Court File No. CV-16-11549-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

AND IN THE MATTER OF TCC URBANCORP (BAY) LIMITED PARTNERSHIP

BOOK OF AUTHORITIES OF THE FOREIGN REPRESENTATIVE

Date: April 20, 2017

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TO: **SERVICE LIST**

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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 URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")AND IN THE MATTER OF TCC URBANCORP (BAY) LIMITED PARTNERSHIP

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

BOOK OF AUTHORITIES

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Ontario Court of Justice (General Division)

966478 Ontario Ltd. v. Hack

1995 CarswellOnt 3654, 59 A.C.W.S. (3d) 900

966478 Ontario Limited, Plaintiff and Ludwig Val Hack, Defendant

Ludwig Val Hack, Plaintiff by Counterclaim and 966478 Ontario Limited, David Franklin, Sheldon Skryzlo, Harold Sand, 96 Jameson Avenue Limited Partnership, 797464 Ontario Limited, 1001544 Ontario Limited, 607447 Ontario Limited, 750588 Ontario Limited, 796085 Ontario Limited, 797467 Ontario Limited, Harold Sand & Associates Ltd. and 856675 Ontario Limited doing business as Highview Renovations, Defendants by Counterclaim

966478 Ontario Limited, Plaintiff and Frank Csik, Defendant

Frank Csik, Plaintiff by Counterclaim and 966478 Ontario Limited, David Franklin, Sheldon Skryzlo, Thomas Y. Yu, 96 Jameson Avenue Limited Partnership, Carholme Investments Limited, 797464 Ontario Limited, 1001544 Ontario Limited, 607447 Ontario Limited, 750588 Ontario Limited, 796085 Ontario Limited, 797467 Ontario Limited, Harold Sand & Associates Ltd. and 856675 Ontario Limited doing business as Highview Renovations, Defendants by Counterclaim

Epstein J.

Heard: September 6-8, 1995
Judgment: December 18, 1995
Docket: 94-CQ-47900CM, 94-CQ-47904CM

Counsel: *Ms P.A. Neena Gupta*, for Plaintiff.
Ms Janet Page, for Defendant.

Subject: Contracts; Corporate and Commercial; Torts

Headnote

Fraud and misrepresentation --- Negligent misrepresentation (Hedley Byrne principle) — Miscellaneous issues

Bills of exchange --- Promissory notes — Miscellaneous issues

***Epstein J.*:**

1 These Reasons pertain to three motions for summary judgment brought by certain parties in separate but closely related actions. The facts and the issues addressed in the three motions are virtually identical; in fact, they were argued as one. Accordingly, I have prepared one set of Reasons containing the decision in the motions in both actions.

2 The plaintiff in each action 966478 Ontario Limited ("966478") seeks judgment on a promissory note signed by the defendant in each action; Mr. Csik, a dentist, and Mr. Hack, a chartered accountant. For simplicity, I will refer to the defendants collectively as the Investors.

3 There is a counterclaim in each action in which the plaintiff (defendant by counterclaim) and two of the other defendants to the counterclaims, namely, 607447 Ontario Limited ("607447") and Carholme Investments Limited ("Carholme") seek a dismissal of the counterclaims as against them.

4 What has brought these parties to litigation is yet another failed limited partnership. In 1988 the Investors purchased their interests in a limited partnership known as 96 Jameson Avenue Limited Partnership (the "Limited Partnership"). They borrowed money to finance their investment. Part of these borrowings were secured by the promissory notes (the "Notes") that form the subject matter of the actions. Carholme was the owner of the property in question (the "Property") in September 1988. 607447 lent money to high-risk investors and is a related corporation to Carholme.

5 These Notes were executed by the Investors in 1988, both in favour of 607447, and both in the principal amount of $85,600. Provisions were made for the payment of interest. The Investors agreed to pay the balance outstanding on their respective Notes on December 28, 1993. They further agreed that the Notes were negotiable instruments.

6 The Notes were assigned to 966478 in writing on April 15, 1992, for consideration. Notice of the assignment was provided to the Investors in August 1992, after which time they continued to pay interest on the Notes to the end of 1993. The Investors have not paid the principal balances owing.

7 The claim is defended by Hack and Csik primarily on the basis of misrepresentations allegedly made by 607447 and Carholme to them to induce them to invest in the Limited Partnership. The Investors further submit that because of the close association of Carholme, 607447 and 966478, 966478 was not an innocent purchaser of the Notes, without notice. Obviously the thrust of the defence rests on whether there were any pre-purchase misrepresentations that were relied upon by the Investors in their investment decision and whether any such misrepresentations could affect the plaintiff's ability to enforce the Notes. Is there credible evidence before me, concerning this defence, such that a triable issue has been raised?

8 The facts leading up to the execution of the Notes and the relationship among those involved are critical to the Investors' defence. Based on the evidence before me, I find the following to be the situation.

(a) Facts Leading to the Execution of the Notes

9 Csik attended a seminar in the office of his accountant, Hack. The purpose of the seminar was the promotion of the investment in the Limited Partnership.

10 The seminar was presented by Mr. Wu, who Csik understood represented "the people who were putting the project together." Csik knew that Hack was receiving a fee from these people. Csik decided, on the evening of the seminar, to invest in the Limited Partnership. Accordingly, at that time he filled out an application for a bank loan.

11 The bank turned down Csik's application because it was reluctant to advance additional funds based on how it viewed the amount of leverage in Csik's investment portfolio.

12 Wu subsequently attended at Csik's office and suggested that perhaps the people who were running the project could see if they could make financing available. Csik had no objection to this and subsequently went to Hack's office to sign the Note.

13 It would appear that before executing the Note, Csik did not speak to anyone who identified himself or herself as being associated with Carholme, 607447 or 966478. He does not recall whether Wu provided him with any specific information regarding the source of the funding prior to Csik's signing the Note. As well, Csik does not recall if Wu told him that he was a director, officer or employee of Carholme.

14 As far as Hack is concerned, his evidence is that Wu only indicated to him that the promoters of the partnership were Messrs. Franklin and Sand. Specifically, Hack testified under cross-examination as follows:

> Well, on the presentation of Mr. Wu, and later Mr. Franklin, it was my impression that this was a group of people that included the vendor and Franklin and Sand and Wu, and together they were putting a plan together whereby they could upgrade this certain project.

15 Hack says he believed that Carholme and 607447 were related to the promoters of the partnership because a company known as 796085 Ontario Limited acquired title to the property from Carholme and held it in trust for the general partners. Carholme subsequently held a vendor-take-back mortgage on the property. However, Hack did not have any conversations with the principals of 607447, Carholme or 966478 prior to deciding to invest in the partnership or, more importantly, prior to executing the Note.

16 Hack did not know who drafted the offering memorandum. He did review it and the "numbers" and decided to invest (as did many of his clients). Before the date of the seminar, Hack received a fee of $79,608 from the promoters.

17 Hack's only information regarding the source of funding for the loan was that Wu told him that he obtained the money from "the vendor and his group."

18 As late as October of 1994, the Investors conducted themselves in a manner consistent with their obligations under the Notes. They continued to make payments on the Notes until January 1994, and after they were aware of the problems associated with the investment and even after they were aware that Carholme was commencing power of sale proceedings with respect to the property.

19 In October 1993, Hack was reminded of his obligation to repay the principal owing under the Note. In response. Hack requested a re-negotiated payment plan. In December 1993, Hack acknowledged that $85,600 was owing but he requested an extension to August 1998. An acknowledgment form was prepared to this end but Hack refused to execute it as it contained a clause to the effect that Hack had no dispute concerning the amount claimed. As a result, the plaintiff commenced this litigation. It was not until after the action was started that the allegations of wrong-doing were raised.

(b) The Relationships

20 The plaintiff was incorporated on December 6, 1991, for the purpose of investment. The sole shareholder and only employee ws Jerry Woznica ("Woznica"), also known as Jerry White. At various times, Woznica held himself out as a signing officer of Carholme and 607447. In addition to 966478, Woznica was an employee of The Buchman Group of Companies.

21 Carholme was incorporated March 23, 1960, and amalgamated on July 1, 1987, with numerous other companies under the umbrella name of The Buchman Group of Companies.

22 Carholme was the owner of the Property as of September 21, 1988. Carholme became insolvent in the summer of 1992.

23 607447 was incorporated on December 11, 1984, and is a related corporation to Carholme. The financial statements of Carholme and 607447 are consolidated. 607447 depended on Carholme for cash flow. When 607447 ceased to operate in 1992, its portfolio consisted only of the Notes.

24 Against this background the Investors submit that the motion for summary judgment should be dismissed against them for the following reasons:

> (a) there were misrepresentations made to Hack and Csik as to the nature and risks of the investment which entitle them to recession or damages;
>
> (b) as a result of misrepresentations, there was a total failure of consideration for promissory notes given by Csik and Hack to the defendant 607447 dated December 23, 1988;

(c) in the alternative, the demand by 966478 on the promissory notes is in excess of the amount due and owing, if any amount is due and owing;

(d) in any event, 966478 has not suffered any loss arising from the promissory notes;

(e) any indebtedness owing by Csik and Hack 966478 was satisfied by the taking of the Property; and

(f) because of its close connection with 607447, 966478 is not a holder in due course and is subject to all available defences.

25 I propose to deal with each in turn.

(a) Misrepresentations made to the Investors concerning the nature and risks of the investment

26 The Investors' allege that in the offering memorandum the promoters represented that there were three mortgages against the title to the Property. The evidence suggests that there may have been another debenture on title, one between Carholme and First City Trust Company.

27 Secondly, the Investors argue that they relied upon representations concerning substantial rent increases. However, the application was not dealt with promptly. By the time the Rent Review Board allowed a 35 per cent increase, the property had been transferred as a result of the Power of Sale proceedings.

28 Third, the defendants submit that there were misrepresentations concerning a substantial amount of repair work to be performed on the Property and a large fund available for this purpose. The Investors have concerns about the amount of money in the repair fund and how it was spent.

29 The key to the defence of misrepresentation is for the Investors to adduce evidence sufficient to persuade me that there were misrepresentations upon which they relied to borrow the money that they needed to invest and that any such representations should affect the legal rights of the plaintiff, the holder of the Notes.

30 There is insufficient evidence to do this.

31 The misrepresentations concerning the Limited Partnership investment were alleged to have been made orally by Wu or in writing in various documents. There is no credible evidence to support a finding that Wu, in fact or in law, was an agent of Carholme, the holder of the Note or its predecessor. In particular there is no evidence that either of the said companies cloaked Wu as agent of either of them. See *Re Mastercraft Group Inc.* (Ontario Court (Gen. Div.), May 6, 1994, *Mastercraft Group Inc.* (Ont. C.A., April 5, 1995, unreported). Further, the defendants have adduced no evidence to support a finding that either numbered company or Carholme had anything to do with the drafting of the offering memorandum. Simply put, there is no evidence that any of the misrepresentations alleged can be attributed to the plaintiff, 607447 or Carholme.

32 Secondly, representations regarding future rents, repairs, and the like, cannot be raised in defence of the Notes. The Investors, having regard to their experience and sophistication, have not satisfied me that they reasonably relied upon such representation: see *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39.

33 In any event, it is clear on the evidence before me that the loan decisions and transactions that are the subject of these actions are separate transactions from the decisions and investments in the Limited Partnership. However those investments may be tainted by reason of any misrepresentations, and whatever rights may emerge therefrom, such problems do not, in the circumstances of this case, affect the enforceability of the Notes: see *Mastercraft, supra.*

(b) Total failure of consideration for the Note

34 The Investors argue that their investment in the Limited Partnership had no value because of the misrepresentations. Accordingly, there was no consideration given by the plaintiff to the Investors for the Notes.

35 The law is clear that a lender is entitled to judgment for the outstanding indebtedness, even where the loan was used to invest in a void, unwise or improper investment: see *Citibank Canada v. Mannone* (25 June 1992), [unreported] (Ont. Gen. Div.).

36 If the complaint of the Investors has merit, then their recourse may be in a claim for damages. Again, the authorities demonstrate judgment should be granted even where there is a counterclaim for damages or set-off: see *Iraco Ltd. v. Staiman Steel Ltd.* (1986), 54 O.R. (2d) 488 (H.C.), and *Haick v. Smith* (1988), 27 C.P.C. (2d) 193.

(c) The demand is in excess of the amount owing

37 In light of the admissions of the Investors as to the amount owing, both in the course of their negotiations with the plaintiff and in their actions of continuing to pay interest on the amount claimed, there is no "air of reality" to this defence.

(d) The plaintiff has suffered no loss relating to the Notes

38 First, the Investors have not adduced sufficient evidence to meet the burden of satisfying me that this is a credible issue to warrant a trial.

39 Secondly, even if I were to find at this stage that the Investors factually had an arguable case that 966478 has suffered no loss, my decision would be the same on this point. The Investors rely upon the case of *Citibank v. Cameron* (1991), 4 O.R. (3d) 526 (Master), for the proposition that the court ought not grant summary judgment in an action on a promissory note where it could not be said with sufficient certainty that the defendant received a benefit from the loan *or* that the plaintiff incurred a detriment at the defendant's request. In my view, the facts in the *Citibank* case relevant to the issue of consideration bear no relationship to the case at bar.

40 In this case the test of consideration has been met for the simple reason that the Investors did receive a benefit from the loans. They received the amount of the principal of the loan that they used to finance an investment in which they wanted to participate. Similarly, 607447 suffered a detriment *at the request of the Investors*. The fact that the investment turned out not to be profitable irrelevant to the issues before me.

(e) Indebtedness was satisfied by the taking of the property

41 Again, the evidence of the Investors in support of this point is insufficient to meet the onus incumbent on the defendants.

42 In defence of motions for summary judgment the responding parties are obliged to put their best foot forward and adduce sufficient credible evidence to raise an issue that should properly be put to a trial judge. The law makes it clear that the judge hearing the motion must take a good hard look at the facts, draw logical conclusions from the evidence that is before the court, and determine if there is a triable issue. In going through this process, the motions judge should consider what evidence is not in the record as well as what is. It is no defence to the motions for the responding parties to raise an issue and essentially say that there will be evidence available at trial to support it.

(f) The "close connection defence"

43 This is the Investors' primary defence.

44 The Investors maintain that 966478 and the defendants by counterclaim, in the circumstances of these transactions, are related, associated or affiliated companies, dealing on a non-arm's length basis or agency or joint venture basis.

45 If there is evidence before me to raise an argument of close connection, then the Investors rely on the proposition that such a connection between an endorser and an endorsee has the result that an endorsee is not a holder in due course and is subject to all available defences: see *Federal Discount Corporation Ltd. v. St. Pierie* (1962), 32 D.L.R. (2d) 86 (Ont. C.A.).

46 Obviously, the crux of this defence lies in establishing the connection alleged by the Investors and then satisfying the Court that the connection is of such an intimate nature that there is a viable issue as to whether the plaintiff is a holder in due course of the Notes.

47 It was the latter that formed the basis of the decision of the Court of Appeal in the *Federal Discount* case. In that case, Justice Kelly determined that there was such an intimate connection between the lender and the company in which the investment was made that the two businesses were really one, "each one in the conduct of its particular phase being useless without the association of the other."

48 It is clear that what the Investors are asking me to do is to collapse the distinction between the assignor and the promoters. If that distinction is collapsed, then the law is clear that the defences open to the Investors against the assignor should also be available against the assignee.

49 There is a heavy onus on the Investors to satisfy me that there is a triable issue over whether this distinction should be collapsed. The usual case for this rather extraordinary step is one in which there is evidence of fraud or some other clear, overt activity that would make maintaining the distinction, unjust.

50 On the facts as contained in the record before me I cannot hold that the relationship and arrangements between the holders of the Notes and the promoters were so close that, in effect, they can be considered as being engaged in one business rather than as parties engaging in normal commercial transactions. For example, of all the investors in the Limited Partnership, only these two obtained other than bank financing; 607447 was not established to finance this project; the project could have been financed without 607447. As I have said, the investment in the Limited Partnership was one commercial transaction; the financing of that investment, the bank, or through 607447, was another.

51 In conclusion, the evidence satisfies me that these two actions and these motions for summary judgment fall into the same category as the circumstances analysed and the conclusions reached in the *Mastercraft* decision. The Investors made a decision to invest in a Limited Partnership. The Investors separately borrowed funds to finance the investment. Interest was paid on these borrowings over an extended period of time. The investment proved to be unprofitable possibly in part due to problems created by the promoters. The Investors are now attempting to use these problems in defence to a claim for repayment of the loan. In effect, they are attempting to tarnish the holder of the Notes and its predecessor with the same brush as that with which the promoters may eventually be found to be tarnished.

52 This they cannot do for various reasons, some of which I have discussed. The primary frailty in the Investors' position is the fact that the loan transactions, as evidenced by the Notes, are separate transactions from the purchase of the units in the Limited Partnership.

53 In the result, the motions for summary judgment are allowed in each of the two actions.

54 The plaintiff is entitled to judgment against Mr. Csik and Mr. Hack in their respective actions, together with interest and costs. The Investors have requested a stay of execution of the Judgments obtained by the plaintiff in each action. However, this issue was not argued. Counsel may make an appointment before me to deal with that issue, if so advised, by making arrangements with my secretary.

55 I assume counsel can resolve between themselves any other outstanding issues.

End of Document

Most Negative Treatment: Distinguished
Most Recent Distinguished: Mollot v. Monette | 1981 CarswellQue 30, 1981 CarswellQue 91, [1981] 2 S.C.R. 133, 16 B.L.R. 139, 39 N.R. 451, 11 A.C.W.S. (2d) 461, 128 D.L.R. (3d) 577, J.E. 81-1117 | (S.C.C., Nov 16, 1981)

1974 CarswellOnt 248
Supreme Court of Canada

Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.

1974 CarswellOnt 248, [1975] 2 S.C.R. 846, 3 N.R. 215, 49 D.L.R. (3d) 422

J.D.F. Builders Limited, Appellant and Cross-Respondent and Albert Pearl (Management) Ltd., Respondent and Cross-Appellant and John D. Fienberg, Cross-Respondent

Laskin C.J. and Martland, Judson, Ritchie and Spence JJ.

Judgment: January 25, 1974
Judgment: January 28, 1974
Judgment: October 1, 1974

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *Melville O'Donohue, Q.C.*, and *Alan R. Purser*, for the Appellant and Cross-Respondents.
Fred M. Catzman, Q.C., and *Marvin A. Catzman*, for the Respondent and Cross-Appellant.

Subject: Corporate and Commercial; Contracts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Business associations

IV Powers, rights and liabilities
IV.9 Contracts by corporations
IV.9.a General principles
IV.9.a.iv Personal liability of agent
IV.9.a.iv.C On negotiable instruments

Headnote
Corporations --- Contracts by corporations — Personal liability of agent — On negotiable instruments

The judgment of the Court was delivered by *Spence J.*:

1 This is an appeal by J.D.F. Builders Limited from the judgment of the Court of Appeal for Ontario pronounced on December 14, 1972, whereby that Court allowed, in part, the appeal from the judgment of Donohue J. pronounced on September 9, 1971. By the latter, Donohue J. had allowed judgment against both the defendants J.D.F. Builders Limited and John D. Fienberg in the sum of $164,777.59 with interest.

2 The judgment of the Court of Appeal directed the dismissal without costs of the action as against the defendant John D. Fienberg and reduced the judgment against the defendant J.D.F. Builders Limited to the sum of $151,888.46 plus

interest at seven per cent from December 12, 1972. This was the calculation resulting from the allowance of judgment for $84,500 with interest from the date of the promissory note to which reference will be made hereafter.

3 Albert Pearl (Management) Limited is a private company of which the sole beneficial shareholder is Albert Pearl. J.D.F. Builders Limited is another private company, the shareholders of which are three more private companies and the shareholders, in turn, of those three companies are the defendant John D. Fienberg and John D. Fienberg's Children's Trusts. There were other single shareholders of both J.D.F. Builders Limited and the three other private companies but they were all mere nominees of the defendant John D. Fienberg and had no beneficial interest.

4 Albert Pearl was a chartered accountant carrying on business in the City of Toronto and he acted as auditor for J.D.F. Builders Limited and the three other companies. He was also the trustee of the trusts for the children of the defendant John D. Fienberg.

5 In the year 1956, Albert Pearl gave up his public accounting practice and began to devote the bulk of his time to the business affairs of John D. Fienberg and his network of companies. He became owner of a considerable major share in the capital of two of those companies Anlouis Investments Limited and Key Investments Limited and became, moreover, the Chief Executive Officer of those companies.

6 Prior to 1961, J.D.F. Builders Limited, who were in the construction business and particularly the construction of homes, entered into what would amount to a four-way partnership with three other building corporations and in 1961 this partnership was turned into a public company known as Consolidated Building Corporation Limited. Its capitalization of one million shares was divided equally among four original partner companies of whom the defendant J.D.F. Builders Limited was one. The value of the shares of Consolidated Building Corporation escalated astoundingly in the period from 1960 through to about 1964.

7 On December 9, 1960, the plaintiff Albert Pearl (Management) Limited entered into an agreement with one of the Fienberg companies, J.D.F. Holdings Limited, whereby Albert Pearl (Management) Limited agreed to sell and J.D.F. Holdings Limited to purchase the former's shares in both Anlouis Investments Limited and Key Investments Limited for the total of $132,333 to be paid for $5,333 in cash and the balance in yearly instalments of at least $5,000 without interest. In short, the defendant J.D. Fienberg was buying out Albert Pearl's interest, which he had put into his company Albert Pearl (Management) Limited, in both Anlouis and Key. Payments were made on this indebtedness and those payments are all set out in the statement produced at trial and marked Exhibit 6. That statement shows a balance due to Albert Pearl (Management) Limited on December 20, 1966, of $4,500.

8 After the agreement aforesaid for the purchase of Albert Pearl's interest in Anlouis and Key, Albert Pearl and John D. Fienberg agreed that Albert Pearl should use the moneys which he received for two purposes: Firstly, to purchase Consolidated Building Corporation's shares both common and preferred and share warrants for and on account of J.D.F. Builders Limited, and, secondly, to make payments into John D. Fienberg's Children's Trusts. Albert Pearl testified that Fienberg's purpose as explained to him, Pearl, was to reduce Fienberg's estate and increase the estate of his children.

9 Toward the end of the year 1966, Pearl and his wholly-owned company Albert Pearl (Management) Limited found they were in the position of having expended a very large sum of money in carrying out these two purposes and were most insufficiently secured having in hand merely a certain number of shares of Consolidated Building Corporation, part of those purchased from the various brokers for and on account of J.D.F. Builders Limited. Albert Pearl also discovered, in addition to those purchases of Consolidated Building Corporation shares which he had been carrying out upon the instructions of John D. Fienberg, that John D. Fienberg personally and in the names of various other persons, had been carrying on tremendous purchases in the same Building Corporation's shares all for J.D.F. Builders Limited so that J.D.F. Builders Limited had become indebted to a bank for a very large sum of money and had had to pledge all the shares in the said Consolidated Building which it had acquired from both Albert Pearl (Management) Limited in the fashion aforesaid and from these other transactions.

10 In the meantime, it would appear that the fall in the value of the Consolidated Building Corporation shares had been just as startling as its rise. Albert Pearl became very concerned and had a series of discussions with John D. Fienberg and in February 1967, during these discussions, he prepared a statement showing the current state of the account between him, on one hand, and J.D.F. Builders Limited and John D. Fienberg, on the other. This statement was produced at trial and marked Exhibit 13. I set out that statement in full:

ROBERT PEARL ACCOUNT WITH J.D.F. BUILDERS LIMITED.

	Advance	<*>Interest
Dec. 30, 1960--J.D.F. Children	$ 5,000.00	$ 2,096.00
Dec. 12, 1961--J.D.F. Children	5,000.00	1,706.00
Dec. 28, 1961--Thomson & McKinnon	20,000.00	7,031.00
Jan. 16, 1962--Thomson & McKinnon	5,000.00	1,740.00
Jun. 1, 1962--Thomson & McKinnon	5,000.00	1,598.00
Jun. 1, 1962--R.H. Scarlett & Co. Ltd.	3,000.00	958.00
Jun. 27, 1962--Thomson & McKinnon	2,500.00	788.00
July 3, 1962--Thomson & McKinnon	2,000.00	617.00
Dec. 11, 1962--J.D.F. Children	5,000.00	1,327.00
Jan, 28, 1963--J.D.F.	1,470.00	380.00
May 14, 1963--Merrill Lynch Pierce Fenner & Smith, Inc.	14,000.00	3,483.00

	Advance	<*>Interest
July 24, 1963--Waite, Reid & Co. Ltd.	13,000.00	3,050.00
Aug. 14, 1963--Waite, Reid & Co. Ltd.	14,000.00	3,225.00
Dec. 10, 1963--J.D.F. Children	5,000.00	973.00
Dec. 14, 1964--J.D.F. Children	5,000.00	630.00
Jan. 16, 1965--Waite, Reid & Co. Ltd.	2,000.00	209.00
Dec. 9, 1965--J.D.F. Children	5,000.00	318.00
Jun. 21, 1966--Draper Dobie & Co. Ltd.	2,000.00	207.00
Dec. 20, 1966--J.D.F. Children	5,000.00	9.00
Feb. 12, 1962--Thomson & McKinnon	2,000.00	667.00
	$120,970.00	$31,012.00
	31,012.00	
Total	$151,982.00	

<*>Interest at 6% compounded yearly to March 1st, 1967.

It will be noted that it ends with a total figure of $151,982 which was the amount of the promissory note to which reference will be made hereafter.

11 Exhibit 13 was presented by Albert Pearl to John D. Fienberg. Albert Pearl testified:

A. Well, I discussed with Mr. Fienberg the possibility and the desirability of obtaining a note.

Q. Yes.

A. And to give specific tangibility to the indebtedness that was owing to Albert Pearl.

12 Albert Pearl testified that John D. Fienberg asked him to leave Exhibit 13 with him so that he could check it and John D. Fienberg undertook to contact him later and state if it was in order to execute the note. He further testified that

upon receiving word from John D. Fienberg's secretary that he had checked and approved Ex. 13 and would execute the note, he himself took the form of promissory note produced at trial as Ex. 1, with a typewriter filled in the blanks as they appeared, and imprinted a stamp which he had in his office reading "J.D.F. Builders Limited" and then placed the note in a folder, attended Fienberg's office and presented the folder with the note in it to John D. Fienberg. He continued his testimony that some short time later, upon receiving another telephone call from John D. Fienberg's secretary, he reattended the latter's office and was handed the folder with the note executed as it was presented at trial. That note, Ex. 1, reads as follows:

> Front & Yonge Sts. Br.
>
> 39 Yonge St. MARCH 1, 1967 — $151,982.00 1-372 TORONTO 1, ONT.
>
> On demand WE promise to pay to the order of ... ALBERT PEARL ... the sum of ONE HUNDRED AND FIFTY-ONE THOUSAND, NINE HUNDRED & EIGHTY-TWO DOLLARS with interest payable monthly at the rate of 7 per cent per annum up to and after maturity and until actual payment at the Bank of Montreal here. Value received.
>
> J.D.F. Builders Ltd.
>
> J.D. Fienberg

13 The letters and words "J.D.F. Builders Ltd." appear in ink stamping on the original and the signature "J.D. Fienberg" is in handwriting.

14 The promissory note, Ex. 1, was not paid and Albert Pearl (Management) Limited, by writ issued May 13, 1968, claimed payment thereof with interest as against both the defendants J.D.F. Builders Limited and John D. Fienberg.

15 John D. Fienberg's defence was based upon a denial of his signature as it appeared on Ex. 1 and a complete denial of any knowledge as to the making of the note.

16 The learned trial judge, upon hearing all of the evidence, made findings of fact expressly based on credibility to the effect that the defendant John D. Fienberg had signed the note and also had signed a document, being a letter to Albert Pearl dated November 6, 1961, to which specific reference shall be made hereafter.

17 It was the learned trial judge's view that the promissory note was the joint note of both defendants and he gave judgment for the full amount plus interest against both defendants.

18 Arnup J.A., in the judgment for the Court of Appeal, said:

> Having regard to the authorities, to the relevant sections of the Bills of Exchange Act, and to the surrounding circumstances I have set out, we are unanimously of the opinion that this promissory note is to be regarded as the note of the corporation.
>
> We have all expressed, in the course of the argument, our grave doubts as to how a single signature could be both the signature on behalf of the corporation and the signature of the individual himself, as a maker of the note, thereby involving him in personal liability. We have reached the conclusion that Mr. Fienberg personally is not a maker of the note and that accordingly the judgment against him cannot stand.

The Court of Appeal affirmed the judgment upon the note against J.D.F. Builders Limited.

19 J.D.F. Builders Limited appealed to this Court from the judgment of the Court of Appeal for Ontario and submitted that the judgment against that defendant be set aside and the action be dismissed or, in the alternative, that the action

be dismissed against it and that judgment be given against the defendant John D. Fienberg for $36,470, the amount of the payments made by the plaintiff Albert Pearl (Management) Limited to the credit of the Fienberg Children's Trusts.

20 It may be noted that pleadings and defence were filed by separate solicitors on the part of both defendants and that different counsel represented both defendants at trial but that in the Court of Appeal one counsel who had previously appeared for the defendant J.D.F. Builders Limited appeared for both defendants and in this Court the same counsel again appeared for both defendants.

21 The plaintiff Albert Pearl (Management) Limited cross-appealed requesting that the judgment at trial be restored or, in the alternative, that it be granted judgment against the defendant John D. Fienberg or, in the further alternative, that it be given judgment against the defendant John D. Fienberg for the full amount of its claim. At the commencement of his argument upon the cross-appeal, counsel for Albert Pearl (Management) Limited announced that he intended only to urge that the judgment be awarded for the full amount against the defendant, here appellant, J.D.F. Builders Limited or, to put it short ly, he was content with the judgment of the Court of Appeal freeing the defendant John D. Fienberg from liability but asked to have judgment against the appellant J.D.F. Builders Limited not for the limited amount granted by the Court of Appeal but at trial for the full amount of the note plus interest. The Court of Appeal for Ontario had reduced the amount of the judgment against the defendant J.D.F. Builders Limited to the amount of the payments by the plaintiff Albert Pearl (Management) Limited for purchase of shares for and on account of the defendant J.D.F. Builders Limited, and had excluded from the judgment the amount of the payments made by the said plaintiff to J.D.F. Holdings Limited for the J.D. Fienberg Children's Trusts being of the opinion that there was no consideration for that part of the debt evidenced by the promissory note. It will therefore be seen that this Court faces two problems only: Firstly, was the judgment of the Court of Appeal for Ontario correct in holding that the promissory note evidenced a debt of the defendant, here appellant, J.D.F. Builders Limited, and, secondly, if so, is the plaintiff, here respondent, Albert Pearl (Management) Limited entitled to recover the full face value of the note plus interest or only the part represented by consideration flowing from J.D.F. Builders Limited.

22 With respect, I have come to the conclusion that the Court of Appeal was quite correct in its view that that promissory note did not evidence the personal debt of the defendant John D. Fienberg. I make that statement not only by reference to the method of execution of the document, *i.e.*, that the said Fienberg's signature appeared once only and that directly beneath the stamped signature of the appellant J.D.F. Builders Limited but, having reviewed the evidence of Albert Pearl, I have come to the conclusion that it was his intention and also the intention of the defendant John D. Fienberg that the note should only pledge the credit of the appellant J.D.F. Builders Limited. As Arnup J.A. pointed out in his reasons for judgment, the documents would seem to bear out that opinion. Exhibit 6, the document drawn up about September 1966 to show the receipts from Fienberg on account of the purchase price of Pearl's share in Anlouis and Key, and the payments made both to the various brokers for the purchase of Consolidated shares on account of J.D.F. Holdings Limited and the payments made to the credit of the Children's Trusts is headed "Albert Pearl (Management) Limited and J.D.F. Holdings Limited". Exhibit 13, the statement submitted by Albert Pearl to John D. Fienberg upon which the promissory note was based is headed

> ALBERT PEARL
>
> Account with
>
> J.D.F. BUILDERS LIMITED

23 In his evidence, Mr. Pearl referred to the presentation of that Exhibit 13 to Mr. Fienberg and after having stated it was to give specific tangibility to the indebtedness that was owing to Albert Pearl identified the promissory note in these words:

> This document is a note drawn by J.D.F. Builders Limited to the order of Albert Pearl in the amount of $151,982.00 with interest payable monthly at the rate of 7% per annum up to and after maturity and until actual payment and so on.

to which counsel made the enlightening reply:

> Q. I don't want to undercut my case by saying it was drawn by J.D.F. Builders. Will you instead simply tell his lordship what signature appears on it?
>
> A. The signature appearing here is that of J.D. Fienberg.

Shortly before this, when questioned by his counsel as to the presentation of this account, Ex. 13, Albert Pearl was asked:

> Q. Well, was there any question about the payment there and then?
>
> A. There was no possibility of payment at that time because, as I will explain, *we* were in pretty dire financial circumstances.

(The emphasis is my own but I think it indicative of the fact that Mr. Pearl was looking to an acknowledgment of debt from the corporate entity and not from Mr. Fienberg personally.)

24 Counsel for the respondent Albert Pearl (Management) Limited takes the position that John D. Fienberg had not only an ostensible authority but a real authority to execute the promissory note for and on behalf of the appellant J.D.F. Builders Limited. I refer firstly to ostensible authority. A clearer case of ostensible authority could not be imagined. John D. Fienberg held beneficially all the shares in J.D.F. Builders Limited although those shares were carried in a variety of names including Anlouis Investments Limited and Key Investments Limited. It must be remembered that years before the end any interest which the plaintiff company or its sole owner Albert Pearl held in either of the latter companies had been sold to Fienberg or, perhaps, one should more accurately state, to J.D.F. Holdings Limited, another wholly-owned Fienberg company. John D. Fienberg had the sole corporate management of J.D.F. Builders Limited and indeed all of the companies. It was said in testimony that he had always been president of them all. No one as familiar with the operation of these various companies as Albert Pearl was could ever doubt that what John D. Fienberg said in reference to them or any of them was law and would have to be carried out. This would seem to be almost a textbook case for the application of the indoor management rule exemplified in *Royal British Bank v. Turquand*[1].

25 I am of the opinion, however, that one need not turn to that well-established rule as I think on all of the evidence and documents John D. Fienberg had a real authority to bind the corporation by his signature. In addition to the stock holding I have outlined, it must be remembered that J.D.F. Builders Limited was in the business of constructing buildings and that in the carrying out of that business it had entered into a partnership and later taken a quarter of the shares in a corporation carrying on that same business and that the purchase of the shares for and on account of J.D.F. Builders Limited was the purchasing of shares in that Consolidated Building Corporation, so that the transactions were in the ordinary business of J.D.F. Builders Limited.

26 It must also be remembered that Albert Pearl acting as accountant and auditor for J.D.F. Builders Limited and all of the other companies during the relevant period, did not have anything to do with the preparation of corporate documents including banking documents. Amongst those corporate documents were the following:

27 Minutes of a Meeting of the Directors of the Company held August 15, 1961, at which the following resolution was moved and carried:

> **RESOLUTION**

The Chairman then presented to the meeting the resolution wherein this Company gave to John D. Fienberg, President of the Company, full authority to transfer shares of stock in Consolidated Building Corporation Limited, to endorse all stock certificates without the requirement of a seal and to do whatever was required in connection with shares of Consolidated Building Corporation Limited in the interest of this Company without any further resolution from this Company.

ON MOTION, duly moved and seconded and unanimously carried, the Board of Directors approved of the resolution and requested that a copy of same become part of these minutes and precede the first page of the minutes of this meeting.

28 The minutes of that meeting were signed by the President John D. Fienberg and the Secretary.

29 I have already referred to the minutes of the meeting of the directors on December 1, 1961, which made specific reference to Mr. Pearl and which included this statement:

CONSOLIDATED BUILDING CORPORATION LIMITED STOCK

This company understands and agrees that any purchase or sale made by Albert Pearl, upon the instructions of this company, in regard to any Consolidated Building Corporation Limited stock (common, warrants and preferred) is to be held by the said Albert Pearl in trust for the benefit or at the risk of this company, that is J.D.F. Builders Limited.

Less than a month before, on November 6, 1961, J.D.F. Builders Limited, over the signature of Mr. Fienberg, had addressed a letter to Mr. Pearl which read as follows:

Mr. Albert Pearl,

99 Avenue Road,

Toronto 5, Ontario.

Dear Mr. Pearl:

It is hereby agreed and understood that any purchase and/or sale made by you acting upon our instructions, of any Consolidated Building Corporation Limited security (viz: common, warrants and preferred shares) is to be held in trust for and for the risk of J.D.F. Builders Limited.

Yours truly,

J.D.F. BUILDERS LIMITED

J.D. Fienberg

J.D. Fienberg

30 On the very day following that which appears on the promissory note, *i.e.*, on March 2, 1967, the minutes of a directors' meeting of J.D.F. Builders Limited read, in part, as follows:

CONSOLIDATED BUILDING CORPORATION LIMITED STOCK

The following shares were held in trust by Albert Pearl in an account or accounts for the benefit of or at the risk of J.D.F. Builders Limited. This company now authorizes that these shares be transferred to the account of J.D.F. Builders Limited. The shares to be so transferred are as follows:

a) 20,600 Consolidated Building Corporation Limited common shares;

b) 19,029 Consolidated Building Corporation Limited warrants;

c) 500 Consolidated Building Corporation Limited preferred shares.

The meeting unanimously approved the completion of this transfer.

The following memorandum was then read and ordered inserted into the minutes:

> We, the Directors of the above-named company, consent to this meeting being held at the above time and place and we do hereby waive notice of the meeting and consent to the transaction of such business as may now come before it, as testified by our signatures hereto.

31 It is true that the respondent has been unable to adduce any evidence in relation to a formal resolution of the directors authorizing the execution of the note. I am, however, of the opinion that such execution was, in the ordinary course of business of the corporation. It was a debt in so far as the portion due to purchase of Consolidated Building Corporation stock is concerned of J.D.F. Builders and it was simply an acknowledgment of that debt.

32 This Court has lately considered the necessity for corporate documentation in these circumstances of wholly-owned corporate entities.

33 In *Eisenberg v. Bank of Nova Scotia et al.* [2], I said on behalf of the Court at p. 694:

> Therefore, upon a consideration of the above authorities, I have been led to the conclusion that a corporation, when a matter is *intra vires* of the corporation, cannot be heard to deny a transaction to which all the shareholders have given their assent even when such assent be given in an informal manner or by conduct distinguished from a formal resolution at a duly convened meeting.

34 I am of the opinion that the *Eisenberg* case applies exactly to the present circumstances. I would, therefore, agree with the judgment given at trial and affirmed on appeal holding that J.D.F. Builders Limited was bound by the promissory note and that judgment should go against that company.

35 The Court of Appeal for Ontario, however, as I have said, reduced that judgment so that it covered only the payment by Albert Pearl (Management) Limited for purchases of shares of Consolidated Building Corporation for and on account of the appellant J.D.F. Builders Lim ited. In concluding that the amount of the judgment was so limited, Arnup J.A. said:

> As I have indicated, the amount of the promissory note is made up of the two categories of indebtedness, one being the indebtedness of Fienberg personally, and the other that of the corporation. It is argued by the appellant that judgment cannot be given against the corporation for the indebtedness of Fienberg to Pearl because that portion of the promissory note is not supported by consideration moving from Pearl to the corporation as maker of the note. Authority was cited for the proposition that a partial failure of consideration or partial absence of consideration may be a defence *pro tanto* between the immediate parties to a bill of exchange, and this proposition is not challenged by Mr. Catzman.

36 Arnup J.A. accepted the argument that so far as the promissory note covered payments made by the respondent Albert Pearl (Management) Limited on the instructions of the cross-respondent John D. Fienberg to the John D. Fienberg Children's Trusts, there was no consideration. With respect, I am of the opinion that this was in error. In the first place, under s. 54 of the *Bills of Exchange Act*, R.S.C. 1970, c. B-5, there is a presumption of consideration and the onus of proving the lack of consideration is upon the drawer of the bill: *Westcott v. Luther* [3], per Lamont J. at p. 256. Again, by the provisions of s. 53(1)(*b*) an antecedent debt or liability may constitute valuable consideration and there

was in the present case an antecedent liability both as to the portion of the note covering the stock transactions for J.D.F. Builders Limited and payments made upon John D. Fienberg's instructions for the benefit of the children's trusts.

37 Finally, Falconbridge, *Banking and Bills of Exchange*, (7th. ed. 1969) at p. 605, said:

> In *Currie v. Misa* (1875), L.R. 10 Ex. 153, the Court of Exchequer Chamber said: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." The second branch of this judicial description of consideration is more important than the first. It does not matter whether the party making the promise receives any apparent benefit; it is sufficient that the promisee undertakes some burden or gives up something which in contemplation of law may be of value, and that the promisor accepts what the promisee undertakes or gives up as the inducement or price for the promise. The consideration must move from the promisee, that is, the promisee must suffer some detriment; but the consideration need not move to the promisor, that is, the apparent benefit, if any, need not be enjoyed by the promisor, and may consist in forbearance or credit given by the promisee to a third person, as is usually so in the case of a guarantee.

So that, so long as consideration flowed from Albert Pearl (Management) it did not matter that the consideration in so far as it was in reference to John D. Fienberg did not flow to J.D.F. Builders Limited.

38 While an antecedent debt or liability of a third party, in this case John D. Fienberg *in vacuo*, cannot form valuable consideration unless there is some connection between the receipt of the bill and the debt, such connection may establish consideration: *Oliver v. Davis et al.*[4], per Evershed M.R. at 735:

> This at any rate is plain — that if the antecedent debt or liability of a third party is to be relied upon as supplying "valuable consideration for a bill", there must at least be some relationship between the receipt of the bill and the antecedent debt or liability.

That case was considered and commented upon by Speight J. in *Bonior v. A. Siery Limited*[5], where circumstances closely resembling the present one occurred.

39 Upon the findings of the jury, the facts may be stated as follows.

40 A. Siery owed one Bonior £1,500. About 80 per cent of that amount had been obtained by Siery for the purpose of establishing a transport business. Bonior desired payment, Siery promised payment but failed to make it and then Bonior went to Siery's place of business and demanded payment with the result that Siery drew a cheque upon the defendant limited company for £1,500 and delivered it to Bonior. The limited company had been formed to take over the cartage business and A. Siery was the sole shareholder of A. Siery Limited. Speight J. discussed, *inter alia, Oliver v. Davis*[6], and concluded that there was such a connection as would give consideration for the bill. At p. 260, he said:

> It is apparent therefore that Siery and Cave treated the company and its assets as being Siery's and subject to Bank difficulties, he was entitled to apply the assets as he liked, and draw for his own personal use whatever the account would stand, and the accountant would debit the books in whatever way was appropriate.

41 In my view, that statement would apply exactly to the relationship between John D. Fienberg and J.D.F. Builders Limited in the present case and I am of the opinion that there was such a connection between these two as would supply consideration for the portion of the note representing the payments made by the respondent Albert Pearl (Management) Limited for the benefit of the Children's Trusts.

42 The consideration of course was the forbearance of Albert Pearl (Management) Limited. Although the source of the funds which first Albert Pearl and later Albert Pearl (Management) Limited used to purchase the shares of Consolidated Building Corporation for the benefit of J.D.F. Builders Limited and to apply to the credit of the Children's Trusts was,

of course, money received from John D. Fienberg, that money was for instalments on the purchase price of Albert Pearl's interest in Anlouis Investments Limited and Key Investments Limited. In short, they were all moneys which were owned by Albert Pearl and Albert Pearl (Management) Limited, and the expenditure of those moneys for those two purposes created debts by J.D.F. Builders Limited and John D. Fienberg. As I have said, those debts had accumulated from the year 1960 and in March of 1967 totalled the amount of the note, *i.e.*, $151,982, all of which was long overdue and which was but lightly secured. It was realized by both Albert Pearl and John D. Fienberg that payment immediately of the debt in full or even in part could not be considered.

43 I am of the opinion that Albert Pearl properly described the purpose of the note when he used the words which I have already recited, "to give specific tangibility to the indebtedness that was owing to Albert Pearl", or to put it otherwise, to fix the amount of the debt in expectation of its final repayment. That was done on March 2, 1967. No claim for payment was made until the writ in this action was issued on May 13, 1968, after a demand for payment on April 25, 1968. There was, therefore, forbearance running from Albert Pearl (Management) Limited to both J.D.F. Builders Limited and John D. Fienberg in so far as the antecedent debts of them both were concerned.

44 It is interesting to note that according to the account between Albert Pearl and John D. Fienberg for the payment by instalments of Pearl's shares in Anlouis and Key, there was a balance of $4,500 owing, that is, the final item shown on Ex. 6.

45 On December 29, 1967, Albert Pearl (Management) Limited wrote to J.D.F. Holdings Limited, "Attention: Mr. J.D. Fienberg" as follows:

> An agreement between our two companies, dated Dec. 6, 1960, stipulates a minimum annual payment of $5,000.00 to Albert Pearl (Management) Limited. We have not, to date, received the 1967 payment for the presently outstanding balance of $4,500.00. Payment of this amount is hereby requested.

So there was a demand for payment, that is, no forbearance, as to the $4,500 amount as contrasted with no demand for payment of the value of the amount of the note until that demand recited above.

46 This Court in *Hutchison v. The Royal Institution for the Advancement of Learning*[7], adopted *Crears v. Hunter*[8], and Newcombe J. at p. 67 quoted from Lopes L.J. at p. 346 of *Crears v. Hunter*:

> In this case the question is whether there was evidence of a consideration for the making of this note by the defendant. The law appears to be that a promise to forbear is a good consideration, but also that actual forbearance at the request, express or implied, of the defendant would be a good consideration.

47 I have concluded that the conference between Albert Pearl and John D. Fienberg in March 1967 amounted to a request for forbearance on the part of both the antecedent debtors and that upon the giving of the promissory note there was actual forbearance in favour of both antecedent debtors lasting more than one year. It is true that evidence concerning consideration is slim but as counsel for the appellant points out the defence of lack of consideration was not raised in the pleadings and, therefore, one would not expect the matter to have been canvassed extensively in the evidence.

48 I have, therefore, concluded that there was good consideration for both the portion of the promissory note which represented the stock purchases for J.D.F. Builders Limited and the payments in furtherance of the Children's Trusts.

49 Moreover, when the discussions took place between Albert Pearl and John D. Fienberg leading up to the signing of the note the latter was speaking for himself, and also as president of the appellant company. Both of Albert Pearl's debtors were represented. In the result, he received, in satisfaction of their debts, a note from one debtor, the company, for the full amount of both debts. By accepting the company's note in satisfaction of the debt of John D. Fienberg, Albert Pearl incurred a detriment. It is true that the note was not received as absolute payment of John D. Fienberg's debt, but it was a conditional payment of that debt. Such debt would only revive if the note was not realized. There was, therefore, consideration for the note moving from Albert Pearl within the requirement of s. 53(1)(*a*) of the *Bills of Exchange Act*.

50 I have come to the conclusion that the appeal should be dismissed with costs and that the cross-appeal should be allowed to permit judgment to go against J.D.F. Builders Limited for the full amount of the note, $151,982, plus interest at seven per cent from March 1, 1967, until payment. The cross-appellant Albert Pearl (Management) Limited should have its costs in all courts against the appellant and cross-respondent J.D.F. Builders Limited.

51 I would not disturb the order of the Court of Appeal for Ontario as to the costs payable to John D. Fienberg and I would dismiss the cross-appeal in this Court against the said John D. Fienberg without costs.

Appeal dismissed with costs, cross appeal allowed in part with costs, cross appeal against Fienberg dismissed without costs.

Solicitors of record:
Solicitors for the appellant: *Gardiner, Roberts*, Toronto.
Solicitors for the respondent: *Catzman & Wahl*, Toronto.

Footnotes

1 (1856), 6 El. & Bl. 327.

2 [1965] S.C.R. 681.

3 [1933] S.C.R. 251.

4 [1949] 2 K.B. 727.

5 [1968] N.Z.L.R. 254.

6 [1949] 2 K.B. 727.

7 [1932] S.C.R. 57.

8 (1887), 19 Q.B.D. 341.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Century Services Inc. v. LeRoy | 2010 BCSC 328, 2010 CarswellBC 617, 187 A.C.W.S. (3d) 202, [2010] B.C.W.L.D. 4462, 65 C.B.R. (5th) 82 | (B.C. S.C., Mar 16, 2010)

2009 BCCA 202
British Columbia Court of Appeal

British Columbia (Attorney General) v. Malik

2009 CarswellBC 1194, 2009 BCCA 202, [2009] 7 W.W.R. 85, [2009] B.C.W.L.D. 3861, [2009] B.C.W.L.D. 3862, [2009] B.C.W.L.D. 3863, [2009] B.C.W.L.D. 3864, [2009] B.C.W.L.D. 3865, [2009] B.C.W.L.D. 3866, 177 A.C.W.S. (3d) 1085, 270 B.C.A.C. 199, 454 W.A.C. 199, 53 C.B.R. (5th) 25, 79 R.P.R. (4th) 1, 91 B.C.L.R. (4th) 87

Her Majesty the Queen in right of the Province of British Columbia as represented by the Attorney General of British Columbia (Respondent / Petitioner) And Khalsa Developments Ltd. (Appellant / Respondent) And Ripudaman Singh Malik, 0772735 B.C. Ltd., Gurdip Singh Malik and Balbir Singh Bajwa (Respondents / Respondents)

Her Majesty the Queen in right of the Province of British Columbia as represented by the Attorney General of British Columbia (Respondent / Petitioner) And Ripudaman Singh Malik (Appellant / Respondent) and 0772735 B.C. Ltd., Gurdip Singh Malik, Balbir Singh Bajwa, and Khalsa Developments Ltd. (Respondents / Respondents)

Finch C.J.B.C., Frankel, Tysoe JJ.A.

Heard: March 5, 2009
Judgment: May 7, 2009
Docket: Vancouver CA036407, CA036517

Proceedings: affirming *British Columbia (Attorney General) v. Malik* (2008), 2008 CarswellBC 1623, 2008 BCSC 1033, 46 C.B.R. (5th) 92 (B.C. S.C.)

Counsel: J.C. McKechnie for Appellant, Khalsa Developments Ltd.
B.E. McLeod for Appellant, Ripudaman Singh Malik
F.G. Potts, R.N. Hamilton for Respondent

Subject: Property; Corporate and Commercial; Public; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Real property

VII Mortgages
VII.5 Redemption
VII.5.c Clog on equity (collateral advantage)

Real property

VII Mortgages
VII.9 Foreclosure
VII.9.a General principles

Real property

VII Mortgages
VII.9 Foreclosure
VII.9.b When right arises
VII.9.b.viii Miscellaneous

Real property

VII Mortgages
VII.9 Foreclosure
VII.9.d Entitlement to interim judgment
VII.9.d.i Order nisi
VII.9.d.i.F Miscellaneous

Real property

VII Mortgages
VII.9 Foreclosure
VII.9.d Entitlement to interim judgment
VII.9.d.iii Miscellaneous

Real property

VII Mortgages
VII.9 Foreclosure
VII.9.e Time for redemption
VII.9.e.ii Factors considered in shortening time
VII.9.e.ii.D Miscellaneous

Headnote

Real property — Mortgages — Foreclosure — General principles

Defendant was charged in connection with 1985 Air India bombing — Crown took two mortgages from defendants as security for advances made by Crown to fund legal costs of defendant in his defence against criminal charges — One mortgage was against defendant's one-half interest in property jointly owned by his wife, and second mortgage was against hotel property owned by company — After defendant was acquitted of charges, Crown was not repaid any of its advances after it demanded payment — Defendant commenced action against Crown for malicious prosecution — Crown's petition for foreclosure with respect to two mortgages was granted — Chambers judge granted order nisi with three-month redemption period in respect of mortgages — Defendants appealed — Appeals dismissed — Crown was entitled to take steps to enforce payment — There was no clog on equity of redemption — Company was not required to sell hotel property — It had option to pay net sale proceeds on sale of hotel or redeem hotel mortgage by paying reimbursement amount to Crown — Chambers judge did not err in declining to stay order nisi — Defendant contracted out of right to set-off — Length of redemption was not changed — Defendants were unsuccessful on grounds of appeal and they should not benefit from lengthened redemption period.

Real property — Mortgages — Foreclosure — When right arises — Miscellaneous

Defendant was charged in connection with 1985 Air India bombing — Crown took two mortgages from defendants as security for advances made by Crown to fund legal costs of defendant in his defence against criminal charges — One mortgage was against defendant's one-half interest in property jointly owned by his wife, and second mortgage was against hotel property owned by company — After defendant was acquitted of charges, Crown was not repaid any of its advances after it demanded payment — Defendant commenced action against Crown for malicious prosecution — Crown's petition for foreclosure with respect to two mortgages was granted — Chambers judge

granted order nisi with three-month redemption period in respect of mortgages — Defendants appealed on basis that foreclosure petition should have been referred to trial list — Appeals dismissed — Chambers judge did not err in declining to refer Crown's foreclosure petition to trial list — On proper interpretation of guarantee and hotel mortgage, Crown was entitled to take steps to enforce payment from company at any time after 45th day following completion of trial — Crown was limited in its recourse in enforcing payment to net sale proceeds from sale of hotel property — Company had option of redeeming hotel mortgage without selling hotel property by paying reimbursement amount to Crown — Company's proposed interpretation would render meaningless portion of paragraph enabling Crown to enforce guarantee between date that is 45 days after completion of trial and sale of hotel property.

Real property — Mortgages — Redemption — Clog on equity (collateral advantage)

Defendant was charged in connection with 1985 Air India bombing — Crown took two mortgages from defendants as security for advances made by Crown to fund legal costs of defendant in his defence against criminal charges — One mortgage was against defendant's one-half interest in property jointly owned by his wife, and second mortgage was against hotel property owned by company — After defendant was acquitted of charges, Crown was not repaid any of its advances after it demanded payment — Defendant commenced action against Crown for malicious prosecution — Crown's petition for foreclosure with respect to two mortgages was granted — Chambers judge granted order nisi with three-month redemption period in respect of mortgages — Defendants appealed on basis that foreclosure petition should have been referred to trial list — Appeals dismissed — There was no clog on equity of redemption — Company was not required to sell hotel property in order to satisfy hotel mortgage — It had option to pay net sale proceeds on sale of hotel property or redeem mortgage by paying reimbursement amount to Crown.

Real property — Mortgages — Foreclosure — Entitlement to interim judgment — Miscellaneous

Defendant was charged in connection with 1985 Air India bombing — Crown took two mortgages from defendants as security for advances made by Crown to fund legal costs of defendant in his defence against criminal charges — One mortgage was against defendant's one-half interest in property jointly owned by his wife, and second mortgage was against hotel property owned by company — After defendant was acquitted of charges, Crown was not repaid any of its advances after it demanded payment — Defendant commenced action against Crown for malicious prosecution — Crown commenced action against defendant and others for unsecured advances made by it to fund defence costs — Crown obtained Mareva injunction restraining defendant from mortgaging or disposing of any assets and preventing defendant and his wife from causing company to mortgage or dispose of its assets — Defendants brought applications to set aside Mareva injunction order — Chambers judge dismissed applications to set aside Mareva injunction — Crown's petition for foreclosure with respect to two mortgages was granted — Defendants appealed — Appeals dismissed — Mareva injunction did not impede redemption of hotel property — Mareva injunction contained provision allowing defendants to apply to vary terms of order — If company arranged refinancing at arm's length sale of hotel property, application could be made to vary Mareva injunction to permit refinancing or sale — As long as refinancing or sale did not have effect of prejudicing Crown by transferring equity to third parties, court would not refuse such application.

Real property — Mortgages — Foreclosure — Entitlement to interim judgment — Order nisi — Miscellaneous

Defendant was charged in connection with 1985 Air India bombing — Crown took two mortgages from defendants as security for advances made by Crown to fund legal costs of defendant in his defence against criminal charges — One mortgage was against defendant's one-half interest in property jointly owned by his wife, and second mortgage was against hotel property owned by company — After defendant was acquitted of charges, Crown was not repaid any of its advances after it demanded payment — Defendant commenced action against Crown for malicious prosecution — Crown commenced action against defendant and others for unsecured advances made by it to fund defence costs — Crown's petition for foreclosure with respect to two mortgages was granted — Chambers judge granted order nisi with three-month redemption period in respect of mortgages — Chambers judge declined to stay order nisi — Defendants appealed — Appeals dismissed — Chambers judge did not err in declining to stay order nisi

— Defendant contracted out of his right to assert set-off — It was not inequitable to hold defendant to his bargain — If stay were granted, it would render that provision of agreement ineffective — Stay would have had effect of preventing Crown from recovering payment of reimbursement amount until it was known whether defendant was able to obtain judgment against Crown that could be deducted from reimbursement amount.

Real property — Mortgages — Foreclosure — Time for redemption — Factors considered in shortening time — Miscellaneous

Defendant was charged in connection with 1985 Air India bombing — Crown took two mortgages from defendants as security for advances made by Crown to fund legal costs of defendant in his defence against criminal charges — One mortgage was against defendant's one-half interest in property jointly owned by his wife, and second mortgage was against hotel property owned by company — After defendant was acquitted of charges, Crown was not repaid any of its advances after it demanded payment — Defendant commenced action against Crown for malicious prosecution — Crown commenced action against defendant and others for unsecured advances made by it to fund defence costs — Crown's petition for foreclosure with respect to two mortgages was granted — Chambers judge granted order nisi with three-month redemption period in respect of mortgages — Defendants appealed — Appeal dismissed — Length of redemption period was not changed — Though ability of mortgagor to pay was not proper consideration for shortening redemption period to three months from usual six months, court was not inclined to give effect to this ground of appeal — Defendants did not move expeditiously to obtain leave to appeal and stay pending appeal — Defendants were unsuccessful on their grounds of appeal and they should not benefit from lengthened redemption periods resulting from unsuccessful appeals.

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Cases considered by *Tysoe J.A.*:

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J.G.M. Group L.L.C. v. Williams (2009), 2009 BCSC 85, 2009 CarswellBC 164 (B.C. S.C. [In Chambers]) — distinguished

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McLarty v. R. (2008), [2008] 4 C.T.C. 221, (sub nom. *McLarty v. Minister of National Revenue)* 374 N.R. 311, (sub nom. *Canada v. McLarty)* [2008] 2 S.C.R. 79, 46 B.L.R. (4th) 1, (sub nom. *McLarty v. Canada)* 293 D.L.R. (4th) 659, 2008 CarswellNat 1380, 2008 CarswellNat 1381, 2008 SCC 26, (sub nom. *R. v. McLarty)* 2008 D.T.C. 6366 (Fr.), (sub nom. *R. v. McLarty)* 2008 D.T.C. 6354 (Eng.) (S.C.C.) — considered

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R. v. Malik (2003), 2003 CarswellBC 2296, 2003 BCSC 1439, 111 C.R.R. (2d) 40 (B.C. S.C. [In Chambers]) — referred to

R. v. Rowbotham (1988), 25 O.A.C. 321, 35 C.R.R. 207, 1988 CarswellOnt 58, 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.) — referred to

Royal Bank v. Parmar (2005), 2005 CarswellBC 1898, 2005 BCSC 1155, 36 R.P.R. (4th) 300 (B.C. S.C. [In Chambers]) — referred to

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APPEALS by defendants from judgment reported at *British Columbia (Attorney General) v. Malik* (2008), 2008 CarswellBC 1623, 2008 BCSC 1033, 46 C.B.R. (5th) 92 (B.C. S.C.), granting Crown's petition for foreclosure on two mortgages.

Tysoe J.A.:

Introduction

1 Her Majesty the Queen in right of the Province of British Columbia (the "Crown") took mortgages from each of the appellants as security for advances made by the Crown to fund part of the legal costs of the appellant, Ripudaman Singh Malik, in defending himself against criminal charges that were tried in what became commonly known as the Air India trial.

2 The Crown was not repaid any of its advances after it demanded payment and, in October 2007, it commenced foreclosure proceedings with respect to the two mortgages. The foreclosure petition was heard in January 2008, at the same time as other applications in an action by the Crown to recover the unsecured advances made to fund Mr. Malik's defence costs. On July 31, 2008, the chambers judge granted an order nisi with a three-month redemption period in respect of the mortgages.

3 The appellants challenge the order nisi on several grounds. Mr. Malik also says that the order nisi should have been stayed pending the hearing of another action.

Background

4 Mr. Malik was charged in 2000 in connection with the 1985 Air India catastrophe. In 2002, the Crown entered into two agreements to provide funding for Mr. Malik's defence costs. The first agreement was interim in nature and was replaced by the second agreement. In the second agreement, which was called the Defence Counsel Agreement, it was recited that Mr. Malik had agreed to transfer all of his assets to the Crown; it also contained a provision by which the Crown could terminate the agreement if Mr. Malik failed to comply.

5 In January 2003, three months before the Air India trial began, the Crown gave notice that it would be terminating the second agreement if Mr. Malik did not sign an indemnity with respect to the defence costs funded by the Crown. Mr. Malik declined to sign an indemnity in a form satisfactory to the Crown, and made a court application in August 2003 pursuant to the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 25 O.A.C. 321 (Ont. C.A.), for relief should the Crown not agree to continue funding his defence costs. On September 19, 2003, Madam Justice Stromberg-Stein dismissed Mr. Malik's application on the basis that he failed to discharge the onus of establishing he was not in a position to contribute to the funding of his defence costs ([*R. v. Malik*] 2003 BCSC 1439, 111 C.R.R. (2d) 40 (B.C. S.C. [In Chambers])).

6 Negotiations between Mr. Malik and the Crown ensued, leading to a third agreement dated October 17, 2003 called the Payment Agreement. It was pursuant to the Payment Agreement that the mortgages were granted by the appellants.

7 Under the Payment Agreement, the Crown agreed to fund 50% of the legal fees of Mr. Malik's principal lawyers, 100% of their disbursements and other miscellaneous costs from September 19, 2003 to the completion of the Air India trial. The amount funded by the Crown under the Payment Agreement was defined as the "Reimbursement Amount". As security for payment of the Reimbursement Amount, Mr. Malik agreed to execute and deliver or cause to be executed and delivered several documents that were defined as the "Security Documents", which included the following:

> (a) a mortgage against Mr. Malik's one-half interest in property jointly owned by him and his wife, and located on Hamilton Street in Vancouver (the "Hamilton Street Mortgage");
>
> (b) a guarantee (the "Guarantee") from Khalsa Developments Ltd. ("Khalsa"), a company that owned a hotel in Harrison Hot Springs (the "Hotel Property") and the shares of which were held by Mr. and Mrs. Malik; and
>
> (c) a mortgage against the Hotel Property (the "Hotel Mortgage").

8 Mr. Malik agreed in the Payment Agreement that he would use his best efforts to sell at the highest price all of his assets (which included his one-half interest in the Hamilton Street property) and the Hotel Property. He also agreed to pay the Reimbursement Amount, without set-off or deduction, on the earlier of the occurrence of one of the events of default specified in the Payment Agreement and 45 days following completion of the Air India trial. The Payment Agreement provided that upon the occurrence of one of the events of default (which included the failure to pay the Reimbursement Amount when due), the Crown had the option, among other things, to demand payment of the Reimbursement Amount and all other monies advanced by the Crown in payment of Mr. Malik's defence and to take steps to realize on the security provided by Mr. Malik under the Payment Agreement.

9 The Hamilton Street Mortgage, the Guarantee and the Hotel Mortgage were executed and delivered to the Crown. There is no issue on these appeals regarding the validity of the Hamilton Street Mortgage, and its terms need not be reviewed.

10 The relevant provisions of the Guarantee are as follows:

> FOR VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, the undersigned KHALSA DEVELOPMENTS LTD. (the "Guarantor") HEREBY IRREVOCABLY GUARANTEES payment by RIPUDAMAN SINGH MALIK (Malik) of all obligations present or future, at any time owing by Malik to Her Majesty the Queen in Right of the Province of British Columbia represented by the Attorney General, Parliament Buildings, Victoria, B.C. V8V1X4 (the Attorney General) in respect of the Reimbursement Amount (the "Reimbursement Amount") as set forth in a Payment Agreement dated for reference the 17 day of October, 2003, made between, *inter alia*, the Attorney General and Malik (the "Payment Agreement"), a copy of which is hereby acknowledged by the Guarantor, it being understood that the obligation of the Guarantor and recourse under this Guarantee hereunder shall be limited to the lesser of $1.8 million or the amount of the Malik Net Sale Proceeds, and shall be payable only from the proceeds of sale of the Hotel Property as defined below.
>
> In this Guarantee "Malik Net Sale Proceeds" means the total sale price realized from the sale of the property described in Schedule "A" attached (the Hotel Property)
>
> (i) less real estate commission ...
>
> . . . . .
>
> (vi) less fifty percent (50%) of the remaining balance of the total sale price of the Hotel Property after making the deductions and adjustments described in (i) to (v).
>
> The Guarantor further understands and agrees that:
>
> 1. If the Hotel Property sells after the date the trial of the proceeding referred to in the Payment Agreement has completed, the Malik Net Sale Proceeds shall be paid to the Attorney General to be applied against the Reimbursement Amount by Malik to the Attorney General under the Payment Agreement, and any balance remaining after the Reimbursement Amount has beenfinally determined and paid in full will be paid to Malik or as directed by court order; and
>
> 2. If the Hotel Property sells prior to the completion of the proceeding referred to in the Payment Agreement such that the Reimbursement Amount to be paid by Malik to the Attorney General under the Payment Agreement is not known, the Malik Net Sale Proceeds will be held by the Attorney General in an interest bearing account with the irrevocable authority of the Attorney General to apply the Malik Net Sale Proceeds and any interest earned thereon against the Reimbursement Amounts owing by Malik under the Payment Agreement as those amounts are determined until the full amount of the Reimbursement Amount owing by Malik under the Payment Agreement has been satisfied, and any balance remaining after the Reimbursement Amount has been finally determined and paid in full will be paid to Malik or as directed by court order.

> PROVIDED THAT this Guarantee shall terminate automatically and shall be of no further force and effect immediately upon payment of the amount set out in the immediately preceding paragraph.
>
> Unless the Guarantor has made payment to the Attorney General as contemplated above, the Guarantor shall make payment to the Attorney General of the amount payable hereunder forthwith upon receipt of a written demand for payment delivered to the undersigned by the Attorney General ...
>
> . . . . .
>
> The liability of the Guarantor hereunder is direct and may be enforced by the Attorney General upon the earlier of a date which is 45 days after the date of the completion of the trial referred to in the Payment Agreement or upon a sale of the Hotel Property without first being required to pursue or exhaust any right or remedy against Malik or any other party.
>
> This Guarantee and the Payment Agreement contain the entire agreement between the Attorney General and the Guarantor relating to the subject matter hereof and none of the parties shall be bound by any other representation, agreement or compromise made by any other party which is not embodied herein or in the Payment Agreement.
>
> [Emphasis added.]

11 The Hotel Mortgage contained three additional or modified terms in addition to the prescribed standard mortgage terms that were incorporated into the Hotel Mortgage by reference. The first of these terms provided that the Hotel Mortgage secured the obligations of Khalsa under the Guarantee. The second provided that the obligations secured by the Hotel Mortgage became forthwith due and payable if the Hotel Property and the shares in Khalsa were sold or transferred to a person not approved by the Crown. The third read as follows:

> Notwithstanding anything contained herein (including the Prescribed Standard Mortgage Terms forming Part 2 of this Mortgage), the only obligations the Mortgagor has to the Mortgagee are pursuant to the Guarantee and recourse of the Mortgagee hereunder shall be limited in accordance with the terms of the Guarantee.

12 The Crown made advances aggregating $1,681,526.33 under the Payment Agreement. It received a payment of $72,498.81 that was credited against the Reimbursement Amount, leaving a balance of $1,609,027.52 owed by Mr. Malik to the Crown under the Payment Agreement.

13 On March 16, 2005, Mr. Malik and his co-accused were acquitted of the charges. On December 13, 2005, the Crown sent a letter to Mr. Malik's counsel demanding payment of all monies advanced by the Crown to pay for Mr. Malik's defence costs. On January 3, 2006, the Crown sent a letter to Khalsa demanding payment on the Guarantee in the amount of $1,609,027.52.

14 On March 14, 2007, Mr. Malik commenced an action against, among others, the Crown, claiming that he had been maliciously prosecuted and wrongfully imprisoned as a result of the Air India charges. No steps were taken in this action prior to the commencement of the present proceedings.

15 On October 23, 2007, the Crown commenced the action against Mr. Malik and others with respect to the unsecured advances made by it to fund his defence costs and, on the same day, the Crown obtained two *ex parte* orders, a *Mareva* injunction and an *Anton Piller* order. Among other things, the *Mareva* injunction restrained Mr. Malik from mortgaging or disposing of any of his assets and ordered Mr. Malik and Mrs. Malik not to cause Khalsa to mortgage or dispose of any of its assets other than in the ordinary course of business. The foreclosure proceeding was commenced on the following day.

16 The defendants in the Crown's first action made application to set aside the *Mareva* injunction and the *Anton Piller* order, and the applications were heard in January 2008, concurrently with the hearing of the petition in the foreclosure

proceeding. Prior to the hearing, Mr. Malik filed an amended writ of summons in his malicious prosecution action to claim an indemnity and set-off in respect of legal costs incurred in his defence of the Air India charges. He also filed a statement of claim in the malicious prosecution action and a counterclaim to like effect in the Crown's first action. The counterclaim has since been discontinued, but I mention it because, in addition to applying to set aside the *Mareva* injunction and the *Anton Piller* order, Mr. Malik made applications in the Crown's first action and the foreclosure proceeding to have them consolidated and stayed pending the hearing of his counterclaim. One of the issues raised on these appeals is related to those additional applications.

Decisions of the Chambers Judge

17 In his reasons for judgment issued jointly in the Crown's first action and the foreclosure proceeding (indexed as [*British Columbia (Attorney General) v. Malik*] 2008 BCSC 1027 (B.C. S.C.)), the chambers judge dismissed the applications to set aside the *Mareva* injunction and the *Anton Piller* order, and dismissed Mr. Malik's applications to consolidate the foreclosure proceeding with the Crown's first action and to stay them pending the hearing of Mr. Malik's counterclaim. He held that the Payment Agreement was unrelated to the subject matter of the Crown's first action concerning advances under an earlier, and distinct, agreement, and unrelated to the counterclaim. He also concluded that the security given under the Payment Agreement was not so closely related to the Crown's first action or the counterclaim as to be inextricable from it.

18 In his reasons for judgment issued in the foreclosure proceeding (indexed as 2008 BCSC 1033 (B.C. S.C.)), the chambers judge rejected Khalsa's argument that no demand could properly be made on the Guarantee prior to the sale of the Hotel Property. He also rejected Khalsa's alternate argument that the proceeding should be referred to the trial list on the basis there was a triable issue on the point. The chambers judge did not grant the one-month redemption period requested by the Crown, but he fixed a three-month redemption period on the basis that representations had been made on behalf of Mr. Malik that his family had the ability to pay. He also dealt with miscellaneous matters that are not in issue on these appeals.

Issues on Appeal

19 The issues raised by the appellants are as follows:

> (a) Should the foreclosure petition have been referred to the trial list to permit a full inquiry into the proper construction of the Guarantee and the Hotel Mortgage?
>
> (b) Is the Hotel Mortgage void as being a clog on the equity of redemption?
>
> (c) Should the order nisi be stayed pending removal of the impediment to redemption created by the *Mareva* injunction?
>
> (d) Should the trial judge have directed the foreclosure petition to be heard concurrently with the malicious prosecution action in view of Mr. Malik's claim of set-off against the Reimbursement Amount or, alternatively, should the trial judge have stayed the order nisi in view of Mr. Malik's cross claim?
>
> (e) Should a shortened redemption period have been ordered?

The second and third issues do not appear to have been raised before the chambers judge.

Discussion

(a) Interpretation of Guarantee and Hotel Mortgage

20 The general approach to be taken to the interpretation of a written agreement was summarized in *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70, 73 B.C.L.R. (3d) 102 (B.C. C.A.):

> [17] The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: *Delisle v. Bulman Group Ltd.* (1991), 54 B.C.L.R. (2d) 343 (S.C.), approved by Chief Justice McEachern in *Bramalea Ltd. v. Vancouver School Board No. 39* (1992), 65 B.C.L.R. (2d) 334 (C.A.); *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Eli Lilly and Co. v. Novopharm Ltd.* (1998), 161 D.L.R. (4th) 1 (S.C.C.).
>
> [18] The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 72 B.C.L.R. (2d) 273 (C.A.); *Melanesian Mission Trust Board v. Australian Mutual Provident Society*, [1997] 1 N.Z.L.R. 391 (P.C.).

This approach was most recently approved by this Court in *Victoria Drive Auto Sales Ltd. v. Cardinal Management Ltd.*, 2008 BCCA 428, 86 B.C.L.R. (4th) 2 (B.C. C.A.).

21 The general principles to be utilized in interpreting the words contained in a written contract were summarized by the Supreme Court of Canada in *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 at 901, 112 D.L.R. (3d) 49 (S.C.C.):

> ... the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation . . . which promotes a sensible commercial result.

22 Khalsa submits the Crown can only be entitled to foreclose on the Hotel Mortgage prior to the sale of the Hotel Property if a term to that effect is implied in the Guarantee or the Hotel Mortgage. It says the implication of a term is a triable issue because there should be a full inquiry into the proper construction of the documents.

23 Khalsa's submission is grounded on the provisions of the Guarantee that limit the liability of Khalsa to the lesser of $1.8 million and the "Malik Net Sale Proceeds" and that require Khalsa to pay "the amount payable hereunder" (which Khalsa contends is the lesser of $1.8 million and the "Malik Net Sale Proceeds"). Thus, unless a term is implied, it is said the Crown cannot foreclose on the Hotel Mortgage prior to a sale of the Hotel Property because the amount payable under the Guarantee will not be known until there is a sale.

24 Khalsa relies on *J.G.M. Group L.L.C. v. Williams*, 2009 BCSC 85 (B.C. S.C. [In Chambers]), as an analogous situation. In that case, there was an oral loan agreement. It was the common intention that the loan was to be repaid from the proceeds of a sale of the borrower's former matrimonial home. The property did not sell as quickly as anticipated, and the lender commenced action against the borrower for repayment of the loan. The lender submitted to the judge that it was an implied term of the loan agreement that the loan would be repaid within a reasonable time. Relying on the principles enunciated in *Boutsakis & Kakavelakis, A Partnership v. Boutsakis*, 2008 BCCA 13, 77 B.C.L.R. (4th) 113 (B.C. C.A.), the judge held that such a term could not be properly implied and dismissed the action.

25 I do not accept the proposition that there must be a trial before the court may make a determination as to whether a term should be implied in a contract. But I take Khalsa's submission to be that the meaning of the Guarantee and the Hotel Mortgage is ambiguous unless there is an implied term to the effect that the Crown is entitled to enforce the Guarantee by foreclosing on the Hotel Mortgage prior to the sale of the Hotel Property. An ambiguity can be resolved by implying a term, but it is more commonly resolved by a consideration of extrinsic evidence, which is best introduced in *viva voce* form at a trial.

26 In my opinion, however, the wording of the Guarantee is not ambiguous and there is no need to either imply a term or consider extrinsic evidence. I agree with the Crown's submission that Khalsa's position ignores the distinction between the amount payable under the Guarantee and the recourse available to the Crown to enforce payment.

27 In normal loan transactions, the recourse of the lender is not limited and the lender may look to all the assets of the borrower and any guarantor to enforce payment of the loan. In limited recourse loan transactions, such as the one in this case, the borrower or guarantor agrees to pay the full amount of the loan but, if payment is not made voluntarily, the recourse of the lender in enforcing payment is limited to specified assets of the borrower or guarantor. A limited recourse transaction is to be differentiated from a limited guarantee, where recourse may be had to all the guarantor's assets but the amount of the guarantee is limited to an amount less than the total of the loan.

28 There has been little judicial consideration of the concept of limited recourse loans. However, it has been recognized by the Supreme Court of Canada in *McLarty v. R.*, 2008 SCC 26, [2008] 2 S.C.R. 79 (S.C.C.), where Mr. Justice Rothstein described the concept as follows:

> [29] The present case involves limited recourse debt. In the context of debt, recourse means that the creditor has a right to repayment of a loan from the borrower, not just from the collateral that secured the loan. By contrast, non-recourse or limited recourse debt limits the creditor to recovery of specified security. The creditor is not entitled to seek repayment from the borrower should the proceeds from the disposition of the security be less than the total indebtedness.

29 The present situation is somewhat unusual because the guarantor (Khalsa) guaranteed the full amount of the loan (the Reimbursement Amount), and the recourse was limited to the lesser of a specified amount ($1.8 million) and a specified asset (the "Malik Net Sale Proceeds", being one-half of the net proceeds, after specified deductions, from the sale of the Hotel Property). As it turned out, however, the Reimbursement Amount is less than the upper monetary limit of the recourse.

30 I disagree with Khalsa's submission that the words "the amount payable hereunder" in the Guarantee (which I have underlined for emphasis in the part of the Guarantee that I have reproduced above) does not mean the Reimbursement Amount. Although it would have been preferable if the draftsperson had used the defined term "Reimbursement Amount" rather than the phrase "the amount payable hereunder", it is my opinion that the amount payable under the Guarantee is the payment guaranteed in the first paragraph of the Guarantee, the Reimbursement Amount.

31 This interpretation is reinforced by the wording of the sentence containing the phrase "the amount payable hereunder". The sentence begins with the phrase "Unless the Guarantor has made payment to the Attorney General as contemplated above". That phrase is referring to payment of the Malik Net Sale Proceeds to the Attorney General pursuant to clauses 1 and 2 of the third paragraph of the Guarantee (it appears that the draftsperson inadvertently left out the $1.8 million limit in that paragraph). By stating the Guarantor was to pay "the amount payable hereunder" (rather than stating "the Guarantor shall make such payment"), it must be taken that the phrase "the amount payable hereunder" is referring to an amount that is different than the payment under the third paragraph of the Guarantee. The only other different amount is the Reimbursement Amount.

32 There is an additional reason why Khalsa's proposed interpretation of the Guarantee is flawed. Khalsa's interpretation that the Crown cannot enforce the Guarantee and the Hotel Mortgage prior to the sale of the Hotel

Property is contrary to an express provision of the Guarantee. The penultimate paragraph of the Guarantee reproduced above provided that the Attorney General could enforce the liability of Khalsa under the Guarantee upon the earlier of the date that is 45 days after the completion of the Air India trial and a sale of the Hotel Property. A contract should not be given an interpretation that renders some of its wording meaningless if another reasonable interpretation does not have the same result. Khalsa's proposed interpretation would render meaningless the portion of the paragraph enabling the Attorney General to enforce the Guarantee between the date that is 45 days after the completion of the Air India trial and the sale of the Hotel Property.

33 This interpretation is also consistent with the Payment Agreement. It provided that upon an event of default, which included non-payment of the Reimbursement Amount 45 days following completion of the Air India trial, the Crown could elect to take steps on the security provided by Mr. Malik under the terms of the Payment Agreement (although it was Khalsa, not Mr. Malik, which granted the Guarantee and the Hotel Mortgage, Mr. Malik did provide this security in the sense that he covenanted and agreed to cause the Security Documents to be executed and delivered). The ability of the Crown to realize on the security was not expressed to be contingent on the sale of the Hotel Property.

34 It is also the penultimate paragraph reproduced above that distinguishes this case from *J.G.M. Group L.L.C.* and makes it unnecessary to imply a term in the Guarantee or the Hotel Mortgage. The difficulty in that case was that the parties had not agreed to an outside date for the repayment of the loan if the borrower's former matrimonial home was not sold within the anticipated time frame. Here, the Guarantee contained an outside date by which the Crown was entitled to enforce the Guarantee (and the Hotel Mortgage) if a sale of the Hotel Property had not yet occurred.

35 On the proper interpretation of the Guarantee and the Hotel Mortgage, the Crown was entitled to take steps to enforce payment from Khalsa at any time after the 45th day following the completion of the Air India trial. The Crown is limited in its recourse in enforcing payment to the "Malik Net Sale Proceeds" resulting from the sale of the Hotel Property. Khalsa has the option of redeeming the Hotel Mortgage without selling the Hotel Property by paying the Reimbursement Amount to the Crown. In my view, therefore, the chambers judge did not err in declining to refer the Crown's foreclosure petition to the trial list.

(b) Clog on Equity of Redemption

36 Khalsa submits the Hotel Mortgage is void because the requirement to sell the Hotel Property constitutes a clog on the equity of redemption that is not severable. This is because the courts have developed an equitable doctrine to protect mortgagors from relinquishing the right to redeem mortgages granted by them, whether the relinquishment is contained in the mortgage itself or in a collateral agreement.

37 Khalsa cites two authorities in support of its position that the sale requirement in this case is an impermissible impediment to its ability to redeem the Hotel Property. The first is *Browne v. Ryan*, [1901] 2 I.R. 653 (Ireland H.L.), in which a clog on the equity of redemption was described by the dissenting judge in the decision of the three-judge panel of the Queen's Bench Division in the following terms at 667-68:

> It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage, to get back the subject of the mortgage (in the present case the mortgaged lands) to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled on redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he be so prevented in fact, the equity of redemption is affected by what, whether very aptly or not, has been always termed "a clog".

In that case, the land was mortgaged to an auctioneer. As part of the loan transaction, the mortgagor agreed either to have the land sold through the auctioneer within the following 12 months or to pay the auctioneer five per cent of the sale price. It was held by the English Court of Appeal, in reversing the decision of the majority of the Queen's Bench Division, that the collateral advantage to the auctioneer placed a fetter on the equity of redemption that vitiated the advantage.

38 The second authority relied upon by Khalsa is *Jarrah Timber & Wood Paving Corp. v. Samuel*, [1904] A.C. 323, 73 L.J. Ch. 526 (U.K. H.L.). There, the lender took a mortgage over the borrower's debenture stock and was also granted an option to purchase the stock at 40 per cent within the following 12-month period. It was held that the option was void and that the borrower was entitled to redeem the stock upon repayment of the loan without regard to the option to purchase.

39 Here, there is no requirement on Khalsa to sell the Hotel Property in order to satisfy the Hotel Mortgage. Khalsa has an option: it may limit the Crown's recourse by paying it the "Malik Net Sale Proceeds" upon a sale of the Hotel Property or it may redeem the Hotel Mortgage by paying the Reimbursement Amount to the Crown. All mortgagors have the option of discharging the mortgage by selling the mortgaged property.

40 There is no clog on the equity of redemption in this case. Khalsa is not required to sell the Hotel Property in order to discharge the Hotel Mortgage, and Khalsa does not have a continuing obligation to sell the Hotel Property following its redemption.

(c) Effect of Mareva Injunction

41 The *Mareva* injunction provides that neither Mr. Malik nor Mrs. Malik may cause Khalsa to sell or mortgage any of its assets. Khalsa argues that the effect of the injunction is to prevent or impede Khalsa from redeeming the Hotel Property. If this impediment had been voluntarily agreed to by Khalsa as part of the mortgage transaction, then it would be struck down as a clog on the equity of redemption. Therefore, Khalsa submits, the equitable result is that the redemption period should not begin to run until the impediment is removed.

42 I agree with the Crown's position that, in practical terms, the *Mareva* injunction does not impede the redemption of the Hotel Property (or Mr. Malik's one-half interest in the Hamilton Street property). The *Mareva* injunction contains a provision that the defendants are at liberty to apply to vary the terms of the order. If Khalsa (or Mr. Malik) arranged refinancing or an arm's length sale of the Hotel Property (or Mr. Malik's one-half interest in the Hamilton Street property), an application could be made to court to vary the *Mareva* injunction to permit the refinancing or sale. As long as the refinancing or sale did not have the effect of prejudicing the Crown by transferring equity to third parties, I cannot imagine the court refusing such an application.

(d) Set-off/Stay

43 Relying on the general principles articulated in the leading decision of *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689, 65 B.C.L.R. 31 (B.C. C.A.), and an analogous situation in *Piggott v. Williams* (1821), 6 Madd. 95 (Eng. K.B.), Mr. Malik says the chambers judge erred in concluding that he did not have an equitable set-off against the Crown's claim to be paid the Reimbursement Amount. Mr. Malik submits the chambers judge should have done what was directed in *Northland Bank v. Kocken* (1993), 100 D.L.R. (4th) 753, 77 B.C.L.R. (2d) 377 (B.C. C.A.); namely, the foreclosure petition should be dealt with at the same time as the mortgagor's claim of set-off is tried.

44 The Crown responds that the chambers judge was correct in his conclusion and that, in any event, Mr. Malik contracted out of his right to assert a set-off. As I agree with the Crown's alternate argument, it is not necessary to examine the doctrine of equitable set-off, and I will proceed on the assumption that Mr. Malik does have a claim of equitable set-off as a result of his malicious prosecution action.

45 The law recognizes the ability of borrowers and guarantors to contract out of defences or set-offs they may have against the lender's claim. If a borrower or guarantor does contract out of defences or set-offs, the courts will generally hold them to the bargain they have made. This was confirmed by the Supreme Court of Canada in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, 139 D.L.R. (4th) 426 (S.C.C.), where Mr. Justice Cory, for the majority, said the following in the context of guarantees:

> [4] Generally, it is open to parties to make their own arrangements. It follows that a surety can contract out of the protection provided to a guarantor by the common law or equity. See for example *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107. The Ontario Court of Appeal, correctly in my view, added that any contracting out of the equitable principle must be clear. See *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792 (C.A.), at p. 796.

46 In the present case, Mr. Malik agreed, in s. 5.4 of the Payment Agreement, to "pay the Reimbursement Amount without set-off or deduction".

47 The Crown cites four decisions in which the British Columbia Supreme Court has upheld a "contracting out" clause in the context of a foreclosure proceeding: *Bate v. 287443 B.C. Ltd.*, [1988] B.C.J. No. 272 (B.C. S.C.); *Bate v. 287443 B.C. Ltd.*, [1988] B.C.J. No. 3063 (B.C. S.C.); *KKBL No. 348 Ventures Ltd. v. Vancouver Tech Park Corp.*, 2003 BCSC 164, 8 R.P.R. (4th) 312 (B.C. S.C.); and *Royal Bank v. Parmar*, 2005 BCSC 1155, 36 R.P.R. (4th) 300 (B.C. S.C. [In Chambers]).

48 In *KKBL No. 348 Ventures Ltd.*, the mortgagor argued that the amounts claimed by the mortgagee should be reduced by way of set-off as a result of certain actions taken by the president of the mortgagee. I respectfully agree with the following comments made by Madam Justice L. Smith:

> [13] Mr. Poisson, counsel for the petitioners, referred me to the following British Columbia authorities illustrating the enforcement of provisions in mortgage agreements excluding the right of set-off: *Bate v. 287443 B.C. Ltd.*, [1988] B.C.J. No. 272 (Q.L.) (S.C.) ("*Bate #1*"); *Bate v. 287443 B.C. Ltd.*, [1988] B.C.J. No. 3063 (Q.L.) (S.C.) ("*Bate #2*"); and *Aetna Acceptance Corp. v. Brown*, [1995] B.C.J. No. 1108 (Q.L.) (S.C.).
>
> [14] Mr. Anderson was unable to refer me to any authorities to the contrary. As I understood Mr. Anderson's argument, however, it is that his clients are not only entitled to equitable set-off under the principles set out in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31 (C.A.) but also to a remedy by way of counterclaim against Peterson for breach of fiduciary duty. I will not review the basis for either claim in any detail because I have concluded that the mortgage agreement does not permit the mortgagors to assert a set-off (whether equitable or otherwise) or counterclaim to reduce the amounts payable under the mortgage. The parties expressly agreed as a term of the mortgage that "[a]ll amounts payable to the Mortgagee hereunder shall be made without deduction, compensation, set-off, or counterclaim". The mortgagors thereby agreed that they would have to pursue claims against the mortgagee outside of mortgage enforcement proceedings. The mortgagors have commenced a separate action setting out the claims, and they will be free to pursue that action. I note that in *Bate #2* the claim which the mortgagor wished to pursue against the mortgagee was in deceit; nevertheless, the court held the parties to their bargain. While there may be circumstances in which a provision excluding the right of set-off will not be enforced, I do not think that such circumstances exist in this case.

Mr. Malik points to the last sentence of this passage and says that the present case is one in which a provision excluding the right of set-off should not be enforced.

49 I share the view expressed by Smith J. that the door should not be closed on the authority of the court to exercise its equitable jurisdiction to decline to enforce a "contracting out" clause in certain circumstances. For example, in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, 110 D.L.R. (3d) 424 (S.C.C.), the Supreme Court of Canada gave an indication that effect may not be given to a "contracting out" clause if it is onerous or unreasonable in ordinary commercial terms.

50 However, I do not regard the present situation as one where the court should decline to give effect to s. 5.4 of the Payment Agreement. The Air India trial was in progress when Mr. Malik entered into the Payment Agreement, and its terms were negotiated by counsel for both parties. Mr. Malik believes that he was maliciously prosecuted, and would have held that belief when he agreed to pay the Reimbursement Amount without set-off or deduction. In the first *Bate* decision, Mr. Justice Meredith had regard to the fact that the alleged right was known to the mortgagor when he signed

the mortgage containing the "contracting out" clause. In my view, it is not inequitable in the circumstances to hold Mr. Malik to his bargain.

51 In the alternative, Mr. Malik submits the order nisi should be stayed pending the outcome of his malicious prosecution action. He cites *Royal Bank v. Rizkalla* (1984), 59 B.C.L.R. 324, 50 C.P.C. 292 (B.C. S.C.), and *Pacific Playground Holdings Ltd. v. Endeavour Developments Ltd.*, 2002 BCSC 126, 1 R.P.R. (4th) 280 (B.C. S.C.), as examples of cases where an order nisi of foreclosure was stayed in order to permit the mortgagor to pursue a claim against the mortgagee.

52 While I have no doubt about the authority of the court to grant a stay of execution with respect to a judgment in order to allow the judgment debtor an opportunity to pursue a meritorious claim against the judgement creditor, this is not a case, in my view, where the court should exercise its discretion to grant a stay. If a stay were granted, it would render nugatory s. 5.4 of the Payment Agreement in which Mr. Malik agreed to pay the Reimbursement Amount without set-off or deduction. A stay would have the effect of preventing the Crown from recovering payment of the Reimbursement Amount until it is known whether Mr. Malik has been able to obtain a judgment against the Crown that can be deducted from the Reimbursement Amount. I am not persuaded that the chambers judge erred in declining to stay the order nisi.

(e) Length of Redemption Period

53 The chambers judge granted a shortened redemption period (i.e., three months rather that the "usual" six months) on the basis of representations made on behalf of Mr. Malik in the foreclosure proceeding that he had the ability to pay. While a chambers judge has a discretion to order a shortened redemption, he or she must exercise the discretion on the basis of appropriate principles and, with great respect to the chambers judge, the ability of the mortgagor to pay is not a proper consideration for the shortening of a redemption period. The purpose of a six-month redemption period is to enable the mortgagor to redeem or sell the mortgaged property on as favourable a basis as the mortgagor can arrange during the redemption period. The fact that a mortgagor has the ability to redeem the mortgaged property at the outset of the redemption period is not an appropriate basis for shortening it. To the contrary, it is when the mortgagor does not have the ability to redeem the mortgaged property that the court may properly shorten the redemption period.

54 There was no evidence of any of the factors justifying a shortened redemption period. The Crown did not introduce evidence of insufficiency of equity, abandonment or wasting. The chambers judge declined to rely on the ground that the matter had gone on for too long already, and there was no suggestion that Mr. Malik or Khalsa was responsible for delaying the proceedings.

55 Despite my view that the chambers judge should have ordered a six-month redemption period, I am not inclined to give effect to this ground of appeal. Over a year has passed since the hearing of the foreclosure petition. The order nisi was pronounced on July 31, 2008, and the appellants did not move expeditiously to obtain leave to appeal and a stay pending appeal (which were given on November 14, 2008). The appellants have been unsuccessful on their other grounds of appeals, and I tend to the view that mortgagors should not benefit from lengthened redemption periods as a result of bringing unsuccessful appeals. If a six-month redemption period had been ordered, it would have already expired but for the stay pending these unsuccessful appeals. In the circumstances, I would not change the length of the redemption period.

Conclusion

56 I would dismiss both appeals.

***Finch C.J.B.C.*:**

I agree.

***Frankel J.A.*:**

I agree.

Appeals dismissed.

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1929 CarswellNat 32
Exchequer Court of Canada

Canadian Pacific Railway v. R.

1929 CarswellNat 32, [1929] 2 D.L.R. 641, [1930] Ex. C.R. 26, 35 C.R.C. 248

His Majesty the King, Plaintiff and The Canadian Pacific Railway Company, Defendant

Audette J.

Judgment: March 21, 1929

Counsel: *I.C. Rand, K.C.*, and *W.P. Jones, K.C.*, for plaintiff.
W.N. Tilley, K.C., W.L. Scott, K.C., and *E.P. Flintoft, K.C.*, for the defendant.

Subject: Property; Public; Contracts; Torts

Headnote

Boundaries and Surveys — Conventional boundaries — Estoppel

Communications Law — Telephone and telegraph services — Telegraph companies

Estoppel — Estoppel in pais — Particular classes — Availability against Crown

On an information of intrusion exhibited to compel defendant company to remove its telegraph poles from the right of way of a government railway, the Exchequer Court held that defendant company had erected its telegraph line under a revocable licence from the Crown and that the Crown was estopped from denying the licence. Per Audette J.: "Now, there is a difference between estoppel by deed, and estoppel in pais or equitable estoppel, arising from acts and conduct. And while it may readily be conceded that the Crown is not bound by estoppel by deed, by recital in his patent ... yet it is held in the case of Atty. Gen. to Prince of Wales v. Collom, [1916] 2 K.B. 193 that the Crown is bound by estoppel in pais.... Under the circumstances of the case ... it must be found the defendant had a right to believe they were along the right of way by leave and permission open or implied". On appeal to the Privy Council it was held that on the facts of the case there was no foundation for the application of any equitable doctrine of estoppel.

Torts — Trespass — Trespass to land — Defences — Leave and licence

***Audette J.*, now delivered judgment.:**

1 This is an information of intrusion exhibited by the Attorney General of Canada, whereby it appears, *inter alia*, that the plaintiff seeks to remove a line of telegraph poles and wire erected by the defendant upon the right of way of the Canadian National Railway System — the plaintiff's property — under the circumstances hereinafter mentioned.

2 Besides claiming the possession of land upon which these poles are erected, the Crown further asks

(*b*) $713,408 for the issues and profits of the said lands and premises from the 1st January, 1890, till possession shall be given.

The conclusion of an action of intrusion. And by way of amendment, at trial:

or in the alternative damages for trespass to said lands in the sum of $100,000.

The conclusion of a common law action for damages.

(*b*1) In the alternative a declaration as to the right, if any, of the defendant in said lands, in respect of the said line of poles and wires.

3 This amendment, it will be seen, is in the nature of a material departure from what is usually understood would be covered in an information of intrusion; but it has the great advantage of placing before the Court the whole controversy between the parties, in respect of this telegraph line built by the defendant on the right of way of the Government railway over an area of, in round figures, 500 miles.

4 The defendant company, by their amended statement in defense, avers, among other material things, that their entry upon the plaintiff's lands, was by leave of the proper officers of the Government railway, while the Crown, with that knowledge, stood by and acquiesced in this state of things for a great number of years, whereby an irrevocable license of occupation was impliedly granted. That the terms upon which the defendants were allowed on the right of way had been settled and that they are still ready and willing to carry out the same, as agreed upon.

5 It is thought unnecessary to develop into greater details the ground set out in the defense, which are fully spread on the record.

6 This controversy, complex in its legal aspects, extends, in the history of the facts controlling it, with all its ramifications, as far back as 1887, when negotiations originally started, the building by the defendant commencing in 1889.

7 At that time, in respect of the territory where the railway was then in operation, there were in existence agreements with telegraph lines, between the Crown and The Western Union Telegraph Company, The Great North Western Telegraph Company, and The Montreal Telegraph Company. See exhibits 6 and 290.

8 In this respect, it is thought unnecessary to say more than that the agreement (exhibit No. 6) with Montreal Telegraph Company gave them exclusive right over the territory covered by the agreement, — a matter upon which the Law Officers of the Crown have given considered opinion. An exclusive right was also given the Western Union Company from New Glasgow to Canso, but that agreement of 1880, it is contended by defendant, has been superseded by a later agreement (16th October, 1889, exhibit No. 290) without that exclusive right.

9 The history of this case involves so many facts and such a mass of evidence both oral and documentary, that it is thought unadvisable to recite them all in detail. Sufficient is it to mention only those that have a specific controlling effect. And with regard to the above mentioned agreement with these three companies, and the exclusive right over certain area, reference will be hereafter made in the final adjudication.

10 The right of way of a railway, it may be said *en passant*, has always been regarded as the proper place to build a telegraph line; the line is thereby unobstructed and can be easily inspected from a train. And in both the Government Railway Act and the General Railways Act provisions are made to meet such eventuality. See secs. 45 and 46, ch. 38, R.S.C., 1886, The Government Railways Act; The Railway Act, 51 Vic., ch. 29, secs. 265 and 266.

11 The first negotiations between the parties started in 1887 when the C.P.R. asked that no exclusive right be given any company to erect a line between Canso and Sydney (exhibits 8, 9, A, 14, 15, 39-29) when Mr. Schreiber, the Chief Engineer and General Manager of the Canadian Government Railways at the time, advised that

> we are quite prepared to negotiate an arrangement by which your company would be permitted to build and operate a line along this railway; and under such conditions (exhibit No. 15) as the Government may see fit to impose.

Must it not be deemed that his power was properly exercised in allowing the defendant to proceed with building in the meantime? *Omnia praesumuntur rite et solemniter esse acta.*

12 At that time the defendants were approaching the completion of their "Short Line," there was the Cable at Canso and the agitation in the public for an *All Red Route*, i.e., a domestic telegraph company on exclusive Canadian soil.

13 According to witness Richardson, who was in charge of the C.P.R. Telegraph lines at the time, the defendant company began building their line, between St. John and Halifax, outside the right of way in 1889 and completed the work in 1890. This witness adds that it was all built outside the right of way, excepting in a few cases. He thinks only in one case, probably less than half a mile, just a small detour. He consulted Mr. Archibald, with this question of boundary, who granted him leave. Here the I.C.R. supplied an experienced man, familiar with the running of trains, to control and handle the hand-cars used in building the line.

14 This part between St. John and Halifax was built outside the right of way, after the C.P.R. had tried to get leave to build inside, and had been met with the exclusive right of the Montreal Telegraph, set up by the Justice Department, but no objection was set up as far as the Government was concerned. Finally as the company could not wait any longer, they built outside. Witness Grant, an employee of the Western Union, further testified that when the C.P.R. were building on the right of way between New Glasgow and Mulgrave, he called it to the attention of Gray, the Roadmaster, who told him that he had instructions from headquarters to allow them to build on the right of way.

15 Richardson also built the line between Truro and New Glasgow, outside the right of way, in 1889; before reaching Halifax.

16 In 1893 he built the line between New Glasgow to Sydney on the right of way. Before commencing work on that area, under instructions of Mr. Hosmer, he first went to see Mr. Pottinger, the officer in charge of the whole I.C.R. as Chief Superintendent (p. 116) and consulted him about the construction of the line. Mr. Pottinger brought in the engineer of the railway, Mr. Archibald, and Mr. Wallace, the freight agent, and they all discussed the whole question. What the witness wanted to know was if they had any special instruction in regard to the construction of this line on their right of way, so that he could meet their wishes. Finally Mr. Pottinger turned him over to the department that handled that work and the engineer, Mr. Archibald, who told witness to build it the same as he would build the C.P.R. line, placing no restriction upon the manner he would build (pp. 243, 244).

17 The work was done openly. The poles were distributed from the cars and the transportation paid for.

18 This witness had nothing to do with the building from Westville to Pictou.

19 Now with respect to this section between New Glasgow and Sydney, it appears, from exhibits Nos. 116, 117, 118, 302, 125, 127 and 129, that permission or leave to build was given by Mr. Schreiber, subject to agreement similar to the one with the Western Union Telegraph; that the Crown drew up such an agreement, submitted it to the General Manager of the Government Railways and transmitted it to the defendant for execution, and that, after being duly executed by the C.P.R., it was returned to the Crown with request to also execute the same and return one copy.

20 This document was lost while in the possession of the Crown. In view of all this, it cannot be said that the C.P.R. was a trespasser on that section anyhow. The defendant is bound by that document and through its counsel at trial it declared its readiness to do everything they thereby agreed to; they built from New Glasgow to Sydney upon the terms asked for by the Crown.

21 With respect to the line from Westville to Pictou, the Board which had, at the time, the full control and management of the Government Railways, by a resolution of the 10th March, 1911, as shown by exhibit No. 185, granted the request

of the C.P.R. for permission to string their wires on that area on the right of way, and to give the Crown the use of the line and to put the same into their stations at Westville and Pictou. See exhibits 188, 189, 193 and 195.

22 In a letter from Mr. Pottinger to Mr. McNicoll, Vice-President C.P.R., exhibit No. 194, Mr. Pottinger says: —

> As I told you verbally when in Montreal, it will be all right for you to go on and build that line and we will arrange at a later period.

23 There is further what was called the Mersereau incident in 1904. The latter, at that date, was in charge of the building, maintenance and repair between St. John and Moncton, and arrived at a given place, for better convenience, some poles were placed on the right of way and objected to by the section man. The matter was referred to the Manager, Mr. Pottinger, who allowed them to maintain and place their poles on the right of way, on a distance of between 5 to 10 miles on that division.

24 From that date the work of repairing and maintenance was converted into rebuilding. It is perhaps well to say here that it was mentioned at trial that the life of those telegraph poles was between 15, 20 and 25 years, according to the nature of the soil. This rebuilding, by the defendant, resulted in transferring all their poles on the right of way. According to witness McNeil, the poles were brought on the right of way to conform with the other lines, concluding that the C.P.R. should be in the same and in no better position.

25 At one time an action of intrusion was taken before this Court, against the C.P.R., and instruction was also given to issue a similar action in Halifax; but the whole matter was stopped by Sir John A. Macdonald, then Premier of Canada and Minister of Railways and Canals at the time, who then defined the Crown's policy in respect of this matter.

26 As will appear by exhibit 75, on the 24th September, 1890, Sir John A. Macdonald wrote to Sir John Thompson, the Minister of Justice, as follows: —

> Please stay proceedings. It won't do to have any further difficulties with the C.P.R. just now. This is an unimportant matter.

And the suit in the Exchequer Court was abandoned and the costs paid by the Crown.

27 Furthermore, on the 9th October, 1890, Sir John A. Macdonald, wrote to W.C. Van Horne, the President of the C.P.R. as follows: —

> Dear VAN HORNE: —
>
> I have yours of the 22nd ult. and return you the papers therein enclosed, as you desire. The Government have not the slightest objection, so far as they are concerned, to the C.P.R. planting telegraph poles along the line of the I.C.R. The trouble is that long ago, by an absurd agreement, the Montreal Telegraph Company was given the exclusive right to plant poles and wires along the line of the I.C.R. Such being the case, the Government Officials gave notice to your people not to plant poles but the warning was utterly disregarded. The proceedings were taken lest the Government might be held responsible by the Montreal Telegraph Co. for breach of agreement and consequent damage. Dwight's letter to Hosmer is satisfactory enough, but it is not, I take it, binding on the Company, especially if under the control of Wiman. However, if the C.P.R. will stand between the Government and all harm in the event of proceedings being taken, we will not interfere with your telegraph poles.
>
> Yours faithfully,
>
> JOHN A. MACDONALD.
>
> W.C. Van Horne, Esq.,

Montreal.

See in this respect sect. 5, 6 ch. 38, R.S.C., 1886, defining the Minister's power, without Order in Council.

28 Then later on, in 1915, when the poles were all on the right of way, Mr. McMillan, the General Manager of the C.P.R. Telegraph, and Mr. Gutelius, then in charge of the Government Railways, as manager, met and discussed the whole matter seeking the solution of the problem in an agreement whereby the C.P.R. could give certain services or render certain services to the I.C. Ry. in exchange for an arrangement whereby they could maintain their telegraph lines on the right of way.

29 A draft of such agreement was prepared by Mr. Gutelius, exhibit No. 239a. It was brought to a mutual conference at Montreal; changes were made and finally resulted in the agreement filed as Exhibit 245a — which was again duly executed by the C.P.R. and transmitted to the Crown. It was marked O.K. by Mr. Gutelius, under his own signature, and every page was initialed by him — the draft had also been marked O.K. and corrected by Mr. Gutelius.

30 This document, Mr. McMillan testified, never came back into his possession and the document turns up at trial as coming from the hands of the Crown.

31 Then Mr. Hayes, who succeeded Mr. Gutelius, proposed a new agreement. That was followed in 1924 with a letter of the Department of Justice advising that proceedings would be taken, but not assigning any special delay within which to remove the poles.

32 Hence the present action.

33 Having so set forth out of the mass of the evidence such of the important facts that were thought necessary, I shall now approach the consideration of the controversy on its merits.

34 It would seem that the poles were placed on the right of way with the consent and co-operation of the high officers of the railway and the Prime Minister and Minister of Railways at the time, and conjectured that these agreements that were placed in the hands of the Crown, after being duly signed by the C.P.R. would be executed. As a matter of fact they were not executed by the Crown, but on the other hand, the Crown retained the documents in its possession after they were marked with the approval of its responsible officers, and the right of the defendant to regard them as satisfactory to the Crown thus becomes apparent. Surely the equitable right of the defendant to remain upon the property under the terms of the proposed agreement cannot be disputed.

35 The land upon which the poles are erected belongs to and is vested in the Crown. There is here no question of parting with land or entering into a lease for which the authority of Parliament or an Order in Council would be required. The Crown is not divested of its fee. The defendant is found in occupation only of such portions of the surface of the lands as was necessary to erect their poles upon, with the consent, permission and authority of the railway officials. The permission is given by the Prime Minister and the Minister of Railways, and by the officer, who under the Order in Council appointing him (exhibit No. 293) is given

> the duties and powers of General Manager, such powers as are usually vested in the executive of a railway Corporation.

Executive is

> l'ensemble des personnes qui exercent l'autorité politique.

The poles are erected openly with here and there a confirmation of the leave or permission to do so.

36 The operation of the railway is confided onto this manager, and a telegraph system or telegraph systems would seem to be a necessary part for the operation of a railway. He could not give perpetual rights which would amount to alienation of property, but could it be said he could not grant a licence of occupation? Indeed, a revocable licence is nothing but a personal privilege to do certain acts upon the land of another, but creates no estate therein, and is revocable at will and may rest in parol. See also *Plimmer et al v. Mayor, etc., Wellington*[1] . A licence could be implied as resulting from both the negotiations and the conduct of the minister and the managers of the I.C.R. And while this licence was being enjoyed by the defendant, the plaintiff, so to speak, stood by with full knowledge.

37 The leave given by the manager and others, was an act of interim nature, subject to arrangement. How can we find fault with such a sane act of administration? A foreign telegraph company was already on the right of way. Why any discrimination against a Canadian, a domestic company, which has a system of telegraphs extending from the Pacific to the Atlantic and a cable at Canso? Should not state messages, which might be conflicting with American interest, be in preference placed in the hands of a Canadian company, than in that of a foreign company? Should not this be doubly true if some trouble were arising with respect to the fisheries rights, in the Maritime Provinces, as between the Canadian and American Governments?

38 This is not a case where it is sought to protect the Crown's prerogatives, and it would seem that no claim of right could be made good against the defendant, under the circumstances. The case should not be approached in a narrow view of the prerogative rights, but it should be dealt with broadly as the issues demand. It is of utmost importance in the administration of justice that even the appearance or what might appear unjust and unfair should be avoided, if possible.

39 Under the circumstances of this case, were the Civil Law resorted to — although it is not the law under which the issues are to be determined here — there would be assumed a contract *sui generis*, whereby it would be presumed proper authorization was given. There would be presumed in favour of the occupant a sort of right to a certain superficies. *Tremblay v. Guay*[2] ; *Beaudry Lacantinerie et Chauveau*[3] ; Fuzier-Herman Rep. vo. Superficie. The Common Law closely approaches in spirit the above doctrine of the Civil Law where it restrains the actual owner of land, who has stood by and allowed another under mistake of title to improve it, from ejecting the latter from the land without compensation for his improvements. The equity inherent in that doctrine is of much the same spirit as that arising upon the facts of the case before me. Furthermore, it is a rule of the Common Law that a licence enables the person to do a thing which without such licence would be a trespass. And while a licence without consideration is revocable, if granted for a valuable consideration it is irrevocable. *Taylor v. Caldwell*[4] . In *Hurst v. Picture Theatres Limited*[5] , it was held that a man may become a licensee without a formal grant in writing.

40 Kay J., in *McManus v. Cooke*[6] , cites many authorities which support the equitable right of the defendant in the case before me. It is useful to quote his remarks at p. 695:

> In the well known case of *Dann v. Spurrier*[7] , the doctrine is thus stated: "This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting those acts, which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment."
>
> In *Powell v. Thomas*[8] , this doctrine was applied to a case in which the plaintiff had made a railway over the defendant's land without objection from the defendant, the only dispute being on the question of price, and the Court of Equity restrained the defendant from prosecuting an action of ejectment. So, in the case of *Duke of Devonshire v. Eglin*[9] , the defendant allowed the plaintiff to make a watercourse under his land to convey water to a town. The watercourse was made at the plaintiff's expense, and this easement was enjoyed for about nine years, and although there was no grant the defendant was decreed to execute a proper deed, and a perpetual injunction was granted to

restrain his interference with the watercourse. *Hewlins v. Shippam* [10] ; *Wood v. Leadbitter* [11] , and other authorities at Common Law, were cited, and it was argued that the right claimed could only be granted by deed, and that therefore the licence was revocable; but this common law doctrine was not allowed to prevail in equity.

41 There has been a licence or permission given in fact and upon apparent authority, and why should it not be binding? This seems inherently justified by the acts of the managers of the Railway and the Minister of the Crown. The defendant's rights are only questioned after years of its overt acts of occupation and enjoyment. In other words, the conduct of the parties carries against the granting of the remedy asked by the information of intrusion. Upon no fair consideration, under the circumstances of the case, could an order of ejectment be made against the defendant company who were not trespassers.

42 The plaintiff has acquiesced, by its conduct, during a long period of time, to the occupation of this land. *McGreevy v. The Queen* [12] ; *The Queen v. McCurdy* [13] ; *The Queen v. Yule* [14] . This acquiescence has led the defendant to believe that the occupation was assented to; it would otherwise work out an injustice. *Rochdale Canal Co. v. King* [15] . See also exhibit No. 51 in respect of the construction by the Justice Department upon the facts that if the poles are suffered upon the right of way it would support evidence that poles had been placed there by permission of the plaintiff.

43 Upon the facts of the case, it is clear that the plaintiff has no right to treat the defendant as a trespasser. The defendant from the beginning was upon the property of the plaintiff as a licensee with the consent and acquiescence of the plaintiff, and has ever since been continuously in that capacity upon the property. See also *Peterson v. The Queen* [16] ; *Davenport v. The Queen* [17] ; *Attorney-General v. Ettershank* [18] .

44 Now, there is a difference between estoppel by deed, and estoppel in pais or equitable estoppel, arising from acts and conduct. And while it may be readily conceded that the Crown is not bound by estoppel by deed, by recital in his patent (Robertson, On Civil Procedure), yet it is held in the case of *Attorney-General v. Collom* [19] , that the Crown is bound by estoppel in pais. See also *Queen Victoria Niagara Falls Park Comm'rs. v. International Railway Co.* [20] ; *City of Montreal v. Harbour of Montreal* [21] ; *Attorney-General v. Holt & Co. Ltd. et al* [22] . Under the circumstances of the case, as above mentioned, it must be found the defendant had a right to believe they were along the right of way by leave and permission open or implied.

45 Estoppels in pais are called equitable estoppels because they arise upon facts which render their application in the protection of rights equitable and just. Words and Phrases, vol. 2, pp. 340 et seq. Estoppel is the shield of justice interposed for the protection of those who have acted improvidently. It is the special grace of the Court, authorized and permitted to preserve equities that would otherwise be sacrificed. Idem 345.

46 The trial was proceeded with only upon the question of law, or, at any rate, leaving the question of damages to be dealt with after the rights of the parties had been determined, and hope was then expressed by counsel that once the rights were determined the terms and conditions could be agreed upon by the parties:

47 In the result, the prime controlling issue to be determined by these proceedings is what right, if any, has the defendant on the right of way? Answering the same I find that the defendants are and have been on the right of way from the beginning by the licence of the plaintiff — but not an irrevocable licence, which would be tantamount to an alienation of the property of the Crown.

48 I do not think that I should be called upon in my judgment to determine more than that; but if I can assist the parties to a full and complete settlement of their difficulties I shall be glad to have them, or either of them, apply, upon notice, for further directions.

49 There will be judgment accordingly. The question of costs is reserved.

Judgment accordingly.

Footnotes

1 (1884) L.R. 9 A.C. 699.

2 (1929) S.C.R. 29, at p. 34.

3 Biens. No. 372.

4 (1863) 3 B. & S. 826.

5 (1915) 1 K.B. 1.

6 (1887) 35 Ch. D. 681.

7 (1802) 7 Ves. 230, at p. 231.

8 (1848) 6 Hare, 300.

9 (1851) 14 Beav. 530.

10 (1826) 5 B. & C. 221.

11 (1845) 13 M. & W. 838.

12 (1888) 1 Ex. C.R. 321, at p. 322.

13 (1891) 2 Ex. C.R. 311, at p. 320.

14 (1899) 30 S.C.R. 24 at pp. 34, 35.

15 (1853) 16 Beav. 630, at p. 636 (*c*).

16 (1889) 2 Ex. C.R. 67.

17 (1877) L.R. 3 A.C. 115.

18 (1875) L.R. 6 P.C.A. 354.

19 (1916) L.R. 2 K.B. 193, at at 204.

20 63 Ont. L.R. 49, 66, 67.

21 (1926) A.C. 299 at p. 313.

22 (1915) A.C. 599.

5

1970 CarswellAlta 101
Supreme Court of Canada

Canadian Superior Oil Ltd. v. Hambly

1970 CarswellAlta 101, 1970 CarswellAlta 144, [1970] S.C.R. 932, [1970] S.C.J. No. 48, 12 D.L.R. (3d) 247, 74 W.W.R. 356

Canadian Superior Oil Ltd. et al v. Hambly et al

Martland, Judson, Ritchie, Hall and Spence, JJ.

Judgment: May 25, 1970

Counsel: *J. D. Arnup, Q.C.* and *D. O. Sabey*, for appellants.
W. B. Gill, Q.C. and *J. B. Ballem, Q.C.*, for respondents.

Subject: Contracts; Natural Resources; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Estoppel

I What constitutes

Natural resources

III Oil and gas
III.5 Oil and gas leases
III.5.e Termination of lease
III.5.e.v Miscellaneous

Headnote
Estoppel — What constitutes

Oil and Gas — Oil and gas lease — Termination of lease

Mines and Minerals — Oil and Gas Lease — Expiry of Lease — Whether Revived by Lessor's Subsequent Conduct — Estoppel.

Appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (1969) 67 W.W.R. 525, 3 D.L.R. (3d) 10, dismissing an appeal from the judgment of Riley, J. (1968) 65 W.W.R. 461. Appeal dismissed.

Appellants sought a declaration that a certain oil and gas lease was a valid and subsisting lease, in full force and effect. Drilling under the lease had commenced just prior to the expiry of the primary term and had come to an end

some seven weeks after the expiry date. The lease by virtue of its terms could only continue in force after the cessation of drilling if there was production, actual or constructive, but there was none. It was not seriously contended that the lease did not terminate when drilling ceased but the appellants argued that by reason of his conduct the respondent lessor was estopped from denying that the lease continued in full force and effect.

It was *held, per curiam*, that the appeal must be dismissed; upon the termination of the lease on August 6, 1958, the legal relationship which had theretofore existed between the parties came to an end, and the lease thereafter could only be revived by agreement for consideration between them; subject to the equitable rule as to acquiescence, a cause of action could not be founded on estoppel: *Low v. Bouverie*, [1891] 3 Ch. 82, at 101, 105, 60 LJ Ch 594; *Combe v. Combe*, [1951] 2 K.B. 215, 95 Sol J 317, [1951] 1 All E.R. 767 applied. The principle of promissory estoppel enunciated in *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130, [1947] LJR 77, 62 T.L.R. 557, assumed the existence of a legal relationship between the parties, but in the case at bar that relationship had come to an end before any of the alleged representations upon which appellants based their plea were made.

The judgment of the Court was delivered by *Martland, J.*:

1 The appellants in this case seek a declaration that a petroleum and natural gas lease, dated June 17, 1948, between the respondent Ralph Hambly, hereinafter referred to as "Hambly", as lessor, and the appellant Canadian Superior Oil Ltd., hereinafter referred to as "Superior", formerly known as Rio Bravo Oil Company Limited, as lessee, is a good, valid and subsisting lease. In these proceedings the legal position of the other appellant is the same as that of Superior and the legal position of the other respondent is the same as that of Hambly. We are concerned, in this appeal, with the legal relations of Hambly and Superior in respect of that lease.

2 The appellants' action was dismissed at trial (1968) 65 W.W.R. 461, and their appeal from the trial judgment was dismissed by unanimous decision of the Appellate Division of the Supreme Court of Alberta (1969) 67 W.W.R. 525, 3 D.L.R. (3d) 10.

3 The lease was for a primary term of 10 years and related to all of sec. 17, tp. 38, rge. 2, W. 5 M. in the Province of Alberta.

4 The provisions of the lease which were material to this action provide as follows:

2. Subject to the other provisions herein contained, this lease shall be for a term of Ten (10) Years from this date (called 'primary term') and as long thereafter as oil, gas or other mineral is produced from said land hereunder, or as long thereafter as Lessee shall conduct drilling, mining or reworking operations thereon as hereinafter provided and during the production of oil, gas or other mineral resulting therefrom.

3. The royalties reserves by Lessor are:

. . . . .

(b) On gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; where gas from a well producing gas only is not sold or used, Lessee may pay as royalty $100.00 per well per year, and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof;

. . . . .

12. If Lessee shall commence to drill a well within the term of this Lease or any extension thereof, Lessee shall have the right to drill such well to completion with reasonable diligence and dispatch, and if oil or gas be found in paying

quantities, this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.

5 The lease provided that Superior should commence drilling operations on the leased land on or before one year from its date, but provided for annual postponements of the drilling commitment, during the primary term of the lease, by payment by Superior to Hambly of a delay rental of $640. There were no drilling operations commenced until June 10, 1958. The learned trial Judge found that drilling operations ceased on August 6, 1958, and this finding was not attacked in this Court. Prior to that date, on July 23, 25 and 26, tests had disclosed gas flows in three formations, and had established that gas "in paying quantities" could be produced from the well. There was at that time no available market for it, and Superior was aware that the well would not be put into production. This situation had been provided for in par. 3 (b) under which Superior had the option, but was under no duty, to pay a royalty of $100 per year in respect of that well. If it made such payment, it would be considered that gas was being produced, within the meaning of par. 2.

6 Under the lease, a gross royalty of 12 $^{1}/_{2}$ per cent was reserved to Hambly. On May 25, 1951 Hambly executed four royalty trust agreements, each relating to one quarter section of the leased land, whereby he assigned to Prudential Trust Company Limited, as trustee, the royalties payable to him under the provisions of the lease, in trust, to be disbursed among the holders of royalty units purchased by them.

7 On August 13, 1958, a week after drilling operations had ceased, a cheque for $100 was sent to the trust company, as a payment in lieu of production, which cheque was received the following day. The accompanying letter referred to No. 2 gross royalty trust agreement, this being the agreement relating to the quarter section on which the drilling had occurred. This payment was distributed among the holders of royalty units under that agreement. Hambly did not have any interest in any unit under that agreement.

8 The lease in question here is in the same form as that which was under consideration in this Court in *Can. Superior Oil of Calif. Ltd. v. Kanstrup and Scurry-Rainbow Oil Ltd.* (1964) 49 W.W.R. 257, [1965] S.C.R. 92, 47 D.L.R. (2d) 1, affirming (1964) 47 W.W.R. 129, 43 D.L.R. (2d) 261, and, in the light of that decision, the conclusion reached by the Courts below, that the lease terminated on August 6, 1958, is correct. The only material factual difference between the *Kanstrup* case and the present one is that, in the present case, the drilling of a well had commenced just prior to the end of the primary term, and par. 12 came into operation.

9 Under that paragraph, Superior had the right to drill the well to completion (which it did), and if oil or gas was found in paying quantities (and it was) the lease would continue with like effect as if the well had been completed during the primary term. If the well had been completed during the primary term, and produced oil or gas in paying quantities, that term would be extended, under par. 2, beyond the primary term "as long thereafter as oil, gas or other mineral is produced". The latter part of par. 2, after providing for an extension of the primary term for as long as Superior conducted drilling, mining or reworking operations, goes on to provide for the continuance of the extension "during the production of oil, gas or other mineral resulting therefrom".

10 The result is that, under par. 2, extension of the term of the lease depends upon there being production either at the time the primary term ends, or, if par. 12 becomes applicable, on the completion of the drilling of a well commenced before the primary term ends. In either case, failure to produce results in the termination of the lease.

11 In the present case, the commencement of the drilling of the well, shortly before the expiration of the primary term, extended the term until drilling was completed (August 6, 1958). At that time, the term of the lease could only continue as a result of production, actual or constructive, and there was none. Accordingly the lease terminated on that date.

12 This conclusion was not seriously challenged in argument before this Court. The contention of the appellants was that Hambly was estopped from taking the position that the lease had terminated on August 6, 1958 and, in support of this submission, reliance was placed upon his conduct, on different occasions, as constituting a representation by him to Superior that the lease was still in effect. All of these occasions occurred after the lease had terminated on August 6, 1958.

13 Without attempting finally to determine the matter, I have serious doubt as to whether the issue of estoppel can properly be raised in the circumstances of this case. The appellants, as plaintiffs, seek a declaration that the lease is a good, valid and subsisting lease. For the reasons already given, it appears that the lease in question had terminated. It could not be revived thereafter except by agreement, for consideration, between the parties. To say that subsequent representations by Hambly could recreate the legal relations between the parties would be to say that such representations could create a new cause of action for Superior. But, subject to the equitable rule as to acquiescence, which has sometimes been described as estoppel by acquiescence, and to which I will refer later, a cause of action cannot be founded upon estoppel: *Low v. Bouverie*, [1891] 3 Ch. 82, at 101, 105, 60 LJ Ch 594; *Combe v. Combe*, [1951] 2 K.B. 215, 95 Sol J 317, [1951] 1 All E.R. 767; *Spencer Bower and Turner* on *Estoppel by Representation*, 2nd ed., p. 279, par. 289.

14 The doctrine of promissory estoppel, enunciated by Lord Denning in *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130, [1947] LJR 77, 62 T.L.R. 557, was considered by this Court in *Conwest Exploration Co. v. Letain*, [1964] S.C.R. 20, 41 D.L.R. (2d) 198. Judson, J., speaking for the majority, at p. 28, expressed the view that Lord Denning's statement did not do anything more than to restate the principle propounded by Lord Calms in *Hughes v. Metro. Ry.* (1877) 2 App. Cas. 439, at 448, 46 LJQB 583:

> ... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

15 This principle assumes the existence of a legal relationship between the parties when the representation is made. It applies where a party to a contract represents to the other party that the former will not enforce his strict legal rights under it. In the present case, however, the contractual rela tionship between the parties had come to an end before any representation is alleged to have been made. There is no allegation that Hambly, while the lease still subsisted, had ever represented that its provisions would not be enforced strictly.

16 We do not have here evidence to support an allegation of fraud, of the kind which was defined by Fry, J., when dealing with the equitable defence of acquiescence, in his well-known statement in *Willmott v. Barber* (1880) 15 Ch D 96, at 105, 49 LJ Ch 792:

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

17 Part of the above passage was cited by Johnson, J.A., who delivered the reasons of the Appellate Division. He went on to say this at p. 531:

> There can be no doubt that the respondent Hambly did not know that he had the right to treat the petroleum and natural gas lease as terminated. It was only after two parties had tried to obtain copies of his lease that he began to suspect that something might be wrong. It is significant that even after he granted a new petroleum and natural gas lease to the respondent, Paddon-Hughes Development Co. Ltd., he expressed his opinion to a representative of Kerr-McGee that the new lessees were wasting their money in paying him the consideration for signing the lease. The relationship created by the document relied upon by the appellants is not one which imports a duty in Hambly to disclose to the appellants that their lease had been terminated: *B.A. Oil Co. v. Kos* (1964) 46 W.W.R. 141, [1964] S.C.R. 167, at 176, 42 D.L.R. (2d) 426, affirming (1964) 46 W.W.R. 36, 36 D.L.R. (2d) 422.
>
> The appellants, from their knowledge of the drilling records which Hambly did not possess, were, at all times, in a better position to know the facts upon which their right to continue the lease depended.

18 I do not propose to consider this aspect of the case any further, because, in any event, I am in agreement with the concurrent findings of the Courts below that no estoppel was proved. The appellants adopted, in argument, the legal principles stated in *Greenwood v. Martins Bank*, [1933] A.C. 51, at 57, 101 LJKB 623.

19 The essential factors giving rise to an estoppel are, I think: (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; (3) Detriment to such person as a consequence of the act or omission.

20 The learned trial Judge reviewed the evidence respecting the appellants' allegations as to representations made by Hambly to Superior and reached the following conclusion at p. 473:

> In the case at bar there is no basis for estoppel. The plaintiffs were aware at all times as to the possible invalidity of the lease. ... No detriment has been proved.

21 Johnson, J.A., after reviewing the evidence, expressed the following opinion at p. 534:

> In my opinion, there was no representation by word or conduct by the respondent, Hambly, on which a defence of estoppel could be founded. That being so, it is unnecessary to consider whether the appellants suffered prejudice, which is another element that must be considered when estoppel is pleaded.

22 As I am in agreement with their conclusion that the evidence in this case did not support a plea of estoppel, I do not think that it would serve any useful purpose for me to review that evidence.

23 In my opinion the appeal should be dismissed with costs.

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Most Negative Treatment: Distinguished
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2011 SCC 10
Supreme Court of Canada

Kerr v. Baranow

2011 CarswellBC 240, 2011 CarswellBC 241, 2011 SCC 10, [2011] 1 S.C.R. 269, [2011] 3 W.W.R. 575, [2011] B.C.W.L.D. 2245, [2011] B.C.W.L.D. 2316, [2011] B.C.W.L.D. 2321, [2011] B.C.W.L.D. 2322, [2011] B.C.W.L.D. 2346, [2011] B.C.W.L.D. 2347, [2011] B.C.W.L.D. 2440, [2011] B.C.W.L.D. 2441, [2011] W.D.F.L. 1631, [2011] W.D.F.L. 1646, [2011] W.D.F.L. 1647, [2011] W.D.F.L. 1648, [2011] W.D.F.L. 1649, [2011] W.D.F.L. 1651, [2011] W.D.F.L. 1657, [2011] W.D.F.L. 1660, [2011] W.D.F.L. 1668, [2011] W.D.F.L. 1680, [2011] W.D.F.L. 1685, [2011] W.D.F.L. 1690, [2011] W.D.F.L. 1700, [2011] W.D.F.L. 1701, [2011] W.D.F.L. 1702, [2011] W.D.F.L. 1706, [2011] W.D.F.L. 1714, [2011] W.D.F.L. 1715, [2011] A.C.S. No. 10, [2011] S.C.J. No. 10, 108 O.R. (3d) 399, 14 B.C.L.R. (5th) 203, 199 A.C.W.S. (3d) 1214, 274 O.A.C. 1, 300 B.C.A.C. 1, 328 D.L.R. (4th) 577, 411 N.R. 200, 509 W.A.C. 1, 64 E.T.R. (3d) 1, 93 R.F.L. (6th) 1, J.E. 2011-333

Margaret Patricia Kerr (Appellant) and Nelson Dennis Baranow (Respondent)

Michele Vanasse (Appellant) and David Seguin (Respondent)

McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein, Cromwell JJ.

Heard: April 21, 2010
Judgment: February 18, 2011
Docket: 33157, 33358

Proceedings: reversing in part *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.); additional reasons at *Kerr v. Baranow* (2010), [2010] 4 W.W.R. 465, 2 B.C.L.R. (5th) 197, 2010 CarswellBC 108, 2010 BCCA 32, 78 R.F.L. (6th) 305 (B.C. C.A.); reversing in part *Kerr v. Baranow* (2007), 2007 CarswellBC 3047, 2007 BCSC 1863, 47 R.F.L. (6th) 103 (B.C. S.C.); and reversing *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.); reversing *Vanasse v. Seguin* (2008), 2008 CarswellOnt 4265 (Ont. S.C.J.); additional reasons at *Vanasse v. Seguin* (2009), 2009 CarswellOnt 606, 77 R.F.L. (6th) 109 (Ont. S.C.J.)

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Subject: Restitution; Family; Property; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Family law

III Division of family property
III.4 Determination of ownership of property

III.4.a Application of trust principles
III.4.a.i Resulting and constructive trusts
III.4.a.i.A Resulting trusts generally

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IV Support
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IV Support
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Restitution and unjust enrichment

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Restitution and unjust enrichment

V Benefits conferred in anticipation of reward
V.5 Family
V.5.e Miscellaneous

Headnote

Restitution and unjust enrichment — Benefits conferred in anticipation of reward — Family — Common law spouses

V and S lived together in common law relationship from 1993 until March 2005 — In 2000, S sold company for approximately $11 million — Parties separated almost 5 years later — V brought proceedings claiming unjust enrichment — Trial judge concluded that relationship of parties could be divided into three distinct periods and that S had been unjustly enriched by V in second period — Trial judge determined that V was entitled to one-half interest in prorated increase of S's net worth during period of unjust enrichment — S appealed, conceding unjust enrichment during period — Court of Appeal directed that proper approach to valuation was to place monetary value on services provided by V to family taking due account of S's own contributions — V appealed — Appeal allowed — Monetary award for unjust enrichment need not, as matter of principle, always be calculated on fee-for-service basis — Trial judge had concluded that V was at least equal contributor to family enterprise throughout relationship and that during period of unjust enrichment her contributions had significantly benefitted S — There were several factors which suggested that throughout relationship S and V were working collaboratively toward common goals — There were number of findings of fact that indicated that V and S considered their relationship to be joint family venture — There was strong inference from factual findings that, to S's knowledge, V relied on relationship to her detriment — Not only were V and S engaged in joint family venture but there was clear link between V's contribution to it and accumulation of wealth — Trial judge's approach to calculation was reasonable in circumstances.

Family law — Division of family property — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Resulting trusts generally

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and

spousal support — B brought counterclaim for unjust enrichment — Trial judge allowed K's claim both by way of resulting trust and by way of remedial constructive trust as remedy for her successful claim in unjust enrichment and rejected B's counterclaim — B successfully appealed — Court of Appeal concluded that K's claims for resulting trust and in unjust enrichment should be dismissed and that B's claim for unjust enrichment should be remitted to trial court for determination — K appealed — Appeal allowed in part — Court of Appeal was right to set aside trial judge's findings of resulting trust and unjust enrichment and did not err in directing that B's counterclaim be returned to court for hearing — Court of Appeal was correct to intervene and conclude that transfer was not gratuitous — Common intention resulting trust has no further role to play in resolution of disputes such as this one — Resulting trust should not have been imposed on property on basis of finding of common intention between parties.

Restitution and unjust enrichment --- Benefits conferred in anticipation of reward — Family — Miscellaneous

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — B brought counterclaim for unjust enrichment — Trial judge allowed K's claim both by way of resulting trust and by way of remedial constructive trust as remedy for her successful claim in unjust enrichment and rejected B's counterclaim — B successfully appealed — Court of Appeal concluded that K's claims for resulting trust and in unjust enrichment should be dismissed and that B's claim for unjust enrichment should be remitted to trial court for determination — K appealed — Appeal allowed in part — Court of Appeal was right to set aside trial judge's findings of resulting trust and unjust enrichment and did not err in directing that B's counterclaim be returned to court for hearing — K's unjust enrichment claims should not have been dismissed but rather new trial ordered — Court of Appeal erred in assessing B's contributions as part of juristic reason analysis — Trying counterclaim separated from K's claim would be artificial and potentially unfair way of proceeding — K's claim was not presented, defended or considered by courts pursuant to joint family venture analysis — Even assuming K made out her claim in unjust enrichment, it was not possible to fairly apply joint family venture approach using record available.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Retroactivity of order

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — K was awarded $1,739 per month in spousal support effective date she commenced proceedings — B successfully appealed — Court of Appeal concluded that order for support should be effective as of first day of trial — K appealed — Appeal allowed in part — Court of Appeal's order with respect to commencement date of spousal support order was set aside and order of trial judge restored — There was little concern about certainty of B's obligations and there was little need to provide further incentives for K or others in her position to proceed with more diligence — It was unreasonable for Court of Appeal to attach such serious consequences to fact that interim application was not pursued — There was virtually no delay in applying for support nor was there any inordinate delay between date of application and date of trial — K was in need throughout relevant period, suffered from serious physical disability and her standard of living was markedly lower than it was while she lived with B — B had means to provide her support, had prompt notice of her claim and there was no indication in Court of Appeal's reasons that it considered judge's award imposed on him hardship so as to make award inappropriate.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Miscellaneous

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — K was awarded $1,739 per month in spousal support effective date she commenced proceedings — B successfully appealed — Court of Appeal concluded that order for support should be effective as of first day of trial — K appealed — Appeal allowed in part — Court of

Appeal's order with respect to commencement date of spousal support order was set aside and order of trial judge restored — There was little concern about certainty of B's obligations and there was little need to provide further incentives for K or others in her position to proceed with more diligence — It was unreasonable for Court of Appeal to attach such serious consequences to fact that interim application was not pursued — There was virtually no delay in applying for support nor was there any inordinate delay between date of application and date of trial — K was in need throughout relevant period, suffered from serious physical disability and her standard of living was markedly lower than it was while she lived with B — B had means to provide her support, had prompt notice of her claim and there was no indication in Court of Appeal's reasons that it considered judge's award imposed on him hardship so as to make award inappropriate.

Restitution et enrichissement injustifié --- Avantages conférés dans l'attente d'un retour — Famille — Conjoints de fait

V et S ont fait vie commune entre 1993 et mars 2005 — En 2000, S a vendu son entreprise pour la somme d'environ 11 millions $ — Parties se sont séparées pratiquement 5 années plus tard — V a entamé des procédures, invoquant l'enrichissement injustifié — Juge de première instance a conclu que la relation des parties pouvait se diviser en trois périodes distinctes et que S s'était injustement enrichi grâce à V au cours de la deuxième période — Juge de première instance a déterminé que V avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de S pendant la période de l'enrichissement injustifié — S a interjeté appel, admettant l'enrichissement injustifié au cours de la deuxième période — Cour d'appel a statué que la meilleure façon de procéder à l'évaluation était de calculer la valeur monétaire des services fournis par V à la famille en considérant de façon adéquate la contribution de S — V a formé un pourvoi — Pourvoi accueilli — Il n'est pas toujours nécessaire, en principe, de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la rémunération des services rendus — Juge de première instance a conclu que V avait contribué au moins autant pendant la relation à la coentreprise familiale et que, pendant la période de l'enrichissement injustifié, ses contributions avaient grandement avantagé S — Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, V et S collaboraient en vue d'atteindre des buts communs — Certain nombre de conclusions de fait indiquaient que V et S considéraient leur relation comme une coentreprise familiale — Il y avait de fortes raisons d'inférer des conclusions de fait que, à la connaissance de S, V se fiait sur la relation à son détriment — Non seulement V et S étaient engagés dans une coentreprise familiale, mais il y avait aussi un lien clair entre la contribution de V à celle-ci et l'accumulation de la richesse — Approche adoptée par la juge de première instance au sujet du calcul était raisonnable dans les circonstances.

Droit de la famille --- Partage du patrimoine familial — Détermination de la propriété des biens — Application des principes de fiducie — Fiducie résultoire et fiducie constructoire — Fiducies résultoires en général

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont laissée paralysée du côté gauche et qui l'ont rendue inapte au travail — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — B a présenté une demande reconventionnelle fondée sur l'enrichissement injustifié — Juge de première instance a accueilli la réclamation de K sur le fondement de la fiducie résultoire et de la fiducie constructoire de nature réparatoire comme réparation pour enrichissement injustifié et a rejeté la demande reconventionnelle de B — B a interjeté appel avec succès — Cour d'appel a conclu que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée et que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen — K a formé un pourvoi — Pourvoi accueilli en partie — Cour d'appel a eu raison d'écarter les conclusions du juge de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié et n'a pas commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B au tribunal — Cour d'appel a eu raison d'intervenir et de conclure que le transfert n'a pas été fait à titre gratuit — Fiducie résultoire fondée sur l'intention commune n'avait plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci — Fiducie résultoire n'aurait pas dû être imposée à l'égard de la propriété sur la base de l'intention commune des parties.

Restitution et enrichissement injustifié — Avantages conférés dans l'attente d'un retour — Famille — Divers

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont laissée paralysée du côté gauche et qui l'ont rendue inapte au travail — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — B a présenté une demande reconventionnelle fondée sur l'enrichissement injustifié — Juge de première instance a accueilli la réclamation de K sur le fondement de la fiducie résultoire et de la fiducie constructoire de nature réparatoire comme réparation pour enrichissement injustifié et a rejeté la demande reconventionnelle de B — B a interjeté appel avec succès — Cour d'appel a conclu que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée et que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen — K a formé un pourvoi — Pourvoi accueilli en partie — Cour d'appel a eu raison d'écarter les conclusions du juge de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié et n'a pas commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B au tribunal — Réclamations de K fondées sur l'enrichissement injustifié n'auraient pas dû être rejetées mais une nouvelle audition de ces demandes aurait dû être ordonnée — Cour d'appel a commis une erreur en évaluant les contributions de B dans le cadre de l'analyse du motif juridique — Il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle séparément de celle de K — Demande de K n'a pas été présentée, défendue ni examinée par les tribunaux suivant la méthode d'analyse de la coentreprise familiale — Même à supposer que K avait réussi à établir ses prétentions au sujet de l'enrichissement injustifié, il n'était pas possible d'appliquer équitablement la méthode d'analyse de la coentreprise familiale sur la base du dossier.

Droit de la famille — Aliments — Pensions alimentaires pour époux en vertu de la Loi sur le divorce ou des lois provinciales — Application rétroactive de l'ordonnance

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — K a obtenu une pension alimentaire mensuelle de 1 739 $ payable à la date où elle a entamé les procédures — B a interjeté appel avec succès — Cour d'appel a conclu que l'ordonnance de pension alimentaire devrait être applicable à compter du premier jour de l'audition — K a formé un pourvoi — Pourvoi accueilli en partie — Conclusion de la Cour d'appel au sujet de la date d'exécution de l'ordonnance alimentaire devrait être annulée et l'ordonnance de première instance rétablie — Il n'y avait pas vraiment lieu de s'interroger sur la certitude des obligations de B et il n'était pas vraiment nécessaire de mettre en place d'autres mesures propres à inciter K, ou d'autres personnes dans sa situation, à procéder de façon plus diligente — Il était déraisonnable pour la Cour d'appel d'attribuer des conséquences aussi graves au fait qu'une demande provisoire n'avait pas été présentée — K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition — K avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec B — B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge lui créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

Droit de la famille — Aliments — Pensions alimentaires pour époux en vertu de la Loi sur le divorce ou des lois provinciales — Divers

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — K a obtenu une pension alimentaire mensuelle de 1 739 $ payable à la date où elle a entamé les procédures — B a interjeté appel avec succès — Cour d'appel a conclu que l'ordonnance de pension alimentaire devrait être applicable à compter du premier jour de l'audition — K a formé un pourvoi — Pourvoi

accueilli en partie — Conclusion de la Cour d'appel au sujet de la date d'exécution de l'ordonnance alimentaire devrait être annulée et l'ordonnance de première instance rétablie — Il n'y avait pas vraiment lieu de s'interroger sur la certitude des obligations de B et il n'était pas vraiment nécessaire de mettre en place d'autres mesures propres à inciter K, ou d'autres personnes dans sa situation, à procéder de façon plus diligente — Il était déraisonnable pour la Cour d'appel d'attribuer des conséquences aussi graves au fait qu'une demande provisoire n'avait pas été présentée — K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition — K avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec B — B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge lui créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

B and K separated after a common law relationship of more than 25 years. In 1991, K suffered a massive stroke and cardiac arrest leaving her unable to return to work. B took early retirement in 2002. After surgery in 2005, K was transferred to an extended care facility. K claimed support and a one-third share of the property held in her partner's name based on resulting trust and unjust enrichment principles. B brought a counterclaim that K had been unjustly enriched at his expense. The trial judge awarded K one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims. The trial judge did not address B's counterclaim. The trial judge also awarded substantial monthly support for K effective as of the date she applied to the court for relief. B appealed. The Court of Appeal allowed the appeal, concluding that K's claim for resulting trust and in unjust enrichment should be dismissed, that B's claim for unjust enrichment should be remitted to the trial court for determination and that the order for spousal support should be effective as of the first day of trial, not as of the date proceedings were commenced.

V and S lived together in a common law relationship for approximately 12 years. During the first four years the couple diligently pursued their respective careers. In 1997, V took a leave of absence. During the next three and one-half years, the couple had two children and V took care of the domestic labour while S devoted himself to developing his business. In 2000, S's business was sold after which V continued to assume most of the domestic responsibilities. V and S separated in 2005. At the time of separation, V's net worth was about $332,000 and S's net worth was about $8,450,000. V brought an action for spousal support and child custody, and claimed unjust enrichment. The trial judge concluded that the relationship could be divided into three distinct periods and that S had been unjustly enriched by V during the second period. The trial judge concluded that throughout the relationship V had been at least an equal contributor to the family enterprise and that V's efforts during this second period were directly linked to S's business success. The trial judge concluded that a monetary award was appropriate and determined that V was entitled to a one-half interest in the prorated increase in S's net worth during the period of unjust enrichment. The trial judge awarded just under $1 million. S appealed, conceding unjust enrichment during the second period. The Court of Appeal set aside the trial judge's finding and held that V should be treated as an unpaid employee, not a co-venturer. Both K and V appealed.

Held: The appeal by V was allowed and the appeal by K was allowed in part.

Per Cromwell J. (McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein JJ. concurring): The time had come to acknowledge that there was no continuing role for the "common intention" resulting trust. First, the "common intention" resulting trust was doctrinally unsound. It was inconsistent with the underlying principles of resulting trust law. Second, the notion of common intention may be highly artificial, particularly in domestic cases. Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. Finally, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provided a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships.

The law of unjust enrichment had been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. A critical early question — whether the provision of domestic services could support a claim for unjust enrichment — was conclusively resolved in a 1993 decision. Remedies for unjust enrichment were restitutionary in nature. The first remedy was always a monetary award. Restricting the money remedy to a fee-for-services calculation was inappropriate for four reasons. First, it failed to reflect the reality of the lives of many domestic partners. Second, it was inconsistent with the inherent flexibility of unjust enrichment. Third, it ignored the historical basis of quantum meruit claims. Finally, it was not mandated by the Court's judgment in the 1993 case. Where the unjust enrichment was best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of a "joint family venture" to which both partners had contributed, the monetary remedy should reflect that fact. When the parties had been engaged in a joint family venture, and the claimant's contributions to it were linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. To be entitled to a monetary remedy of that nature, the claimant must show both that there was in fact a joint family venture and that there was a link between his or her contributions to it and the accumulation of assets and/or wealth. Whether there was a joint family venture was a question of fact and may be assessed by having regard to all the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family.

Unjust enrichment analysis in domestic situations was often complicated by the fact that there had been a mutual conferral of benefits. Mutual enrichments should mainly be considered at the defence and remedy stages but they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constituted relevant evidence of the existence of juristic reason for the enrichment. The parties' reasonable or legitimate expectations had little role to play in deciding whether the services were provided for a juristic reason within the existing categories. In some cases, the facts that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons was present. The parties' reasonable or legitimate expectations had a role to play at the second step of the juristic reason analysis.

In the V appeal, the trial judge's order should be restored. The money compensation for unjust enrichment need not always be calculated on a quantum meruit basis. The trial judge's findings of fact and analysis indicated that the unjust enrichment of S at the expense of V ought to be characterized as retention by S of a disproportionate share of the wealth generated from a joint family venture. There were several factors which suggested that throughout their relationship the parties were working collaboratively towards common goals. There was a pooling of resources. There were a number of findings of fact that indicated that the parties considered their relationship to be joint family venture. Not only were the parties engaged in a joint family venture but that there was a clear link between V's contribution to it and the accumulation of wealth. The trial judge's approach was reasonable in the circumstances. The trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to S's contribution.

In the K appeal, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that B's counterclaim be returned to the Supreme Court of British Columbia for hearing. The Court of Appeal was correct to conclude that the transfer was not gratuitous. The trial judge apparently based his conclusions about the resulting trust on his finding of a common intention on the part of K and B to share in the property. The common intention resulting trust had no further role to play in the resolution of such disputes. K's claim for unjust enrichment should be returned for a new trial. The first consideration in support of a new trial was that the Court of Appeal directed a hearing of B's counterclaim. Trying the counterclaim separated from K's claim would be an artificial and potentially unfair way of proceeding. More fundamentally, K's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis

that had been set out. Attempting to resolve K's unjust enrichment claim on its merits, using the record before this Court, involved too much uncertainty and risked injustice. With respect to the date of the spousal support order, the order of the trial judge should be restored. The Court of Appeal made two main errors. First, it erred in finding that the circumstances of K were such that there was no need prior to the trial. Second, the Court of Appeal was wrong to fault K for not bringing an interim application. There was virtually no delay in applying for maintenance nor was there any inordinate delay between the date of application and the date of trial. B had the means to provide support, had prompt notice of K's claim and there was no indication in the Court of Appeal's reasons that indicated that it had considered the trial judge's award a hardship so as to make that award inappropriate.

K et B se sont séparés après plus de 25 ans de vie commune. En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont rendue inapte au travail. B a pris une retraite anticipée en 2002. À la suite d'une intervention chirurgicale, en 2005, K a été transférée dans un établissement de soins prolongés. Sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, K a réclamé une pension alimentaire et un tiers des biens détenus au nom de son conjoint. Par demande reconventionnelle, B a cherché à faire reconnaître que K s'était injustement enrichie à ses dépens. Le juge de première instance a accordé à K un tiers de la valeur de la maison du couple, sur le fondement de la fiducie résultoire et de l'enrichissement injustifié. Le juge de première instance ne s'est pas prononcé au sujet de la demande reconventionelle de B. Le juge de première instance a également accordé à K une pension alimentaire mensuelle importante, rétroactive à la date d'introduction de l'instance. B a interjeté appel. La Cour d'appel a accueilli l'appel, concluant que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée, que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen et que l'ordonnance concernant la pension alimentaire devrait être rétroactive à la date du début de l'audition et non à la date d'introduction de l'instance.

V et S ont fait vie commune pendant environ 12 ans. Au cours des quatre premières années, les parties ont diligemment continué leur carrière respective. En 1997, V a pris un congé. Au cours des trois années et demie qui ont suivi, les parties ont eu deux enfants et V s'est occupée des travaux domestiques pendant que S se consacrait à la croissance de son entreprise. En 2000, l'entreprise de S a été vendue et V a continué de s'acquitter de la plupart des obligations familiales. V et S se sont séparés en 2005. Au moment de la séparation, l'avoir net de V était d'environ 332 000 $ tandis que l'avoir net de S était d'environ 8 450 000 $. V a déposé une action visant à obtenir une pension alimentaire et la garde des enfants et a invoqué l'enrichissement injustifié. La juge de première instance a conclu que la relation pouvait se diviser en trois périodes distinctes et que S s'était injustement enrichi grâce à V au cours de la deuxième période. La juge de première instance a conclu que tout le long de la relation, V avait contribué au moins autant à la coentreprise familiale et que les efforts déployés par V pendant cette deuxième période étaient directement liés au succès professionnel de S. La juge de première instance a conclu qu'une indemnité pécuniaire était appropriée et a déterminé que V avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de S pendant la période de l'enrichissement injustifié. La juge de première instance a accordé un montant d'un peu moins d'un million de dollars. S a interjeté appel, admettant l'enrichissement injustifié au cours de la deuxième période. La Cour d'appel a annulé la conclusion de la juge de première instance et a conclu que V devait être considérée comme une employée non rémunérée, et non comme une co-entrepreneure. K et V ont toutes les deux formé un pourvoi.

Arrêt: Le pourvoi formé par V a été accueilli et le pourvoi formé par K a été accueilli en partie.

Cromwell, J. (McLachlin, J.C.C., Binnie, LeBel, Abella, Charron, Rothstein, JJ., souscrivant à son opinion) : Il était temps de reconnaître que la fiducie résultoire fondée sur l'« intention commune » avait perdu sa raison d'être. Premièrement, la fiducie résultoire basée sur l'« intention commune » était mal fondée sur le plan théorique. Elle était incompatible avec les principes sous-jacents du droit des fiducies résultoires. Deuxièmement, la notion d'intention commune peut être extrêmement artificielle, surtout en matière familiale. Troisièmement, la fiducie résultoire fondée sur « l'intention commune » au Canada tirait son origine d'une interprétation erronée de quelques formulations imprécises dans l'ancienne jurisprudence de la Chambre des lords. Finalement, les principes de l'enrichissement

injustifié, conjugués au recours possible à la fiducie constructoire, fournissaient un fondement beaucoup moins artificiel, plus complet et plus rationnel pour traiter de la grande variété des circonstances donnant lieu à des réclamations découlant d'unions conjugales.

Les règles relatives à l'enrichissement injustifié ont été le principal moyen utilisé pour régler les réclamations pour partage inéquitable des biens après la rupture d'une relation conjugale. Une question cruciale qui consistait au début à savoir si la prestation de services domestiques pouvait appuyer une action pour enrichissement injustifié a été définitivement réglée dans un arrêt de 1993. Les moyens utilisés pour corriger l'enrichissement injustifié étaient de nature réparatoire. La réparation pécuniaire était toujours considérée en premier. Il était inapproprié de calculer la réparation pécuniaire en fonction de la rémunération des services rendus, et ce, pour quatre raisons. Premièrement, ce type de calcul ne reflétait pas la réalité de nombreux conjoints vivant en union libre. Deuxièmement, il était incompatible avec la souplesse inhérente à l'enrichissement injustifié. Troisièmement, il ne tenait pas compte de l'historique des réclamations fondées sur le quantum meruit. Enfin, l'arrêt de la Cour de 1993 ne l'imposait pas. Dans les cas où la meilleure façon de qualifier l'enrichissement injustifié était de le considérer comme une rétention injuste d'une part disproportionnée des biens accumulés dans le cadre d'une « coentreprise familiale » à laquelle les deux conjoints avaient contribué, la réparation pécuniaire devrait refléter ce fait. Quand les parties ont été engagées dans une coentreprise familiale, et que les contributions du demandeur sont liées à l'accumulation de la richesse, il convenait de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la part proportionnelle de la contribution du demandeur à cette accumulation de la richesse. Pour avoir droit à une réparation pécuniaire de cette nature, le demandeur doit prouver qu'une coentreprise familiale existait effectivement et qu'il existait un lien entre ses contributions à la coentreprise et l'accumulation de l'avoir ou de la richesse. La question de savoir s'il existait une coentreprise familiale était une question de fait et on pouvait l'apprécier en prenant en considération toutes les circonstances pertinentes, y compris les facteurs relatifs à l'effort commun, à l'intégration économique, à l'intention réelle et à la priorité accordée à la famille.

L'analyse de l'enrichissement injustifié en matière familiale se compliquait souvent du fait qu'il y avait eu des avantages réciproques. Les enrichissements mutuels devraient être examinés principalement au stade de la défense ou à celui de la réparation, mais il était aussi possible de le faire au stade de l'analyse du motif juridique dans la mesure où l'octroi d'avantages réciproques constituait une preuve pertinente de l'existence d'un motif juridique justifiant l'enrichissement. Les attentes raisonnables ou légitimes des parties jouaient un rôle négligeable au moment de décider si les services ont été fournis pour un motif juridique appartenant à une catégorie établie. Dans certains cas, le fait que des avantages réciproques aient été conférés ou le fait que les avantages aient été fournis conformément aux attentes raisonnables des parties pouvait constituer une preuve pertinente pour déterminer si l'une des catégories établies de motifs juridiques s'appliquait. Les attentes raisonnables ou légitimes des parties jouaient un rôle à la deuxième étape de l'analyse du motif juridique.

Dans le pourvoi de V, l'ordonnance de la juge de première instance devrait être rétablie. Il n'est pas toujours nécessaire de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction du quantum meruit. Selon les conclusions de fait et l'analyse de la juge de première instance, l'enrichissement injustifié de S au détriment de V tenait à la conservation, par S, d'une part disproportionnée de la richesse générée par la coentreprise familiale. Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, les parties collaboraient en vue d'atteindre des buts communs. Il y avait une mise en commun des ressources. Un certain nombre de conclusions de fait indiquaient que les parties considéraient leur relation comme une coentreprise familiale. Non seulement les parties étaient engagées dans une coentreprise familiale, mais il y avait aussi un lien clair entre la contribution de V et l'accumulation de la richesse. L'approche adoptée par la juge de première instance était raisonnable dans les circonstances. La juge de première instance s'est prononcée de manière réaliste et pratique quant à la preuve dont elle disposait et a suffisamment tenu compte des contributions de S.

Dans le pourvoi de K, la Cour d'appel a eu raison d'écarter les conclusions de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié. Elle n'a pas non plus commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B à la Cour suprême de la Colombie-Britannique. La Cour d'appel a eu raison de conclure que le transfert n'avait pas été fait à titre gratuit. Le juge de première instance semblait avoir fondé ses conclusions relatives à la fiducie résultoire sur l'existence d'une intention commune, de la part de K et de B, de partager la propriété. La fiducie résultoire fondée sur l'intention commune n'avait plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci. Il convenait de renvoyer la demande de K fondée sur l'enrichissement injustifié pour qu'elle fasse l'objet d'une nouvelle audition. La première considération à l'appui d'une nouvelle audition était que la Cour d'appel avait ordonné l'audition de la demande reconventionnelle de B. Il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle séparément de celle de K. Fondamentalement, la demande de K n'a pas été présentée, défendue ni examinée par les tribunaux d'instance inférieure suivant la méthode d'analyse de la coentreprise familiale qui a été exposée. Tenter de trancher sur le fond la demande de K fondée sur l'enrichissement injustifié, sur la base du dossier soumis à la Cour, présentait trop d'aléas et des risques d'injustice. En ce qui concernait la date d'exécution de l'ordonnance alimentaire, l'ordonnance de première instance devrait être rétablie. La Cour d'appel a commis deux erreurs principales. Premièrement, elle a commis une erreur en concluant que la situation de K était telle qu'elle n'avait pas besoin de soutien avant l'audition. Deuxièmement, la Cour d'appel a eu tort de reprocher à K de ne pas avoir présenté une demande provisoire. K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition. B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

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***Cromwell J.*:**

I. Introduction

1 In a series of cases spanning 30 years, the Court has wrestled with the financial and property rights of parties on the breakdown of a marriage or domestic relationship. Now, for married spouses, comprehensive matrimonial property statutes enacted in the late 1970s and 1980s provide the applicable legal framework. But for unmarried persons in domestic relationships in most common law provinces, judge-made law was and remains the only option. The main legal mechanisms available to parties and courts have been the resulting trust and the action in unjust enrichment.

2 In the early cases of the 1970s, the parties and the courts turned to the resulting trust. The underlying legal principle was that contributions to the acquisition of a property, which were not reflected in the legal title, could nonetheless give rise to a property interest. Added to this underlying notion was the idea that a resulting trust could arise based on the "common intention" of the parties that the non-owner partner was intended to have an interest. The resulting trust soon proved to be an unsatisfactory legal solution for many domestic property disputes, but claims continue to be advanced and decided on that basis.

3 As the doctrinal problems and practical limitations of the resulting trust became clearer, parties and courts turned increasingly to the emerging law of unjust enrichment. As the law developed, unjust enrichment carried with it the possibility of a remedial constructive trust. In order to successfully prove a claim for unjust enrichment, the claimant must show that the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic reason" for the enrichment. This claim has become the pre-eminent vehicle for addressing the financial consequences of the breakdown of domestic relationships. However, various issues continue to create controversy, and these two appeals, argued consecutively, provide the Court with the opportunity to address them.

4 In the *Kerr* appeal, a couple in their late-sixties separated after a common law relationship of more than 25 years. Both had worked through much of that time and each had contributed in various ways to their mutual welfare. Ms. Kerr claimed support and a share of property held in her partner's name based on resulting trust and unjust enrichment principles. The trial judge awarded her one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims (2007 BCSC 1863, 47 R.F.L. (6th) 103 (B.C. S.C.)). He did not address, other than in passing, Mr. Baranow's counterclaim that Ms. Kerr had been unjustly enriched at his expense. The judge also ordered substantial monthly support for Ms. Kerr pursuant to statute, effective as of the date she applied to the court for relief. However, the resulting trust and unjust enrichment conclusions of the trial judge were set aside by the British Columbia Court of Appeal (2009 BCCA 111, 93 B.C.L.R. (4th) 201 (B.C. C.A.)). Both lower courts addressed the role of the parties' common intention and reasonable expectations. The appeal to this Court raises the questions of the role of resulting trust law in these types of disputes, as well as how an unjust enrichment analysis should take account of the mutual conferral of benefits and what role the parties' intentions and expectations play in that analysis. This Court is also called upon to decide whether the award of spousal support should be effective as of the date of application, as found by the trial judge, the date the trial began, as ordered by the Court of Appeal, or some other date.

5 In the *Vanasse* appeal, the central problem is how to quantify a monetary award for unjust enrichment. It is agreed that Mr. Seguin was unjustly enriched by the contributions of his partner, Ms. Vanasse; the two lived in a common law relationship for about 12 years and had two children together during this time. The trial judge valued the extent of the enrichment by determining what proportion of Mr. Seguin's increased wealth was due to Ms. Vanasse's efforts as an equal contributor to the family venture (2008 CanLII 35922). The Court of Appeal set aside this finding and, while ordering a new trial, directed that the proper approach to valuation was to place a monetary value on the services provided by Ms. Vanasse to the family, taking due account of Mr. Seguin's own contributions by way of set-off (2009 ONCA 595, 252 O.A.C. 218 (Ont. C.A.)). In short, the Court of Appeal held that Ms. Vanasse should be treated as an unpaid employee, not a co-venturer. The appeal to this Court challenges this conclusion.

6 These appeals require us to resolve five main issues. The first concerns the role of the "common intention" resulting trust in claims by domestic partners. In my view, it is time to recognize that the "common intention" approach to resulting trust has no further role to play in the resolution of property claims by domestic partners on the breakdown of their relationship.

7 The second issue concerns the nature of the money remedy for a successful unjust enrichment claim. Some courts take the view that if the claimant's contribution cannot be linked to specific property, a money remedy must always be assessed on a fee-for-services basis. Other courts have taken a more flexible approach. In my view, where both parties have worked together for the common good, with each making extensive, but different, contributions to the welfare of the other and, as a result, have accumulated assets, the money remedy for unjust enrichment should reflect that reality. The money remedy in those circumstances should not be based on a minute totting up of the give and take of daily domestic life, but rather should treat the claimant as a co-venturer, not as the hired help.

8 The third area requiring clarification relates to mutual benefit conferral. Many domestic relationships involve the mutual conferral of benefits, in the sense that each contributes in various ways to the welfare of the other. The question is how and at what point in the unjust enrichment analysis should this mutual conferral of benefits be taken into account? For reasons I will develop below, this issue should, with a small exception, be addressed at the defence and remedy stage.

9 Fourth, there is the question of what role the parties' reasonable or legitimate expectations play in the unjust enrichment analysis. My view is that they have a limited role, and must be considered in relation to whether there is a juristic reason for the enrichment.

10 Finally, there is the issue of the appropriate date for the commencement of spousal support. In my respectful view, the Court of Appeal erred in setting aside the trial judge's selection of the date of application in the circumstances of the *Kerr* appeal.

11 I will first address the law of resulting trusts as it applies to the breakdown of a marriage-like relationship. Next, I will turn to the law of unjust enrichment in this context. Finally, I will address the specific issues raised in the two appeals.

II. Resulting Trusts

12 The resulting trust played an important role in the early years of the Court's jurisprudence relating to property rights following the breakdown of intimate personal relationships. This is not surprising; it had been settled law since at least 1788 in England (and likely long before) that the trust of a legal estate, whether in the names of the purchaser or others, "results" to the person who advances the purchase money: *Dyer v. Dyer* (1788), 2 Cox Eq. Cas. 92, at p. 93, 30 E.R. 42 (Eng. Ch. Div.). The resulting trust, therefore, seemed a promising vehicle to address claims that one party's contribution to the acquisition of property was not reflected in the legal title.

13 The resulting trust jurisprudence in domestic property cases developed into what has been called "a purely Canadian invention", the "common intention" resulting trust: A H. Oosterhoff, et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009) at p. 642. While this vehicle has largely been eclipsed by the law of unjust enrichment since the decision of the Court in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), claims based on the "common intention" resulting trust continue to be advanced. In the *Kerr* appeal, for example, the trial judge justified the imposition of a resulting trust, in part, on the basis that the parties had a common intention that Mr. Baranow would hold title to the property by way of a resulting trust for Ms. Kerr. The Court of Appeal, while reversing the trial judge's finding of fact on this point, implicitly accepted the ongoing vitality of the common intention resulting trust.

14 However promising this common intention resulting trust approach looked at the beginning, doctrinal and practical problems soon became apparent and have been the subject of comment by the Court and scholars: see, e.g., *Pettkus*, at pp. 842-43; Oosterhoff, at pp. 641-47; D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005) ("*Waters*") at pp. 430-35; J. Mee, *The Property Rights of Cohabitees: An Analysis of Equity's Response in Five Common Law Jurisdictions* (1999), at pp. 39-43; T. G. Youdan, "Resulting and Constructive Trusts" in *Special Lectures of the Law Society of Upper Canada* 1993 - *Family Law: Roles, Fairness and Equality* (1994), 169 at pp. 172-74.

15 In this Court, since *Pettkus*, the common intention resulting trust remains intact but unused. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic

partners, the time has come to acknowledge that there is no continuing role for the common intention resulting trust. To explain why, I must first put the question in the context of some basic principles about resulting trusts.

16 That task is not as easy as it should be; there is not much one can say about resulting trusts without a well-grounded fear of contradiction. There is debate about how they should be classified and how they arise, let alone about many of the finer points: see, for example, *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at pp. 449-50; *Waters'*, at pp. 19-22; P. H. Pettit, *Equity and the Law of Trusts* (11th ed. 2009), at p. 67. However, it is widely accepted that the underlying notion of the resulting trust is that it is imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner": Oosterhoff, at p. 25. There is also widespread agreement that, traditionally, resulting trusts arose where there had been a gratuitous transfer or where the purposes set out by an express or implied trust failed to exhaust the trust property: *Waters'*, at p. 21.

17 Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.

18 The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.), at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the *transferor's actual intention*" (emphasis added).

19 As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds that property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).

20 The presumption of resulting trust, however, is neither universal nor irrebuttable. So, for example, in the case of transfers between persons in certain relationships (such as from a parent to a minor child), a presumption of advancement — that is, a presumption that the grantor intended to make a gift — rather than a presumption of resulting trust applies: see *Pecore*, at paras. 27-41. The presumption of advancement traditionally applied to grants from husband to wife, but the presumption of resulting trust traditionally applied to grants from wife to husband. Whether the application of the presumption of advancement applies to unmarried couples may be more controversial: Oosterhoff, at pp. 681-82. Although the trial judge in *Kerr* touched on this issue, neither party relies on the presumption of advancement and I need say nothing further about it.

21 That brings me to the "common intention" resulting trust. It figured prominently in the majority judgment in *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423 (S.C.C.). Quoting from Lord Diplock's speech in *Gissing v. Gissing*, [1970] 2 All E.R. 780 (U.K. H.L.), at pp. 789 and 793, Martland J. held for the majority that, absent a financial contribution to the acquisition of the contested property, a resulting trust could only arise "where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other": *Murdoch*, at p. 438.

22 This approach was repeated and followed by a majority of the Court three years later in *Rathwell*, at pp. 451-53, although the Court also unanimously found there had been a direct financial contribution by the claimant. In *Rathwell*, there is, as well, some blurring of the notions of contribution and common intention; there are references to the fact that

a presumption of resulting trust is sometimes explained by saying that the fact of contribution evidences the common intention to share ownership: see p. 452, *per* Dickson J. (as he then was); p. 474, *per* Ritchie J. This blurring is also evident in the reasons of the Court of Appeal in *Kerr*, where the court said, at para. 42, that "a resulting trust is an equitable doctrine that, by operation of law, imposes a trust on a party who holds legal title to property that was gratuitously transferred to that party by another *and where there is evidence of a common intention that the property was to be shared by both parties*" (emphasis added).

23 The Court's development of the common intention resulting trust ended with *Pettkus*, in which Dickson J. (as he then was) noted the "many difficulties, chronicled in the cases and in the legal literature" as well as the "artificiality of the common intention approach" to resulting trusts: at pp. 842-3. He also clearly rejected the notion that the requisite common intention could be attributed to the parties where such an intention was negated by the evidence: p. 847. The import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the "approach enunciated in *Becker v. Pettkus* has become the dominant legal paradigm for the resolution of property disputes between common law spouses" (para. 100).

24 This, in my view, is as it should be, and the time has come to say that the common intention resulting trust has no further role to play in the resolution of domestic cases. I say this for four reasons.

25 First, as the abundant scholarly criticism demonstrates, the common intention resulting trust is doctrinally unsound. It is inconsistent with the underlying principles of resulting trust law. Where the issue of intention is relevant to the finding of resulting trust, it is the intention of the grantor or contributor alone that counts. As Professor Waters puts it, "In imposing a resulting trust upon the recipient, Equity is never concerned with [common] intention (*Waters'*, at p. 431)." The underlying principles of resulting trust law also make it hard to accommodate situations in which the contribution made by the claimant was not in the form of property or closely linked to its acquisition. The point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in such cases there is not, in any meaningful sense, a "resulting" back of the transferred property: *Waters'*, at p. 432. It follows that a resulting trust based solely on intention without a transfer of property is, as Oosterhoff puts it, a doctrinal impossibility: "... a resulting trust can arise only when one person has transferred assets to, or purchased assets for, another person and did not intend to make a gift of the property": p. 642. The final doctrinal problem is that the relevant time for ascertaining intention is the time of acquisition of the property. As a result, it is hard to see how a resulting trust can arise from contributions made over time to the improvement of an existing asset, or contributions in kind over time for its maintenance. As Oosterhoff succinctly puts it at p. 652, a resulting trust is inappropriate in these circumstances because its imposition, in effect, forces one party to give up beneficial ownership which he or she enjoyed before the improvement or maintenance occurred.

26 There are problems beyond these doctrinal issues. A second difficulty with the common intention resulting trust is that the notion of common intention may be highly artificial, particularly in domestic cases. The search for common intention may easily become "a mere vehicle or formula" for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties. Dickson J. in *Pettkus* noted the artificiality and undue malleability of the common intention approach: at pp. 843-44.

27 Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. While much has been written on this topic, it is sufficient for my purposes to note, as did Dickson J. in *Pettkus*, at p. 842, that the principles upon which the common intention resulting trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt* (1969), [1970] A.C. 777 (U.K. H.L.), and *Gissing*. However, no clear majority opinion emerged in those cases and four of the five Law Lords in *Gissing* spoke of "resulting, implied or constructive trusts" without distinction. The passages that have been most influential in Canada on this point, those authored by Lord Diplock, in fact relate to constructive rather than resulting trusts: see, e.g., *Waters'*, at pp. 430-35; Oosterhoff, at pp. 642-43. I find persuasive Professor Waters' comments, specifically approved by

Dickson J. in *Pettkus*, that where the search for common intention becomes simply a vehicle for reaching what the court perceives to be a just result, "[i]t is in fact a constructive trust approach masquerading as a resulting trust approach": D. Waters, Comment (1975), 53 *Can. Bar Rev.* 366, at p. 368.

28 Finally, as the development of the law since *Pettkus* has shown, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provide a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships. There is no need for any artificial inquiry into common intent. Claims for compensation as well as for property interests may be addressed. Contributions of all kinds and made at all times may be justly considered. The equities of the particular case are considered transparently and according to principle, rather than masquerading behind often artificial attempts to find common intent to support what the court thinks for unstated reasons is a just result.

29 I would hold that the resulting trust arising solely from the common intention of the parties, as described by the Court in *Murdoch* and *Rathwell*, no longer has a useful role to play in resolving property and financial disputes in domestic cases. I emphasize that I am speaking here only of the common intention resulting trust. I am not addressing other aspects of the law relating to resulting trusts, nor am I suggesting that a resulting trust that would otherwise validly arise is defeated by the existence in fact of common intention.

III. Unjust Enrichment

A. Introduction

30 The law of unjust enrichment has been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. In a series of decisions, the Court has developed a sturdy framework within which to address these claims. However, a number of doctrinal and practical issues require further attention. I will first briefly set out the existing framework, then articulate the issues that in my view require further attention, and finally propose the ways in which they should be addressed.

B. The Legal Framework for Unjust Enrichment Claims

31 At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request: see *Peel*, at p. 789; see generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed., 2007), c. 4-11, 17 and 19-26).

32 Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788.

33 The application of unjust enrichment principles to claims by domestic partners was resisted until the Court's 1980 decision in *Pettkus*. In applying unjust enrichment principles to domestic claims, however, the Court has been clear that there is and should be no separate line of authority for "family" cases developed within the law of unjust enrichment. Rather, concern for clarity and doctrinal integrity mandate that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases" (*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 997).

34 Although the legal principles remain constant across subject areas, they must be applied in the particular factual and social context out of which the claim arises. The Court in *Peter* was unanimously of the view that the courts "should

exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases" (p. 997, *per* McLachlin J. (as she then was); see also p. 1023, *per* Cory J.). Thus, while the underlying legal principles of the law of unjust enrichment are the same for all cases, the courts must apply those common principles in ways that respond to the particular context in which they are to operate.

35 It will be helpful to review, briefly, the current state of the law with respect to each of the elements of an unjust enrichment claim and note the particular issues in relation to each that arise in claims by domestic partners.

C. The Elements of an Unjust Enrichment Claim

(1) Enrichment and Corresponding Deprivation

36 The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

37 The Court has taken a straightforward economic approach to the first two elements — enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see *Peter*, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 31.

38 For the first requirement — enrichment — the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

39 Turning to the second element — a *corresponding* deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

(2) Absence of Juristic Reason

40 The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

41 Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp.990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.); *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (*Peel*, at p. 803).

42 A critical early question in domestic claims was whether the provision of domestic services could support a claim for unjust enrichment. After some doubts, the matter was conclusively resolved in *Peter*, where the Court held that they could. A spouse or domestic partner generally has no duty, at common law, equity, or by statute, to perform work or

services for the other. It follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from other contributions (*Peter*, at pp. 991 and 993; *Sorochan*, at p. 46). They constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy (*Peter*, at p. 993). The unpaid provision of services (including domestic services) or labour may also constitute a deprivation because the full-time devotion of one's labour and earnings without compensation may readily be viewed as such. The Court rejected the view that such services could not found an unjust enrichment claim because they are performed out of "natural love and affection". (*Peter*, at pp. 989-95, *per* McLachlin J., and pp. 1012-16, *per* Cory J.).

43 In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasureable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

> First, the plaintiff must show that no juristic reason from an established category exists to deny recovery [...] The established categories that can constitute juristic reasons include a contract (*Pettkus, supra)*, a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

44 Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

45 Policy arguments concerning individual autonomy may arise under the second branch of the juristic reason analysis. In the context of claims for unjust enrichment, this has led to questions regarding how (and when) factors relating to the manner in which the parties organized their relationship should be taken into account. It has been argued, for example, that the legislative decision to exclude unmarried couples from property division legislation indicates the court should not use the equitable doctrine of unjust enrichment to address their property and asset disputes. However, the court in *Peter* rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also *Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325 (S.C.C.), at para. 61.)

(3) Remedy

46 Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at p. 669, *per* La Forest J.).

(a) Monetary Award

47 The first remedy to consider is always a monetary award (*Peter*, at pp. 987 and 999). In most cases, it will be sufficient to remedy the unjust enrichment. However, calculation of such an award is far from straightforward. Two issues have given rise to disagreement and difficulty in domestic unjust enrichment claims.

48 First, the fact that many domestic claims of unjust enrichment arise out of relationships in which there has been a mutual conferral of benefits gives rise to difficulties in determining what will constitute adequate compensation. While the value of domestic services is not questioned (*Peter*; *Sorochan*), it is unjust to pay attention only to the contributions of one party in assessing an appropriate remedy. This is not only an important issue of principle; in practice, it is enormously difficult for the parties and the court to "create, retroactively, a notional ledger to record and value every service rendered by each party to the other" (R. E. Scane, "Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70 *Can. Bar Rev.* 260, at p. 281). This gives rise to the practical problem that one scholar has aptly referred to as "duelling *quantum meruits*" (J. D. McCamus, "Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?", in J.W. Neyers, M. McInnes and S.G.A. Pitel, eds., *Understanding Unjust Enrichment* (2004), 359, at p. 376). McLachlin J. also alluded to this practical problem in *Peter*, at p. 999.

49 A second difficulty arises from the fact that some courts and commentators have read *Peter* as holding that when a monetary award is appropriate, it must invariably be calculated on the basis of the monetary value of the unpaid services. This is often referred to as the *quantum meruit*, or "value received" or "fee-for-services" approach. This was followed in *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.). Other appellate courts have held that monetary relief may be assessed more flexibly — in effect, on a value survived basis — by reference, for example, to the overall increase in the couple's wealth during the relationship: *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26 (B.C. C.A.), at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (B.C. C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (B.C. C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108 (N.B. C.A.), at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40 (B.C. C.A.), at para. 37. With respect to inconsistencies in how *in personam* relief for unjust enrichment may be quantified, see also: *Matrimonial Property Law in Canada*, vol 1, by J.G. McLeod and A.A. Mamo, eds.(loose-leaf), at pp. 40.78-40.79.

(b) Proprietary Award

50 The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

51 As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154 (Alta. Q.B.), at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

52 The plaintiff must also establish that a monetary award would be insufficient in the circumstances (*Peter*, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights (*Lac Minerals*, at p. 678, *per* La Forest J.).

53 The extent of the constructive trust interest should be proportionate to the claimant's contributions. Where the contributions are unequal, the shares will be unequal (*Pettkus*, at pp. 852-53; *Rathwell*, at p. 448; *Peter*, at pp. 998-99). As Dickson J. put it in *Rathwell*, "The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions" (p. 454).

D. Areas Needing Clarification

54 While the law of unjust enrichment sets out a sturdy legal framework within which to address claims by domestic partners, three areas continue to generate controversy and require clarification. As mentioned earlier, these are as follows: the approach to the assessment of a monetary award for a successful unjust enrichment claim, how and where to address the mutual benefit problem, and the role of the parties' reasonable or legitimate expectations. I will address these in turn.

E. Is a Monetary Award Restricted to Quantum Meruit?

(1) Introduction

55 As noted earlier, remedies for unjust enrichment may either be proprietary (normally a remedial constructive trust) or personal (normally a money remedy). Once the choice has been made to award a monetary rather than a proprietary remedy, the question of how to quantify that monetary remedy arises. Some courts have held that monetary relief must always be calculated based on a value received or *quantum meruit* basis (*Bell*), while others have held that monetary relief may also be based on a value survived (i.e. by reference to the value of property) approach (*Wilson*; *Pickelein*; *Harrison*; *MacFarlane; Shannon*). If, as some courts have held, a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or order a monetary remedy calculated on a *quantum meruit* basis. One scholar has referred to this approach as the false dichotomy between constructive trust and *quantum meruit* (McCamus, at pp. 375-76). Scholars have also noted this area of uncertainty in the case law, and have suggested that an *in personam* remedy using the value survived measure is a plausible alternative to the constructive trust (McCamus, at p. 377; P. Birks, *An Introduction to the Law of Restitution* (1985), at pp. 394-95). As I will explain below, *Peter* is said to have established this dichotomy of remedial choice. However, in my view, the focus in *Peter* was on the availability of the constructive trust remedy, and that case should not be taken as limiting the calculation of monetary relief for unjust enrichment to a *quantum meruit* basis. In appropriate circumstances, monetary relief may be assessed on a value survived basis.

56 I will first briefly describe the genesis of the purported limitation on the monetary remedy. Then I will explain why, in my view, it should be rejected. Finally, I will set out my views on how money remedies for unjust enrichment claims in domestic situations should be approached.

(2) The Remedial Dichotomy

57 As noted, there is a widespread, although not unanimous, view that there are only two choices of remedy for an unjust enrichment: a monetary award, assessed on a fee-for-services basis; or a proprietary one (generally taking the form of a remedial constructive trust), where the claimant can show that the benefit conferred contributed to the acquisition, preservation, maintenance, or improvement of specific property. Some brief comments in *Peter* seem to have spawned this idea, which is reflected in a number of appellate authorities. For instance, in the *Vanasse* appeal, the Ontario Court of Appeal reasoned that since Ms. Vanasse could not show that her contributions were linked to specific property, her claim had to be quantified on a fee-for-services basis. I respectfully do not agree that monetary awards for unjust enrichment must always be calculated in this way.

(3) Why the Remedial Dichotomy Should Be Rejected

58 In my view, restricting the money remedy to a fee-for-services calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. Second, it is inconsistent with the inherent flexibility of unjust enrichment. Third, it ignores the historical basis of *quantum meruit* claims. Finally, it is not mandated by the Court's judgment in *Peter*. For those reasons, this remedial dichotomy should be rejected. The discussion which follows is concerned only with the quantification of a monetary remedy for unjust enrichment; the law relating to when a proprietary remedy should be granted is well established and remains unchanged.

(a) Life Experience

59 The remedial dichotomy would be appropriate if, in fact, the bases of all domestic unjust enrichment claims fit into only two categories — those where the enrichment consists of the provision of unpaid services, and those where it consists of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. To be sure, those two bases for unjust enrichment claims exist. However, all unjust enrichment cases cannot be neatly divided into these two categories.

60 At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

61 There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in *Clarke v. Clarke*, [1990] 2 S.C.R. 795 (S.C.C.), at p. 807 (in relation to Nova Scotia's *Matrimonial Property Act*), "... the Act supports the equality of both parties to a marriage and *recognized the joint contribution of the spouses, be it financial or otherwise, to that enterprise*. ... The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized" (emphasis added).

62 Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

63 This reality has also been recognized many times and in many contexts by the Court. For instance, in *Murdoch*, Laskin J. (as he then was), in dissent, would have imposed constructive trust relief, on the basis that the facts were

"consistent with a pooling of effort by the spouses" to establish themselves in a ranch operation (p. 457), and that the spouses had worked together for fifteen years to improve "their lot in life through progressively larger acquisitions of ranch property" (p. 446). Similarly, in *Rathwell*, a majority of the judges agreed that Mr. and Mrs. Rathwell had pooled their efforts to accumulate wealth as a team. Dickson J. emphasized that the parties had together "decided to make farming their way of life" (p. 444), and that the acquisition of property in Mr. Rathwell's name was only made possible through their "joint effort" and "team work" (p. 461).

64 A similar recognition is evident in *Pettkus* and *Peter*.

65 In *Pettkus*, the parties developed a successful beekeeping business, the profits from which they used to acquire real property. Dickson J., writing for the majority of the Court, emphasized facts suggestive of a domestic and financial partnership. He observed that "each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort" (p. 853); that each contributed to the "good fortune of the common enterprise" (p. 838); that Wilson J.A. (as she then was) at the Court of Appeal had found the wealth they accumulated was through "joint effort" and "teamwork" (p. 849); and finally, that "[t]heir lives and their economic well-being were fully integrated" (p. 850).

66 I agree with Professor McCamus that the Court in *Pettkus* was "satisfied that the parties were engaged in a common venture in which they expected to share the benefits flowing from the wealth that they jointly created" (p. 367). Put another way, Mr. Pettkus was not unjustly enriched because Ms. Becker had a precise expectation of obtaining a legal interest in certain properties, but rather because they were in reality partners in a common venture.

67 The significance of the fact that wealth had been acquired through joint effort was again at the forefront of the analysis in *Peter* where the parties lived together for 12 years in a common law relationship. While Mr. Beblow generated most of the family income and also contributed to the maintenance of the property, Ms. Peter did all of the domestic work (including raising the six children of their blended family), helped with property maintenance, and was solely responsible for the property when Mr. Beblow was away. The reality of their joint venture was acknowledged when McLachlin J. wrote that the "joint family venture, in effect, was no different from the farm which was the subject of the trust in *Becker v. Pettkus*" (p. 1001).

68 The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "[I]t is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that, in a case where both parties had contributed to the "family venture", it was appropriate to look to all of the family assets, rather than simply one of them, to approximate the value of the claimant's contributions to that family venture (p. 1001). Third, the Court's justification for affirming the value of domestic services was, in part, based on reasoning that such services are often proffered in the context of a common venture (p. 993).

69 Relationships of this nature are common in our life experience. For many domestic relationships, the couple's venture may only sensibly be viewed as a joint one, making it highly artificial in theory and extremely difficult in practice to do a detailed accounting of the contributions made and benefits received on a fee-for-services basis. Of course, this is a relationship-specific issue; there can be no presumption one way or the other. However, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. It should not impose on them the need to engage in an artificial balance sheet approach which does not reflect the true nature of their relationship.

(b) Flexibility

70 Maintaining a strict remedial dichotomy is inconsistent with the Court's approach to equitable remedies in general, and to its development of remedies for unjust enrichment in particular.

71 The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways. So, for example, when speaking of equitable compensation for

breach of confidence, Binnie J. affirmed that "the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation": *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), at para. 61. At para. 24, he noted the broad approach to equitable remedies for breach of confidence taken by the Court in *Lac Minerals*. In doing so, he cited this statement with approval: "... the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" (from J. D. Davies, "Duties of Confidence and Loyalty", [1990] *Lloyds' Mar. & Com. L.Q.* 4, at p. 5). Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 34.

72 Turning specifically to remedies for unjust enrichment, I refer to Binnie J.'s comments in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.) at para. 13. He noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, "retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience". Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed requires, recourse to a number of different sorts of remedies depending on the circumstances: see *Peter*, at p. 987; *Sorochan*, at p. 47.

73 Thus, the remedy should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it. This means that a monetary remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant. There is no reason to think that the wide range of circumstances that may give rise to unjust enrichment claims will necessarily fall into one or other of the two remedial options into which some have tried to force them.

(c) History

74 Imposing a strict remedial dichotomy is also inconsistent with the historical development of the unjust enrichment principle. Unjust enrichment developed through several particular categories of cases. *Quantum meruit*, the origin of the fee-for-services award, was only one of them. *Quantum meruit* originated as a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law. The scope of the claim was expanded over time, and the measure of a *quantum meruit* award was flexible. It might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (loose-leaf), vol. 1 at § 4:200.30. The important point, however, is that *quantum meruit* is simply one of the established categories of unjust enrichment claims. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial straitjacket.

(d) Peter v. Beblow

75 *Peter* does not mandate strict adherence to a *quantum meruit* approach to money remedies for unjust enrichment. One must remember that the focus of *Peter* was on whether the plaintiff's contributions entitled her to a constructive trust over the former family home. While it was assumed by both McLachlin J. and Cory J., who wrote concurring reasons in the case, that a money award would be fashioned on the basis of *quantum meruit*, that was not an issue, let alone a holding, in the case.

76 There are, in fact, only two sentences in the judgments that could be taken as supporting the view that this rule should always apply. At p. 995, McLachlin J. said, "Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e. *quantum meruit*; and the one the trial judge awarded, title to the house based on a constructive trust"; at p. 999, she wrote that "[f]or a monetary award, the 'value received' approach is appropriate". Given

that the focus of the case was deciding whether a proprietary remedy was appropriate, I would not read these two brief passages as laying down the sweeping rule that a monetary award must always be calculated on a fee-for-services basis.

77 Moreover, McLachlin J. noted that the doctrine of unjust enrichment applies to a variety of situations, and that successful claims have been addressed through a number of remedies, depending on the circumstances. Only one of these remedies is a payment for services rendered on the basis of *quantum meruit*: p. 987. There is nothing in this observation to suggest that the Court decided to opt for a one-size-fits-all monetary remedy, especially when such an approach would be contrary to the very flexibility that the Court has repeatedly affirmed with regards to the law of unjust enrichment and corresponding remedies.

78 This restrictive reading of *Peter* is not consistent with the underlying nature of the claim founded on the principles set out in *Pettkus*. As Professor McCamus has suggested, cases like *Pettkus* rest on a claimant's right to share surplus wealth created by joint effort and teamwork. It follows that a remedy based on notional fees for services is not responsive to the underlying nature of that claim: McCamus, at pp. 376-77. In my view, this reasoning is persuasive whether the joint effort has led to the accumulation of specific property, in which case a remedial constructive trust may be appropriate according to the well-settled principles in that area of trust law, or where the joint effort has led to an accumulation of assets generally. In the latter instance, when appropriate, there is no reason in principle why a monetary remedy cannot be fashioned to reflect this basis of the enrichment and corresponding deprivation. What is essential, in my view, is that, in either type of case, there must be a link between the contribution and the accumulation of wealth, or to use the words of McLachlin J. in *Peter*, between the "value received" and the "value surviving". Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation.

79 Professor McCamus has suggested that the equitable remedy of an accounting of profits could be an appropriate remedial tool: p. 377. While I would not discount that as a possibility, I doubt that the complexity and technicality of that remedy would be well-suited to domestic situations, which are more often than not rather straightforward. The unjust enrichment principle is inherently flexible and, in my view, the calculation of a monetary award for a successful unjust enrichment claim should be equally flexible. This is necessary to respond, to the extent money can, to the particular enrichment being addressed. To my way of thinking, Professor Fridman was right to say that "where a claim for unjust enrichment has been made out by the plaintiff, the court may award whatever form of relief is most appropriate so as to ensure that the plaintiff obtains that to which he or she is entitled, regardless of whether the situation would have been governed by common law or equitable doctrines or whether the case would formerly have been considered one for a personal or a proprietary remedy" (p. 398).

(4) The Approach to the Monetary Remedy

80 The next step in the legal development of this area should be to move away from the false remedial dichotomy between *quantum meruit* and constructive trust, and to return to the underlying principles governing the law of unjust enrichment. These underlying principles focus on properly characterizing the nature of the unjust enrichment giving rise to the claim. As I have mentioned above, not all unjust enrichments arising between domestic partners fit comfortably into either a "fee-for-services" or "a share of specific property" mold. Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of what McLachlin J. referred to in *Peter* (at p. 1001) as a "joint family venture" to which both partners have contributed, the monetary remedy should reflect that fact.

81 In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though

not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

82 This flexible approach to the money remedy in unjust enrichment cases is fully consistent with *Walsh*. While that case was focused on constitutional issues that are not before us in this case, the majority judgment was clearly not intended to freeze the law of unjust enrichment in domestic cases; the judgment indicates that the law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances" (para. 61). In short, while emphasizing respect for autonomy as an important value, the Court at the same time approved of the continued development of the law of unjust enrichment in order to respond to the plethora of forms and functions of common law relationships.

83 A similar approach was taken in *Peter*. Mr. Beblow argued that the law of unjust enrichment should not provide a share of property to unmarried partners because the legislature had chosen to exclude them from the rights accorded to married spouses under matrimonial property legislation. This argument was succinctly — and flatly — rejected with the remark that it is "precisely where an injustice arises without a legal remedy that equity finds a role": p. 994.

84 It is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.

85 I conclude, therefore, that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.

86 Thus the rejection of the remedial dichotomy leads us to consider in what circumstances an unjust enrichment may be appropriately characterized as a failure to share equitably assets acquired through the parties' joint efforts. While this approach will need further refinement in future cases, I offer the following as a broad outline of when this characterization of an unjust enrichment will be appropriate.

(5) Identifying Unjust Enrichment Arising From a Joint Family Venture

87 My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich set of factual circumstances, what emerge as the hallmarks of such a relationship?

88 It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship. Furthermore, as previously stated, there can be no presumption of a joint family venture. The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in

fact, is well-grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their *ex post facto* assertions or the court's view of how they ought to have done so.

89 In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

(a) Mutual Effort

90 One set of factors concerns whether the parties worked collaboratively towards common goals. Indicators such as the pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent, if any, to which the parties have formed a true partnership and jointly worked towards important mutual goals.

91 Joint contributions, or contributions to a common pool, may provide evidence of joint effort. For instance, in *Murdoch*, central to Laskin J.'s constructive trust analysis was that the parties had pooled their efforts to establish themselves in a ranch operation. Joint contributions were also an important aspect of the Court's analyses in *Peter*, *Sorochan*, and *Pettkus*. Pooling of efforts and resources, whether capital or income, has also been noted in the appellate case law (see, for example, *Birmingham v. Ferguson* [2004 CarswellOnt 3119 (Ont. C.A.)], 2004 CanLII 4764; *McDougall v. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54 (Man. C.A.), at para. 14). The use of parties' funds entirely for family purposes may be indicative of the pooling of resources: *McDougall*. The parties may also be said to be pooling their resources where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities, and enabling him or her to pursue activities in the paid workforce (see *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.) and *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382 (Alta. C.A.), at para. 27).

(b) Economic Integration

92 Another group of factors, related to those in the first group, concerns the degree of economic interdependence and integration that characterized the parties' relationship (*Birmingham*; *Pettkus*; *Nasser*). The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture. For example, the existence of a joint bank account that was used as a "common purse", as well as the fact that the family farm was operated by the family unit, were key factors in Dickson J.'s analysis in *Rathwell*. The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations (see *Wilson; Panara*).

93 The parties' conduct may further indicate a sense of collectivity, mutuality, and prioritization of the overall welfare of the family unit over the individual interests of the individual members (McCamus, at p. 366). These and other factors may indicate that the economic well-being and lives of the parties are largely integrated (see, for example, *Pettkus*, at p. 850).

(c) Actual Intent

94 Underpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties, and this is a particularly important consideration in relation to domestic partnerships. While domestic partners might not marry for a host of reasons, one of them may be the deliberate choice not to have their lives economically intertwined. Thus, in considering whether there is a joint family venture, the actual intentions of the parties must be given considerable weight. Those intentions may have been expressed by the parties or may be inferred from their conduct. The important point,

however, is that the quest is for their actual intent as expressed or inferred, not for what in the court's view "reasonable" parties *ought* to have intended in the same circumstances. Courts must be vigilant not to impose their own views, under the guise of inferred intent, in order to reach a certain result.

95 Courts may infer from the parties' conduct that they intended to share in the wealth they jointly created (P. Parkinson, "Beyond *Becker v. Pettkus*: Quantifying Relief for Unjust Enrichment" (1993), 43 U.T.L.J. 217, at p. 245). The conduct of the parties may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture (*Pettkus*; *Peter*; *Sorochan*). In some cases, courts have explicitly labelled the relationship as a "partnership" in the social and economic sense (*Panara*, at para. 71; *McDougall*, at para. 14). Similarly, the intention to engage in a joint family venture may be inferred where the parties accepted that their relationship was "equivalent to marriage" (*Birmingham*, at para. 1), or where the parties held themselves out to the public as married (*Sorochan*). The stability of the relationship may be a relevant factor as may the length of cohabitation (*Nasser*; *Sorochan*; *Birmingham*). When parties have lived together in a stable relationship for a lengthy period, it may be nearly impossible to engage in a precise weighing of the benefits conferred within the relationship (*McDougall*; *Nasser*).

96 The title to property may also reflect an intent to share wealth, or some portion of it, equitably. This may be the case where the parties are joint tenants of property. Even where title is registered to one of the parties, acceptance of the view that wealth will be shared may be evident from other aspects of the parties' conduct. For example, there may have been little concern with the details of title and accounting of monies spent for household expenses, renovations, taxes, insurance, and so on. Plans for property distribution on death, whether in a will or a verbal discussion, may also indicate that the parties saw one another as domestic and economic partners.

97 The parties' actual intent may also negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Once again, it is the parties' actual intent, express or inferred from the evidence, that is the relevant consideration.

(d) Priority of the Family

98 A final category of factors to consider in determining whether the parties were in fact engaged in a joint family venture is whether and to what extent they have given priority to the family in their decision making. A relevant question is whether there has been in some sense detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. As Professor McCamus puts it, the question is whether the parties have been "[p]roceeding on the basis of understandings or assumptions about a shared future which may or may not be articulated" (p. 365). The focus is on contributions to the domestic and financial partnership, and particularly financial sacrifices made by the parties for the welfare of the collective or family unit. Whether the roles of the parties fall into the traditional wage earner/homemaker division, or whether both parties are employed and share domestic responsibilities, it is frequently the case that one party relies on the success and stability of the relationship for future economic security, to his or her own economic detriment (Parkinson, at p. 243). This may occur in a number of ways including: leaving the workforce for a period of time to raise children; relocating for the benefit of the other party's career (and giving up employment and employment-related networks as a result); foregoing career or educational advancement for the benefit of the family or relationship; and accepting underemployment in order to balance the financial and domestic needs of the family unit.

99 As I see it, giving priority to the family is not associated exclusively with the actions of the more financially dependent spouse. The spouse with the higher income may also make financial sacrifices (for example, foregoing a promotion for the benefit of family life), which may be indicative that the parties saw the relationship as a domestic and financial partnership. As Professor Parkinson puts it, the joint family venture may be identified where

> [o]ne party has encouraged the other to rely to her detriment by leaving the workforce or forgoing other career opportunities for the sake of the relationship, and the breakdown of the relationship leaves her in a worse position than she would otherwise have been had she not acted in this way to her economic detriment. [p. 256].

(6) Summary of Quantum Meruit Versus Constructive Trust

100 I conclude:

1. The monetary remedy for unjust enrichment is not restricted to an award based on a fee-for-services approach.

2. Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions.

3. To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.

4. Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family.

F. Mutual Benefit Conferral

(1) Introduction

101 As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415. The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?

102 The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

103 Mutual benefit conferral, however, gives rise to more practical problems in an unjust enrichment claim where the appropriate remedy is a money award based on a fee-for-services-provided approach. The fact that the defendant has also provided services to the claimant may be seen as a factor relevant at all stages of the unjust enrichment analysis. Some courts have considered benefits received by the claimant as part of the benefit/detriment analysis (for example, at the Court of Appeal in *Peter v. Beblow* (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.)). Others have looked at mutual benefits as an aspect of the juristic reason inquiry (for example, *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (B.C. C.A.), and the Court of Appeal judgment in *Kerr*). Still others have looked at mutual benefits in relation to both juristic reason and at the remedy stage (for example, as proposed in *Wilson*). It is apparent that some clarity and consistency is necessary with respect to this issue.

104 In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment

(para. 9). This approach is consistent with the authorities from this Court, and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.

105 At the outset, however, I should say that this Court's decision in *Peter* does not mandate consideration of mutual benefits at the juristic reason stage of the analysis: see, e.g., *Ford*, at para. 14; *Thomas v. Fenton*, 2006 BCCA 299, 269 D.L.R. (4th) 376 (B.C. C.A.), at para. 18. Rather, *Peter* made clear that mutual benefit conferral should generally not be considered at the benefit and detriment stages; the Court also approved the trial judge's decision to take mutual benefits into account at the remedy stage of the unjust enrichment analysis.

106 In *Peter*, the trial judge found that all three elements of unjust enrichment had been established. Before Ms. Peter and Mr. Beblow started living together, he had a housekeeper whom he paid $350 per month. When Ms. Peter moved in with her children and assumed the housekeeping and child-care responsibilities, the housekeeper was no longer required. The trial judge valued Ms. Peter's contribution by starting with the amount Mr. Beblow had paid his housekeeper, but then discounting this figure by one half to reflect the benefits Ms. Peter received in return. The trial judge then used that discounted figure to value Ms. Peter's services over the 12 years of the relationship: (B.C. S.C.).

107 The Court of Appeal, at (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.), set aside the judge's finding on the basis that Ms. Peter had failed to establish that she had suffered a deprivation corresponding to the benefits she had conferred on Mr. Beblow. The court reasoned that, although she had performed the services of a housekeeper and homemaker, she had received compensation because she and her children lived in Mr. Beblow's home rent free and he contributed more for groceries than she had.

108 This Court reversed the Court of Appeal and restored the trial judge's award. The Court was unanimous that Ms. Peter had established all of the elements of unjust enrichment, including deprivation. Cory J. (with whom McLachlin J. agreed on this point) made short work of Mr. Beblow's submission that Ms. Peter had not shown deprivation. He observed, "As a general rule, if it is found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course be deprivation suffered by the plaintiff": at p. 1013. The Court also unanimously upheld the trial judge's approach of taking account of the benefits Ms. Peter had received at the remedy stage of his decision. As noted, the trial judge had reduced the monthly amount used to calculate Ms. Peter's award by 50 percent to reflect benefits she had received from Mr. Beblow. McLachlin J. did not disagree with this approach, holding at p. 1003 that the figure arrived at by the judge fairly reflected the value of Ms. Peter's contribution to the family assets. Cory J., at p. 1025, referred to the trial judge's approach as "a fair means of calculating the amount due to the appellant". Thus, the Court approved the approach of taking the mutual benefit issue into account at the remedy stage of the analysis. *Peter* therefore does not support the view that mutual benefits should be considered at the benefit/detriment or juristic reason stages of the analysis.

(2) The Correct Approach

109 As I noted earlier, my view is that mutual benefit conferral can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment. Otherwise, the mutual exchange of benefits should be taken into account at the defence and/or remedy stage. It is important to note that this can, and should, take place whether or not the defendant has made a formal counterclaim or pleaded set-off.

110 I turn first to why mutual benefits should not be addressed at the benefit/detriment stage of the analysis. In my view, refusing to address mutual benefits at that point is consistent with the *quantum meruit* origins of the fee-for-services approach and, as well, with the straightforward economic approach to the benefit/detriment analysis which has been consistently followed by this Court.

111 An unjust enrichment claim based on a fee-for-services approach is analogous to the traditional claim for *quantum meruit*. In *quantum meruit* claims, the fact that some benefit had flowed from the defendant to the claimant is taken into account by reducing the claimant's recovery by the amount of the countervailing benefit provided. For example, in a *quantum meruit* claim where the plaintiff is seeking to recover money paid pursuant to an unenforceable contract, but received some benefit from the defendant already, the claim will succeed but the award will be reduced by an amount corresponding to the value of that benefit: Maddaugh and McCamus (loose-leaf), vol. 2, at § 13:200. The authors offer as an example *Giles v. McEwan* (1896), 11 Man. R. 150 (Man. C.A.). In that case, two employees recovered in *quantum meruit* for services provided to the defendant under an unenforceable agreement, but the amount of the award was reduced to reflect the value of benefits the defendant had provided to them. Thus, taking the benefits conferred by the defendant into account at the remedy stage is consistent with general principles of *quantum meruit* claims. Of course, if the defendant has pleaded a counterclaim or set-off, the mutual benefit issue must be resolved in the course of considering that defence or claim.

112 Refusing to take mutual benefits into account at the benefit/detriment stage is also supported by a straightforward economic approach to the benefit/detriment analysis which the Court has consistently followed. *Garland* is a good example. The class action plaintiffs claimed in unjust enrichment to seek restitution for late payment penalties that had been imposed but that this Court (in an earlier decision) found had been charged at a criminal rate of interest: see *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 (S.C.C.). The company argued that it had not been enriched because its rates were set by a regulatory mechanism out of its control, and that the rates charged would have been even higher had the company not received the late payment penalties as part of its revenues. That argument was accepted by the Court of Appeal, but rejected on the further appeal to this Court. Iacobucci J., for the Court, held that the payment of money, under the "straightforward economic approach" adopted in *Peter*, was a benefit: para. 32. He stated at para. 36: "There simply is no doubt that Consumers' Gas received the monies represented by the [late payment penalties] and had that money available for use in the carrying on of its business. ...We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme." The Court held that the company was in fact asserting the "change of position" defence (that is, the defence that is available when "an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned": para. 63). This defence is considered only after the three elements of an unjust enrichment claim have been established: para. 37. Thus the Court declined to get into a detailed consideration at the benefit/detriment stage of the defendant's submissions that it had not benefitted because of the regulatory scheme.

113 While *Garland* dealt with the payment of money, my view is that the same approach should be applied where the alleged enrichment consists of services. Provided that they confer a tangible benefit on the defendant, the services will generally constitute an enrichment and a corresponding deprivation. Whether the deprivation was counterbalanced by benefits flowing to the claimant from the defendant should not be addressed at the first two steps of the analysis. I turn now to the limited role that mutual benefit conferral may have at the juristic reason stage of the analysis.

114 As previously set out, juristic reason is the third of three parts to the unjust enrichment analysis. As McLachlin J. put it in *Peter*, at p. 990, "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'." The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. *Garland* established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations.

115 The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step

in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.

(3) Summary

116 I conclude that mutual benefits may be considered at the juristic reason stage, but only to the extent that they provide evidence relevant to the parties' reasonable expectations. Otherwise, mutual benefit conferrals are to be considered at the defence and/or remedy stage. I will have more to say in the next section about how mutual benefit conferral and the parties' reasonable expectations may come into play in the juristic reason analysis.

G. Reasonable or Legitimate Expectations

117 The final point that requires some clarification relates to the role of the parties' reasonable expectations in the domestic context. My conclusion is that, while in the early domestic unjust enrichment cases the parties' reasonable expectations played an important role in the juristic reason analysis, the development of the law, and particularly the Court's judgment in *Garland*, has led to a more limited and clearly circumscribed role for those expectations.

118 In the early cases of domestic unjust enrichment claims, the reasonable expectations of the claimant and the defendant's knowledge of those expectations were central to the juristic reason analysis. For example, in *Pettkus*, when Dickson J. came to the juristic reason step in the analysis, he said that "where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it" (p. 849). Similarly, in *Sorochan*, at p. 46, precisely the same reasoning was invoked to show that there was no juristic reason for the enrichment.

119 In these cases, central to the Court's concern was whether it was just to require the defendant to pay — in fact to surrender an interest in property — for services not expressly requested. The Court's answer was that it would indeed be unjust for the defendant to retain the benefits, given that he had continued to accept the services when he knew or ought to have known that the claimant was providing them with the reasonable expectation of reward.

120 The Court's resort to reasonable expectations and the defendant's knowledge of them in these cases is analogous to the "free acceptance" principle. The notion of free acceptance has been invoked to extend restitutionary recovery beyond the traditional sorts of *quantum meruit* claims in which services had either been requested or provided under an unenforceable agreement. The law's traditional reluctance to provide a remedy for claims where no request was made was based on the tenet that a person should generally not be required, in effect, to pay for services that he or she did not request, and perhaps did not want. However, this concern carries much less weight when the person receiving the services knew that they were being provided, had no reasonable belief that they were a gift, and yet continued to freely accept them: see P. Birks, *Unjust Enrichment* (2nd ed. 2005), at pp. 56-57.

121 The need to engage in this analysis of the claimant's reasonable expectations and the defendant's knowledge thereof with respect to domestic services has, in my view, now been overtaken by developments in the law. *Garland*, as noted, mandated a two-step approach to the juristic reason analysis. The first step requires the claimant to show that the benefit was not conferred for any existing category of juristic reasons. Significantly, the fact that the defendant also provided services to the claimant is not one of the existing categories. Nor is the fact that the services were provided pursuant to the parties' reasonable expectations. However, the fact that the parties reasonably expected the services to be provided might afford relevant evidence in relation to whether the case falls within one of the traditional categories, for example a contract or gift. Other than in that way, mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the first step in the juristic reason analysis set out in *Garland*.

122 However, different considerations arise at the second step. Following *Peter* and *Garland*, the parties' reasonable or legitimate expectations have a critical role to play when the defendant seeks to establish a new juristic reason, whether case-specific or categorical. As Iacobucci J. put it in *Garland*, this introduces a category of residual situations in which

"courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery" (para. 45). Specifically, it is here that the court should consider the parties' reasonable expectations and questions of policy.

123 It will be helpful in understanding how *Peter* and *Garland* fit together to apply the *Garland* approach to an issue touched on, but not resolved, in *Peter*. In *Peter*, an issue was whether a claim based on the provision of domestic services could be defeated on the basis that the services had been provided as part of the bargain between the parties in deciding to live together. While the Court concluded that the claim failed on the facts, it did not hold that such a claim would inevitably fail in all circumstances: p. 991. It seems to me that, in light of *Garland*, where a "bargain" which does not constitute a binding contract is alleged, the issue will be considered at the stage when the defendant seeks to show that there is a juristic reason for the enrichment that does not fall within any of the existing categories; the claim is that the "bargain" represents the parties' reasonable expectations, and evidence about their reasonable expectations would be relevant evidence of the existence (or not) of such a bargain.

124 To summarize:

1. The parties' reasonable or legitimate expectations have little role to play in deciding whether the services were provided for a juristic reason within the existing categories.

2. In some cases, the facts that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. An example might be whether there was a contract for the provision of the benefits. However, generally the existence of mutual benefits flowing from the defendant to the claimant will not be considered at the juristic reason stage of the analysis.

3. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, that is, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall within the existing categories. It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant. The question is whether the parties' expectations show that retention of the benefits is just.

125 I will now turn to the two cases at bar.

IV. The *Vanasse* Appeal

A. Introduction

126 In the Vanasse appeal, the main issue is how to quantify a monetary award for unjust enrichment. The trial judge awarded a share of the net increase in the family's wealth during the period of unjust enrichment. The Court of Appeal held that this was the wrong approach, finding that the trial judge ought to have performed a *quantum meruit* calculation in which the value that each party received from the other was assessed and set off. This required an evaluation of the defendant Mr. Seguin's non-financial contributions to the relationship which, in the view of the Court of Appeal, the trial judge failed to perform. As the record did not permit the court to apply the correct legal principles to the facts, it ordered a new hearing with respect to compensation and consequential changes to spousal support.

127 In this Court, the appellant Ms. Vanasse raises two issues:

1. Did the Court of Appeal err by insisting on a strict *quantum meruit* (i.e. "value received") approach to quantify the monetary award for unjust enrichment?

2. Did the Court of Appeal err in finding that the trial judge had failed to consider relevant evidence of Mr. Seguin's contributions?

128 In my view, the appeal should be allowed and the trial judge's order restored. For the reasons I have developed above, my view is that money compensation for unjust enrichment need not always, as a matter of principle, be calculated on a *quantum meruit* basis. The trial judge here, although not labelling it as such, found that there was a joint family venture and that there was a link between Ms. Vanasse's contribution to it and the substantial accumulation of wealth which the family achieved. In my view, the trial judge made a reasonable assessment of the monetary award appropriate to reverse this unjust enrichment, taking due account of Mr. Seguin's undoubted and substantial contributions.

B. Brief Overview of the Facts and Proceedings

129 The background facts of this case are largely undisputed. The parties lived together in a common law relationship for approximately 12 years, from 1993 until March 2005. Together, they had two children who were aged 8 and 10 at the time of trial.

130 During approximately the first four years of their relationship (1993 to 1997), the parties diligently pursued their respective careers, Ms. Vanasse with the Canadian Security Intelligence Service ("CSIS") and Mr. Seguin with Fastlane Technologies Inc., marketing a network operating system he had developed.

131 In March of 1997, Ms. Vanasse took a leave of absence to move with Mr. Seguin to Halifax, where Fastlane had relocated for important business reasons. During the next three and one-half years, the parties had two children; Ms. Vanasse took care of the domestic labour, while Mr. Seguin devoted himself to developing Fastlane. The family moved back to Ottawa in 1998, where Mr. Seguin purchased a home and registered it in the names of both parties as joint tenants. In September 2000, Fastlane was sold and Mr. Seguin netted approximately $11 million. He placed the funds in a holding company, with which he continued to develop business and investment opportunities.

132 After the sale of Fastlane, Ms. Vanasse continued to assume most of the domestic responsibilities, although Mr. Seguin was more available to assist. He continued to manage the finances.

133 The parties separated on March 27, 2005. At that time, they were in starkly contrasting financial positions: Ms. Vanasse's net worth had gone from about $40,000 at the time she and Mr. Seguin started living together, to about $332,000 at the time of separation; Mr. Seguin had come into the relationship with about $94,000, and his net worth at the time of separation was about $8,450,000.

134 Ms. Vanasse brought proceedings in the Superior Court of Justice. In addition to seeking orders with respect to spousal support and child custody, Ms. Vanasse claimed unjust enrichment. She argued that Mr. Seguin had been unjustly enriched because he retained virtually all of the funds from the sale of Fastlane, even though she had contributed to their acquisition through benefits she conferred in the form of domestic and childcare services. She alleged her contributions allowed Mr. Seguin to dedicate most of his time and energy to Fastlane. She sought relief by way of constructive trust in Mr. Seguin's remaining one half interest in the family home, and a one-half interest in the investment assets held by Mr. Seguin's holding company.

135 Mr. Seguin contested the unjust enrichment claim. While conceding he had been enriched during the roughly three-year period where he was working outside the home full time and Ms. Vanasse was working at home full time (May 1997 to September 2000), he argued there was no corresponding deprivation because he had given her a one-half interest in the family home and approximately $44,000 in Registered Retirement Saving Plans ("RRSPs"). In the alternative, Mr. Seguin submitted that a constructive trust remedy was inappropriate because there was no link between Ms. Vanasse's contributions and the property of Fastlane.

136 The trial judge, Blishen J., concluded that the relationship of the parties could be divided into three distinct periods: (1) From the commencement of cohabitation in 1993 until March 1997 when Ms. Vanasse left her job at CSIS; (2) From March 1997 to September 2000, during which both children were born and Fastlane was sold; and (3) From September 2000 to the separation of the parties in March 2005. She concluded that neither party had been unjustly enriched in the

first or third periods; she held that their contributions to the relationship during these periods had been proportionate. In the first period, there were no children of the relationship and both parties were focused on their careers; in the third period, both parents were home and their contributions had been proportional.

137 In the second period, however, the trial judge concluded that Mr. Seguin had been unjustly enriched by Ms. Vanasse. Ms. Vanasse had been in charge of the domestic side of the household, including caring for their two children. She had not been a "nanny/housekeeper" and, as the trial judge held, throughout the relationship she had been at least "an equal contributor to the family enterprise". The trial judge concluded that Ms. Vanasse's contributions during this second period "significantly benefited Mr. Seguin and were not proportional" (para. 139).

138 The trial judge found as fact that Ms. Vanasse's efforts during this second period were directly linked to Mr. Seguin's business success. She stated, at para. 91, that

> Mr. Seguin was enriched by Ms. Vanasse's running of the household, providing child care for two young children and looking after all the necessary appointments and needs of the children. Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane.
>
> [Emphasis added.]

Again at para. 137, the trial judge found that

> Mr. Seguin was unjustly enriched and Ms. Vanasse deprived for three and one-half years of their relationship, during which time Mr. Seguin often worked day and night and traveled frequently while in Halifax. Mr. Seguin could not have succeeded, as he did, and built up the company, as he did, without Ms. Vanasse assuming the vast majority of childcare and household responsibilities. Mr. Seguin could not have devoted his time to Fastlane but for Ms. Vanasse's assumption of those responsibilities. ... Mr. Seguin reaped the benefit of Ms. Vanasse's efforts by being able to focus all of his considerable energies and talents on making Fastlane a success.
>
> [Emphasis added.]

139 The trial judge concluded that a monetary award in this case was appropriate, given Mr. Seguin's ability to pay, and lack of a sufficiently direct and substantial link between Ms. Vanasse's contributions and Fastlane or Mr. Seguin's holding company, as required to impose a remedial constructive trust.

140 With respect to quantification, Blishen J. noted that Ms. Vanasse had received a one-half interest in the family home, but concluded that this was not adequate compensation for her contributions. The trial judge compared the net worths of the parties and determined that Ms. Vanasse was entitled to a one-half interest in the prorated increase in Mr. Seguin's net worth during the period of the unjust enrichment. She reasoned that his net worth had increased by about $8.4 million dollars over the 12 years of the relationship. Although she noted that the most significant increase took place when Fastlane was sold towards the end of the period of unjust enrichment, she nonetheless prorated the increase over the full 12 years of the relationship, yielding a figure of about $700,000 per year. Starting with the $2.45 million increase attributable to the three and one-half years of unjust enrichment, the trial judge awarded Ms. Vanasse 50 percent of that amount, less the value of her interest in the family home and her RRSPs. This produced an award of just under $1 million.

141 Mr. Seguin did not appeal Blishen J.'s unjust enrichment finding, and conceded unjust enrichment between 1997 and 2000 on appeal. Therefore, the trial judge's findings that there had been an unjust enrichment during that period and that there was no unjust enrichment during the other periods are not in issue. The sole issue for determination in this Court is the propriety of the trial judge's monetary award for the unjust enrichment which she found to have occurred.

C. Analysis

(1) Was the Trial Judge Required to Use a Quantum Meruit Approach to Calculate the Monetary Award?

142 I agree with the appellant that a monetary award for unjust enrichment need not, as a matter of principle, always be calculated on a fee-for-services basis. As I have set out earlier, an unjust enrichment is best characterized as one party leaving the relationship with a disproportionate share of wealth that accumulated as a result of the parties' joint efforts. This will be so when the parties were engaged in a joint family venture and where there is a link between the contributions of the claimant and the accumulation of wealth. When this is the case, the amount of the enrichment should be assessed by determining the claimant's proportionate contribution to that accumulated wealth. As the trial judge saw it, this was exactly the situation of Ms. Vanasse and Mr. Seguin.

(2) Existence of a Joint Family Venture

143 The trial judge, after a six-day trial, concluded that "Ms. Vanasse was not a nanny/housekeeper". She found that Ms. Vanasse had been at least "an equal contributor to the family enterprise" throughout the relationship and that, during the period of unjust enrichment, her contributions "significantly benefited Mr. Seguin" (para. 139).

144 The trial judge, of course, did not review the evidence under the headings that I have suggested will be helpful in identifying a joint family venture, namely "mutual effort", "economic integration", "actual intent" and "priority of the family". However, her findings of fact and analysis indicate that the unjust enrichment of Mr. Seguin at the expense of Ms. Vanasse ought to be characterized as the retention by Mr. Seguin of a disproportionate share of the wealth generated from a joint family venture. The judge's findings fit conveniently under the headings I have suggested.

(a) Mutual Effort

145 There are several factors in this case which suggest that, throughout their relationship, the parties were working collaboratively towards common goals. First, as previously mentioned, the trial judge found that Ms. Vanasse's role was not as a "nanny/housekeeper" but rather as at least an equal contributor throughout the relationship. The parties made important decisions keeping the overall welfare of the family at the forefront: the decision to move to Halifax, the decision to move back to Ottawa, and the decision that Ms. Vanasse would not return to work after the sale of Fastlane are all clear examples. The parties pooled their efforts for the benefit of their family unit. As the trial judge found, during the second stage of their relationship from March 1997 to September 2000, the division of labour was such that Ms. Vanasse was almost entirely responsible for running the home and caring for the children, while Mr. Seguin worked long hours and managed the family finances. The trial judge found that it was through their joint efforts that they were able to raise a young family and acquire wealth. As she put it, "Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities" (para. 91). While Mr. Seguin's long hours and extensive travel reduced somewhat in September 1998 when the parties returned to Ottawa, the basic division of labour remained the same.

146 Notably, the period of unjust enrichment corresponds to the time during which the parties had two children together (in 1997 and 1999), a further indicator that they were working together to achieve common goals. The length of the relationship is also relevant, and their 12-year cohabitation is a significant period of time. Finally, the trial judge described the arrangement between the parties as a "family enterprise", to which Ms. Vanasse was "at least, an equal contributor" (paras. 138-39).

(b) Economic Integration

147 The trial judge found that "[t]his was not a situation of economic interdependence" (para. 105). That said, there was a pooling of resources. Ms. Vanasse was not employed and did not contribute financially to the family after the children were born, and thus was financially dependent on Mr. Seguin. The family home was registered jointly, and the parties had a joint chequing account. As the trial judge put it, "She was 'the C.E.O. of the kids' and he was 'the C.E.O. of the finances'" (para. 105).

(c) Actual Intent

148 The actual intent of the parties in a domestic relationship, as expressed by the parties or inferred from their conduct, must be given considerable weight in determining whether there was a joint family venture. There are a number of findings of fact that indicate these parties considered their relationship to be a joint family venture.

149 While a promise to marry or the discussion of legal marriage is by no means a prerequisite for the identification of a joint family venture, in this case the parties' intentions with respect to marriage strongly suggest that they viewed themselves as the equivalent of a married couple. Mr. Seguin proposed to Ms. Vanasse in July 1996 and they exchanged rings. While they were "devoted to one another and still in love", a wedding date was never set (para. 14). Mr. Seguin raised the topic of marriage again when Ms. Vanasse found out she was pregnant with their first child. Although they never married, the trial judge found that there had been "mutual expectations [of marriage] during the first few years of their 12 year relationship" (para. 64). Mr. Seguin continued to address Ms. Vanasse as "my future wife", and she was viewed by the outside world as such (para. 33).

150 The trial judge also referred to statements made by Mr. Seguin that were strongly indicative of his view that there was a joint family venture. As the trial judge put it, at para. 28, upon the sale of Fastlane

> Mr. Seguin became a wealthy man. He told Ms. Vanasse that they would never have to worry about finances as their parents did; their children could go to the best schools and they could live a good life without financial concerns.

Again, at para. 98:

> After the sale of the company, Mr. Seguin indicated they could retire, the children could go to the best schools and the family would be well cared for. The family took travel vacations, enjoyed luxury cars, bought a large cabin cruiser which they used for summer vacations and purchased condominiums at Mont-Tremblant.

151 While the trial judge viewed Mr. Seguin's promises and reassurances as contributing to a reasonable expectation on the part of Ms. Vanasse that she was to share in the increase of his net worth during the period of unjust enrichment, in my view these comments are more appropriately characterized as a reflection of the reality that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and the benefit of their children.

(d) Priority of the Family

152 There is a strong inference from the factual findings that, to Mr. Seguin's knowledge, Ms. Vanasse relied on the relationship to her detriment. As the trial judge found, in 1997 Ms. Vanasse gave up a lucrative and exciting career with CSIS, where she was training to be an intelligence officer, to move to Halifax with Mr. Seguin. In many ways this was a sacrifice on her part; she left her career, gave up her own income, and moved away from her family and friends. Mr. Seguin had moved to Halifax in order to relocate Fastlane for business reasons. Ms. Vanasse then stayed home and cared for their two small children. As I have already explained, during the period of the unjust enrichment, Ms. Vanasse was responsible for a disproportionate share of the domestic labour. It was these domestic contributions that, in part, permitted Mr. Seguin to focus on his work with Fastlane. Later, in 2003, the "family's decision" was for Ms. Vanasse to remain home after her leave from CSIS had expired (para. 198). Ms. Vanasse's financial position at the breakdown of the relationship indicates she relied on the relationship to her economic detriment. This is all evidence supporting the conclusion that the parties were, in fact, operating as a joint family venture.

153 As a final point, I would refer to the arguments made by Mr. Seguin, which were accepted by the Court of Appeal, that the trial judge failed to give adequate weight to sacrifices Mr. Seguin made for the benefit of the relationship. Later in my reasons, I will address the question of whether the trial judge actually failed in this regard. However, the points raised by Mr. Seguin to support this argument actually serve to reinforce the conclusion that there was a joint family venture. Mr. Seguin specifically notes a number of factors, including: agreeing to step down as CEO of Fastlane in September 1997 to make himself more available to Ms. Vanasse, causing friction with his co-workers and partners, and reducing his remuneration; agreeing to relocate to Ottawa at Ms. Vanasse's request in 1998; and making increased efforts to work

at home more and travel less after moving back to Ottawa. These facts are indicative of the sense of mutuality in the parties' social and financial relationship. In short, they support the identification of a joint family venture.

(e) Conclusion on Identification of the Joint Family Venture

154 In my view, the trial judge's findings of fact clearly show that Ms. Vanasse and Mr. Seguin engaged in a joint family venture. The remaining question is whether there was a link between Ms. Vanasse's contributions to it and the accumulation of wealth.

(3) Link to Accumulation of Wealth

155 The trial judge made a clear finding that there was a link between Ms. Vanasse's contributions and the family's accumulation of wealth.

156 I have referred earlier, in some detail, to the trial judge's findings in this regard. However, to repeat, her conclusion is expressed particularly clearly at para. 91 of her reasons:

> Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these [household and child-rearing] responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane.

157 Given that and similar findings, I conclude that not only were these parties engaged in a joint family venture, but that there was a clear link between Ms. Vanasse's contribution to it and the accumulation of wealth. The unjust enrichment is thus best viewed as Mr. Seguin leaving the relationship with a disproportionate share of the wealth accumulated as a result of their joint efforts.

(4) Calculation of the Award

158 The main focus of the appeal was on whether the award ought to have been calculated on a *quantum meruit* basis. Very little was argued before this Court regarding the way the trial judge approached her calculation of a proportionate share of the parties' accumulated wealth. I conclude that the trial judge's approach was reasonable in the circumstances, but I stress that I do not hold out her approach as necessarily being a template for future cases. Within the legal principles I have outlined, there may be many ways in which an award may be quantified reasonably. I prefer not to make any more general statements about the quantification process in the context of this appeal, except this. Provided that the correct legal principles are applied, and the findings of fact are not tainted by clear and determinative error, a trial judge's assessment of damages is treated with considerable deference on appeal: see, e.g., *Nance v. British Columbia Electric Railway*, [1951] A.C. 601 (British Columbia P.C.). A reasoned and careful exercise of judgment by the trial judge as to the appropriate monetary award to remedy an unjust enrichment should be treated with the same deference. There are two final specific points that I must address.

159 Mr. Seguin submits, very briefly, that a proper application of the "value survived" approach in this case would require a careful determination of the contributions by third parties to the growth of Fastlane during the period his own contributions were diminished, as a result of what counsel characterizes as Ms. Vanasse's "demands" that he reduce his hours and move back to Ottawa. This argument is premised on the notion that the money he received from the sale was not justly his to share with Ms. Vanasse. I cannot accept this premise. Unexplained is why he received more than his share when the company was sold or why, having received more than he was due, Ms. Vanasse is still not entitled to an equitable share of what he actually received.

160 Second, there is the finding of the Court of Appeal that the trial judge failed to take into account evidence of Mr. Seguin's numerous and significant non-financial contributions to the family. I respectfully cannot accept this view. The trial judge specifically alluded to these contributions in her reasons. Moreover, by confining the period of unjust enrichment to the three and one-half year period, the trial judge took into account the periods during which Ms. Vanasse's

contributions were not disproportionate to Mr. Seguin's. In my view, the trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to Mr. Seguin's contributions.

D. Disposition

161 I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of the trial judge. The appellant should have her costs throughout.

V. The *Kerr* Appeal

A. Introduction

162 When their common law relationship of more than 25 years ended, Ms. Kerr sued her former partner, Mr. Baranow, advancing claims for unjust enrichment, resulting trust, and spousal support. Mr. Baranow counterclaimed that Ms. Kerr had been unjustly enriched by his housekeeping services provided between 1991 and 2006, and by his early retirement in order to provide her personal assistance. The trial judge awarded Ms. Kerr $315,000, holding that she was entitled to this amount both by way of resulting trust (to reflect her contribution to the acquisition of property) and by way of remedial constructive trust (as a remedy for her successful claim in unjust enrichment). He also awarded Ms. Kerr $1,739 per month in spousal support effective the date she commenced proceedings. Although the trial judge rejected Mr. Baranow's assertion that Ms. Kerr had been unjustly enriched at his expense, the reasons for judgment and the order after trial do not otherwise address Mr. Baranow's counterclaim.

163 Mr. Baranow appealed. The Court of Appeal allowed the appeal, concluding that Ms. Kerr's claims for a resulting trust and in unjust enrichment should be dismissed, that Mr. Baranow's claim for unjust enrichment should be remitted to the trial court for determination, and that the order for spousal support should be effective as of the first day of the trial, not as of the date proceedings were commenced.

164 Ms. Kerr appeals, submitting that the Court of Appeal erred by setting aside the trial judge's findings that:

(1) a resulting trust arose in her favour;

(2) she had unjustly enriched Mr. Baranow; and

(3) spousal support should begin as of the date she instituted proceedings.

165 In my view, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that Mr. Baranow's counterclaim be returned to the Supreme Court of British Columbia for hearing. However, my view is that Ms. Kerr's unjust enrichment claim should not have been dismissed, but rather a new trial ordered. While the trial judge's errors certainly were not harmless, it is not possible to say on this record, which includes findings of fact tainted by clear error, that her unjust enrichment claim would inevitably fail if analyzed using the clarified legal framework set out above. With respect to the commencement date of the spousal support order, I would set aside the order of the Court of Appeal and restore the trial judge's order.

B. Overview of the Facts

166 The trial judge's disposition of both the resulting trust and unjust enrichment claims turned on his conclusion that Ms. Kerr had provided $60,000 worth of equity and assets at the beginning of the relationship. This fact, in the trial judge's view, supported awarding her one-third of the value of the home she shared with Mr. Baranow at the time of separation. According to the trial judge, this $60,000 of equity and assets consisted of three elements: her $37,000 of equity in the Coleman Street home she had shared with her former husband; the value of an automobile; and the value of furniture which she brought into her relationship with Mr. Baranow. The trial judge did not make specific findings of fact about the value of either Ms. Kerr's or Mr. Baranow's non-monetary contributions to the relationship. As previously noted, while the judge rejected in a single sentence Mr. Baranow's contention that Ms. Kerr had been unjustly enriched

at his expense, the judge did not explain the basis of that conclusion. Mr. Baranow's counterclaim was not otherwise addressed.

167 The trial judge's findings of fact, of course, must be accepted unless tainted with clear and determinative error. In this case, however, the Court of Appeal's intervention on some of the judge's key findings was justified, because those findings simply were not supported by the record. I will have to delve into the facts, more than might otherwise be required, to explain why.

168 The parties began to live together in Mr. Baranow's home on Wall Street in Vancouver in May 1981. Shortly afterward, they moved into Ms. Kerr's former matrimonial home on Coleman Street. They had met at their mutual place of work, the Port of Vancouver, where she worked as a secretary and he as a longshoreman. Ms. Kerr was in midst of a divorce. Through her separation agreement, Ms. Kerr received her husband's interest in their former matrimonial home on Coleman Street in North Vancouver, all of the furniture in the house, and a 1979 Cadillac Eldorado. However, Ms. Kerr's ex-husband owed more than $400,000 and Ms. Kerr was guarantor of some of that debt.

169 In the summer of 1981, the Coleman Street property was the subject of foreclosure proceedings and, according to the evidence, was about to be foreclosed on July 29, 1981. Ms. Kerr testified at trial that, at the time, she had two teenage children, was earning under $30,000 a year, and had no money to save the house.

170 Ms. Kerr instructed her lawyer to place the titles to the Coleman Street property and the vehicle into Mr. Baranow's name. Mr. Baranow paid $33,000 in cash to secure the property against outstanding debts, and guaranteed a $100,000 mortgage at a rate of 22 percent. He then began to make the mortgage payments and eventually refinanced the mortgage, together with that on his Wall Street property, and assumed that new mortgage himself.

171 The couple lived together for the next 25 years, first in the Wall Street property, then at Coleman Street, then in a temporary apartment, and finally in their "dream home" which they constructed on Mr. Baranow's Wall Street property.

172 While the parties lived together in the Coleman Street property (from September 1981 to December 1985), Mr. Baranow retained the $450 per month he received by renting out his Wall Street property. The trial judge found that, although the parties kept their financial affairs separate, there was an arrangement by which Mr. Baranow would pay the property taxes and mortgage payments on both the Coleman Street and the Wall Street properties. The mortgage on both properties was paid off before July 1985. However, Mr. Baranow took out a $32,000 mortgage on the Wall Street property in July 1985, which was paid in full by August 1988.

173 The Coleman Street property was sold in August 1985 for $138,000. This sale was at a considerable loss, taking into account the real estate commission, the $33,000 in cash Mr. Baranow had contributed at the time of the transfer to him, and the mortgage payments he alone had made between the transfer in the summer of 1981 and the sale in the summer of 1985.

174 The parties moved into an apartment (from August 1985 until October 1986) while they constructed their "dream home" at the Wall Street location. The existing dwelling was torn down and replaced. Mr. Baranow spent somewhere between $97,000 and $105,000 on its construction, with additional amounts spent for materials, labour and permits. Ms. Kerr, the trial judge found, was involved with the planning, interior decorating and cleaning. She also planted sod, tended the flower garden, and paid for some wood paneling in the downstairs bedroom. In addition, she made contributions towards the purchase of furniture, appliances, and other chattels for the Wall Street property. Her son paid $350 per month in rent, which Mr. Baranow retained. At one point in his reasons, the trial judge stated that Ms. Kerr paid "all of the household expenses and the insurance on the new house ... even after the $32,000.00 mortgage was paid off by [Mr. Baranow] in August 1988" (para. 24). However, at another point, the judge noted that Ms. Kerr paid the utilities and insurance and bought "some groceries" (para. 36). Mr. Baranow, he found, paid the property-related expenses, consisting of property taxes (less the disability benefit attributable to Ms. Kerr) and upkeep (which was minimal in the new house). The trial judge found that the current value of the Wall Street property was $942,500, compared with $205,000 in October

of 1986. He then concluded that, given there were no mortgage payments after 1988, Ms. Kerr's share of the expenses "was probably higher" than Mr. Baranow's for approximately 18 years before they stopped living together.

175 In 1991, Ms. Kerr suffered a massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work. Her health steadily deteriorated, and relations between the couple became increasingly strained. Mr. Baranow took an early retirement in 2002. The trial judge acknowledged that Mr. Baranow claimed to have done this to care for Ms. Kerr, but noted that early retirement was also favourable to him. The trial judge found that Mr. Baranow started to experience "caregiver fatigue" and began exploring institutional care alternatives in June 2005. The next summer, in August 2006, Ms. Kerr had to undergo surgery on her knee. After the surgery, Mr. Baranow made it clear to the hospital staff that he was not prepared to have her return home. Ms. Kerr was transferred to an extended care facility where she remained at the time of trial. The trial judge found that, in the last 18 months Ms. Kerr resided at the Wall Street property, Mr. Baranow did most of the housework and helped her with her bodily functions.

C. Analysis

(1) The Resulting Trust Issue

176 The trial judge found that Mr. Baranow held a one-third interest in the Wall Street property by way of resulting trust for Ms. Kerr, on three bases. The Court of Appeal found that each of these holdings was erroneous. I respectfully agree.

(a) Gratuitous Transfer

177 The trial judge found that the transfer of the Coleman Street property to Mr. Baranow was gratuitous, therefore raising the presumption of a resulting trust in Ms. Kerr's favour. At the time of transfer to Mr. Baranow, roughly $133,000 was required to save the property (it was subject to a first mortgage of just under $80,000, a second mortgage of just under $35,000, a judgment in favour of the Bank of Montreal of just under $12,000, and other miscellaneous debts and charges, adding up to roughly $133,000). There was also a $26,500 judgment in favour of CIBC, which was of concern to Ms. Kerr, although it is not listed in the payouts required to close the transfer. We know that Ms. Kerr had guaranteed some of her former husband's debts, and that she declared bankruptcy in 1983 in relation to $15,000 of debt for which she had co-signed with her former husband.

178 The Court of Appeal reversed the trial judge's resulting trust finding, holding that the transfer was not gratuitous. The court pointed to the contributions and liabilities undertaken by Mr. Baranow to make the transfer possible, and concluded that the trial judge's finding in this regard constituted a palpable and overriding error.

179 On this point, I respectfully agree with the Court of Appeal. There is no dispute that Mr. Baranow injected roughly $33,000 in cash, and guaranteed a $100,000 mortgage, so that the property would not be lost to the bank in the foreclosure proceedings. This constituted consideration, and the transfer therefore cannot reasonably be labelled gratuitous. The respondent would have us hold otherwise on the basis of technical arguments about the lack of a precise coincidence between the time of the transfer and payments, and the lack of payment directly to Ms. Kerr because Mr. Baranow's payments were made to her creditors. These arguments have no merit. An important element of the trial judge's finding of a resulting trust was his conclusion that there was "no evidence" that Mr. Baranow's payment of $33,000 in cash and his guarantee of the $100,000 mortgage "were in connection with the transfer or part of an agreement between the parties so as to constitute consideration for the transfer" (para. 76). Putting to one side for the moment whether this finding reflects a correct understanding of a gratuitous transfer, the judge clearly erred in making this statement; there was in fact much evidence to that precise effect. Mr. Baranow testified that Ms. Kerr had "tearfully asked" Mr. Baranow for help to save the property from the creditors. Ms. Kerr's solicitor recorded in his reporting letter that Ms. Kerr felt she had little choice but to convey the property to Mr. Baranow "faced with the large outstanding debts of [her] husband which include[d] a Judgment taken by C.I.B.C. for a debt outstanding in the amount of $26,500.00". At trial, Ms. Kerr was asked whether she had requested Mr. Baranow to save the house; she responded, "I guess so". Thus, contrary to

the judge's finding, there was in fact considerable evidence that Mr. Baranow's paying off of the debts and guaranteeing the mortgage were in connection with the transfer of the property to him. This evidence shows that he accepted the transfer and assumed the financial obligations at Ms. Kerr's request, and in order to further her purpose of preventing the creditors from foreclosing on the property.

180 The Court of Appeal was correct to intervene on this point and conclude that the transfer was not gratuitous. The trial judge's imposition of a resulting trust on one-third of the Wall Street property on this basis accordingly cannot be sustained.

(b) Ms. Kerr's Contributions

181 The trial judge also based his finding of resulting trust on Ms. Kerr's financial and other contributions to the acquisition of the new home on the Wall Street property. He found Ms. Kerr had contributed a total of $60,000: $37,000 in equity from the transfer of the Coleman Street property to Mr. Baranow; $20,000 for the value of the Cadillac also transferred to Mr. Baranow; and $3,000 for the furniture in the Coleman Street property. In addition, the trial judge noted that, in obtaining the legal title of Coleman, Mr. Baranow was able to "re-mortgage both properties for $116,000.00 and apply the $16,000.00 toward the acquisition of the Wall Street Property" (para. 82). Furthermore, Mr. Baranow would not have been able to pay off the mortgages with the same efficiency but for Ms. Kerr's contributions to household expenses. However, the trial judge did not attach any value to these last two matters in his determination of the extent of the resulting trust which he imposed on the Wall Street property.

182 The Court of Appeal reversed this finding as not being supported by the record. The court noted that Ms. Kerr did not have $37,000 in equity in the Coleman Street property when Mr. Baranow took title, Mr. Baranow did not receive any beneficial interest in the vehicle, and there was no evidence of the value of the furnishings.

183 I agree with the Court of Appeal's disposition of this issue. As it pointed out, the evidence showed that, in addition to Mr. Baranow paying cash and guaranteeing a mortgage, he paid the monthly mortgage payments, taxes and upkeep expenses on the Coleman property until it was sold in 1985 for $138,000 (less real estate commission). Mr. Baranow received no beneficial interest in the vehicle and the judge made no finding about the value of the furnishings. There was not, in any meaningful sense of the word, any equity in the Coleman property for Ms. Kerr to contribute to the acquisition or improvement of the Wall Street property. I would affirm the conclusion of the Court of Appeal on this point.

(c) Common Intention Resulting Trust

184 The trial judge also appears to have based his conclusions about the resulting trust on his finding of a common intention on the part of Ms. Kerr and Mr. Baranow to share in the Wall Street property. For the reasons I have given earlier, the "common intention" resulting trust has no further role to play in the resolution of disputes such as this one. I would hold that a resulting trust should not have been imposed on the Wall Street property on the basis of a finding of common intention between these parties.

(d) Conclusion With Respect to Resulting Trust

185 In my view the Court of Appeal was correct to set aside the trial judge's conclusions with respect to the resulting trust issues.

(2) Unjust Enrichment

186 The trial judge also found that Mr. Baranow had been unjustly enriched by Ms. Kerr to the extent of $315,000, the value of the one-third interest in the Wall Street property determined during the resulting trust analysis. The judge found that Ms. Kerr had provided the following benefits to Mr. Baranow:

a. $37,000 equity in the Coleman Street property

b. the automobile

c. the furnishings

d. $16,000 in refinancing permitted by the Coleman transfer and applied to the Wall Street property

e. $22,000 gained on the resale of the Coleman Street property

f. household expenses and insurance paid on both properties

g. spousal services such as housework, entertaining guests and preparing meals until Ms. Kerr's disability made it impossible to continue

h. assistance with planning and decoration of the Wall Street house

i. financial contributions towards the purchase of chattels for the new home

j. a disability tax exemption

k. approximately five years' worth of rental income from Ms. Kerr's son

187 Turning to the element of corresponding deprivation, the trial judge noted that it was "unlikely" that Ms. Kerr had given up any career or educational opportunities over the course of the relationship. Furthermore, her income remained unchanged, even following her stroke, due to her receipt of disability pensions and other benefits. The judge found that she had lived rent-free for the entire relationship. He concluded, however, that she had suffered a deprivation because, had she not contributed her equity in the Coleman Street property, it was "reasonable to infer that she would have used it to purchase an asset in her own name, invest for her own benefit, use it for some personal interest, or otherwise avail herself of beneficial financial opportunity": para. 92. He also concluded, without elaboration, that the benefits that she received from the relationship did not overtake her contributions.

188 The Court of Appeal set aside the trial judge's finding of unjust enrichment. It found that Mr. Baranow's direct and indirect contributions, by which Ms. Kerr was enriched and for which he was not compensated, constituted a juristic reason for any enrichment which he experienced at her expense. The court found that, for reasons mentioned earlier, there was no $60,000 contribution by Ms. Kerr and therefore her claim rested on her indirect contributions. The court also concluded that the trial judge's analysis failed to assess the extent of Mr. Baranow's direct and indirect contributions to Ms. Kerr, including: his payment of accommodation expenses for the duration of the relationship; his contribution to the purchase price of the van which Ms. Kerr still possesses; her receipt of almost half of his lifetime amount of union medical benefits, used to pay for her health care expenses; his taking early retirement with a reduced monthly pension to care for Ms. Kerr; and his provision of extensive personal caregiver and domestic services without compensation. Moreover, in the Court of Appeal's view, the trial judge had failed to note that Mr. Baranow's payment of her living expenses permitted her to save about $272,000 over the course of the relationship.

189 The appellant challenges the Court of Appeal's decision on two bases. First, she argues that the court improperly interfered with the trial judge's finding of fact with respect to Ms. Kerr's $60,000 contribution to the relationship. Second, she submits that the court improperly considered the question of mutual benefits through the lens of juristic reason, and that this resulted in the court failing to consider globally who had been enriched and who deprived. Ms. Kerr's submission on this latter point is that consideration of mutual benefit conferral should occur during the first two steps of the unjust enrichment analysis: enrichment and corresponding deprivation. Once that has been established, she argues that the legitimate expectations of the parties may be considered as part of the analysis of whether there was a juristic reason for the enrichment. The main point is that, in the appellant's submission, it was open to the trial judge to conclude that the parties' legitimate expectation was that they would accumulate wealth in proportion to their respective incomes; without a share of the value of the real property acquired during the relationship, that reasonable expectation cannot be realized.

190 More fundamentally, the appellant urges the Court to adopt what she calls the "family property approach" to unjust enrichment. In essence, the appellant submits that her contributions gave rise to a reasonable expectation that she would have an equitable share of the assets acquired during the relationship.

191 I will deal with these submissions in turn.

(a) Findings of Fact Regarding the $60,000 Contribution

192 As noted earlier, the Court of Appeal was right to set aside the trial judge's conclusion that the appellant had contributed $60,000 to the couple's assets. There was, in no realistic sense of the word, any "equity" to contribute from the Coleman Street property to acquisition of the new Wall Street "dream home". Furthermore, the appellant retained the beneficial use of the motor vehicle, and there was no satisfactory evidence of the value of the furniture. The judge's findings on this point were the product of clear and determinative error.

(b) Analysis of Offsetting Enrichments

193 On this issue, I cannot accept the conclusions of either the trial judge or the Court of Appeal. As noted, in his determination of the extent of Ms. Kerr's unjust enrichment, the trial judge largely ignored Mr. Baranow's contributions. However, for the reasons I have developed earlier, the Court of Appeal erred in assessing Mr. Baranow's contributions as part of the juristic reason analysis; this analysis prematurely truncated Ms. Kerr's *prima facie* case of unjust enrichment. I have set out the correct approach to this issue earlier in my reasons. As, in my view, there must be a new trial of both Ms. Kerr's unjust enrichment claim and Mr. Baranow's counterclaim, it is not necessary to say anything further. The principles set out above must accordingly be applied at the new trial of these issues.

(c) The "Family Property Approach"

194 I turn finally to Ms. Kerr's more general point that her claim should be assessed using a "family property approach". As set out earlier in my reasons, for Ms. Kerr to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that Mr. Baranow has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. Of course, this clarified template was not available to the trial judge or to the Court of Appeal. However, these requirements are quite different than those advanced by the appellant and accordingly her "family property approach" must be rejected.

(d) Disposition of the Unjust Enrichment Appeal

195 I conclude that the findings of the trial judge in relation to unjust enrichment cannot stand. The next question is whether, as the Court of Appeal decided, Ms. Kerr's claim for unjust enrichment should be dismissed or whether it ought to be returned for a new trial. With reluctance, I have concluded the latter course is the more just one in all of the circumstances.

196 The first consideration in support of a new trial is that the Court of Appeal directed a hearing of Mr. Baranow's counterclaim. Given that the trial judge unfortunately did not address that claim in any meaningful way, the Court of Appeal's order that it be heard and decided is unimpeachable. There was evidence that Mr. Baranow made very significant contributions to Ms. Kerr's welfare such that his counterclaim cannot simply be dismissed. As I noted earlier, the trial judge also referred to various other monetary and non-monetary contributions which Ms. Kerr made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the contributions made by Mr. Baranow. In these circumstances, trying the counterclaim separated from Ms. Kerr's claim would be an artificial and potentially unfair way of proceeding.

197 More fundamentally, Ms. Kerr's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that I have set out. Even assuming that Ms. Kerr made out her claim in unjust enrichment, it is not possible to fairly apply the joint family venture approach to this case on appeal, using the record available to this Court. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Moreover, even if one were persuaded that the evidence permitted resolution of the joint family venture issue, the record is unsatisfactory for deciding whether Ms. Kerr's contributions to a joint family venture were linked to the accumulation of wealth and, if so, in what proportion. The trial judge found that her payment of household expenses and insurance payments, along with the "proceeds" from the Coleman Street property, allowed Mr. Baranow to pay off the $116,000 mortgage on both properties before July 1985. There is, thus, a finding that her contributions were linked to the accumulation of wealth, given that the Wall Street property was valued at $942,500 at the time of trial. However, as the judge's findings with respect to Ms. Kerr's equity in the Coleman Street property cannot stand, this conclusion is considerably undermined. For much the same reason, there is no possibility on this record of evaluating the proportionate contributions to a joint family venture. In short, to attempt to resolve Ms. Kerr's unjust enrichment claim on its merits, using the record before this Court, involves too much uncertainty and risks injustice.

198 In this respect, the *Kerr* appeal is in marked contrast to the *Vanasse* appeal. There, an unjust enrichment was conceded and the trial judge's findings of fact closely correspond to the analytical approach I have proposed. In the present appeal, while the findings made do not appear to demonstrate a joint family venture or a concomitant link to accumulated wealth, it would be unfair to reach that conclusion without giving an opportunity to the parties to present their evidence and arguments in light of the approach set out in these reasons.

199 Reluctantly, therefore, I would order a new trial of Ms. Kerr's unjust enrichment claim, as well as affirm the Court of Appeal's order for a hearing of Mr. Baranow's counterclaim.

(3) Effective Date of Spousal Support

200 The final issue is whether, as the Court of Appeal held, the trial judge erred in making his order for spousal support in favour of Ms. Kerr effective on the date she had commenced proceedings rather than on the first day of trial. In my respectful view, the Court of Appeal erred in its application of the relevant factors and ought not to have set aside the trial judge's order.

201 The trial judge found that the appellant's income in 2006 was $28,787 and the respondent's income was $70,520, on the basis of their respective income tax returns. He then applied the Spousal Support Advisory Guidelines ("SSAG") to arrive at a range of $1,304 to $1,739 per month. He settled on an amount at the higher end of that range in order to assist Ms. Kerr in pursuing a private bed while waiting for a subsidized bed in a suitable facility closer to her family.

202 The Court of Appeal agreed with the trial judge that Ms. Kerr was entitled to an award of spousal support given the length of the parties' relationship, her age, her fixed and limited income and her significant disability; she was entitled to a spousal support award that would permit her to live at a lifestyle that is closer to that which the parties enjoyed when they were together; and that the judge had properly determined the quantum of support. The Court of Appeal concluded, however, that the trial judge had erred in ordering support effective the date Ms. Kerr had commenced proceedings. It faulted the judge in several respects: for apparently having made the order as a matter of course rather than applying the relevant legal principles; for failing to consider that, during the interim period, Ms. Kerr had no financial needs beyond her means because she had been residing in a government-subsidized care facility and had not had to encroach on her capital; for failing to take account of the fact she had made no demand of Mr. Baranow to contribute to her interim support and had provided no explanation for not having done so; and for ordering retroactive support where, in light of the absence of an interim application, there was no blameworthy conduct on Mr. Baranow's part.

203 The appellant submits that the decision to equate the principles pertaining to retroactive spousal support with those of retroactive child support has been done without any discussion or legal analysis. Furthermore, she argues that

the Court of Appeal's reasoning places an untoward and inappropriate burden on applicants, essentially mandating that they apply for interim spousal support or lose their entitlement. Lastly, she argues that there is a legal distinction between retroactive support before and after the application is filed, and that in the latter circumstance there is less need for judicial restraint. I agree with the second and third of these submissions.

204 There is no doubt that the trial judge had the discretion to award support effective the date proceedings had been commenced. This is clear from the British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128 ("*FRA*"), s. 93(5)(d):

> (5) An order under this section may also provide for one or more of the following:
>
> . . . . .
>
> (d) payment of support in respect of any period before the order is made;

205 The appellant requested support effective the date her writ of summons and statement of claim were issued and served. She was and is not seeking support for the period before she commenced her proceedings, or for any period during which another court order for support was in effect. I note that she was obliged by statute to seek support within a year of the end of cohabitation: s. 1(1), definition of "spouse" para. (b), of the *FRA*. Ms. Kerr made her application just over a month after the parties ceased living together.

206 I will not venture into the semantics of the word "retroactive": see *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 (S.C.C.), at paras. 2 and 69-70; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254 (B.C. C.A.), at paras. 55-57. Rather, I prefer to follow the example of Bastarache J. in *S. (D.B.)* and consider the relevant factors that come into play where support is sought in relation to a period predating the order.

207 While *S. (D.B.)* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

208 Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. It that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see *S. (D.B.)*, at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, for example, M.L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.

209 Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which

the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *S. (D.B.)*, at paras. 100-103).

210 Neither of these concerns carries much weight in this case. The order was made effective the date on which the proceedings seeking relief had been commenced, and there was no interim order for some different amount. Commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered. There is thus little concern about certainty of the payor's obligations. Ms. Kerr diligently pursued her claim to trial and that being the case, there is little need to provide further incentives for her or others in her position to proceed with more diligence.

211 In *S. (D.B.)*, Bastarache, J. referred to the date of effective notice as the "general rule" and "default option" for the choice of effective date of the order (paras. 118 and 121; see also para. 125). The date of the initiation of proceedings for spousal support has been described by the Ontario Court of Appeal as the "usual commencement date", absent a reason not to make the order effective as of that date: *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (Ont. C.A.), at para. 24. While in my view, the decision to order support for a period before the date of the order should be the product of the exercise of judicial discretion in light of the particular circumstances, the fact that the order is sought effective from the commencement of proceedings will often be a significant factor in how the relevant considerations are weighed. It is important to note that, in *S. (D.B.)*, all four litigants were requesting that child support payments reach back to a period in time preceding their respective applications; such is not the case here.

212 Other relevant considerations noted in *S. (D.B.)* include the conduct of the payor, the circumstances of the child (or in the case of spousal support, the spouse seeking support), and any hardship occasioned by the award. The focus of concern about conduct must be on conduct broadly relevant to the support obligation, for example concealing assets or failing to make appropriate disclosure: *S. (D.B.)*, at para. 106. Consideration of the circumstances of the spouse seeking support, by analogy to the *S. (D.B.)* analysis, will relate to the needs of the spouse both at the time the support should have been paid and at present. The comments of Bastarache J. at para. 113 of *S. (D.B.)* may be easily adapted to the situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in *S. (D.B.)* emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.

213 In light of these principles, my view is that the Court of Appeal made two main errors.

214 First, it erred by finding that the circumstances of the appellant were such that there was no need prior to the trial. The trial judge found, and the Court of Appeal did not dispute, that the appellant was entitled to non-compensatory spousal support, at the high end of the range suggested by the SSAG, for an indefinite duration. Entitlement, quantum, and the indefinite duration of the order were not appealed before this Court. It is clear that Ms. Kerr was in need of support from the respondent at the date she started her proceedings and remained so at the time of trial. The Court of Appeal rightly noted the relevant factors, such as her age, disability, and fixed income. However, the Court of Appeal did not describe how Ms. Kerr's circumstances had changed between the commencement of proceedings and the date of trial, nor is any such change apparent in the trial judge's findings of fact. As I understand the record, one of the objectives of the support order was to permit Ms. Kerr to have access to a private pay bed while waiting for her name to come up for a subsidized bed in a suitable facility closer to her son's residence. From the date she commenced her proceedings until the date of trial, she resided in the Brock Fahrni Pavilion in a government-funded extended care bed in a room with three other people. In my respectful view, her need was constant throughout the period. If the Court of Appeal's rationale was that Ms. Kerr's need would only arise once she actually had secured the private pay bed, its decision to make the order effective the first day of trial seems inconsistent with that approach. The Court of Appeal did not suggest

that her need was any different on that day than on the day she had commenced her proceedings. Nor did the court point to any financial hardship that the trial judge's award would have on Mr. Baranow.

215 Respectfully, the Court of Appeal erred in principle in setting aside the judge's order effective as of the date of commencement of proceedings on the ground that Ms. Kerr had no need during that period, while upholding the judge's findings of need in circumstances that were no different from those existing at the time proceedings were commenced.

216 Second, the Court of Appeal in my respectful view was wrong to fault Ms. Kerr for not bringing an interim application, in effect attributing to her unreasonable delay in seeking support for the period in question. Ms. Kerr commenced her proceedings promptly after separation and, in light of the fact that the trial occurred only about thirteen months afterward, she apparently pursued those proceedings to trial with diligence. There was thus clear notice to Mr. Baranow that support was being sought and he could readily take advice on the likely extent of his liability. Given the high financial, physical, and emotional costs of interlocutory applications, especially for a party with limited means and a significant disability such as Ms. Kerr, it was in my respectful view unreasonable for the Court of Appeal to attach such serious consequences to the fact that an interim application was not pursued. The position taken by the Court of Appeal to my way of thinking undermines the incentives which should exist on parties to seek financial disclosure, pursue their claims with due diligence, and keep interlocutory proceedings to a minimum. Requiring interim applications risks prolonging rather than expediting proceedings. The respondent's argument based on the fact that a different legal test would have applied at the interim support stage is unconvincing. After a full trial on the merits, the trial judge made clear and now unchallenged findings of need on the basis of circumstances that had not changed between commencement of proceedings and trial.

217 In short, there was virtually no delay in applying for maintenance, nor was there any inordinate delay between the date of application and the date of trial. Ms. Kerr was in need throughout the relevant period, she suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with the respondent. Mr. Baranow had the means to provide support, had prompt notice of her claim, and there was no indication in the Court of Appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

218 While it is regrettable that the judge did not elaborate on his reasons for making the order effective as of the date proceedings had been commenced, the relevant legal principles applied to the facts as he found them support the making of that order and the Court of Appeal erred in holding otherwise.

219 In summary, I conclude that the Court of Appeal erred in setting aside the portion of the judge's order for support between the commencement of proceedings and the beginning of trial. I would restore the order of the trial judge making spousal support effective September 14, 2006.

D. Disposition

220 I would allow the appeal in part. Specifically, I would:

a. allow the appeal on the spousal support issue and restore the order of the trial judge with respect to support;

b. allow the appeal with respect to the Court of Appeal's decision to dismiss Ms. Kerr's unjust enrichment claim and order a new trial of that claim;

c. dismiss the appeal in relation to Ms. Kerr's claim of resulting trust and the ordering of a new hearing of Mr. Baranow's counterclaim and affirm the order of the Court of Appeal in relation to those issues.

221 As Ms. Kerr has been substantially successful, I would award her costs throughout.

Appeal by V allowed; appeal by K allowed in part.

Pourvoi de V accueilli; pourvoi de K accueilli en partie.

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2016 ONSC 6298
Ontario Superior Court of Justice

National Money Mart Co. v. State Farm Fire and Casualty Co.

2016 CarswellOnt 16541, 2016 ONSC 6298, 272 A.C.W.S. (3d) 647

NATIONAL MONEY MART COMPANY, carrying on business under the firm name and style of MONEY MART (Plaintiff) and STATE FARM FIRE AND CASUALTY COMPANY (Defendant)

M.D. Faieta J.

Heard: September 19, 2016
Judgment: October 25, 2016
Docket: CV-12-470117

Counsel: Marvin J. Huberman, for Plaintiff
Daniel I. Reisler, for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bills of exchange and negotiable instruments

III Cheques
III.11 Forged or unauthorized cheques
III.11.a Forged cheques
III.11.a.i General principles

Civil practice and procedure

XVIII Summary judgment
XVIII.5 Requirement to show no triable issue

Headnote

Bills of exchange and negotiable instruments --- Cheques — Forged or unauthorized cheques — Forged cheques — General principles

Plaintiff operated business that provided cheque cashing service — Defendant was insurer that issued cheque to insured — Customer purporting to be insured cashed cheque at plaintiff's business — Insured advised defendant that he had not received cheque, with result that cheque was dishonoured by defendant's bank and returned to plaintiff — Plaintiff brought action against defendant for payment of amount of cheque — Defendant brought motion for summary judgment dismissing action — Motion granted — Given that negotiation of cheque was affected with fraud or illegality, plaintiff was not deemed to be "holder in due course" under s. 57(2) of Bills of Exchange Act ("Act") — Plaintiff was not "holder in due course" within meaning of s. 55(1) of Act due to failure to make further inquiries following up on three areas of discrepancy — Information from insurer had indicated discrepancies in customer's date of birth and appearance, and plaintiff itself had discovered discrepancy in customer's name and phone number — Plaintiff showed wilful disregard of facts and must have had suspicion that there was something wrong and refrained from asking questions or making further enquiries — In any event, s. 48(1) of Act applied to bar plaintiff from enforcing payment due to forgery.

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Table of Authorities

Cases considered by *M.D. Faieta J.*:

Aronowicz v. EMTWO Properties Inc. (2010), 2010 ONCA 96, 2010 CarswellOnt 598, 64 B.L.R. (4th) 163, 98 O.R. (3d) 641, (sub nom. *Aronowicz v. Emtwo Properties Inc.*) 258 O.A.C. 222, (sub nom. *Aronowicz v. Emtwo Properties Inc.*) 316 D.L.R. (4th) 621 (Ont. C.A.) — referred to

Benjamin v. Weinberg (1956), [1956] S.C.R. 553, 1956 CarswellQue 37 (S.C.C.) — followed

Hi-Tech Group Inc. v. Sears Canada Inc. (2001), 2001 CarswellOnt 9, 52 O.R. (3d) 97, 11 B.L.R. (3d) 197, 4 C.P.C. (5th) 35, 141 O.A.C. 56 (Ont. C.A.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — considered

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), 2008 SCC 14, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 86 Alta. L.R. (4th) 1, [2008] 5 W.W.R. 195, (sub nom. *Lameman v. Canada (Attorney General)*) 372 N.R. 239, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, [2008] 2 C.N.L.R. 295, (sub nom. *Lameman v. Canada (Attorney General)*) 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General)*) 421 W.A.C. 26, (sub nom. *Canada (Attorney General) v. Lameman*) [2008] 1 S.C.R. 372 (S.C.C.) — referred to

Vinski v. Lack (1987), 21 C.P.C. (2d) 208, 61 O.R. (2d) 379, 1987 CarswellOnt 490 (Ont. Master) — referred to

1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 21 O.R. (3d) 547, 43 R.P.R. (2d) 161, 16 C.E.L.R. (N.S.) 1, 77 O.A.C. 196, 1995 CarswellOnt 63 (Ont. C.A.) — referred to

Statutes considered:

Bills of Exchange Act, R.S.C. 1985, c. B-4
Generally — referred to

s. 2 "holder" — considered

s. 3 — considered

s. 48(1) — considered

s. 55(1) — considered

s. 55(1)(b) — considered

s. 57(2) — considered

s. 165 — considered

Criminal Code, R.S.C. 1985, c. C-46
s. 366(1) — considered

s. 366(1)(a) — considered

s. 366(1)(b) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 4.06(1) — considered

R. 4.06(2) — considered

R. 20.01(3) — referred to

R. 20.02(1) — referred to

R. 20.02(2) — referred to

R. 20.04(2) — referred to

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

R. 20.05(1) — referred to

R. 39.01(4) — referred to

Forms considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Form 4D — referred to

MOTION by defendant for summary judgment dismissing action.

***M.D. Faieta J.*:**

INTRODUCTION

1 The Defendant State Farm Fire and Casualty Company ("State Farm") insured a property, which was owned by Soud Alfedany ("Alfedany") and damaged by fire. State Farm settled Alfedany's property damage claim and issued him a cheque amount of $120,104.73 dated June 19, 2012 (the "Cheque").

2 A person who purported to be Alfedany (the "Customer") presented the Cheque at a store in Toronto operated by the Plaintiff, National Money Mart Company ("Money Mart"), on June 21, 2012. Money Mart paid the full amount of the Cheque, less a commission of about three percent, in two instalments to the Customer on June 22, 2012 and June 25, 2012. On June 29, 2012, Alfedany advised State Farm that he had not received the Cheque. On November 14, 2012, Alfedany provided a statement to State Farm indicating that he disputed the endorsement on the Cheque on the grounds that it was "forged or unauthorized." Both Money Mart and State Farm hold banking accounts with the Bank of Montreal. On December 3, 2012, the Bank of Montreal credited State Farm's account in the amount of $120,104.73.

The Cheque was dishonoured and returned to Money Mart on December 4, 2012. On December 18, 2012, State Farm issued a second cheque to Alfedany in the amount of $120,104.73.

3 Money Mart submits that it is a "holder in due course" of the Cheque pursuant to the *Bills of Exchange Act*, R.S.C. 1985, c. B-4 (the "Act"), and is entitled to payment of $120,104.73, plus interest and costs, from State Farm.

4 State Farm brings this motion for summary judgment to dismiss Money Mart's action. The parties have exchanged affidavits and conducted cross-examinations of the affiants. Money Mart submits the motion for summary judgment should be dismissed and that judgment should be granted in its favour.

5 For the reasons described below, I have granted State Farm's motion for summary judgment and have dismissed Money Mart's claim.

ANALYSIS

6 The following principles apply on a motion for summary judgment:

- A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all of part of the claim in the statement of claim: see Rule 20.01(3), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

- An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit: see Rule 39.01(4).

- An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts: see Rule 20.02(1).

- Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: see *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.), at para. 11.

- In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial: see Rule 20.02(2).

- The court is entitled to assume that the record contains all the evidence that the parties would present if the matter proceeded to trial: see *Aronowicz v. EMTWO Properties Inc.*, 2010 ONCA 96, 98 O.R. (3d) 641 (Ont. C.A.), at paras. 17-19.

- A court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence: see Rule 20.04(2).

- The onus is on the moving party to show that there is no genuine issue requiring a trial: see *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (Ont. C.A.), at para. 36, and *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (Ont. C.A.) at para. 31.

- Under Rules 20.04(2.1) and 20.04(2.2), a court may exercise any of the following powers for the purpose of determining whether there is a genuine issue requiring a trial, unless it is in the interest of justice for such powers to be exercised only at a trial:

    - Weigh the evidence.

- Evaluate the credibility of a deponent.
- Draw any reasonable inference from the evidence.
- Order that oral evidence be presented by one or more parties for the purposes of exercising the above powers.
- If the court cannot grant judgment on the motion, the court should:
  - Decide those issues that can be decided in accordance with the principles described above;
  - Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;
  - In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.
- Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously: see Rule 20.05(1).

7 A "full appreciation" of the evidence is no longer required to rule on the merits of an action without a trial. In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), the Supreme Court of Canada stated, at para. 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

8 The parties agree that if Money Mart is the holder in due course of the Cheque, then it is entitled to payment from State Farm unless s. 48(1) of the Act applies. Accordingly, the issues raised by this motion for summary judgment are as follows:

> Issue #1: Is Money Mart deemed to be a "holder in due course" of the Cheque pursuant to s. 57(2) of the Act?
>
> Issue #2: Is Money Mart a "holder in due course" of the Cheque pursuant to s. 55(1) of the Act?
>
> Issue #3: Is Money Mart barred from seeking to enforce payment of the Cheque by s. 48(1) of the Act?

ISSUE #1: IS MONEY MART DEEMED TO BE A "HOLDER IN DUE COURSE" OF THE CHEQUE UNDER SUBSECTION 57(2) OF THE ACT?

9 Section 2 of the Act defines a "holder" as "the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof." There is no dispute that the Cheque issued by the Defendant is a "bill" given s. 165 of the Act, which states that a "cheque is a bill drawn on a bank, payable on demand."

10 Subsection 57(2) of the Act provides that:

> Every holder of a bill, is in the absence of evidence to the contrary, deemed to be a holder in due course, but if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is the holder in due course is on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course. [Emphasis added.]

11 Accordingly, Money Mart is presumed to be a holder in due course of the Cheque unless State Farm proves that Money Mart's acceptance, issue or subsequent negotiation was affected with fraud or illegality.

12 State Farm submits that the negotiation of the bill is affected with fraud or illegality in that:

1) The person who presented the Cheque to Money Mart was not the payee, Alfedany; and

2) Alfedany's signature on the Cheque was forged.

Did Alfedany present the Cheque?

13 The Cheque was endorsed and given to Money Mart by a man who presented himself as Alfedany on June 21, 2012. This individual provided Money Mart with a driver's licence and a Social Insurance Number card bearing Alfedany's name. He also provided Money Mart with a letter dated June 19, 2012, from State Farm that accompanied the Cheque that had been sent to Alfedany. Alfedany's home had been rendered uninhabitable following a fire on December 11, 2011. The letter, and its attachment, explained that the Cheque had been issued to indemnify Alfedany for property damage as a result of the fire. Staff at Money Mart took a photo of the individual who presented the Cheque. The photo shows a man wearing dark sunglasses.

14 David Hladysh is a claims representative for State Farm. His affidavit evidence, at paras. 21-23, is as follows:

> I have personally met Mr. Alfedany on many occasions in 2012 and 2013. Specifically, I met with Mr. Alfedany on January 26, 2012, March 2, 2012, March 13, 2012, May 16, 2012, and July 30, 2013.
>
> Money Mart has produced a photocopy it made of the driver's licence presented by the man who negotiated the cheque to Money Mart. A true copy of the photocopied driver's licence is attached hereto . . . Having personally met Mr. Alfedany on several occasions, I am able to say that the man pictured in the driver's licence . . . does not look like Mr. Alfedany. I do not believe that the man pictured in the driver's licence . . . is Mr. Alfedany.
>
> Money Mart has produced a second photograph of the individual who presented the cheque to it. . . . Having met Mr. Alfedany on several occasions, I am able to say that the man pictured in the photograph does not look like Mr. Alfedany. I do not believe that the man pictured in the photograph . . . is Mr. Alfedany.

15 On cross-examination, the above evidence of Hladysh was unchallenged. However, Hladysh stated that he did not know the identity of the person who cashed the Cheque at Money Mart: see Question 100.

16 State Farm submits that the person who presented the Cheque to Money Mart was Mohammed Husari. It relies on the evidence of Detective Amber Jackson of the Brantford Police Service, who stated that driver's licence presented to Money Mart was invalid because the algorithm shown on the licence was incorrect given the displayed name. She further stated that the police investigation identified the Customer as Mohammed Husari: see Affidavit of Detective Jackson, at para. 4.

17 On cross-examination, Detective Jackson explained that once Husari was identified as the person who had cashed the Cheque, the police investigation was passed to the Toronto Police Service in December 2012 because Husari lives in Toronto: see Questions 43-48.

18 Based on the above evidence, I am satisfied that Alfedany was not the Customer and did not present the Cheque at Money Mart for payment.

Was Alfedany's signature on the Cheque forged?

19 The Act does not define "forgery." However, the *Criminal Code*, R.S.C. 1985, c. C-46, s. 366(1), provides that "forgery" occurs when a person "makes a false document, knowing it to be false, with intent (a) that it should in any way

be used or acted on as genuine, to the prejudice of any one whether within Canada or not; or (b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not."

20 State Farm submits that the endorsement on the back of the Cheque was forged as it was not signed by Alfedany.

21 State Farm's claims representative, David Hladysh, states that the Customer's signature on the documents provided by Money Mart (i.e. the endorsement on the back of the Cheque, the driver's licence, the agreement of purchase and sale, and customer registration form) bears no resemblance to Alfedany's signature on documents submitted to State Farm earlier in the history of this claim, such as a residential tenancy agreement Alfedany entered after the fire.

22 Further, State Farm relies upon an "Affidavit of Forgery or Missing Endorsement" purportedly signed by Alfedany, which states:

> The undersigned, residing at the address below, being duly sworn, deposes and says that the cheque(s)/draft(s), described below has/have been examined and the item(s) is/are disputed on the ground(s) of:
>
> (X) Forged or Unauthorized Endorsement . . .
>
> The undersigned denies having authorized any person to negotiate/transfer/cash/deposit said cheque(s)/ draft(s) without all necessary endorsements; or authorized any person to endorse or alter said item(s). Any endorsement on the cheque(s)/draft(s) is not mine, nor was it authorized by the undersigned. It is further warranted that no proceeds or benefits from the unauthorized payment/negotiation of the item(s) was/ were received directly or indirectly by the undersigned. . . .

23 The "Affidavit of Forgery or Missing Endorsement" cannot be relied upon as it does not comply with the requirements of Rule 4.06(1) of the *Rules of Civil Procedure*. First, it is not in Form 4D. Second, it is not written in the first person and does not preface the statement made by the affiant with the phrase "I [insert name] . . . MAKE OATH AND SAY or AFFIRM." Third, the "affidavit" simply contains the illegible signatures of the "affiant" and a "notary public," and does not identify their names: see *Vinski v. Lack* (1987), 61 O.R. (2d) 379 (Ont. Master). Fourth, Hladysh states that he was told by a person named "Angel" that Alfedany signed the "Affidavit of Forgery and Missing Endorsement." In my view, this hearsay evidence is unreliable. Had State Farm wished to rely upon Angel's statement that Alfedany had signed the Affidavit, then it should have placed her affidavit evidence (or a proper affidavit from Alfedany) before this court.

24 Notwithstanding the inadmissibility of the purported Alfedany affidavit, I find that the Cheque was forged given the unchallenged evidence of Hladysh that the signatures on the Cheque bears no resemblance to Alfedany's signature found on documents in State Farm's possession.

Conclusion

25 Given that I have found that the negotiation of the Cheque was affected with fraud or illegality, Money Mart is not deemed to be a "holder in due course" under s. 57(2) of the Act. However, it is open to Money Mart to prove that it is a "holder in due course" within the meaning of s. 55(1) of the Act.

ISSUE #2: IS MONEY MART A "HOLDER IN DUE COURSE" OF THE CHEQUE UNDER SUBSECTION 55(1) OF THE ACT?

26 Subsection 55(1) of the Act states:

> A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,

(a) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; and

(b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it. [Emphasis added.]

27 Section 3 of the Act states:

A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

28 State Farm argues that Money Mart has not satisfied s. 55(1)(b) of the Act.

29 In *Benjamin v. Weinberg*, [1956] S.C.R. 553 (S.C.C.), the Supreme Court of Canada, in finding that the appellant was not a holder in due course, adopted the following tests to determine whether the appellant became the holder in due course of a cheque that had been signed in blank by the respondent:

If he was . . . honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind — I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover — I think that is dishonesty: see *Jones v. Gordon*, [1877] 2 A.C. 616 at 629 (Lord Blackburn)

If there be anything . . . wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry: see *London Joint Stock Bank v. Simmons*, [1892] A.C. 201 at 221 (Lord Herschell) [Emphasis added.]

30 This subjective approach rewards negligent business practices and at least one commentator has suggested that it may be time to reconsider the test for "good faith" to include the observance of reasonable commercial standards: see Bradley Crawford, Q.C., *The Law of Banking and Payment in Canada* (Aurora: Canada Law Book, 2008) (loose-leaf, November 2008 and October 2012 supplements), at pp. 21-37 to 21-39.

31 The evidence shows that when the Cheque was presented, staff at Money Mart followed its standard procedure to ensure that it was cashing the Cheque for the right person. Given that he was a new customer, this required completing a Customer Registration Form and a "Working the Cheque Form," and getting the customer's driver's licence, a second piece of identification, and a "guesstimate" of his height, weight, eye colour and hair colour: see the Affidavit of Carrie Crowe, sworn April 9, 2015, at para. 5 and Appendix "A"; excerpts from the Examination of Leon Broomes, August 2, 2013.

32 Staff found that the Customer's explanation for the amount of the Cheque made sense because the Customer provided a letter from State Farm, which described that the payment represented reimbursement for a fire damage claim. On the following day, Money Mart sought confirmation from the Bank of Montreal that sufficient funds were available in State Farm's bank account to cover the amount of the Cheque. Such confirmation was received by fax. Another section of the form asks "Does this make sense?" The answer written on the form was "Yes, maker approved. Cheque is remaining settlement payment for claim. Structural Damage Claim Policy included": see "Working the Cheque Form" dated June 21, 2012, Affidavit of David Hladysh, Tab P; excerpts from the Examination of Leon Broomes, August 2, 2013.

33 State Farm submits that Money Mart, for the following reasons, should have suspected that something was wrong with the transaction and should have made further inquiries rather than close their eyes to the situation.

Discrepancy between the Customer's and Alfedany's Date of Birth

34 The date of birth on the driver's licence presented by the Customer to Money Mart was April 30, 1968. A credit check performed by Money Mart on June 22, 2012, provided a date of birth of July 1, 1956, and stated "input DOB does not match DOB on file."

35 Money Mart claims that that the 1968 date of birth was confirmed by telephone call with State Farm. The basis for this assertion is the affidavit of Carrie Crowe, a North American Fraud Manager for Money Mart. The affidavit is not based on her investigation and does not state the source of her information and belief for her synopsis of the events that occurred on June 21, 2012 to June 25, 2012: see Affidavit of Carrie Crowe, sworn April 9, 2015, at para. 5. Once again, this affidavit fails to comply with Rule 4.06(1) and (2). It is not confined to facts within her personal knowledge. There is no indication that she took any part in the events. Further, the affidavit does not state the source of her information and belief for the many statements regarding the events. For these reasons, I strike paragraph 5 of Crowe's affidavit.

36 Paragraph 9 of the affidavit evidence of David Hladysh relies on a file log note written by Kelly Tuplin of State Farm which shows that Money Mart called State Farm on June 22, 2012, at 12:59 p.m. to inquire about the date of birth and was told that the date on the driver's licence presented to Money Mart did not match State Farm's records. The log note states:

> Phone Call from Pat Tran from Dollar Financial Money Mart (Money Mart).
>
> Call was originally transferred through Lisa Campbell. Lisa advised the birthday they had with his driver's license was incorrect to the birthday we had on file. Money Mart was saying the birthday was in April and the years was in the 60's. Our file shows birthday 07/01/1956.
>
> Spoke with Pat — He was trying to confirm details regarding the cheque and our insured. For security reasons, obtained his phone number . . . called back . . .

Pat asked if Soud picked up the cheque yesterday. As per task, it was mailed out. He then asked for a description of Soud — Provided description based on my memory and Michael's memory from meeting him. Approx 200 pounds, 5"11 [sic], short dark hair / grey on the sides, very soft spoken. Pat agreed with the description and thanked me for the time. See Page 14 of Exhibit D to the Affidavit of David Hladysh

37 I find that Money Mart staff was told by State Farm staff that Alfedany's date of birth was July 1, 1956, and not the date of birth on the driver's licence presented by the Customer.

Discrepancy in Appearance of the Customer and Alfedany

38 The Registration Form completed by Money Mart staff states that the Customer was five feet, seven inches, and 170 pounds. It states that his hair and eyes are brown: see Affidavit of David Hladysh, Exhibit "O."

39 As noted above, State Farm provided Money Mart with a physical description for Alfedany that was clearly different — 5'11", 200 pounds, short dark hair, grey on the sides.

Discrepancy in Name and Telephone Number Associated with Address Given by Customer

40 Money Mart conducted a Google search of the address that the Customer provided. The Google search came back with the address, phone number and name "A. Moussa." The name and phone number were different than the name and phone number given by the Customer: see Affidavit of Carrie Crowe, Tab 1.

Conclusion

41 Given the above discrepancies, there is no explanation for why Money Mart did not make further inquiries to confirm that the Customer was Alfedany. There are many steps it could have easily taken, such as asking State Farm for a sample of Alfedany's signature.

42 In my view, using the words of the Supreme Court of Canada in *Benjamin*, Money Mart's failure to make further inquiries following up on the three areas of discrepancy described above, "showed a wilful disregard of the facts and must have had a suspicion that there was something wrong and refrained from asking questions or making further enquiries."

43 Accordingly, I find that that Money Mart is not a "holder in due course."

44 For completeness, I will address the fact that Money Mart would have been barred from enforcing payment by s. 48(1) of the Act had I found that it was a holder in due course of the Cheque.

#3: IS MONEY MART BARRED FROM ENFORCING PAYMENT OF THE CHEQUE BY SUBSECTION 48(1) OF THE ACT?

45 Section 48(1) of the Act states:

> Subject to this Act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. [Emphasis added.]

46 As noted above, I have found that the signature on the Cheque was forged.

47 Accordingly, the issue is whether State Farm is precluded from setting up forgery as a defence to Money Mart's enforcement of the Cheque. In this context, "precluded" means "estopped." "Setting up" means pleading and establishing by evidence. The question is whether State Farm is estopped from denying Money Mart's claim on the basis that the signature on the Cheque is forged by its own " . . . words and conduct or silence and inactivity . . . ": see Crawford, *The Law of Banking and Payment in Canada*, at pp. 23-54 ff.

48 Money Mart relies the following statement from para. 10 of the affidavit of Carrie Crowe, Money Mart's National Fraud Investigator, as the basis for the estoppel:

> After my investigation, I concluded that Money Mart's employees properly followed all procedures and conducted appropriate due diligence. These employees had no reason to believe or suspect that the item presented was counterfeit. The only discrepancy was the DOB [date of birth], and when that was discovered Money Mart was prepared to turn the cheque away. It was only because a State Farm representative confirmed the DOB on the [Driver's] Licence, not the credit check, and provided a physical description of the person standing in our lobby that a decision was made to negotiate the subject cheque. [Emphasis added.]

49 However, there is no evidence that Crowe has any personal knowledge of the above facts, particularly those underlined above, as her affidavit does not state that she took part in the events that occurred on June 21, 22, or 25, 2012. Crowe's affidavit does not describe the source of her information and belief for the various assertions that she has made. Further, Money Mart has not provided this court with evidence of the persons who took part in those events, including discussions with representatives of State Farm and the decision to negotiate the Cheque. Once again, Crowe's affidavit evidence does not comply with Rules 4.06(1), (2) and 39.01(4) of the *Rules of Civil Procedure*. For these reasons, I find that the above statement should be struck.

50 In any event, I reject the submission that State Farm confirmed the information Money Mart provided about Alfedany. I have already found above that State Farm provided Money Mart with a date of birth and description of Alfedany that did not match those provided by the Customer.

51 Accordingly, the defence provided by s. 48(1) of the Act applies.

CONCLUSION

52 For the above reasons, I have granted State Farm's motion for summary judgment.

53 The parties have agreed on costs and, accordingly, I award the sum of $7,500, inclusive of fees, disbursements and taxes, to State Farm.

Motion granted.

End of Document

1996 CarswellOnt 3284
Ontario Court of Justice, General Division

PCL Industries Ltd. (Receiver of) v. 431218 B.C. Ltd.

1996 CarswellOnt 3284, 14 O.T.C. 77, 65 A.C.W.S. (3d) 671

Beallor Beallor Burns Inc., in its capacity as Receiver of PCL Industries Limited, Plaintiff v. 431218 B.C. Ltd. and 431220 B.C. Ltd., Defendants

Benotto J.

Judgment: September 11, 1996
Docket: Doc. 93-CQ-45923

Counsel: *Michael J. W. Round*, for the Plaintiff (Moving Party).
Peter Greene, for the Defendants (Responding Parties).

Subject: Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bills of exchange and negotiable instruments

IV Promissory notes and bank drafts
IV.20 Miscellaneous

Civil practice and procedure

X Pleadings
X.8 Amendment
X.8.c Grounds for amendment
X.8.c.iii Identification of parties

Debtors and creditors

II Payment by debtor
II.2 Mode of payment
II.2.c Set-off

Benotto, J.:

1 The defendants gave a promissory note for $800,000 to a company, "PCL". PCL gave an assignment of money due to Montreal Trust as part of continuing security for payment of its obligations. The Assignment included the promissory note. Montreal Trust appointed "Beallor" to be the receiver of PCL and instructed it to exercise all rights and powers of Montreal Trust as holder of the security. Beallor brought an action against the defendants on the promissory note and then this summary judgment motion.

2 The defendants brought a cross motion to amend the statement of defence to plead that the proper plaintiff should be Montreal Trust, not Beallor. The amendment was granted at the outset subject to such terms as would seem appropriate after argument on the summary judgment motion.

3 The issues are:

1. Is Beallor the correct plaintiff?

2. Can the defendants assert a set-off in the face of the prohibition in the promissory note?

3. Are the defendants entitled to a deduction for the "qualifying payments" defined in the note?

Correct Plaintiff

4 The defendants' counsel argues that the motion must fail because Beallor is the wrong plaintiff. Beallor, he says, is the receiver for PCL, not an agent for Montreal Trust, and can therefore only realize on assets owned by PCL. Since PCL assigned away its rights to Montreal Trust, the receiver has nothing to sue for. PCL, it is argued, did not own the promissory note at the time the action was commenced.

5 I do not agree with this position. The assignment of the note by PCL to Montreal Trust was not absolute. It was part of the continuing security for the payment of PCL's obligations to Montreal Trust. The terms of the assignment confirm it is given as continuing security for the payment of PCL's liabilities. Therefore, PCL retained the right to sue on the note. (See *Hazel v. Rahaman* (1981), 32 O.R. (2d) 108.) The receiver was given power by Montreal Trust to exercise all its rights as holder of the security including the note. In fact, Montreal Trust may not have been able to bring the action in its own name because the assignment was not absolute and no notice had been given to the defendants.

6 Therefore, I do not accept the technical defence that Montreal Trust should have been the plaintiff. Moreover, the presence of Montreal Trust as a *named* party is unnecessary for the adjudication of the issues. Had I found otherwise, as a term of the amendment, I would either have dispensed with the requirement to add it (rule 5.03(6)) or I would have granted the plaintiff leave to add Montreal Trust as a party *nunc pro tunc*.

7 The defendants' counsel said the addition of Montreal Trust would require an adjournment so new pleadings could be exchanged. That is incorrect for he agreed that no new issues, positions or defences would be raised. The pleadings, production and discovery would be exactly the same. Nothing would change. The exact motion that was argued before me would then be re-argued in front of another judge. Nothing would be achieved but expense and delay. This would waste the Court's time and amount to an abuse of process. It would ignore the general principle of interpretation of the rules of practice: to secure the most expeditious and least expensive determination of the case. The "golden rule" is that "fussiness over matters of form, affecting no matter of substance, is quite useless": see: *Meredith CJCP* in *Richard v. Hall* (1928), 62 O.L.R. 212 at 217.

Set-Off

8 The promissory note provides that there is to be no set-off. The defendants argue that, due to ambiguity of the clause, parole evidence is admissible to determine the parties' true intent and this can only be determined after trial. The ambiguity is said to lie in the wording of the following clause:

> The undersigned shall pay all principal and interest hereunder without set-off or counterclaim (including, without limitation, any set-off or counterclaim related to the purchase by the undersigned of certain securities...) and without deduction or withholding for or on account of any present or future taxes, levies, duties, imposts or other charges of any kind.

9 Defendants' counsel says that the parentheses create uncertainty because they contain words that refer to particular areas of set-off. He states that those words cast doubt on the intention to exclude all set-off. I disagree. In my view, the clause is perfectly clear: no set-off. The addition of the words "including, without limitation" must have been added so as not to restrict the set-off. There is therefore no need to look beyond the wording of the note. However, even if the clause was ambiguous, I find, having examined the evidence, that it supports the straightforward interpretation of the clause: there is to be no set-off.

10 Even if set-off could be asserted, it would fail. There is no mutuality of the debts being set off and there can be no set-off after the debtor becomes aware of the receiver. (See *Robbie & Co. v. Witney Warehouse Co.*, [1963] 3 All E.R. 613 (C.A.) and *United Steel Corporation v. Turnbull*, [1973] 2 O.R. 540 (C.A.).

11 Thus, there are no triable issues on the set-off.

Qualifying Payment

12 The terms of the note allow for the deduction of one half of certain payments called "qualifying payments" which are defined. These were payments that were incurred in settling a UK tax debt. The defendants were obliged, under the terms of the note, to provide "detailed documentation" regarding the payments upon request. The disputed payments (totalling some $24,600) fall into three categories.

1. Payments to Linklaters & Paines

13 The note says that the payments to legal counsel in UK, Linklaters & Paines, were qualifying payments. The disputed payments were to Linklaters & Paines in New York, not UK. In addition, the defendants have not produced, as requested, documents that would prove the work done. This was necessary because the invoices produced refer to work that may not be concerning the UK tax debt. For these two reasons, the payments do not quality.

2. Payments to Touche Ross

14 These payments were made after the maturity date of the note. The defendants' representative, Mr. McInnis, said in his examination for discovery (p.29) that he knew payments had to be made before the maturity date to qualify. This makes sense, as otherwise, there would be no way of knowing the amount due on maturity.

3. Payments to Price Waterhouse

15 These, too, were after maturity and substantiating documentation was not produced. There is therefore no triable issue on the qualifying payments.

16 The plaintiff shall have judgment as requested. Counsel may send me brief costs submissions within two weeks.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Grinberg v. Law Development Group (Thornhill) Ltd. | 1996 CarswellOnt 1821, [1996] O.J. No. 1722, 2 R.P.R. (3d) 209, 1 O.T.C. 392, 63 A.C.W.S. (3d) 745 | (Ont. Gen. Div., May 1, 1996)

1994 CarswellOnt 3965
Ontario Court of Justice (General Division)

Richards v. Law Development Group (Georgetown) Ltd.

1994 CarswellOnt 3965, [1994] O.J. No. 2914, 52 A.C.W.S. (3d) 210

Kimberly J. Richards and Sylvester Richards, Plaintiffs and Law Development Group (Georgetown) Limited, Defendant

Grossi J.

Heard: September 8, 1994
Judgment: December 14, 1994
Docket: Toronto 92-CQ-24091

Counsel: *Normand Direnfeld*, for Plaintiffs.
Barbra H. Miller, for Defendant.

Subject: Contracts; Property

Headnote

Sale of land — Condominiums — Agreement of purchase and sale — Time of performance

Sale of land — Condominiums — Agreement of purchase and sale — Disclosure statement

Sale of land — Condominiums — Termination

***Grossi J.*:**

Reasons for Judgment

1 This action arose out of the purchaser's (the "Plaintiffs") refusal to close an Agreement of Purchase and Sale of a condominium unit owned and built by the defendant developer (the "Defendant").

2 In this case the Plaintiffs brought an action for the return of their deposit in the amount of $10,000 plus special and punitive damages which they claim are due to the alleged negligent misrepresentations and breach of contract by the Defendant. The Defendant counterclaimed for damages determined at the conclusion of trial to be in the amount of $14,988.95, being the loss incurred by it as a result of the shortfall in the resale of the subject property.

3 I heard a great deal of evidence and submissions not all of which were relevant over a period of 10 days.

4 On February 27, 1991, the parties entered into an agreement for the purchase of a condominium townhouse unit, to be built for the price of $129,880. The deposit of $10,000 was paid in seven instalments, the last being 180 days after the execution of the agreement. The balance of the purchase price was to be secured by the arrangement of a first mortgage in the amount of $116,892.00. The sum of $3,000.00 subject to adjustments, was due on closing. The closing date was

to be March 1, 1992. It was also stipulated to be a tentative occupancy date, which could be varied by the vendor in accordance with the provisions in the agreement.

5 The Plaintiffs purchased the unit from a brochure they received and viewed. They also received and viewed a site plan on which the proposed development was laid out. At that time the development site was in its natural state and no servicing of the site or construction of condominium townhouses had commenced.

6 The contract was contained in a customary condominium Offer to Purchase form and included, among other terms, reference to the following Warranty Programme, Workmanship and Materials, Inspection, Occupancy Date, Extensions to complete, Changes to the plan, Representations, Disclosure Statement and That time shall be of the essence.

7 On July 6, 1992, the closing date the Plaintiffs inspected the unit and found it was not to their liking. They claimed it was unsuitable, and advised the Defendant that they did not want the unit. As a result the transaction did not close.

8 The Plaintiffs advanced a number of arguments based for the most part on the above mentioned terms.

Negligent Misrepresentation:

9 The Plaintiffs allege that the Defendant made negligent misrepresentations which induced them to enter into the Agreement of Purchase and Sale. Their chief allegation is that the sales agent provided to them misleading or blatantly incorrect information in that they would have an unobstructed view of the neighbouring heritage home.

10 Mr. Richards provided the chief evidence for the Plaintiffs. He testified that he and his wife looked at the Kingsmill Brochure, and as they were interested in the Avebury Model, told Pam Pitfield, the sales person on site, that their concern was to select a unit that suited their needs. They particularly referred to a future sale. Mr. Richards stated that as the site was not yet cleared, the sales person pointed to the approximate location of Units 7 through 10 on the site plan, and indicated that a heritage home was situated on the property to the rear of these units. The units would front an open area containing visitor parking. These factors, he said, prompted them to select Unit 9.

11 Pam Pitfield stated that she had 8-years of experience in real estate sales and had been selling the subject development for the past 2 years. She met the Plaintiffs in the sales office located in a trailer on the site in February 1991. At the time the site was in its natural state i.e. uncleared bush. She felt that the Plaintiffs had decided on their choice of unit before speaking to her. She thought the location was good as she expected that there would be no building on the land on which the neighbouring heritage home was located, and there would be no townhouses to the front or back, and no road, or railway line to the rear. She stated that there was no discussion about the view. She discussed the location of visitor parking and a green parkette in front of the unit. She did not recall or remember a discussion about the location of the heating unit and electrical panel. She did recall the attendance of Mrs. Richards and her mother at the office and getting the impression that the latter did not agree with the purchase.

12 She stated that the location of the wood fence to the rear of Units 7-10 was clearly visible on the site plan and that she had no idea of construction height or grading requirements. It was her opinion that the unit continued to be the best location as the others either front on the main road, or backed onto each other or a railway line.

13 She continued to be involved in selling the development along with another development involving detached homes two to three miles away.

14 I accept the evidence of Mrs. Pitfield. She was a reliable and knowledgeable witness. She had sufficient experience in real estate sales to recognize the limitations of her role in the sale. In my view her discussions concerning the heritage home cannot be construed as an inducement to be relied on by the Plaintiffs to enter into the agreement. Nor could she reasonably be expected to know the placement of electrical and heating systems in the unit and the grading requirements of the development. I find therefore that is it unlikely she would discuss these with the Plaintiffs.

15 In my view Mrs. Pitfield action does not give rise to any negligent misrepresentations. Further the agreement stipulate that there are no representations other than those expressed in the agreement. See Schedule A. Page 12 cl.(d):

> (d) The Purchaser acknowledges and agrees with the Vendor that there is no representation, warranty, guarantee, collateral agreement or condition precedent to, concurrent with, or in any way affecting this Agreement, Condominium or the Property other than expressed herein.

Substantial Completion:

16 The Plaintiffs claim that they did not close the deal as the unit was not substantially completed on the scheduled closing date.

17 On the facts I find as follows:

> The occupancy date was set for July 6, 1992. Sometime between 8:00 and 9:00 a.m. that day the Plaintiffs met with Joe Pettigen the Defendant Customer Service Representative to conduct pre-delivery inspection. On opening the door to the unit the Plaintiffs were unwilling to do the inspection. Pettigen suggested that they reschedule it for later in the day. The Plaintiffs looked through the unit, and agreed to reschedule the inspection as suggested. This allegedly lasted 15-20 minutes. About noon on the same date the Plaintiffs accompanied by Mr. North, Mrs. Richards father attended, met Pettigen and commenced the inspection. Pettigen, clip board in hand, went through the unit noting Mr. North's complaints and what he believed were deficiencies. There were many; too many to enumerate. They are set out in a series of photographs which form Exhibits 1-27. The photographs were taken on behalf of the Plaintiffs on July 6, 1992, with the exception of photographs 2 and 3 which were taken on July 7, 1992.

18 The Plaintiffs refused to sign the inspection form and advised that they did not want the unit. Pettigen denied advising the Plaintiffs that the unit would be ready on July 10, next.

19 I am satisfied that the unit was substantially complete and met the requisite condition. On this date there was in effect a municipal authorization to occupy it, and other suites, issued by the Town of Halton Hills. Each and every one of the complaints were explained by the defence witnesses and I accept their evidence. They were experienced in the construction industry and, in particular, the bringing of condominium units to completion for occupancy.

20 Shawn Dillion, a building inspector for the Town of Halton Hills inspected the unit. Part of his concerns on inspection of any unit were (and are) as follows: The safety of the unit for a person who is going to occupy the premises, the availability of water, a toilet facility, lighting and heating. While the availability of heat is a concern, during the months of July and August, this may be waived provided the hot water system is on. He found that the unit complied with sections 2.4.3.2(1) of the Ontario Building Code and that it met the minimum standard of the Town of Halton Hills. He approved the issuance of an occupancy certificate for the unit as of July 6, 1992.

21 I am of the view the defects were of no practical interference with the occupancy as they were such that they could have been repaired, replaced or installed that day.

22 As stated above the complaints are too numerous to deal with individually. In any event, in my view, it is not necessary to do so, except for the water, electrical, heating and cooling facilities.

23 The Plaintiffs' photograph Exhibit 7 shows a kitchen light which is on. The witnesses Hewitt, Pettigen and Lewis stated that the lights were on. Dillion stated that he would not issue an occupancy certificate unless the water was on. Pettigen recalls demonstrating how to hook up the dishwasher and turning the taps on and flushing the toilet. Pettigen recalls it being a hot day and on testing the air conditioner found it to be working.

24 Paragraph 10 of the agreement enables the purchaser to the return of his deposit if the unit is not substantially complete. This remedy is not available due to the issuance of an occupancy certificate signifying that the unit may be occupied.

25 Notwithstanding the issuance of an occupancy certificate signifying that the unit is substantially complete, in some cases there may remain some items in dispute. In this event the Purchasers may claim damages as set out in Sec. 14(1) (b) of the *Ontario New Home Warranty Plan Act*, and section 6(1) of the Regulations. In this case the Purchasers did not avail themselves of this remedy.

Inspection Prior to Closing:

26 The Plaintiffs claim that the Defendant failed to carry-out the requirement of inspecting the property seven days prior to the closing date.

27 The Purchasers attended to inspect the unit on June 19 and July 4. The unit was uninhabitable for occupancy. On the latter date they were advised to return on July 6 between 8:30 - 9:00 a.m. for an inspection. The final inspection did not occur 7 days prior to the closing date.

28 In my view, inspection is required for the purpose of complying with the *Ontario New Homes Warranties Plan Act*. Paragraph 8 of Schedule "A" to the Agreement of Purchase and Sales states:

> 8. The Purchaser agrees to inspect the Unit upon the Vendors's request and with a representative of the Vendor at least seven (7) days prior to the Closing Date. At the time of such inspection, the Purchase shall execute a certificate of completion and possession in such form as is prescribed, from time to time, under the Ontario New Home Warranties Plan Act listing all outstanding, incomplete or apparently defective items in the Unit. Except as to those items specifically listed in the certificate, the Purchaser shall be deemed to have acknowledged that the Unit has been completed in accordance with this Agreement and the Purchaser shall be deemed conclusively to have accepted the Unit. At the option of the Vendor, the Purchaser shall not be entitled to possession of the Property unless and until the Purchaser has executed such certificate, but notwithstanding the foregoing, from and after the Closing Date, the Purchaser shall be obligated to commence the payment of the Occupancy Licence Fee and to perform its obligations under the Occupancy Licence, if applicable.
>
> In the event the Purchaser fails to attend and execute the certificate of completion and possession prior to the Closing Date, the Vendor may declare the Purchaser to be in default under this Agreement or, at the Vendor's discretion, it may complete such form on behalf of the Purchaser and in such event, the Purchaser hereby irrevocably appoints the Vendor or its agent to complete such form on its behalf and the Purchaser shall be bound as if he had executed such form.
>
> The Vendor agrees to complete all items set forth in the certificate of completion and possession in respect of the Unit as soon as is reasonably practicable. In addition, the Vendor agrees to rectify any apparent defects in materials or workmanship covered by the warranty certificate for the Unit in accordance with the certificate within a reasonable time after the Closing Date provided the Purchaser has made a claim with respect to such defect as required under the Ontario New Home Warranties Act.

29 The Purchasers conduct implied that if they were satisfied with the unit, they would take occupancy on July 6. The inspection in this case was ongoing. I am therefore of the view that the inspection requirement was complied with.

Disclosure Statement:

30 The Plaintiffs claim that the Defendant did not make full disclosure of alterations made to their unit on the Disclosure Statement. In particular, the Plaintiffs argued that reference should have been made to the following:

alterations to the kitchen, placement of the electrical panel and furnace, installation of a water heater, and the retaining wall.

1. Alterations to the Kitchen:

31 The alterations in the kitchen concern the placement of the stove and refrigerator and the size of cabinet drawers. On the floor plan these appliances are located on either side of the sink.

32 By letter dated June 25, 1992, in response to the Plaintiffs, the Defendant advised that according to their construction department, the fridge and stove were located beside each other as there was not enough room for all of the cupboards if they were located as per the brochure, beside each other.

33 By fax dated July 2, 1992 in response to the Plaintiffs, the Defendant advised that the drawers were the same as other "A" units, the unit being purchased.

2. The Placement of the Electrical Panel:

34 David Lewis was the Defendant's General Supervisor of Construction. He was employed by the Defendant for seven years. His duties were to visit the Defendant's building site and supervise the site supervisors. He attended the site daily. He stated that the placement of the electrical panel is determined by the electrical contractor with the approval of Ontario Hydro. Applying the electrical installation requirements to the unit layout, the panel in the living room ultimately became the only location for the placement of the panel.

3. Placement of the Furnace:

35 He stated regarding the location of the furnace, heat and air vents are required to be on an outside wall. Applying the principle of heat loss prevention, the back wall was the most reasonable location.

4. Hot Water Heater:

36 The Agreement stipulated that hot water would be heated by gas. As an alternative to gas, electricity was substituted. Lewis explained that electrical hot water heating was substituted for gas as a chimney vent would be required for the gas. The vent would encroach on the upper unit thereby creating a legal problem.

5. The Retaining Wall:

37 The complaint regarding the retaining wall was not made until the closing date. The Plaintiffs complained that it is too high, thus obstructing their view of the neighbouring heritage home.

38 In my view a reasonable Purchaser viewing the site and the site plan would expect that construction of this magnitude would possibly result in a significant grade change. This is especially true of Mrs. Richards as her father, Mr. North, had some experience in the development business.

39 Mr. Chin, the architect, explained that the retaining wall was necessary because construction of roads and installations of services affected the grade. Soil had to be moved and supported; and support was achieved by building a wall.

Content of Disclosure Statements:

40 The issue, then, is what must a disclosure statement contain? Section 52(6) of the *Condominium Act*, R.S.O. 1990, c. C.26 lists the information that the disclosure statement must contain. The subsections relevant to this case state as follows:

> 52(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

. . . . .

(b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;

. . . . .

(g) any other matters required by the regulations to be disclosed.

41 The most comprehensive case on the extent of the purchaser's right to rescind an agreement of purchase and sale of a condominium is *Abdool v. Somerset Place Developments of Georgetown; Budinsky v. Breakers East, Inc.* (1992), 10 O.R. (3d) 120 (C.A.) leave to appeal refused: (1993), 101 D.L.R. (4th) vii (Note) (S.C.C.)

42 In that case it was held that an agreement for the sale of a condominium could still be terminated after the ten-day cooling off period if there was a material defect in the disclosure statement, at p. 139 the Court of Appeal said:

> To discharge this [the purchaser's] onus and prove the materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would instead have rescinded the agreement before the expiration of the ten day cooling off period.

43 On the facts I find that at the time of entering into the agreement the Defendant had no knowledge nor could it have any knowledge of the above alterations, placements and changes. These only became apparent during construction and development of the site. It follows that these changes could not therefore be part of any disclosure statement.

44 Material amendments must also be disclosed under s. 52(2) of the *Condominium Act*, failing which a purchaser may rescind. At p. 149 Robins J.A. for the Court said:

> Amendments that substantially change a purchaser's anticipated use and enjoyment of the unit or the amenities associated therewith or that adversely affect the value of the unit, are, I would think, clearly material amendments that revive the rescission period. [The emphasis is mine]

45 In the case which is before this Court, I am of the view that the Plaintiffs' claim if it is to succeed, must come within the material amendment provision.

46 In the case of *Aiken v. Dockside Inc.*, (February 18, 1993) O.J. No. 369 (Ont. Gen. Div.). The purchaser sought to obtain rescission of the agreement of purchase and sale of condominium units on two grounds. For this case I need consider only their claim that the vendors had breached the requirement of full disclosure in the *Condominium Act*. The Court relied on the test outlined by Robins J.A. in *Abdool* and held that providing by-laws on the recreational amenities at a later date was neither material non-disclosure nor material amendment giving rise to the right of rescission. Nor was the failure to provide the "sandy beach" and a boardwalk, as had been displayed in the promotional brochure, a material amendment.

47 In *Rogers Cove Ltd. v. Sloot*, (Sept. 18, 1991) (Ont. Gen. Div.) the issue was whether the amended disclosure statement gave rise to a right of rescission. The amendment referred to multiple unit residential developments, *serviced single family lots* and ancillary and related uses. The underlined words were not in the original document. The original disclosure statement specified that part of the shared facilities would include "part of the waterfront, the swimming pool, tennis court and park area". The amended disclosure statement deleted any reference to those facilities. The court held that the developer was unilaterally attempting to alter the agreement and to convey something materially different, giving the purchaser a right to rescind.

48 In *Jervis Court Development Ltd. v. Ricci* (1992), 23 R.P.R. (2d) 32 B.C.S.C. the issue was whether there had been a material misrepresentation on the luxuriousness of the condominium which would excuse the purchaser from performing the contract. Among other concerns, one of the by-laws was amended and the purchaser had been told it dealt with the allocation of storage lockers. In fact, it gave the corporation the right to have its staff walk into the defendants' suite, out into the balcony, and hang window washing maintenance equipment over the balcony to clean and maintain the whole building. That function appears to be performed exclusively from the defendants' suite for the whole building when the defendants agreed to by the suite there was no such right (p.36).

49 The court held that the amendment made a material change. The above cases refer to changes that clearly affect the purchasers use and enjoyment and the value of the unit.

50 Unlike the addition of different lot uses, the deletion of recreational amenities, and the addition of an intrusive right of way to a unit, the changes in this case are not a deletion or intrusion, but rather a relatively minor rearrangement of facilities, grounded on approved construction principles.

51 In my opinion the changes in this case, set out in 1-4 above are not of the materiality to be the subject of disclosure.

52 Even if they could be elevated to the status of materiality they do not meet the test in *Abdool*, (supra) which is: *would a reasonable purchaser rescind the agreement and walk away from the deal.*

53 Dealing with the wall, there was evidence presented that it was acceptable to some people, that it was used as a selling feature and that the privacy aspect was attractive to purchasers presently on site. There is no evidence that a reasonable purchaser would have walked away from the deal.

54 In my view all of these items come within clause 15 in the Agreement of Purchase and Sale which permits the vendors to change, vary, or modify the plans, pertaining to the condominium including engineering, landscaping, grading and mechanical site service or as same may be illustrated in any sales brochures.

55 Clause 15 of the Agreement of Purchase and Sale reads as follows:

> The Purchaser acknowledges and agrees that the Vendor may from time to time in its discretion, or as required by any governmental authority or mortgagee, change, vary or modify the plans, colours, materials and specifications pertaining to the Condominium (including architectural, structural, engineering, landscaping, grading, mechanical, site service or other plans) from the plans and specifications existing at the inception of the project, or as they exist at the time the Purchaser has entered into this Agreement, or as same may be illustrated in any sales brochures, models or otherwise. With respect to any aspect of construction, finishing or equipment the Vendor shall have the right, without the Purchaser's consent, to substitute materials for those described in this Agreement or in the plans or specifications, provided the substituted materials are of equal or better quality. The Purchaser hereby consents to any such alteration and agrees to complete the sale notwithstanding any such modifications.

56 The clause is unambiguous and in my view gives the vendor the right to make the above changes. The clause further gives the vendor the right to substitute materials provided they are of equal or better value. There is no evidence that the substitutions of electrical hot water for a gas hot water tank is of any lesser value. In any event, in my view, if there was such evidence the plaintiff's claim is in damages not rescission.

57 The Plaintiffs requests, so far as was possible, were accommodated. The window was moved, the range hood was removed and they were advised that the plug was located behind the dry wall. The nature of the requests are supportive of the Defendant's submission that the Plaintiffs attended the unit a number of times within at least two months of the eventual occupancy date of July 6, 1992.

Estoppel and Rescission:

58 The Defendant raised the question of whether the Plaintiffs, by their conduct, are estopped from asserting their right to rescind the contract. As the Defendants have not succeeded on any grounds which would entitle them to rescission I will make only limited remarks on this issue.

59 The Plaintiffs requested, and were granted, upgrades for which they paid. They made the following enquiries of the Defendant: on April 29, 1992 as to the moving of the kitchen window;, on May 25, 1992 as to the elimination of the range hood fan, and installation of an electrical outlet; on June 29, 1992 as to the size of the kitchen drawer; and on July 2, 1992 as to the absence of an electrical outlet for the fridge and upgrade of the front doors.

60 The electrical panel, the furnace, the change in grade and construction of the retaining wall were observable. In fact Mr. Richards admitted on discovery that he observed the electrical panel. There was defence evidence that the wall could be observed from various locations within the apartment. No complaint was made with respect to this defect. A complaint at that time would have reactivated the 10-day cooling off period as provided for by the *Condominium Act*. Instead the purchasers did nothing and waited until the closing date to raise the materiality of the wall and advise the vendor that they did not want the unit. If the complaint was made it would have given the defendant an opportunity to consider its position with respect to the agreement and assess whether the complaint was material or not. The Purchasers silence resulted in the defendant relying on them to close. The Defendant lost the opportunity to mitigate its loss by attempting to resell the property.

1. Estoppel and Waiver:

61 The basic concept of estoppel is that a person is precluded from retracting a statement upon which another has relied. A definition that has been judicially approved is that of *Spencer Bower on the Law Relating to Estoppel by Representation*, 3rd ed. by Turner (London, Butterworths, 1977), p. 9 found in Waddams S.M. *The Law of Contract* 2nd ed. (Toronto, Canada Law Book, 1984), p. 143 which reads as follows:

> ...where one person ('the representor') has made a representation to another person ('the representee') in words, or by acts and 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.

62 I have referred to the detriment that has occurred to this Defendant through the silence of these Purchasers and in my view the doctrine is clearly applicable to this case.

2. Change in the Closing Date:

63 I have considered the Plaintiffs' argument that the changes in the closing date do not comply with the Agreement and I find no merit in it whatsoever.

64 The Vendor advised the Purchasers of the changes and the reasons for same. The Purchasers did not object to either the postponement or the advancement dates. I do not propose to review the reasons for the changes. Suffice it to say that I accept the defence evidence and I find that the changes are supported by proper reasons based on the exigencies of bringing a development to fruition.

65 Further, the Purchasers attack of the changes in the closing date rings hollow when one considers that on July 7, the day after the closing date they were ready, willing and able to close the transaction.

66 I reviewed the principle of estoppel when dealing with the issue of the Plaintiffs' opportunity to observe the unit. In my view that principle applies to the Purchaser's conduct in relation to the changes in the closing date. The Defendant

relied on their acceptance and expected them to close. As the agreement was alive, the Defendant took no steps to resell. The opportunity to mitigate was lost. I find that the Defendant relied on the Purchasers acceptance of the changes in the closing dates to its detriment. I find that estoppel applies.

67 The Purchasers by acquiescing to the extensions or postponements which they now claim were improper, waived the term of the agreement which provided for limited extension periods.

68 In *Aiken v. Dockside Village Inc.* (Ont. Gen. Div) at p. 3 Wilson J. said,

> The applicants cannot both affirm and disavow the agreements of purchase and sale.

69 In any event if the Purchasers had a remedy as a result of the changes in the closing date; it was in damages, not rescission, as provided by Regulation 892, s. 17 to 24 of the *Ontario New Home Warranties Plan* or alternatively under cl. 9 of the Agreement of Purchase and Sale, which states:

> 9. This transaction of purchase and sale shall be completed on the Closing Date or any earlier or later date as may be permitted under this Agreement, at which time vacant possession of the Unit will be given to the Purchaser.
>
> The Vendor shall be entitled, upon giving at least sixty (60) days' prior written notice to the Purchaser, to accelerate the Closing Date provided that the Unit is substantially complete and fit for occupancy on the earlier date specified in the Vendor's notice to the Purchaser. The Purchaser acknowledges that the Closing Date specified in this Agreement is a tentative occupancy date and that the Vendor will give notice of the anticipated occupancy date when the roof assembly for the building in which the Residential Unit is located is completed and no later than 120 days before the anticipated occupancy date.

Maintenance of the Retaining Wall:

70 I have considered the submission that the absence of a provision in the Budget Statement for the maintenance of the retaining wall contravened the agreement. I find this argument has no merit in light of my finding that the retaining wall came within clause 15 of the Agreement of Purchase and Sale, and is not an item requiring disclosure.

Time is of the Essence:

71 The Plaintiffs submit that time was of the essence, and that the Defendant's breach of this clause released them (the Plaintiffs) from the agreement.

72 I have considered the clause in the agreement referring to time being of the essence and I find no merit in the Plaintiffs' arguments on this point.

73 It appears that the current authority is that time of the essence clauses can be waived by the conduct of the parties. In the case before this Court, the Plaintiffs acquiesced in the changes to the closing date and on the eventual closing date they were prepared to close except, that the property was not to their satisfaction.

74 In my view the clause does not allow the Purchaser after the fact to say "I do not now wish to close the deal."

75 In *Iwanczuk v. Center Square Developments Ltd.*, [1967] 1 O.R. 447 Stark J. said at p. 451:

> ...the fact that three separate times for closing this contract were arranged and were allowed to pass without any intimation from either party that the contract was still not valid and subsisting indicate vary clearly that the use of the phrase 'time to be of the essence' was a mere form which had lost its meaning and which both parties by their conduct had waived.

Did the Defendant Sign the Agreement of Purchase and Sale:

76 I have considered the submission that there is no evidence that the Defendant signed the agreement of purchase and sale and I find no merit in it. No signed document was tendered as an exhibit. However, Mr. Li, on behalf of the Defendant, said that he signed the agreement on February 27, 1991 and that he had one of the originals in his file but it was not signed by the Defendant. If he wished to be dishonest he could simply have signed it.

77 The Purchasers attended the T.D. Bank for the purpose of arranging a mortgage. In my view it is unlikely the Bank would process a mortgage application without an agreement signed by both parties. In any event the Purchasers conducted themselves as if they had a deal. They retained a solicitor to act on their behalf. I can draw an inference from the correspondence that there is an agreement of purchase and sale. If it was unsigned by the vendor I should have thought that this defect would have been raised at the outset.

Communication of Acceptance of the Agreement by the Defendant:

78 I have considered the submission that the Defendant did not communicate acceptance of the offer to the Plaintiffs and I find no merit in it.

79 In *Fisher et al. v. Schiller et al.* (1979), 25 O.R. 56 (C.A.) Morden J.A. held for the Court at p. 57:

> An acceptance is a final and unqualified expression of assent to the terms of an offer and the general rule is that for an acceptance to be complete it must be communicated to the offeror: Chitty on Contracts, 24th Ed. (1977) pp. 27 and 32. Cheshire and Fifoot's Law of Contract, 9th Ed. (1976) at p. 41 puts the matter this way:
>
> > There must be an external manifestation of assent, some words spoken or act done by the offeree or by his authorized agent which the law can regard as the communication of the acceptance to the offeror.

80 These statements of principles are in accord with reasonable commercial expectations. The Defendant took the initial deposit with the offer and continued to accept a series of deposits over a period of time.

81 Further the defendant by amendments to the offer on two occasions, March 7 and March 14, 1991 respectively, consented to extensions to the "10-day cool off" period. From this evidence I am of the opinion that communication of acceptance of the offer was made to the Purchasers.

82 In my view to interpret this conduct otherwise makes no sense.

Unconscionable Transaction:

83 The Plaintiffs' final submission was that this transaction was unconscionable. I have considered this issue and find that there is no merit in it.

84 The Purchasers were first time home buyers and purchased the subject property on a pre-sale basis. They bought this property in a real estate market in an area that was slightly increasing and then suddenly substantially declined.

85 They did not buy from a model suite; rather, they bought before there was a shovel in the ground. They had time to review the agreement. They had extensions. Their lawyer had a chance to renegotiate some of the terms. Yet they still wrote to the vendor after all these extensions and said "We are firming up the deal". Also as mentioned above there is evidence that Mrs. Richards' mother, Mrs. North, was not happy with the Purchasers entering into this agreement.

86 It appears that the list of complaints was being added to as this action proceeded. Several of these issues were not raised until the conclusion of discovery. That is when the failure to sign the offer and the failure to communicate acceptance surfaced as issues. And it was not until the conclusion of the trial that the unconscionable transaction argument was raised for the first time.

87 I find that the Defendant has answered to my satisfaction all the issues raised by the Plaintiffs, and that the evidence supports the position that there was no breach of the agreement nor any negligent misrepresentation by the Defendant.

88 In conclusion I am of the view that this is simply a situation where the Purchasers, dissatisfied with their purchase, made very effort to get out of the agreement.

89 The action for a declaration that the Agreement of Purchase and Sale is null and void due to the negligent misrepresentations and breach of contract is dismissed.

Reasons for Counterclaim:

90 I turn now to consider the counterclaim advanced by the Defendant. It is based on a loss in the amount of $14,988.75 on the sale of the unit after crediting the deposit. The Plaintiffs agree with the correctness of the calculations in arriving at the figure of $14,988.75, but argue that the Defendant cannot claim for the deposit of $10,000.00 as they did not give proper notice of their intention to do this subsequent to the aborted closing.

91 In my view this is another argument in which there is no merit. The Plaintiffs were given two opportunities subsequent to July 6, 1992 to close the deal. They were advised by letter dated July 15, 1992 that the deposit would be forfeited and that an action for breach of contract would be commenced unless the Plaintiffs closed the deal on or before July 17, 1992. In my view the proper interpretation is that the Defendant, in compliance with the right set out in paragraph 25 of the agreement, has indicated to the Plaintiff that it is claiming damages and crediting the deposit in arriving at the damage claim.

92 Section 25 of the Agreement of Purchase and Sale reads as follows:

> Upon default of the Purchaser under any of the covenants, representations, warranties, acknowledgments and obligations to be performed under this Agreement, including, without limitation, any and all covenants contained in the Occupancy Licence, and such default continues for seven (7) days after written notice thereof has been given to the Purchaser or his solicitor by the Vendor or its solicitors, then in addition to any other rights or remedies which the Vendor may have, the Vendor, at its option, shall have the right to declare this Agreement null and void, and in such event the deposit, all interest accrued thereon, together with all sums paid to the Vendor with respect to extras or changes to the Unit ordered by the Purchaser shall be the absolute property of the Vendor and without prejudice to or limiting the rights of the Vendor to claim for damages in excess of such amounts.

93 In my opinion the Defendant acted in a commercially responsible and fair manner in arriving at and calculating damages.

94 The last argument raised by the Plaintiffs is that the Defendant could have rented the property and applied the rent in mitigation of damages. Bill McEwen, a real estate broker stated that a rental on these types of residential properties would likely result in the vendor fetching a lower price before finally selling it.

95 Any tenancy would have to be of a short term, likely month to month to enable the vendor to continue offering the property for sale. I do not intend to get into the implications of Landlord-tenant issues. Suffice it to say that in all likelihood a tenancy would result not in mitigation of loss, but an increase in loss.

96 Mr. Li on behalf of the Defendant stated that this development was not a rental type project. His concern was that if you do a rental you run the risk of the property being perceived by prospective Purchasers as being of a lesser value. It is somehow blemished.

97 In my view the Defendant dealt with the disposal of the property in a reasonable manner.

98 I find that the Defendant has proven the damages advanced. There will be judgment for the Defendant on the counterclaim in the amount of $14,988.75.

99 The Law Development Group will have its costs of both the main action and the counterclaim.

100 I may be spoken to on the issue of costs.

End of Document

CA012802
Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

COLETTE RIML

PLAINTIFF
(RESPONDENT)

AND:

WILLIAM GREGER and LORRAINE GREGER

DEFENDANTS
(APPELLANTS)

Before: The Honourable Mr. Justice Wallace
The Honourable Mr. Justice Toy
The Honourable Mr. Justice Taylor

Paul E. Love	Counsel for the Appellants
Nevin L. Fishman	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia September 27, 1991
Place and Date of Judgment:	Vancouver, British Columbia November 22, 1991

Written Reasons by:
The Honourable Mr. Justice Toy

Concurred in by:
The Honourable Mr. Justice Wallace
The Honourble Mr. Justice Taylor

Court of Appeal for British Columbia

No. CA012802
Vancouver Registry

Colette Riml

v.

William Greger and Lorraine Greger

***Reasons for Judgment of The Honourable Mr. Justice Toy*:**

This is an appeal from a judgment granted at the conclusion of a summary trial wherein the plaintiff successfully sued on a promissory note for $14,000 made by the defendants in favour of the plaintiff's husband who had assigned the note to her.

The pertinent facts can most easily be appreciated by referring in part to the reasons given by the trial judge.

> The plaintiff and her husband were married in 1967 and they separated in 1973. There were three children of the marriage. After the separation, Hubert Riml moved to Vancouver Island where he carried on business as a retail merchant and the plaintiff and the three children continued to reside in North Vancouver. In the summer of 1982, he was diagnosed as having cancer and took steps to put his business affairs in order. To this end, on July 21, 1982, he sold a portion of his business to the defendant Lorraine Greger for the sum of $21,000 to be paid by $7,000 in cash and the balance of $14,000 by payments of 60% of the monthly gross sales. On August 7, 1982, William Greger and Lorraine Greger, jointly and severally, executed a promissory note in favour of Hubert Riml, or order, for $14,000, payable on or before September 1, 1988. On September 10, 1982, Hubert Riml assigned all money to become due under this note to the plaintiff. In April 1983, Hubert Riml came to North Vancouver to reside with the plaintiff and the children

as he was then too ill to care for himself. As this time he gave the plaintiff the promissory note explaining that he had assigned it to her to be used for the benefit of the children. Hubert Riml died on September 4, 1983.

Formal demand for payment was made on November 28, 1988. Payment was not made and this action was commenced.

Four grounds of appeal were advanced, only two of which require consideration because counsel for the defendants properly conceded in his factum and in argument that if the trial judge's findings were supportable that consideration was given by Mr. Riml to Mrs. Greger, or that there was an antecedent debt within the meaning of s. 52(1)(a) or (b) of the ***Bills of Exchange Act***, R.S.C. 1970, c. B-4, that the other grounds of appeal could not prevail.

It is only necessary for my purposes to consider the latter finding, namely, that at the time Mr. and Mrs. Greger signed the promissory note, was there an existing debt or liability owing by Mrs. Greger to Mr. Riml?

Counsel for the defendant, both in his factum and in argument, acknowledged that in attacking a promissory note which contains the words "value received", as this one does, that the onus rests on the makers to establish that no consideration was given or that there was no antecedent debt. Recent authority for that broad

proposition can be found in ***Bank of Nova Scotia v. Bauer*** (1976), 2 W.W.R. 52.

The antecedent debt or liability, if it existed, is to be found in the agreement made between Mr. Riml and Mrs. Greger on July 28, 1982. The document is obviously one that was not drawn by a professional, however, the essential terms of it are not ambiguous.

The agreement is in these words:

> This is to verify that on this date Hubert Riml sold the ski and ski boot part of his souvenir business to Lorraine Greger of Fanny Bay, for the total summ of $21,000.00 which includes both finished and unfinished stock. The terms for this transaction are as follows: $7,000.00 downpayment with the balance of $14,000.00 to be paid on a 60% - 40% interest free split of the total monthly gross sales, 60% to be paid to Hubert Riml, until the total balance is paid unless purchaser wishes to pay off balance sooner.
>
> This transaction is agreed upon by both parties involved.
>
> H Riml
> Lorraine Greger.

Counsel for the defendants in argument relied on assertions that Mrs. Greger made that it was her understanding that the stock of souvenirs was held by her on consignment, and that on two occasions, namely, October 28, 1982, and March 30, 1983, she made payments of 60% of gross sales, which payments totalled $940.80

which moneys were received by Mr. Riml before his death and before, as she said, the business failed.

However, I construe the agreement between Mr. Riml and Mrs. Greger as follows:

1. Hubert Riml sold the ski and ski boot part of his souvenir business to Lorraine Greger on July 28, 1982.
2. The purchase price for that business was the total sum of $21,000.00.
3. The terms of payment of the $21,000.00 consideration were
   (a) a down payment of $7,000.00;
   (b) the balance of $14,000.00 was to be interest-free but payable at the rate of 60% of total monthly gross sales until the total balance was paid;
   (c) the provision requiring payments of 60% of total monthly gross sales could be avoided in the event that the "purchaser wishes to pay off the balance sooner".

The underlined words lead me to the conclusion that as of July 28, 1982, when the $7,000.00 down payment was made to Mr. Riml and the part of the souvenir business was transferred to Mrs. Greger that both parties acknowledged a presently existing indebtedness of $14,000.00.

The trial judge's conclusion on this issue was as follows:

> Moreover, so far as Lorraine Greger is concerned, the sum of $14,000 was owing by her to Hubert Riml under the terms of the agreement. The close connection between the agreement and the note can be found in the stated amount, the proximity of the relevant dates and as well has been referred to in the affidavits of the defendants. I am satisfied that the note is referable by necessary implication to the debt then existing, i.e., an antecedent debt or liability. In the result, I find that Lorraine Greger has not rebutted the presumption of consideration and that she is bound by her signature on the note.

Like the trial judge, I am not satisfied that the defendants have met the onus upon them to show that no consideration in the form of an antecedent debt or liability existed. The antecedent debt was the $14,000 which remained owing for the souvenir business. It remained for Mrs. Greger to stipulate a date by which this debt would be paid, and by the terms of the note she did so. Consequently the appeal must be dismissed.

"The Honourable Mr. Justice Toy"

I AGREE: "The Honourable Mr. Justice Wallace"

I AGREE: "The Honourable Mr. Justice Taylor"

Most Negative Treatment: Distinguished
Most Recent Distinguished: Trombley v. Pannu | 2015 BCSC 1889, 2015 CarswellBC 2985, 82 B.C.L.R. (5th) 145, [2015] B.C.W.L.D. 8126, 258 A.C.W.S. (3d) 814 | (B.C. S.C., Sep 2, 2015)

2005 SCC 38, 2005 CSC 38
Supreme Court of Canada

Ryan v. Moore

2005 CarswellNfld 157, 2005 CarswellNfld 158, 2005 SCC 38, 2005 CSC 38, [2005] 2 S.C.R. 53, [2005] R.R.A. 694, [2005] S.C.J. No. 38, 139 A.C.W.S. (3d) 1089, 18 E.T.R. (3d) 163, 247 Nfld. & P.E.I.R. 286, 254 D.L.R. (4th) 1, 25 C.C.L.I. (4th) 1, 32 C.C.L.T. (3d) 1, 334 N.R. 355, 735 A.P.R. 286, J.E. 2005-1188, EYB 2005-91679

Cabot Insurance Company Limited and Rex Gilbert Moore, deceased, by his Administratix, Muriel Smith, Appellants v. Peter Ryan, Respondent

McLachlin C.J.C., Major, Bastarache, LeBel, Deschamps, Abella, Charron JJ.

Heard: December 7, 2004
Judgment: June 16, 2005 *
Docket: 29849

Proceedings: reversing in part *Ryan v. Moore* (2003), 2003 NLCA 19, 2003 CarswellNfld 109, 50 E.T.R. (2d) 8, 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181 (N.L. C.A.); reversing in part *Ryan v. Moore* (2001), 2001 CarswellNfld 277, 205 Nfld. & P.E.I.R. 211, 615 A.P.R. 211, 41 E.T.R. (2d) 287, 19 M.V.R. (4th) 120, 18 C.P.C. (5th) 95 (Nfld. T.D.)

Counsel: Sandra Chaytor, Jorge Segovia, for Appellants
Ian F. Kelly, Q.C., Gregory A. French, for Respondent

Subject: Civil Practice and Procedure; Insurance; Estates and Trusts; Torts; Contracts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

VII Limitation of actions
VII.5 Actions in tort
VII.5.b Statutory limitation periods
VII.5.b.iii When statute commences to run
VII.5.b.iii.D Continuing torts

Civil practice and procedure

VII Limitation of actions
VII.5 Actions in tort
VII.5.b Statutory limitation periods
VII.5.b.iii When statute commences to run
VII.5.b.iii.E Miscellaneous

Civil practice and procedure

VII Limitation of actions

VII.5 Actions in tort
VII.5.b Statutory limitation periods
VII.5.b.iv Suspension and interruption of statute
VII.5.b.iv.A Confirmation of cause of action

Civil practice and procedure

VII Limitation of actions
VII.7 Estates
VII.7.b Claim against estate
VII.7.b.ii In tort

Estoppel

II Estoppel in pais
II.1 Elements
II.1.e Detrimental reliance
II.1.e.ii Sufficiency of prejudice

Headnote

Civil practice and procedure --- Limitation of actions — Estates — Claim against estate — In tort

Vehicles operated by plaintiff, driver and another person were involved in accident in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Plaintiff met prescribed limitation period in Limitations Act — Section 5 of Survival of Actions Act prohibits action brought six months after letters of probate or administration of estate of deceased have been granted and after expiration of one year from date of death — Judge-made discoverability rule did not apply to extend period legislature prescribed — By using specific event as starting point for "limitation clock", legislature was displacing discoverability rule in all situations to which Survival of Actions Act applied — Driver's subsequent death had no impact whatsoever on accrual of plaintiff's cause of action — Survival of Actions Act was itself legislative exception to common law rule and it would displace intention of legislature to stretch limitation period.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — When statute commences to run — Continuing torts

Vehicles operated by plaintiff, driver and another person were involved in accident in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Plaintiff met prescribed limitation period in Limitations Act — Section 5 of Survival of Actions Act prohibits action brought six months after letters of probate or administration of estate of deceased have been granted and after expiration of one year from date of death — Judge-made discoverability rule did not apply to extend period legislature prescribed — By using specific event as starting point for "limitation

clock", legislature was displacing discoverability rule in all situations to which Survival of Actions Act applied — Driver's subsequent death had no impact whatsoever on accrual of plaintiff's cause of action — Survival of Actions Act was itself legislative exception to common law rule and it would displace intention of legislature to stretch limitation period.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — When statute commences to run — General

Survival of Actions Act — Vehicles operated by plaintiff, driver and another person were involved in accident in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Plaintiff met prescribed limitation period in Limitations Act — Section 5 of Survival of Actions Act prohibits action brought six months after letters of probate or administration of estate of deceased have been granted and after expiration of one year from date of death — Judge-made discoverability rule did not apply to extend period legislature prescribed — By using specific event as starting point for "limitation clock", legislature was displacing discoverability rule in all situations to which Survival of Actions Act applied — Driver's subsequent death had no impact whatsoever on accrual of plaintiff's cause of action — Survival of Actions Act was itself legislative exception to common law rule and it would displace intention of legislature to stretch limitation period.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — Suspension and interruption of statute — Confirmation of cause of action

Accident involving three vehicles took place in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Section 16 of Limitations Act could only apply to limitation period which limits time during which action can be taken — Since limitation period which arises under Survival of Actions Act superseded first limitation period of Limitations Act, and did not create or revive action, s. 16 could not apply.

Estoppel --- Estoppel in pais — Elements — Detrimental reliance — Sufficiency of prejudice

Accident involving three vehicles took place in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Mutual assent distinguished estoppel by convention from other types of estoppel — Exchanged letters did not prove existence of common assumption — Court of Appeal erred by giving weight to subject line of letters — Fact that parties were conferring without regard to limitation period did not establish shared assumption that limitation defence would not be relied on — Not only did plaintiff not rely on alleged assumption but his conduct did not show intention to

affect legal relations between parties — There were no reasons based on estoppel, or any other legal doctrine, to preclude driver's estate or insurer from relying on Survival of Actions Act limitation period.

Procédure civile — Prescription des actions — Successions — Réclamation contre la succession — En matière de responsabilité délictuelle

Véhicules conduits par le demandeur, le conducteur et une autre personne ont été impliqués dans un accident en 1997 — Conducteur est décédé en 1998 de causes non liées à l'accident — Lettres d'administration ont été délivrées à l'administratrice de la succession du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Demandeur satisfaisait au délai de prescription prévu par la Limitations Act — Article 5 de la Survival of Actions Act interdit l'action intentée plus de six mois après la délivrance des lettres d'homologation ou d'administration de la succession du défunt et après l'expiration d'un an suivant la date du décès — Règle prétorienne sur la possibilité de découvrir le dommage ne pouvait permettre d'allonger le délai de prescription prévu par le législateur — 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'appliquait — Décès subséquent du conducteur n'avait absolument aucune incidence sur la naissance de la cause d'action du demandeur — Survival of Actions Act constituait 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.

Procédure civile — Prescription des actions — Actions en responsabilité délictuelle — Délais de prescription prévus par la loi — Point de départ du délai de prescription — Délits civils continus

Véhicules conduits par le demandeur, le conducteur et une autre personne ont été impliqués dans un accident en 1997 — Conducteur est décédé en 1998 de causes non liées à l'accident — Lettres d'administration ont été délivrées à l'administratrice de la succession du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Demandeur satisfaisait au délai de prescription prévu par la Limitations Act — Article 5 de la Survival of Actions Act interdit l'action intentée plus de six mois après la délivrance des lettres d'homologation ou d'administration de la succession du défunt et après l'expiration d'un an suivant la date du décès — Règle prétorienne sur la possibilité de découvrir le dommage ne pouvait permettre d'allonger le délai de prescription prévu par le législateur — 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'appliquait — Décès subséquent du conducteur n'avait absolument aucune incidence sur la naissance de la cause d'action du demandeur — Survival of Actions Act constituait 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.

Procédure civile — Prescription des actions — Actions en responsabilité délictuelle — Délais de prescription prévus par la loi — Point de départ du délai de prescription — En général

Survival of Actions Act — Véhicules conduits par le demandeur, le conducteur et une autre personne ont été impliqués dans un accident en 1997 — Conducteur est décédé en 1998 de causes non liées à l'accident — Lettres

d'administrations ont été délivrées à l'administratrice de la succession du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Demandeur satisfaisait au délai de prescription prévu par la Limitations Act — Article 5 de la Survival of Actions Act interdit l'action intentée plus de six mois après la délivrance des lettres d'homologation ou d'administration de la succession du défunt et après l'expiration d'un an suivant la date du décès — Règle prétorienne sur la possibilité de découvrir le dommage ne pouvait permettre d'allonger le délai de prescription prévu par le législateur — 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'appliquait — Décès subséquent du conducteur n'avait absolument aucune incidence sur la naissance de la cause d'action du demandeur — Survival of Actions Act constituait 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.

Procédure civile --- Prescription des actions — Actions en responsabilité délictuelle — Délais de prescription prévus par la loi — Suspension et interruption de la prescription — Confirmation de la cause d'action

Accident impliquant trois véhicules a eu lieu en 1997 — Conducteur est décédé de causes non liées à l'accident en 1998 — Lettres d'administration ont été délivrées à l'administratrice du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Article 16 de la Limitations Act n'était applicable qu'au délai de prescription qui restreint le délai dans lequel l'action peut être intentée — Article 16 ne pouvait s'appliquer, étant donné que le délai de prescription prévu par la Survival of Actions Act supplantait le délai de prescription prévu par la Limitations Act et ne pouvait créer l'action ou la faire vivre à nouveau.

Préclusion --- Préclusion en raison de la conduite — Éléments — Acte de confiance préjudiciable — Suffisance du préjudice

Accident impliquant trois véhicules a eu lieu en 1997 — Conducteur est décédé de causes non liées à l'accident en 1998 — Lettres d'administration ont été délivrées à l'administratrice du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Assentiment réciproque distingue la préclusion par convention des autres types de préclusion — Lettres échangées n'établissaient pas l'existence d'une présupposition commune — Cour d'appel a commis une erreur en accordant de l'importance à la mention de l'objet de ces lettres — 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 — Non seulement le demandeur ne s'est pas fondé sur la présupposition alléguée, mais son comportement ne démontrait pas d'intention d'affecter les rapports juridiques entre les parties — Aucuns motifs fondés sur la préclusion, ou fondés sur toute autre doctrine juridique, n'existaient

pour empêcher la succession du conducteur ou l'assureur de celui-ci d'invoquer le délai de prescription prévu par la Survival of Actions Act.

Vehicles operated by the plaintiff, the driver and another person were involved in an accident in November 1997. Correspondence was exchanged between the plaintiff and the adjuster assigned by the driver's insurer. The plaintiff forwarded his hospital chart to the adjuster and was reimbursed. In December 1998, the driver died of causes unrelated to the accident. In January 1999, the adjuster wrote to the plaintiff and referred to the driver as "Our Insured". Letters of Administration were granted to the driver's administratrix in February. A cheque for payment of a medical report was forwarded by the adjuster and the driver was referred to as "Our Insured". The plaintiff issued his statement of claim in October 1999. The plaintiff wrote to the adjuster referring to the driver as "Your Insured". The adjuster learned of the driver's death in May 2000. The plaintiff learned of the driver's death in September 2000. In November 2000, the insurer refused to settle the plaintiff's claim because the action was outside the limitation period.

The insurer applied to intervene in the proceedings and sought an order striking out the statement of claim as being out of time. The plaintiff applied to amend the description of the driver in the statement of claim. The applications judge dismissed the application to have the action dismissed. The insurer appealed and the plaintiff cross-appealed. The majority of the Court of Appeal allowed, in part, both the appeal and the cross-appeal. The applications judge's order to permit the intervention of the insurer and the amendment of the statement of claim was affirmed. The majority held that the applications judge had erred in holding that the cause of action against the driver was a cause of action to which the Survival of Actions Act did not apply. The majority held that the applications judge had erred in holding that the confirmation provisions of the Limitations Act also applied to the limitation period under the Survival of Actions Act. The majority held that the driver's estate and the insurer were barred by the principle of estoppel from relying on the fact of the driver's death and the granting of letters of administration. As a result, nullity could not be established and the statement of claim was amended to name the driver's administratrix as defendant in the action. The insurer and the driver's estate by his administratrix appealed.

Held: The appeal was allowed and the statement of claim struck at all levels of court.

The situation was governed by two limitation periods: s. 5 of the Limitations Act and s. 5 of the Survival of Actions Act. The plaintiff met the prescribed limitation period in the Limitations Act. Section 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. 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 Survival of Actions Act does not establish a relationship between these events and the injured party's knowledge. The judge-made discoverability rule did not apply to extend the period the legislature had prescribed. By using a specific event as the starting point of the "limitations clock", the legislature was displacing the discoverability rule in all situations to which the Survival of Actions Act applied. The plaintiff's cause of action arose prior to the driver's death and the plaintiff was aware of his cause of action before the driver's death and before the expiration of the Survival of Actions Act limitation period. The plaintiff did not need to have knowledge of the death to prove his claim or to issue and serve the statement of claim. The driver's subsequent death had no impact whatsoever on the accrual of the plaintiff's cause of action. The Survival of Actions Act was itself a legislative exception to a common law rule. It would displace the intention of the legislature to stretch the limitation period.

Section 16 of the Limitations Act 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, s. 16 cannot apply to it.

Mutual assent is what distinguishes estoppel by convention from other types of estoppel. It is not enough that each of the two parties acts on an assumption not communicated to the other. The estopped party must have communicated to the other that he or she was indeed sharing the other party's mistaken assumption. None of the letters exchanged by the plaintiff and the adjuster 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 both assumed that the driver was alive. The Court of Appeal erred by giving weight to the subject line of the letters which, properly interpreted, provided no evidence of a mutual assumption that the driver was alive. The fact that the parties were conferring without regard to the limitation period did not establish a shared assumption that the limitation defence would not be relied on. Even if one were to assume the existence of a communicated common assumption between the parties, there was no evidence that the plaintiff relied upon this assumption. The plaintiff never put his mind to the shorter Survival of Actions Act limitation period. From the date of the accident to the date of the expiry of the Survival of Actions Act limitation period, there was never any discussion by the plaintiff of the limitation period. Not only did the plaintiff not rely on this alleged assumption, but his conduct did not show an intention to affect the legal relations between the parties. Given that there was no shared assumption or reliance, the detriment criterion did not need to be addressed.

Silence or inaction would be considered a representation if a legal duty was owed by the representor to the representee to make a disclosure or to take steps the omission of which was relied upon as creating an estoppel. There was no duty on the insurer or the administratrix, who were at the time only potential defendants, to advise the plaintiff 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 was no representation, no duty to speak, no intention to affect legal relations and no reliance. There were no reasons based on estoppel, or any other legal doctrine, to preclude the driver's estate or the insurer from relying on the Survival of Actions Act limitation period.

Les véhicules conduits par le demandeur, le conducteur et une autre personne ont été impliqués dans un accident en novembre 1997. Des lettres ont été échangées entre le demandeur et l'expert en sinistres nommé par l'assureur du conducteur. Le demandeur a envoyé à l'expert en sinistres son dossier hospitalier et a été remboursé. Le conducteur est décédé de causes non liées à l'accident en décembre 1998. En janvier 1999, l'expert en sinistres a écrit au demandeur, faisant référence au conducteur comme « Notre assuré ». Les lettres d'administration ont été délivrées à l'administratrice de la succession du conducteur en février. L'expert en sinistres a envoyé un chèque pour payer pour la copie du rapport médical et le conducteur y était indiqué comme étant « Notre assuré ». Le demandeur a déposé sa déclaration en octobre 1999. Il a écrit à l'expert en sinistres en indiquant que le conducteur était « Votre assuré ». L'expert en sinistres a été informé du décès du conducteur en mai 2000. Le demandeur a été informé du décès du conducteur en septembre 2000. En novembre 2000, l'assureur a refusé de payer la réclamation du demandeur au motif que son action était prescrite.

L'assureur a demandé la permission d'intervenir dans les procédures et a demandé une ordonnance radiant la déclaration parce que prescrite. Le demandeur a demandé la permission de modifier la description du conducteur dans la déclaration. La demande de rejet de l'action a été rejetée par le juge qui en était saisi. L'assureur a interjeté appel et le demandeur a fait un pourvoi incident. Les juges majoritaires de la Cour d'appel ont accueilli en partie le pourvoi et le pourvoi incident. Ils ont confirmé l'ordonnance du premier juge permettant l'intervention de l'assureur et la modification de la déclaration. Ils ont par ailleurs estimé que le premier juge s'était trompé en concluant que la cause d'action contre le conducteur était une cause d'action non visée par la Survival of Actions Act. Ils ont conclu que le premier juge avait commis une erreur en statuant que les dispositions de la Limitations Act relatives à la confirmation s'appliquent également au délai de prescription fixé par la Survival of Actions Act. Ils ont estimé que la règle de la préclusion empêchait la succession du conducteur et l'assureur d'invoquer le décès du conducteur et la délivrance des lettres d'administration. Par conséquent, la nullité ne pouvait être établie et la déclaration a été modifiée afin de désigner l'administratrice de la succession du conducteur comme partie défenderesse dans l'action. L'assureur et l'administratrice, au nom de la succession du conducteur, ont interjeté appel.

Arrêt: Le pourvoi a été accueilli et la déclaration a été radiée à toutes les instances.

La situation était régie par deux délais de prescription: l'art. 5 de la Limitations Act et l'art. 5 de la Survival of Actions Act. Le demandeur a respecté le délai de prescription prévu par la Limitations Act. Par ailleurs, 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 du défunt et après l'expiration d'un délai d'un an suivant la date du décès. Selon la Survival of Actions Act, le délai de prescription commence à courir à partir du décès du défendeur ou de la délivrance, par le tribunal, des lettres d'administration ou d'homologation. La Survival of Actions Act n'établit aucun lien entre ces faits et le moment où la partie lésée en prend connaissance. La règle prétorienne de la possibilité de découvrir le dommage ne s'appliquait pas pour prolonger le délai fixé par le législateur. 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'appliquait. La cause d'action du demandeur a pris naissance avant le décès du conducteur; le demandeur était bien au fait de sa cause d'action tant avant le décès qu'avant l'expiration du délai de prescription fixé par la Survival of Actions Act. Le demandeur n'avait pas besoin d'être au courant du décès pour établir le bien-fondé de sa réclamation ou pour déposer et signifier sa déclaration. Le décès subséquent du conducteur n'avait absolument aucune incidence sur la naissance de la cause d'action du demandeur. La Survival of Actions Act constituait en soi une exception législative à une règle de common law. Prolonger le délai de prescription aurait pour effet d'écarter l'intention du législateur.

L'article 16 de la Limitations Act ne peut s'appliquer qu'au délai dans lequel une action peut être intentée. Il ne pouvait s'appliquer, parce que le délai de prescription prévu par la Survival of Actions Act supplantait le délai de prescription prévu par la Limitations Act et ne pouvait créer l'action ou la faire vivre à nouveau.

C'est l'assentiment réciproque qui distingue la préclusion par convention des autres types de préclusion. Il ne suffit pas que chacune des deux parties agisse sur la foi d'une présupposition non communiquée à l'autre. La partie précluse doit avoir informé l'autre qu'elle partageait effectivement sa présupposition erronée. Aucune des lettres échangées par le demandeur et l'expert en sinistres, relativement à la réclamation du demandeur pour le préjudice corporel subi, n'établissait l'existence d'une présupposition commune. Le simple fait que les parties aient communiqué entre elles n'établissait pas le fait qu'elles avaient toutes deux présupposé que le conducteur était en vie. 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'établissait pas l'existence d'une présupposition commune que le conducteur était vivant. 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. Même si l'on pouvait présumer l'existence d'une présupposition commune entre les parties, rien n'établissait que le demandeur s'était fondé sur cette présupposition. Le demandeur ne s'est jamais préoccupé du délai de prescription plus court prévu par la Survival of Actions Act. Entre la date de l'accident et celle de l'expiration du délai de prescription fixé par la Survival of Actions Act, le demandeur n'a jamais abordé la question du délai de prescription. Non seulement le demandeur ne s'est pas fondé sur la présupposition alléguée, mais son comportement ne démontrait aucune intention d'affecter les rapports juridiques entre les parties. Étant donné l'absence de présupposition commune ou d'acte de confiance, il n'est pas nécessaire d'examiner le critère du préjudice.

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. Ni l'assureur ni l'administratrice, qui étaient à l'époque des défendeurs éventuels, n'avaient l'obligation d'informer le demandeur de l'existence d'un délai de prescription, de l'aider à intenter son action ou de l'informer des conséquences du décès d'une partie. Il n'y avait aucune assertion, aucune obligation de parler, aucune intention de modifier les rapports juridiques ni aucun acte de confiance. Aucuns motifs fondés sur

la préclusion, ou fondés sur toute autre doctrine juridique, n'existaient pour empêcher la succession du conducteur ou l'assureur de celui-ci d'invoquer le délai de prescription prévu par la Survival of Actions Act.

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s. 2 — considered

s. 2(b) — considered

s. 5 — considered

s. 8(1) — considered

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s. 38(3) — considered

Words and phrases considered

estoppel by convention

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 (S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 7-8).

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 (Eng. C.A.), at p. 5; *London Borough of Hillingdon v. Arc Ltd.*, [2000] E.W.J. No. 3278 (Eng. 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 (Eng. C.A.), at para. 84.

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 (Eng. 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 *K. Lokumal & Sons (London) Ltd.*, 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 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.]

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.

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.

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; India; Norwegian American Cruises A/S*). 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).

detrimental reliance

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 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 Property Gold Mines Ltd.* (1937), 59 C.L.R. 641 (Australia H.C.), at p. 674).

estoppel by representation

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 (S.C.C.), at p. 164).

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.

[The plaintiff /respondent] 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 [the plaintiff /respondent] 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 (S.C.C.)). The appellants had no duty to exercise reasonable care, nor to divulge any information.

APPEAL by insurer and driver's estate by his administratrix from judgment reported at *Ryan v. Moore* (2003), 2003 NLCA 19, 2003 CarswellNfld 109, 50 E.T.R. (2d) 8, 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181 (N.L. C.A.), allowing appeal from dismissal of application for dismissal of action.

POURVOI de l'assureur et de l'administratrice, au nom de la succession du conducteur, à l'encontre de l'arrêt publié à *Ryan v. Moore* (2003), 2003 NLCA 19, 2003 CarswellNfld 109, 50 E.T.R. (2d) 8, 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181 (N.L. C.A.), qui a accueilli le pourvoi à l'encontre du jugement rejetant la demande visant à obtenir le rejet de l'action.

***Bastarache J.*:**

1 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 A), 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.

2 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 the plaintiff by the exercise of reasonable diligence (*Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at p. 224).

3 Section 16(1) of the *Limitations Act*, S.N.L. 1995, c. L-16.1 (see Appendix A), 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.

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 (S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 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 (S.C.C.), at 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.

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.
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 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.

November 9, 2000	Cabot Insurance refuses to settle Ryan's claim because the action is outside the limitation period.

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".

B. Supreme Court of Newfoundland and Labrador ((2001), 205 Nfld. & P.E.I.R. 211 (Nfld. T.D.))

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 (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.

C. Court of Appeal of Newfoundland and Labrador ((2003), 224 Nfld. & P.E.I.R. 181, 2003 NLCA 19 (N.L. C.A.))

(1) Wells C.J. (for the majority)

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.

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.

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.

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 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.

(2) Cameron J.A. (dissenting)

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.

II. Analysis

A. Discoverability

(1) Statutory Limitation Periods

16 The situation here is governed by two limitation periods: s. 5 of the *Limitations Act* (see Appendix A) 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 of 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.

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.

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 Accident 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 A) 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).

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": Wells C.J., at para. 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.

(2) Discoverability: The Judge-Made Rule

21 The debate concerning the use of the discoverability principle in tort actions has been settled by this Court in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), *Central Trust* and *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.).

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.

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 (S.C.C.), at 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 (Man. C.A.), at p. 206). See also *Peixeiro*, at para. 37; *Snow (Guardian ad litem of) 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 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.

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.

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 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.

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 (S.C.C.). While the facts of that case are very similar to the present, it is not clear whether the Court of Appeal of Newfoundland and Labrador 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.

29 The Nova Scotia Court of Appeal decision in *Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193 (N.S. C.A.), 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 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 (Ont. C.A.). 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, 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 / Société Canadienne de la Croix-Rouge, Re*, [2003] O.J. No. 5669 (Ont. C.A.), and *Edwards v. Law Society of Upper Canada* (2000), 48 O.R. (3d) 321 (Ont. 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 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.

33 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 v. MacKenzie* (1992), 84 Man. R. (2d) 149 (Man. Q.B.), para. 18, cited in *J. (A.) v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501 (Man. C.A.), p. 510.

34 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 (Guardian ad litem of)*, 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

35 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.

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.
>
> (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 (Eng. C.A.), at p. 61, as requiring an "admission". While 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.

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. Sri Lanka* (1976), [1977] 2 All E.R. 481 (Eng. Q.B.)). As the British Columbia Court of Appeal concluded in *Podovinikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716 (B.C. C.A.), 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.

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.

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 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 and Labrador Court of Appeal decision in *Wheaton v. Palmer* (2001), 205 Nfld. & P.E.I.R. 304 (Nfld. C.A.), 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 (B.C. C.A.), 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 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.

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* (1893), 2 B.C.R. 365 (B.C. C.A.), at 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.* (1981), [1982] Q.B. 84 (Eng. 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.

52 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.

(1) Estoppel by Convention

(a) Definition and Principles

53 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)

54 Spencer Bower defines the modern concept of estoppel by convention as follows (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.

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.

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 (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.

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 (New Zealand C.A.), at p. 550. In fact, they simply advocate a more detailed description of the requirements also found in other foreign cases.

58 The jurisprudence in the United Kingdom is indeed abundant in contrast to that in Canada (see, e.g., *India v. India Steamship Co. Ltd.*, [1998] 1 Lloyd's Rep. 1 (U.K. H.L.), at p. 10; *K. Lokumal & Sons (London) Ltd. v. Lotte Shipping Co. Pte. Ltd.*, [1985] 2 Lloyd's Rep. 28 (Eng. C.A.), at pp. 34-35; *Norwegian American Cruises A/S v. Paul Mundy Ltd.*, [1988] 2 Lloyd's Rep. 343 (Eng. C.A.), at pp. 349-53).

59 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 (B.C. S.C.), at para. 35; *Capro Investments Ltd. v. Tartan Development Corp.*, [1998] O.J. No. 1763 (Ont. Gen. Div.), at para. 31.

(b) Application of the Law

60 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 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 (Eng. C.A.), at p. 5; *London Borough of Hillingdon v. Arc Ltd.*, [2000] E.W.J. No. 3278 (Eng. 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 (Eng. C.A.), 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 (Eng. 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 *K. Lokumal & Sons (London) Ltd.*, 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 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 *Norwegian American Cruises A/S*, at p. 350. Thus, it is not enough that each of the two parties acts on an assumption not communicated to the other (*India*, 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 fourteen 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 Actions Act*. Effectively, this Court is in the presence of mutual ignorance, not mutual assumption.

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.

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 SA NV*, [2002] 2 Lloyd's Rep. 390 (Eng. C.A.), 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.

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):

> 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.

(ii) Detrimental Reliance

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.

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; K. Lokumal & Sons (London) Ltd.*, at p. 35; *Litwin Construction (1973) Ltd. v. Kiss* (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, 2002 BCSC 934 (B.C. S.C.), at para. 74; 32262 *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227 (B.C. S.C.), at pp. 235-36.

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 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 Property Gold Mines Ltd.* (1937), 59 C.L.R. 641 (Australia H.C.), at 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.

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 cannot disregard the fact that all negotiations/communications were also done on a "without prejudice" basis.

72 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.

(iii) Detriment

73 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.

74 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; India; Norwegian American Cruises A/S*). 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).

75 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, 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.

(2) Estoppel by Representation

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.

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 (S.C.C.)). The appellants had no duty to exercise reasonable care, nor to divulge any information.

78 Hence, there was no representation, no duty to speak, no intention to affect legal relations and no reliance in this case.

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.

80 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.

Appeal allowed.

Pourvoi accueilli.

Appendix A

Limitations Act, S.N.L. 1995, c. L-16.1

[Limitation period 2 years]

5. 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;

. . . . .

[Confirmation]

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.

(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

[Causes of action to survive]

2. 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.

[Limitation of action]

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.

Footnotes

* Corrigenda issued by the court on September 9, 2005 and September 27, 2005 respectively have been incorporated herein.

2005 BCSC 232
British Columbia Supreme Court

Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.

2005 CarswellBC 395, 2005 BCSC 232, [2005] B.C.W.L.D. 2966, [2005] B.C.J. No. 347, 137 A.C.W.S. (3d) 682

Sharbern Holding Inc., Plaintiff And Vancouver Airport Centre Ltd., Larco Hospitality Management Inc. and MM&R Valuation Services, Inc. doing business as HVS International — Canada and HVS International - Canada, Defendants And Larco Enterprises Inc., Vancouver Airport Centre Ltd. and Larco Hospitality Management Inc., Third Parties

Wedge J.

Heard: November 22-26, 2004
Judgment: February 24, 2005
Docket: Vancouver S033260

Counsel: S.R. Schachter, Q.C., G.B. Gomery, for Plaintiff
R.J.R. Hordo, Q.C., M.A. Lakhani, E. Swartz, for Defendants, Vancouver Airport Centre, Larco Hospitality Management Inc., Larco Enterprises Inc.
G. Nijman, C. York, for Defendants, MM&R Valuation Services, HVS International - Canada

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.H Miscellaneous

Headnote

Civil practice and procedure — Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — General principles

Plaintiff S Inc., along with other investors, bought strata units in airport hotel H — Investors invested pursuant to prospectus, offering memorandum and disclosure statement issued in 1998 by developer of property, defendant V Ltd. — Offering memorandum was issued under Real Estate Act — Section 75(2) of Real Estate Act provides for statutory relief for misrepresentations in prospectus — V Ltd. developed airport hotel about one year after developing airport hotel M, adjoining hotel in same complex — Both hotels were managed by affiliate of V Ltd., defendant H Ltd. — Offering memorandum contained certain financial projections concerning airport hotel H strata units, including projected average annual cash return of 16.6 per cent — Projections were based on projected room rates and occupancies prepared for V Ltd. by defendant MMR — S Inc.'s investment return was negative 10 per cent rather than positive 16 per cent return projected in offering memorandum — S Inc. brought action against V Ltd., H Ltd. and MMR, alleging breach of fiduciary duty, negligent and fraudulent misrepresentation by V Ltd. and negligent misrepresentation by MMR — S Inc. applied to have its action certified as class proceeding

— Application granted — Claims of S Inc. raised several significant common issues, resolution of which will either end lawsuit or advance it in meaningful way — Common issues included trust obligations of V Ltd. and H Ltd., breach of fiduciary duty by V Ltd. and H Ltd., liability of V Ltd. for fraudulent and negligent misrepresentations in offering memorandum, and liability of MMR for negligent misrepresentation in preparation of financial projections — Statutory cause of action arising under s. 75(2) of Real Estate Act would be subsumed under common issues — Precise nature and scope of individual reliance issues and individual defences ought to be determined following trial of common issues.

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BG Checo International Ltd. v. British Columbia Hydro & Power Authority (1990), 41 C.L.R. 1, 4 C.C.L.T. (2d) 161, 44 B.C.L.R. (2d) 145, [1990] 3 W.W.R. 690, 1990 CarswellBC 60 (B.C. C.A.) — considered

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Hoy v. Medtronic Inc. (2003), 183 B.C.A.C. 165, 301 W.A.C. 165, 2003 BCCA 316, 2003 CarswellBC 1290, 14 B.C.L.R. (4th) 32, [2003] 7 W.W.R. 681 (B.C. C.A.) — considered

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Kerr v. Danier Leather Inc. (2004), 46 B.L.R. (3d) 167, 2004 CarswellOnt 1826, 23 C.C.L.T. (3d) 77 (Ont. S.C.J.) — considered

Kripps v. Touche Ross & Co. (1997), 1997 CarswellBC 925, 89 B.C.A.C. 288, 145 W.A.C. 288, 35 C.C.L.T. (2d) 60, [1997] 6 W.W.R. 421, 33 B.C.L.R. (3d) 254 (B.C. C.A.) — considered

Metera v. Financial Planning Group (2003), [2003] 10 W.W.R. 367, 36 C.P.C. (5th) 284, 2003 ABQB 326, 2003 CarswellAlta 516, 332 A.R. 244, 12 Alta. L.R. (4th) 120 (Alta. Q.B.) — considered

Moyes v. Fortune Financial Corp. (2002), 2002 CarswellOnt 3810, 61 O.R. (3d) 770, 32 C.P.C. (5th) 150 (Ont. S.C.J.) — considered

Moyes v. Fortune Financial Corp. (2003), 2003 CarswellOnt 4245, 178 O.A.C. 236, 38 C.P.C. (5th) 67, 67 O.R. (3d) 795 (Ont. Div. Ct.) — referred to

Parallels Restaurant Ltd. v. Yeung's Enterprises Ltd. (1990), 4 C.C.L.T. (2d) 59, 49 B.L.R. 237, 1990 CarswellBC 362 (B.C. C.A.) — considered

Queen v. Cognos Inc. (1993), 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169, 1993 CarswellOnt 801, 1993 CarswellOnt 972 (S.C.C.) — considered

Reid v. Ford Motor Co. (2003), 2003 BCSC 1632, 2003 CarswellBC 2672 (B.C. S.C.) — followed

Rumley v. British Columbia (2001), 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 9 C.P.C. (5th) 1, 205 D.L.R. (4th) 39, [2001] 11 W.W.R. 207, 95 B.C.L.R. (3d) 1, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 10 C.C.L.T. (3d) 1, [2001] 3 S.C.R. 184 (S.C.C.) — considered

Samos Investments Inc. v. Pattison (2001), 2001 BCSC 1790, 2001 CarswellBC 2989, 22 B.L.R. (3d) 46 (B.C. S.C.) — considered

Samos Investments Inc. v. Pattison (2002), 2002 BCCA 442, 2002 CarswellBC 1819, 5 B.C.L.R. (4th) 21, 216 D.L.R. (4th) 646, 23 C.P.C. (5th) 48, 171 B.C.A.C. 284, 280 W.A.C. 284 (B.C. C.A.) — considered

Tiemstra v. Insurance Corp. of British Columbia (1997), 49 D.L.R. (4th) 419, 1997 CarswellBC 1373, 38 B.C.L.R. (3d) 377, 95 B.C.A.C. 144, 154 W.A.C. 144, 12 C.P.C. (4th) 197, [1998] 2 W.W.R. 168, 46 C.C.L.I. (2d) 140 (B.C. C.A.) — considered

Western Canadian Shopping Centres Inc. v. Dutton (2001), 94 Alta. L.R. (3d) 1, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, *(*sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534 (S.C.C.) — considered

Statutes considered:

Class Proceedings Act, R.S.B.C. 1996, c. 50
Generally — referred to

s. 4 — considered

s. 4(1)(a) — considered

s. 4(1)(b) — considered

s. 4(1)(c) — considered

s. 4(1)(d) — considered

s. 4(1)(e) — considered

s. 4(2) — considered

s. 4(2)(a) — considered

s. 4(2)(b) — considered

s. 4(2)(c) — considered

s. 4(2)(d) — considered

s. 6(2) — considered

s. 8(1)(f) — referred to

s. 8(1)(g) — referred to

s. 27(3)(b) — referred to

Condominium Act, R.S.B.C. 1996, c. 64
Generally — referred to

Real Estate Act, R.S.B.C. 1996, c. 397
Generally — referred to

Pt. 2 — considered

s. 75(2) — considered

s. 75(2)(a) — referred to

s. 75(2)(iii) — referred to

s. 75(2)(viii) — referred to

s. 75(2)(ix) — referred to

Real Estate Services Act, S.B.C. 2004, c. 42
Generally — referred to

Securities Act, R.S.B.C. 1996, c. 418
Generally — referred to

Strata Property Act, S.B.C. 1998, c. 43
Generally — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
R. 19(24) — referred to

APPLICATION for certification of class proceeding.

Wedge J.:

I. Introduction

Nature of Application

1 Sharbern Holding Inc. ("Sharbern") applies to have its action certified as a class proceeding.

Overview

2 Sharbern, along with many other investors, bought strata units in the Airport Hilton in Richmond, B.C. They did so pursuant to a prospectus, the Offering Memorandum and Disclosure Statement (the "Offering Memorandum"), issued in 1998 by the developer of the property, the defendant Vancouver Airport Centre Ltd. ("VAC").

3 VAC developed the Airport Hilton about a year after developing the Airport Marriott, an adjoining hotel in the same complex. Both hotels are managed by an affiliate of VAC, the defendant Larco Hospitality Management, formerly known as HMS Hospitality Management Services Ltd ("HMS").

4 The Offering Memorandum contained certain financial projections concerning the Airport Hilton strata units, including a projected average annual cash return of 16.6%. Those projections were based on projected room rates and occupancies prepared for VAC by the defendant MM&R Valuation Services ("MM&R").

5 The Offering Memorandum disclosed that VAC had entered into similar agreements with the Airport Marriott purchasers, and knew of no material conflicts of interest arising from its involvement in the two projects.

6 The Airport Hilton has not performed financially as projected by VAC in the Offering Memorandum. Sharbern brought this action, alleging breach of fiduciary duty by VAC and HMS, negligent and fraudulent misrepresentation by VAC, and negligent misrepresentation by MM&R.

7 Sharbern now seeks certification of its action on behalf of owners of the Airport Hilton units (the "Owners").

Positions of the parties

8 Sharbern submits that the action is grounded substantially in the alleged fiduciary relationship between VAC/HMS and the Owners arising from the Offering Memorandum. It argues that there are common issues arising out of a common set of documents, and that the determination of those issues will materially advance the litigation. It emphasizes that the claim involves misrepresentations made in a prospectus to a relatively small and well-defined group of investors, rather than multiple representations made by different sources at different times.

9 Sharbern says the central questions arising from the pleadings are first, whether the financial projections in the Offering Memorandum were negligently prepared and second, whether the statements concerning conflict of interest were true. Sharbern submits the answers to those questions will affect every Owner in the same manner, and while they may not end the litigation, will advance it in a meaningful way.

10 The defendants argue that claims involving fiduciary duty and misrepresentation are generally not suitable for certification due to the inherently individualistic nature of inquiries that must be conducted on issues such as duty of care, reliance and materiality, and remedies such as rescission and damages. In this case, they say, the individual issues will overwhelm the common issues such that little judicial economy will be achieved by determining the common issues.

11 Further, say the defendants, a balance must be struck between efficiency and fairness. They say certification of this action would severely curtail discovery rights and result in unfairness to those defending the claims.

Issues

12 It is common ground that the narrow issues arising in this application are the following:

1) Do the claims raise common issues?

2) If so, would a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues?

13 For the reasons that follow, I have concluded the answer to both questions is "yes." The action should proceed as a class proceeding.

II. Facts

14 VAC, a subsidiary of Larco Investments Ltd., is a real estate developer that has developed three hotels in Richmond: the Richmond Inn, the Airport Marriott and the Airport Hilton. The Airport Marriott and Airport Hilton are strata-titled hotels. Each contains 237 strata units that were sold as a public offering to investors by VAC. The Airport Marriott units were sold in 1996 and the Airport Hilton units in 1998. The Marriott adjoins the Hilton on the same city block and the two hotels share certain retail amenities.

15 VAC manages the Airport Marriott under a hotel asset management agreement. Operational management was subcontracted to a third party, DMS Limited, commencing October 1, 1996. DMS was part of the Delta Group which was sold to CP Hotels Ltd, a competitor of the Marriott Group, in 1998. As a result, Marriott required VAC to change its operational management. Effective September 14, 1998, management of the Airport Marriott was transferred to Larco Hospitality Management Inc., (formerly "HMS"). HMS is an affiliate of VAC. Both are wholly owned subsidiaries of a common parent. For that reason, VAC and HMS are often referred to collectively as the "Larco Defendants".

16 The Airport Marriott project was sold by VAC pursuant to an offering memorandum issued under the *Real Estate Act*, R.S.B.C. 1996, c. 397, as rep. by *Real Estate Services Act*, S.B.C. 2004, c. 42, s. 146. The Airport Marriott offer included a guarantee to purchasers of a 12% annual return on their investment for five years. The offer disclosed the management terms, which included a management fee of 5% of "gross rental revenue" (a defined term) and an incentive management fee. The Airport Marriott became operational in 1998.

17 The Airport Hilton project was sold by VAC pursuant to the Offering Memorandum, which was issued under the *Securities Act*, R.S.B.C. 1996, c. 418 and the *Real Estate Act*. The Offering Memorandum included excerpts of a market study prepared for the developer by MM&R, including projected room rates and occupancies for the first five years of operation. VAC prepared a Statement of Projected Net Income, which included the following statements:

> These assumptions and hypotheses were derived in consultation with MM&R Valuation Services Inc..., an independent consulting company with experience in the hotel industry. To the best of the Developer's knowledge and belief, the Projection reflects plausible results of operations and net income and Annual Cash Return to sample individual strata lot owners for the period covered by the Projection.

18 On the basis of the projected occupancies and room rates, VAC projected a five year average annual cash return to investors of 16.6%, using as an averaging period the years 2000 to 2004 inclusive.

19 All Owners of Airport Hilton units were required to enter into a Hotel Asset Management Agreement (the "HAMA") with VAC. The terms of the HAMA are similar to the management agreement that VAC entered into with the Marriott owners. Under the terms of the HAMA, VAC and HMS (as subcontractor) have the right to manage the Airport Hilton for twenty years. In both cases, VAC and HMS have the exclusive right to manage the day-to-day operations of the hotel.

20 There are, however, some differences in the two management agreements. VAC receives a management fee calculated as a percentage of gross rental revenues with respect to both hotels, but the percentage of the fee stipulated in the Airport Marriott agreement is larger than that provided in the HAMA agreement. Further, in the Airport Marriott management agreement, there is an incentive fee payable for successful results. There is no such fee payable for the management of the Airport Hilton.

21 A review of the Offering Memorandum discloses another difference between the terms governing the unit owners at the Marriott and the Hilton. While the average annual cash return projected for Hilton unit owners in the Offering Memorandum was 16.6%, that return was not guaranteed. Airport Marriott owners were guaranteed a 12% rate of return.

22 These differences in the financial incentives to VAC and HMS in the operation of the two hotels were not contained in the Offering Memorandum distributed in the marketing of the Hilton units. The Offering Memorandum did, however,

disclose that VAC was developing the Airport Marriott project, and that Airport Marriott purchasers had entered into agreements with VAC similar to those offered to the Airport Hilton investors. The relevant provisions are Articles 4.9(i) and 4.11, which state as follows:

> 4.9(i) **Liabilities and Obligations of the Developer.** The developer is currently developing the Vancouver Airport Marriott, a 237 room full service hotel, on the Parent Property. The Vancouver Airport Marriott is scheduled for completion in or about June of 1998. In this regard, the Developer has entered into purchase agreements, ancillary documents *similar in form and substance to the Agreements*, and certain additional agreements with purchasers of strata lots comprising the Vancouver Airport Marriott, all of which give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements.
>
> **4.11**
>
> *Conflicts of Interest*
>
> *The developer is not aware of any existing or potential conflicts of interest* among the Developer, the directors and officers of the Developer, Larco Investments Ltd. as the shareholder of the Developer or those persons providing professional services to the Developer *that could reasonably be expected to materially affect the purchaser's investment decision....*
>
> [Emphasis added]

23 Sharbern is a private company owned by two individuals, Robert Wood and Arend Hofman. It received a copy of the Offering Memorandum in March 1998, and paid a deposit at that time. The Affidavit of Mr. Wood was filed in support of the certification application. In cross-examination on his Affidavit, Mr. Wood acknowledged that when he and Mr. Hofman attended to sign their purchase contract, they discussed the fact that the Marriott agreement included a guaranteed investment return while the Hilton agreement did not. Mr. Wood recalled looking at the Offering Memorandum, and discussing it with Mr. Hofman, but did not recall reading details. He acknowledged that before completing the purchase of one of the Hilton units, he was aware there was to be a sharing of resources between the Marriott and the Hilton. That did not raise any concern at the time.

24 Sharbern completed the purchase of its unit on June 23, 1999. At that time, it executed an agreement in the terms of the HAMA, appointing VAC as its agent for the management and operation of the hotel. Every Owner signed the same agreement.

25 The Hilton opened in June of 1999. After receiving inquiries from owners who had not appreciated that they had given up their rights to elect a strata council, HMS called for volunteers to serve on an investors' committee to receive information concerning the Hilton's financial performance. Mr. Wood became the chair of the committee, which met with hotel management every four months or so. Minutes of the meetings were prepared and mailed to all unit owners.

26 The financial performance of the Hilton was, according to Mr. Wood, "dismal." Sharbern's investment return was -10% rather than the 16% return projected in the Offering Memorandum. Mr. Wood became increasingly dissatisfied with what he felt was inadequate financial disclosure from VAC and HMS. Other members of the committee were also unhappy. In 2002, a majority of the Owners formed a litigation group for the purpose of retaining counsel to advise them and demand further information from the Larco Defendants.

27 On June 16, 2003, following correspondence between legal counsel, this action was commenced against the Larco Defendants. Document lists were exchanged. On January 14, 2004, Sharbern amended its statement of claim, joined MM&R as a defendant, and applied for certification of the action as a class proceeding.

28 On February 2, 2004, counsel for Sharbern commenced separate proceedings in which each Owner who had joined the litigation group, including Sharbern, was named individually as a plaintiff (the "Multi-Plaintiff Action"). In total, 210 owners of 126 units were named in the Multi-Plaintiff Action.

29 In its amended statement of claim, Sharbern advanced claims against the Larco Defendants, both on its own behalf and on behalf of the proposed class of the Owners. Sharbern's claims against VAC have been summarized as follows:

(a) VAC owes Sharbern and the other owners fiduciary duties as their agent and proxy;

(b) VAC is a trustee for the owners of funds received and expended in the operation of the Airport Hilton;

(c) HMS is VAC's sub-agent and owes the owners the same fiduciary duties as are owed by VAC;

(d) VAC and HMS are in a conflict of interest by virtue of their conflicting fiduciary duties to advance the conflicting interests of the Hilton and the Marriott owners. The conflict is exacerbated by VAC's financial incentive to prefer the interests of the Marriott owners to the interest of the Hilton owners;

(e) The Offering Memorandum failed to disclose material facts in relation to the Larco Defendants' conflict of interest, which failure constitutes fraudulent misrepresentation;

(f) The Offering Memorandum negligently misrepresented projected annual cash returns to the Hilton purchasers.

30 Against VAC, Sharbern seeks rescission and damages for the negligent or fraudulent misrepresentations contained in the Offering Memorandum.

31 Against the Larco Defendants, Sharbern seeks damages and an accounting, for breach of fiduciary duty and breach of trust, in the management and operation of the Hilton.

32 Sharbern seeks damages from MM&R for negligent misrepresentation, on the basis that MM&R prepared the projections concerning occupancy rates and room rates which were incorporated in the Offering Memorandum and used to prepare the projected cash returns.

33 MM&R, in its statement of defence, says that it only provided projections to VAC's parent, Larco Enterprises Inc., and did not consent to their use by VAC and their inclusion in the Offering Memorandum. It says it made no representations to the Hilton owners, and denies that it was negligent.

34 MM&R has issued a third party notice against the Larco Defendants.

35 The defence of MM&R includes the assertion that if the investors suffered losses as alleged, they were caused or contributed to by various factors, including poor management of the hotel and diversion of customers by HMS from the Airport Hilton to the Airport Marriott.

36 Sharbern and the Larco Defendants plead that the MM&R projections were incorporated into the Offering Memorandum with MM&R's permission.

37 The size of the proposed class is not in issue. According to the materials filed in the application, there were 215 strata lots sold to members of the public at prices ranging from $119,000 to $223,900. The number of members of the proposed class is larger than 215, because some of the strata units were purchased by more than one person (although there were also persons who bought more than one unit). The exact number of class members was not in evidence, and it was not argued that the number is significant.

38 It is common ground that all of the strata lots sold to investors were sold by VAC pursuant to the Offering Memorandum, and that all investors signed common documentation agreeing to be bound by the HAMA (the text of which is included in the Offering Memorandum). The litigation does not involve secondary purchasers.

III. Certification: General Legal Principles

39 Applications for certification are governed by section 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*Act*"). Section 4 provides as follows:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

40 The *Act* must be construed generously, particularly at the certification stage. It permits the Courts to deal efficiently and on a principled basis with cases involving large — often vast — numbers of parties and complex legal issues, some of which are common issues, others not (*Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, 2001 SCC 68 (S.C.C.) [*Hollick* cited to S.C.R.]).

41 In *Collette v. Great Pacific Management Co.*, 26 B.C.L.R. (4th) 252, 2004 BCCA 110 (B.C. C.A.), our Court of Appeal summarized the criteria discussed in *Hollick* as follows:

> ...Chief Justice McLachlin, in a unanimous judgment, recognized that class proceedings offer important procedural advantages. They serve judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis. They improve access to justice by combining claims that would not be economical to pursue individually. They serve efficiency and justice by ensuring that wrongdoers face the full consequences of harm caused and modify their behaviour accordingly. These advantages are reasons to apply class proceedings legislation flexibly and expansively (at para. 25).

42 In *Samos Investments Inc. v. Pattison*, 216 D.L.R. (4th) 646, 2002 BCCA 442 (B.C. C.A.), Prowse J.A., discussing the policy underpinnings of the *Act* as canvassed by the Court in *Hollick*, quoted McLachlin C.J.C.'s comment:

> In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters (at para. 23).

43 The certification stage is not meant to test the merits of the plaintiff's claim (*Hollick* at paras. 16 and 37).

The certification criteria

Section 4(1)(a) — Cause of Action

44 The pleadings must disclose a cause of action. The test is the same as is applied under Rule 19(24) of the *Supreme Court Rules* (*Gregg v. Freightliner Ltd.*, 35 C.C.P.B. 31, 2003 BCSC 241 (B.C. S.C.) at paras. 22-24).

Section 4(1)(b)- Identifiable Class

45 There must be a recognizable class of two or more persons, and it must be defined by reference to objective criteria (*Hollick* at para. 17).

46 Section 6(2) of the *Act* requires that a class including persons not resident in British Columbia must be divided into subclasses and the Court must consider whether the non-resident subclass requires separate representation. Members of the non-resident subclass may not be included automatically in the action, but may be offered the right to opt in (s. 8(1)(g)), while resident members may be offered the right to opt out (s. 8(1)(f)).

Section 4(1)(c) — Common Issues

47 Under s. 4(1)(c) the inquiry is confined to whether common issues of fact or law exist. At this stage, the process does not involve the weighing of common issues against individual issues (*Harrington v. Dow Corning Corp.*, 193 D.L.R. (4th) 67, 2000 BCCA 605 (B.C. C.A.) at para. 23 [*Harrington*]).

48 Central to the inquiry under this section is whether a class action proceeding will avoid duplication of fact-finding or legal analysis. *Hollick* requires the Court to ask the following questions in order to determine whether issues are common issues:

- Is the resolution of the issue necessary to the resolution of the claim of each class member?
- Is the issue a substantial ingredient of each of the class members' claims?

49 With respect to the first factor, an issue will be common only where its resolution is applicable to all who are to be bound by it. The requirement of commonality means that "success for one is success for all" (*Metera v. Financial Planning Group*, 332 A.R. 244, 2003 ABQB 326 (Alta. Q.B.), [*Metera*], per Slatter J. at para. 54).

50 The second factor is satisfied if the resolution of a common issue, for or against the class, will move the litigation forward and is capable of extrapolation to all members of the class. Resolution of the common issues need not be determinative of liability (*Harrington* at paras. 20 to 24; *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, 98 B.C.A.C. 22 (B.C. C.A.) at paras. 52-53, [*Campbell* cited to B.C.L.R.]).

51 In *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173, 35 C.P.C. (4th) 43 (Ont. S.C.J.) at p. 197 [*Bre-X*] Winkler J. observed at p. 197 that a common issue must have sufficient significance to the claim asserted that its resolution will advance the litigation in a meaningful way:

> The existence of the common issue must be discernible at the certification stage since it provides the basis for the common issue trial and the viability of a class proceeding. The common issue cannot be dependent upon findings which have to be made at individual trials, not can it be based on an assumption to circumvent the necessity for the individual inquiries.

52 Further, as noted by the Court in *Tiemstra v. Insurance Corp. of British Columbia* (1997), 49 D.L.R. (4th) 419, 38 B.C.L.R. (3d) 377 (B.C. C.A.) at para. 15, the common issues must be "dispositive of a significant feature" of the claim.

Section 4(1)(d)- Preferability

53 Section 4(2) of the *Act* describes the factors the Court may take into account when determining the issue of preferability. The factors, as listed, are not exhaustive, and no single factor trumps the others (*Elms v. Laurentian Bank of Canada*, 90 B.C.L.R. (3d) 195, 2001 BCCA 429 (B.C. C.A.)).

54 The question of preferability must take into account the importance of the common issues in relation to the claims as a whole. One factor to consider is whether the common issues predominate over any questions affecting only individual members of the class. However, as noted by the Court in *Hollick*, that question cannot be determined in a vacuum. The common issues must be considered in context: Given all of the circumstances of the particular claim, would a class action be preferable to other methods of resolving these claims?

55 In *Campbell*, Cumming J.A., for the Court, stated that a chambers judge "must do something in the nature of a cost/benefit analysis in deciding whether to certify a proceeding" (at para. 66). That concept was expanded upon by Finch C.J. in *Hoy v. Medtronic Inc.*, 14 B.C.L.R. (4th) 32, 2003 BCCA 316 (B.C. C.A.) at para. 54:

> ...in my respectful view the cost/benefit analysis is not of the nature described by the defendants, i.e. it is not an accounting exercise to determine economic viability. The analysis, rather, involves an assessment of whether a class proceeding would advance the claims in any meaningful way. If resolution of the common issues goes a considerable measure towards obtaining relief for the plaintiffs, then the benefit of proceeding by way of class action, as opposed to individual actions, is a factor in favour of certification.

56 When addressing preferability, then, the Court must consider the common issues in context and the alternatives to certification, and determine whether a class proceeding will be a fair, efficient and manageable way of advancing a claim. In doing so, the Court must construe the statute generously, keeping in mind the objective of access to justice and judicial economy.

Section 4(1)(e) — Representative Plaintiff

57 The Court must be satisfied that there is a representative plaintiff who meets the requirements of the *Act* in that the plaintiff:

> (a) would fairly and adequately represent the interests of the class, including subclasses;
>
> (b) has produced a workable plan for advancing the proceeding and notifying class members; and

(c) does not have, on the common issues, a conflict of interest with other class members.

58 Sharbern proposes that it be appointed to represent the resident and non-resident subclasses. The defendants raised no issue with respect to the suitability of Sharbern as the representative.

59 I am of the view that Sharbern is an appropriate representative of the proposed class. It has formally obtained the support of 210 owners of 126 units. The principals of Sharbern, Robert Wood and Arend Hofman, have participated in an investors' committee since its inception in 1999, and have taken a leading role in organizing the group for litigation. Conflicts of interest are neither alleged nor apparent.

60 Sharbern has provided a plan for proceeding which, while it may require some modification, provides a workable means of advancing the litigation and notifying the proposed class members.

IV. Analysis

61 It was common ground among the parties that the causes of action disclosed by the pleadings are well-known to the law. Section 4(1)(a) of the *Act* is satisfied.

62 Section 4(1)(b) requires a recognizable class of two or more persons, defined by reference to objective criteria. The proposed class is limited to those unit owners who purchased units under the Offering Memorandum. It does not include any secondary purchasers.

63 There may be a small number of unit owners who do not reside in British Columbia. As required by s. 6(2) of the *Act*, Sharbern proposes that the class be divided into a resident subclass and a non-resident subclass. It proposes that these subclasses comprise the class, and that the class be defined as follows:

> The "Owners" are the owners and former owners of strata lots in the Vancouver Airport Hilton Hotel (the "Hotel") who purchased their strata lots from the defendant, Vancouver Airport Centre Ltd. ("VAC"), pursuant to an Offering Memorandum and Disclosure Statement dated February 3, 1998 (as amended July 8, 1998)(the "Offering Memorandum") or are the assignees of such a purchaser. The Resident Subclass comprises all Owners resident in British Columbia who do not opt out of this proceeding.
>
> The Non-Resident Subclass comprises all Owners not resident in British Columbia who opt into this proceeding....

64 The Owners constitute an identifiable class. The class membership is limited and is determined by an objective test.

65 As earlier noted, Sharbern is an appropriate representative plaintiff such that s. 4(1)(e) is satisfied.

66 The central issues in dispute concern the requirements of subsections (c) and (d) of s. 4(1), and are as follows:

(1) First, do the claims raise common issues?

(2) Second, if so, is a class action the preferable manner of proceeding?

1. Do the claims raise common issues?

67 To reiterate, the *Act* requires that

> ...the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members.

68 Sharbern's proposed list of common issues is appended to these reasons (Appendix 1). I will deal first with the alleged trust and fiduciary obligations.

Alleged Trust Obligations and Fiduciary Duty (VAC and HMS)

69 Sharbern proposes the following common issues with respect to the alleged trust and fiduciary obligations:

Trust obligations of VAC and HMS

- Are VAC and HMS trustees of the Gross Rental Revenue (as defined in the HAMA) collected pursuant to the HAMA for the benefit of the Owners?

- If so, what is the scope of the obligation of VAC and HMS to account to the Class for trust funds received and expended in the management of the Hotel, and is the obligation limited in the manner alleged by these defendants?

Breach of fiduciary duty by VAC and HMS

- Do VAC and HMS owe fiduciary duties to the Class in respect of the operation of the Hotel?

- If so, are they in a position where their fiduciary duties to the Class conflict with their interests in respect of the Airport Marriott or their duties to the unit owners of that hotel?

- Have VAC and HMS breached their fiduciary duties to the Class?

70 With respect to the claim that VAC and HMS are trustees of the rental revenues collected under the HAMA for the benefit of the unit owners, Sharbern seeks an accounting of the revenues received and expended in the management of the Airport Hilton, the return of management fees, and a declaration that Sharbern is entitled to inspect certain documents in the possession of VAC and HMS concerning the management of the Airport Hilton.

71 VAC and HMS admit the HAMA but deny they are trustees in respect of management fees. In the alternative, they plead that their obligation is limited to VAC providing reasonable accounting information as stipulated in the HAMA.

72 Sharbern says the lawsuit is grounded substantially in the alleged fiduciary relationship, and that the proposed common issue of fiduciary duty arises on the pleadings. The relationship is alleged to have arisen from the language of the HAMA to which all Owners are party. It is alleged that VAC owes the Owners fiduciary duties by reason of VAC's appointment as their agent to manage the Airport Hilton in their stead. As unit owners, they would otherwise have had the powers afforded strata unit owners under the *Condominium Act*, R.S.B.C. 1996, c. 64, as rep. by *Strata Property Act*, S.B.C. 1998, c. 43, s. 294. The Owners allege HMS owes them fiduciary duties by reason of its appointment as VAC's sub-agent.

73 Sharbern pleads further that the fiduciary duties of VAC and HMS conflict with the duties they owed to the unit owners of the Airport Marriott. VAC and HMS earn greater compensation, as a percentage of gross rental revenue, under the Airport Marriott management agreement than under the HAMA. Sharbern says the exposure under the Airport Marriott guarantee provides VAC and HMS with further incentive to divert customers from the Airport Hilton to the Airport Marriott.

74 VAC and HMS oppose the characterization of these issues as common issues. They say the existence of a fiduciary relationship, if any, will depend on the nature of the particular dealings and relationship which VAC and HMS may have had with the respective investors. They rely on *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 (S.C.C.) at para. 14, [*Hodgkinson* cited to S.C.R.] in which La Forest J. cited with approval the observation of the trial judge that "in construing a relationship as fiduciary, everything turns on the particular facts of the relationship."

75 VAC and HMS argue they must examine each of the intended class members to determine if their individual dealings with these defendants constitute the special circumstances necessary to justify characterizing their relationships

as fiduciary rather than simply contractual. That examination would entail inquiries into the differing degrees of sophistication of the Owners as investors, their varying levels of reliance, and the degree to which each Owner participated in the management activities of VAC and HMS.

76 Are the issues of trust and fiduciary duty issues common to the proposed class? I am satisfied they are common issues. My reasons for declining to accept the arguments of the Larco Defendants are as follows.

77 First, the issue at this stage of the proceeding is whether the pleadings give rise to an allegation of fiduciary duty common to the class, as distinct from whether that issue is likely to succeed at trial. In other words, the question here is whether the existence or non-existence of a fiduciary duty is an issue common to the class. Whether, as the defendants contend, the HAMA is contractual in nature, and whether the standard of conduct required under the HAMA is commercial reasonableness (as opposed to a duty to act in the best interests of the owners) are central issues to be determined on a hearing of the merits. They cannot be argued as a bar to certification.

78 Second, the claim disclosed by the pleadings is that VAC's duty to act in the best interests of the Owners arose from the specific language of the HAMA. Sharbern does not allege that the fiduciary duty arose from individual dealings between VAC (or its agents) and the Owners. To the extent that other factors may also give rise to a fiduciary duty, Sharbern does not rely on them.

79 I accept that the fiduciary duties alleged in the pleadings are duties alleged to arise out of a presumptively fiduciary relationship, created by the HAMA, of principal and agent or trustee and *cestui que trust*. In *Hodgkinson* at 407, the Court made these comments on the issue of presumptively fiduciary duties arising from contractual relationships:

> ...I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations.

80 At 409, the Court made a similar observation:

> ...there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interest of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal.

81 In *Elms v. Laurentian Bank of Canada*, 73 B.C.L.R. (3d) 366, 2000 BCSC 379 (B.C. S.C. [In Chambers]), [*Elms*] Maczko J. certified an action involving alleged breaches by investors of fiduciary duties they claimed were owed to them by a land developer, a law firm and a bank. In that case, the defendants argued that fiduciary relationships are individualistic and their existence must be determined on a case-by-case basis. Mr. Justice Maczko concluded at para. 17 that the defendants' argument overstated the proposition:

> If I accepted the defendants argument there could never be a class action where a breach of fiduciary duty is alleged. However, there have been at least three cases in which class actions have been certified where a breach of fiduciary duty has been alleged. What is relevant is the nature of the duty alleged to have been breached.

82 In *Elms*, as in the present case, the plaintiffs alleged that the documents reflecting the transaction were identical for each member of the class. The plaintiffs did not allege any individual circumstances that would change the nature of the relationship with the defendants. They also argued their claim did not require proof of reliance by the investors.

83 The decision of the trial judge to certify the claim in *Elms* was appealed, but certification was upheld by our Court of Appeal (*Elms v. Laurentian Bank of Canada*, 90 B.C.L.R. (3d) 195, 2001 BCCA 429 (B.C. C.A.)). On the question of whether breach of fiduciary duty was properly determined to be a common issue, the Court said the following at para. 44:

> The investors' characterization of their claim suggests that the issues of whether there is a duty of care, the scope of that duty, and whether there is a fiduciary duty are issues that are capable of extrapolation to each member of the class or subclass. The investors' argument is that Oliver had a duty, in the absence of reliance, based on the relationship Oliver had with all investors. Because the investors claim that any individual differences do not affect the nature of Oliver's duty to each of them, the resolution of this issue would be applicable to all members of the class. Similarly, the investors argued that the Bank had the same duty to each of them regardless of a particular investor's individual circumstances. They note that the documents by which each of them opened the R.R.S.P.'s with the Bank were identical. The resolution of the question of whether the Bank breached a duty of care or a fiduciary duty in these circumstances would be capable of extrapolation to each member of the class and would clearly move the litigation along significantly.

84 Sharbern has confined its claim, by virtue of the pleadings, to a claim of fiduciary duty arising from the HAMA. As counsel for Sharbern argued, it is not for the defendants to expand the plaintiff's claim in order to defeat certification. If the Owners succeed in their argument that the language of the HAMA creates fiduciary duties with respect to them, there will likely be no greater need to examine the individual circumstances than there would be in the case of a trustee or agent. At this point in the proceedings, it is sufficient that the issue is a common issue by virtue of the pleadings.

85 I am satisfied the issues of trust and fiduciary relationship are common issues arising from the pleadings. The relationship is alleged to have arisen under the HAMA, an agreement to which all Owners are party. At a minimum, determination of the existence of fiduciary duty as a common issue will assist in narrowing the scope of individual discoveries. More broadly, its determination is necessary to both the successful prosecution of the claim and its defence. As such, its resolution will move the litigation forward significantly.

Misrepresentation

86 Sharbern proposes the following common issues with respect to the claim of misrepresentation against VAC:

- Did VAC owe a duty of care to the Class in respect of representations contained in the Offering Memorandum?
- Did the Offering Memorandum materially misrepresent:

  (i) the conflict of interest and the agreements between VAC and the unit owners of the Vancouver Airport Marriott Hotel as alleged in the amended statement of claim?

  (ii) that the financial projections contained in the Offering Memorandum were based on reasonable assumptions, as alleged in the amended statement of claim?

- If so, was VAC negligent or fraudulent?
- Subject only to any individual defences and any individual issues of reliance, is VAC liable for negligent misrepresentation?

87 As against VAC, Sharbern alleges that it owed the Owners a duty of care in respect of certain representations contained in the Offering Memorandum. It says that duty of care was breached because the Offering Memorandum materially misrepresented first, the lack of conflict of interest and second, the financial projections.

88 Sharbern's plea of fraudulent misrepresentation (and, alternatively, negligent misrepresentation) rests on the statement in the Offering Memorandum that VAC was not aware of any material conflict of interest arising from its obligations to the Airport Marriott unit owners. The plea of negligent misrepresentation is based on the financial projections (that is, the projected average annual cash return of 16.6% in the first five years of the investment).

89 With respect to MM&R, Sharbern proposes the following common issues:

- Did MM&R owe a duty of care to the Class in respect of representations contained in the Offering Memorandum?

- Did MM&R materially misrepresent to the Class that the financial projections included in the Offering Memorandum were based on reasonable assumptions?

- If so, was MM&R negligent?

90 Sharbern's claim against MM&R is that it was negligent in the preparation of the financial projections, which were published by VAC in the Offering Memorandum. MM&R denies any negligence, and pleads that VAC included materials prepared by MM&R in the Offering Memorandum without its consent.

91 All of the defendants take the position that claims of misrepresentation, whether negligent or fraudulent, are not suitable to be considered as common issues. Principally, their position rests on three arguments.

92 First, they say duty of care in misrepresentation cases, particularly the issue of proximity of the relationship, must be determined on an individual or case by case basis. Duty of care is therefore not a common issue.

93 Second, they say misrepresentation claims require proof of actual reliance on the alleged misrepresentations, and this proof requires a case by case analysis which is inherently individualistic. As such, the individual issues in this case will overwhelm any common issues there may be. They point to the various promotional materials provided to the prospective investors, and the various promotional statements made to them by VAC or its agents in meetings and individual discussions. They also point to the fact that some investors may not have placed any reliance on the Offering Memorandum. The investors may have had a spectrum of reasons for investing in the project other than the projected rate of return on their money.

94 Thirdly, they say the materiality of the alleged misrepresentations cannot be determined without individual discovery of each investor because the question of whether a representation was material is, at least in part, a subjective inquiry involving the particular investor's circumstances, level of sophistication, investment objectives and the like. Again, this inquiry will overwhelm the common issues.

95 Sharbern's responses were as follows. First, the existence of a duty of care is a common issue arising on the pleadings. The amended statement of claim contains the allegation that the strata lots were sold to the owners under the Offering Memorandum. That allegation, in turn, lays the foundation for the allegations that VAC retained MM&R to prepare the projected annual cash returns by projecting occupancy rates and average daily room rates over a five-year period, which projections were alleged to have been included in the Offering Memorandum with MM&R's consent. It is alleged that through the inclusion of these reports, MM&R represented to the unit owners that the projections were reasonable.

96 Thus, says Sharbern, the material facts said to give rise to the alleged duty of care with respect to the negligent misrepresentation claim involve these common facts: VAC's retainer of MM&R, and MM&R's consent to include its report in the Offering Memorandum. The Offering Memorandum was distributed to a limited class of persons for the initial sale of units in the Airport Hilton. There is no issue of reliance by secondary purchasers.

97 Sharbern emphasizes that the claim of fraudulent misrepresentation is a narrow one. The plea involves only the allegation that VAC falsely represented that there were no material conflicts of interest. The question is whether the existence of the management fee and guarantee contained in the Airport Marriott agreement, and the joint management of the two hotels by HMS, created a conflict of interest that ought to have been brought home to the Owners in the Offering Memorandum.

98 Are the misrepresentation claims common issues in this case? I must have regard to the pleadings and to the common issues that arise from those pleadings. The owners advance claims based on two distinct representations, both contained in the Offering Memorandum: first, the statement that there were no material conflicts of interest and second, the statement that the financial projections were reasonable.

99 Central to the litigation is the question of whether the statement about conflict of interest in the Offering Memorandum is true. The answer to that question will bind all Owners, as all are identically situated in relation to this allegation. If the statement is true, the fraudulent (or negligent) misrepresentation claim based on the statement will fail without further inquiry. As such, the issue is a common one, the resolution of which will necessarily move the litigation forward in a meaningful way.

100 Whether the financial projections contained in the Offering Memorandum were reasonable is also central to the litigation. The answer to that question, too, will bind all of the Owners and move the litigation forward.

Duty of Care

101 The next question is whether duty of care can properly be characterized as a common issue.

102 In *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 577 (S.C.C.) [*Hercules Management*] the Court described the criteria for establishing a duty of care in a negligent misrepresentation action. A *prima facie* duty of care will arise where first, the defendant ought reasonably to have foreseen that the plaintiff would rely on the representation and second, where reliance by the plaintiff would be reasonable in the particular circumstances of the case.

103 The Court in *Hercules Management* also stipulated that there must be no policy considerations weighing against the imposition of a *prima facie* duty of care. In that case, there was a concern with respect to indeterminate liability.

104 Whether duty of care is a common issue depends on the pleadings in each case. In *Canadian Imperial Bank of Commerce v. Deloitte & Touche* (2003), 33 C.P.C. (5th) 127, 172 O.A.C. 59 (Ont. Div. Ct.) [*CIBC* cited to C.P.C.], the plaintiff sought to certify an action on behalf of sixty-nine financial institutions which had loaned more than $1 billion to Philip Services Inc. Deloitte was Philip's auditor. The plaintiff pleaded that the lenders relied on Philip's financial statements containing significant misrepresentations resulting from a negligent audit on the part of Deloitte. The trial judge (in *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 25 C.P.C. (5th) 188, [2002] O.T.C. 523 (Ont. S.C.J.)) declined to certify, finding in part that Deloitte's duty of care must be determined on a case-by-case basis.

105 The Divisional Court allowed the appeal on that point. Swinton J., giving judgement for the Court, had this to say on the issue of duty of care:

> The Supreme Court of Canada has held that a duty of care can be owed to a class of plaintiffs. In *Haig v. Bamford* [1977] 1 S.C.R. 466 (S.C.C.) Dickson J. determined that where an accountant who was to prepare audited financial statements for a corporation had actual knowledge of a limited class who would use and rely on the information, the accountant had a duty of care to members of that class (at 476-7). In that case, the plaintiff was an investor who had not been identified at the time that the financial statements were prepared, but the accountant was aware that the financial statements were to be used to attract equity investment for the company from a limited number of potential investors (at 478) (para. 34).

106 The Court determined that the manner in which negligent misrepresentation was pleaded made the duty of care a common issue. The pleadings alleged that Deloitte knew of a class of lenders who would rely on financial statements it prepared, and did rely on those statements. While the Court concluded that reliance was an individual issue, it nevertheless concluded that duty of care was a common issue. On that point, Swinton J. observed the following:

> Given *Haig* and *Hercules* [*Hercules Management Ltd. v. Ernst & Young* [1997] 2 S.C.R. 165 (S.C.C.)], and the way in which negligent misrepresentation has been pleaded, the issue of the duty of care is a common issue, since the plaintiffs base their claim on the fact that there was a class of plaintiffs known to Deloitte, to whom the financial statements would be shown for purposes of obtaining financing.

> The respondents also argued that there was an individual issue of reliance that must be considered in determining whether there was a duty of care because of a covenant in the 1997 Credit Agreement. In that covenant, the lenders undertook to complete an independent investigation and promised that they would not rely on information provided to them by the Administrative Agent, CIBC.
>
> There is no question that the issues of reliance and contributory negligence are individual issues. The effect of the provision of the Credit Agreement will be an issue at trial when the judge determines reliance and contributory negligence. However, the existence of this provision does not turn the issue of duty of care into an individual issue, given the way in which the duty of care has been pleaded in the Amended Statement of Claim (paras. 38-41).

107 In *Kripps v. Touche Ross & Co.* (1997), 33 B.C.L.R. (3d) 254, 35 C.C.L.T. (2d) 60 (B.C. C.A.) [*Kripps* cited to B.C.L.R.], our Court of Appeal discussed the issue of proximity as it relates to duty of care in a negligent misrepresentation case involving a prospectus. The Court agreed with the conclusion of the trial judge that the defendant auditors owed a duty of care to investors on the basis of "likely reliance" by the investors on audited statements:

> ...[B]ecause the auditors knew that the purpose for which they were engaged to audit the...financial statements...was to facilitate the sale of debentures to the public through the distribution of the company's prospectus containing their report, there was a proximity of relationship between them and an identifiable class of persons who would obtain a copy of the prospectus upon which they would likely rely. The proximity was clearly sufficient to give rise to a duty of care (para. 37).

108 The Court cannot, of course, resolve the merits of the duty of care issue on the certification application. At this stage, the question is whether the plaintiff has alleged the existence of a duty of care in a manner that gives rise to a common issue.

109 I have concluded that duty of care as pleaded in this case is a common issue. The material facts said to give rise to the alleged duty of care arise on common facts. The alleged negligent misrepresentation of the financial projections involve common facts, which are VAC's retainer of MM&R and MM&R's alleged consent to the inclusion of its report in the Offering Memorandum. The Offering Memorandum was distributed to a limited class of persons for the purpose of promoting units in the Airport Hilton for their initial sale. There is no issue of reliance by secondary purchasers.

110 The alleged misrepresentation (that is, that there was no conflict of interest) arises, once again, from the Offering Memorandum. The gist of the pleading is that VAC knew of a class of investors who would rely on this representation in the Offering Memorandum. The pleadings allege the existence of a duty of care in a manner giving rise to common issues that will substantially move the litigation forward.

Materiality

111 The defendants argue that even if the issue of whether the representations were true or reasonable are common issues, there remains the question of whether the representations were material. They say the materiality of the financial projections and the statement concerning conflict of interest are individual issues requiring discovery of each Owner.

112 In response, Sharbern asked how either representation could be anything other than material, given the nature of the investment and the obligation to issue a prospectus disclosing all facts material to that investment. With respect to the statement concerning conflict of interest, Sharbern invited consideration of the converse proposition — that is, a statement in the Offering Memorandum that VAC and HMS *would* be in a conflict of interest in managing the hotel for the next 20 years. Such a disclosure would surely be material to any prospective investor. Sharbern says this is a case where the materiality of the representation can be determined on the face of the document, without considering the individual circumstances of the investors.

113 Sharbern submits that materiality is an issue quite distinct from inducement or reliance. In support of that proposition, it relies on the following excerpt from Spencer Bower and Turner, *The Law of Actionable Misrepresentation* 3rd ed. (London: Butterworths, 1974) at paras. 124-6:

> Materiality is a thing distinct from inducement. Each is a question of fact, and each must be separately proved.
>
> A representation is material when its tendency, or its natural and probable result, is to induce the representee to enter into the contract or transaction which in fact he did enter into, or otherwise to alter his position in the manner in which he did in fact alter it.
>
> ...For the purpose of determining the question of materiality in any case, as distinct from inducement, the view of either of the parties are...of no importance whatever. If in any ordinary case a representation was not material, the fact that the representee thought at the time, or says at trial, that it was, cannot make it so; on the other hand, the fact that the representee at the time considered a material representation to be immaterial, does not negative its materiality, though of course it destroys all prospect of establishing actual inducement.

114 Sharbern accepts that reliance (with the possible exception of deemed reliance under the *Real Estate Act*) raises individual issues which may be resolved in whatever procedure the Court decides is appropriate after the determination of the common issues.

115 I accept Sharbern's argument that the materiality of a representation is an issue distinct from inducement (and that inducement relates to the reliance issue). The materiality of the representation that there were no conflicts of interest can be determined on the face of the Offering Memorandum. Whether the statement induced the Owners to purchase their units is a separate issue.

116 The materiality of the financial projections, which were based on room rates and occupancy rates, raises the same issue. The Offering Memorandum describes the ownership of units in the Airport Hilton as an investment opportunity, and projects an average annual return of 16.6% over five years. I do not accept (as argued by MM&R) that the projected room and occupancy rates ought to be viewed separately from the financial projections. The latter are directly tied to the former. The materiality of these projections is apparent from the Offering Memorandum itself, and do not require individual discovery of the investors. Whether the projections induced the investors to act as they did is another question which may require individual inquiries.

Reliance

117 In addition to the proposed common issues described earlier, Sharbern proposes as common issues the following:

> **Liability of VAC and MM&R based on Misrepresentation**
>
> • Are the members of the Class deemed to have relied on the representations contained in the Offering Memorandum pursuant to s. 75(2) of the ***Real Estate Act***, R.S.B.C. 1996, c. 397 and the common law?
>
> • Subject only to any individual defences and any individual issues of reliance, is VAC or MM&R liable to the Class for misrepresentation, and, if so, what individual defences remain for determination?

118 As noted by all of the defendants, reliance is an essential ingredient in the tort of negligent misrepresentation: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 (S.C.C.). In that case, Iacobucci J. described the ingredients of a successful negligent misrepresentation claim:

> (1) There must be a duty of care based on a "special relationship" between the representor and the representee;
>
> (2) The representation must be untrue, inaccurate or misleading;

(3) The representor must have acted negligently in making the misrepresentation;

(4) The representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

(5) The reliance must have been detrimental to the representee in the sense that damages resulted.

119 Similarly, reliance is an ingredient of fraudulent misrepresentation. In *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1990] 3 W.W.R. 690, 44 B.C.L.R. (2d) 145 (B.C. C.A.). Southin J.A. described the constituent elements of the tort as follows:

(1) There was a false representation;

(2) The defendant did not have an honest belief in the representation;

(3) The plaintiff relied on the false representation to his or her detriment; and

(4) The defendant intended to deceive the plaintiff.

120 The defendants argue that each member of the class must prove actual reliance on the alleged misrepresentations, based on the individual circumstances of each investor. For that reason, misrepresentation is not suitable to be considered as a common issue.

121 As against VAC, Sharbern has amended its statement of claim to include a plea involving the statutory cause of action arising under s. 75(2) of the *Real Estate Act*. The Offering Memorandum was a prospectus issued under Part 2 of the legislation. Part 2 requires developers in certain circumstances to make material disclosures by way of a prospectus. Where a prospectus contains a material misstatement, the *Real Estate Act* describes a regimen for statutory relief against the developer and other persons who authorized the issuing of the prospectus.

122 Section 75(2) provides in part the following:

> If a prospectus has been accepted for filing by the superintendent under this Part,
>
> (a) every purchaser of any part of the subdivided land...to which the prospectus relates is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not, and
>
> (b) if any material false statement is contained in the prospectus,
>
> . . .
>
> (iii) every person who is a developer...
>
> . . .
>
> is liable to compensate all persons who have purchased the subdivided land...for any loss of damage those persons may have sustained, unless it is proved
>
> (viii) that, with respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, the person had reasonable grounds to believe and did, up to the time of the sale of the subdivided land...believe that the statement was true, [and]
>
> (ix) that, with respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from or report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy or extract from a report or valuation, but the...developer or person who authorized the issue of the prospectus is liable to pay compensation as aforesaid if it is proved

> that he, she or it had no reasonable grounds to believe that the person making the statement, report or valuation was competent to make it...

123 The section creates, for the benefit of purchasers pursuing a statutory claim, a presumption of reliance on the prospectus even where the purchaser did not receive the prospectus.

124 As against VAC, Sharbern's amended pleadings disclose a common law claim and a claim for a statutory remedy under the *Real Estate Act*. Sharbern acknowledges that these deemed reliance provisions do not apply to MM&R.

125 The operation of the deemed reliance provisions arising from the statute was examined in *Hass v. Tung Nan Enterprises Ltd.*, [1997] B.C.J. No. 127 (B.C. S.C. [In Chambers]). The plaintiffs bought a condominium pursuant to an offering memorandum, which contained an estimate of future maintenance fees. The estimate was accurate when it was made, but by the time the plaintiffs bought the condominium the developer knew the fees were understated by approximately $60 per month. The trial judge allowed the plaintiff's action on a summary trial and awarded damages. The plaintiffs had not seen the offering memorandum at the time they agreed to buy the condominium as it was delivered to them only after they entered into to purchase agreement. However, that fact made no difference to the claim due to the presumption of reliance under the *Real Estate Act*.

126 Whether Sharbern can succeed in its statutory claim against VAC is an issue to be determined at trial, as is the question of whether the deeming provisions of the *Real Estate Act* apply to a common law claim of misrepresentation. If Sharbern does not succeed on either of those issues, actual reliance will become an issue, as it is in the claims against MM&R. As already noted, the defendants say actual reliance can be determined only on a case by case basis and is, by necessity, an individual issue.

127 At least one of the Owners, a company known as Tevan Trading Ltd., purchased ten units in the Airport Hilton. By operation of a regulation to the *Real Estate Act*, VAC may be exempt from the requirement to provide Tevan with a copy of the Offering Memorandum. In that case, a subclass consisting of Tevan may be required to prove actual reliance as well.

128 The Court in *Kripps* cited (at para. 98) one of its earlier decisions concerning fraudulent misrepresentation, *Parallels Restaurant Ltd. v. Yeung's Enterprises Ltd.* (1990), 4 C.C.L.T. (2d) 59 (B.C. C.A.) in which Anderson J.A. held the following at p. 68

> In my opinion, once the plaintiff has proved a false representation of a material fact, the evidentiary burden shifts to the defendant to clearly show that the plaintiff was not induced by the false representation.

129 The majority in *Kripps* also concluded that proof of reliance in negligent misrepresentation cases should not be any different than it is in cases of fraud.

130 As noted, reliance may or may not be an individual issue with respect to the allegations against VAC. At this stage of the proceedings, however, whether the deemed reliance is available to the Owners is a common issue.

131 In the event the deeming provisions of the *Real Estate Act* are not available to the Owners, reliance may or may not be inferred with respect to VAC.

132 This case, like most cases in which certification is sought, involves some individual issues. With respect to MM&R, reliance is one of them. It may also be an individual issue with respect to VAC. However, the relative significance of the common and individual issues is a matter that must be examined in the context of the preferability analysis, to which I will turn in due course.

Remedies

133 Sharbern proposes the following common issues with respect to remedies:

- Subject only to any individual defences, and any individual issues of reliance, is the Class or are the members of the Class entitled to the following remedies as a result of the defendants' breach of fiduciary duty, breach of trust or misrepresentation and negligence:
    - (i) rescission of their purchases?
    - (ii) damages, including statutory compensation?
- If the Class or the individual Owners are entitled to damages, what is the measure of the damages and how are they to be calculated?
- If the measure of damages depends in whole or in part on the fair market value of the strata lots in the Hotel at a given time, what was the fair market value of the strata lots at the relevant time(s)?
- Are VAC and HMS liable to the Class on an accounting? If so, does their liability include:
    - (i) liability for the return of management fees taken by them from the Hotel's revenues?
    - (ii) liability for the return of any other financial benefits obtained through breaches of fiduciary duty?
    - (iii) liability arising out of the failure by VAC and HMS to lawfully allocate expenses between the Hotel and the Airport Marriott:

134 It was not disputed by VAC and HMS that their potential liability on an accounting was a common issue.

135 The rescission remedy as against VAC arises from the allegations of misrepresentation and breach of fiduciary duty consequent upon the purchase of the Airport Hilton units. Whether a particular class member is entitled to the remedy will depend on individual defences that may be raised. For example, the availability of rescission as a remedy will depend on when individual Owners became aware of the alleged breaches.

136 Sharbern acknowledges that whether the Court will be able to address damages as a common issue is unclear at this stage in the proceedings. It says damages *may* be a common issue, citing *Kerr v. Danier Leather Inc.* (2004), 46 B.L.R. (3d) 167, 23 C.C.L.T. (3d) 77 (Ont. S.C.J.), where damages were dealt with as a common issue in a misrepresentation action involving the sale of shares under an offering memorandum.

137 Where the case of misrepresentation or breach of fiduciary duty has been established in respect of the purchase of real property, the measure of damages is the difference between the purchase price and the fair market value of the property at the date the purchaser could reasonably have known the facts giving rise to the claim: *Begusic v. Clark, Wilson & Co.* (1991), 82 D.L.R. (4th) 667, 57 B.C.L.R. (2d) 273 (B.C. C.A.) at paras. 63-68. In this case, the Owners will seek damages based on the difference between the value of the units and the purchase price.

138 The units differ in size and location within the hotel. Sharbern proposes that the market value of the units be determined by reference to the value of a representative unit, with adjustments, to be addressed through expert evidence. It suggests this issue is amenable to determination at a common issue trial, where the valuation experts would be required to testify only once.

139 The date of valuation may not be a common issue. The Court must be able to determine the earliest and latest dates on which an Owner might have been expected to know the facts giving rise to his or her claim. Sharbern proposes that in the trial of the common issues the Court hear evidence and determine how market values have fluctuated through the various possible dates that may be determined individually. In other words, the Court would fix the valuation period on the common issues trial, and on subsequent individual trials determine individual values within that period.

140 I accept that the issue of an accounting remedy is a common issue. However, whether the Court will be in a position to address rescission and damages as common issues is not clear at this stage. The nature and scope of these remedial matters will depend, at least in part, on the outcome of the other common issues. In my view, while some of the remedial issues may be common issues as proposed by Sharbern, their consideration ought to be put in abeyance until after the trial of the common issues on liability.

Summary: Common Issues

141 In summary, I conclude that the following issues are common issues, subject to further discussion and submissions by counsel as to the precise framing of the issues:

(a) *Trust Relationship:*

(i) Whether VAC and HMS are trustees of the revenues collected under the HAMA; and

(ii) If so, the scope of the obligation of VAC and HMS to account for the trust funds received and expended in the management of the Hotel;

(b) *Fiduciary Duty:*

(i) Whether VAC and HMS owe fiduciary duties to the Class in respect of the operation on the Hotel and, if so, whether their fiduciary duties conflict with their interests with respect to the Airport Marriott or their duties to the unit owners of that hotel;

(ii) Whether VAC and HMS have breached their fiduciary duties to the Class;

(c) *Misrepresentation - VAC*

(i) Whether VAC owed a duty of care to the Class in respect of the impugned representations contained in the Offering Memorandum;

(ii) Whether the impugned representations in the Offering Memorandum were material misrepresentations and, if so, whether VAC was negligent or fraudulent;

(iii) Whether the members of the Class are deemed to have relied on the impugned representations of VAC pursuant to s. 75(2) of the *Real Estate Act;*

(iv) Whether, subject to individual issues of reliance and individual defences, VAC is liable for negligent or fraudulent misrepresentation;

(d) *Misrepresentation: MM&R*

(i) Whether MM&R owed a duty of care to the Class in respect of representations in the Offering Memorandum;

(ii) Whether MM&R materially misrepresented to the Class that the financial projections in the Offering Memorandum were reasonable and, if so, whether MM&R was negligent;

(iii) Whether, subject to individual issues of reliance and individual defences, MM&R is liable for misrepresentation.

142 The precise nature and scope of the individual reliance issues and individual defences ought to be determined following the trial of the common issues.

143 While some remedial issues will likely be common issues, their characterization ought to await the conclusion of the common issues trial.

2. Is a class action the preferable procedure?

144 To reiterate, s. 4(2) of the *Class Proceeding Act* provides that when determining whether a class proceeding would be the preferable procedure, the Court's consideration must include the following:

- whether common issues predominate over individual issues;
- whether a significant number of class members have a valid interest in individually controlling the prosecution of separate actions;
- whether the proceeding would involve claims that are the subject of other proceedings;
- whether other means of resolving the claims are less practical or efficient;
- whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

145 The principal submissions of all defendants are twofold. First, they say resolution of the common issues will not sufficiently advance the litigation, given the significance of individual issues of duty of care, reliance and materiality to claims of negligent and fraudulent misrepresentation. The individual issues, say the defendants, will overwhelm the common issues.

146 Second, the defendants submit that a class action proceeding is not designed to shift the balance in commercial litigation by preventing the defendants access to procedures they need to defend the action and move the litigation forward. They say that in this case, in particular, postponement of their discovery rights with respect to the individual Owners on the issues of reliance and materiality will result in unfairness to them.

147 The defendants say the preferable procedure is the Multi-Plaintiff Action. That proceeding was filed on behalf of 210 owners of 126 units (of the 215 units sold to the public).

148 I have already addressed the issues of duty of care and materiality. Both, in my view, are common issues that do not require individual inquiries. As already noted, however, the reliance issues will require individual inquiries, at least with respect to the negligent misrepresentation claim against MM&R, and possibly with respect to the misrepresentation claims against VAC.

149 Sharbern's response to the defendants' arguments is as follows. Fundamentally, it says, this is a prospectus case, not a case involving multiple representations. There is no plea that would engage individual inquiries as to what might have been said to each of the Owners by realtors or others. The Owners do not advance claims based on any representations that may have been made by VAC in promotional materials, meetings or one-on-one discussions with prospective investors. To the extent that VAC made representations not found in the Offering Memorandum, the owners do not advance claims based on them.

150 Sharbern says the fact that this is a prospectus case goes a long way to addressing the defendants' arguments concerning reliance and materiality. One must simply ask "Why is a prospectus required?" The law requires a prospectus in transactions such as the one currently in issue because purchasers must be apprised of all facts material to their decision to invest. It is presumed that investors will rely on the prospectus when making their investment decision. The prospectus protects not only the purchaser but the developer, who can point to the prospectus in the event the purchaser claims he or she was not made aware of all facts material to the transaction.

151 Simply put, says Sharbern, there is no air of reality to the argument that reliance is the most significant issue in a prospectus case, or that reliance as an individual issue will overwhelm the common issues. In a prospectus case, the most significant issue is whether the material facts contained in the prospectus are true. That issue is a common issue, the answer to which will either end the dispute or significantly move the litigation forward.

Section 4(2)(a) Predominance of Common Questions

152 As noted earlier, in the context of preferability, the statute requires the Court to consider the relative significance of the individual issues to the common issues. While there is no requirement that the common issues predominate, the *Act* directs the Court to consider as one criterion whether common issues predominate over issues affecting only individual members of the class.

153 As against VAC, there may or may not be individual issues of reliance with respect to most investors. The deeming provisions of the *Real Estate Act* do not apply to MM&R such that individual issues of reliance are bound to arise. Depending on the circumstances of the case, it may fall to the Owners to prove reliance.

154 On the other hand, depending upon the findings of fact at trial, reliance may be inferred such that it falls to the defendants to rebut the inference. In *Kripps*, at para. 103, Finch J.A. (as he then was) concluded the following:

> It is sufficient...for the plaintiff in an action for negligent misrepresentation to prove that the misrepresentation was at least one factor which induced the plaintiff to act to his or her detriment. I am also of the view that where the misrepresentation in question is one which was calculated or which would naturally tend to induce the plaintiff to act upon it, the plaintiff's reliance may be inferred The inference of reliance is one which may be rebutted but the onus of doing so rests on the representor.

155 In *CIBC* the Court concluded that although reliance was a significant individual issue in the action, certification was appropriate. That was because a significant number of issues were properly characterized as common issues on the pleadings, including the existence of a duty of care, the appropriate standard of care, whether there were material misstatements and whether the misstatements were made negligently. Determination of all these issues would significantly advance the litigation. Swinton J observed:

> Here, there are two sets of representations found in the two financial statements. While the reliance of each Original Lender on those representations will have to be determined at some point, it will only be after a determination of significant common issues with respect to liability — particularly the existence of a duty of care to the Original Lenders, the standard of care for auditors, the determination whether there were material misstatements in the financial statements, and whether the misstatements were made negligently or recklessly. All of these are significant common issues, requiring extensive documentary and oral evidence and, with respect to the standard of care issues, expert evidence.... Resolution of these issues is very important to the course of the litigation, as success in respect of the common issues will significantly advance the litigation for the proposed class members, while if those issues are decided in favour of the defendants, the litigation will come to an end (para. 41).

156 The defendants argue that misrepresentation claims such as the ones disclosed in this case are not suitable for a class proceeding because the individual issues, and particularly the reliance issues, will inevitably overwhelm the common ones. One of the decisions on which they rely is *Moyes v. Fortune Financial Corp.* (2002), 61 O.R. (3d) 770, 32 C.P.C. (5th) 150 (Ont. S.C.J.), aff'd (2003), 67 O.R. (3d) 795, 38 C.P.C. (5th) 67 (Ont. Div. Ct.) [*Moyes*]). In *Moyes*, duty of care was also found to be an individual issue, but the Court focussed principally on the issue of reliance. At para. 32, the Court said the following:

> Common issues #4 and #5 theoretically could be determined on a class-wide basis insofar as the statements are determined to be false, misleading or inaccurate. But that determination alone does not determine the issue of liability. Central to the liability issue in this regard are the determinations of whether any given class member received

> the statements and, if so, whether they relied upon them and, if so, whether that reliance caused any damage. In other words, the determination of the accuracy of the statements may start you along the road to the ultimate destination, that is the determination of liability, but it appears there would be many miles left to travel before arriving there. This point is made by Winkler J. in *Carom v. Bre-X Minerals Ltd.*, *supra*, at p. 241 O.R.:
>
> > Reliance is not established by a mere showing that a plaintiff was a recipient of a representation. Rather, the representation must have caused the recipient to act in a certain manner. In these actions, this means that not only will the details of the actual representations made to the individual class members have to be analyzed, but that the action taken by the class members after each representation was made will have to be scrutinized as well.

157 *Moyes* involved a plaintiff who sought to certify claims against a former investment advisor to a proposed class of investors. The advisor's dealings with the investors involved a series of representations made at various meetings at different times. Some representations were made by the promoter, while others were made by an intermediary. There was no offering memorandum or prospectus. The Court concluded, among other things, that a finding of misrepresentation on the part of the intermediary, as distinct from the promoter, would not necessarily mean success for all members of the class on that issue.

158 Sharbern, on the other hand, relies on *Metera*. In that case, four plaintiffs applied for certification of an action on behalf of 85 investors against Financial, as well as a mutual fund dealer and related corporations. The investment offered by Financial was limited partnership units in an apartment complex in Las Vegas. The units were marketed under a prospectus exemption provided by the Alberta securities legislation. The claims against the defendants included negligence, negligent misrepresentation, breach of fiduciary duty and conflict of interest.

159 In *Metera*, Slatter J. discussed at some length the issue of whether proceedings ought to be certified where there are significant individual issues in addition to the common issues. The Court observed that both British Columbia and Alberta class proceeding legislation recognize there will be cases where common issues ought to be decided as a class proceeding even though numerous individual issues will remain to be decided. As it was put by Slatter J. at para. 68, "Even where the individual issues overwhelm the common issues, the court must still ask 'How is it best to decide those common issues?'."

160 Slatter, J. went on to say the following at para. 69:

> It should be noted that it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. Class proceedings are usually bifurcated. First there is a hearing or trial to determine the common issues, and then a procedure must be devised to resolve the individual issues. This is the normal situation, and the presence of individual issues should not be overemphasized, the question always being whether a class proceeding is the preferable way to resolve what common issues there are.

161 The Court in *Metera* discussed the *Moyes* decision at some length. Slatter J. noted that in *Moyes*, concern was expressed that a decision on the common issues would only begin the inquiry, and would be only theoretical until the individual issues were decided. Citing cases such as *Bre-X*, the Court observed that a determination of the common issues need not necessarily result in a determination of liability:

> ...the common issues do not have to embrace the entire cause of action. So just because an issue like reliance is an individual issue does not preclude other aspects of a misrepresentation claim from raising common issues. ... [T]he better formulation of the test is how the common issues can best be decided.... This test can be met even if the common issues are somewhat "preliminary" (para. 71).

162 The decision of Bauman J. in *Samos Investments Inc. v. Pattison* (2001), 22 B.L.R. (3d) 46, 2001 BCSC 1790 (B.C. S.C.) [*Samos*], provides a helpful overview of cases involving proposed class actions for misrepresentation and breach of fiduciary duty arising primarily from investments. Mr. Justice Bauman observed at para. 78 of *Samos* that from a review of the cases in which certification was granted one could extract certain common themes, which he described as follows:

(a) The first point that emerges is that in each case the central allegation concerned essentially a single transaction (at para. 81);

(b) The second point that emerges from these cases is really a reflection of the first: the proposed class in each case was largely homogeneous; the same fraud or misrepresentation was made to all and that triggered each of their losses — although the quantum of each loss might not have been similar (at para. 91);

(c) The third point is in turn a reflection of the second: each class member's loss was easy to quantify, that is, amount invested less amount realized when the fraud/misrepresentation became generally known (at para. 92).

163 After reviewing the cases in which certification was denied, Bauman J. noted the following:

What emerges from these cases is evidence of a marked reluctance to certify actions where there would be the need to resolve a number of issues individually, where there are differences in the claims or conflicts of interest between the proposed class members, and where, in misrepresentation cases, there is no commonality as to the representation received or the timing of receipt (para. 107).

164 *Samos* concerned an alleged conspiracy involving a series of corporate transactions undertaken by directors of Westar, a widely traded public company, over a period of several years. The action, initiated by a minority shareholder in the company, involved allegations of fraudulent misrepresentation and breach of fiduciary duty. The proposed class of plaintiffs was shareholders who held shares in the company during several different time periods.

165 In *Samos*, the Court refused to certify the action, principally for two reasons. First, as a result of the active trading of Westar shares during the several time periods in question, the allegations involved different representations made to different shareholders during various periods of time, potentially inducing a spectrum of reactions from investors. Consequently, there were few, if any, common issues. Second, and perhaps more importantly, the fact of different representations at different times within each of the time periods created actual conflicts between members of the class.

166 In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 (S.C.C.), the Court permitted certification of an investor's action where the individual circumstances of the investors were quite diverse. The essence of the claim was that the defendants and their advisors breached their fiduciary duties to the investors by mismanaging or misdirecting their funds. Writing for the Court, McLachlin C.J. held as follows at paras. 53-54:

The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, though different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess recessionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

167 In the case of *Kerr v. Danier Leather Inc.* (2001), 19 B.L.R. (3d) 254, 14 C.P.C. (5th) 293 (Ont. S.C.J.) [*Kerr* cited to C.P.C.], the Court certified a claim for misrepresentations contained in a prospectus issued under the Ontario securities legislation for an initial public offering. At the certification hearing, it was unclear whether the damages issues

could be determined as common issues. The Court nevertheless held that certification was warranted. At paras. 60-62, the Court concluded as follows:

> There is an arguable issue in respect of damages that properly cannot, and should not, be determined at this point. This is an issue for the judge that tries the common issues. The *CPA* is sufficiently flexible such that if it is ultimately determined that the damages issues must be dealt with on an individual basis this can be done....
>
> Although a resolution of the common issues as to misrepresentation may not end the litigation because it is ultimately determined that the question of damages must [be] dealt with as individual issues, the resolution of the conceded common issues in favour of the *defendant* would undoubtedly conclude the matter. On the other hand, a resolution of the conceded common issues in favour of the *plaintiff* class would advance the progress of the litigation.
>
> [Emphasis in original]

168 In cases where common issues have been identified that would move the litigation forward, the existence of significant individual issues has not been regarded as an obstacle to certification. In *Harrington*, a products liability case involving silicone breast implants, the Court identified as a single common issue the question of whether the implants were reasonably fit for their intended purpose. The Court acknowledged that individual issues of causation, allocation of fault, limitation defences and damages remained to be determined following the trial of the common issue. The action was nevertheless certified on the basis that the resolution of the common issue would significantly advance (or end) the litigation.

169 Another products liability case, *Hoy v. Medtronic Inc.* (2001), 94 B.C.L.R. (3d) 169, 2001 BCSC 1343 (B.C. S.C. [In Chambers]), aff'd [2003] 7 W.W.R. 681, 2003 BCCA 316 (B.C. C.A.), involved the manufacture and sale of allegedly defective pacemaker leads. The identified common issues were duty of care, breach of standard of care and punitive damages. There were many more individual issues than common issues, all of which were likely to arise at the trials of the individual claims, including the issue of damages. Nevertheless, the common issues were such that their resolution would advance the litigation in a meaningful way, and the numerous individual issues were not a bar to certification.

170 A similar result was reached in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69 (S.C.C.), which involved allegations by former residents of the Jericho School for the Deaf that they had been the victims of systemic sexual abuse. The common issue was whether the defendant was negligent or in breach of fiduciary duty in failing to take reasonable measures to protect students from sexual misconduct. Again, the action was certified despite the numerous individual issues such as causation and injury that would remain to be litigated following the common issues trial.

171 Returning to s. 4(2)(a) of the *Act* as it relates to the circumstances of the present case, I am persuaded that the relationship between the common and individual issues is one that favours certification. This is a prospectus case. The alleged representations were made in one set of documents, at one time, to a finite group of investors. The common issues are fundamental to the resolution of the claims advanced, and are not overwhelmed by individual issues such as reliance. I accept the submission of Sharbern that with respect to the allegations of both misrepresentation and breach of fiduciary duty, the central question is whether the impugned statements in the Offering Memorandum are true. If the answer is "yes", the defendants will defeat both the misrepresentation and breach of fiduciary duty claims. If the answer is in whole or in part "no", the litigation will have been advanced significantly. In view of the manner in which the action has been framed by the pleadings, I am satisfied that the common issues of fact and law will predominate over the issues affecting only individual members.

Section 4(2)(b) Separate Actions

172 The proposed class action is supported by a majority of the members of the class. There was no evidence to suggest that any of the class members wished to proceed individually.

Section 4(2)(c) Other Proceedings

173 The Multi-Plaintiff Action was launched in February of 2004 to preserve the rights of individual plaintiffs against the possible expiry of the limitation period. In the event that Sharbern's action is certified, the Multi-Plaintiff Action will be stayed.

Section 4(2)(d) Other Means of Resolving the Claims

174 The defendants argue that the Multi-Plaintiff Action is a more practical and efficient means of determining the claims than the proposed class action. They say there is no evidence that the class proceeding would promote access to justice, particularly as individual claims of this magnitude are commonly handled as normal commercial lawsuits. According to the defendants, class actions were intended only to assist those claimants with small "non-commercial" claims, such as product liability claims, where relatively small claims would not otherwise proceed. In those cases, particularly given the size of the claims, there is no expectation of (or necessity for) significant discovery of individual claimants.

175 In the present case, the average price of an individual unit was approximately $155,000. However, in some cases, several Owners pooled their resources to buy one unit. In other cases, one Owner purchased one or more units. Thus, the size of the investment varies from Owner to Owner.

176 While one policy underpinning of the *Act* is undoubtedly to promote access to justice for those litigants bringing claims with limited individual economic recovery, the legislation is not limited to that objective. In *CIBC*, for example, the Ontario Divisional Court held that a class action would be the preferable procedure to address the claims of sixty-nine financial institutions with respect to losses on loans exceeding $1 billion. The preferability criteria, while encompassing the objective of access to justice, do not limit class proceedings on that basis.

177 The defendants also argued that the *Act* was not designed to alter the balance in commercial litigation where there is an expectation of significant discovery early in the proceedings. They say substantial unfairness will result if they are denied access to full and timely discovery of all 210 owners currently involved in the litigation.

178 While there will be postponement of discovery rights, the *Act* contemplates that result once an action is certified, pending resolution of the common issues. That is the inevitable result of certification in most instances. However, it will be open to the Court to give directions as to the manner and scope of discovery under s. 27(3)(b) of the *Act*, and to establish special rules for the trial of the individual issues, if warranted.

Section 4(2)(e) Administration of the Class Proceeding

179 I have already concluded that individual inquiries such as those contemplated by the Multi-Plaintiff Action do not constitute the preferable procedure in this case, given the number of common issues and the advantages of having those common issues decided first. Once the common issues are decided, individual issues such as reliance and individual defences that are available against members of the class can be tested.

180 The alternative to certification is the Multi-Plaintiff Action, filed as a precautionary measure on behalf of 210 owners of 126 units. Every plaintiff will be subject to discovery on every issue. In *Reid v. Ford Motor Co.* (2003), [2004] B.C.W.L.D. 295, 2003 BCSC 1632 (B.C. S.C.), Gerow J. made the following observation which, in my view, is applicable to the circumstances in the present case:

> Judicial economy will also be enhanced because the class members do not need to participate in the initial discovery process or the common issues trial. If the defendants are successful at the common issues trial, the court and the class will be saved from having to manage and participate in such individual procedures. If the plaintiff is successful, any procedures necessary to resolve the individual litigation will be no more complex than they would have been within individual litigation, and given the many management tools available in class proceedings, should be simpler (para. 100).

181 In short, the administration of the class proceeding will present fewer difficulties than those likely to be experienced if the matter proceeded in the form of the Multi-Plaintiff Action. The identical issues would have to be considered in that action, but in a less controlled and efficient manner.

182 The defendant MM&R argued that the third party claim it has brought against the Larco Defendants poses practical problems for the certification application. MM&R submitted that while liability in the third party claim will not crystallize until the Owners' claims have been determined, facts relevant in the claim include those relevant in the Owners claim against all defendants. Thus, it argues, the interests of judicial economy would not be served by dealing with the third party claim after the Owners' claims are resolved.

183 At this point in the proceedings, it is not clear why the third party claim cannot be tried during the common issues trial, or immediately after. All issues specific to the third party claim are common to all Owners. The Larco Defendants will be participating in the common issues trial such that no prejudice will accrue to them.

184 There are a number of options available to deal with the third party claim, including the ordering of a separate trial (*Aylsworth v. Richardson Greenshields of Canada Ltd.* (1987), 20 B.C.L.R. (2d) 43 (B.C. S.C.)). It is open to the defendants to make further submissions on this point before the trial on the common issues. At this point, I do not view the third party proceedings as an impediment to certification of Sharbern's action.

Summary on the issue of preferable procedure

185 In light of the criteria described in s. 4(2) of the *Act*, I am satisfied that a class proceeding is the preferable procedure in this case. The class is limited and well-defined. There are substantial common issues which are significant in relation to the claims as a whole. The resolution of those issues will advance the claims in a meaningful way.

Proposed Plan for Proceeding

186 Sharbern's proposed plan for proceeding is appended to its notice of motion. Detailed submissions concerning the plan were not made in the course of the certification hearing and, certainly, at that point such arguments would have been premature. A case management hearing ought to be convened at the earliest convenience of the parties and the Court for the purpose of dealing with the litigation plan.

V. Summary of Conclusions

187 I have concluded the following:

1(a) The claims of Sharbern raise several significant common issues, the resolution of which will either end the lawsuit or advance it in a meaningful way. Framed generally, the common issues are the following:

(i) Trust obligations of VAC and HMS

(ii) Breach of fiduciary duty by VAC and HMS

(iii) Liability of VAC for misrepresentations (fraudulent and negligent) in the Offering Memorandum (including the issue of deemed reliance under the *Real Estate Act*);

(iv) Liability of MM&R for negligent misrepresentation in the preparation of the financial projections;

(b) Remedial issues such as rescission and damages may or may not be individual issues. Their characterization should await the conclusion of the common issues trial.

2 A class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

188 Accordingly, I make the following orders:

- The action will be certified as a class proceeding;
- The Class is described as proposed in Sharbern's notice of motion, subject to further submissions by counsel on additional subclasses (such as a subclass consisting of Tevan);
- The notice requirements and opting out provisions are as proposed by Sharbern;
- The plaintiff Sharbern will be the representative plaintiff;
- The common issues of fact or law are as described in para. 140 above, subject to discussion and further submissions by counsel;
- The plan of proceeding proposed by Sharbern will be subject to discussion and further submissions by counsel.

189 A case management conference will be convened at a date agreeable to counsel.

Application granted.

APPENDIX 1 — Amended Plaintiff's List of Common Issues

Trust obligations of VAC and HMS

(a) Are VAC and HMS trustees of the Gross Rental Revenue (as defined in the Hotel Asset Management Agreement) collected pursuant to the Hotel Asset Management Agreement for the benefit of the Owners?

(b) If so, what is the scope of the obligation of VAC and HMS to account to the Class for trust funds received and expended in the management of the Hotel and is the obligation limited in the manner alleged by these defendants?

Breach of fiduciary duty by VAC and HMS

(c) Do VAC and HMS owe fiduciary duties to the Class in respect of the operation of the Hotel?

(d) If so, are they in a position where their fiduciary duties to the Class conflict with their interests in respect of the Vancouver Airport Marriott Hotel or their duties to the unit owners of that hotel?

(e) Have VAC and HMS breached their fiduciary duties to the Class?

Misrepresentations by VAC in the Offering Memorandum

(f) Did VAC owe a duty of care to the Class in respect of representations contained in the Offering Memorandum?

Did the Offering Memorandum materially misrepresent:

(i) the conflict of interest and the agreements between VAC and the unit owners of the Vancouver Airport Marriott Hotel as alleged in the amended statement of claim?

(ii) that the financial projections contained in the Offering Memorandum were based on reasonable assumptions, as alleged in the amended statement of claim?

If so, was VAC negligent or fraudulent?

(i) Subject only to any individual defences *[and any individual issues of reliance]*, is VAC liable for negligent or fraudulent misrepresentation?

Negligence by MM&R in the preparation of financial projections

(j) Did MM&R owe a duty of care to the Class in respect of representations contained in the Offering Memorandum?

(k) Did MM&R materially misrepresent to the Class that the financial projections included in the Offering Memorandum were based on reasonable assumptions?

(l) If so, was MM&R negligent?

Liability of VAC & MMR to the Class based on misrepresentation

Are the members of the Class deemed to have relied on the representations contained in the Offering Memorandum pursuant to s. 75(2) of the *Real Estate Act* R.S.B.C. 1996, c. 397 and the common law?

Subject only to any individual defences [and any individual issues of reliance], are VAC or MM&R liable to the Class for misrepresentation and, if so, what individual defences remain for determination?

Remedies

Subject only to any individual defences [and any individual issues of reliance], is the Class or are the members of the Class entitled to the following remedies as a result of the defendants' breach of fiduciary duty, breach of trust or misrepresentation and negligence:

(i) rescission of their purchases?

(ii) damages, including statutory compensation?

(p) If the Class or the individual Owners are entitled to damages, what is the measure of the damages and how are they to be calculated?

(q) If the measure of damages depends in whole or in part on the fair market value of the strata lots in the Hotel at a given time, what was the fair market value of the strata lots at the relevant time (s)?

(r) Are VSC and HMS liable to the Class on an accounting? If so, does their liability include:

(i) liability for the return of management fees, together with interest, taken by them from the Hotel's revenues to which they were not entitled by reason of their conflicts of interest?

(ii) liability for the return of any other financial benefits obtained by VAC and HMS through breaches of fiduciary duty?

(iii) liability arising out of the failure by VAC and HMS to lawfully allocate expenses between the Hotel and the Vancouver Airport Marriott Hotel?

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Bank of Nova Scotia v. Gil Beaudry Farm Supply Inc. | 1999 CarswellOnt 1123, 87 A.C.W.S. (3d) 1031, 94 O.T.C. 321 | (Ont. Gen. Div., Apr 16, 1999)

1985 CarswellBC 62
British Columbia Court of Appeal

Toronto Dominion Bank v. Jordan

1985 CarswellBC 62, [1985] B.C.W.L.D. 1091, [1985] B.C.J. No. 2251, 30 A.C.W.S. (2d) 384, 61 B.C.L.R. 105

TORONTO-DOMINION BANK v. JORDAN

Taggart, Craig and Lambert JJ.A.

Judgment: March 6, 1985
Docket: Vancouver No. CA002044

Counsel: *M. P. Carroll* and *R. Davies*, for appellant.
R. S. Anderson and *D. I. McBride* for respondent.

Subject: Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Financial institutions

IV Internal organization and management
IV.2 Officers and employees of bank
IV.2.b Duties and powers
IV.2.b.iv Branch manager
IV.2.b.iv.B Miscellaneous

Financial institutions

XIV Institutions with banking functions
XIV.2 Credit unions
XIV.2.b Miscellaneous

Headnote
Banking and Banks --- Institutions with banking functions — Credit unions

Bills of exchange — Rights of holder — Rights of holder in due course — Defendant giving wife, J., signed blank cheque drawn on account with credit union — J. filling in own name as payee and $359,000 as amount — J. delivering cheque to plaintiff bank to cover overdraft — Cheque returned dishonoured by credit union — Plaintiff obtaining judgment at trial against defendant as holder in due course — Appeal by defendant allowed — Plaintiff's bank manager knowledgeable of questionable conduct on part of J. — Plaintiff bank not accepting cheque in good faith.

The defendant's wife, J., was a "confidence artist of consummate skill" who had been involved in a cheque kiting scheme. She had an account with the plaintiff bank and had developed a most unusual relationship with its manager,

C. She represented herself to him as a wealthy businesswoman. She made loans and gifts of money to him, the transactions being accomplished so as to remain hidden from the bank's inspectors. C. kept a number of her blank cheques drawn on another bank in his desk drawer so that he could fill them out and deposit them to her account when immediate coverage of her overdrafts was required. As time went by, more cheques went through J.'s account at C.'s branch, and an increasing number of them were returned N.S.F. Managers of two other banks contacted C. to advise him of their suspicions that J. was kiting cheques. When C. pressed J. to cover an overdraft which had grown to an amount in excess of $350,000, J. obtained a signed blank cheque from the defendant. She filled in her own name as payee and $359,000 as the amount and delivered the cheque to C. C. made little or no effort to confirm the presence of funds to cover the cheque. The cheque was dishonoured. The plaintiff sued the defendant claiming the rights of a holder in due course on the ground that the cheque was accepted by C. in good faith. The plaintiff obtained judgment and the defendant appealed.

Held:

Appeal allowed.

The trial judge erred in finding that C. acted "honestly" within the meaning of s. 3 of the Bills of Exchange Act. He found that C. may have been foolish or gullible but nevertheless acted "honestly". But the word "honestly" in the Act is not used as a synonym for the opposite of fraudulent. It is used as a synonym for "good faith" and C. was not honest in the transaction. He could not shield himself from the debilitating effect of facts and circumstances known to him at the time he acquired the bill or which were reasonably inferable from the facts and circumstances which were brought to his knowledge. After the warning he had received from other bankers and in the context of the dishonest and unorthodox relationship between himself and J., he could not be said to have acted honestly or in good faith in accepting the cheque.

Table of Authorities

Cases considered:

Bank of Montreal v. Banks Marine Indust. Ltd., 31 B.C.L.R. 52, [1981] 6 W.W.R. 481, affirmed *(*sub nom. *Bank of Montreal v. Lasqueti Fishing Co.)* 43 B.C.L.R. 273, [1983] 4 W.W.R. 549 (C.A.) — *referred to*

Bank of Montreal v. Normandin, [1925] S.C.R. 587, [1925] 3 D.L.R. 975 — *applied*

Fed. Discount Corp. v. St. Pierre, [1962] O.R. 310, 32 D.L.R. (2d) 86 (C.A.) — *applied*

Jones v. Gordon (1877), 2 App. Cas. 616 (H.L.) — *applied*

London Joint Stock Bank v. Simmons, [1892] A.C. 201 (H.L.) — *referred to*

Williams & Glyn's Bank v. Belkin Packaging Ltd., [1983] 1 S.C.R. 661, 47 B.C.L.R. 273, [1983] 6 W.W.R. 481, 21 B.L.R. 282, 147 D.L.R. (3d) 577, 47 N.R. 241 — *referred to*

Statutes considered:

Bills of Exchange Act, R.S.C. 1970, c. B-5, ss. 3, 56-59, 165(3).

Authorities considered:

Law Reform Commission of Canada, "The Cheque: Some Modernization" (1979), Report 11.

Scott, S. A., "The Bank is Always Right: Section 165(3) of the Bills of Exchange Act and its Curious Parliamentary History" (1973), 19 McGill L.J. 78.

Words and phrases considered:

HONESTLY

[The word "honestly" as used in s. 3 of the *Bills of Exchange Act*, R.S.S. 1970, c. B-5] is there being used in a context of excluding negligence, that is, mere carelessness where there is a duty to be careful. It is not being used as a synonym for the contradictory of fraudulent.

Appeal from judgment of Gibbs J., 52 B.C.L.R. 63, granting judgment to plaintiff as holder of cheque in due course.

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

I

1 Mrs. Judith Jordan was "a confidence artist of consummate skill". Among other ventures, she was running a box on the Vancouver Stock Exchange in the stock of Pez Resources Ltd., and she was kiting cheques through a web of bank accounts so that she could keep the game going. As the stock fell, the pace got faster and faster. Both her husband and her banker were drawn in. This case is about which of them should bear the loss when the music stopped. The loss is $359,000.

2 Gibbs J. decided in favour of the bank. His reasons are reported at (1984), 52 B.C.L.R. 63. David Jordan has brought this appeal from that decision.

3 I would allow the appeal. The real dispute is about whether the bank manager, James Courage, acted in good faith. I perceive that question to be one of mixed fact and law. Insofar as the answer depends on matters of fact alone, I accept Gibbs J.'s findings. Insofar as the answer depends on credibility, particularly with respect to Courage's testimony, I again accept Gibbs J.'s findings. But insofar as the question of whether Courage acted in good faith depends on an understanding of what constitutes good faith as a matter of law, I think that Gibbs J. has adopted an incomplete view of the law. In consequence, his conclusion that Courage, and thus the bank, must be considered to have acted in good faith is, in my opinion, wrong. The conclusion rests on an inference, drawn from fact, but guided by a perception of the law which I think is incorrect. In consequence, the error is one which this court may rectify.

II

4 The bank brought this action on a cheque in the amount of $359,000. The drawer was David Jordan, the drawee was B.C. Teachers Credit Union and the payee was Judith Jordan. The cheque was dated 20th February 1982 and was presented to the bank on that date.

5 The bank's claim rests on s. 165(3) or, in the alternative, on s. 56(1) of the Bills of Exchange Act. I will set them out:

> 165 ...
>
> (3) Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.
>
> 56.(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:

(*a*) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact;

(*b*) that he took the bill in *good faith* and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it. [The italics are mine.]

Section 56(1) gives the conditions for being a holder in due course. Section 165(3) puts a bank, in certain circumstances, in a position equivalent to that of a holder in due course. It is not disputed by David Jordan that if the bank is a holder in due course, or if it has all the rights and powers of a holder in due course, then the bank should succeed on its claim against him on the cheque.

6 For its part, the bank concedes, as a matter of law, that s. 165(3) does not apply unless the bank received the cheque for deposit, *in good faith*. That good faith requirement is not explicit in s. 165(3). But, in the context of the legislative history of the subsection, which was grafted on to s. 165 in 1967, and reading the Bills of Exchange Act as a whole, with particular attention to the relationship which must exist between s. 165(3) and ss. 56 to 59, I am satisfied that the concession was correctly and wisely made by the bank. But I emphasize that the point was conceded, not reserved for argument in a higher court. The concession was made in the light of the decision of Paris J. in *Bank of Montreal v. Banks Marine Indust. Ltd.*, 31 B.C.L.R. 52, [1981] 6 W.W.R. 481, which was affirmed by Macdonald J.A., for this court in *Bank of Montreal v. Lasqueti Fishing Co.* (1983), 43 B.C.L.R. 273, [1983] 4 W.W.R. 549. Reference was also made to the Law Reform Commission of Canada Report entitled "The Cheque: Some Modernization" (1979), Report 11, and to an article ["The Bank is Always Right: Section 165(3) of the Bills of Exchange Act and its Curious Parliamentary History"] by Stephen A. Scott in (1973), 19 McGill L.J. 78.

7 So, whether the bank's claim rests on s. 165(3) or on s. 56(1), the bank cannot recover unless it acted in good faith. And it is on that question that this case turns.

III

8 I now propose to consider what does and what does not constitute "good faith", as a matter of law. The start is s. 3 of the Bills of Exchange Act:

3. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

Gibbs J. also referred to the reasons of Lord Blackburn in *Jones v. Gordon* (1877), 2 App. Cas. 616 at 628-29 (H.L.), and to the endorsement by Estey J. in *William & Glyn's Bank v. Belkin Packaging Ltd.*, [1983] 1 S.C.R. 661, 47 B.C.L.R. 273 at 287, [1983] 6 W.W.R. 481, 21 B.L.R. 282, 147 D.L.R. (3d) 577, 47 N.R. 241 of a passage from the reasons of Kelly J. in *Fed. Discount Corp. v. St. Pierre*, [1962] O.R. 310, 32 D.L.R. (2d) 86 at 97 (C.A.). To those authorities I would like to add a passage from the reasons of Lord Herschell in *London Joint Stock Bank v. Simmons*, [1892] A.C. 201 at 221 (H.L.), cited with approval by Mignault J. for the Supreme Court of Canada in *Bank of Montreal v. Normandin*, [1925] S.C.R. 587, [1925] 3 D.L.R. 975.

9 Here are the three passages, with my emphasis added, that I have found particularly helpful in the context of this case:

10 *Jones v. Gordon* [p. 629]:

But if the facts and circumstances are such that *the jury*, or whoever has to try the question, *came to the conclusion* that he was not honestly blundering and careless, but *that he must have had a suspicion that there was something wrong, and that he refrained from asking questions* not because he was an honest blunderer or a stupid man, but *because he thought in his own secret mind — I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover — I think that is dishonesty.*

11 *Fed. Discount Corp. v. St. Pierre* [p. 97]:

> It is not necessary for the support of ordinary commercial transactions that the holder of a bill of exchange should under all circumstances be permitted to shield himself behind the guise of a holder in due course and attempt to separate his character as holder in due course from the debilitating effect of *facts and circumstances actually known to him* at the time he acquired the bill or *which were reasonably inferable from facts and circumstances which were brought to his knowledge.*
>
> In the examination of any transfer to decide if it constituted the transferee a holder in due course *the plaintiff's actual involvement with the transferor will be a major factor; on this account the whole relationship between the plaintiff and its transferor must be examined and considered.*

12 *Bank of Montreal v. Normandin* [p. 592]:

> *regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith.* If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further enquiry.

I draw two conclusions from these passages that are crucial to this case. The first is that the total relationship between the parties must be considered. The second is that if, in the context of that total relationship, there are facts actually known to the person who becomes the holder of the cheque, which actually cause a suspicion to arise, or which should cause a suspicion to arise in any normal person in his occupation, and the suspicion is suppressed, in the first case, or not allowed to arise at all, in the second case, then unless the situation is one where the behaviour ought to be categorized as merely negligent, that is, an act of carelessness towards a person to whom a duty of care is owed, and not as dishonest, the suppression of the suspicion, or the failure to allow it to arise at all, through wholly inappropriate gullibility, will deny good faith.

13 I think that the difference between my view of the law and the view adopted by Gibbs J. rests on the fact that Gibbs J.'s view is that the test is entirely a subjective one, whereas I think that some objective considerations may be relevant. The facts must be known to the person whose good faith is in issue. But, if the facts are known, and they would give rise to a suspicion in any rational person, it is not acting in good faith to refuse to countenance the suspicion because of a self-induced lack of judgment, as in this case, or because of inordinate gullibility, stupidity or mental imbalance. I rely particularly for my view on the contrast, in the reasons of Kelly J. in *Fed. Discount Corp. v. St. Pierre*, between "facts and circumstances actually known to him" and facts and circumstances "which were reasonably inferable from facts and circumstances which were brought to his knowledge". But I regard the other two decisions to which I have referred as supporting the objective element of the test.

14 And, of course, the fact that certain conduct could give rise to liability in negligence does not mean that the conduct cannot also be categorized as less than honest.

IV

15 I now come to the facts. I have concluded that James Courage, the bank manager, did not act in good faith. That conclusion involves a consideration of the relationship between James Courage and Judith Jordan in order to establish the context of the disputed transaction. It also involves a consideration of the transaction itself. I do not propose to set out the whole history in narrative form. Gibbs J. has already done so. I will try to confine my discussion to the facts which have led me to the conclusion that James Courage did not act in good faith.

16 I start with the general background of deception. I cannot improve on Gibbs J.'s summary [at pp. 66-67] of some of the relevant aspects of Judith Jordan's trickery:

> As the facts unfolded before me, it rapidly and readily became apparent that Judith Jordan was the root cause of the problem of the plaintiff and the defendant. She engaged in deceitful and deceptive financial and other practices on a large scale. Using several bank accounts, two in her own name, her husband's, her grandmother's, and perhaps others, she moved funds from place to place, frequently covering cheques written on one account with others drawn on another. She speculated on the stock market using several different customer accounts including those of her husband, her bank manager and her grandmother. Shares were bought and sold and funds moved in and out of the customer accounts at the same time funds were moved around between bank accounts. No one of the parties whose accounts she was using was aware of the extent of Judith Jordan's manipulations. To any one of them who caught a glimpse and asked she explained that what she was doing was necessary in order to minimize the income tax payable on her stock market profits.
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> The extent of Judith Jordan's deception was quite astonishing. She convinced her husband that she was a high level business executive with a salary in the $80,000 to $90,000 range plus perquisites and occasional extras, such as an expense paid trip to Hawaii, obtained by reason of her excellence in her field. About the only part that was true was that she was employed in a business. Her salary was of the order of $22,000. To her husband and to the plaintiff's branch manager with whom she dealt, one James Barry Courage, she successfully posed as a wealthy woman, knowledgeable and successful in the stock market. She carried with her, for use as the occasion demanded, a Bank of Montreal pass book with appropriate credit and debit entries and a balance ranging over two years between $1,630,000 and $545,000. It was a complete fabrication. She filed an assets statement with the Bank of Montreal as part of a loan application showing asset values of $1,260,000. She filed the same statement with the plaintiff bank in support of her loan application. Perhaps 25 percent of it was true and that 25 percent consisted of her husband's assets, they having accrued to him on the death of his father. Her husband also understood that she, or he and she together, had substantial wealth.

Perhaps I should add, for completeness of background, that David Jordan was a school teacher.

17 I now come to the particulars of the relationship between James Courage and Judith Jordan. They met in January 1981. He was manager of a branch of the Bank of Montreal. She became a customer. But she was not treated like any other customer. That is, she did not do her business with a faceless machine or after lining up to reach a teller's wicket. She did all her withdrawals and deposits with James Courage, directly in his office.

18 Judith Jordan was so satisfied with the relationship that she established with Courage that when he changed employers and became manager of a branch of the Toronto-Dominion Bank in Richmond, in July 1981, she opened an account at the new branch.

19 In describing this banker-customer relationship, Gibbs J. said [at p. 70]:

> Courage's favours to Judith Jordan were significant and unusual. She attended upon him rather than a teller when she visited his bank. He filled out her deposit slips for her. He kept track of her account so that overdrafts, if they occurred, could be covered in less than two days. He kept blank cheques signed by Judith Jordan in his desk so that, whenever instructed by her, he could fill in the appropriate amount and deposit on her behalf. He ignored the instructions of his employer to obtain security of double the value of the $20,000 loan authorized for her. On occasion he issued certified cheques to her against uncertified cheques deposited by her.

20 When Courage was still at the Bank of Montreal, that is, before July 1981, Judith Jordan purchased shares in International Corona for him. He never paid her for the shares. When she sold the shares, the gain was $2,950. She did not send Courage a cheque for that amount. She gave it to him in cash. Presumably that was done so that the payment could not be traced.

21 In October 1981 Courage applied for a staff loan from the Toronto-Dominion Bank for the express reason of paying off his former staff loan from the Bank of Montreal. He did not use the proceeds for that purpose. Instead, he used them to buy stock.

22 Starting in December 1981, Courage allowed Judith Jordan to use his account at C. M. Oliver, a stockbroker, to trade in shares of Pez Resources Ltd. She said she needed another account to give her more leverage, as there was a limit to how much trading she could do in her own accounts. I think that Courage should have suspected that there was some form of deception involved, at the very least an infringement of the revenue laws or the rules of the Vancouver Stock Exchange.

23 By the end of 1981 Courage knew that Judith Jordan had a number of bank accounts, ostensibly to channel funds from the purchase and sale of stocks to the various people whose nominee accounts she was operating.

24 Over the latter part of 1981 and early 1982 Judith Jordan left with Courage a number of blank cheques drawn on her Bank of Montreal account. He kept the cheques in his desk drawer and he filled them out and deposited them to her account when she was required to make immediate coverage of overdrafts and could not get to the bank on the same day. He did not provide this service for any other customer and he testified that he did not remember ever mentioning to any other bank employee that he was holding the blank cheques.

25 On 18th January 1982 Judith Jordan purchased a bank draft in the amount of $22,000 to the order of her grandmother, Mrs. Horvath. The draft was then endorsed in favour of Courage's wife and was delivered to Courage's house, addressed to his wife. The $22,000 was either a loan or a gift at the time it was made. Whichever it was, it was at Courage's suggestion that the devious route for passing the funds was followed. In my opinion, no other conclusion is possible than the conclusion that Courage did not wish any evidence of the gift or loan to appear in any records to which an inspector of the Toronto-Dominion Bank had access.

26 Judith Jordan had applied for a $20,000 loan from the Toronto-Dominion Bank at Courage's branch. Courage recommended to the manager of commercial credit that the loan be unsecured, but the manager insisted that the loan be secured with good quality security, properly margined, to double the amount of the loan. The loan was advanced but the security required by the credit department was never given. That was the only loan authorization ever given to Courage in respect to Judith Jordan. Courage's own loan limit was $10,000.

27 The cheques going through Judith Jordan's account were going faster and getting larger, exponentially. In September 1981 the largest deposit was $18,800 and the largest withdrawal was $11,952. In October the figures were $33,000 and $34,000; in November $165,000 and $165,000; in December, $168,000 and $168,000; in January 1982, $399,000 and $397,000; and by the middle of February 1982, $495,000 and $396,000. By late January and early February, ever-increasing numbers of N.S.F. cheques were coming back to the account.

28 The other principal accounts in which corresponding activity was occurring were David Jordan's account at the B.C. Teachers Credit Union and Judith Jordan's account at a branch of the Bank of Montreal. In December and January the managers of both those branches spoke to Courage separately, by telephone, to express their suspicion that Judith Jordan's bank transactions might be fraudulent, or dishonest, and might well involve kiting. Both of the managers gave evidence.

29 Allen Hoegg, the Credit Union manager, did not confine himself to expressing his suspicions to Courage. He had a meeting with Judith Jordan in which he told her that there must be funds in the Credit Union account at the time when a cheque was written on the account, and that it was not enough for her to deposit the funds to cover the cheque on the day that she expected the cheque to come back to the Credit Union through the clearing system. In the case of the Credit Union, that time difference could be as long as a week. After Judith Jordan continued writing cheques on David Jordan's account when there were no funds in the account, Allen Hoegg insisted that those cheques would not be cleared at all unless the deposits to cover them were made with certified cheques. In the telephone call between Allen

Hoegg and Courage, Allen Hoegg requested Courage to telephone him any time a cheque for a large amount drawn on David Jordan's account at B.C. Teachers Credit Union was presented at Courage's branch. There can have been no other purpose in that request than to establish a system to warn both Hoegg and Courage if there were no funds to cover the cheque. But the principal beneficiary of that knowledge would be Courage, who might be prevented from giving value for the cheque. Hoegg always retained the alternative of not accepting it.

30 Harold Petersen, the Bank of Montreal manager, suspected kiting as early as November or December 1981, merely from an examination of the operation of Judith Jordan's account at his branch. He telephoned both Courage and Allen Hoegg. He told them of his suspicions. By early February 1982 he had insisted to Judith Jordan that cheques drawn on her account at his branch would not be cleared unless they were covered by certified funds in the account.

31 Both Allen Hoegg and Harold Petersen took the necessary steps to prevent their branches from being the one left holding the bag on what they saw as a kiting operation. They both warned Courage, in good time, that they suspected a kiting operation. Both Allen Hoegg and Harold Petersen said that Courage seemed unconcerned. But, in my opinion, it was not open to him, at that time, not to be suspicious. No matter how gullible he was, when two other bank managers told him that they were suspicious and that he ought to be suspicious, he could not have avoided being suspicious. He might have dismissed his suspicions, but that is the very thing that Lord Blackburn and Lord Herschell have said amounts to dishonesty. At the very least, the "debilitating effect of facts and circumstances" were, in the words of Kelly J., "reasonably inferable from facts and circumstances which were brought to his knowledge". And it must be remembered that on 18th January 1982, at the very time when Allen Hoegg and Harold Petersen were expressing their concerns to Courage, his own personal financial position was being enhanced by a surreptitious loan or gift to him of $22,000 from Judith Jordan.

32 As part of the general background, I should also add that in addition to accepting a gift of $2,950 from Judith Jordan when he was manager of the Bank of Montreal branch, and in addition to accepting a gift or loan of $22,000 when he was manager of the Toronto-Dominion Bank branch, James Courage was dishonest on a number of other occasions. He lied about what had occurred when he wrote an explanation to the bank on 8th March 1982. On 9th March 1982 he swore an affidavit that he knew to be false in a mortgage foreclosure action. He concealed facts from his employer which he knew would reflect unfavourably on his conduct. I do not consider that there is any doubt that both before and after this incident, James Courage was a dishonest man.

33 I have now set out the general background of the transaction. I have quoted passages from the reasons of Kelly J., as approved by Estey J., which emphasize the importance that should be attached to that general background.

V

34 That brings me to the transaction itself. On 1st February 1982 Courage received a report from the regional head office of the bank about the overdraft in Judith Jordan's account. It was the first overdraft report he had received on the account. He had a telephone discussion with a bank officer about the report. On 2nd February 1982 Judith Jordan deposited three cheques at Courage's branch, each in the amount of $158,000. Two of those cheques were returned N.S.F. on 5th February 1982, along with yet another cheque in the amount of $53,000, also deposited by Judith Jordan. Courage spoke to her. She said she would come in with a deposit to cover the shortfall caused by the N.S.F. cheques. On 9th February Judith Jordan deposited three cheques totalling $316,000 to her account, just enough to cover the two N.S.F. cheques of $158,000 each. On 11th February all three cheques were returned N.S.F. Courage spoke to Judith Jordan on the telephone. After the branch had closed, she deposited three cheques drawn by Metric Masonery and payable to her, in a total amount of $495,000. The branch was reopened for this transaction and a teller was waiting to process the cheques when they arrived. The three Metric Masonery cheques were returned N.S.F. on 16th February. Two of the cheques, totalling $345,000, were placed in the overdue bills account because, if they had been debited to Judith Jordan's account, the account would have been in overdraft to that extent. On 16th February Judith Jordan told Courage that the two cheques would be covered the next day. On 17th or 18th she told Courage that she had given the covering cheque to a B.C.I.T. student to deliver, but since he could not get to the bank and still make his classes, he just went to his classes

and did not deposit the cheque. On 19th February Judith Jordan telephoned Courage to say she would be in that day with the covering cheque. Later in that day, Courage got a message that she had collapsed in the street and had been taken to hospital and so could not make the deposit. But she was able to telephone Courage at his home on the evening of 19th February and said she would bring in a covering cheque on 20th.

35 On Saturday, 20th February, Judith Jordan got a blank cheque from her husband, David. That is, it was signed by him and the name of B.C. Teachers Credit Union was printed on the cheque as drawee, but the amount of the cheque was left blank, and the payee was blank. Judith Jordan filled in her own name as payee and $359,000 as the amount of the cheque. She delivered the cheque to Courage at his bank. Courage's branch was open on Saturdays and not on Mondays. All Saturday transactions were treated as Monday transactions in the bank and in the records of the clearing house. Courage gave evidence that when he had the cheque he telephoned Allen Hoegg, the manager at B.C. Teachers Credit Union, but that Allen Hoegg was out for lunch. The cheque was then processed in the records of Courage's branch and it showed as being deposited to Judith Jordan's account as of Monday, 22nd February.

36 After the cheque was processed, Courage took Judith Jordan to a restaurant nearby. While they were there, Judith Jordan said she would like to withdraw $1,000 in cash from her account. But Courage told her he would not release the cash to her, notwithstanding that her account was then about $20,000 in credit. He said that he told her that he would like the account to settle down. This fact was not mentioned by Gibbs J. in his reasons, but the evidence is clear, and the fact is strongly relied on by counsel for David Jordan as demonstrating that Courage did not take the cheque in good faith.

37 Courage never spoke to Allen Hoegg on Saturday, 20th February. On Tuesday, 23rd February, the two N.S.F. cheques totalling $345,000 were transferred from the overdue bills account and debited to Judith Jordan's account. $7,000 was taken from her account and applied against her bank loan. In due course, the $359,000 cheque drawn on David Jordan's account at B.C. Teachers Credit Union arrived at the Credit Union. There were no funds to cover it. It was returned to Courage's branch, marked N.S.F.

38 That is the cheque on which the Toronto-Dominion Bank now claims the rights of a holder in due course on the ground that the cheque was accepted by Courage in good faith.

VI

39 I will set out two key passages from the reasons of Gibbs J. The first is at p. 72:

> Although he may have been careless, or foolish, or gullible, I do not think Courage acted dishonestly in respect of the transactions in issue. Neither, in my view, did he refrain from asking questions because he feared he would learn that something was wrong.

The second is at p. 73: "His deceits on other occasions do not erode my belief that he acted honestly when the cheque was delivered to him for deposit".

40 I think that Gibbs J., in reaching those conclusions, is attaching a different meaning to the word "honestly" than I think should be attached to that word when it is used in s. 3 of the Bills of Exchange Act. It must be remembered that it is there being used in a context of excluding negligence, that is, mere carelessness where there is a duty to be careful. It is not being used as a synonym for the contradictory of fraudulent. I doubt if Courage was fraudulent. It is being used as a synonym for "in good faith". I am satisfied that when that meaning is given to the word "honestly", Courage was not honest in this transaction, that is, he did not take the cheque for $359,000 in good faith. To adopt again the language of Kelly J. in *Fed. Discount Corp. v. St. Pierre*, supra, Courage cannot shield himself from the debilitating effect of facts and circumstances known to him at the time he acquired the bill or which were reasonably inferable from the facts and circumstances which were brought to his knowledge.

41 James Courage was more than careless, he was more than foolish, and he was more than gullible. He was dishonest with his employer about his dealings with Judith Jordan, and he was hopelessly compromised by his relationship with

her, to the point where he was incapable of acting on a suspicion, or perhaps even formulating a suspicion, when he was told point blank by two fellow managers that the circumstances were suspicious.

42 It is not necessary for me to reach a conclusion as to whether Courage was suspicious and suppressed his suspicions, or whether he was so bewitched that he did not allow a suspicion to form. Courage received express warnings from Allen Hoegg and Harold Petersen. In the face of those warnings it was no longer open to him, no matter how naive and gullible he was, not to turn the suspicions over in his mind. After those warnings, and in the context of the dishonest and unbankerlike relationship between Courage and Judith Jordan, Courage cannot be said to have acted honestly or in good faith in accepting the cheque.

43 I do not think that the Toronto-Dominion Bank took the cheque in good faith or became a holder in due course.

VII

44 I have concluded that the bank did not acquire the cheque in good faith. So the bank did not become a holder in due course and did not acquire the rights and powers of a holder in due course. But it gave value for the cheque and became a holder for value. As such, it took the cheque subject to defects of title of prior parties. In the circumstances of this case, I consider that Judith Jordan obtained the cheque by a fraud and by undue influence on David Jordan, and that when the bank became a holder for value, it did so subject to the defect of title on the part of Judith Jordan, as payee, against David Jordan, as drawer.

45 I would allow the appeal and dismiss the action by the bank against David Jordan.

Appeal allowed.

1933 CarswellOnt 86
The Supreme Court of Canada

Westcott v. Luther

1933 CarswellOnt 86, [1933] 2 D.L.R. 369, [1933] S.C.R. 251

George Westcott, Sole Surviving Executor of the Estate of Archibald McCormick, Deceased (Defendant), Appellant and Martin Luther (Plaintiff), Respondent

Rinfret, Lamont, Smith, Cannon and Crocket JJ.

Judgment: February 22, 1933
Judgment: March 15, 1933

Proceedings: On Appeal from the Court of Appeal for Ontario

Counsel: *A.G. Slaght K.C.* and *J.H. Clark* for the appellant.
R.S. Robertson K.C. and *G.P. Campbell* for the respondent.

Subject: Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bills of exchange and negotiable instruments

IV Promissory notes and bank drafts
IV.6 Consideration
IV.6.b Burden of proof

Evidence

XX Corroboration
XX.2 When required
XX.2.e Actions involving deceased
XX.2.e.ii Sufficiency
XX.2.e.ii.D Bills of exchange

Headnote
Bills of Exchange --- Promissory notes — Consideration — Burden of proof

Collateral agreement as to enforcement — Consideration — Bills of Exchange Act, R.S.C. 1927, c. 16, ss. 58, 176.

Plaintiff was an employee of M. In return for his services M. gave him a promissory note. At the time of delivery M. asked him not to tell anyone that he had the note, and not to produce it until after M.'s death, and then only if M.'s estate was sufficient to support the testator's sister. Plaintiff complied with these requirements. After M.'s death it was found that the estate was more than sufficient for the maintenance of the testator's sister. Plaintiff thereupon brought action against defendant who was M.'s executor. Plaintiff proved M.'s signature. Held, plaintiff was entitled to succeed. The document was in fact a promissory note within the meaning of s. 176, for plaintiff's compliance with M.'s wishes amounted only to a collateral agreement not to enforce his rights until the requests had been complied with, and this agreement did not make the document any the less an unconditional promise to pay. Further, since

the document was a promissory note, valuable consideration for the giving thereof was to be presumed under s. 58, and the onus of rebutting such presumption was upon defendant, and he had failed to discharge it.

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

1 The questions involved in this appeal are, (1) whether the document handed to the respondent under the circumstances detailed by him, by the late Archibald McCormick (hereinafter called the Deceased) is a promissory note within the *Bills of Exchange Act*, and (2), whether there was corroboration of the plaintiff's evidence that the document was signed by the deceased, sufficient to satisfy the requirement of section 11 of the Ontario *Evidence Act?*

2 A promissory note is defined by section 176 of the Act as follows: —

176. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

3 Section 11 of the *Evidence Act* provides: —

11. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

4 The document in question here is: —

$5000.

Due Jan. 13th 1928

Jan. 13th 1927.

One year after date I promise to pay to the order of Martin Luther Five Thousand Dollars at The Royal Bank of Canada for value received with interest at the rate of 5 per cent per annum as well after as before maturity.

A. McCormick.

5 The respondent had lived with the deceased on his farm during his whole life, some 43 years. After he quit attending school he received wages which were increased until he was getting $500 a year, a free house and garden, with liberty to pasture and feed his stock without charge if there was feed for them. The respondent worked the farm under the deceased's direction and took care of the stock. He lived in the house with the deceased and his sister Kate until he got married some fifteen years ago, and from that time he lived in the tenant's house which was close by. During the year it was customary for the deceased to give the respondent, from time to time as he required them, advances on account of his wages and an account of these sums was kept by each of the parties. Then, in the early part of January in the following year, they had a final settling up. The deceased's sister Kate kept the accounts for him.

6 On January 13, 1927, the respondent went to the deceased's house for a settling up of the accounts for the year 1926. Both account books shewed that there was a balance of $206.87 due to the respondent. According to the respondent's testimony the deceased asked him if he needed the money and he replied that he did not as long as he remained there. The deceased then said that he wanted to give him something; that he owed his mother something; that he had not given her anything for the last two years and only $1.50 per week at any time; that he was going to give him a note and if he did not need the money he would let it go on the note. The deceased went to an adjoining room and got a note form and gave it to the respondent to fill up, as the deceased could only write his name; that he filled it out, the deceased telling

him to make it for $5,000 and to put in 5% interest. This he did, and the deceased signed it. It might here be pointed out that the respondent's mother had worked for the deceased for over forty years, and that she had died in 1926.

7 The respondent further testified that the deceased stated he wanted to keep the note for a while. To this the respondent was agreeable, and the deceased kept the note until January, 1928, when the respondent went over to settle up for the year 1927. On that occasion the question of the note was brought up and the deceased said that, as he was repairing the buildings on the place from which the respondent would obtain considerable benefit, he did not think he should pay interest on the note for that year. Whereupon the respondent indorsed on the back of the note a receipt for the payment of one year's interest. The interest had not been paid. The deceased then handed the note to the respondent and asked him not to tell anyone that he had it and not to produce it until after his (deceased's) death, and then only if there was more than enough in his estate to support Kate. The deceased also asked him if he would remain on the farm at his present wages until the deceased died. To all these requests the respondent agreed.

8 The deceased died on February 8, 1929, leaving an estate worth $50,000. Six weeks later his sister Kate died. The respondent then presented his note to the appellant who is the sole surviving executor of the deceased's estate. The appellant required strict proof of the respondent's claim. The respondent then brought this action on the note.

9 The County Court Judge, before whom the matter came, believed the story of the respondent and found that the note had been duly executed by the deceased, and delivered to the respondent as stated by him. He, however, thought that, on the respondent's own evidence, the note was not to be paid until the death of the deceased. From this he concluded that the respondent was setting up a parol agreement entirely different from that disclosed by the note on its face. Furthermore he was unable to find any corroboration of the statement of the respondent that he had given valuable consideration for the note, namely, the unpaid balance of his wages for 1926, and his promise to continue working on the farm, at his then wages, until after the death of the deceased. For these reasons he dismissed the action. This decision was reversed by the Court of Appeal.

10 Before this Court the burden of the argument on behalf of the appellant was that, according to the respondent's evidence, the real agreement between the parties was that the note was to be paid only after the deceased's death and then only conditionally; that this was not the agreement set out on the face of the note; that the note was, therefore, a false and misleading document, the falsity of which prevented it from being a promissory note within the meaning of the *Bills of Exchange Act* and, therefore, no presumption could arise, under section 58 of the Act, that the respondent was a holder for value.

11 In my opinion this contention cannot be upheld. What the respondent agreed to when the note was handed to him was: (*a*) that he would not mention to anyone the fact that he held it; (*b*) that he would not produce it until after the death of deceased; and (*c*) then only if there was in the deceased's estate more than sufficient to support his sister.

12 The deceased's reason for making the requests contained in (*a*) and (*b*) presumably was to prevent any unpleasantness with those nephews and nieces who will be entitled to the money if respondent does not succeed in establishing his claim, and to whose importunity he may have feared he would be exposed if it were known that he had benefited a stranger to the prejudice of his own blood relations. The reason for requiring (*c*) was a desire to make sure that his sister would not come to want.

13 It will be observed that nowhere did the deceased suggest that the note was not to be a present obligation in favour of the respondent. All he does is to request the respondent not to enforce his rights until after he himself has passed away, leaving an estate more than sufficient to support his sister. The acceptance by the respondent of these requirements amounts, as the Court of Appeal held, to no more than a collateral engagement on his part not to enforce his rights until the requests had been complied with. That does not make the document any the less an unconditional promise in writing by the deceased to pay at a fixed time a sum certain in money to the respondent. There is no ambiguity in the note itself. The respondent's agreement not to enforce payment while the deceased was living, was no part of the note, the terms of which import a present and unqualified obligation, and there is nothing in the evidence to justify the conclusion that

the delivery of the note by the deceased was conditional upon the fulfilment of his requests. He was satisfied that the respondent would respect his wishes.

14 Whether the agreement of the respondent not to enforce the note in the deceased's lifetime would have afforded any defence to the note had action been brought upon it before the deceased's death, we need not inquire, for, even if it would and the respondent could have been enjoined from enforcing his rights, the document was still a promissory note within the meaning of the *Bills of Exchange Act*, and, as such, it imports that valuable consideration has been given for it (section 58). This shifts to the appellant the onus of establishing want of consideration, as was pointed out by Riddell J. in *Mercier v. Campbell*[1]. That onus the appellant has not met. Consideration being presumed until the contrary is shewn, the deceased's obligation on the note was contractual, and not by way of testamentary gift, as the trial judge held.

15 The respondent's evidence, that the note was signed by the deceased, was abundantly corroborated by the testimony of experts in handwriting, and by Dr. MacPherson, who testified that, before his death, the deceased told him that he had seen the respondent well provided for by a note, and had divided the rest of his estate between Colin and Kate.

16 It was also argued for the appellant that if the document was a promissory note importing that it had been given for value and was thus an enforceable contract, there should be a new trial for the reason that the claim had been framed and the action had been conducted throughout on the basis that the respondent was seeking to enforce a gift and not a contractual right. There is no substance in this contention. The appellant knew, from the statement of claim and the examination for discovery of the respondent, just what the respondent was claiming and the grounds upon which he based his claim, and was not in any way taken by surprise.

17 In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors of record:
Solicitors for the appellant: *McTague, Clark, Springsteen, Racine & Spencer.*
Solicitors for the respondent: *Shaw & Shaw.*

Footnotes

1 (1907) 14 Ont. L.R. 639, at 652.

Title Page

CANADA LAW BOOK

The Law of
Banking and Payment
in Canada

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§24:20 HOLDER FOR VALUE

Under the BEA, there are two degrees or qualities in which a person may hold a bill: as a holder for value or as a holder in due course. The latter is a higher degree of the former and is included within it. Thus all holders in due course are also holders for value, but the converse is not true. Both types receive detailed examination in this and the following sections.

> 53(1) Where value has, at any time, been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to that time.
>
> .....
>
> 57(1) Every party whose signature appears on a bill is, in the absence of evidence to the contrary, deemed to have become a party thereto for value.

Cross-references: "Value" is equated with valuable consideration in BEA, s. 2; see §21:20.90. "Valuable consideration" is discussed in §23:70.10. "Holder" is defined by BEA, s. 2 and discussed in §24:10, *supra*. Every party whose signature appears on a bill is presumed by BEA, s. 57(1) to have received value, and every holder is presumed by s. 57(2) to be a holder in due course. The rights of a holder are discussed at §26:20, and the defences available against holders of various qualities are discussed at §§26:30*ff*.

§24:20.10 Presumption of Value

Value means "valuable consideration", except that value does not have to be given or received by the person claiming to be a holder for value. When the defendant's signature is admitted or proved, BEA, s. 57(1) creates a rebuttable presumption that it was in exchange for some valuable consideration,[26] effectively shifting the onus of proof as to the enforceability of the express or implied engagement or promise of the party,[27] as contained in the instrument or implied by the BEA.[28] As Riddell J. pointed out in *Mercier v. Campbell*,[29] that is one of the principal differences[30] between a promissory note and an express promise to pay in some other written form: "The only difference is that a promissory note imports a consideration, while an ordinary simple contract does not." Whereas, according to the general law of contract, the party relying upon a contract must prove the consideration,[31] in the case of a bill, the party charged must prove lack of consideration.[32] Of course, the presumption is rebuttable, but the evidence must go the whole distance of negativing every consideration that might support the note in all the circumstances of the case.[33] For example, it has been held that a "bold assertion" denying consideration is insufficient without corroboration of some kind.[34] In *Bank of Nova Scotia v. Bauer*,[35] it was shown that the proceeds of a note were paid into the wrong account but, since it was not also shown that no value was received at any time by the maker during the currency of the note, the maker was liable on it to the payee bank. However, where the evidence clearly shows that the maker received no consideration for the promise of payment, the note is unenforceable by the payee, since no value was given for it.[35.1]

Although the presumption of value received, if not rebutted, will be sufficient to qualify the holder as a holder for value, it does not follow that the bill is always enforceable by such a holder against a party for value. The defences available against a holder are considered at §26:30.

Since the BEA equates value and valuable consideration, it may be deduced that value "may be constituted by

. . . any consideration sufficient to support a simple contract; or . . . an antecedent debt or liability".[36] However, as with consideration generally,[37] I do not intend in this treatise to do more than to comment on those aspects of the definition of "value" that have special meaning or otherwise require special attention with respect to bills, notes and cheques. There appear to be only a few.

§24:20.10(1) Extent of Value

As with the rule that a court will not inquire into the adequacy of a consideration, it appears not to be material, for purposes of the law of bills, whether the value given for a bill, cheque or note by one claiming as a holder for value is the fair equivalent of the face value of the instrument. The giving of any value enables the holder of a negotiable instrument to enforce it for its full face amount, subject, of course, to any defences available against that holder.

Two qualifications of that statement are required. The first is that there may be cases where the circumstances are such that the giving of less than a commercially reasonable value for an instrument may give rise to an inference that the holder did not act in good faith in acquiring it.[38] The second qualification arises under BEA, s. 53(2), where the holder has a lien or security interest only.[39]

§24:20.10(2) Bank Credit as Value

There is an interesting conceptual problem concerning whether a bank becomes a holder for value of a cheque merely by receiving it for collection and crediting the depositing customer's account with its face amount before actually receiving the proceeds of collection. However, the point has no practical importance in Canada while BEA, s. 165(3) continues to apply since, under it, the bank has all the rights of a holder in due course.[40] Even where that subsection might not apply, there is some modern authority for recognizing that the acceptance of an instrument for deposit is "value" within the meaning of the BEA: *Belarus Equipment of Canada Ltd. v. C & M Equipment (Brooks) Ltd. (Receiver of)*.[41]

The old dispute only ever concerned cheques. Where bills of exchange[42] or notes[43] are discounted by a bank (giving present value to its customers for instruments payable to them but not yet due and payable), no question has ever been raised against the bank's status as a holder for value.[44]

§24:20.20 Qualifying as Holder for Value

As is noted in §23:70.10, in dealing with the requirement of consideration, a person may become a holder for value of an item and thus become enabled by BEA, s. 73 to enforce it (subject to any defences available against him) in two ways:

(1) by giving consideration for the engagement of the party whose liability he seeks to enforce; or

(2) by the fact of value being given for the item after that person became a party.[45]

Although BEA, s. 2 equates consideration and value, it in fact uses the two concepts differently, as the foregoing statement and the following cases illustrate. It is value and consideration that are material, and not merely transfer of the item to new holders. If neither consideration nor value has been given for an item, it remains unenforceable against anyone.[46]

§24:20.20(1) Consideration and Value Compared

In the ordinary case, it is not necessary to distinguish between consideration and value. If A sells goods to B in exchange for a cheque, A gives both consideration for B's engagement to pay by accepting B as his debtor, and value for the instrument in parting with the goods in exchange. But where B makes a gift of a cheque to A, it is unenforceable in A's hands because he gave neither consideration nor value. It may become

enforceable, however, if value is given for it at some later time and it comes into the hands of one who qualifies as a holder for value. Thus, when A deposits the cheque in his bank and receives provisional credit for it, the bank gives value[47] and has, in any event, by the operation of BEA, s. 165(3), all the rights of a holder in due course of the item.[48]

However, where more than two parties and a bank are involved, it may become necessary to make a finer distinction. For example, in *Clavelle v. Russell*,[49] the defendant real estate agent, to induce the plaintiff to enter into an agreement for sale of lands to a buyer found by the defendant, presented his own cheque in the amount of the required cash down payment. Lamont J.A. noted[50] that the consideration for the cheque was the acceptance of the offer and that the plaintiff was therefore a holder for value even though the buyer defaulted and the sale was never completed.

That result may be usefully compared to the more recent decision in *Barker v. Shakespeare; Gill Fuels Ltd. v. Shakespeare*,[51] in which solicitors were sued upon a trust account cheque that they had delivered to a vendor on behalf of their client, the purchaser. However, in that case, Swencisky Co. Ct. J., having decided that the sale contract was void for uncertainty, ruled (correctly, it is submitted) that the plaintiff vendor had given to the defendant neither consideration nor value[52] for the cheque.

It is clear, as a matter of principle, that one promise may be valid consideration for any number of other promises. The cases illustrate this where there is more than one original maker or drawer,[53] or where other parties endorse with the intention of lending their names to the credit of the other parties[54] (see §28:70.10).

§24:20.20(2) Holder for Value Qua Whom

However, in addition to, and quite apart from, such questions of whether consideration flowed from the person seeking to enforce the defendant's engagement on the item, there is the question of whether the plaintiff qualifies as a holder for value *qua* the defendant. It will be appreciated, upon consideration of the text of BEA, s. 53(1), that a holder may be a holder for value against some parties and not against others. If the holder has personally given value, he is a holder for value against all earlier parties, even those who received no value. If he gave no value personally, he is not a holder for value against his immediate transferor. However, if the latter gave value, the holder is a holder for value against persons who became parties prior to the giving of that value. Since this is true of persons generally, it follows that a person expressly appointed by the holder, in an endorsement, as an agent for collection of an item may enforce it in his own name without being required to give value himself. BEA, s. 53(1) states that aspect of the sheltering doctrine, another aspect of which is stated in s. 56 (see §24:30.40, *infra*).

Some illustrations may make the foregoing clearer. In *McLean v. Clydesdale Banking Co.*,[55] the defendant gave his cheque for £250 to a friend to assist the friend with his overdraft. After the friend deposited it, the defendant stopped payment, but was held liable to the friend's bank since it had become a holder for value by crediting the friend. What is important in such cases is that it appears that value was given *for the bill*. There is no requirement that it be given directly by the holder to another party to the bill. Thus, in *Diamond v. Graham*,[56] three persons had agreed to exchange cheques for some purpose. The plaintiff parted with his cheque only upon requesting and receiving the defendant's cheque, payable directly to him. The Court of Appeal rejected the argument that the plaintiff could enforce the cheque only if he had given value to the defendant. Danckwerts L.J. noted: "There is nothing in the subsection [s. 53(1) of the Canadian BEA] which appears to require value to have been given *by* the holder as long as value has been given *for* the cheque."[57]

§24:20.20(3) When Value Given

Finally, it must also be emphasized that, for a plaintiff to be a holder for value, some value must be given for the item either at the same time that the defendant becomes a party to it, or at some time thereafter at the same time that the plaintiff became the holder, or at some time prior thereto. For example, in *Stack v.*

Dowd,[58] the defendant signed, after maturity and after dishonour by non-payment, a note made payable to the plaintiff by two others. The court refused to enforce the note against the defendant in the absence of some showing that additional time had been bargained for and granted. Since it is clear that the note would have been equally enforceable against the defendant as it was against the makers if she had signed before or at the time the note had been issued,[59] the concern of Riddell J. for the want of "consideration" may, it is submitted, be properly understood as a want of value given at the time, or after, the defendant became a party.

In all of the foregoing, the technicalities of the form and movement of the item must be carefully regarded. For example, in *McLean v. McDougall*,[60] upon the sale of a car by the plaintiff's son to the defendant, the latter made his note for the price payable directly to the plaintiff, who was later unable to enforce it. The plaintiff, who had pleaded vaguely that he was "backing" his son in the car business, was perceived by the court to be a total stranger to the transaction, having given neither consideration for the defendant's engagement to pay, nor value for his completed instrument. It is tempting to consider why the plaintiff could not have been regarded as a holder for value since his son had clearly given value.[61] If the note had been made payable to the son initially, it could have been endorsed as a gift and still have been enforceable in the hands of the father.[62] There has never been any suggestion that remittance instruments, such as bank or postal money orders, are not enforceable by named payees who receive them as gifts from persons purchasing them from the issuers for value.[63]

§24:20.30 Holder with a Lien

> 53(2) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

§24:20.30(1) Meaning of "Lien"

A lien is a charge upon property as security for the satisfaction of a debt.[64] Although perhaps not necessarily restricted to possessory charges in theory or common parlance, it has been so restricted in modern technical usage. In that usage, a non-possessory lien would be termed a *security interest*. There is also a tendency now to restrict "lien" to charges created non-consensually, as by statute[65] or by common law. However that may be, the BEA itself contemplates charges arising both by contract and by implication of law. Thus "lien" must, for the purposes of this subsection at least, be understood as including both.

The only common law liens likely to become involved in the application of BEA, s. 53(2) are the banker's general lien, discussed by Crawford and Falconbridge,[66] and perhaps solicitor's and broker's common law liens. No existing statutory lien seems likely to apply, although Alberta Treasury Brances or the Ontario Savings Office, being part of their respective provincial government, might be in a position to enforce Crown liens against their depositors!

§24:20.30(2) Enforceability of Lien

Where a lien is alleged to arise out of the provisions of a contract, it would appear to be material to inquire into the applicable provincial and federal legislation to determine whether the lien is enforceable before affording the lienor the status of holder under this subsection. However, whatever the source of the alleged lien, it seems necessary and desirable to construe s. 53(2) as being limited in scope to security interests, charges or liens that are valid and enforceable under the applicable law. Where the lien did not so qualify, it would be difficult to assert that the holder "had" a lien within the meaning of the subsection.

There have not been any cases on banker's liens in Canada for over 50 years.[67] Crawford and Falconbridge[68] discussed the old cases in §5101.3. In view of the age of the cases, it seems unnecessary for me to consider the matter further here.

§24:20.40 Liability of Accommodation Party

54(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or endorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on a bill to a holder for value, and it is immaterial whether, when that holder took the bill, he knew that party to be an accommodation party or not.

If statutes are to be understood as a logical exposition of basic principles, then this section is badly out of sequence in both the British and the Canadian Acts. In such an exposition, it properly belongs with the other sections dealing with the liability of the several parties to a bill upon their respective engagements upon, and with respect to, the bill. Accordingly, see the discussion of the foregoing at §28:70.

§24:20.50 Defences Available Against Holder for Value

The *Bills of Exchange Act* is strangely silent on the defences to which a holder not in due course, but for value, is subject. However, an inference may be drawn from the provisions of s. 73(b), which describes the rights of a holder in due course. That provision, in relieving the higher degree of holder from the effects of defects of title and "mere personal defences available to prior parties among themselves" suggests that a holder for value takes subject to both types of defence. That inference is supported by the provision in s. 55(2) of the Act, to the effect that, to qualify as a holder in due course, a transferee must take "in good faith". Thus, it may be deduced that a holder for value who takes other than "in good faith" may enforce payment of a negotiable instrument only subject to the legal consequences, or effects, of the knowledge that disqualifies him. That would appear to give the court scope to examine and to give effect to, the otherwise "mere personal defences" that the party liable wishes to raise to reduce the sum payable, or to erase it.

I discuss elsewhere the content of the concept of "defect of title" [68.1] and the rather more difficult issues raised by a plea of a "personal defence" (or, as it is often called, an "equitable defence").[68.2]

§24:30 HOLDER IN DUE COURSE

§24:30.10 Definition

55(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,

(*a*) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; and

(*b*) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

Cross-references: "Holder" is defined in BEA, s. 2 and discussed at §§21:20.40 and 24:10, *supra*. "Value" and "valuable consideration" are equated by BEA, s. 2 and contrasted in the commentary at §24:20.20(1), *supra*. "Bank credit as value" is discussed at §24:20.10(2), *supra*. "Good faith" is defined in BEA, s. 3 and contrasted with "negligence" in §21:40.10. Good faith in the sense of no notice is discussed in §24:30.30, *infra*. "Dishonour" is discussed in §27:40.10. The section applies to cheques and promissory notes, making the changes in terms authorized by BEA, ss. 165(2) and 186(2); See §34:30.10, §35:80, respectively.

The BEA refers to the holder as one who has "taken" the bill. This may emphasize the importance of possession to qualify as a holder,[69] but almost certainly means nothing more than receiving by a negotiation, a term that the section also uses and the BEA defines. This is not to say that one may not take an instrument as a holder in due course even though one receives it only as collateral, subject to a security interest. The questions whether it is negotiated to one as a holder and whether one is the beneficial owner are clearly

separate (see §24:10.20, *supra*).

§24:30.20 Qualifying Items

It should be noted that the two paragraphs of BEA, s. 55(1) describe respectively:

> (a) the characteristics that the item taken must have if the holder is to qualify as a holder in due course; and
>
> (b) the conditions on which the holder must take it.

The former are considered in this section, the latter in §24:30.30, *infra*.

§24:30.20(1) Face of Bill Complete and Regular

In the ordinary case, the court will determine, by reference to the elements of the appropriate statutory definition in BEA, ss. 16, 165 and 176,[70] whether an item is complete and regular.[71]

§24:30.20(1)(a) Complete

If all the requisites of a negotiable instrument are not present when he first sees it, the transferee of the item cannot qualify as a holder in due course of it. However, in exceptional cases within the scope of BEA, ss. 30 and 31, where the power provided by those sections is properly exercised, a person who knows that the item has been completed in some material particular by someone other than the drawer or maker may nevertheless take as a holder in due course. It is important to note that it is the appearance of the item when offered, and not the true facts of its condition when first issued,[72] that is material to the point.[73]

A draft is complete although not yet accepted.[74] A cheque would presumably be complete, although indicating no account number, since by BEA, s. 16, that information is optional, as is a notation of the transaction giving rise to it.

§24:30.20(1)(b) Regular

"Regular" refers not only to the general appearance of the item, but to its apparent orthodoxy in point of law. An item that has been torn in half may not, in modern times, appear to be regular merely because it has been taped back together, even though, in older times, there may have been a practice of dividing bills in two for safer postal transmission by separate letters.[75]

In general, it may be said that an item ought to be regarded as regular if it contains everything required by the BEA in point of form, and nothing prohibited by the BEA by way of variation. Obviously, anything that would qualify as a material alteration of the item pursuant to BEA, s. 144 (see §29:70), if apparent, would render it irregular. Equally obviously, nothing permitted by the BEA, however unusual or uncommon in practice, ought to prejudice it. A cheque that had obviously been filled up in handwriting other than that of the person who signed it as drawer, has been held to be "regular" for the purpose of enabling the payee to take it as a holder in due course.[76] Also, a cheque that is post-dated is "regular" even though offered for negotiation before its due date.[77]

It is clear that the use of the term "face" by the section is not intended to exclude consideration of the whole of the instrument, back as well as front.[78] However, the few cases that exist on the point are not in agreement concerning how carefully irregularities in endorsements must be scrutinized. The English Court of Appeal[79] found that the omission from an endorsement of the word "Company" was fatal where the endorsing payee's name was given as "Fathi and Faysal Nabulsy Company". However, the Alberta Court of Appeal[80] approved the omission of "Co." and, it is submitted, correctly so (see §22:40.30(1)). In *Toronto Dominion Bank v. Canadian Acceptance Corp.*,[81] the Quebec Court of Appeal ruled that minor differences in the appearance of

signatures were similarly immaterial, but an endorsement in the name "Gilles Cote", where the item was payable to "Jules Cote", was properly held to be irregular. The bank's teller knew the payee by the latter name and did not notice the discrepancy, but it was fatal.

§24:30.20(2) Not Overdue

Where an item is not payable on demand, it is overdue after the expiration of the last day of grace (see BEA, s. 41 and §22:50) or, where grace has been excluded by the provision of the bill, on the day specified or described in the bill. Items payable on demand are deemed to be overdue when the conditions described in s. 69(2) and (3) are satisfied (see §25:60). BEA, s. 69(1) deals specifically with the case of an item endorsed and transferred when it is overdue. As to overdue interest, see the following §24:30.20(3).

§24:30.20(3) No Notice of Dishonour

A bill is dishonoured by non-acceptance and by non-payment when the conditions of BEA, ss. 80 and 95 respectively are satisfied (See §27:20.40, §27:30.50 respectively). The notice referred to in s. 55 is, of course, actual knowledge, howsoever obtained, or a suspicion when combined with wilful disregard of the means of knowledge (see §24:30.30, *infra*). The notice of dishonour referred to in ss. 95*ff.* (see §27:40) is a formal notification and quite distinct.

It has been held that if a bill provides for payment of interest in instalments before the principal is due, a person taking it before maturity, but after default in payment of interest, without notice of such default,[82] is not prevented, by that fact alone, from being a holder in due course.[83]

§24:30.30 Good Faith and No Notice of Defect of Title

I discuss the meaning of "good faith" in §21:40.10. The concept contains no element or consideration of the possible negligence of the holder.[84]

In general, it may be said that an item is taken in good faith when it is received in the ordinary course without notice or even suspicion of irregularity of any kind. Since every holder is deemed by the BEA to be a holder in due course, there is a rebuttable presumption that each holder received the item in good faith.[85] However, where that presumption is displaced, and the good faith and absence of notice of a holder are put in issue, it becomes necessary to become much more precise in determining the legal meaning of those terms. Although occasionally cases arise in which only the existence of good faith (rather than the absence of notice of some fact, the knowledge of which would *ipso facto* impugn the holder's good faith) is material,[86] the two questions are usually inextricably linked in the courts' analysis and are discussed together here.

§24:30.30(1) Question of Fact

§24:30.30(1)(a) Actual or Constructive Notice

It should be noted that the question whether a person acted in good faith is one of fact. The courts are careful not to apply any concept of constructive notice in these cases. That doctrine, "by which a man who, through gross negligence, refrains from making inquiries is held to have notice", does not apply in the law of negotiable instruments.[87] There must be evidence justifying

a finding that the suspicions of the holder were actually aroused.[88] However, that is not to say that such evidence must be direct. It can be garnered from words, conduct, silence or inactivity.[89] If the circumstances, as shown by direct evidence to have been understood by the holder, are such that his allegations of innocence and ignorance are not credible, the court is obviously justified in finding that he did not act in good faith.[90] It is in this limited sense that one must understand the judicial statements that a certain holder "must have had a suspicion",[91] that he "knew or ought to have known",[92] or that "it is incredible that he

made no inquiry".[93] With respect, it appears that Cormack Dist. Ct. J. struck the correct balance when he observed: "The whole transaction was one which would arouse the suspicions of a reasonable banker". However, he went on to add that, on the evidence, it was "obvious that any innate stirrings of doubt . . . were suppressed by his desire to see [the] shaky loan retired".[94]

No one is disqualified by their occupation or associations, except to the extent that a "close connection" with fraudulent persons may establish a foundation for a finding that they must have known that bills, cheques or notes endorsed to them were subject to defences in favour of the parties primarily liable on them.[95] That is very well established, and ought not to be considered as having been in any way unsettled by recent — and notable — comments by Hogan P.C.J. of the British Columbia Provincial Court.[96] The case involved a claim by a cheque-cashing service bureau against the drawer of a cheque that had been negotiated to the plaintiff, but later countermanded. The decision was in favour of the claimant, but the learned judge took the opportunity to inveigh against the precedents that compelled him to give the protection of holder in due course status to the claimant. He questioned whether it was good policy to do so, given what he described as the facts of the typical cheque-cashing service bureau's operations: *viz.*, fingerprinting and photographing payees before accepting an endorsement of a cheque, and setting fees high enough to cover the losses they experience on the bad ones. He concluded:[97]

> They have all the devices of modern communication to verify a cheque. Then they wish to eliminate the risk entirely by seeking the protection of the *Bills of Exchange Act* as if they were a small shopkeeper or a commercial supplier, which they are not. Commercial cheque cashing firms should not have a stronger case against the maker [*sic*] of the cheque than the person who presented it to them . . .

Far from agreeing with the observation by Hogan P.C.J. that "there are few things carrying less weight than the musings of a Provincial Court Small Claims decision",[98] I wish to record my disagreement with his policy recommendation.[99] I see no harm in an endorsee taking steps either to preserve their rights of recourse against the endorser, or to prosecute a fraudulent impostor of the real payee, if that is what the transaction turns out to be. The customers of the bureaux apparently do not find the methods used to be as offensive as the learned judge did, or they would not frequent those who use them. It seems to me that the real culprit in this type of case is the willingness of members of the public to issue cheques before they are satisfied that they are liable to make the payment. The power of countermand has proven to be an ineffective drawer protection device, since it does not affect the rights of holders in due course. Either we are going to have a law of negotiable cheques, or not. The claimant did not bargain for an assignment of the payee's claim: they bought his cheque and should be unconcerned with disputes arising out of the underlying transaction, so long as they do not know about them. The correct policy is to discourage litigation over countermanded cheques as Hogan P.C.J. wisely has done, by enforcing them when the endorsee qualifies as a holder in due course, as the claimant did here.

§24:30.30(1)(b) Grounds for Suspicion

What kind of circumstances have been found sufficient to excite suspicion? Making due allowance for the limited utility of precedents on questions of fact, it has been held that taking at an undervaluation is not, *per se*, evidence of bad faith, but is a material fact.[100] A bank manager who admitted being sufficiently curious to "drive by" the used car lot of a new customer, but who had no actual grounds for suspicion and did not suspect irregularities in items passing through its account, was held to have acted in good faith in later accepting negotiation of instruments from the dealer.[101] A finance company was said to have been negligent in discounting an instalment promissory note without also receiving, from the payee, the copy of the statement required by law at the time[102] to be delivered to both the maker and the transferee, but was permitted to enforce it as a holder in due course.[103] However, another finance company that accepted a transfer of documents from a seller of a food supply service was held to have been more than merely negligent and to have acted in bad faith when it was shown that the forms had been prepared for use in

financing car sales and made no sense in the other context.[104]

In recent cases, it has been decided that a bank does not take in other than good faith when it accepts from a real estate developer promissory notes given in a series of condominium purchases by consumers, knowing that the notes were only one in a whole series of documents executed by the parties on the closings of the sales, and that the units had yet to be built.[105] And cheque cashing service bureaux have qualified as holders in due course of cheques that their staff purchased from customers, even though the clerks failed to obtain all the information required in a customer identification form that they were instructed to complete before purchasing any instrument.[106] It has also been held to be immaterial to the rights of such bureaux that the payee knew that the cheque he was offering for sale had already been countermanded[107] (there being no evidence that he told the clerk that!), or that the cheque was post-dated and the apparent date had not yet arrived.[108]

§24:30.30(1)(c) Notorious Facts and Prior Knowledge

In the past, two particular sources of knowledge have given the courts difficulty in individual cases. These have involved the question of whether a particular holder had notice of facts alleged to be notorious, as well as whether a person could be affected in relations with the parties to one instrument by reason of facts known to him as a result of prior dealings with one of them as a party to other instruments. For example, it has been held that publication of newspaper stories impugning the business methods of a particular seller was evidence on which a jury could find that the holder had notice of impropriety.[109] It has also been held that a bank manager who admitted thinking that all grain dealers were breaking a new law by entering into futures contracts without proper licensing could not accept an endorsement of a note from a known grain dealer even though it did not appear that the manager knew the note arose in a futures contract.[110] Perhaps a better example of the proper effect of general knowledge of bad character or prior disreputable acts by one's transferor is the judgment of Gibbs J. in *Toronto-Dominion Bank v. Jordan*,[111] in which he found that a bank manager's alleged knowledge of a customer's shady dealings was either not proved to his satisfaction, or not sufficient to overcome the presumption of regularity and his finding that the manager (although described as "careless, foolish and gullible") had not acted dishonestly. In *Royal Bank of Canada v. Ryan*,[112] a bank manager was said to have acted other than in good faith in accepting for deposit two cheques payable to a customer at a time when another cheque, having the same payee and drawer, had been dishonoured NSF and was known to be a matter of dispute.

Occasionally, knowledge of the general law may be sufficient to put a transferee on inquiry. For example, it has been held that one taking a note made by an Ontario municipal corporation must be deemed to know that, under the law applicable to such corporations, such a note could not be validly made except by by-law, and is thus put on inquiry to ascertain whether a by-law was passed and cannot be a holder in due course if no such by-law exists.[113] Or, again, a bank was denied holder in due course status of an instrument that it had accepted for deposit to the personal account of a notary upon a finding that the bank's representative had noticed that the endorsement was expressly "in trust" and admitted knowing that notaries maintained trust accounts for clients' funds.[114] However, it has also been held, with perhaps greater justification, that the notoriety of a particular person's business methods is equally within the knowledge of the other parties to the instrument and does not amount to a defect of title.[115] Permitting the holder to acquire holder in due course status in such cases is also consistent with the results in the cases from the same period holding that knowledge by the holder that other holders were experiencing difficulties in collecting notes to the same payee did not put a holder on notice of impropriety.[116] However, the solution to this conflict of authorities seems clear. Events have overtaken these cases involving notorious facts. Their original function was chiefly to make enforceable against financing institutions the equities of the sales promotions of the persons transferring quantities of negotiable paper to them. However, that function is now much more sensitively discharged by the "close connection" doctrine and Part V of the BEA (see §35:50 and Chapter 36, respectively).

As a result, the cases, while no doubt still technically correct, have lost most of their practical significance.

§24:30.30(2) Knowledge or Suspicion of What?

It is all very well for a court or commentator to caution against permitting one, whose suspicions were probably aroused at the time he acquired an item, later to claim holder in due course status, but such cautions do not go far enough without also stating what are the facts or circumstances about which holders must not ignore knowledge or suspicions. It is tempting, when trying to provide a reliable description of such matters, to quote Lord Herschell to the effect that to disqualify, the knowledge or suspicion must be of "something wrong in the transaction".[117] However, that is not the law that applies to transfers of interests in negotiable instruments, that is, the higher standard that is evolving only now with respect to the developing jurisprudence on "knowing receipt" of funds that are subject to an express or constructive trust.[118] While it would be wrong to attempt to be exhaustive on this point, the following may be of assistance.

§24:30.30(2)(a) Real or Absolute Defences

These are listed and described in §26:30.30 and, since they are available against a holder in due course even though he has no knowledge or suspicion of their existence, it may be deduced that, *a fortiori*, they bind holders taking with knowledge or suspicions concerning them in individual cases. This in turn raises the possibility that whether or not grounds sufficient to establish a real or absolute defence actually exist in a case may not matter if the holder took without clearing up his suspicion that they might. This has already been decided by the Supreme Court of Canada[119] with respect to a suspicion of the mental incompetence of the maker of certain notes. That would have the effect of greatly enlarging the scope of such defences and should be pursued only with great caution.

§24:30.30(2)(b) Defects of Title

These are listed in part in BEA, s. 55(2) and described in §26:30.40. These defences are the chief concern of the courts in these cases, or in cases of overdue transfer, since they affect only:

(a) persons who acquire instruments with notice of them, or actual, and negligently or wilfully unresolved, suspicions concerning them; and

(b) post-maturity transferees.

§24:30.30(2)(c) Absence of Consideration

Obviously, original absence of consideration *per se* cannot be a defect of title, or there could never be any liability upon an accommodation party to a holder for value, a case expressly provided for in the BEA by s. 54(2) (see §§24:20.40, *supra*, and 28:70). That subsection also provides that "it is immaterial whether, when that holder took the bill, he knew that party to be an accommodation party or not". It has also been decided that there is no difference, in this respect, between a party who intends to commit himself without receiving value, and one for whom the entire promised consideration has totally failed[120] or has not yet been received at the time of negotiation and is known by the endorsee to be wholly executory at that time.[121] It has also been repeatedly decided that a total or partial failure of consideration occurring after negotiation is not a defence available against a remote party having the rights of a holder in due course (see §26:30.40(3)(a)).

§24:30.30(2)(d) Executory Consideration

However, there is one line of cases that may cause difficulties if not properly understood. In these cases, it has been decided that a holder's title to a negotiable instrument is defective where it is shown that before receiving it, he had knowledge or well-founded suspicions that the consideration, anticipated in the underlying transaction by one liable on the instrument, had not yet been received, or had failed in whole or in part, or would very likely fail *in such a way as to constitute the alienation of the instrument a fraud on that*

party, or a negotiation in breach of faith.[122] The importance of the italicized words is paramount because it is not knowledge that the consideration is executory that gives rise to the defect of title, but the knowledge that the negotiation is fraudulent or in breach of faith. For example, in *Interprovincial Building Credits, Ltd. v. Soltys*,[123] Dickson J. (as he then was) disqualified a finance company from holder in due course status on a finding that it knew, as a result of actual inquiries by a responsible officer, that a note that it was taking was conditional upon completion of certain work not yet completed and was unlikely to be completed.[124] Other examples may be found in the reports,[125] and must be regarded as perfectly correct.

Unfortunately, there have also been cases not quite so carefully founded upon the jurisdiction. The most doctrinaire of these cases held that a holder, who also received chattel security documents, should be regarded merely as an assignee of the seller. The very existence of the note was ignored.[126] That is not now, and never was, the law. The courts that took such positions were apparently endeavouring to re-establish a proper balance between the requirements of the law of negotiable instruments and the obvious need for some protection for individual consumers.

It will be noted that all of the cases taking the extreme position involved doubtful consumer transactions. However, the combined force of Part V of the BEA (see Chapter 36) and the innovative jurisdiction developed by Kelly J.A. in the leading case of *Federal Discount Corp. v. St. Pierre*[127] have, it is hoped, made such efforts no longer necessary. The law of negotiable instruments should be permitted to return to its former, proper state on this point.

§24:30.30(2)(e) Other Facts

It is tempting to state that knowledge by a holder of other facts not establishing a defect of title or evidencing a negotiation in breach of faith is immaterial. For example, it has been held that the holder may, with impunity, know that the payee's business methods have been questioned publicly,[128] that the maker of a note offered to him is in financial difficulties,[129] that a cheque is drawn upon an overdrawn account,[130] or that the drawer of a cheque he is taking is an accommodation party only.[131] On principle, it would seem that, by itself, knowledge that the drawer of a cheque had countermanded it would not prevent an endorsee from the payee taking as a holder in due course.[132]

However, it may be best to be cautious. For example, as is noted in §26:30.40(1), the list of defects of title is not closed. Neither is the capacity of the courts to respond to the needs of commerce or a particular class of persons engaged in commerce. After all, the whole doctrine of "close connection" (see §35:50), unless capable of being subsumed under the established defect of title of "negotiation in breach of faith", is a judicial gloss on the whole concept of holder in due course and the careful precision of the statute. I content myself with the observation that I know of no other matters, the knowledge of which may be material to the status of an acquiring holder. As one old mid-western American judge is reputed to have remarked, one may know with impunity that one's transferor is "a Republican, a Presbyterian and a poor shot with a rifle".[133] I should also note that where the holder agrees to some condition not compatible with due course status, he may lose it even without a showing of any fact sufficient to deprive him of it in the absence of his agreement.[134] Moreover, the status of a holder not in due course is not improved by the removal or "cure" of an originally disqualifying defect of title.[135]

§24:30.30(2)(f) Changed Circumstances

It seems that the holder's claim to holder in due course status must be judged with reference to his knowledge at the time of his acquisition. Knowledge of a fraud on a prior party, coming to him after his acquisition of the instrument for value, cannot be permitted to prejudice his rights on it.[136] Conversely, a holder taking with knowledge of unfulfilled conditions precedent upon the maker's promise to pay and who, because of the nature of the conditions, does not take as a holder in due course, does not later qualify for that status if the

conditions are fulfilled.[137]

§24:30.30(2)(g) Notice and the Knowledge of Corporations

When does a corporation know a fact? That is a difficult question which has troubled the courts and commentators for a long time. Its importance in the context of bills of exchange is obvious, but it has not been noticeably productive of either more numerous or more difficult problems than elsewhere in the law. To anyone reflecting upon the problem, it will be clear that the concept of notice is used in the BEA in two quite distinct senses. Notice of dishonour clearly requires the delivery of a formal notification. Taking without notice (less clearly) implies the absence of knowledge although, as the discussion in §24:30.30(2)(d), *supra*, has endeavoured to make clear, there may be grounds for a juridical finding of a taking with notice without there necessarily being evidence of a conscious, subjective appreciation of the material fact. I consider the analysis of Seavey[138] and the Restatement[139] distinguishing these two concepts under the rubrics of "notification" and "knowledge", respectively, to be both correct in law and useful, although there is little Canadian authority to support it.

Some corporations are given a measure of protection and certainty on this issue by legislation. For example, any notification sent to banks regarding individual customers or accounts "constitutes notice to the bank and fixes the bank with knowledge of its contents" only if received at a branch that is the branch of account for that customer.[140] Notices to the bank or authorized foreign bank in respect of its own affairs may be sent to the head office of the bank or the principal office of the authorized foreign bank.[141] Section 462(2) of the *Bank Act*, in stating that such notification only "constitutes notice to the bank and fixes the bank with knowledge" of the contents, presumably addresses only the effect of such attempts at formal notification. It would appear to remain a question of fact in each case whether, despite the absence of notification, the material officials of the bank knew, or ought reasonably to have known, any particular fact.

Apart from such cases, it seems that there is notification of a corporation only if, at the time, the agent or officer actually receiving the information was either expressly or apparently authorized to receive it. In this connection, it is probably correct to apply as well the concepts of ostensible authority and agency power discussed in §23:40.10. The efficiency, or lack of it, with which the corporation directs the information to its mind and management so as to be able to react to it would, in all but the most exceptional circumstances,[142] be immaterial. As far as the notifying outsider is concerned, the corporation has been notified.

Knowledge, on the other hand, being much less formal, and acquired in so many different ways, is more difficult to deal with. Some propositions may be stated more confidently than others. For example:

(1) *Information acquired by an agent acting in a particular transaction is "knowledge" of the principal.* If the transaction is within the express or implied actual authority, or the customary or apparent authority, of the agent to effect on behalf of his principal, then everything he learns in the course of effecting the transaction is knowledge of his principal. Thus, in *Commercial Bank of Windsor v. Morrison*,[143] a bank failed on a claim against accommodation makers of notes when it was shown that the bank's agent in the transaction giving rise to the notes had express knowledge of suspensive conditions upon the delivery of the instruments. As the Chief Justice observed: "The only title that the bank had to the notes in question was through . . . its agent, and it is impossible that they can be used by the bank except subject to the terms upon which" its agent received them.[144] Other cases may be found to the same effect.[145]

(2) *Knowledge obtained by an agent in an earlier transaction for a corporation should probably be deemed to be knowledge of the corporation in a later transaction if both transactions are within the course and scope of the agent's authority or power.* The authorities are exclusively concerned with protecting a principal against information acquired by the agent on behalf of a different principal.[146] Where there is continuity of the agency employment, there seems to be no reason to treat a corporate principal any more favourably than the agent would be treated if he had acted on his own account instead of for the principal. Making due allowance

for forgetfulness, it is surely within the power of the court to find that the earlier acquired knowledge is actual knowledge of the principal in the new transaction.

(3) *Unauthorized acts beyond the agency powers of the agent, or fraud of the agent and the third party upon the principal, take the case out of the rule.*[147] There is no reason to suppose that an agent acting in excess of his authority would inform his principal of the details of his activities.

(4) *If knowledge of two or more agents is to be combined in order to determine what the corporation's mind and management knows at any given time, the following appear also to be material:*

(i) The information of both agents must have been acquired within the course and scope of their offices.[148]

(ii) If the information is not of the sort that the agents are under a duty either to record or to forward to another centre within the corporation,[149] there must be some circumstance that ought reasonably to have caused the corporation to make inquiries of the informed agents.

(iii) If transmission of the information to another centre within the corporation should have occurred, the corporation must be allowed a reasonable time for such transmission in all the circumstances.

(5) *Knowledge of a corporation that one of its own agents or servants is defrauding it must obviously come through some channel of communication other than the faithless agent or servant.* In *Morguard Trust Co. v. Bank of Nova Scotia*,[150] a solicitor, whom the bank thought was acting for it in a mortgage transaction, forged the endorsement of the payee. The efforts of the bank to discover the true facts were thwarted by the fraudulent solicitor to such an extent that the bank did not "learn" of the forgery until the examinations for discovery in its action for relief.

(6) *Imputed knowledge distinguished.* The English courts have, in the past 10 years or so, had occasion to sophisticate their analysis of knowledge of corporations considerably. The leading case is still the judgment of Hoffmann L.J. in *El Ajou v. Dollar Land Holdings plc.*[151] In the course of deciding that a corporation was not fixed with imputed knowledge acquired by an agent in a transaction, his Lordship distinguished several classes of cases. In the first group, he classified cases[152] in which the knowledge of an agent affects the terms or performance of the contract that he concludes on behalf of his principal, such as where an agent to purchase insurance withholds material information from the underwriter, or an agent to purchase shipping is shown to know of the ship-owner's standard terms of contracting. In the second group Hoffmann L.J. classified cases in which a principal who is under a contractual or other duty to investigate certain circumstances or to make disclosure of material facts, may be found to have performed those duties or to have failed in them, according to whether an agent that he employs to do them has material information, or acquires it in the course of doing so.[153] In the third group of cases, the agent has actual or ostensible authority to receive communications on behalf of the principal, either informative (such as the state of health of an applicant for insurance)[154] or what he called "performative": such as to receive service of process, or a notice to quit rented premises.[155] The final group of cases, and the one in which the *El Ajou* facts were found to fall, comprised those in which the principal had no contractual or other duty to disclose or to inquire and probably did not know the material fact. If his agent did know, and had a duty to disclose that information to the principal, there is only a rebuttable presumption that the principal was actually informed.

Applying the foregoing analysis in *Infiniteland Ltd. v. Artisan Contracting Ltd.*[156] Chadwick L.J., for the Court of Appeal, decided that a purchaser of a business did not have "actual knowledge" of certain facts affecting the value of the assets, even though the accountant that it had retained to do its due diligence had discovered all the material facts. Chadwick L.J. stated:[157]

> It seems to me that the distinction between 'actual' and 'imputed' knowledge in this field is so well known — see the

> analysis in the judgment of Lord Justice Hoffmann in *El Ajou v Dollar Land Holdings plc and another* . . . that, had the parties intended to include 'imputed knowledge' in the qualification by which they cut down the scope of the relevant saving provision, they would have said so.

§24:30.35 Takes for Value

Section 55(1)(*b*) of the BEA requires that, to qualify as a holder in due course, a holder must take the bill "for value". The importance of the point is sometimes overlooked by the lower courts,[157.1] but was recently emphasized by Deschamps, J. *per cur.* in the Supreme Court's April 2009 decision in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*.[157.2] That was the case in which a cheque for a very large sum arrived unexpectedly in the mail at the office of a small cookware distribution company. The payment was possibly linked to discussions that the two principals had had with someone at a trade show in the United States who had expressed interest in purchasing B.M.P.'s rights to distribute the wares there. There was, however, no evidence of any agreement calling for the payment, which arrived in a plain envelope without any enclosing letter. It was, effectively, money out of the blue. The principals of the payee corporation deposited the cheque with BNS, which presented it through the clearing and received settlement for it before the drawee, Royal Bank of Canada, discovered that it was a counterfeit bearing only forged signatures. Cohen J. of the British Columbia Supreme Court had ruled that the worthlessness of the cheque had no relevance to the rights of the payee to retain the proceeds as against its banker — a proposition that cannot bear scrutiny.[157.3] In the course of rejecting an argument that RBC was precluded by its payment from later denying the genuineness of the drawer's signature.[157.4] Deschamps J. observed:[157.5]

> BMP did not take the instrument for value, so it was not a holder in due course. Since only a holder in due course can benefit from s. 128(*a*) *BEA*, even if RBC were deemed — by payment — to have accepted the forged cheque, it would not be precluded from denying to BMP the genuineness of the drawer's signatures.

I discuss the concept of value and certain points of law relevant to it, in §§24:20.10 and 24:20.20, *supra*, and need not repeat any of that material here.

§24:30.40 Sheltered Holder

> 56. A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Cross-references: "Holder" is defined in BEA, s. 2 and discussed in §24:10, *supra*. "Holder for value" is defined in BEA, s. 53 and discussed in §24:20.10, *supra*. "Holder in due course" is defined in BEA, s. 55(1) and discussed in §24:30.10, *supra*. The rights of a holder are set out in BEA, s. 73 and discussed in §26:20. The section applies to cheques and notes, making the changes required by BEA, ss. 165(2) and 186(2), and discussed in §§34:30.10 and 35:80, respectively.

§24:30.40(1) New Transferee

BEA, s. 56 is necessary for the protection of the holder in due course, for otherwise it might be impossible for him to negotiate a bill further by reason of irregularities becoming known after he has acquired the bill for value without notice. The section has also been relied upon by Canadian courts to permit action on items by persons not themselves holders for value, but mere agents for collection on behalf of a holder in due course.[158] By referring to "fraud or illegality", the section appears to advert to the illustrations of the meaning of the term "defect of title" provided in BEA, s. 55(2) without restricting itself to such matters only.

In order to qualify as a sheltered holder, the person must become a holder and receive title to the item by some method of negotiation that is recognized by the BEA (see Chapter 25). However, it is not necessary for him to take before maturity.[159]

Although, as a general principle, BEA, s. 69 provides that an overdue bill can be negotiated only subject to defects of title affecting it at its maturity, if the sheltered holder takes from a holder in due course who held it at maturity, both ss. 56 and 69 may be complied with since an item so held is not subject to any defects of title.[160]

A sheltered holder obviously may know of fraud or illegality affecting the item so long as he was not a party to it. *A fortiori*, he may know of fraud or illegality not affecting the item,[161] or of matters affecting the item but not constituting fraud or illegality.[162]

Note that the section does not make the item enforceable by the sheltered holder in all events. He has only the same rights as the holder in due course from whom he received it. He may, therefore, be defeated by any defence, such as a real defence, that would also be available against such a holder (see §26:30.30).

§24:30.40(2) Reacquiring Party

The section has been applied by the Supreme Court of Canada in favour of a person acquiring, after maturity, an item of which he was an accommodation endorser prior to maturity.[163] Chafee has pointed out[164] that the theoretical legitimacy of such an application of the section is not free from doubt. Curiously, the English Court of Appeal, in *Jade Int'l Steel Stahl und Eisen GmbH & Co. KG v. Robert Nicholas (Steels) Ltd.*,[165] treating the question as one of first impression, has considerably extended that position and cast doubt on the clarity of the distinction between immediate and remote parties (see §26:30.10) by applying the section in favour of the payee of a bill. The circumstances were unusual, but not unique. The bill was drawn by a seller and accepted by the buyer for the price of goods sold and to be delivered. The buyer, dissatisfied with the quality, dishonoured the bill by non-payment. The bank at which the item had been discounted charged it back to the payee/seller's account. In defence to the seller's action for payment and motion for summary judgment, the buyer/acceptor wished to plead the defects of the goods, but the court ruled that although such defences might have been raised against the payee if he had remained an immediate party, they were not available to the acceptor when the payee appeared in the guise of a remote party as transferee from a holder in due course. Reasoning that such defences would not have been available against the bank that held the bill at maturity, the court purported to apply the British equivalent of BEA, s. 56 and gave the sheltered holder all the rights of the bank.

With respect, both the result and the reasoning seem wrong. The drawer/payee to whom a dishonoured bill is charged back does not derive his title to the item through the previous holder, as required by the section, but precisely vice versa. He initiates the instrument and the whole transaction by drawing a bill payable to his own order and discounting it upon his own endorsement. Rights acquired by the holder in due course, and enforceable by him during his holding or transferable to other remote parties by negotiation, simply lapse when the bill is returned to the drawer following dishonour. The BEA expressly recognizes this in s. 139(*b*), where it provides that such a party "is remitted to his former rights as regards the acceptor". The mere passage of time while the bill was out of his hands is so clearly irrelevant to his rights on it that he is permitted to strike out his own original, and all intervening, endorsements and to reissue the bill. Neither principle nor practical considerations require that the drawer/payee be insulated in this fashion from the contract defences of the acceptor. The extent to which an immediate party, whether reacquiring or not, may claim to be free of contract defences is discussed in §26:30.10(2). To the extent that they exceed the limits there discussed, both the logic and the result of the *Jade Int'l Steel* case should be repudiated.

§24:30.50 Presumptions in Favour of Holder

> 57(1) Every party whose signature appears on a bill is, in the absence of evidence to the contrary, deemed to have become a party thereto for value.
>
> (2) Every holder of a bill is, in the absence of evidence to the contrary, deemed to be a holder in due course, but if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with

fraud, duress or force and fear, or illegality, the burden of proof that he is the holder in due course is on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course.

Cross-references: The various parties to a bill are discussed in the subsections of §22:40. "Signature" is referred to in BEA, s. 4 and discussed in §21:40.20. The section applies to cheques and notes, making the changes in terms authorized by BEA, ss. 165(2) and 186(2), and discussed in §§34:30.10 and 35:80, respectively.

§24:30.50(1) Holds for Value

I deal in §24:20, *supra*, with the presumption in s. 57(1).

§24:30.50(2) Holds in Due Course

Before the presumption of holding in due course applies, the plaintiff must first establish that he is a holder (see §24:10.10, *supra*) and that the instrument sued upon satisfies the requirements of the BEA for a bill, cheque or note (see §22:10). The section specifically provides that the presumption may be rebutted by admission or proof that one or more of the listed vices affected one of the listed functions of acceptance, issue or negotiation. If that is done, the onus returns to the holder to establish value and good faith, as provided in the section.[166] However, even at that point, it is still open to the defendant to show that any other requisite of good faith holding has not been satisfied by the plaintiff (see the subsections of §24:30, *supra*, and s. 73 in Chapter 26). For example, he may show that it was negotiated to him when overdue.[167]

§24:30.50(3) Application to Payee

It has been held in England, in *Talbot v. Von Boris*,[168] that no part of BEA, s. 57(2) applies to the payee of a note, but that appears to be clearly wrong. There can be no doubt that the payee is a holder. That is specifically provided by the definition in s. 2. Therefore, s. 57(2) applies to the payee of a note. There is no mandate for the courts to ignore the plain text of the BEA. The point is not simple, however, as demonstrated by the judgment of the Ontario Court of Appeal in *Esses v. Friedberg*[168.1] and further emphasized by Geva in a comment upon the reasoning.[168.2] The case's confusing facts make summary here impractical, but suffice to note that the plaintiff was the payee of a cheque that had been certified by the defendant bank at the request of a third party and in reliance upon a deposit by its customer (the drawer) of a bank draft that had been procured by the fraud of some person or persons unknown. The important point to note is that the payee of the certified cheque was a remote party and, therefore, eligible to claim holder in due course status under the approach argued for in §24:30.70(2), *infra*. However, Watt J.A. ruled *per cur.* (without indicating any appreciation of the difficulty or the history of the issue) that s. 57(2) applied to *every* payee. However, as there was evidence of fraud in the inception of the instrument, the result was that the court set aside a summary judgment for the payee and ordered a trial to determine whether the payee was implicated or could enforce the instrument regardless of the underlying frauds and absence of value. As this treatise has argued for at least three editions[168.3] that a remote payee ought to be recognized as capable of achieving holder in due course status despite the fact that the instrument is issued to him, rather than negotiated, the result of the decision is welcome. The over-simplification of the issue of the scope of application of s. 57(2), however, is not.[168.4]

§24:30.50(4) Facts Rebutting Presumption

The words "if . . . it is admitted or proved" mean no more than that some evidence must be offered and accepted to displace the presumption raised in BEA, s. 57(1).[169] An affidavit by a defendant in reply to a motion for summary judgment, showing that the note sued on is affected by fraud or illegality, is a sufficient answer to the motion notwithstanding the plaintiff's affidavit that he is a holder in due course.[170]

In *Maxham v. Excalabur International Capital Corp.*,[171] a question arose as to the correct interpretation of s. 57(2). Specifically, the issue was whether the presumption that every holder is a holder in due course could be displaced only by evidence of fraud, duress or illegality. Not surprisingly, Meiklem J. ruled that any evidence of any failure by the holder to satisfy the requirements of s. 55 to take as a holder in due course (*e.g.*, good faith, value, etc.) was sufficient. However, with respect to Meiklem J., the question raises a false issue. On a close reading, it is clear that s. 57(2) operates in two ways:

> (1) Its presumption that every holder is a holder in due course prevails until "evidence of the contrary" is adduced and believed. That evidence must go to the facts of the holder's actions, circumstances and knowledge at the time of negotiation, and the holder must pass the tests of s. 55.
>
> (2) The other effect of s. 57(2) comes from the opportunity of the parties liable on the instrument to show that the acceptance, issue or any subsequent negotiation was affected by fraud, duress or illegality. If they show one of those, the onus shifts to the plaintiff holder to show either that he is a holder in due course or (if he wishes to continue to receive the benefit of the presumption in his favour) that he is a sheltered holder; that is, in the second case, the plaintiff must show that at some time after the acts of fraud, duress or illegality, value was given for the instrument, in good faith, by some other holder in due course. In other words, in this second case, the plaintiff loses the benefit of the presumption that he is a holder in due course if he took the instrument from the persons who worked the fraud, applied the duress or engaged in the illegality. He regains the status of holder in due course only if he then affirmatively satisfies the court on every prerequisite of the statutory definition.

In *Maxham*, once it was shown that the holder of the disputed instruments was the payee of them, and it was clear that he did not wish to adduce any evidence concerning the circumstances of his acquisition, the possibility of him also being a sheltered holder was destroyed, and no issue under s. 57 even arose. A payee who is a party to such questionable dealings, as the evidence disclosed, is not entitled to the benefit of any presumption in his favour and must prove his status as a holder in due course affirmatively.

A more recent example of the same issue arose in *Esses v. Friedberg*,[171.1] in which a remote party payee of a certified cheque was held able to enforce payment of it against the bank only upon satisfying the onus of establishing his status as a holder in due course.

§24:30.50(4)(a) Fraud

It appears that the words "affected with fraud . . . or illegality" import a very broad inquiry into the circumstances of acceptance, issue and subsequent negotiation to see whether there was anything that the court could label fraud "or some other like circumstance *in connection with* the bill before it reached [the plaintiff holder's] hands".[172] Halsbury,[173] in a passage cited with approval by a court in southern Africa,[174] asserted that it does not matter that the fraud is at the expense, not of one of the immediate parties, but of third parties who are strangers to the contract altogether. The same approach was taken by McEwan J. of the British Columbia Supreme Court in *Pan Pacific Auto & Diesel Services Ltd. v. Khalsa Credit Union*.[175] In that case, Amex relied on fraudulent credit reports and identification in approving an application for a credit card. Only two charges were ever made on the card, both within a few days following the issue of the card; both in favour of a motor repair shop in Surrey, B.C.; both for large sums; both for sales of heavy equipment, which the repair shop had no history of dealing. Amex paid the amounts to the merchant's account at a branch of the defendant credit union in Surrey, which paid them out to the owner of the shop by bank draft. He deposited the draft in a branch of BNS, but before he could collect the proceeds, Amex alerted the credit union that it suspected fraud in the transaction. The funds being frozen in all accounts, the payee brought action to enforce payment and failed. McEwan J. held[175.1] that:

> The evidence as a whole raises significant doubt as to the *bona fides* of the transactions underlying the [bank draft]. The plaintiffs have not met the burden of proof they must carry, in such circumstances, under s. 57(2) of the *Bills of Exchange Act*, of showing that "subsequent to the . . . fraud . . . value has in good faith been given for the bill". The

evidence does not establish that there was any transaction underlying the issue of the [bank draft]. The plaintiff's action is, accordingly dismissed as against each of the defendants.

No court has ever attempted to define "fraud" for this, or any other, purpose. There does not appear to be any reason why the BEA should be construed as intending only legal, as distinct from equitable, fraud.[176] Most Canadian courts that have applied the section have done so without any critical examination of the traditional requirements of fraud in common law, but have treated the matter simply as a question of fact.[177] However, it has been decided that neither partial nor total failure of consideration is sufficient to shift the onus to the holder.[178] In *Toronto Dominion Bank v. Canadian Acceptance Corp.*,[179] the court ruled that there clearly had been fraud affecting the issue of cheques signed by an officer of the drawer as part of a scheme, between him and the payees, to defraud the corporate drawer. Such questions of fact are clearly within the competence of the court, but one may perhaps be permitted to doubt that Wells J.A., in *Banque Provinciale du Canada v. Claude*,[180] was justified in finding fraud on the ground simply that the post-dated cheques had been lodged with the bank as collateral, unless he considered (but did not state) that any negotiation in the circumstances was in breach of faith by the payee and therefore fraudulent (see §26:30.40(4)).

§24:30.50(4)(b) Duress

Duress, being a species of fraud in which pressure rather than deception is the operative vice, is also referred to in the section as sufficient to shift the onus. As with fraud itself, duress may shade off by degrees to the exercise of undue influence, remediable only in equity or upon restitutionary principles.[181] The courts have not defined duress for the purposes of the BEA. Presumably, it has the same meaning as for the law of other contracts: a coercion of will that vitiates consent.[182] Again, there appears to be no difficulty in including these principles or standards within BEA, s. 57(2), subject to one caveat. The utility of negotiable instruments depends, to a great extent, upon the certainty of payment. If evidence of slight pressure or socially undesirable conduct[183] is going to be accepted as reversing the onus, then equally slight positive evidence of good faith and value, perhaps nothing more than a taking in the ordinary course, ought to be accepted as re-establishing it. There is a very good indication that these considerations are well understood and agreed by the courts. In *Gordon v. Roebuck*,[184] the Ontario Court of Appeal decided that a payee, who had exercised practical coercion by taking advantage of an emergency by the maker of a note to obtain payment of an alleged debt as a condition of giving a necessary release, had exercised only *justifiable* economic duress and, therefore, could enforce payment of a promissory note representing a part of the demand.[185]

The concept of force and fear referred to in the section is apparently one of Scots law, similar to duress. Unless the equivalent jurisprudence also exists in the civil law of Quebec as a cause of lesion, the phrase ought probably to be deleted by amendment.[186]

The section does not refer to lost or stolen instruments. Depending upon the circumstances, theft might be found to fall within fraud, and robbery within duress. The Ontario Court of Appeal,[187] although holding that Government of Canada bonds were not notes within the meaning of the BEA, considered the problem of shifting the onus, in cases of loss and theft, on common law principles that might be applied to cases involving bills, notes or cheques, but not within the scope of s. 57(2). Since the BEA does not address the question, the pre-BEA law continues to apply.[188] Accordingly, it appears that proof of the theft of a note shifts, to a subsequent holder, the onus of proving that he is a holder in due course,[189] whereas proof of the loss of a note may not do so.[190]

§24:30.60 Re-Establishing Holder in Due Course Status

The question of what must be shown by the holder to re-establish his status as a holder in due course (if he is able), after the presumption in his favour has been rebutted pursuant to BEA, s. 57(2), raises an interesting point of difference between the Canadian and the British statutes. Before the BEA, it was uncertain what the

holder had to prove.[191] The better view seems to have been that since no man would be presumed to be a party to a fraud, the holder might be required to show that he gave value, but would be presumed to have acted in good faith until the contrary was shown. However, the original British BEA[192] fairly clearly changed that and required the challenged holder to show both value and good faith.[193] This is consistent with the law to the effect that a plea of *bona fide* purchase for value is entire; that is, it is a single plea to be proved by the person pleading it, and not to be regarded as a plea of purchase for value which may be met by a reply of notice.[194] However, the Canadian BEA goes further by the addition of the final seven words to s. 57(2), which require the holder to show not merely that he gave value in good faith, but that value was given in good faith by some other holder. That cannot be a correct position for the law since it would mean that no original payee, however innocent and even though a remote party and completely untouched by the fraud, could ever enforce the instrument.[195] Falconbridge[196] considered the addition of the seven words to the Canadian BEA to have been "due to a misunderstanding of the meaning of the subsection" by Parliament. He advocated amendment to repeal the erroneously added words. Maclaren,[197] on the other hand, noted the interpretation of the British section by the English Court of Appeal in *Talbot v. Von Boris*[198] to the effect that the section ought not to be applied to original payees, and concluded that "the Imperial Act was construed in accordance with the clear meaning of our legislation".

Falconbridge's view appears to be prevailing. Wells J.A. cited, with approval,[199] a passage from the 7th edition of Falconbridge's treatise, arguing that whether or not the holder can qualify under s. 57(2), he should be recognized as a holder in due course if he proves he meets all the requirements of s. 55(1). This was taken a step further by the Manitoba Court of Appeal in the case of *Williams v. Shuster*,[200] in holding that an innocent endorsee might qualify as a holder in due course even though he received the item from a fraudulent payee. Of course, on the face of the words of s. 57(2), he could not possibly do so in such circumstances. The result is in accord with common sense and developments elsewhere and is here recommended as the correct interpretation of our BEA. That is, since a holder in due course may take free of very nearly all defences that are not expressly referred to in the BEA (see §26:30), he ought also to be able to take free of fraud of which he is innocent, and may do so if s. 57(2) is regarded as only shifting the onus and not as creating a new substantive requirement.[201] The decision of the Quebec Court of Appeal in *Caisse populaire Desjardins de Côte-des-Neiges c. Banque Toronto-Dominion*[201.1] is not to the contrary, although it may appear so on first impression. In that case, three caisses collected for customers certain cheques on which the names of the payees had been fraudulently altered. Dalphond J.A. notes that fact shifts to the caisses the onus of proving their status as holders in due course of the instruments by showing some evidence that "subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course". The learned judge then remarks:

> Even if we were to ignore this statutory requirement on the ground that the legislature could not have intended this meaning, as argued by Crawford[201.2] . . . among others, I find from the records that the Caisses have not established that they should nevertheless be considered to be holders in due course because they committed no fault and were neither negligent nor wilfully blind . . .

In other words, the Court does not insist on a literal interpretation of the closing words of s. 57(2) with respect to the qualifications of prior holders, but finds that the caisses offered no evidence of any kind to support the reinstatement of their holder in due course status. Being deprived by the circumstances of the protection of the presumption, they then failed to establish their status by evidence.

Of course, the holder's protestations of innocence and ignorance of the illegality of the transaction giving rise to the negotiable instrument on which he claims are not sufficient to restore the holder's status under s. 57(2). The court must be satisfied, on a balance of probabilities, that the holder was not aware in the defect of title of his transferor at the time the instrument was transferred to him. The decision in *Red River Forest Products Inc. v. Ferguson*[201.3] is illustrative. The plaintiff claimed as bearer of a promissory note in the amount of $200,000, which had been sold to him by one Oseski and endorsed to bearer. The defendant alleged that the

note had been delivered to Oseski to cover the defendant's losses in a poker game, and that gaming debts were unenforceable in Manitoba by statute. The court agreed a gaming debt was an illegal consideration and, therefore, had to examine the circumstances of the plaintiff's acquisition. The evidence showed that the plaintiff had paid only $20,000 for the note and had no prior experience of dealing in negotiable instruments. There were also indications of other *indicia* of knowledge of the origins of the instrument by the plaintiff.[201.4] Accordingly, De Graves J. held that the plaintiff had not satisfied the onus upon him to re-establish holder-in-due-course status and, therefore, could not enforce the note. And that decision was affirmed on appeal.

§24:30.70 Payee as Holder in Due Course

In discussing this question, I wish to distinguish between the position as established by the precedents and the position in theory, and what the law might be on principle. I shall also comment on some recent developments that promise to make the conundrum irrelevant in future.

§24:30.70(1) On Authority

The conventional interpretation of the BEA is that the payee of an instrument cannot qualify as a holder in due course of it.[202] Although "holder" is defined[203] in terms that expressly include the payee, and under s. 57(2) there is a rebuttable presumption that every holder is a holder in due course,[204] it was judicially observed, very shortly after the passage of the BEA in 1882, that the item is not negotiated to the first payee within the narrow meaning of the British equivalent of Canadian BEA, s. 59(3).[205] That interpretation of the Act was confirmed a few years later in the famous decision of the House of Lords in *Jones (R.E.) Ltd. v. Waring & Gillow Ltd.*[206] The House gave two reasons for that interpretation: (i) the provision in the Act of a separate definition of "issue" appeared to their Lordships to take the first delivery of an instrument out of the scope of the definition of "negotiation," which is an essential part of the definition of holder in due course; and (ii) the precedent UK section[207] now represented by Canadian s. 39(2) was said to distinguish immediate from remote parties and to include a holder in due course among the latter, thus apparently supporting the characterization of a holder in due course as a remote party to whom the instrument has been negotiated *after* its original issue. The House did not consider the effect of UK s. 30(2), the precedent for Canadian s. 57(2) by which every holder is *prima facie* deemed to be a holder in due course until the contrary is proved.

I respectfully disagree with both the points taken by the House in *Jones v. Waring & Gillow*, for the reasons given elsewhere.[208] However, I should note that, for the most part, the English writers and authorities have accepted that resolution of the matter. It is only the Canadian authors and a few Canadian judges who have dissented from that view of the intent and effect of the *BEA*.[209]

There were many decisions in favour of the payee by Canadian courts before the decision in *Jones v. Waring & Gillow*[210] and, after a pause for reflection, that trend was resumed.[211] Deschamps J., in giving the reasons of the Supreme Court of Canada in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*[212] cited opinion on the issue, which she appeared to consider to be open. Subsequent decisions of lower courts have been less respectful of the history or subtlety of the issue, giving judgment for the payee plaintiff on a variety of grounds and giving, as often as not, no indication of any awareness of it.[213] It may be significant that in each case, the payee was a remote party who had no connection with the underlying transaction between the drawer of the cheque and the person who procured it to be payable to the named payee directly. That is certainly the easier of the two fact situations. It was not until the 2000, in *Ierullo v. Rovan*[214] that a decision informed by that history was delivered. Nordheimer J. reviewed the authorities and the arguments presented by Crawford and Falconbridge[215] and decided that, where the circumstances are appropriate, a remote party payee may qualify as a holder in due course. And, as that decision has since been followed[216] without attracting adverse criticism from any quarter, it may be taken to be established as the applicable law with respect to remote party payees.

That resolution had not, however, been expressed in a way capable of being interpreted to include immediate party payees until the judgment of the Ontario Court of Appeal appeared to do so in *Esses v. Friedberg & Co.*[217] In that case, Watt J.A., *per cur.* deduced from a reading of s. 57(2) of the BEA, but without referring to any of the interpretive case law or commentary[218], that *every* payee of a cheque is entitled to the statutory presumption that they are a holder in due course. He is reported[219] as writing:

> Although every holder of a bill is not a holder in due course, s. 57(2) of the *BEA* enacts a rebuttable presumption that a holder is a holder in due course. . . . The payee of a cheque . . . is a holder of a bill under s. 2 of the *Act*. It follows, as a result of s. 57(2), that a payee of a cheque is presumed to be a holder in due course, absent evidence to the contrary.

It is important to note that Mr. Esses, the payee, appeared to be a remote party, but in circumstances that were sufficiently extraordinary and suspicious for Watt J.A. to reverse the motion for summary judgment given below and send the matter to trial. Therefore, the assertion by the Court that the statutory presumption of holder in due course status applies to all payees was not strictly part of the *ratio decidendi.* Nevertheless, the *dictum* did not attract adverse comment from the Supreme Court of Canada when denying leave to appeal and, therefore, provides support for a change in the administration of the law on the status of payees. As I have already noted,[220] that is a development that the Supreme Court of Canada has also commented on without disapproval in a *dictum* in reasons written by Deschamps J.[221] I agree with the critics to which Deschamps J. refers in that reference,[222] that it is time to reconsider the issue and to recognize that all payees should be presumed to hold in due course. At the same time, I think it fair to comment that until the *Esses* case, all the courts to consider s. 57(2) and all the commentators who address it, had tacitly assumed that the presumption of holder in due course status created was one of fact only, not law. That is, given the authority of the decision of *Jones (R.E.) v. Waring & Gillow, Ltd.*[223] it was essential to interpret the presumption of s. 57(2) as applying only to persons who could qualify as holders in due course; as payees were thought to be disqualified by law from achieving that status by the terms of the BEA, they could not be presumed to do so.

If that interpretation is now to be reconsidered, and cases such as *Esses, Ierullo v. Rovan*[224] and *St. Martin Supplies Inc. v. Boucley*[225] confirmed as authoritative, then so much the better for our law of negotiable instruments.[225.1] I may go further than some other commentators in my support of re-interpretation of the presumption to include all payees — immediate as well as remote parties. But, as I try to explain in the next following section, I think that the constitutional law of Canada requires that the substantive law established by the *Bills of Exchange Act* must be given precedence over the provincial laws of contract and procedure. If the *Act* is properly interpreted as raising a presumption in favour of all payees unless specified vices in the history of the relations of the parties to the instrument are proved, then the rights of all holders will be determined — at least initially[226] — by federal law, as they should be. The law of bills of exchange is exclusively federal under Canadian constitutional law,[227] and makes express and exclusive provision for the classes of defences that may be raised. Provincial laws of procedure, contract or restitution are not competent to give effect to allegations of any lesser irregularity, contract defence, or unjust enrichment.

§24:30.70(2) On Principle

§24:30.70(2)(a.5) Immediate Parties

In principle, the payee of a cheque or promissory note, who received the instrument in some contractual relationship with the person primarily liable on it,[228] and against whom the payee seeks to enforce payment, should be characterized as a holder in due course. I find the issue to be very complex, with many conflicting elements of policy, as I shall attempt to describe. But in my opinion, the better view at this time is that the Canadian *Bills of Exchange Act* should be so interpreted, and that the courts that have done so[229] have decided correctly.

There is no single reason that impels the conclusion to which have come: it is, rather, a case of attempting to

weigh the arguments *pro* and *con* to reach a conceptually sound and practically satisfying opinion.

The arguments in favour of permitting immediate party payees to achieve holder in due course status are the following:

1. As an immediate party, the payee has personal knowledge of all the material facts of the underlying transaction which gave rise to the issue of the payment instrument. But not all the facts of a relationship raise effective defences against a holder in due course. Knowledge of a defect of title is a disqualifying flaw in the title of any but a holder in due course; but the definition of "defect of title"[230] does not include "mere contract defences of prior parties among themselves".[230.1]

2. The payee is a holder, and takes by "negotiation". The payee's status as a holder is established by the definition of "payee" in s. 2. The payee takes by delivery from the originator of the instrument in a process sometimes referred to as "issue" but also within the definition of "negotiation".[230.2]

3. As a holder, the payee is entitled to the presumption in s. 57(2) that he is a holder in due course.[230.3]

4. Recognition of the payee as a holder in due course promotes the negotiability of negotiable instruments, and removes from the judicial, financial and payment systems, all grounds for doubt or concern that a negotiable instrument that is complete and regular on its face, is possibly encumbered by undiscovered claims that could diminish or destroy its value.

5. Recognition of the payee as a holder in due course, and adjudicating their rights and duties in accordance with the provisions of the *Bills of Exchange Act* to the extent of their application and interpretation, confirms the exclusive legislative competence of the federal Parliament over Bills of Exchange and Promissory Notes,[230.4] thus distinguishing them from ordinary contracts, and ensuring uniform national standards of judicial disposition of disputes under differing provincial laws of contract or procedure.

6. The prevailing current practice[230.5] of awarding immediate judgment to the holder for the full sum payable on the instrument, but suspending execution pending trial of any credible and relevant contractual or equitable defence, rather than remitting the defendant to a separate proceeding, avoids inefficient delays and duplication of proceedings that dismissal of them would make inevitable.

On the other hand, the arguments against such a characterization are as follows:

1. Section 55(1)(b), in defining the requirements of a holder in due course specifies that at the time it was negotiated to him, he had no notice of any defect of title of the person who negotiated it to him. The definition of "defect of title" is inapt to describe the circumstances of the originator an instrument who delivers it by issue.[230.6] Rather, it appears to refer more particularly to the circumstances in which the bill was obtained by some remote holder whose title is now questioned.[230.7] Notice on the part of the immediate payee of facts giving rise to a contract defence or equitable set-off by the drawer of the cheque or maker of the note the payee is attempting to enforce does not disqualify the payee from achieving holder in due course status. Only notice of defect of title, or proof of some fraud or other misconduct by a prior party has that effect.

2. The presumption of holding in due course provided by s. 57(2) is at least partially rebutted by the fact that an immediate party payee knows from personal experience all the material facts of the underlying transaction that gave rise to the issue of the instrument he is attempting to enforce in full. If those facts include any conduct that may fairly be described as a defect of title, holder in due course status is unachievable by the immediate party payee. That is the effect of s. 57(2) which, after establishing the presumption, goes on to provide that a person who knows that the issue of a cheque or note was affected by fraud, duress or illegality has the onus of proving that value was given in good faith for the

instrument by some other holder *after* those nullifying defects. An immediate party payee cannot do that, by definition.

3. Privately issued cheques and promissory notes have not formed an important part of the currency of trade and commerce in Canada since the late 19th century. It is not necessary to enforce rigorously the qualities that bestow and ensure their negotiability for the protection of third party transferees in good faith and for value, because they are almost never negotiated. Cheques are invariably deposited with a bank for collection; promissory notes are almost always held by the payee to maturity.

4. It is more efficient use of the courts' time and resources to permit disputes over the proper sum payable on a cheque or note between the immediate parties, if the claims of both obligor and payee are heard and disposed of in the same proceedings. Recognition of the payee as a holder in due course has been seen by some judges to inhibit them from hearing and giving effect to defences and equitable set-offs on domestic negotiable instruments. Signing a form of cheque or note in anticipation of competent contractual performance is not understood by the public to foreclose the right to dispute the final payment in the light of the known facts of the actual performance of the payee.

I conclude that the better opinion is that immediate party payees should be presumed to be holders in due course in order to respect the paramountcy of the federal law that governs bills, cheques and notes.[230.8] That law does not clearly prescribe the effect of matters of dispute that fail to rise to the level of defects of title.[230.9] Therefore, it should be accepted that an immediate party payee may have knowledge of contract defences or equitable set-offs, without impairing their right to immediate judgment for the full sum payable by the instrument.

§24:30.70(2)(a) Remote Party

In view of the modern trend of acceptance of the application of the statutory presumption of holding in due course to remote party payees by both courts and commentators,[230.10] it should not be necessary to spend much effort considering the supporting principle. Such persons receive a payment instrument from a remitter who is not a party to it. If they have given value in good faith, without knowledge of any defect in the title of any prior party, they are entitled to enforce it and to retain the proceeds beneficially. If reason in addition to the payee's status as a holder in due course is required, it may be found in the fact that the transfer of bank credit effected by the clearing and settlement of the instrument is a payment of money. The transferee of a payment of money who receives it for value and in good faith without notice of any irregularity in the transferor's right, is immune from third-party-claims to recover it.[230.11]

There is a second body of law that is occasionally invoked by Canadian courts to resolve disputes involving payees of negotiable instruments that have been procured by the remitter's fraud on the drawer in circumstances similar to those in *Jones (R.E.) Ltd. v. Waring & Gillow.*[230.12] It is based on restitutionary theory and has its foundation in the judgment of Goff J. (as he then was) in *Barclay's Bank Ltd. v. W.J. Simms, Son & Cooke (Southern) Ltd.*[230.13] and that of Waller J. in *Citibank N.A. v. Brown Shipley & Co. Ltd.*[230.14] But it might equally properly be determined by application of the law of holder in due course of a negotiable instrument or, indeed, the law of *bona fide* transferee of money for value. In *Toronto-Dominion Bank v. Carotenuto*[230.15] the British Columbia Court of Appeal addressed, in purely restitutionary terms, a claim by a bank for repayment of money paid on bank drafts that were issued under the influence of fraudulent representations by a customer. The drafts were made payable to persons who were owed money by the fraudulent customer, but were innocent of any participation in the scheme. In other words, it was a modern recurrence of the very issue raised in the classic bills of exchange case, *Jones (R.E.) Ltd. v. Waring & Gillow,* but the Court relegated to the final paragraph of its reasons any consideration of the issues in terms of that decision or that law. Describing the debate as to whether a payee might be a holder in due course in such circumstances as a "chestnut"[230.16] Newbury J.A. observed that restitutionary analysis could satisfactorily dispose of the issue in favour of the payees, thus making it "unnecessary" to consider whether they might also take free of the

bank's claim as holders in due course. A similar approach had been taken previously by Killeen J, in *Royal Bank of Canada v. Harowitz*.[230.17] That was the case in which Julius Melnitzer repaid a loan made to him by the defendant by drawing a cheque against a balance he had previously created in his account with the plaintiff bank in a series of fraudulent transactions involving forged documents pledged as collateral. Killeen J. analysed the issue in terms of restitutionary theory and concluded that the defendant's loan to Melnitzer was a juristic reason sufficient to defend her retention of the payment. The facts could also have justified a finding that the defendant was a holder in due course of a negotiable instrument and took for value without notice of the drawer's fraud.

With respect to the judges and counsel who participated in those two decisions, I think that it is strongly preferable for such issues to be analysed and, if possible, resolved first by reference to the law of holder in due course when a negotiable instrument is the means of transfer, or the law of *bona fide* transferee of money when the value transferred is in the form of bank credit, as it was, for example, in *Toronto-Dominion Bank v. Bank of Montreal*.[230.18] It may not be of any importance in a unitary state such as the United Kingdom, whether a decision is analysed in terms of one law or the other,[230.19] but it does matter in Canada, I think. That is because the laws of money and negotiable instruments are federal, and the laws of contract and restitution are provincial. While it is highly desirable for the provincial laws on those subjects to be compatible in all provinces, it is essential that the laws of money and negotiable instruments be so. If a defendant is the holder in due course of a negotiable instrument, or a *bona fide* transferee of money for value, they are protected in their retention of the value transferred, whatever the basis of the claim to the contrary. There is no need to consider the case on the basis of restitutionary principles, but if one were to do so, those defendants should be found to have a juristic reason for retention of the benefit of the payment by reason of their status as protected holders under the federal law. If they are not so entitled, only then it would be appropriate to consider whether, nevertheless, they have a restitutionary defence, such as change of position, which has no role in either federal law.[230.20]

§24:30.70(2)(b) Certified Cheques

There are three judgments of the Ontario courts, which, if correct, would create a second ground on which payees might become entitled to enforce cheques free of defences when they pay a fee to have them certified. They are the decisions of the Ontario Court of Appeal in *A.E. LePage Real Estate Services Ltd. v. Rattray Publications*[231] and *Centrac Inc. v. Canadian Imperial Bank of Commerce*[232] and a first instance decision of Langdon J. in *City Front Developments Inc. v. Bank of Nova Scotia*.[233] In all three, payees of cheques were permitted to enforce them against the bank that certified them, but in very different circumstances. I discuss the cases at length in §10:10.70, but for present purposes, I may simply note that the theory of "collateral contract" advanced in the reasoning of those cases is either something distinct and apart from the law of negotiable bills and cheques, or seriously flawed reasoning. Finlayson J.A., in particular, has tried in the two appeal decisions, to create a new law to the effect that when a bank certifies a cheque at the request of the payee, demanding and receiving a fee for that service, it somehow precludes itself from raising any defence at all to an action on the cheque by the payee. With respect, I think that both of those decisions are better explained by the application of restitutionary principles, as I explain in the section of this treatise already noted. The third is simply wrong as a matter of law.

In my opinion, there is no difference in the legal rights of the payee when the cheque is certified, or not.

§24:30.70(2)(c) Reasonable Expectations

The weakest argument that has yet been advanced for a new rule to protect payees comes from a trial judgment in Manitoba. In *Fyk v. Ritchie Bros. Auctioneers (Canada) Ltd.*[234] Keyser J. offered, *ex obiter dictum*, the "observation" that a payee of a cheque ought to be able to enforce it when the circumstances are such that he is entitled to rely on it. The case was unusual: a farmer placed a tractor with auctioneers for sale. The machine was sold, but after inspecting it, the buyer complained that it was not as described. The auctioneers

cancelled the sale and countermanded the cheque that they had sent to the seller. Although finding that the auctioneers had acted without authority in cancelling the sale, Keyser J. thought that the payee should be entitled to enforce it against them, since he had expected to be paid. The opinion cannot be supported,[235] and I am pleased to report that there is no mention of it in the reasons of the Court of Appeal[236] in confirming the actual ruling that the auctioneers remained liable for the sale proceeds, since they acted without authority in releasing the first buyer.

I have long argued in this treatise[237] and elsewhere that debtors ought to be discouraged from issuing cheques until they are certain that they owe the sum they order to be paid, in order to sustain the "cash-like" quality of negotiable instruments. But that argument extends only to the desirability of enforcing cheques between immediate parties on summary judgment procedure, and remitting to other proceedings any defence or claim by the drawer that less or nothing at all is owing. It would be wrong to develop a law that prevented a drawer of a cheque from raising any defence or counterclaim in appropriate proceedings against the payee, just because he had issued a cheque for some other sum. Reasonable expectation of receiving a payment is not a ground for enabling the payee of a cheque to enforce it against the drawer, free from all defences and counterclaims, except where the court considers it desirable in the interests of justice, to stay the judgment on the cheque until the defences or claims of the drawer can be heard and determined.

§24:30.70(2)(d) Avals

There is one final class of cases in which a payee may enforce at least the endorser's engagement as a holder in due course. These are not quite uniquely Canadian, but are unknown in either the U.K. or the U.S. or any other common law jurisdiction, having been introduced to our law through the civil law concepts applied in Quebec. They are the cases of *aval*, or anomalous endorsement by guarantors,[238] and are discussed in connection with BEA, s. 130 at §28:60.*

§24:30.70(3) Deleted

§24:30.80 Drawee as Holder in Due Course

Before the BEA, there were cases affirming that where the drawee or acceptor paid a draft before its maturity, the payment did not discharge the instrument. It operated, instead, as a purchase by the drawee or acceptor who, as owner of an instrument not yet mature, might then negotiate it for value to a person who might qualify as a holder in due course. This idea is preserved by BEA, s. 138 (see §29:20.20). However, that can have no application to a demand instrument since it is at maturity from the moment of its issue (see §25:60.10).

Thus, logically, the requirements of BEA, s. 55 that a holder in due course take the item as a holder by a negotiation ought to preclude the drawee from ever achieving that status. However, on more than one occasion, Canadian courts have expressly declared the drawee to be a holder in due course and have purported to determine parties' rights on that basis. For example, in *William Ciurluini Ltd. v. Royal Bank of Canada*,[248] the plaintiff, C, delivered a cheque to J in payment for a used car. Both C and J banked with Royal Bank, but at different branches. J requested payment of the cheque from his own branch, and received payment after a telephone call was made to the branch, to which the cheque was addressed, to ascertain that it was "okay". A few minutes after that assurance was given and payment was made to J, C discovered a lien on the car and purported to stop payment by telephoned countermand to his own branch. Parker J. ruled that J's branch had become a holder in due course, whose rights could not be jeopardized by countermand. The same position had been taken in an earlier case by Middleton J. and confirmed by the full Appellate Division.[249] In another case on point,[250] Schroeder J.A. went so far as to rule that a single branch might be a holder in due course of a cheque drawn upon it by one of its customers and deposited for collection by another. Rivard J.A., in giving the judgment of the Quebec Court of Appeal in *Capital Associates Ltd. v. Royal Bank of Canada*,[251] stated explicitly that the fact that both the drawer and the payee of a cheque held their

accounts at the same branch "makes no difference" to the law to be applied.

With respect, there is no doubt that such cases cannot be supported on such reasoning. The drawee of a cheque is not a holder of that cheque. It receives such an instrument upon the terms of its contractual relationship with its depositor, and its rights and duties in connection with it are properly determined only by reference to the express and implied incidents of that relationship. Although a cheque may be addressed to one branch of a bank,[252] it is, in theory as well as practice, drawn upon the bank as a whole.[253] No doubt, questions may arise concerning the proper characterization of the relations created by various forms of endorsement of general items for collection,[254] but when collecting an "on-us" item[255] for a customer, the bank can act only as an agent for its customer. As Estey J. succinctly stated,[256] when a bank is acting to collect a cheque for one customer from another customer, "it cannot . . . claim as a holder in due course as against its principal" (the drawer).

When paying a cheque drawn upon it, the bank discharges the item.[257] It then has no further value except as a voucher justifying the bank's debit to the account, or as evidence of payment by the drawer to the payee. There is no negotiation of the item such as might constitute the drawee a holder (see §25:20.60). In addition, the paying bank's duties are determined by the express and implied incidents of its relationship with the customer for whose account the payment is made. The relations of the bank with both customers are material to the determination of its rights and duties and those of the two customers. A bank acting thus in two capacities cannot escape its liabilities under either by setting up what might have been a defence against other persons with whom it had no such relationship.[258]

If it is, thus far, clear on principle that our courts ought not to afford the status of holder in due course, or even of holder for value, to a bank that acts for both payee and drawer of a cheque, how does the matter stand on precedent? In the first place, not all courts to consider the problem have fallen into the error. Costello Co. Ct. J., in *Royal Bank of Canada v. Boyce*,[259] gave no consideration to the point, simply remarking that it was clear to him that a drawee could not be a holder.[260] It would be reassuring to be able to regard the decision of the Supreme Court of Canada in *Keyes v. Royal Bank of Canada*[261] as determinative of the issue but, in all fairness, the dictum of Estey J., while strongly in support, is hardly part of the *ratio decidendi* of that case. On the other hand, there is no truly compelling authority for the other view. Although Middleton J. once characterized a drawee bank as a holder, and was affirmed on appeal,[262] the Court of Appeal, in its very short reasons, delivered orally, referred only to an appropriation of the payment — a ground not requiring holder status for the bank. Similarly, the result reached by the Quebec Court of Appeal, in *Capital Associates Ltd. v. Royal Bank of Canada*,[263] was fully justified by the terms of the banking contract between the payee and the bank once it was held that the stopped item was not "good", as that term was used in that agreement. Far from it making "no difference"[264] that both accounts were held at the same branch, on this view, the case actually illustrates the approach advocated here; that is, the court ignored technical arguments of bills law and determined the parties' rights with reference to their contractual and common law relation of banker and customer. Finally, it may be noted that although Schroeder J.A., in *Canadian Bank of Commerce v. Brash*,[265] clearly purported to rule that the bank in question was a holder in due course, that does not appear to have been part of the *ratio decidendi* for the (perhaps technical) reason that there is no indication, in the report of the case, that there was any defence available to the defendant that could have been overcome only by the bank achieving that status. That leaves only Parker J. who, in the *Ciurluini* case previously discussed,[266] purported to distinguish *Boyce*[267] and to follow *White v. Royal Bank*[268] in holding the drawee bank to be a holder in due course.[269] With respect, that ruling is wrong in principle, not supported by authority, and ought not to be followed.[270]

§24:30.90 Agreements Giving Holder in Due Course Status

Another phenomenon occurring in the Canadian case law and in that of the United States,[271] but not

appearing elsewhere, is the use of agreements, or rather, provisions in larger agreements, purporting to bestow the rights of a holder in due course upon any transferee from the payee of a note also given in the same transaction. Such agreements are now expressly made ineffective with respect to consumer notes by BEA, s. 191 (see §36:40), but have had a measure of success in more general applications and with respect to consumer notes prior to the enactment of s. 191 in 1970.

The practice appears to have first come to the attention of the Canadian courts in *Killoran v. Monticello State Bank*.[272] A contract for the sale of a horse for $1,400 was documented in two agreements. Each contained, on one sheet of paper, a promissory note for $700, followed by a form of conditional sale contract, which reserved the title to the horse until payment in full of the note. The agreements also contained the following provision:

> These notes . . . may be discounted, pledged or hypothecated by the promisee and . . . payment thereof is to be made to the holder . . . instead of the promisee, and *no holder* . . . shall be affected by . . . any equities existing between the subscriber and the promisee, *but shall be, and shall be deemed to be a holder in due course* . . .[273]

The notes were transferred by the payee to an intermediary, and by that holder to the respondent bank. Since the horse died before Killoran had performed the conditions precedent to title passing to him, he was able to avoid the sale.[274] However, in the Supreme Court of Canada, he was held to be bound to pay the full sum promised by his notes. Close analysis of the very short judgments discloses that there was no clear *ratio decidendi*. Two of the five judges[275] clearly thought that the notes and the collateral agreements were severable, with the result that the bank was a holder in due course, able to enforce the notes free of the merely personal defence of failure of consideration (see §26:30.40(4)(e)). On the other hand, two[276] thought that the provision in the sale contract was conclusive, without deciding whether the notes were negotiable.[277] As Brodeur J. succinctly stated: "He contracted himself out of the right of resorting, as against the assignee of the creditor, to his equities against the creditor himself."[278]

The difficulty with identifying the real basis of the decision comes from the fact that Mignault J. rested his judgment on both grounds. The case is thus authority for, and has been accepted by subsequent courts as authority for, alternative propositions:

> (1) Agreements in the form of notes may be severable and, therefore, unconditional even though contained on the same piece of paper with the sale contracts out of which they arise.[279]
>
> (2) Agreements contemplating the creation of severable evidences of the indebtedness created, and their transfer to a remote party, may validly provide that the transferee of the agreement may take the notes evidencing the indebtedness free of the equities arising from the transaction that would otherwise affect the rights of a bare assignee.[280] Clauses purporting to have this result became known as "cut-off clauses" because they attempted to cut off the equities otherwise available against the assignee.

Although the first proposition became quite controversial (and is discussed at §§35:20.20 and 35:20.30), the second has been accepted without question by the few courts to consider it in the 75 years since *Killoran*.[281] Schroeder J.A. of the Ontario Court of Appeal[282] even permitted the agreement to further strengthen the position of the transferee by the application of a clause prohibiting the introduction of evidence to vary or contradict either the agreement or the notes.

Notwithstanding the foregoing uncritical judicial acceptance and the high authority supporting the proposition, it must be evident that there are technical difficulties with the point for, although the rights of a remote holder of a negotiable instrument derive from the BEA and may exceed those of immediate parties, the rights of an assignee of a simple contract must rise or fall with the contract itself. If that is unenforceable by reason of some inherent vice, surely the assignee can be in no better stead than the immediate promisee, regardless of what a cut-off clause may purport to provide to the contrary. This defect of the cut-off clauses

was first noticed by the Felthams in their celebrated analysis of *Federal Discount Corp. v. St. Pierre*;[283] that is, the very provision upon which the assignee would rely to avoid the effects of his assignor's fraud must fall with the rest of the contract.

Certainly, fraud in the underlying transaction would have that effect, as might total failure of consideration or other grounds for nullifying the promises of the agreement and of the non-negotiable notes. However, *Killoran* itself must be accepted as authority for the proposition that a ground of avoidance, not yet invoked prior to the assignment[284] so as to render the agreement a nullity, does not affect the rights of the assignee.

The best judicial analysis of the effect of cut-off clauses in aid of non-negotiable notes[285] is by Clement J.A. in *Traders Group Ltd. v. Fulkerth*.[286] From that and the foregoing, it appears that if a noteholder requires extraneous assistance, a cut-off clause may be effective if:

(a) the agreement containing it is enforceable at the time the debtor is notified of the assignment (although perhaps subject to defences or counterclaims),

(b) the agreement and the notes are both assigned to the same person,[287]

(c) who brings action upon both,[288] and

(d) the cut-off clause is in terms sufficiently clear and embracing that, when construed, it is found to cover and protect the assignee against the defences that have arisen.

It is submitted that the foregoing is the correct technical explanation for what may be observed to be occurring in the courts with reference to *Killoran*'s disposition of this point. For example, de Grandpré J., for the Supreme Court of Canada in *Industrial Acceptance Corp. v. Richard*,[289] remarked cryptically that in *Range v. Belvedere Finance Corp.*,[290] the maker of the note:

> . . . never received the thing promised in the conditional sales contract originally attached to the note, and the evidence showed that the promise to pay could not be treated separately from the conditional sales contract.

In other words, the failure of consideration and the fact that the note was given "in evidence of the . . . deferred payments but not in payment thereof"[291] meant that, in the absence of a clear cut-off clause, the note was affected with the equities of the sale agreement.

On the other hand, in *British Acceptance Corp. v. Hansen*,[292] where the Alberta Supreme Court, Appellate Division, found not only no fraud in the underlying agreement, but no equities which could attach to either the conditional sale agreement or the note that was joined to it when transferred to the finance company, Moir J.A. had no difficulty in concluding that "the note was intended to and did operate separately from the contract".[293] He did not trouble to reach a conclusion as to whether the note was strictly negotiable. At least one other court[294] has taken the same view. In some circumstances, the debtor's agreement to a cut-off clause may operate as a kind of estoppel in favour of the assignee of the creditors.[295]

With the enactment of Part V of the BEA to protect consumers (see Chapter 36), and the continued availability of the doctrine of close connection developed from *Federal Discount Corp. v. St. Pierre*,[296] there is less need now than formerly for courts to stretch traditional doctrines to extend a measure of protection to that class of persons felt to require it. In consumer transactions, the typical modern provincial legislation prohibits or nullifies the effect of cut-off clauses.[297] Where the holder's rights arise from a negotiation of a valid negotiable instrument, these clauses would appear to be unconstitutional and invalid (see §20:30.20). In other cases, however, an assignee of the seller can have no higher rights than the applicable provincial statute affords him. Between businessmen who deal with each other on roughly equal terms, there is both reason and a technical basis on which the courts may give effect to agreements as written, and at least the foregoing

scope to cut-off clauses they contain in aid of the transferee of associated commercial paper.[298]

There may be a third class of cases: *viz.* those in which the note is given by an investor in a business scheme (*i.e.*, an individual who loses the protection of the consumer laws because the transaction has a business purpose). In those, judicial opinion is divided as to whether parties to a negotiable instrument have the power to vary the effect of the BEA. In *Bank of British Columbia v. Coopers & Lybrand Ltd.*,[299] Macdonald J. ruled that no agreement between the parties could vary the strict requirements of the BEA as to what constitutes a holder in due course.[300] The opposite view was taken a few years later by MacKinnon J., of the same court,[301] without noticing the earlier decision. To MacKinnon J., it was a simple matter of contract, or perhaps, a mix of contract and estoppel, for he stated:

> I find the investors agreed, in the notes, that the bank could become a holder in due course. In the loan agreement and the opinion letter of their solicitor there was opportunity to point out any conditions or limitations of the promissory notes. Not only was that not done, but the bank was led to believe that it could rely on the statement in the notes, "and shall be deemed to be a holder in due course and for value of the promissory notes."[302]

It appears to me that the latter is the better view so long as it is appreciated that such clauses operate only as contracts or estoppels, which are personal rights, and do not change the true legal character of the instruments in the hands of persons who are not bound by, or entitled to the benefit of, the contractual provisions or estopping facts. As between the parties to the contract purporting to give immunity to defences and their assignees, it really is only a question of the enforceability of the contract. If it never became part of the contract, or its effect is vitiated by unconscionability, fraud, duress or other defect, the immunity clause falls with the rest.

FOOTNOTES

[26] *Erio Investments Ltd. v. Michener Allen Auctioneering Ltd.* (2004), 238 D.L.R. (4th) 32 (Sask. C.A.), at para. 18; *Caligiuri v. Tumillo*, [2004] 7 W.W.R. 677 (Man. C.A.).

[27] This passage quoted with approval in *Expression Clip Inc. v. Clément*, 2004 CanLII 8745 (Que. C.A.).

[28] The liabilities of the various parties to bills, notes and cheques are set out in Chapter 28.

[29] (1907), 14 O.L.R. 639 (Div. Ct.) at p. 652, cited and followed on this point in *Kinzie v. Harper* (1908), 15 O.L.R. 582 (Div. Ct.) at p. 584; *Westcott v. Luther*, [1933] 2 D.L.R. 369 (S.C.C.) at p. 373, *per* Lamont J. See also the civil law equivalent: *Pesant v. Pesant*, [1934] 2 D.L.R. 623 (S.C.C.) at pp. 639-40, *per* Cannon J.

[30] His Lordship, in the passage next quoted in the text, stated not "one of the principal" but "the *only* difference", but does not appear to have adverted to other attributes of notes, such as negotiability.

[31] The passage is reproduced from Arthur W. Rogers, *Falconbridge on Banking and Bills of Exchange*, 7th ed. (Toronto: Canada Law Book Ltd., 1969), but *quaere* whether the statement in the text is strictly correct where a written agreement recites a valid consideration and contains an acknowledgment by the parties of its receipt and sufficiency.

[32] *Sovereign Bank of Canada v. McIntyre* (1910), 44 S.C.R. 157.

[33] *Bank of Nova Scotia v. Bauer*, [1976] 2 W.W.R. 52 (B.C.C.A.) at p. 66, *per* Seaton J.A., citing pre-BEA authorities in support. See also *Maclaren's Bills, Notes and Cheques*, 6th ed. by Read (Toronto: Carswell, 1940) at p. 211, to the same effect, citing *Larraway v. Harvey* (1898), 14 C.S. 97 (Que. Ct. of Review).

[34] *1485625 Ontario Inc. v. Peel Halton Kitchens Inc.* (2004), 185 O.A.C. 383 (S.C.J. (Div. Ct.)), at para. 12.

[35] *Supra*, footnote 33.

35.1 *Palcic v. Sadek* (2012), 9 B.L.R. (5th) 235 (B.C. S.C.), affirmed 2013 BCCA 440 (B.C. C.A.), at para. 141, *per* Maisonville J.

36 This may be deduced from the combined application of BEA, ss. 2 and 52(1).

37 See §23:70.10.

38 *Jones v. Gordon* (1877), 2 App. Cas. 616 (H.L.), *per* Lord Blackburn, although pre-BEA, is still the *locus classicus*: see §24:30.30, *infra*.

39 See §24:20.30, *infra*.

40 See §10:50.20. This passage cited with approval by Deschamps J. in *Canada Trustco Mortgage Co. v. Canada* (2011), 334 D.L.R. (4th) 385 (S.C.C.), at para. 26.

41 [1995] 1 W.W.R. 429 (Alta. Q.B.). And see *Re Sunstar Manufacturing Inc.* (2001), 308 A.R. 154 (Q.B.), at paras. 27-30.

42 *Canadian Bank of Commerce v. Davidson* (1875), 25 U.C.C.P. 537.

43 *McCabe v. Bank of Nova Scotia* (1961), 30 D.L.R. (2d) 649 (P.E.I.S.C.); *Royal Bank v. Freed*, [1941] 2 D.L.R. 397 (Man. C.A.). *Cf.* where the bank advances nothing, but merely holds the note as agent for collection: *Welsh v. Trimble and Van Duesen*, [1933] O.W.N. 368 (C.A.).

44 And if the other requirements of BEA, s. 55 are met, a holder in due course.

45 One example is *Galco Enterprises Ltd. v. Hatty* (1979), 27 N.B.R. (2d) 608 (Q.B.).

46 *Molsons Bank v. Stearns* (1905), 6 O.W.R. 667 (C.A.); *Bank of Toronto v. Stillman*, [1930] 3 D.L.R. 838 (Ont. S.C. App. Div.).

47 See §24:20.10, *supra*.

48 See §10:50.

49 (1918), 40 D.L.R. 61 (Sask. C.A.).

50 *Supra*, at p. 63. A similar result was reached by the English Court of Appeal in *Pollway Ltd. v. Abdullah*, [1974] 1 W.L.R. 493 (C.A.).

51 (1956), 2 D.L.R. (2d) 768 (B.C. Co. Ct.) at pp. 776-77.

52 The learned County Court judge referred to "consideration in law", by which he appears to have meant "value".

53 *Stack v. Dowd* (1907), 15 O.L.R. 331 (Div. Ct.).

54 *Gallagher v. Murphy and Gilroy*, [1929] 2 D.L.R. 124 (S.C.C.), esp. pp. 128-29, *per* Rinfret J.

55 (1883), 9 App. Cas. 95 (H.L.).

56 [1968] 1 W.L.R. 1061 (C.A.).

57 *Supra*, at p. 1064 (emphasis added).

58 *Supra*, footnote 53.

59 *Gallagher v. Murphy and Gilroy*, *supra*, footnote 54; *Mollot v. Monette* (1981), 128 D.L.R. (3d) 577 (S.C.C.).

[60] [1930] 1 D.L.R. 713 (N.S.S.C.).

[61] There was nothing wrong with the car. The action arose when the car was destroyed by fire shortly after, and there was a question concerning who had undertaken to insure.

[62] See §23:70.10(2).

[63] The case is not like *Jones (R.E.) Ltd. v. Waring & Gillow, Ltd.*, [1926] A.C. 670 (H.L.), but may be within the protective authority of *Watson v. Russell* (1864), 5 B. & S. 968. See §24:30.70, *infra.*

[64] *Chassey v. May*, [1925] 2 W.W.R. 199 (B.C.C.A.) at pp. 201-202, *per* Martin J.A. See also *Words and Phrases Judicially Defined*, 2nd ed., vol. 3 (London: Butterworth & Co., 1969) at p. 160.

[65] *E.g.*, the unpaid seller's lien under the *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 38(1)(a), and similar statutes in other provinces, and the mechanic's lien under other provincial legislation.

[66] Bradley Crawford, *Crawford and Falconbridge Banking and Bills of Exchange*, 8th ed. (Aurora: Canada Law Book Inc., 1986), §3401. It should be noted that, in addition to banker's liens, early common law also recognized general liens for solicitors and stockbrokers, as well as commercial factors (in the sense that term is used in Factors Acts). Circumstances might arise in which a member of one of those professions or trades might also qualify as a holder under the BEA by means of such a lien.

[67] *Bank of British North America v. McComb* (1911), 18 W.L.R. 94 (Man. C.A.), was the last.

[68] *Op. cit.*, footnote 66.

[68.1] See §24:30.30(2)(b) "Defects of Title".

[68.2] See §26:50.30 "Contractual Defences", and §26:40.10(2) "Available Defences [to Summary Judgment]".

[69] See commentary at §24:10.10, *supra*, and the discussion by Milmo J. in *Barclays Bank v. Astley Industrial Trust Ltd.*, [1970] 2 Q.B. 527 at pp. 536*ff.*

[70] Of course, reference cannot be made to BEA, s. 189 on this point for, paradoxically, it is only when a consumer bill is not in the form required by that section that anyone may become a holder in due course of it.

[71] See *Bellamy v. Williams* (1917), 40 D.L.R. 396 (Ont. S.C. App. Div.) at pp. 399-400.

[72] See the comments on the term "issue" at §21:20.70.

[73] It is sufficient if the item is apparently regular: *Maxon v. Irwin* (1907), 15 O.L.R. 81 (Div. Ct.). Knowledge of not apparent defects is material under subsequent tests of the holder's status: see §24:30.30, *infra.*

[74] *National Park Bank of New York v. Berggren & Co.*, [1914-15] All E.R. 548 (K.B.).

[75] *Ingham v. Primrose* (1859), 7 C.B. (N.S.) 82.

[76] *Ierullo v. Rovan* (2000), 46 O.R. (3d) 692 (S.C.J.).

[77] *2203850 Nova Scotia Ltd. v. Sarkar* (1995), 145 N.S.R. (2d) 101 (S.C.); *Wheatland Investments Ltd. v. Sask Tel*, [1995] 1 W.W.R. 671 (Sask. Q.B.). *Cf. Money Mart Cheque Cashing Centre (WPG) Ltd. v. Reis Lighting Products & Services Inc.* (1994), 94 Man. R. (2d) 276 (Q.B.).

[78] *Arab Bank Ltd. v. Ross*, [1952] 2 Q.B. 216 (C.A.) at p. 226, *per* Denning L.J.; *Yeoman Credit, Ltd. v. Gregory*, [1963] 1 W.L.R. 343 (Q.B.) at p. 352.

[79] *Arab Bank Ltd. v. Ross, supra*, at p. 227.

[80] *Union Bank v. Tattersall* (1920), 52 D.L.R. 409 (Alta. S.C. App. Div.).

[81] (1969), 7 D.L.R. (3d) 728 (Que. C.A.).

[82] Of course, knowledge of such default would raise a duty to inquire in order to preserve good faith: *Vaughan v. Schneider* (1913), 11 D.L.R. 290 (Alta. S.C.). See §24:30.30, *infra*.

[83] *Union Investment Co. v. Wells* (1908), 39 S.C.R. 625.

[84] See *Benjamin v. Toronto-Dominion Bank* (2006), 80 O.R. (3d) 424 (S.C.J.).

[85] BEA, s. 57(2). See also §24:30.50, *infra*.

[86] As in *Tri-State Finance Co. v. Clargo* (1969), 11 D.L.R. (3d) 51 (Ont. Div. Ct.), where the issue was whether a holder that had supplied totally inappropriate contract forms could be in good faith.

[87] *Union Investment Co. v. Wells*, *supra*, footnote 83, at p. 637, *per* Duff J.; *London Joint Stock Bank v. Simmons*, [1892] A.C. 201 (H.L.) at p. 221, *per* Lord Herschell.

[88] *Benjamin v. Weinberg*, [1956] S.C.R. 533; *Pennoyer (J.C.) Co. v. Williams Machinery Co.* (1915), 24 D.L.R. 607 (Ont. S.C. App. Div.).

[89] *Nasrin Karim Professional Corp. v. Bank of Nova Scotia* (2004), 31 Alta. L.R. (4th) 372 (Q.B.), at para. 30, *per* Mahoney J., affd 279 D.L.R. (4th) 729 (C.A.).

[90] *Red River Forest Products Inc. v. Ferguson* (1993), 98 D.L.R. (4th) 697 (Man. C.A.), leave to appeal to S.C.C. refused 101 D.L.R. (4th) viii; *Bank of Montreal v. Normandin*, [1925] 3 D.L.R. 975 (S.C.C.); *Vaughan v. Schneider*, *supra*, footnote 82.

[91] *Oldstadt v. Lineham* (1908), 1 Alta. L.R. 416 (S.C. *en banc*).

[92] *Sachs v. Plante*, [1970] Rev. Leg. 436 (Que. Prov. Ct.).

[93] *Vaughan v. Schneider* (1913), 11 D.L.R. 290 (Alta. S.C.).

[94] *Royal Bank of Canada v. Klip 'N Kurl Salon (Lynwood) Ltd.*, [1977] 2 W.W.R. 8 (Alta. Dist. Ct.) at p. 29. See also *Bank of Montreal v. Tourangeau* (1980), 118 D.L.R. (3d) 293 (Ont. H.C.J.).

[95] See §35:50.

[96] *422885 B.C. Ltd. (Cashplan) v. 482915 B.C. Ltd. (End Roll)*, 2004 BCPC 337.

[97] *Supra*, at para. 7.

[98] *Ibid.*, at para. 5.

[99] In so far as it applies to the law of negotiable instruments. If those in authority are concerned that the low-cost bank accounts mandated in the last revision of the *Bank Act*, S.C. 1991, c. 46 (see §9:10) have not satisfactorily addressed the problems of the underprivileged, they may wish to strengthen them, or to prohibit cheque-cashing services to be provided by others. I have no opinion on the need for, or the wisdom of, such measures.

[100] *Jones v. Gordon* (1877), 2 App. Cas. 616 (H.L.), esp. at p. 632, *per* Lord Blackburn; *Red River Forest Products Inc. v. Ferguson*, *supra*, footnote 90. *Cf. Union Acceptance Corp. Ltd. v. St. Amour* (1957), 8 D.L.R. (2d) 2 (Ont. C.A.), where the court relied in part on the fact that the note was routinely discounted in the ordinary course. See also *Jacobs v. Larose*, [1971] C.A. 281 (60% "interest" taken on discount of series of post-dated cheques).

[101] *Toronto Dominion Bank v. Canadian Acceptance Corp.* (1969), 7 D.L.R. (3d) 728 (Que. C.A.).

[102] *Consumer Protection Act*, S.O. 1966, c. 23, s. 21.

[103] *Avco Ltd. v. Bradley*, [1969] 1 O.R. 240 (Dist. Ct.). See also *Union Bank of Canada v. Benson* (1918), 39 D.L.R. 661 (Sask. C.A.).

[104] *Tri-State Finance Co. v. Clargo* (1969), 11 D.L.R. (3d) 51 (Ont. Div. Ct.).

[105] *Bank of Montreal v. Abrahams* (2002), 59 O.R. (3d) 180 (S.C.J.), affd 68 O.R. (3d) 34 (C.A.), leave to appeal to S.C.C. refused [2004] 1 S.C.R. v.

[106] *National Money Mart Co. v. Load Runner Logistics Ltd.* (2002), 162 Man. R. (2d) 20 (Q.B.).

[107] *National Money Mart Co. v. Solid Gem Enterprises Ltd.*, 2006 ABPC 32.

[108] *360788 B.C. Ltd. v. 304983 British Columbia Ltd.* (1998), 90 A.C.W.S. (3d) 795 (B.C.S.C.).

[109] *Oldstadt v. Lineham* (1908), 1 Alta. L.R. 416 (S.C. *en banc*).

[110] *Bank of Toronto v. Sweeney; Bank of Toronto v. Cochrane*, [1927] 2 W.W.R. 597 (Sask. K.B.).

[111] (1984), 52 B.C.L.R. 63 (S.C.), revd 61 B.C.L.R. 105 (C.A.), leave to appeal to S.C.C. refused [1985] 1 S.C.R. xiii.

[112] (1993), 107 Nfld. & P.E.I.R. 1 (Nfld. S.C.).

[113] *Waterous Engine Co. v. Town of Capreol*, [1923] 3 D.L.R. 575 (Ont. S.C. App. Div.).

[114] *Banque Nationale du Canada v. Reynolds* (1989), 31 Q.A.C. 152 (C.A.).

[115] Except, of course, where the "close connection" doctrine is applicable (see §35:50).

[116] *Union Investment Co. v. Grimson* (1916), 27 D.L.R. 208 (Alta. S.C. App. Div.); *Hayden, Clinton National Bank v. Dixon* (1916), 26 D.L.R. 694 (Alta. S.C. App. Div.); *Royal Bank of Canada v. Grobe and Walbridge*, [1928] 3 D.L.R. 93 (Alta. S.C.). *Cf. Bank of Toronto v. Sweeney; Bank of Toronto v. Cochrane, supra*, footnote 110.

[117] *London Joint Stock Bank v. Simmons*, [1892] A.C. 201 (H.L.) at p. 221, *per* Lord Herschell. Although the case involved bonds not within the BEA, the statement of the learned Law Lord was expressly extended and intended to apply to all negotiable instruments.

[118] See, *e.g.*, *Citadel General Assurance Co. v. Lloyds Bank Canada* (1997), 152 D.L.R. (4th) 411 (S.C.C.), and my comment in "Constructive Thinking? The Supreme Court's Extension of Constructive Trusts to Banks on the Basis of Constructive Notice of a Breach of Trust by a Customer" (1998), 31 C.B.L.J. 1, esp. at pp. 8-10.

[119] *Grant v. Imperial Trust*, [1935] 3 D.L.R. 660 (S.C.C.). See also the related case *McNab v. Imperial Trust Co.*, [1935] 4 D.L.R. 570 (S.C.C.).

[120] *Union Bank of Canada v. Benson* (1918), 39 D.L.R. 661 (Sask. C.A.). The holdings of Conant Senior Master and Treleaven J., respectively, in *Canadian Bank of Commerce v. Reliance Distributors Ltd.*, [1949] O.W.N. 371 (Master), affd *loc. cit.* p. 374 (H.C.J.), on the question of whether the plaintiff holder was entitled to summary judgment when it was alleged that it knew there was "a serious failure of consideration", are not to the contrary. Without a hearing into the merits, it would not be possible to ascertain whether the holder had such knowledge as might amount to a defect of title. Note also there was evidence of knowledge of dishonour.

[121] *Donald E. Hirtle Transport Ltd. v. I.A.C.* (1978), 92 D.L.R. (3d) 87 (N.S.C.A.); *Traders Group Ltd. v. Carroll* (1970), 2 N.S.R. (2d) 321 (C.A.); *Canyon Securities v. McConnell* (1958), 17 D.L.R. (2d) 730 (B.C.S.C.).

[122] I have commented at length on the distinction here referred to in "Consumer Instalment Sales Financing Since Federal Discount Ltd. v. St. Pierre"

(1969), 19 U.T.L.J. 353, esp. at pp. 366-67.

123 (1967), 64 D.L.R. (2d) 194 (Man. Q.B.).

124 *Supra*, at p. 202.

125 *Bank of Montreal v. Abrahams* (2002), 59 O.R. (3d) 180 (S.C.J.), at par. 63, *per* Lissaman J., affd 68 O.R. (3d) 34 (C.A.), leave to appeal to S.C.C. refused [2004] 1 S.C.R. v; *Edie v. Turkewich*, [1940] 2 D.L.R. 204 (Man. C.A.); *Sachs v. Plante*, [1970] Rev. Leg. 436 (Que. Prov. Ct.); *Commodity Discount Ltd. v. Briand*, [1962] C.S. 548; *Commodity Discount Ltd. v. Decarie*, [1962] Rev. Leg. 118 (Que. S.C.). This is also perceived to be the basis of cases such as *Standard Bank of Canada v. Wettlaufer* (1915), 23 D.L.R. 507 (Ont. H.C.), and *Goldstein v. Gillis* (1909), 10 W.L.R. 109 (B.C.S.C.), where the holder was shown to have had knowledge that the acceptance of a bill was agreed to be conditional only. See §26:30.40 (negotiation in breach of faith). It may also be the basis of *Traders Finance Corp. v. Casselman* (1960), 22 D.L.R. (2d) 177 (S.C.C.), in which the knowledge of the holder was of underlying provincial law making the note unenforceable in other than special circumstances.

126 See *Elmhurst Investment Co. v. Allard*, [1963] B.R. 236 (Que. Q.B., Appeal Side) at p. 245, *per* Casey J., criticized by Crawford, *op. cit.*, footnote 122, pp. 362-63.

127 (1962), 32 D.L.R. (2d) 86 (Ont. C.A.). See also the discussion at §35:50.

128 *Oldstadt v. Lineham* (1908), 1 Alta. L.R. 416 (S.C. *en banc*).

129 *Levenhurst Investments Ltd. v. Oakfield Country Club Ltd.* (1968), 68 D.L.R. (2d) 79 (N.S.S.C.).

130 *Royal Bank of Canada v. Hickey* (1978), 12 A.R. 603 (Dist. Ct.).

131 BEA, s. 54(2); *Mazur v. Imperial Investment Corp.* (1962), 33 D.L.R. (2d) 763 (Man. C.A.), affd 39 D.L.R. (2d) 631 (S.C.C.). However, see *Hornby v. McLaren* (1908), 24 T.L.R. 494 (C.A.) (fatal to know that accommodation cheque countermanded).

132 See *Gauthier v. Reinhardt* (1904), 26 C.S. 134 (sheltered holder may know of countermand). *Cf. Banque Provinciale du Canada v. Beauchemin* (1959), 18 D.L.R. (2d) 584 (S.C.C.) (bank not holder in due course because of knowledge of intended countermand).

133 Recounted to me by the late Professor Albert S. Abel and related here in affectionate memory of him.

134 *Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd.* (1983), 147 D.L.R. (3d) 577 (S.C.C.), affg 123 D.L.R. (3d) 612 (B.C.C.A.).

135 *Supra.*

136 *Ibid.*

137 See §24:30.30(2)(d), *supra*, and the discussion of *Canadian Bank of Commerce v. Wait* (1907), 7 W.L.R. 255 (Alta. S.C.), in Crawford and Falconbridge, *op. cit.*, footnote 66, §5101.3.

138 Seavey, "Notice Through an Agent" (1916), 65 U. of Pa. L. Rev. 1.

139 American Law Institute, *Restatement of the Law, Second, Agency* (St. Paul: American Law Institute, 1958), §§9-11.

140 *Bank Act*, s. 462(2). An identical provision in s. 579(2) applies to authorized foreign banks, and a similar provision applies to trust companies that are subject to the *Trust and Loan Companies Act*, S.C. 1991, c. 45, s. 448. The "branch of account" is the branch at which an account is administered: *Bank Act*, ss. 461 and 578.

141 *Bank Act*, s. 660.

142 *E.g.*, where the time elapsed between notification and the corporation's action through another agent or officer is extremely short, so as to have probably precluded actual effective transmission.

143 (1902), 32 S.C.R. 98.

144 *Supra*, at p. 105, *per* Strong C.J.C.

145 *Imperial Bank v. Heisz; Imperial Bank v. Hundt*, [1930] 1 D.L.R. 339 (Ont. H.C.); *U.S. Fidelity & Guarantee Co. v. Cruikshank and Simmons* (1919), 49 D.L.R. 674 (Sask. C.A.); *Commercial Bank of Windsor v. Smith* (1901), 34 N.S.R. 426 (C.A.).

146 *Cameron v. Hutchison* (1869), 16 Gr. 526. However, see *Purdom v. Northern Life Ass'ce Co. of Canada*, [1928] 4 D.L.R. 679 (Ont. S.C. App. Div.), affd [1930] 1 D.L.R. 1003 (S.C.C.), *sub nom. Fidelity Trust Co. of Ontario v. Purdom and Northern Life Ass'ce Co.*

147 *Dallas v. Toronto General Trusts Corp.*, [1936] 4 D.L.R. 233 (Man. K.B.); *Whitney v. Great Northern Ins. Co.* (1917), 32 D.L.R. 756 (Alta. S.C. App. Div.), affd 44 D.L.R. 433 (S.C.C.).

148 See *Steel Service Ltd. (Re); Jolly v. Trustee and H. Lunenfeld & Sons Ltd.* (1935), 16 C.B.R. 231 (Ont. H.C.J.) (knowledge of common officer not that of both corporate principals unless duty owed to one to communicate and to other to receive); *Houghton & Co. v. Nothard, Lowe & Wills, Ltd.*, [1928] A.C. 1 (H.L.); *McArthur (J.D.) Co. Ltd. v. Alberta & Great Waterways Ry. Co.*, [1924] 2 D.L.R. 118 (Alta. S.C. App. Div.).

149 See *Steel Service Ltd. (Re), supra.*

150 (1982), 40 O.R. (2d) 211 (H.C.J.), affd 44 O.R. (2d) 384*n* (C.A.).

151 [1994] 2 All E.R. 685 (C.A.) at pp. 710*h* to 705*a*.

152 Such as *Blackburn Low & Co. v. Vigors* (1887), 12 App. Cas. 531 (H.L.), and *Turton v. London and North Western Rly Co.* (1850), 15 L.T.O.S. 92.

153 His Lordship referred, *inter alia*, to *Regina Fur Co. Ltd. v. Bossom*, [1957] 2 Lloyd's Rep. 466.

154 Citing *Blackley v. National Mutual Life Assurance*, [1972] N.Z.L.R. 1038 (C.A.).

155 Citing *Tanham v. Nicholson* (1862), L.R. 5 H.L. 561.

156 [2005] EWCA Civ. 758 (C.A.).

157 *Supra*, at para. 82.

157.1 See, *e.g.*, Lax J. in *Esses v. Friedberg & Co.* (2007), 157 A.C.W.S. (3d) 946 (Ont. S.C.J.), revd 241 O.A.C. 134 (C.A.), leave to appeal to S.C.C. refused [2009] 1 S.C.R. viii.

157.2 (2005), 8 B.L.R. (4th) 247 (B.C.S.C.), revd in part 278 D.L.R. (4th) 501 (C.A.), revd in part 304 D.L.R. (4th) 292 (S.C.C.).

157.3 If the cheque is worthless, there are no retainable proceeds for the parties to contest. Both owe duties of restitution to the drawee.

157.4 See §28:30.40.

157.5 *Supra*, footnote 157.2, at para. 39.

158 *Barré v. Lafontaine and Bousquet*, [1958] C.S. 85.

159 *Scott v. Ashley Colter Ltd.*, [1942] 3 D.L.R. 538 (S.C.C.); *British Acceptance Corp. v. Hansen* (1974), 44 D.L.R. (3d) 421 (Alta. S.C. App. Div.) at p. 426; *Millican v. Capital Discount Corp. Ltd.* (1929), 37 O.W.N. 263 (H.C.).

160 *Scott v. Ashley Colter Ltd., supra; British Acceptance Corp. v. Hansen, supra;* Shore v. Mead (1914), 29 W.L.R. 283 (Sask. S.C. *en banc*).

161 As apparently occurred in *Millican v. Capital Discount Corp. Ltd., supra,* footnote 159, with reference to changed serial numbers.

162 *Puffer v. Mastorkis* (1966), 59 D.L.R. (2d) 427 (Ont. H.C.J.) (plea of *non est factum* not proved; evidence of misrepresentation inducing signature fraudulent, but not in sufficient degree); *Gauthier v. Reinhardt* (1904), 26 C.S. 134, in which the sheltered holder knew the cheque had been countermanded.

163 *Scott v. Ashley Colter Ltd., supra,* footnote 159.

164 Chafee, "The Reacquisition of a Negotiable Instrument by a Prior Party" (1921), 21 Col. L. Rev. 538.

165 [1978] 1 Q.B. 917 (C.A.).

166 *State Discount Ltd. v. Crawford,* [1960] O.W.N. 451 (C.A.).

167 See BEA, s. 69; §25:60.10.

168 [1911] 1 K.B. 854 (C.A.).

168.1 (2007), 157 A.C.W.S. (3d) 946 (Ont. S.C.J.), revd 241 O.A.C. 134 (C.A.), leave to appeal to S.C.C. refused [2009] 1 S.C.R. viii.

168.2 Geva, "Defences on Cheque Certification: *Esses v. Friedberg*" (2009), 24 B.F.L.R. 359.

168.3 See §24:30.70, *infra.*

168.4 See §24:30.70(1).

169 *Tatam v. Haslar* (1889), 23 Q.B.D. 345.

170 *Farmer v. Ellis* (1901), 2 O.L.R. 544 (H.C.J.). *Cf. Flour City Bank v. Connery* (1898), 12 Man. R. 305 (Q.B.); *Bank of Toronto v. Stillman,* [1930] 3 D.L.R. 838 (Ont. S.C. App. Div.); *Hogarth v. Scott,* [1960] O.W.N. 248 (H.C.J.).

171 [1996] 2 W.W.R. 432 (B.C.S.C.).

171.1 *Supra,* footnote 168.1.

172 *Lloyd's Bank Ltd. v. Cooke,* [1907] 1 K.B. 794 (C.A.) at p. 808 (emphasis added), *per* Fletcher Moulton L.J.

173 3 Hals., 3rd ed., at p. 180, citing precedents in which cheques were issued to payees in payments that were fraudulent preferences of those creditors over others of the drawer.

174 *Baron (Ben) and Partners v. Henderson,* 1958 (4) S.A. 270 (So. Rhodesia H.C.), affd 1959 (3) S.A. 188 (Fed. S.C.).

175 2007 CarswellBC 2166, 2007 BCSC 860.

175.1 *Ibid.,* at para. 40.

176 Although the Court of Appeal in England has decided that the term does not include taking an instrument from a debtor, knowing that it is a fraudulent preference: *Oesterreichishce Landerbank v. S'Elite Ltd.,* [1980] 2 Lloyd's Rep. 139. *Sed quaere.*

177 *E.g.,* in *Benjamin v. Weinberg,* [1956] S.C.R. 553, affg [1954] Q.B. 582 (Que. Q.B., Appeal Side), the Supreme Court of Canada did not trouble to review any

evidence, and the note of the Court of Appeal judgment referred to none. In *Noble v. Boothy* (1912), 7 D.L.R. 1 (B.C.S.C.), Murphy J. began with his conclusion of fraud.

178 *Bank of Toronto v. Stillman, supra,* footnote 170.

179 (1969), 7 D.L.R. (3d) 728 (Que. C.A.).

180 (1965), 52 D.L.R. (2d) 211 (Ont. C.A.) at p. 219.

181 See Crawford, "Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties" (1966), 44 Can. Bar Rev. 142; and "Restitution ♦ Mistake of Law and Practical Compulsion" (1967), 17 U.T.L.J. 344.

182 See *Gordon v. Roebuck* (1992), 92 D.L.R. (4th) 670 (Ont. C.A.), and *Pao On v. Lau Yiu,* [1979] 3 All E.R. 65 (P.C.) at pp. 78-79, *per* Lord Scarman.

183 See the comment on the evolution of the "close connection" doctrine at §35:50.

184 *Supra,* footnote 182.

185 *Ibid.,* at p. 675, *per* McKinlay J.A. *Cf.* the more protective approach in *Friesen v. Warachka* (1988), 52 Man. R. (2d) 257 (Q.B.), where a threat by a dissatisfied customer to picket a used car lot was held to be duress disentitling the customer to enforce payment of the cheque the dealer gave to end the threat, but later countermanded.

186 In view of BEA, s. 9, the argument of the text might be put more forcefully by restricting reference to "English law" only.

187 *Weidman Bros. Ltd. v. Guaranty Trust Co.,* [1955] 5 D.L.R. 107 (Ont. C.A.) at p. 115.

188 BEA, s. 9. See also §21:40.80.

189 *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208.

190 *King v. Milson* (1809), 2 Camp. 5. *Cf. Byles on Bills of Exchange,* 25th ed. by Megrah and Ryder (London: Sweet & Maxwell, 1983) at p. 245.

191 See *Jones v. Gordon* (1877), 2 App. Cas. 616 (H.L.) at p. 627, *per* Lord Blackburn.

192 *Bills of Exchange Act, 1882* (U.K.), 45 & 46 Vict., c. 61.

193 *Tatam v. Haslar* (1889), 23 Q.B.D. 345.

194 *Union Bank of Halifax v. Indian & General Investment Trust* (1908), 42 N.S.R. 353 (S.C. App. Div.), affd 40 S.C.R. 510; *Pennoyer (J.C.) Co. v. Williams Machinery Co.* (1915), 24 D.L.R. 607 (Ont. S.C. App. Div.); *Nisbet and Potts' Contract (Re),* [1905] 1 Ch. 391 at p. 402.

195 See the discussion in §24:30.70, *infra,* of the closely related problem of whether a payee may be qualified to take as a holder in due course.

196 Falconbridge, *op. cit.,* footnote 31, at p. 637.

197 Maclaren, *op. cit.,* footnote 33, at pp. 211-12.

198 [1911] 1 K.B. 854 (C.A.). See a criticism of this case at §24:30.50(3), *supra.*

199 *Banque Provinciale du Canada v. Claude* (1965), 52 D.L.R. (2d) 211 (Ont. C.A.) at p. 218.

200 [1952] 3 D.L.R. 574 (Man. C.A.).

201 *Williams v. Shuster*, *supra*, at p. 576, *per* Coyne J.A.

201.1 2011 QCCA 1148, 2011 CarswellQue 5814 (Que. C.A.), at para. 30.

201.2 Citing this treatise at §24:30.60, pp. 24-34 and 24-35.

201.3 [1991] 1 W.W.R. 749 (Man. Q.B.), affd 98 D.L.R. (4th) 697 (Man. C.A.), leave to appeal refused 101 D.L.R. (4th) viii (S.C.C.).

201.4 *Supra*, at para. 28 (Q.B.).

202 See *Jones (R.E.) Ltd. v. Waring & Gillow, Ltd.*, [1926] A.C. 670 (H.L.). This "common view" was confirmed by Deschamps J. in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2005), 8 B.L.R. (4th) 247 (B.C.S.C.), revd in part 278 D.L.R. (4th) 501 (C.A.), revd in part 304 D.L.R. (4th) 292 (S.C.C.), at para. 39, but also stated to the subject to exception "in some factual circumstances".

203 BEA, s. 2.

204 Until recently, the only cases to apply this presumption in favour of a payee were from Quebec: see, *e.g.*, *Lacasse v. Gratton*, [1963] C.S. 69; *Silberberg v. Menaker*, [1955] C.S. 352. However, Watt J.A. on behalf of the Ontario Court of Appeal applied the presumption in *Esses v. Friedberg* & Co. (2007), 157 A.C.W.S. (3d) 946 (Ont. S.C.J.), revd 241 O.A.C. 134 (C.A.), leave to appeal to S.C.C. refused [2009] 1 S.C.R. viii, without evidencing any awareness that his reasoning was unorthodox, and the same improvisation has been adopted with no more apparent consciousness of the traditional interpretation by two lower court judges, as well. With respect, to ignore the distinction between the issue of a negotiable instrument and its negotiation is to miss the essence of negotiable instruments law. On the other hand, the trend in the Canadian litigation has clearly been to exclude defences that the courts characterize as equitable set-offs, in order to promote the "cash-like quality" of negotiable instruments, and that is surely to be encouraged. It is, perhaps, a question of style more than of substance when a judge appears not to understand that she is flouting convention to achieve what she perceives to be a just result.

205 *Lewis v. Clay* (1897), 67 L.J.Q.B. 224, *per* Lord Russell C.J., quoted with approval by Cartwright J. in *Duplain v. Cameron* (1961), 30 D.L.R. (2d) 348 (S.C.C.) at p. 363. See also *Mollot v. Monette* (1981), 128 D.L.R. (3d) 577 (S.C.C.) at p. 578, *per* Laskin C.J.C.

206 [1926] A.C. 670 (H.L.).

207 Section 21(2) of the *Bills of Exchange Act*, 1882 (45 & 46 Vict. c. 61. It is interesting to note that in the original Act, the phrase "except a holder in due course" is not placed within commas; it immediately follows, and obviously refers only, to "remote parties".

208 See §24:30.70(2)(a.5) "On Principle".

209 The issue does not arise in the US. The Uniform Commercial Code, in its definition of "holder in due course" in Art. 3 - 302(a)(1), refers to both negotiation and issue as a means of transfer to an eligible transferee, thus including the payee.

210 *Lilly v. Farrar* (1908), 17 B.R. 554 (Que. K.B., Appeal Side); *McDonough v. Cook* (1909), 19 O.L.R. 267 (C.A.); *Knechtel Furniture Co. v. Ideal House Furnishers. Ltd.* (1910), 14 W.L.R. 175 (Man. C.A.); *Manitoba Bridge & Iron Works v. Minnedosa Power Co.*, [1917] 1 W.W.R. 731 (Man. K.B.); *Lee v. Blake*, [1924] 4 D.L.R. 369 (Ont. S.C. App. Div.) at p. 373; *Marshall v. Rogers*, [1924] 1 D.L.R. 888 (Alta. S.C.); *Gallagher v. Murphy and Gilroy*, [1929] 2 D.L.R. 124 (S.C.C.).

211 *Dominion Bank v. Fassel and Baglier Construction Co. Ltd.*, [1955] 4 D.L.R. 161 (Ont. C.A.); *Lacasse v. Gratton*, [1963] C.S. 69; *Canadian Imperial Bank of Commerce v. Lively* (1974), 46 D.L.R. (3d) 432 (N.S.S.C.); *Central Factors Corp. v. Bragg* (1977), 76 D.L.R. (3d) 585 (B.C.S.C.).

212 304 D.L.R. (4th) 292, 2009 CarswellBC 809 (S.C.C), at para. 39.

213 See e.g., *Royal Bank v. Harowitz* (1994), 17 O.R. (3d) 671, 1994 CarswellOnt 836 (Ont. Gen. Div.), affirmed (1997), 33 O.R. (3d) 704, 1997 CarswellOnt 2609 (Ont. C.A.); *Misco Holdings Inc. v. Bank of Nova Scotia* (2010), 82 B.L.R. (4th) 257, 2010 CarswellOnt 10560 (Ont. S.C.J.). In *Gledhill v. Le Donne* 2013 CarswellOnt 7086, 2013 ONSC 2987 (Ont. S.C.J.), additional reasons 2013 CarswellOnt 11147, 2013 ONSC 5091 (Ont. S.C.J.) Goldstein J. sent a case of remote party payee to trail without identifying that approach, being under the impression that a cheque from a dupe to a holder in due course was a difficult novel issue of restitution for the victims of a Ponzi scheme! The exception was the decision of Larouche J. of the Superior Court of Quebec who reviewed the history and debate in his reasons for holding the remote party payee of a note to be a holder in due course in *Lacasse v. Gratton* 1962 CarswellQue 113. The

case had no influence on the jurisprudence of the common law provinces, and has been cited only once, but not followed in Quebec: *Saboca Inc. c. Collac* 1963 CarswellQue 409.

214 (2000), 46 O.R. (3d) 692 (S.C.J.), affirmed 2001 CarswellOnt 9827 (Div. Ct.).

215 Crawford and Falconbridge, *Banking and Bills of Exchange*, 8th ed. (Aurora, Canada Law Book, 1986) at pp. 1476-77.

216 *Gledhill v. LeDonne*, 2013 ONSC 2987 (S.C.J.).

217 (2007), 157 A.C.W.S. (3d) 946 (Ont. S.C.J.), revd 241 O.A.C. 134 (C.A.), leave to appeal to S.C.C. refused [2009] 1 S.C.R. viii.

218 See §24:30.50(3) "Application [of presumption] to Payee".

219 *Supra*, footnote 217, at paras. 55-56.

220 *Supra* text at about footnote 212.

221 In *BMP Global Distribution Inc. v. Bank of Nova Scotia* (2009), 304 D.L.R. (4th) 292 (S.C.C.), at para. 39 Deschamps J. is reported as writing, *per cur*: "The most common view is that a payee is not, as a general rule, a holder in due course because he or she has not acquired the instrument by way of negotiation (s. 55(1)(*b*) *BEA*). Yet in some factual circumstances, dealings may take place before the payee becomes the holder of the instrument, *and some commentators consider that the negotiation requirement needs to be revisited . . .*" [emphasis added] An earlier reference by the Supreme Court to *Jones v. Waring & Gillow*, was in *Gallagher v. Murphy*, [1928] 4 D.L.R. 618, but was only a *dictum* and somewhat short of approval. The decision was based on the principle of aval.

222 *Idem.*

223 *Supra*, footnote 206.

224 *Supra*, footnote 214.

225 1968 CarswellQue 131 approved by Deschamps J. in *B.M.P. Global, supra*, footnote 221.

225.1 It is important to remember that the section provides only a presumption, not assured status. Thus, in *Royal Bank of Canada v. Pentagon Construction Maritime Ltd.* (1983), 143 D.L.R. (3d) 764 (N,B.Q.B.), Miller J. would now be regarded as arguably in error in citing (at para. 14) *Jones v. Waring & Gillow* as authoritative, but was undoubtedly correct in finding (at para. 20) that the bank could not be considered to be a holder in due course, since it took the cheques with knowledge of the defect in the transferor's title and, therefore, did not act in good faith. The decision of the Ontario Court of Appeal in *Dominion Bank v. Fassel & Baglier Construction Co.*, [1955] 4 D.L.R. 161, 1955 CarswellOnt 288, is to the same effect. Decisions such as *Niagara Finance Co. Ltd. v. Avco Financial Services Ltd.*, [1975] 2 W.W.R. 352, 1974 CarswellAlta 154 (Alta. Dist. Ct.), to the contrary seem now to be grossly unfair.

226 I discuss in §26:40.10(3) "The Current Practice" the use of judicial discretionary stay of summary judgment in favour of the payee where it appears to the court that a trial of a defence is required.

227 See §20:30.20 "Constitutional Jurisdiction".

228 This enables remote party payees to qualify for holder in due course status if they are able to do so on the facts of the case. See §24:30.70(2)(a) "Remote Party".

229 See §26:40.10(3) "The Current Practice".

230 In s. 55(2).

230.1 Section 73(b). "Among prior parties" also seem peculiarly inapt to describe a contract defence arising out of the relations of the obligor of an instrument and its payee. The payee cannot sensibly be described as a prior party when he holds, and is attempting to enforce, the instrument. It follows that contract defences of the immediate parties *inter se* are not defects of title.

230.2 Section 59(1) of the *BEA* defines negotiation as follows: "A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

230.3 Section 57(2) provides: "Every holder of a bill is, in the absence of evidence to the contrary, deemed to be a holder in due course . . ." The House of Lords did not consider this point in their reasoning in *Jones (R.E.) Ltd. v. Waring & Gillow Ltd.* [1926] A.C. 670 (H.L.).

230.4 *Constitution Act, 1867* s. 91(18); see §20:30.20 "Constitutional Jurisdiction".

230.5 See §26:40.10(3) "The Current Practice".

230.6 Section 55(1)(b) provides: ". . . that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

230.7 Section 56 provides: ". . . the title of a person who negotiates a bill is defective within the meaning of this Act *when he obtained the bill*, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." It is inconceivable that the originator of an instrument could be so described. (emphasis added)

230.8 I consider in the next following section of this commentary, the relative spheres of application of the federal law of bills, cheques and notes, and the provincial common law (or civil law) of restitution.

230.9 *BEA* s. 55(1)(b).

230.10 See §24:30.70(1) "On Authority".

230.11 See §3:20.10(2) "Transfers of Bank Credit".

230.12 See §24:30.70(1) "On Authority".

230.13 [1979] 3 All E.R. 522 (Q.B.).

230.14 [1991] 2 All E.R. 690 (Q.B.).

230.15 (1998), 154 D.L.R. (4th) 627 (B.C.C.A.).

230.16 *Per* Newbury J.A. *per cur.* in *Toronto-Dominion Bank v. Carotenuto, ibid.* at p. 639.

230.17 1994 CarswellOnt 836 (Gen. Div.).

230.18 (1995), 22 O.R. (3d) 362 (Gen. Div.).

230.19 Recall that Waller J. in *Citibank N.A. v. Brown Shipley & Co. Ltd. supra* footnote 230.14 resolved that dispute entirely by reference to restitutionary principles.

230.20 But which may be controlling, as for example, in *Toronto-Dominion Bank v. Bank of Montreal, idem.*

231 (1994), 120 D.L.R. (4th) 499 (Ont. C.A.).

232 (1994), 120 D.L.R. (4th) 765 (Ont. C.A.).

233 (1998), 41 O.R. (3d) 599 (Gen. Div.).

234 (2004), 182 Man. R. (2d) 215 (Q.B.), affd [2006] 4 W.W.R. 46 (C.A.).

235 Keyser J. referred to two authorities only: Ian Baxter's *The Law of Banking*, 4th ed. (Toronto: Carswell, 1992) and my own note in *Canadian Encyclopedic Digest*, 3rd ed. (Toronto: Carswell, 2004), both of which are critical of the rule, but neither of which supports the decision.

236 [2006] 4 W.W.R. 46 (Man. C.A.).

237 See §23:80.20(2).

238 The leading case is *Robinson v. Mann* (1901), 31 S.C.R. 484, followed by *Gallagher v. Murphy and Gilroy*, [1929] 2 D.L.R. 124 (S.C.C.), and the following lower courts: *McDonough v. Cook* (1909), 19 O.L.R. 267 (C.A.); *Knechtel Furniture Co. v. Ideal House Furnishers Ltd.* (1910), 14 W.L.R. 175 (Man. C.A.); *Manitoba Bridge & Iron Works v. Minnedosa Power Co.*, [1917] 1 W.W.R. 731 (Man. K.B.).

* Footnotes 239 to 247 deleted.

248 (1972), 26 D.L.R. (3d) 552 (Ont. H.C.J.).

249 *White v. Royal Bank of Canada* (1923), 53 O.L.R. 543 (H.C.) at p. 544, affd [1923] 4 D.L.R. 1206 (S.C. App. Div.).

250 *Canadian Bank of Commerce v. Brash* (1957), 10 D.L.R. (2d) 555 (Ont. C.A.).

251 (1973), 36 D.L.R. (3d) 579 (Que. C.A.), affd 65 D.L.R. (3d) 384*n* (S.C.C.).

252 Now termed the "branch of account": see ss. 461(1) and 578(1) of the *Bank Act*.

253 See *White v. Royal Bank of Canada, supra*, footnote 249, at p. 548 (H.C.), *per* Middleton J.: "[F]or all purposes of liability the bank is a unit and indivisible".

254 See §25:30. With respect, in citing *In re Farrow's Bank, Ltd.*, [1923] 1 Ch. 41 (C.A.), as determinative of the issue before him in *White v. Royal Bank of Canada, supra*, footnote 249, Middleton J. was apparently unaware of the difference between general and "on-us" items.

255 This term is discussed in §10:10.50(2).

256 *Keyes v. Royal Bank of Canada*, [1947] 3 D.L.R. 161 (S.C.C.) at p. 172.

257 BEA, s. 138. See also §29:20.20.

258 It should be noted that some statements by the Court of Appeal in *Gordon v. London, City & Midland Bank, Ltd.; Gordon v. Capital & Counties Bank Ltd.*, [1902] 1 K.B. 242 (C.A.), affd [1903] A.C. 240, *sub nom. Capital & Counties Bank, Ltd. v. Gordon; London City & Midland Bank v. Gordon* (H.L.), that appear to be *contra* are made only with reference to items drawn on other banks. Collins M.R. dealt with the only "on-us" items, at pp. 272-74 (C.A.), on quite different terms.

259 (1966), 57 D.L.R. (2d) 683 (Ont. Co. Ct.).

260 *Supra*, at p. 689.

261 *Supra*, footnote 256.

262 *White v. Royal Bank of Canada* (1923), 53 O.L.R. 543 (H.C.) at p. 545, affd [1923] 4 D.L.R. 1206 (S.C. App. Div.).

263 (1973), 36 D.L.R. (3d) 579 (Que. C.A.), affd 65 D.L.R. (3d) 384*n* (S.C.C.).

264 See text, *supra*, at footnote 251.

265 (1957), 10 D.L.R. (2d) 555 (Ont. C.A.).

266 *William Ciurluini Ltd. v. Royal Bank of Canada* (1972), 26 D.L.R. (3d) 552 (Ont. H.C.J.): see the text, *supra*, at footnote 248.

267 *Royal Bank of Canada v. Boyce* (1966), 57 D.L.R. (2d) 683 (Ont. Co. Ct.).

268 *White v. Royal Bank of Canada, supra*, footnote 262.

269 Parker J. in *Ciurluini* also cited *Bank of Nova Scotia v. Archo Industries Ltd.* (1970), 11 D.L.R. (3d) 593 (Sask. Q.B.), but it will be noted that that case depended entirely upon BEA, s. 165(3), which only gives the collecting bank the same rights as if it were a holder in due course. See §10:30.10.

270 In *Bank of Nova Scotia v. Gould* (1977), 79 D.L.R. (3d) 473 (Ont. Co. Ct.), Trotter Co. Ct. J., treating the matter as one of first impression, ruled on facts similar to those in *William Ciurluini Ltd. v. Royal Bank of Canada, supra*, footnote 266, that the encashing branch was a holder in due course of a stopped cheque, on the ground that one branch could not reasonably know what the other was doing!

271 See Comments, "Consumer Protection — The Role of Cut-off Devices in Consumer Financing", [1968] Wisc. L. Rev. 505; cases collected at [1955] 4 D.L.R. 162; Ziegel, "Comments: Range v. Corporation de Finance Belvédère" (1970), 48 Can. Bar Rev. 309 at p. 310.

272 (1921), 57 D.L.R. 359 (S.C.C.).

273 *Supra*, at p. 362 (emphasis in original).

274 *Res perit domino; Sale of Goods Ordinance*, C.O.N.W.T. 1898, c. 39, ss. 9 and 22.

275 *Killoran v. Monticello State Bank, supra*, footnote 272, *per* Idington and Duff JJ. See the analysis of the reasons of the court by Ziegel, *op. cit.*, footnote 271, at p. 312.

276 Anglin and Brodeur JJ.

277 Contemporary judicial opinion certainly tended to regard instruments in the *Killoran* form as non-negotiable "lien notes". Idington J. referred to them in *Killoran, supra*, footnote 272, at p. 359, as "ordinary lien notes", as did the Saskatchewan Court of Appeal in *Bank of Nova Scotia v. Phillpott*, [1930] 4 D.L.R. 148 (Sask. C.A.).

278 *Killoran, supra*, footnote 272, at p. 362.

279 See *Bank of Nova Scotia v. Phillpott, supra*, footnote 277, and other cases cited in §26:20.

280 *Range v. Belvedere Finance Corp.* (1969), 5 D.L.R. (3d) 257 (S.C.C.) at p. 262, *per* Pigeon J. *per cur.*, and cases cited, *infra*, footnote 281.

281 *Bank of Montreal v. Abrahams* (2002), 59 O.R. (3d) 180 (S.C.J.), affd 65 O.R. (3d) 34 (C.A.), leave to appeal to S.C.C. refused [2004] 1 S.C.R. v; *Prudential Finance Corp. v. Kucheran* (1964), 45 D.L.R. (2d) 402 (Ont. C.A.); *Union Acceptance Corp. Ltd. v. St. Amour* (1957), 8 D.L.R. (2d) 2 (Ont. C.A.). Major J., in *Del Confectionery Ltd. v. Winnipeg Cabinet Factory Ltd.*, [1941] 4 D.L.R. 795 (Man. K.B.), although at pains to distinguish the first proposition, accepted the second at face value.

282 *Prudential Finance Corp. v. Kucheran, supra.*

283 (1962), 32 D.L.R. (2d) 86 (Ont. C.A.), commented on by Feltham and Feltham, Comment (1962), 40 Can. Bar Rev. 461, esp. at p. 481, for the effect of fraud in the underlying transaction upon a "waiver of defence" (cut-off) clause.

284 If ordinary principles of the law of assignment apply in the usual way in this context, the equities will be cut off only when the assignor or assignee gives notice of the assignment to the debtor. If, as is typically the case, the basic agreement purports to give notice of the proposed assignment, that may not create any delay.

285 It cannot be emphasized too much that the discussion in the text refers only to notes not qualifying under BEA, s. 176 as negotiable instruments. If the note is negotiable, the holder's rights derive from the BEA, and the cut-off clause is merely immaterial surplusage.

286 (1972), 25 D.L.R. (3d) 452 (Alta. C.A.). With all due respect to the dissent of Cairns J.A., if the cut-off clause was not supported by consideration and was not ever pleaded (see, *infra*, footnote 288), it is difficult to see how it could be conclusive on the question, as suggested.

287 Clement J.A. in *Traders Group Ltd. v. Fulkerth*, *supra*, at p. 470, adverted to the problems of a third party beneficiary of the cut-off clause enforcing it — presumably in the event he was not also the assignee of the agreement.

288 Clement J.A. in *Traders Group Ltd. v. Fulkerth*, *supra*, footnote 286, at p. 472, noted that the plaintiff in that case had not pleaded the contract. If the notes were then found to be non-negotiable, the cut-off clause was not properly before the court.

289 (1974), 51 D.L.R. (3d) 559 (S.C.C.) at p. 562.

290 (1969), 5 D.L.R. (3d) 257 (S.C.C.).

291 Pigeon J., quoting from the sale agreement in *Range v. Belvedere Finance Corp.*, *supra*, at p. 259.

292 (1974), 44 D.L.R. (3d) 421 (Alta. S.C. App. Div.).

293 *Supra*, at p. 427.

294 *Donald E. Hirtle Transport Ltd. v. I.A.C.* (1978), 92 D.L.R. (3d) 87 (N.S.C.A.).

295 See *Double Diamond Bowling Supply Ltd. v. Eglinton Bowling Ltd.* (1963), 39 D.L.R. (2d) 19 (Ont. H.C.J.) at p. 25, *per* Parker J.

296 (1962), 32 D.L.R. (2d) 86 (Ont. C.A.). See also §35:50.

297 See, *e.g.*, the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, s. 83.

298 However, see *Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd.* (1983), 147 D.L.R. (3d) 577 (S.C.C.), where the evident intention of the parties that the bank was to be a holder in due course of certain notes was held to be not effectively implemented.

299 (1984), 15 D.L.R. (4th) 714 (B.C.S.C.).

300 His Lordship enunciated an interesting proposition without, however, appearing to notice that his finding that the notes were not subject to the BEA technically prevented the second point from applying in that case!

301 *Canadian Commercial Bank v. Carpentier* (1991), 58 B.C.L.R. (2d) 209 (S.C.).

302 *Supra*, at p. 223.

§25:60 TRANSFER AFTER MATURITY OR DISHONOUR

69(1) Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than the person from whom he took it had.

(2) A bill payable on demand is deemed to be overdue, within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time.

(3) What is an unreasonable length of time for the purpose of subsection (2) is a question of fact.

70. Except where an endorsement bears date after the maturity of the bill, every negotiation is, in the absence of evidence to the contrary, deemed to have been effected before the bill was overdue.

71. Where a bill that is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this section affects the rights of a holder in due course.

Cross-references: "Defect of title" and the legal effects of negotiation subject thereto are discussed at §26:30.40. "Holder in due course" is defined in BEA, s. 55 and discussed in §24:30. These sections also apply to notes: see BEA, s. 186.

§25:60.10 Post-Maturity Transfer

A person to whom an overdue bill is negotiated is not within the definition of a holder in due course and, therefore, does not hold the bill free from any defect of prior parties.

BEA, s. 69(1) states what was originally a rule of evidence only. The reason of the rule is that the negotiation of an overdue bill is out of the usual and ordinary course of business and that circumstance alone is sufficient to excite so much suspicion that, as a rule of law, the endorsee must take the bill on the credit of, and can stand in no better position than, the endorser.[153] The bill comes "disgraced" to the endorsee, as Lord Ellenborough said in *Tinson v. Francis*,[154] and the endorsee must take it subject to the equities.

§25:60.10(1) When Time Bill Overdue

When a bill or note is not payable on demand, it is overdue after the expiration of the last day of grace: see §22:50.40.

§25:60.10(2) Interest Overdue on Time Bill

Where interest is made payable periodically during the currency of a note payable at a certain time after date, the note does not become overdue within the meaning of BEA, ss. 55 and 69 merely by default in payment of an instalment of such interest:[155]

> . . . as a clear rule upon that question cannot be gathered from the express provisions of the "Bills of Exchange Act" we must under [section 9] of that Act have recourse to the common law for the purpose of arriving at the rule to be applied. The grounds upon which those decisions are based in which the rule limiting the currency of overdue instruments has been enunciated and applied do not in my judgment justify the application of the rule to a bill or note in respect of which the principal is not yet due, merely because a payment of interest is in default.[156]

§25:60.10(3) When Demand Note Overdue

The BEA contains, in s. 182, a special rule concerning the negotiation of demand notes. BEA, s. 69(2) does not apply to such instruments (see §35:60.10).

§25:60.10(4) When Cheques and Demand Bills Overdue

BEA, s. 22 states when a bill is payable on demand (see Chapter 22). There is now no distinction in point of law between cheques and other demand drafts.

Before the BEA, there was some confusion whether cheques should be treated like bills. These cases cannot now be relied upon. The BEA is plain that the question of whether a cheque is stale is only a question of fact.[157] As such, the court must consider all the circumstances. For example, where a Toronto businessman, in Chicago on business, mailed a cheque to his bank on a Saturday, six days after having received it as current from a customer, and the bank credited his account with full value when it received it by mail the following Tuesday, it was held that the cheque was not overdue upon negotiation to the bank, and that finding was approved by the Court of Appeal.[158] On the other hand, a trial judge in Quebec[159] later found as a fact that two cheques, drawn on a Montreal branch of a national bank, dated November 5th and 26th, respectively, and mailed to the payee in Dawson Creek, B.C., were stale when deposited by him with an Alberta Treasury Branch office in Medicine Hat, Alberta, on February 1st.

There are no legally binding "rules of thumb" such as the popular belief that cheques six months old must be considered stale. The CPA Rules[160] that govern the clearing of CAD items among members do not list stale date as a disqualifying condition in the Rule that governs the eligibility of items for ACSS clearing.[161] Another Rule[162] provides that ordinary cheques (but not certified cheques, bank drafts or money orders) *may* be returned by the drawee if they are dated more than six months before, but many banks follow a practice of referring such items to the drawer for confirmation of their continued validity before accepting them for deposit, and appear to be justified in law in doing so. The Canadian practice of mailing local cheques across the country must be taken into account, as must the unreliability of the post at present. The experience of delay in the mails is so common that judicial notice might be taken of it. What might appear to be delay may simply be the time now reasonably required.

On the other hand, no law requires a collecting bank or any other person to accept a third party cheque as present value if the item's apparent age offends, or raises a doubt as to its accuracy. Nor would there appear to be any reason why the CPA could not enact a rule restricting the use of the CAD Clearing to cheques of evident currency, simply as an operational measure. Some balance is required, and not every item can be litigated. Perhaps less attention than is due it is being paid to BEA, s. 70 by the courts. Unless the contrary clearly appears on the face of the item, every endorsement is presumed ("*prima facie* deemed") to have been made before maturity. If given its proper effect, the section would place the onus of proof on the party alleging that a cheque had been outstanding too long. On that theory, the *Quinte-Canlin* case just noted[163] would have to be regarded as wrongly decided since there was no evidence of how the two-month delay occurred, or what was common banking practice for bush-trucking contractors in Dawson Creek or Medicine Hat during the winter months.

§25:60.20 Dishonoured Items

Dishonour may be by non-acceptance[164] or by non-payment.[165] If a bill of exchange is duly presented for acceptance and dishonoured, or a cheque or demand bill is presented for payment and dishonoured, the instrument may subsequently be negotiated before it becomes overdue. In order to take it free from any defect of title attaching to it at the time of dishonour, the transferee must take it without notice of any such previous dishonour and must fulfil the other requirements of the definition of a holder in due course.[166]

As to the position of the holder of a note which is not overdue as regards the principal, see the notes on

"interest overdue" in §25:60.10(2), *supra*. In the absence of evidence that a transferee had any knowledge of the fact that the interest had not been paid, he could not be said to have taken a dishonoured note with notice of its character as a dishonoured instrument. Duff J. noted the point in *Union Investment Co. v. Wells*:[167]

> . . . even admitting that default in the payment of interest alone would constitute such dishonour [the fact of such dishonour] does not on the evidence appear since there is nothing to shew that the note, which as we have seen was payable at a particular place, was ever presented there or at all, for the payment of interest . . .

§25:70 REACQUISITION AND REISSUE

> 72. Where a bill is negotiated back to the drawer, to a prior endorser or to the acceptor, that party may, subject to this Act, reissue and further negotiate the bill, but he is not entitled to enforce the payment of the bill against any intervening party to whom he was previously liable.

Cross-references: Drawer is discussed at §22:40.20, and acceptance at §22:90.10. Another basis for reissue is found in BEA, s. 139(*b*) and discussed in §29:30. The section also applies to notes, making the changes in terms authorized by BEA, s. 186(2).

§25:70.10 Scope of Section

The rule in s. 72 probably applies chiefly[168] to bills that are not yet at maturity and, therefore, complements s. 139, which certainly applies only to bills that are at maturity.[169]

The use in s. 72 of the expression "reissue or further negotiate the bill" supports my opinion[170] that reissue and negotiation are functionally indistinguishable terms in this context; they are both methods by which the bill may be put back into circulation. But there are technical distinctions of importance. The meaning of "reissue" is probably best illustrated by comparison with the term "issue", which is defined in s. 2 as the "first delivery" to a holder.[171] "Reissue", then, is redelivery by the drawer to the same person as payee.[172]

"Negotiation", on the other hand, is defined in s. 59(1) as a transfer that constitutes the transferee the holder of the bill.[173] It is, therefore, the proper term to describe the fresh endorsement by an endorser who has received a renegotiation of the bill, or a new endorsement by the acceptor who has become the holder prior to maturity, for the purpose of transfer to a new holder, not previously a party to the bill.

§25:70.20 Reason for Rule

The latter part of the section provides a rule against circuity of action. For example, the drawer of a bill payable to drawer's order endorses it for value to C, who endorses it to D, who endorses it back to the drawer. The drawer cannot recover from C or D, for each of them in turn could recover from him as drawer. However, the rule will not be permitted to outrun the reason. The section would not preclude action in either of the two following examples:

> (1) The payee of a bill endorses it "without recourse" to D, who endorses it to E, who endorses it back to the payee. The payee, in his character of third endorsee, can sue D and E, for they have no claim against him as prior endorser.[175] There is here no circuity of action.
>
> (2) The drawer of a bill endorses it to C, who has previously undertaken to be responsible for the price of goods supplied to the acceptor. C endorses the bill back to the drawer. The drawer, in his character of endorsee, can sue C, for C has no remedy over against him.[176]

§25:70.30 Rights of Reaquirer

It is sometimes said that a person receiving a negotiation of an instrument under BEA, s. 72 "is remitted to his former rights as regards the acceptor and all antecedent parties".[177] Chafee[178] convincingly demonstrated, by reference chiefly to pre-BEA English and American authorities, that this cannot be correct in theory. His

argument was that the reacquirer, like any other endorsee, receives a new title to the instrument, but unlike other endorsees, may (by reason of his prior holding) be unable to enforce the covenants of all parties in just the same way. It is a fascinating and convincing argument, too long to be even paraphrased here.

Rather convincing support for Chafee's argument was (unwittingly) subsequently given by the English Court of Appeal.[179] Their Lordships decided that where a bill is returned by the holder to the drawer upon dishonour by non-payment, and action is brought on the bill by the drawer, the rules of practice that would apply if the action were between immediate parties do not apply. The reason they do not apply was said to be that after negotiating the bill to a holder in due course, the drawer, when reacquiring it after dishonour, holds in the same capacity as the holder at maturity. The result of that holding was that the court had no discretion to admit a counterclaim for damages for breach of contract by the acceptor, but gave judgment for the full amount of the bill without prejudice to the acceptor's right to bring a separate action for his damages if so advised (see §29:70).

CHAPTER 26 — RIGHTS OF HOLDER AND DEFENCES

§26:10 INTRODUCTION

73. The rights and powers of the holder of a bill are as follows:

(*a*) he may sue on the bill in his own name;

(*b*) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;

(*c*) where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and

(*d*) where his title is defective, if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.

Cross-references: "Holder" is defined in *Bills of Exchange Act* ("BEA"),[1] s. 2 and discussed at §§21:20.40 and 24:10. "Holder in due course" is defined by BEA, s. 55 and discussed at §24:30. The rights of a holder of a consumer cheque or note and the defences available are discussed at §36:40. The section also applies to notes: see BEA, s. 186 and §35:80.

The express provisions and deducible implications of this important section, as well as some of the imperfections of its drafting, will be discussed in the present chapter. The section, in addition to providing for the right of the holder of an instrument to sue in his own name, touches upon certain fundamental distinctions between different kinds of defences and between different kinds of holders. These distinctions will require detailed discussion, and their discussion will involve the further distinction between immediate parties and remote parties for the purpose of determining in what circumstances various defences to an action on an instrument may be valid. The interplay of these distinctions forms part of a somewhat complicated pattern that furnishes the key to the solution of some problems peculiar to the law of negotiable instruments.

§26:20 RIGHTS AND POWERS OF HOLDER

It is important to note that s. 73 refers to both rights and powers when describing the legal position of a holder, because the powers of a person may be broader than their rights. The distinction is simple: a *right* to negotiate a bill derives from ownership of it or the authority of the owner; a *power* to negotiate it derives from the appearance of an authority to act on behalf of the owner. The difference has recently been approved by the Supreme Court of Canada[2] in a case in which the power of the sole principal of a private corporation to change the payee on a cheque originally made payable to the corporation was confirmed, even though his

actions were not, in fact, rightful *qua* the corporation, or authorized by appropriate corporate action. I discuss the distinction further in §23:40.10.

§26:20.10 Action in Own Name

The most important right of the holder is the ability to bring action on the item in his own name.[3] This, of course, must be understood as meaning only that the holder is not "liable to be defeated . . . on the ground that the action has been brought against the wrong party",[4] not that the holder is necessarily entitled to succeed in the action. The action that is contemplated in BEA, s. 73 is that authorized by s. 134, against any party liable on the bill, for the statutory measure of damages (see §28:90). There may be other actions with respect to bills, notes and cheques more appropriate for other persons not qualified as holders (because taking by means of transfer other than negotiation (see §25:50)) or not in possession of the item (see §24:10.10). A person in possession of an unendorsed bill, payable to another person or his order, is not a holder and is not entitled to sue in his own name. He will become a holder from the date of endorsement, if subsequently obtained.[5]

The holder may maintain his action against any party liable to him by reason of his engagement on the bill except, of course, where such other party is the rightful owner of the item or it can be shown that the holder holds the item adversely to the true owner.

§26:20.10(1) Jurisdiction

Questions of procedure involved in selecting the proper venue for the holder's action are properly beyond the scope of this treatise, but it may be useful to note that it has been held that a bank is resident in each place where it has a branch,[6] and where a customer fails to pay on a note, the proper place for action by the bank is where the contracting branch was located.[7]

§26:20.10(2) Actions by Agents

An agent-holder of a bill is entitled under BEA, s. 73 to sue in his own name and, even if he gave no value himself, under BEA, s. 53(1), he may claim as holder for value by virtue of value given by his principal or other prior holder (see §24:20.10). If a holder sues as agent, without personal interest, his right of recovery cannot, as a general rule, be higher than that of his principal, and he takes subject to any defence that would be available to the defendant against the principal.

This was the position in which the defendant in *Churchill & Sim v. Goddard*[8] attempted unsuccessfully to put the plaintiffs. The plaintiffs were the *del credere* agents of the seller of goods and, as such, and in return for a comparatively higher rate of commission, made a contract of sale for the seller with the defendant and became responsible to the seller for the discharge, by the defendant, of his contractual obligations. Under the prevailing practice, the seller forwarded the shipping documents to the plaintiffs, who paid to the seller the invoice price less their commission. The plaintiffs then drew, on the defendant, two bills of exchange payable to the drawers' order, and the defendant accepted the bills in return for the shipping documents. Subsequently, the defendant rejected the goods (rightly, as found in arbitration), and refused to pay their acceptances. In an action by the plaintiffs as payees of the bills, the defendant argued that the plaintiffs were merely "agents and trustees" for the seller with regard to the bills, and that either there was no consideration for the bills, or the consideration had failed. It was held that the plaintiffs were holders for value and entitled to recover, and it was pointed out that a decision in favour of the defendant would have the effect of making *del credere* agents responsible to buyers for the performance of contracts by sellers, as well as being responsible to sellers for the performance of contracts by buyers.

§26:20.10(3) Provincial Constraints on Action

At various times in the past, provincial legislatures have attempted to impose constraints upon the ability of

holders of bills, cheques or notes to sue upon them. Almost all such attempts have, to date, been ruled by the courts to be unconstitutional (see §20:30.20).

§26:20.20 Other Rights

It appears to be a useful service for readers not familiar with the BEA as a whole to list several other "rights" of the holder that arise under other provisions of the Act. The holder's rights are:

(1) *To negotiate the bill, cheque or note.*[9]

(2) *To discharge it or any party by renunciation.*[10]

(3) *To cancel the bill*[11] *or any signature on it.*[12]

(4) *To supplement certain deficiencies in form.* Where a bill or note, payable at a fixed time after date, is issued undated, or an acceptance of a bill, payable at sight, is not dated, the holder may insert the true date.[13] Bills falling within the scope of BEA, s. 30[14] may have any missing and material particulars filled up by, not only the holder, but any person in possession of it.[15] However, the holder should take care not to add to, or vary, an item except as authorized by the BEA or case law. Material alterations not so authorized or assented to may void the liability of some parties.[16]

(5) *To vary certain engagements.* Here again, the holder must act with caution and strictly within the authority of the law but, for example, where a bill has been endorsed in blank, any holder may convert it into a special endorsement, and so modify the engagement of that endorser, without requiring his consent.[17] Similarly, the holder is authorized by the BEA[18] to modify certain crossings on cheques, although these provisions, like crossed cheques themselves, are a dead letter in current Canadian law and practice.

(6) *To obtain a replacement of a lost item.*[19]

(7) *To protest for better security.*[20]

In addition to those statutory rights, it is clear that the holder has an indeterminate number of other rights arising *dehors* the BEA, such as:

(8) *To dispose of the item by means other than negotiation.*[22]

(9) *To pledge it or otherwise encumber it as collateral subject to a security interest.*[23]

(10) *To defend his possession or reassert his immediate right to possession by right of action.*[24]

(11) *To defend his right to the proceeds.*

It should be noted that the statutory rights of the holder do not include any special privilege to retain proceeds of an instrument of which he was a holder in due course. There is a clear distinction in principle between the right to enforce an instrument free of the claims and encumbrances listed in s. 73(b), and the right to retain the proceeds against all challenges. The whole law of restitution is devoted to the restoration of unjust enrichments without regard for the medium by which they were obtained.[24.1]

The reference to the law of restitution is material for another reason: if the issue in litigation is not to deny the demand of the holder in due course to receive payment of a negotiable instrument, but to assert a restitutionary attack on the right of the holder to retain the proceeds after collecting them, the ability of the holder to defend may depend upon their ability to establish a juristic reason to justify their enrichment.[24.2] A well-recognized juristic reason in this context is "*bona fide* purchase of the legal title without notice of any

pre-existing equitable interest".[24.3] The equity of restitution cannot be asserted against one who is innocent of the cause of claimant's deprivation, and gave value in exchange for the benefit received.

The Canadian cases on this defence are clear and unanimously of the opinion that the fundamentals of that restitutionary defence are the giving of value in good faith and without notice of the wrong on which the claim is based.[24.4] If the defendant was obliged to enforce payment of the instrument by which the benefit was received, they have already passed the test of acquisition in good faith and for value in that process. If not, they can presumably pass it at this point. Giving value in good faith is effective in both contexts. This has been judicially recognized since the earliest days of the use of negotiable instruments for the purpose of domestic payments. Duff J. noted that, and the authorities establishing it, in the course of his reasons in *Union Investment Co. v. Wells*:[24.5]

> 9 The characteristics which the law recognizes as marking negotiable instruments are, secondly, a person taking such an instrument in good faith and for value acquires a title to it *and that which it represents* as against the whole world. (See, *e.g.*, *London Joint Stock Bank v. Simmons* [[1892] A.C. 201], *per* Lord Herschell, at page 221, and *per* Lord Halsbury at page 207 citing Bowen L.J. [in the Court of Appeal, [(1891), 1 Ch. 270 at p. 294] and in *Bechuanaland Exploration Co. v. London Trading Bank* [[1898] 2 Q.B. 658], at page 666, *per* Kennedy J., and *Foster v. Pearson* [(1835) 1 C M & R 149], at page 855, *per* Parke B.)
>
> 10 These attributes the courts have always recognized as indispensable to instruments forming part of the commercial currency. [Emphasis added and citations added.]

It has also become more clearly in accordance with principle by the recognition of bank credit as a new form of money.[24.6] This development has made is easier to distinguish the the negotiable instrument by which proceeds are transferred, from the proceeds themselves. The *Bills of Exchange Act* protects the right of the holder in due course of the instrument to enforce payment. The law of money protects the right of the payee purchaser in good faith to defend his retention of the proceeds. That is what Duff J. appears to have meant in the emphasized part of para. 9 quoted above from his reasons in *Union Investment Co. v. Wells*. The development of electronic methods of transferring money has made it clear that the law protects both the rights on the instrument and the benefit of the proceeds, but by different means.

A simple, very clear, and more modern illustration of this fundamental point is provided by the decision in *Ierullo v. Rovan* in 2000.[24.7] In that case, the plaintiff was persuaded to provide a rogue with cheques on her bank account that she signed in blank. The rogue used one of the cheques for an unauthorized purpose, filling up the fields for the named payee and the sum payable, and delivering it to the defendant in payment of an unrelated prior indebtedness of his own. Nordheimer J. referred[24.8] to a passage in a predecessor to this treatise to establish that the payee, being a remote party relative to the drawer, could satisfy the requirements of the BEA and, in fact, had attained holder in due course status. He characterized the misuse of the cheque by the rogue as a defect of title, which would impair the defendant's claim, if known by him,[24.9] and considered — before rejecting on what was effectively a defence of *bona fide* purchase — the plaintiff's argument that the defendant would be unjustly enriched unless ordered to hold the proceeds on constructive trust for the plaintiff. Mr. Justice Nordheimer's conclusion was expressed as follows:

> 25 . . . While I consider it a very close call . . . I have concluded that the defendant did not have notice of the defect in title. The defendant, therefore, is a holder in due course of the cheque *and is entitled to retain the proceeds of it.* [Emphasis added.]

The Divisional Court affirmed[24.10] in short reasons directed entirely to the issues concerning the defendant's status as a holder in due course, without mention of the defence of *bona fide* purchase of the proceeds. But it is important that readers realize that was a crucial element of the defendant's success in retaining the latter. Section 73(b) does not grant any such right: holder in due course status, by itself, is not an automatic defence to a challenge to the right of the holder to retain proceeds once collected. But in all but the most exceptional circumstances, the ability of the holder to establish the former must also indicate an ability to establish the

latter.

The contrary is also true, as confirmed by Deschamps J. in giving the reasons of the Supreme Court of Canada in *B.M.P. Global Distributions Inc. v. Bank of Nova Scotia*.[24.11] A customer ("BMP") of the bank ("BNS") had deposited a cheque for a large sum and quickly withdrew the proceeds. Soon thereafter, the bank requested the return of the funds on the grounds that the paying bank had proven that the instrument was a forgery. The customer resisted the claim, but could prove neither holder in due course status, nor change of position, and so was ordered to restore the proceeds to the bank. Deschamps J. stated:[24.12]

> BNS asked BMP for support in recovering the proceeds of the forged cheque. BMP insisted on retaining the funds even though it had given no consideration for them and even though the fraud was beyond dispute. In this case, *BNS's actions entailed no risk of curtailing the protection from which a holder in due course is entitled to benefit.* [Emphasis added.]

The foregoing list is not intended to be exhaustive, but rather illustrative of the strength of the holder's position as possessor of valuable commercial property.

§26:30 DEFENCES TO LIABILITY

§26:30.10 Types of Holder

Section 73(a) of the BEA gives a right of action on a bill or note only to the holder of it.[24.13] Therefore, a potential first line of defence to such an action may arise if the plaintiff is not the holder or, at least, the person with the immediate right of possession of the instrument.[24.14] Once the legitimacy of the plaintiff's claim is established, several distinctions have to be drawn for the purpose of describing precisely the circumstances in which a specific defence may be set up to an action on a bill, cheque or note. First, there are the distinctions between the different kinds or classes of defences discussed in §26:30.20, *infra*. Then there is the distinction between a holder in due course (described in BEA, s. 55(1) and discussed in §24:30) and other holders for value and otherwise (discussed in §24:20). There is also the distinction between immediate and remote parties, discussed in the immediately following section. Finally, some cases in Ontario have very recently begun to take a new approach with respect to certified cheques where the holder pays a fee for the service. In those cases (see §34:70.60), the instruments are said to have a special quality as "cash substitutes" and to be enforceable without defences of any kind. I think that the cases are misguided in taking this extreme position, which is completely out of accord with over 100 years of precedents, but while they remain unreversed by the Supreme Court or Parliament, they must be reckoned with. I explain in §34:70.60(5)(c) how I think the defences available to banks should be applied by the courts.

§26:30.10(1) Immediate and Remote Parties

The BEA, in s. 39, uses the terms "immediate parties" and "remote" parties, but does not define them. Chalmers and Guest state:[25] "Immediate parties are parties in direct relation with each other. All other parties are remote." That is, persons are immediate parties, relative to each other, if their legal relations as parties to an instrument arise out of their direct dealings with each other.[26] Persons are remote parties, as regards each other, if their legal relations as parties to an instrument arise, not out of their direct dealings with each other, but out of their respective dealings with another party, or other parties, to the instrument. Thus, the maker and the payee of a note are usually immediate parties, as are the drawer and the payee of a cheque.[27] However, the payee and the drawee of a cheque are ordinarily remote parties,[28] as would be the endorser and the endorsee, or the acceptor and the payee, of a bill, except where it was drawn payable to the drawer's order. It is important to note, however, that it is the real relations between parties that characterize their relationship, not their apparent relations or position on the item, and evidence is always admissible to show what the real relations were.[29]

The distinction between immediate and remote parties has been judicially accepted in recent case law,[30]

after a period in which its legitimacy, beyond the narrow context of BEA, s. 39, depended largely upon its wide acceptance and use by learned commentators.[31]

Use in Canada appears to have begun with the Supreme Court of Canada in *Scott v. Ashley Colter Ltd.*,[32] in which both Rinfret J. (on behalf of Kerwin and Taschereau JJ. and himself), and Duff C.J.C. (in a short concurring judgment), used the terms in asserting that even: "Assuming there be partial failure of consideration between the immediate parties to a bill, such a failure cannot affect the title of remote parties."[33] Other early examples of the use of the terms and the application of the concept embodied in the distinction between immediate and remote parties to bills, cheques and notes may be found in the reports.[34]

I think that the usage is both convenient and necessary, and I continue to use it in this treatise.

§26:30.10(2) Significance of Distinction

§26:30.10(2)(a) Matters of Formal Validity

There is a marked difference in the receptiveness of the courts to arguments about the formal validity of instruments, depending on whether the parties are immediate or remote. As between remote parties, technical considerations as to the compliance of individual items with the requirements of ss. 16, 165(1) and 176 are regarded as being of critical importance to the negotiability of the items and, therefore, the ability of the holder to qualify as a holder in due course.[34.1] As between immediate parties, on the other hand, technical arguments attempting to show that the instrument fails to qualify as a negotiable instrument tend to receive very little judicial support. The judgment of Farley J. in *Sun Life Trust Co. v. Kitchener-Highland II Partnership*,[35] which was affirmed without reasons by the Court of Appeal, is illustrative. A group of investors sought to defend a claim by the payee of their promissory notes on the grounds of technical formal defects in the notes, allegedly disqualifying them as negotiable instruments. The defence met with judicial impatience on the ground that they were fully effective as contracts to pay, and might be enforced as such.[36] The same impatience was exhibited in the comment by Kathleen A. Quigg J.A. *per cur* in giving the reasons of the New Brunswick Court of Appeal in *LeBlanc v. Fundy Drywall Ltd.*[36.1] Quoting in support a passage from a precedent to this edition, the learned judge wrote:[36.2]

> In my view, it makes no difference whether the document in question is a promissory note within the meaning of the *Bills of Exchange Act*. Specifically, it makes no difference to the outcome of this case whether the note is conditional for two reasons: (1) the note was not negotiated to a third party; and (2) Fundy has sued on the basis of a contract that involves a guarantee of payment should a third party default.

I discuss the significance of the distinction between immediate and remote parties in the next section.

§26:30.10(2)(b) Substantive Defences

When the issue sought to be raised is not purely formal, a second difficulty for defendants who are in an immediate party relation with the plaintiff holder is the "cash-like quality" of negotiable instruments, which may (in proper circumstances) persuade the court not to delay giving summary judgment on the payment instrument in order to inquire into some alleged failure of consideration.[37] Purely on considerations of convenience in procedural terms, some defences between immediate parties are set over for trial as separate causes of action.[38]

Where procedural considerations do not require such severance, the general, theoretical rule is that, as between immediate parties, the defendant may set up any defence that he might have set up if the action had been brought on any simple contract.[39] But as between remote parties, "the cases have been clear and consistent over a number of decades" that a claim of unliquidated damages arising out of the underlying transaction cannot be raised by the maker against a holder in due course of a promissory note.[40] The most extreme illustration of this approach is the judgment of Craig J. in *Toronto-Dominion Bank v. Paconiel*

Investments Inc.,[41] in which the learned judge found a person liable on a promissory note at the suit of its payee even though the defendant had not signed it! Craig J. noted that the defendant had promised to sign the note in a valid written agreement and could, therefore, be held liable either on the principle that equity regards as done that which ought to be done[42] or, in the alternative, in damages of an equal amount for breach of contract.[43] Since the law appears to be evolving, it is only when the parties to the action are not immediate parties that the courts will be persuaded to draw distinctions between different kinds of holders and between different kinds of defences.

§26:30.20 Types of Defences

The discussion, in this section, of defences of various kinds does not include those that arise from the failure of the holder to fulfil the ordinary conditions of the liability of a prior party, as defined by subsequent provisions of the statute and discussed in the various sections of Chapter 27. In this section, it will be assumed that if the defendant is the drawer of a bill or cheque, or the endorser of a bill, cheque or note, the plaintiff will prove presentment for acceptance, presentment for payment, notice of dishonour, protest and notice of protest, so far as any of these acts are necessary in the circumstances.

BEA, s. 73 is far from being an adequate statement of the validity of different kinds of defences against different kinds of holders. It does not mention real or absolute defences[44] and, therefore, of course, fails to state that they are valid even against a holder in due course. It also fails to state that a transferee who is not a holder in due course takes subject to defects of title of prior parties, but not to mere personal defences available to prior parties *inter se*.

BEA, s. 73 explicitly distinguishes defects of title from mere personal defences, notwithstanding that it treats them both in the same way in the sense that a holder in due course takes free from either kind of defence. However, the distinction between defects of title and mere personal defences must not be allowed to obscure the distinction between either of these defences on the one hand and real or absolute defences on the other hand. This distinction is essential to any comprehensive discussion of the rights of a transferee of a negotiable instrument as against prior parties.

Defences should, therefore, be classified as:

(a) real or absolute defences;

(b) defects of title; and

(c) mere personal defences.

Classes (a) and (b) resemble each other in that they both relate to the instrument and affect the title of persons to it. Classes (b) and (c) resemble each other in that they are good defences against some parties and not against other parties.

Absolute defences are discussed in §26:30.30, *infra*. Some defects of title are listed in BEA, s. 55(2). They are discussed in general terms in §26:30.40, *infra*, and the defects specifically referred to in BEA, s. 55(2) are considered individually in the sections following §26:30.40. Mere personal defences are not discussed at length in any one section, but see §26:30.40(2), *infra*, and any good text on the law of contracts.

§26:30.30 Real or Absolute Defences

§26:30.30(1) Substantive Content of Defences

It is fundamental to any law of negotiable instruments that there be a distinction between the substance of real, or absolute, defences on the one hand, and defects of title and personal defences on the other. The former are the defences that apply against all persons, no matter whether the holder has or has not had notice of them, whether or not he took for value, whether before or after maturity, and whether or not the

instrument is complete and regular in form. Without attempting an exhaustive listing, the following are examples of the absolute defences:

(a) complete incapacity to incur contractual liability by signature of the instrument (see §23:30.20 (corporations); §23:30.30 (infants); §23:30.40 (mental incompetents); §23:30.50 (others));

(b) forgery of the party's signature, or signature by another without his authority, except in so far as he is estopped from denying its validity (see §23:40.40);

(c) fraud or illegality of such a nature as renders the expressed obligation of the party a nullity (see §26:30.40(4)(a), *infra*);

(d) the absence of an effective delivery of a blank or incomplete instrument (see §23:20.60);

(e) material alteration of the instrument that releases the party (see §29:70);

(f) discharge by payment in due course and surrender of the instrument (see §29:20), and renunciation at or after maturity (see §29:50.20), or by intentional and apparent cancellation at any time (see §29:60.10).

There are, no doubt, other absolute defences that have their foundations outside the BEA, such as absolute discharge from bankruptcy. But it has been decided[44.1] after a review of the foregoing list that a cheque issued by a trustee in bankruptcy is not discharged by the operation of s. 81(4) of the *Bankruptcy and Insolvency Act*.[44.2]

§26:30.30(2) Effect of Real Defences

Where a party establishes a real, or absolute, defence he is entitled to a declaration that he is under no liability. His statutory engagement[45] is a nullity. The effect of that upon the instrument will vary according to the previous apparent role of that party and the nature of the defence. For example, if he is the maker of a note (there being no other makers or endorsers), and he establishes that his signature was a forgery, then the note is a nullity. However, an endorser of such an instrument would still be liable upon it to a holder in due course by reason of his separate statutory engagement in the terms of BEA, s. 132(*c*).[46] The same consequences would follow if the absolute defence of no delivery were made out by the drawer of a cheque as against an immediate party (see §23:20.40). However, where the defence is forgery, the so-called duty of the drawee bank to know and act only upon its customers' true signatures (see §10:10.30) may affect the results in actual cases.

There are few general rules. All the circumstances of the parties and their dealings with the instrument must be carefully examined.

§26:30.40 Defects of Title

§26:30.40(1) Definition

> 55(2) In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

The terms "defect of title",[47] "defect in the title",[48] and "defective title"[49] are not defined in the BEA. I think that they are functionally equivalent.[50] BEA, s. 55(2) gives several examples of what may make the title of a person to an item defective, but in doing so, is careful not to be construed as being definitive, by beginning with the words "In particular". The terms occur in BEA, ss. 55(1), 69, 71, 73 and 182.

§26:30.40(2) Mere Personal Defences Distinguished

Prior to the enactment of the first British Act in 1882,[51] the defences now classed as defects of title were referred to as "equities attaching to the bill".[52] As that former term suggests, these defences differed from, and were to be distinguished from, what were then referred to as "equities between the parties" — the "mere personal defences" referred to in the BEA.[53]

A mere personal defence is one that does not relate to the instrument or affect the holder's title, as, for example, a right of set-off arising out of another transaction between the maker and the payee of a note. The defence may be good as between the two parties between whom it arises, that is, between immediate parties (see §23:80.10), but it is not available as against a remote party[54] taking in good faith.

A defect of title relates to the instrument and affects the title of a person to it. If, for example, a person obtains an instrument by fraud or undue influence, or for an illegal consideration, his title to it is defective, and the defectiveness of his title may prevent a transferee from him from obtaining a good title. Of course, if the transferee takes as a holder in due course, he is not affected by either defects of title or mere personal defences (see §26:30.10, *supra*).

The distinction between these defences is very difficult to preserve, however. In one sense, both may be described as personal defences since both are founded upon the agreement or conduct of a particular person with regard to the instrument, rendering it inequitable for him, though holding the legal title, to enforce it against the defendant. Cowen's characterization of them both as relative defences[55] is attractive since the term not only contrasts them with the absolute defences previously noted, but also suggests correctly that they are available only against some, but not all, parties.

Perhaps the foregoing may be made clearer by consideration of some of the defences and the leading cases expounding and establishing their effects.

§26:30.40(3) Effect of Defect of Title

Where the title of the holder is defective, their right to enforce the instrument is qualified by the nature of the defect. This may inhibit the right of the payee to enforce payment of the full sum promised, as where effect is given to a contract defence of the maker.[55.1] Or, the defect may nullify that right completely. So, it has been held[55.2] that when the maker and payee of a promissory note fraudulently conspire to conceal the interest payments for the purpose of enabling the payee to evade income tax, the notes are given for an illegal consideration and unenforceable.[55.3]

§26:30.40(3)(a) Against Holder in Due Course

A holder in due course of a negotiable bill, cheque or note may enforce payment of it free of any defect of title of his immediate transferor, or any prior party.[56] It is implicit in the characterization of a person as a holder in due course that they took the instrument in good faith and for value and, at the time that the instrument was negotiated to them, they had no notice of any defect in the title of the person who negotiated it to them.[57] The cases have consistently confirmed these rights for over 100 years,[58] and continue to do so.[59]

§26:30.40(3)(b) Against Post-Maturity Transferee

§26:30.40(3)(b)(i) *Nature of the problem*

The context in which it is most material to distinguish between defects of title and mere personal defences is upon the negotiation of a bill, cheque or note after maturity.[60] This is because BEA, s. 69 subjects such a holder only to defects of title affecting the item at its maturity. Although recognizing the distinction, s. 73(*b*) permits the holder in due course to take free of both. As Chafee noted,[61] the importance of the inquiry lies not in the frequency with which such transfers occur, but in the opportunity such an inquiry raises to discover the essential nature of the rights involved.

The first point of importance is to note that if the item is held at maturity by a holder in due course, it is subject to no defects of title at that time. Accordingly, one taking *bona fide* after maturity, from a holder in due course, takes the position of the holder in due course.[62]

The second point of importance is to note that the issue ought to arise only between remote parties. Regardless of the time of their dealings, immediate parties remain linked by their direct contract and, except for procedural constraints (see §26:30.10(2)(b), *supra*), subject to all the rights and duties of that relation vis-à-vis each other.

The final point of importance is that the substantive law on this topic appears to have become confused and identified with a particular state of the development of the law of procedure governing rights of set-off and counterclaim and the entitlement of a holder to summary judgment on a specially endorsed writ.[63]

§26:30.40(3)(b)(ii) *Modern Canadian cases*

The only cases to raise the question[64] in Canada since the inception of the BEA are *Scott v. Ashley Colter Ltd.*,[65] *Edcal Industrial Agents Ltd. v. Redl*,[66] *Provincial Treasurer of Alberta v. Quinte-Canlin Ltd.*,[67] and *Labrecque v. Dombrowski*.[68]

In the first of the four, the Supreme Court of Canada ruled that a partial failure of consideration arising from delivery of a short quantity of purchased wood, by the holder, at maturity, could not be raised by the buyer as maker of the notes sued upon.

In the second, the Alberta Court of Appeal purported to distinguish this ruling by characterizing the claims of a building owner for defective work by a builder as something other than a partial failure of consideration. In the result, the court, by a majority,[69] permitted the owner to claim contract damages in diminution of its liability to the holder of its notes, who had received them from the builder after two instalments of repayment had become overdue. The decision has been justly criticized[70] and must be regarded as wrong.

In the third case, a single judge in Quebec, treating the matter as one of first impression, ruled that the endorsee of stale cheques could enforce them only to the same extent that his endorser, the payee, might have done. A partial failure of consideration thus reduced the liability of the drawer. With respect, this case appears also to have been wrongly decided.

In the fourth case, another single judge in Quebec set aside a note as "null" in the hands of a post-maturity taker on being satisfied that it had been procured by the payee by fraud — a clear defect of title (although the BEA was not referred to).

In order to understand what are the alleged defects in the reasoning of the *Edcal*[71] and *Quinte-Canlin*[72] decisions, it is necessary to go behind the enactment of the BEA to consider the early case law. On the principles of code construction (see §21:30), this is justifiable only where the BEA is not clear. It is probably justifiable in this case, therefore.

On the one hand, failure of consideration is not one of the items listed as defects of title in BEA, s. 55(2), although illegal consideration is, and one would have thought that had the subject of consideration thus come to the attention of Parliament, it would have disposed of all material aspects of it at the one time. Secondly, the possibility of failure of consideration between a

maker and a payee being a defence against a remote holder seems to fly in the face of the careful distinction in the BEA[73] and the case law between consideration and value, and to undermine the whole concepts of accommodation parties and holders for value who themselves give no consideration (See §28:70, §24:20.20, respectively).

However, as has been noted,[74] the listing of defects in BEA, s. 55(2) is not exhaustive. It may, perhaps, not be possible to assert, to the satisfaction of all, what is the "natural meaning" of the statute on this point, and resort may, therefore, be had to the prior case law in aid of construction.

§26:30.40(3)(b)(iii) *Pre-BEA case law*

When the early case law is examined, a number of interesting points emerge. The first is that the matter appears to have given the courts an inordinate amount of difficulty over a very long period of time, with eminent authorities ranged on both sides.[75] However, after a period of uncertainty, the current of decisions after 1868 ran strongly in favour of the post-maturity holder. In that year, Malins V.-C. delivered judgment in *Overend, Gurney & Co. (Re); Ex p. Swan*,[76] exhaustively reviewing the cases and holding that an ordinary right of set-off between acceptor and drawer was not an equity attaching to the bill and could not be asserted by the former against a holder for value, although taking after maturity.

Of course, once it was determined that only some defences were available against a post-maturity taker, a whole new source of uncertainty arose concerning the means of identifying the privileged defences. It was commonly understood that mere rights of set-off available against prior parties would not avail,[77] even if the post-maturity taker knew of them.[78] Thus, not only original absence of consideration, but partial or total failure of consideration, were wholly immaterial to the rights of the post-maturity taker for value.[79] What was required to prevent him from enforcing the bill was some equity that might have been seen as attaching to the bill itself.

The clearest example was *Holmes v. Kidd*,[80] in which the payee had agreed not to transfer the instrument if not paid at maturity, but instead to sell and to obtain satisfaction only from the proceeds of a certain quantity of canvas that the debtor had pledged with him when he took the bill. It seemed clear that when the payee violated that agreement, by both selling the canvas and transferring the instrument, the equity preventing double recovery was sufficiently attached to the bill to bind a post-maturity taker. It was not material that he did not know of the agreement concerning the canvas. He could have taken free of it if he had qualified as a holder in due course. However, taking after maturity, he was bound.

It appears to be a mixed question of fact and law as to what is required to attach an equity to a bill such that it remains enforceable against a post-maturity taker for value.[81] It has been decided that partial satisfaction after maturity binds a post-maturity taker,[82] as does an agreement to give additional time to pay[83] and part payment before maturity.[84]

§26:30.40(3)(b)(iv) *Conclusion*

After much travail, the law is now tolerably clear that, in Canada, the post-maturity transferee for new value takes, not only free of mere personal defences such as partial or total failure of consideration and matters of set-off arising out of other dealings between prior parties, but also free of defects of title of prior parties and of the holder at maturity, unless the particular defect attaches to and affects the bill itself.[85]

§26:30.40(4) Statutory Illustrations

Once again, it must be emphasized that neither this discussion nor the listing of defects of title in the BEA is intended to be exhaustive. Other examples of defences that are, in effect, treated as defects of title are release or renunciation before maturity,[86] payment before maturity,[87] and some kinds of incapacity.[88]

Part V of the BEA made certain consumer bills and notes void except as against a holder in due course — in effect, creating a new defect of title (see §36:40.10). Geva has argued[89] that failure of consideration *ought to be* recognized as a defect of title (*cf.* §26:30.40(4)(e), *infra*), but acknowledged that it has not yet been so recognized.

Breach of a statutory duty appears to be capable of characterization as a defect of title in some circumstances. Much depends upon the nature of the duty. For example, in *Traders Finance Corp. Ltd. v. Casselman*,[90] the Supreme Court of Canada held that knowledge by the holder of underlying provincial law making the promise of payment unenforceable in all but special circumstances was sufficient to deprive it of the status of holder in due course.

On the other hand, not every irregularity in a transaction or even breach of a statutory duty may be properly classified as a defect of title. For example, in *Avco Ltd. v. Bradley*,[91] the defendant was the buyer of goods under an agreement within the scope of s. 21 of the Ontario *Consumer Protection Act*,[92] and also the maker of a note endorsed by the seller as payee to the plaintiff. The court held that the seller's failure to deliver a form of statement required by the section did not constitute a defect in the payee's title to the note given for the price.

In the following five sections, I shall consider the scope of the other defences described by BEA, s. 55(2) as defects of title.

§26:30.40(4)(a) Fraud and Non Est Factum

§26:30.40(4)(a)(i) *Fraud*

Fraud is, of course, a term not only of great breadth or scope, but also of great flexibility.[93] Conduct that may be characterized as fraud may range by degrees, from deliberate deceit, through careless misrepresentations, all the way to the merely technical failings by fiduciaries in the performance of their highly onerous duties. Between immediate parties,[94] every shade or degree of fraud affecting the transaction between them may be pleaded and, if proved, given almost the same effect with respect to the engagements of a bill, cheque or note[95] as they would have on any similar engagement embodied in a form of simple contract.[96]

Between remote parties, any conduct that a court will characterize as fraud may give rise to a defect in the title to the instrument involved of the person guilty of the fraud or of other persons whose title arises directly out of a transaction that he knows is affected by fraud.[97] Yet, the effect of the defence of fraud, when applied between remote parties, is quite different from that which it has between immediate parties. With one exception,[98] fraud merely makes the engagement of the defrauded party voidable. It is not available as a defence against a holder in due course or one having the rights of such a holder.[99] Of course, when fraud is proved, the holder has the onus of re-establishing his status (see §24:30.60) but, subject to that qualification, he is entitled to enforce the instrument.

A good example is the judgment of Hutcheon J. in *Central Factors Corp. v. Bragg*,[100] in which a corporate signing officer used the signing authority to write maintenance cheques to his former wife. The report of the case does not explain the position of the husband with the corporation, but it must have been a significant one since Hutcheon J. found that the man's wife had no reason to suspect that he had exceeded his actual authority in making the cheques payable to her.[101] Otherwise, the case might be faulted on the ground that it ignored disqualifying constructive notice of impropriety in cases such as *Lipkin Gorman v. Karpnale Ltd.*,[102] in which the Court of Appeal in England found that a gambling club ought to have known that cheques and drafts payable to a firm of solicitors could not be negotiated by even a partner of the firm to buy chips or tokens for the purpose of gaming.

The exception referred to is fraud of such a nature as to prevent the mind of the signing party from appreciating the nature of the document signed. As I explain in the next section, when a party is successful in maintaining a plea of *non est factum*, his signature is a nullity for all purposes of the bill.[103] His engagement is void. He has a real or absolute defence, valid against all persons, including holders in due course. I now turn to that defence.

§26:30.40(4)(a)(ii) *Non est factum*

History

This defence[104] is not peculiar to bills, cheques or notes, but may apply to any document when the person to be charged upon it pleads that it literally is "not his deed". The earliest cases involved illiterate, blind or otherwise physically or mentally disabled persons.[105] The modern cases all stem from the consolidation of the early law by the famous judgment of Byles J. in *Foster v. Mackinnon*,[106] which has been generally accepted as the leading case.[107]

In that case, the defendant had been induced to sign the back of a bill of exchange (thus making himself liable as an endorser),[108] on the fraudulent representation of the acceptor that he was signing a guaranty. In an action by a *bona fide* holder for value, the defendant's plea of *non est factum* succeeded upon his showing that he had signed without knowing the paper was a bill, believing it to be a guaranty, and without negligence in the circumstances. Byles J. said:

> It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.[109]

In the one and one-half centuries since that judgment, there has been considerable judicial and academic controversy over its reference to negligence, but general agreement on the importance of establishing a substantial difference between what the defendant thought he was signing and the actual nature and effect of the document. In *Howatson v. Webb*,[110] it was said that, to make the document void, it is necessary to show that the character of the contract was misrepresented so that the signer intended to sign something of an entirely different nature. It is not sufficient to show merely that the effect of the contract was misrepresented in material respects. This test has also been adopted by the Supreme Court of Canada.[111] In the leading case in the House of Lords on the scope of the plea,[112] terms such as "radically", "fundamentally", "basically", "totally" and "essentially different" may be found throughout the judgments.[113] The concept seems plain enough, although there are bound to be, and have already been,[114] differences of judicial opinion on particular cases or matters of degree.

As to the question of negligence, however, there has been much uncertainty. At its height, the uncertainty led the English Court of Appeal to conclude, in *Carlisle and Cumberland Banking Co. v. Bragg*,[115] that since there existed no general duty of care owed by the signer of ordinary documents to all other persons who might read them, the negligence of the signer was material only when the document actually signed was a bill, cheque or note. That decision set off another storm of controversy,[116] which may only now be abating. The problems raised by the case were particularly difficult in Canada, by reason of the express adoption, by the Supreme Court of Canada,[117] of the reasoning in the *Bragg* decision. Thus, although the House of Lords overruled *Bragg* in *Gallie v. Lee*,[118] some Canadian courts continued to apply the law as laid down by the Supreme Court of Canada.[119] However, in December 1982, that court reversed its earlier decision,[120] to bring the law in Canada into accord with *Gallie v. Lee* at last.

Notwithstanding all of the foregoing, however, the position of bills, cheques and notes is not so unclear. Whether for sufficient reason or not, the cases have always placed them on a special footing. Negligence leading to the inadvertent signing of one of them has always been said to be sufficient to incur liability.[121] All that is now required is a showing of carelessness.[122] The effect is, of course, to restrict the scope of the

defence in the law of bills of exchange.[123]

Present Law

It is believed that the best succinct statement of the present scope of the plea of *non est factum* is still to be found in the speech of Lord Pearson, in *Gallie v. Lee*,[124] as follows:

> In my opinion, the plea of non est factum ought to be available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is not capable of both reading and sufficiently understanding the deed or other document to be signed. By "sufficiently understanding" I mean understanding at least to the point of detecting a fundamental difference between the actual document and the document as the signer had believed it to be. There must be a proper case for such relief. There would not be a proper case if (a) the signature of the document was brought about by negligence of the signer in failing to take precautions which he ought to have taken, or (b) the actual document was not fundamentally different from the document as the signer believed it to be.

It is not enough that a party signed as a matter of form, even without reading,[125] or made a mistake or simply failed to understand[126] unless, perhaps, the mistake was perceived by the other party, in which case, there may be a defence of misrepresentation,[126.1] or even a claim for rectification.[127] The defence may also be available where the failure by the signer to comprehend the significance of the documents being signed or the character in which they were asked to sign[127.1] was actively contributed to by the party claiming to enforce them according to their terms.[128] For example, in recent decisions courts have allowed the defence to makers who were illiterate and inexperienced in matters of business and actively misled by the payees as to the nature and purpose of the instruments they were asked to sign.[129]

In assessing whether the party signing was "careless", the court will have regard for all the circumstances, and especially the experience and condition of the signer, to discover whether the standard of care that might reasonably be expected of such a person was met.[130] Where the plaintiff was in a position to influence the maker and endorser and, possibly, to confuse them concerning the legal effects of the document, the relief may be more readily available.[131] Finally, where documents are signed in blank, it will usually be conclusive evidence of carelessness.[132]

§26:30.40(4)(b) Duress and Undue Influence

Duress began its separate legal existence as a tort doctrine, and only later was accepted in equity as a defence to obligations coercively obtained.[133] There is jurisprudence of duress that is uniquely applicable to negotiable instruments, but is effects in that context may vary from those in the law of contract, as I should try to explain.

Duress has been judicially defined as "the compulsion under which a person acts through fear of personal suffering, as from injury to the body or from confinement, actual or threatened".[134] The *Restatement of the Law of Contracts*[135] is slightly more expansive in its definition:

> . . . any wrongful act . . . that compels a manifestation of apparent consent by another to a transaction without his volition, or . . . any wrongful threat . . . that . . . precludes [the other] from exercising free will and judgment, if the threat was intended or should reasonably have been expected [to have that effect].

That definition has been repeatedly used by American courts of all levels,[136] and catches, better than the first definition, the idea that obligations obtained by such means are flawed.

There is a recognized subset of duress in which the pressure applied is economic in nature, rather than physical or emotional. However, to qualify for relief, a plea of economic duress must complain of the use of extraordinary pressure that vitiates consent. A leading illustration is the decision of the Privy Council in *Pao On v. Lau Yiu Long*,[136.1] which established a four point test to distinguish this from ordinary commercial

pressure:

> In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it.

This test has been adopted by the Ontario Court of Appeal[136.2] and applied by the lower courts.[136.3] I have found no decided case in which the defence has been successful.

There have been no such attempts, judicial or academic, at a definition of undue influence. It is a concept of equitable jurisprudence of great sophistication and sensitivity, reflecting the concern of courts of equitable jurisdiction to prevent the abuse of position or power to obtain unconscionable advantage and, in many different contexts, the means by which they accomplish that objective.

To be undue influence in contemplation of law, there must be — to sum it up in a word — coercion.[137]

Duress and undue influence may not be properly understood if conceived of in narrow terms of definitions. There is no point in attempting to distinguish the two with precision. Rather, they must be appreciated as representing a whole range of conduct, varying by degrees, from the most blatant uses of force on the one hand, to abuses of confidence, breach of fiduciary duty, or merely taking undue advantage of a weaker party on the other.[139] This explains why both duress[140] and undue influence[141] may be characterized as species of fraud but, being specifically referred to by BEA, s. 55(2) in its listing of examples of defects of title, warrant separate mention in the context of bills, cheques and notes. However, except in the scope to be given such defences against remote parties, there is nothing unusual in their application to the engagements of parties to negotiable instruments. If the circumstances of a party's signing of a bill, cheque or note are such that these jurisdictions would protect him from liability upon his promise, then at least as between immediate parties,[142] they should also protect him from liability on the instrument. This has been repeatedly decided, both for cases of duress,[143] and for shades of undue influence.[144] However, it has also been decided that the mere fact that a claimant is an immediate party does not prejudice his ability to enforce instruments where he was not implicated in any real or alleged duress or undue influence, and there was no evidence that he knew, or ought reasonably to have known, of it.[145]

As between remote parties, it is clear that the defences grouped under the rubrics of duress and undue influence constitute defects of title to instruments obtained by conduct that may be so characterized, or otherwise affected by such conduct. That is, although they may be asserted against one who takes with knowledge of the facts,[146] they are of no avail against one having the rights (but not the status) of a holder in due course.[147]

It is not clear whether these defences may also constitute real or absolute defences, available even against a holder in due course. They are, after all, species of fraud and (as discussed at §26:30.40(4)(a), *supra*), it is clear that fraud that completely avoids the contract of the victim constitutes such an absolute defence. There are conflicting indications in the case law. For example, in *Sleen v. Auld*,[148] the Supreme Court of Canada thought that making payments for three years put beyond the defendant the ability to claim relief from allegedly fraudulent misrepresentation. Although that case was between immediate parties, it does indicate that the fraud there practised made the party's engagement on the bill voidable only. As such, it would not be a real defence, but a defect of title only. It is likely (and desirable for the protection of parties relying, in good faith, upon negotiable instruments) that most types of fraud would have this effect in law. The possibility should be kept open, however, that particularly grossly fraudulent conduct might so completely overwhelm the mind of the victim as to render the manifestation of his assent completely null and void. If such a case were to arise,[149] the court would be justified in affording the victim an absolute or real defence.

§26:30.40(4)(c) Illegal Consideration

§26:30.40(4)(c)(i) *Remedial effect of classification*

When the original *Bills of Exchange Act* was enacted by the Parliament at Westminster in the late 19th century[150] the generally accepted opinion was that a promise given for an illegal consideration was void. A passage from the judgment of Parke B. in *Cope v. Rowlands*[151] recently quoted with approval and applied in the context of a dispute over the effect of a violation of s. 347 of the *Criminal Code*[152] in a promissory note by Arbour J. in the decision of the Supreme Court in *Transport North America Express Inc. v. v. New Solutions Financial Corp.*,[153] is representative:

> Where a contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by statute, though the statute inflicts a penalty only, because such a penalty implies prohibition.

Some of the old case law supporting this analysis had earlier been reviewed with approval by the Supreme Court of Canada in a case from the same era as *Cope v. Rowlands*: *Bank of Toronto v. Perkins*.[154] In that case, Ritchie C.J. stated:[154.1]

> It would be a curious state of the law if, after the Legislature had prohibited a transaction, parties could enter into it and, in defiance of the law, compel courts to enforce and give effect to their illegal transactions.

It may be seen, therefore, that in classifying "illegal consideration" as a mere defect of title,[154.2] the BEA changed the old law that would have avoided an affected instrument for all purposes. This was good policy in an era in which negotiable instruments formed an important part of the money supply and were commonly negotiated and delivered as media of payment.[154.3] For the protection of borrowers, negotiable instruments that exacted an usurious consideration were void in the hands of the usurer. For the protection of innocent subsequent holders, an usurious bill or note became payable in full at the suit of a subsequent holder provided they could demonstrate *bona fide* purchase for value and without notice of his transferor's defective title.

§26:30.40(4)(c)(ii) *Meaning of illegal in this context*

Section 55(2) lists "an illegal consideration" among its examples of defects of title, but the BEA does not define that term. That has not been a source of difficulty for the Canadian courts. The clearest cases are those in which the illegality is established by some provision of federal law. Thus, cases may be found in the reports holding that a promissory note given to stifle a prosecution,[154.4] or for the price of goods that it is illegal to sell,[154.5] were given for an illegal consideration. One would normally include in this class of cases those deciding that the rate of interest on a loan is in violation of s. 347 of the *Criminal Code*,[154.6] but, for the reasons that I discuss elsewhere,[154.7] those decisions form a special class by virtue of the fact that the Supreme Court of Canada has decided that a finding of illegality under that provision may have unique consequences.

Where the allegedly illegal consideration is a promise to pay that is made in circumstances constituting a violation of a provincial statute, the result is the same as for breach of a federal law.[154.8] Thus, a promise by a debtor to pay the deficiency following repossession and sale of collateral by a secured creditor has been held to be unenforceable where the applicable provincial law has a "seize or sue" provision, under which the creditor is required to choose between those remedies.[154.9]

A line of decisions modifying the terms of promissory notes given in transactions governed by provincial payday loan statutes require, and receive, more thorough examination elsewhere.[154.10]

The old cases under the *Gaming Acts* of the provinces were subject to special considerations[154.11] and have ceased to be of any relevance, given the repeal of most of the provincial gaming statutes, and the lenience

with which gaming is now regarded in Canadian society.[154.12] In provinces where gaming is no longer illegal, the courts appear to be comfortable giving judgment on promissory notes and cheques given for gaming debts.[154.13]

Some old cases included among the sources of illegal consideration, promises made in the context of agreements that were void by reason of public policy. Examples of these may still arise, but it should be noted that the judicial attitude towards public policy is less vigilant now than in the past. For example, a contract between an unmarried man and woman to cohabit, which would have been unlawful on grounds of public policy not too many years ago, may now be the basis of a judicial division of their family property upon dissolution of the relationship.[154.14] And the Ontario Court of Appeal has decided,[154.15] after a careful consideration of the public policy issue, that gaming has ceased to be contrary to the public policy of Ontario.

§26:30.40(4)(c)(iii) *Effect of illegal consideration*

Since s. 55(2) characterizes illegal consideration as a defect of title, its effect is limited. That is, a defence of illegal consideration may be asserted against an immediate party[154.16] in the ordinary way, but not against a remote party[154.17] who satisfies the onus of proof[154.18] that they qualify as a holder in due course.[154.19] Thus, as already noted, where a promissory note is given in consideration of an agreement to stifle a prosecution,[154.20] or for the price of goods that it is illegal to sell,[154.21] the instrument is unenforceable by the payee. For the reasons that I discuss elsewhere,[154.22] in the increasingly common payday loan cases, the courts have adopted a different approach established by the Supreme Court of Canada[154.23] in a deliberate attempt to soften the impact of the criminal rate of interest provisions of the *Criminal Code*. With rare exceptions,[154.24] they now apply the same approach to promissory notes given in loan transactions in violation of the applicable provincial payday loan statutes. That is, the courts routinely reduce the sum recoverable by the payday loan companies so that the recovery does not exceed the lawful maximum cost of borrowing.[154.25]

There are no cases in which a holder in due course has successfully defeated a defence of illegal consideration raised by the maker of a promissory note, but there is one in which a holder did not. In *Red River Forest Products Inc. v. Ferguson*[154.26] the plaintiff bought, for $20,000 cash, a promissory note for $200,000 from a man who had won it in a poker game in Manitoba, where gaming was still illegal at the time. De Graves J. found that the plaintiff had failed to show that he purchased in good faith and without knowledge of the illegal consideration given for the note by its payee. Accordingly, he had no greater right to enforce payment than the payee would have had. And that is in accordance with s. 57(2) of the BEA, which places on the holder the onus of proving that he took in good faith and for value without notice of the illegal consideration.[154.27]

§26:30.40(4)(c)(iv) *Effect of collateral illegality*

It should be noted that s. 55(2) uses the term "illegal consideration" to describe the defect of title. On a strict interpretation of that language, then, merely collateral illegality, or some taint of illegality in the conduct of one of the parties not forming part of the consideration for the instrument ought to be irrelevant. The case law is not quite as clear on this point as the principle would suggest. Rather, an examination of the decisions indicates that when the promise to pay contained in a promissory note or cheque is not directly in contravention of an applicable statutory prohibition, the issues raised by an allegation of illegal consideration tend to become more subtle and complex. Before the decision in *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.*,[155] the Canadian courts were reluctant to adjust the incidents of bargains that were tainted, in any degree, with illegality.[156] Since that decision, they have shown themselves to be sensitive to differing degrees of heinousness and prepared to adjust the civil consequences to fit the crime.[157] Thus, a showing of some collateral or incidental illegality, introduced by the improper purpose of one party, but not forming the basis of the transaction giving rise to the bill, cheque or note, may be completely immaterial.[158] However, where

the illegality does affect the whole basis of the transaction, such as where a note or cheque is given for the price of goods it is unlawful to buy and sell,[159] the title of an immediate party payee to the instrument is defective.[160] *A fortiori*, if there were a competent federal statute expressly voiding bills, cheques or notes given for some illegal purpose, it seems that the items could be made to be null and void even in the hands of holders in due course.[161] The distinction, although fundamental, is not always recognized by courts more impressed by the fact of some disclosed illegality than motivated to draw precise limits to contain its effects. For example, in *Wojnarowski v. Bomar Alarms Ltd.*[162] Quinn J. refused to enforce three promissory notes given by one of the defendants to the plaintiff's father in connection with loans made to the defendant. The evidence disclosed that the maker and payee had agreed that interest payments required under the notes would be disguised so as to assist the payee in evading the payment of income tax on them. Cheques actually given in payment of interest were made payable to fictitious payees in varying amounts each month, to avoid detection by auditors. Quinn J. appears to confuse the facts in asserting:[162.1]

> Promissory notes, in which the parties, using fictitious payees, conspire not to declare the interest as income, are illegal . . .
>
> The parties to the promissory notes, as well as [the plaintiff] and her siblings, all possessed an illegal intent and are equally culpable.

Well, of course, if the purpose of the loan was illegal, the notes would be unenforceable in the hands of the original payee (the father) and an interesting question would arise as to whether that was a personal defence or a defect of title that disqualified the daughter from enforcing them, as well. But those were not the facts. The loan was for use in the maker's business and was used for that purpose. The only illegality was in the payee's evasive actions in demanding cheques in a form that would obscure the identification of the proceeds as undeclared interest income. That would be sufficient reason for a court to refuse to enforce the cheques, but that was not the issue. The original loans were not for an unlawful purpose and did not further one. If alive, the payee would not have had to disclose his unlawful intention to conceal income in order to enforce payment of the principal. Even if that unlawful purpose had come to the attention of the court, the fact that the *Income Tax Act*[162.2] provides for penalties for persons who fail to declare income ought to have suggested that the statutory offence affected the interest payments only; not the principal. The refusal to enforce repayment of the principal of the three loans appears to be disproportionate to the policy objective of discouraging an illegal agreement to conceal income.[162.3]

§26:30.40(4)(d) Negotiation in Breach of Faith

The title of a person to a bill, cheque or note is made defective by BEA, s. 55(2) when he negotiates it in breach of faith or in such circumstances as to amount to a fraud. This is different from the fraud referred to earlier in the section and discussed at §26:30.40(4)(a), *supra*. That fraud, although it may consist of mere breach of faith, affects the consideration for the item itself. The fraud now referred to arises only upon its subsequent negotiation. It is a defect of title that affects only holders not having the rights of holders in due course (see §24:30.30). In other words, even though a person is negotiating a bill in breach of faith, the transferee may take as a holder in due course if he does not know of the defect in the transferor's title and otherwise fulfils the requirements of BEA, s. 55.[175]

It is curious that this jurisdiction seems to have developed more fully in Canada than in any of the other countries having Acts based on the British Act. None of the standard Commonwealth texts makes any comment on the words of the section,[176] and the half-dozen or so Canadian cases that have applied them have generally regarded the matter as one of first impression.[177]

In one significant exception,[178] and one of the few cases to reach the Supreme Court of Canada, the court cited and followed an English Court of Appeal decision[179] on similar facts. In both cases, a cheque given for the accommodation of a third party was countermanded before presentment. In both, the party receiving the

instrument and presenting it for payment was aware of that fact and that the drawer had instructed the payee not to negotiate the item. In the recent Canadian case, it was the manager of the bank who received the cheque from a customer and attempted to collect it despite his knowledge of the drawer's acts and statements. In the English case, it was an endorsee from the payee, but again, with full knowledge. In both, the courts held that the negotiation was in breach of faith, and the holder, knowing of that, failed to acquire the status of holder in due course. The jurisdiction invoked in these cases lies within a very narrow compass and may easily be confused with several other, more well-established lines of authority. For example, the existence of the fraud affecting the negotiation, even without actual evidence of the holder's knowledge of it, would be sufficient to shift the onus of establishing holder in due course status to the holder under BEA, s. 57(2) (see §24:30.50). The facts being what they were in those cases, that onus could not have been satisfied.

In other cases, the knowledge said to disentitle the holder from taking as a holder in due course was the intended misapplication of the proceeds of the instrument by an agent empowered to negotiate it.[180] In those cases, the courts tended to cite Lord Herschell's statement, from *London Joint Stock Bank v. Simmons*,[181] that a holder cannot be taking in good faith "if there be anything which excites the suspicion that there is something wrong in the transaction". Clearly, knowledge by the endorsee that his endorser is negotiating in breach of faith, or in fraud of the true owner of the instrument, would be knowledge of "something wrong". It is probably nothing more than historical accident that those cases tended to cite Lord Herschell rather than BEA, s. 55(2).

Finally, there are the cases such as *Holmes v. Kidd*,[182] and *Ching v. Jeffery*,[183] discussed in §26:30.40(3)(b), *supra*, as examples of equities that were said, before the BEA, to attach to the bill itself and to bind post-maturity takers for value. Various circumstances were accepted by the courts as constituting a negotiation after maturity as a breach of faith. It is intriguing to speculate whether the difficulties of the 1960s, in Canada, with consumer notes might have been avoided and Part V of the BEA (see Chapter 36) never required, if more use had been made of BEA, s. 55(2). It does not seem to stretch the words to suggest that negotiating a consumer's note would be a breach of faith or fraud if the goods sold were known by both seller and financing party to be shoddy or the debt not self-liquidating as represented (see Chapter 36).

With all of the other lines of authority, it may be understandable that the cases exploring the meaning of the closing words of BEA, s. 55(2) have not received more attention, but there is no reason for it to continue. The words of the subsection are plain and must be given some meaning before pre-BEA concepts such as "something wrong" or "equity attaching to the bill" are turned to as bases for judgments.

Fortunately, Nordheimer J. of the Ontario Superior Court of Justice provided us fairly recently with an excellent example of the correct application of BEA, s. 55(2) and the pre-Act case law. In *Ierullo v. Rovan*,[184] a rogue persuaded the plaintiff to enter into a partnership and to provide him with some blank cheques, signed by her, to purchase equipment and supplies. He used one of the cheques to pay off an old debt that he owed to the defendant, filling it up before delivering it to him. Nordheimer J. correctly characterized the delivery of the cheque to the payee as a negotiation in breach of faith, which had the effect of transferring to the defendant the onus of proving that he took in good faith and for value and without notice of the rogue's defect of title. That decision was confirmed in short reasons by the Divisional Court.[184.1]

Other cases and fact situations illustrating the concept include an agreement by the holder at maturity to apply the bill only to a particular purpose,[185] or not to negotiate it away,[186] to give additional time for payment,[187] or to accept payment in kind or services[188] instead of money.

There may be other cases as well which, although not using the term "breach of faith", may perhaps be best understood as examples of the concept. For example, in *Standard Bank of Canada v. Wettlaufer*,[189] the defendant accepted a bill pursuant to an express agreement that he was to be liable on it only if, and to the extent that, he owed money to the drawer at the date of maturity. The plaintiff bank took the bill by endorsement with full knowledge of the arrangement and was quite properly bound by it although, of course,

one taking without notice would have taken free of it. Another example is *Commercial Bank of Windsor v. Morrison*,[190] where the Supreme Court of Canada held that delivery of a promissory note, on an express condition that it was to be used only in particular circumstances, was a defence to an action on the note by a holder with full knowledge of the condition. Although there is not a word in either decision concerning negotiation in breach of faith, it may be seen that that is what both cases involved.

A question has arisen regarding the effect on collecting banks of accepting for deposit a cheque that is "proceeds" of collateral that is subject to a perfected security interest in favour of a rival creditor of the customer. I discuss the issue elsewhere in the context of statutory tracing,[190.1] but wish to add a short comment in the present context of negotiation in breach of faith.

The *Wetlauffer* and *Morrison* cases[190.2] and the others cited, *supra*, are old, but would probably be decided the same way again if they were to arise now, if only the same provisions of the BEA were to be considered. However, as all were decided before 1966 when Parliament added s. 165(3) to the Act,[190.3] a question arises as to whether, although correctly decided in accordance with s. 57(2) at the time, they remain good law at the present, under s. 165(3). That section gives a bank the rights and powers of a holder in due course simply upon its acceptance of a cheque for deposit and credit to the account of a customer. It contains no mention of, or reference to, the qualifying conditions of ss. 55(2) and 57(2) which were in force when the *Wetlauffer*, *Morrison* and other earlier decisions were delivered. The banks in both those cases lost the right to enforce the deposited instrument because each knew that there were facts that would make the negotiation of it by its customer "wrong," in the sense that it would be in violation of some contract or condition that was legally binding on the transferor. In other words, what somehow became known as "a breach of faith" would have been more accurately described as "a lawful restraint." There is no case that extends the meaning of "breach of faith" to merely subjectively offensive conduct. But, once it was shown that the customer's title to the deposited instrument was defective in this legal sense, the bankers had the onus to show that they took in good faith, for value and without notice of the defect.[190.4] When they were unable to discharge that onus, they failed to achieve holder in due course status, and became subject to the claim of the person in whose favour the title defect was enforceable. Although s. 165(3) does not qualify the right of the bank of deposit in the same way, I do not think that it is capable of producing any different result. That is because it has been authoritatively interpreted in a way that seems to require the same result.

That interpretation was given in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*,[190.5] when the Supreme Court of Canada decided that the protection of s. 165(3) was available to banks only when the customer from whom a deposit was accepted, was "rightfully entitled" to the proceeds credited to their account.[190.6] Of course, the defect in the customer's right to the cheques in that case was that they bore only forged endorsements, capable of bestowing no right on the holder. The question becomes, therefore, whether a customer whose title to a cheque is merely defective by reason of a deposit with a different bank in breach of faith with their secured creditor can still be said to be "rightfully entitled" to the cheque. I think that they can, but that may not matter if the bank has notice or knowledge of the prior security interest.

My reasoning is this. A person who has granted a security interest in some items of their property remains the "owner" of them. The terms of the typical security agreement may restrict their freedom of action, but does not deprive them of their property rights. That would suggest that a customer who diverts a proceeds cheque to some purpose that is prohibited by the security agreement to which the collateral is subject remains, nevertheless, "rightfully entitled" to the instrument, even while wrongfully depriving the secured creditor of it and its proceeds.[190.7] If unaware of the prior security agreement, and not put on inquiry by suspicious circumstances, the collecting bank does not convert the instrument by accepting it for deposit and crediting the proceeds in the customer's account, because it pays the person rightfully entitled to enforce payment. The customer's wrongful act is not in ordering collection of the proceeds, but in diverting them from the control of the secured creditor contrary to an explicit prohibition in the security agreement. If the bank can show that it acted in good faith and gave value without notice or knowledge of the prior security

interest, it should be granted holder in due course status under either s. 57(2) or s. 165(3).[190.8]

It is otherwise, however, if the bank knows or ought reasonably to suspect that the cheque offered for deposit is proceeds of the sale of collateral that is subject to a perfected security interest of a rival creditor.[190.9] This was first decided in *Transamerica Commercial Finance Corporation v. Royal Bank*[190.10] and again in *Indian Head Credit Union v. Andrew*[190.11] and *CFI Trust (Trustee) v. Royal Bank of Canada*[190.12] on the application of provisions of the applicable provincial PPSA. Although none of those decisions takes any notice of either s. 57(2) or s. 165(3), the omission is immaterial, since the result would be the same in any event. And that appears to be perfectly appropriate, since s. 165(3) was never intended to resolve difficult issues of this nature.[190.13]

While this law is clear in principle, the practical application has become confused due to the unauthorized and disruptive intrusion by some provincial legislatures into the field by the enactment of "debtor-initiated payments" provisions in their PPSAs, which purport to define the conditions under which a transferee of a negotiable instrument may retain the proceeds against a claim by a secured creditor. I discuss these elsewhere[190.14] and try to explain why I think that they have no legitimacy and should be given no effect.[190.15]

§26:30.40(4)(e) Failure of Consideration

Total or partial failure of the consideration expected, by a party liable upon a bill, cheque or note, to be received in the underlying transaction is not generally considered to constitute a defect in the title of a holder of the item.[191] In fact, it is trite law that partial or total failure of consideration is not a defence against a remote party who is a holder in due course or a transferee for value,[192] and may be raised in actions between immediate parties to enforce payment of the instrument only if judicially considered to be procedurally expedient and required by the dictates of justice.[193] The most recent cases have begun to deny contractual defences even as between immediate parties.[194] In restitutionary actions, after the instrument has been paid, more lenience is permitted to enable the court to determine whether the payment of the instrument has resulted in an unjust enrichment of the immediate party.[195]

The rule denying the materiality of partial or even total failure of consideration in the underlying transaction is important to preserving the utility of bills of exchange in international commerce.[196] Parties liable on bills must "pay on the bill of exchange first and pursue claims later".[197]

In very special circumstances, failure of consideration may become available against a remote party who does not have the rights of a holder in due course, but not against all such holders. For example, since it is not a defect of title, it is not available against one who takes without notice of it and who would have been a holder in due course but for the fact that the affected item was negotiated to him only after its maturity.[198]

The special circumstances that may subject a remote party to defences based on failure of the underlying consideration appear to be three:

(1) those in which either the nature of the failure or the negotiation of the instrument is such as to constitute the transfer a fraud on the party or a negotiation in breach of faith which is known by the transferee (see §26:30.40(4)(d), *supra*);

(2) those bringing the item within Part V of the BEA as a "consumer bill, cheque or note" (see Chapter 36);

(3) those raising the case law defence of "close connection", disentitling the holder from claiming due course status (see §35:50).

The decision of the Supreme Court of Canada in *Traders Finance Corp. Ltd. v. Casselman*[199] may represent a

fourth category or, perhaps, may be properly classified under all of the foregoing categories. In that case, the court ruled that the "seize or sue" provisions of the Saskatchewan *Limitation of Civil Rights Act*[200] precluded recovery of a contract balance from a buyer under a conditional sale contract after repossession of the goods, thus depriving any note given by him of the consideration required to enforce it against either the payee or an endorsee from him who took with full knowledge of the circumstances. The facts were very confused. Neither Locke J. nor Judson J. (who delivered the only two judgments) went to any lengths to explain how it could be said that the endorsee knew the consideration was going to fail when it took the note at the inception of the transaction. It would seem that, until default, and the election to seize is actually made by the seller or his assignee, there is no basis on which a note might be impugned. The case is clearly exceptional and the statements by Locke and Judson JJ. concerning the legal effect of knowledge of failure of consideration intended to be limited to their context.

There have been several good cases in Canada that clearly illustrate the proper scope of the defence of failure of consideration as against remote parties. In *Donald E. Hirtle Transport Ltd. v. I.A.C.*,[201] the respondent agreed to assist in the financing of a trailer that the appellant wished to acquire from another. A conditional sale agreement and promissory note were completed and fully executed, and the cash proceeds advanced, although all parties knew that the seller did not yet own the goods. In fact, the transaction was specifically intended, by all concerned, to provide the seller with the funds required to acquire the goods to be sold — which, however, he never did. After a review of the authorities, MacKeigan C.J.N.S., on behalf of the Appeal Division of the Nova Scotia Supreme Court, held that the respondent was a holder in due course and fully able to enforce the note. Although the buyer never received any consideration for the promise to pay, the negotiation not being in breach of faith or fraudulent, the payee's title to the note as a holder for value was not defective.

A similar result was reached 10 years earlier with respect to a partial failure of consideration arising from defective work in a building contract.[202] The court ruled that it was not sufficient for the maker of a note to show merely that the holder knew, when taking it, that the payee was in financial difficulties and that the maker had complained about faulty workmanship.

Other courts have come to the same conclusion,[203] which must now be regarded as the only correct conclusion in the absence of special circumstances such as those referred to in the numbered list, *supra*.

A series of recent cases, involving certified cheques, has raised a risk that a doubt may seem to have arisen with respect to the continued validity of the foregoing analysis. That is because, in these cases,[204] the courts may be observed to have engaged in extensive investigation of the equities between a bank and the payee of a cheque that a bank had mistakenly certified, in circumstances where the mistake of the bank meant that the cheque was not supported by any valid consideration. However, on close examination, it may be seen that in all of these cases, the cheque had already been paid. The claim was by the bank for restitutionary relief against its mistaken payment, either against the payee, or (if it had a defence of change of position, or discharge for value, for example), then against the drawer for involuntary discharge of the underlying obligation. The cases do not weaken the propositions that payees may be remote parties and may take free of the defence of failure of consideration in the underlying transaction.[205] They were subsequent proceedings in which the payment of the instrument was questioned on principles of restitution, in a claim for repayment. When banks or other depositary financial institutions attempt to raise the equities as a defence to action by the payee on a certified cheque, they fail, and properly so.[206] The equities may always be raised in new proceedings,[207] and ought to be, when questions of the sufficiency of the consideration essentially arise out of a dispute between a party to the instrument who is not also a party to the action to enforce it.[208]

§26:30.40(5) Bill C-305 Defences

Radical changes are proposed to the foregoing provisions. A private member's bill,[209] which was first introduced in the Parliament that was prorogued in late 2008 in the political crisis over the threatened

ascendancy of a Liberal/NDP coalition government, has been reintroduced as Bill C-305, *An Act to amend the Bills of Exchange Act*.[210] The Bill proposes to amend s. 73 of the BEA to make holders in due course liable to the same defences as on a consumer bill, regardless of the fact that the cheque is not specially marked and post-dated as required by Part V of the Act.[211] The Bill's principal section is as follows:

> 1(2) Paragraph 73(1)(*b*) of the Act is replaced by the following:
>
> > (*b*) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, *except for any defence or right of set-off that the purchaser would have had in an action by the seller*, and may enforce *partial or full* payment against all parties liable on the bill;
> >
> > . . . . .
>
> (2) *The definitions in section 188 apply to this section.* [Emphasis in the Bill.]

As I understand it, the background to this proposal lies in a series of newspaper columns in *The Vancouver Sun* by columnist Don Cayo,[212] protesting against the "victimization" of citizens by a local cheque-cashing bureau. According to Mr. Cayo, large numbers of residents of the Lower Mainland in British Columbia were issuing cheques to small contractors and handymen for home repairs and such before the work was satisfactorily completed. They countermanded the cheques but soon found themselves sued in Provincial Court by the bureau, claiming holder in due course status. Since a contractual defence between the drawer and the payee is not enforceable against a holder in due course,[213] the home-owners routinely lost. He proposed the use of crossed cheques as a defensive measure. In private correspondence I perusaded Mr. Cayo that his proposal would entail many more changes in the law and practice of cheques than he intended, not all of which would be favourable to customers, and suggested that he promote the use of the "consumer bill" provisions already in the Act, instead. It seems that Mr. Cayo may have persuaded the NDP Member for Delta, Ms. Davis, to introduce Bill C-305 as a way of giving consumers the benefits of Part V of the Act, without actually having to label each cheque as a "consumer purchase", as required by those provisions.

It is immediately apparent that, if enacted in its present form, the Bill would destroy the negotiability of all personal cheques[214] and cripple the cheque payment system because the sum payable would no longer be certain. No person, taking a personal cheque for deposit or any other purpose, could know, without extensive inquiries, whether the drawer and payee qualified as a "purchaser" and "seller" under s. 188 and, if so, whether there were any outstanding matters of dispute between them which would provide a defence to some or all of the sum expressed to be payable. The consumer defences provided for in Part V of the Act are effective within a limited scope of application precisely because each instrument that is potentially subject to consumer defences is clearly marked as a "consumer bill" and post-dated at least 30 days. All persons dealing with them know immediately that they are acquiring a potentially flawed liability. Under the proposal of Bill C-305, the liability of each drawer would potentially be similarly flawed, but there would be no warning of that to prospective transferees. The Bill should not be passed in its present form.

I discuss in §22:20.80(1) whether making cheques payable to a named payee "only" would be as effective and less disruptive.

§26:30.50 Contractual Defences

An important issue in any consideration of the defences available in actions on bills of exchange is the admissibility of evidence other than the instrument on which the action is based. As bills, cheques and notes are written contracts, the parol evidence rule applies to them *prima facie*. When that rule is strictly applied, the general rule of contract law applies, with the result that no evidence is admissible to deny or to vary the terms of the instrument. I discuss the extent to which the rule applies to negotiable instruments in §§28:100.10 *et seq*. In brief: the rule has no application to evidence directed to issues for which the *Bills of Exchange Act* expressly provides a rule to the contrary.[214.1] It operates in other contexts in the same way that

it does in the law of contract generally, except that where the action to enforce the terms of the instrument strictly is made by a holder in due course, or one having the rights of such a holder, the range of admissible evidence is restricted by the narrower scope allowed by the Act for defences against the claims of such persons.[214.2]

§26:30.50(1) Incapacity and Lack of Authority

Many contractual defences are discussed in other sections of this treatise. Various sources and degrees of incapacity are discussed in §23:30, *supra*, and want of authority or agency power in one professing to represent another are discussed in §23:40, *supra*.

§26:30.50(2) Statutes of Frauds; Frustration

Some defences, although available with respect to other forms of contract, obviously have no possible application to bills, such as a Statute of Frauds requirement of a signed memorandum[215] or frustration. A party's inability to pay money when due cannot provide him with a defence of frustration, but *semble* the conditions on which he agreed to pay may change so drastically that his payment cannot be enforced by the other parties in immediate relationship with him.[216] However, that would appear to be more clearly a case of a breach of express or implied condition precedent rather than of frustration.

§26:30.50(3) Suspensive Condition

A party may show, as against an immediate party, that his promise was subject to a condition that has not been performed by the other.[217]

§26:30.50(4) Lack of Contractual Intent

Defences tending to show lack of the requisite degree of consent and intention to enter binding legal relations may also apply to bills, as well as to other forms of contracts generally. As between immediate parties, it is always possible for them to agree that no legal duties will be created despite their use of a form of bill or note.[218]

§26:30.50(5) Fraud, Misrepresentation and Unconscionability

Similarly, a party's apparent "engagement" on a bill or note may be deprived of binding legal force by the fraud or misrepresentation of the other, which may vary in all the circumstances and shade away, by degrees, from outright fraud to the most refined concepts of unconscionability such as the abuse of relationships deemed or found to have been fiduciary or confidential in nature, or the mere fact of improper advantage being taken by a strong party of a weaker. The case law on such defences is almost exclusively concerned with their unavailability against remote parties who are either holders for value or holders in due course. However, there is no question that these defences remain available in actions by immediate parties.[219]

§26:30.50(6) Mistake

Similarly, the law of mistake would appear to operate within the relation of immediate parties in exactly the same way as it affects the obligations of parties to simple contracts. For example, if money is paid under a mistake of fact, it is recoverable from an immediate party, notwithstanding that a cheque may have been the means of payment.[220] In *Prince Albert Credit Union v. Diehl*,[221] a promissory note was ordered to be rectified so that the signature of a corporate signing officer would not entail personal liability under BEA, s. 51. The payee was found to have actually perceived that the maker of the note was acting under a unilateral mistake in selecting a form of signature that carried the potential for personal liability, thinking that the note was binding only upon her corporation. Curiously, the court considered that the defendant's negligence in signing without reading was sufficient to deprive her of the defence of *non est factum*, but sufficient to allow

rectification, which had the same result.

§26:30.50(7) Statutory Prohibition

There have been two exceptional cases[222] that indicate that, as between immediate parties, the courts are not prepared to permit the separate constitutional jurisdictions over negotiable instruments and contracts and civil rights (see §20:30.20) to create injustice. There is no doubt that, in the ordinary case, a plaintiff's cause of action on a cheque or note is not affected by provincial consumer protection laws. However, in the two cases referred to, actions were brought on notes perceived by the courts to be for the amount of a deficiency realized by a secured seller following repossession. Since provincial "seize or sue" statutes[223] in the two jurisdictions prohibited secured sellers from claiming any deficiency after repossession, the actions were thus characterized as attempts by the sellers to do indirectly what they could not do directly,[224] and dismissed. The cases are clearly exceptional, but serve well to illustrate the scope of the defences available between immediate parties.

§26:30.50(8) Failure of Consideration

§26:30.50(8)(a) Total Failure

Both total failure of consideration[225] and complete absence of consideration (as, for example, where a gift is made by cheque of the donor but not completed by payment upon presentment)[226] are defences to actions upon the engagements of immediate parties to a bill, cheque or note.[227] A gratuitous promise of payment does not become binding at the suit of the immediate promisee merely because it is expressed formally in a negotiable instrument.[228] Nor does an illegal or other promise, otherwise unenforceable as contrary to public policy.[229]

The clearest modern restatements of this law may be found in the reasons of White J. hearing the applicatio for leave to appeal,[229.1] and Dunnet J., for the Divisional Court, on appeal[229.2] in a case involving a claim by the acceptor of an international trade bill of exchange to set off unliquidated damages against the sum payable to the payee of the instrument. A motion having been granted by Potts J. sending both the claim and defence to trial was appealed on a motion for leave to appeal the unreport decision to White J., who granted leave to appeal the order, stating:[229.3]

> A total failure consideration is only established where there is clear evidence that negatives all possible consideration. Quality discrepancies go to the issue of the adequacy of consideration, not the failure of consideration. Where a party is in possession of the shipped goods, there cannot be a total failure of consideration unless there is clear evidence that the goods cannot be used for the purpose they were intended.
>
> Allegations of repudiation or breach of contract that would allow a party to delay payment of a bill of exchange must be supported by sufficient evidence of such repudiation. In order to avoid the principle of pay first claim later, the total failure of consideration must be exceptional and not simply one that can be addressed by a counterclaim for damages.
>
> Where a failure of consideration is neither liquidated nor absolute, it cannot operate as a defence to an accepted bill of exchange. [Citations omitted.]

On appeal to the Divisional Court, Dunnet J., *per cur.* added:[229.4]

> The defendant does not deny the validity of the bills of exchange and that the defendant accepted them, nor does the defendant put in issue whether or not the plaintiff was a holder in due course.
>
> The evidence is that the goods were shipped and have not been returned.
>
> .....
>
> A total failure of consideration is only established where there is clear evidence that negatives all possible

consideration. Quality discrepancies go to the issue of adequacy of consideration only . . . [Citations omitted.]

In the result, the plaintiff was granted summary judgment and costs of the challenge.

§26:30.50(8)(b) Partial Failure

Partial failure of consideration is a special case. Geva, in one of his earliest contributions to the field,[230] argued that it might once have been, and ought to have been, recognized as a defect of title[231] that Chalmers failed to mention in s. 55(2) of the BEA. But he conceded that the modern position was "overwhelmingly" otherwise. It is commonly stated in texts on this subject that partial failure of consideration is available as a defence to an action of a bill by an immediate party only if the failure is pleaded in a specific and liquidated amount. But there is nothing in bills of exchange law to support such a proposition. Also, it seems to me to be an overly simplified generalization of a difficult issue which may be satisfactorily resolved in each case only upon a careful balancing of the concept of negotiability and the requirements of trade, with issues of procedure and maintaining orderly practice in the courts. I address it in §26:40, *infra*.

§26:30.50(8)(b)(i) *Early history*

The rule had its origin in, and properly remains a part of, the law of procedure, not of bills. Byles, in the 8th ed. of 1862, showed that in the earliest cases, going back a hundred years before his own time, the courts would permit a plea of partial failure of consideration between immediate parties where the failure was "in a specific ascertained amount". The reason he gave was that "the jury cannot, in an action on a bill or note, assess by way of set-off the damages arising from a breach of contract, but the defendant must be left to his cross-action".[232] To illustrate, he compared two cases. In the first, a bill for "19.5s. was accepted for value as to "10 and as an accommodation (that is, without value) for the balance. It was held that although a remote holder might enforce its face amount, between the immediate parties, it could be enforced for "10 only.[233] On the other hand, he asserted that "where a bill is given for goods sold or work done, the price, amount, and quality of the work cannot be disputed in an action on the bill".[234]

That was apparently the rule in equity as well. In *Glennie v. Imri*,[235] the reason for denying equitable relief in similar circumstances was the same. The defendant had alleged the usual matters required to take a case out of the courts of Law and into Chancery — that is, fraud (in selling defective goods), and the complicated nature of the accounts — to no avail. However, it was held that his claim for defective goods was "therefore not a case of set-off, but of breach of contract, and for that he must recover damages in another action".[236]

Geva[237] has shown that the courts' reasoning at this period was still shaped by the earliest sale cases in which the seller's warranty that a horse was sound was viewed as a separate obligation from the contract of the sale itself.

§26:30.50(8)(b)(ii) *Early Canadian cases*

Although they were not all informative on their underlying reasoning, the early Canadian cases were equally clear that only liquidated sums might be pleaded.[238] They seem to have gone even slightly further than the English cases. For example, in *Georgian Bay Lumber Co. of Ontario v. Thompson*,[239] McCarthy, Q.C., was able to persuade the Queen's Bench (Richards C.J., Morrison and Wilson JJ.) that even a fraudulently induced partial failure of consideration was best left to a separate action. If a bill was supported by any consideration, it had to be paid on time:

> . . . the defendants cannot tie up the plaintiffs' recovery in their action until the accounts required are taken, or until the defendants' independent demand for damages or compensation has been tried, and assessed or fixed by an accounting.[240]

There are two new ideas here. Time (that is, delay) is recognized as a factor, and legitimately. Time is of the

essence in the payment of bills. However, there is also an appreciation of the significance of the loss of the exchange bargained, for "if the plaintiff could not sustain this action [on the note], he would have parted with his valuable consideration for nothing".[241]

§26:30.50(8)(b)(iii) *Procedural reform*

However, in the time between the earliest English cases and these in Upper Canada, a significant event occurred. The Parliament at Westminster enacted an early *Bills of Exchange Act*, before Chalmers' Bill. It was a code not of substantive rules, but of procedure.[242] Evidently, so many litigants were attempting to defend simple bills actions by alleging fraud and other facts invoking the jurisdiction of the courts of equity, that a more peremptory procedure was required. That early BEA created what appears to be an early Order XIV procedure for summary judgment on bills of exchange. Section 2 permitted a judge to stay the summary judgment procedure upon receipt of an affidavit of merits showing, *inter alia*, "such facts as would make it incumbent upon the holder to prove consideration". Obviously, matters of set-off and all other claims that could themselves give rise to a separate cause of action were intentionally excluded. Thereafter, until the repeal of the Act,[243] whether they cited it or not, the English cases were in fact applying a procedural rule from the early, procedural BEA in denying defences based on unliquidated partial failures of consideration. For example, the leading case of *Agra and Masterman's Bank Ltd. v. Leighton*,[244] although cited and relied upon in the *Georgian Bay Lumber* decision,[245] was decided on the basis of a statute that had no application in Upper Canada.[246]

Throughout the late 19th century, the Canadian courts routinely refused to hear defences to bills or notes actions between immediate parties based upon partial failure of consideration unless the sum claimed to be set off was in a liquidated amount. They typically cited no authority for this proposition at all or, exceptionally, listed the names of one or two English cases without appearing to distinguish between those passed before the Act of 1855 and those after. Nor did they show any appreciation of the fact that, for most of them,[247] the British BEA had no application. By the early 1900s, the courts had forgotten the origins of the rule and cited only the statements of it by Chalmers and Falconbridge.[248] Maclaren[249] dutifully collected all the early Canadian citations but thought that:

> In a number of the cases . . . the decision is based largely upon the technical rules of pleading that then prevailed. Under the modern Judicature Acts, it might in most cases be set up by way of counterclaim.

Falconbridge[250] is, in fact, ambivalent on the point. On the one hand, he cites Chalmers and a dozen conventional cases applying the old procedural rule for the proposition that:

> Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is in an ascertained and liquidated amount, but not otherwise.

At the same time, he observes:[250.1]

> The rule as to partial failure of consideration is, however, largely a matter of pleading and, as against an immediate party, if such failure is not a defence it can, under modern rules of practice, usually be set up by way of counterclaim.

I interpret that final comment as disclosing a generally sympathetic attitude to the application of at least some contract defences to claims on negotiable instruments by immediate parties. The justice of doing so is undeniable; the difficulties, if any, based on procedural concerns.

The problem continues to create ambiguity and conflicting decisions, which I discuss and attempt to explain, elsewhere.[250.2]

§26:30.50(9) Returned Items

In the *Jade Int'l Steel* case,[251] the plaintiffs and the defendants were immediate parties on certain bills that

the plaintiffs had drawn payable to themselves and that the defendants had accepted. The plaintiffs had discounted the acceptances with a foreign bank and had been obliged to take them back up when the defendant dishonoured them by non-payment at maturity. The defendants wished to raise matters of defence that would be applicable as between the immediate parties,[252] but not as between them and a remote holder in due course. The plaintiffs were permitted to shelter under the holder in due course status of their predecessor in title, the foreign bank. Their Lordships treated the matter as one of first impression, apparently unaware that the same point had been decided by the Supreme Court of Canada in 1942.[253] Although the doctrine is curious, and not quite in harmony with the provisions of the BEA dealing with reacquisition of instruments by parties before maturity (see §25:60), it seems to be established on authority.

FOOTNOTES

[153] *Union Investment Co. v. Wells* (1908), 39 S.C.R. 625 at pp. 632-34.

[154] (1807), 1 Camp. 19.

[155] *Union Investment Co. v. Wells, supra*, footnote 153, esp. at p. 647.

[156] *Ibid.*, at p. 648, *per* Duff J.

[157] Of course, the question of whether the transferee acted in good faith so as to qualify as a holder in due course is also a question of fact: see §24:30.10. However, it would be a mistake to confuse the two questions. The question of a reasonable time for presentment has more recently and properly been left to the jury entirely as one of fact: see *Wheeler v. Young* (1897), 13 T.L.R. 468 (Q.B.).

[158] *Bank of British North America v. E.D. Warren & Co.* (1909), 19 O.L.R. 261 (C.A.).

[159] *Provincial Treasurer of Alberta v. Quinte-Canlin Ltd.*, [1974] C.S. 565. *Cf. Ballem v. Fried*, [1923] 4 D.L.R. 1203 (N.S.C.A.), where a stale cheque, six months old, was negotiated to a new holder who was unable to enforce it because the original consideration was an illegal consideration, a quantity of intoxicating liquor.

[160] Canadian Payments Association, *ACSS Rules*, available at www.cdnpay.ca (accessed July 8, 2008).

[161] Canadian Payments Association, *ACSS Rules*, Rule A1 — General Rules Pertaining to Items Acceptable for Exchange, for the Purpose of Clearing and Settlement, available online at www.cdnpay.ca (accessed July 8, 2008) (hereafter "ACSS Rule A1"), Part III.

[162] Canadian Payments Association, *ACSS Rules*, Rule A4 — Returned and Redirected Items, available online at www.cdnpay.ca (accessed July 8, 2008) (hereafter "ACSS Rule A4"), s. 21.

[163] *Provincial Treasurer of Alberta v. Quinte-Canlin Ltd., supra*, footnote 159.

[164] BEA, s. 80. See §27:20.40.

[165] BEA, s. 94. See §27:30.50.

[166] BEA, s. 55(2). See §24:30.10.

[167] (1908), 39 S.C.R. 625 at p. 627.

[168] It is conceivable that a drawer or endorser might accept a re-negotiation of a bill that is past maturity, but the likelihood of someone doing so is slight, since transfers after maturity are subject to both known and unknown defects of title to which they would otherwise be immune: see §25:60.10 "Post-Maturity Transfer". That fact would probably make it extremely difficult to find a buyer for it. Note that when the acceptor becomes the holder of a bill in

his own right at maturity, it is discharged: s. 140, §29:40 "Transfer to Primary Party at or after Maturity".

169 See §29:30 "Payment by Drawer or Endorser".

170 *Supra.*

171 See §21:20.70(1) "Meaning of Issue".

172 Whatever reason prompted the drawer to make the bill payable to the original payee must still exist. Since the bill was paid by the drawer, rather than by the acceptor, the payee has presumably not yet received the value of it. Redelivering it to him begins a second attempt to accomplish that original objective. Striking out that name and inserting a new payee would be a material alteration of the bill, which would discharge the acceptor: see s. 144 and §29:70.50 "Effect of Material Alteration".

173 See §25:10 "Introduction".

Footnote 174 deleted.

175 *Cf. Morris v. Walker* (1850), 15 Q.B. 589 at p. 594.

176 *Wilkinson & Co. v. Unwin* (1881), 7 Q.B.D. 636 (C.A.); *Glenie v. Smith*, [1907] 2 K.B. 507, affd [1908] 1 K.B. 263 (C.A.). *Cf. Pegg v. Howlett* (1897), 28 O.R. 473 (Div. Ct.). As to the Statute of Frauds, see *McCall Brothers v. Hargreaves*, [1932] 2 K.B. 423.

177 Russell, *A Commentary on the Bills of Exchange Act* (Calgary: Burroughs & Co. Ltd., 1921) at p. 418.

178 Chafee, "The Reacquisition of a Negotiable Instrument by a Prior Party" (1921), 21 Col. L. Rev. 538.

179 *Jade Int'l Steel Stahl und Eisen GmbH & Co. KG v. Robert Nicholas (Steels) Ltd.*, [1978] 1 Q.B. 917 (C.A.).

1 R.S.C. 1985, c. B-4.

2 *343709 Alberta Ltd. (Receiver of) v. Bank of Montreal* (2002), 220 D.L.R. (4th) 193 (S.C.C.).

3 BEA, s. 73(*a*).

4 *A.-G. Alta. and Winstanley v. Atlas Lumber Co.*, [1941] 1 D.L.R. 625 (S.C.C.) at p. 636, *per* Davis J., quoting Viscount Birkenhead L.C., in *Sutters v. Briggs*, [1921] 1 A.C. 1 (H.L.) at p. 15.

5 See BEA, s. 60, discussed at §25:40.10. See also *Good v. Walker* (1892), 61 L.J.Q.B. 736; *Day v. Longhurst* (1893), 62 L.J. Ch. 334.

6 *Canada Life Insurance Co. v. Canadian Imperial Bank of Commerce* (1979), 98 D.L.R. (3d) 670 (S.C.C.); *Bank of Montreal v. Perry* (1981), 31 O.R. (2d) 700 (H.C.J.).

7 *Bank of Montreal v. Perry, supra.*

8 [1937] 1 K.B. 92 (C.A.).

9 BEA, s. 73(*c*). See §25:20, §25:40.20.

10 *Ibid.*, s. 141(1). See §29:50 "Renunciation".

11 *Ibid.*, s. 142(1). See §29:60.10 "Evidence of Cancellation".

12 *Ibid.*, s. 142(2). See §29:60.20 "Intention to Cancel".

13 *Ibid.*, s. 29. See §22:60.10 "Undated Items".

14 See §23:20.60 "Incomplete Instruments".

15 See §23:20.60(3) "Authority to Complete".

16 BEA, s. 144. See §29:70. "Material Alteration".

17 *Ibid.*, s. 66(5). See §25:30.20 "Special Endorsement".

18 *Ibid.*, s. 169(2), (3) and (4). See §34:80 "Crossed Cheques".

19 *Ibid.*, s. 155(1). See §31:30.10 "Duplicate Instruments".

20 *Ibid.*, s. 115. See §27:50.10 "Protest Required or Permitted".

Footnote 21 deleted.

22 Such as by gift, will, assignment, etc. See §25:50"Transfer Other Than Under BEA".

23 See, *e.g.*, s. 22(c) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10. Note the definition of "instrument" in s. 1(1) of that Act, and the saving of the rights of a holder in due course in s. 29(a).

24 See §24:10.10 "Possession".

24.1 Beginning with *Moses v. Macferlan* (1760), 2. Burr. 1005, 97 E.R. 676. See §3:30.20 and 3:40.10(4) "Defences".

24.2 See §10:10.70(2) "Absence of Juristic Reason".

24.3 Smith, *The Law of Tracing* (Oxford University, 1997) at p. 386, quoted with approval by Deschamps J. *per cur.* in *Bank of Montreal v. i Trade Finance Inc.*, [2011] 2 S.C.R. 360 at para. 60; *B.M.P. Citadel General Assurance v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, 1997 CarswellAlta 823 *per* La Forest *per cur.*, at para. 50.

24.4 I cite and discuss some of these at §3:40.10(4)(d)(i) "Bona Fide Purchase".

24.5 (1908), 39 S.C.R. 625, 1908 CarswellMan 150 (S.C.C.), *per* Duff J. *per cur.* at para. 9; leave to appeal refused 1908 CarswellMan 150 (P.C.).

24.6 See §3:20.20(2) "Bank Funds [as a form of money]".

24.7 (2000), 46 O.R. (3d) 692, 2000 CarswellOnt 109 (S.C.J.), affirmed 2001 CarswellOnt 9827 (Ont. Div. Ct.).

24.8 *Ibid*, at paras. 19-21.

24.9 See §26:30.40 "Defects of Title".

24.10 *Supra*, footnote 24.7.

24.11 (2009), 304 D.L.R. (4th) 292, 2009 SCC 15 (S.C.C.).

24.12 *Ibid.*, at para. 69.

24.13 See §26:20.10, *supra*.

24.14 See §24:10.30.

25 *Chalmers and Guest on Bills of Exchange*, 16th ed. (London: Sweet & Maxwell, 2005), at para. 702.

26 This definition approved in *Quantum Financial Services (Canada) Ltd. v. Yip* (1999), 173 D.L.R. (4th) 366 (B.C.S.C.), at para. 7, *per* Smith J.

27 However, see *Ierullo v. Rovan* (2000), 46 O.R. (3d) 692 (S.C.J.), where the payee and drawer were remote parties due to the fact that the cheque had been signed in blank by the drawer and completed before delivery to the payee.

28 No case has yet raised the issue in these terms, but it appears to me that the practice of banks to charge a fee for certification at the request of the holder brings them into an immediate party relation with the payee/holder! The result of that would be to open up the defences available to the drawee against a claim by the payee for payment of the certified cheque as, for example, where the certification fee is paid by a cheque that is dishonoured, or the payee requests certification, knowing that the cheque has already been countermanded and hoping that the bank will make a mistake. So far, the trend has been the other way. Payment of a fee is viewed as creating a separate contract, the implied terms of which are that the cheque is irrevocable: see *City Front Developments Inc. v. Bank of Nova Scotia* (1998), 41 O.R. (3d) 599 (Gen. Div.), and the discussion in §34:70.60(4).

29 *Macdonald v. Whitfield* (1883), 8 App. Cas. 733 (P.C.) at p. 746; *McDonald (Gerald) & Co. v. Nash & Co.*, [1924] A.C. 625 (H.L.); *National Sales Corp. Ltd. v. Bernardi*, [1931] 2 K.B. 188, where other authorities are reviewed. See also §28:100.30.

30 See, *e.g.*, *Ierullo v. Rovan*, *supra*, footnote 27, *per* Nordheimer J.; *Quantum Financial Services (Canada) Ltd. v. Yip*, *supra*, footnote 26, *per* Smith J.; *Iraco Ltd. v. Staiman Steel Ltd.* (1986), 27 D.L.R. (4th) 69 (Ont. S.C.), *per* Holland J., affd 45 D.L.R. (4th) 158*n* (C.A.); *Traders Finance Corp. Ltd. v. Casselman* (1958), 16 D.L.R. (2d) 183 (Man. C.A.), affd 22 D.L.R. (2d) 177 (S.C.C.).

31 *Maclaren's Bills, Notes and Cheques*, 6th ed. by Read (Toronto: Carswell, 1940) at p. 123; *Byles on Bills of Exchange*, 25th ed. by Megrah and Ryder (London: Sweet & Maxwell, 1983) at p. 224.

32 [1941] 2 D.L.R. 192 (N.B.S.C. App. Div.), affd [1942] 3 D.L.R. 538 (S.C.C.).

33 *Supra*, at p. 541 (S.C.C.), citing *Robinson v. Reynolds* (1841), 2 Q.B. 196 at p. 203, *per* Lord Denman C.J.

34 *Mollot v. Monette* (1981), 128 D.L.R. (3d) 577 (S.C.C.) at p. 578, *per* Laskin C.J.C.; *Eastern Elevator Services Ltd. v. Wolfe* (1981), 119 D.L.R. (3d) 643 (N.S.S.C.); *Brown v. Trynor* (1980), 109 D.L.R. (3d) 312 (N.S.C.A.); *Bank of Montreal v. Kon* (1978), 82 D.L.R. (3d) 609 (Alta. S.C.) at p. 622; *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei GmbH*, [1977] 2 All E.R. 463 (H.L.); *Niagara Finance Co. v. Avco Financial Services Ltd.*, [1975] 2 W.W.R. 352 (Alta. Dist. Ct.).

34.1 See e.g., comment in *Canada Trustco Mortgage Co. v. Canada*, 2011 SCC 36, [2011] 2 S.C.R. 635, by Deschamps J. *per maj.* at para. 1.

35 (1996), 19 O.T.C. 305 (Gen. Div.), affd 111 O.A.C. 394 (C.A.).

36 And see, to the same effect, *Sniderman v. Gibbs* (2004), 134 A.C.W.S. (3d) 507 (Ont. S.C.J.), affd 146 A.C.W.S. (3d) 166 (C.A.).

36.1 2014 CarswellNB 11, 2014 CarswellNB 12, 2014 NBCA 2. And see, to the same effect, *Martenfield v. Collins-Barrow Toronto LLP*, 2013 CarswellOnt 10157, 2013 ONSC 4792 (Ont. S.C.J.), at para. 54.

36.2 *Ibid.*, at para. 16.

37 See §23:80.

38 *E.g.*, *Iraco Ltd. v. Staiman Steel Ltd.*, *supra*, footnote 30; *Springhill Enterprises Ltd. v. Uzelac* (2002), 130 A.C.W.S. (3d) 1045 (B.C.S.C.); *Butkovski v. Jalbuena* (1982), 132 D.L.R. (3d) 177 (B.C. Co. Ct.).

[39] *Quantum Financial Services (Canada) Ltd. v. Yip* (1999), 173 D.L.R. (4th) 366 (B.C.S.C.); *Patterson v. Bremner* (2001), 107 A.C.W.S. (3d) 60 (B.C.S.C.).

[40] *Ezetz Management Ltd. v. Kaiser* (1989), 17 A.C.W.S. (3d) 749 (Ont. C.A.), at para. 3, *per* McKinlay J.A.

[41] (1992), 6 O.R. (3d) 547 (Gen. Div.).

[42] *Supra*, at p. 550.

[43] *Ibid.*

[44] These terms are explained in §26:30.30, *infra*.

[44.1] *Money Stop Ltd. v. Snyder* (2010), 187 A.C.W.S. (3d) 561 (Alta. Q.B.).

[44.2] R.S.C. 1985, c. B-3.

[45] See Chapter 28.

[46] Unless negatived or limited by the terms of the endorsement as authorized by BEA, s. 33(*a*). See §25:30, §25:30.40.

[47] BEA, ss. 73(*b*) and 69.

[48] *Ibid.*, s. 55(1)(*b*).

[49] *Ibid.*, s. 55(2).

[50] Johnson J.A., in *Edcal Industrial Agents Ltd. v. Redl* (1966), 60 D.L.R. (2d) 289 (Alta. C.A.) at p. 295, noted the use of different terms in the BEA, but was "not prepared to say" whether the difference was of any significance. It is not: see Donald, "Negotiation of an Overdue Bill of Exchange or Promissory Note" (1970), 8 Alta. L. Rev. 75 at p. 76.

[51] *Bills of Exchange Act, 1882* (U.K.), 45 & 46 Vict., c. 61.

[52] *Chalmers on Bills of Exchange*, 13th ed. by Smout (London: Stevens & Sons, 1964) at p. 122. *Cf. Alcock v. Smith*, [1892] 1 Ch. 238 (C.A.) at p. 263, which stated that the term that was changed (because unknown in Scots law, to which the Act was also to apply) was "subject to equities".

[53] BEA, s. 73(*b*).

[54] The use of the terms "immediate parties" and "remote parties" is explained at §26:30.10(1), *supra*.

[55] Cowen, *op. cit.*, footnote 21, at p. 269.

[55.1] See §26:30.40(2), *supra*.

[55.2] *Wojnarowski v. Bomar Alarms Ltd.* (2010), 100 O.R. (3d) 288 (S.C.J.).

[55.3] See *per* Quinn J., *supra*, at para. 67. The learned judge cites no section of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as the source of the illegality to which he refers, and confuses the issue by appearing to invoke illegality by public policy in para. 70. The decision may not be reliable on this point. Note that the *Criminal Code*, R.S.C. 1985, c. C-46, contains no section making evasion of income tax a crime. Note as well, that the *Income Tax Act*, s. 245(2) enables the authorities to adjust the consequences of unlawful tax avoidance transactions to what is "reasonable in the circumstances".

[56] BEA, s. 73(*b*).

[57] BEA, s. 55(1)(*b*).

[58] *Banque Jacques-Cartier v. Hotel-Dieu d'Arthabaska* (1892), 1 Que. Q.B. 215 (C.A.); *Robertson v. Northwestern Register Co.* (1910), 19 Man. R. 402 (C.A.); *Union Investment Co. v. Grimson* (1916), 27 D.L.R. 208 (Alta. C.A.); *Antoniou v. Union Bank of Canada* (1920), 56 D.L.R. 338 (S.C.C.); *Imperial Bank v. Heisz*, [1930] 1 D.L.R. 339 (Ont. H.C.); *Assaf v. Sulman and Levant*, [1944] 1 D.L.R. 402 (Ont. C.A.); *Levenhurst Investments Ltd. v. Oakfield Country Club Ltd.* (1968), 68 D.L.R. (2d) 79 (N.S.S.C.); *Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd.* (1981), 123 D.L.R. (3d) 612 (B.C.C.A.), affd 147 D.L.R. (3d) 577 (S.C.C.).

[59] *Ierullo v. Rovan* (2000), 46 O.R. (3d) 692 (S.C.J.); *Bank of Nova Scotia v. Gil Beaudry Farm Supply Inc.* (1999), 87 A.C.W.S. (3d) 1031 (Ont. Ct. (Gen. Div.)); *360788 B.C. Ltd. v. 304983 British Columbia Ltd.* (1998), 90 A.C.W.S. (3d) 795 (B.C.S.C.); *Confederation Trust Co. v. Politeski* (1997), 72 A.C.W.S. (3d) 1015 (Ont. Ct. (Gen. Div.)); *Wheatland Investments Ltd. v. Sask. Tel*, [1995] 1 W.W.R. 671 (Sask. Q.B.).

[60] As to when an item is overdue, see BEA, s. 69 and commentary at §25:60.10.

[61] Chafee, "Rights in Overdue Paper" (1918), 31 Harv. L. Rev. 1104. Many of the arguments made and distinctions taken by Chafee were adopted by Geva, "Equities as to Liability on Bills and Notes: Rights of a Holder Not in Due Course" (1980-81), 5 C.B.L.J. 53.

[62] This may be deduced from BEA, ss. 56 and 69(1), and is the result reached by the Supreme Court of Canada in *Scott v. Ashley Colter Ltd.*, [1942] 3 D.L.R. 538 (S.C.C.), and by the English Court of Appeal in *Jade Int'l Steel Stahl und Eisen GmbH & Co. KG v. Robert Nicholas (Steels) Ltd.*, [1978] 1 Q.B. 917 (C.A.).

[63] See the discussions of procedure by Johnson J.A. in *Edcal Industrial Agents Ltd. v. Redl* (1966), 60 D.L.R. (2d) 289 (Alta. C.A.) at pp. 296-97, and by Dean Falconbridge in Rogers, ed., *Falconbridge on Banking and Bills of Exchange*, 7th ed. (Toronto: Canada Law Book Ltd., 1969) at pp. 670-72. The best treatment is by Geva in a very detailed and learned article, *op. cit.*, footnote 61. My comments are set out in §§23:80.10(1) to 23:80.10(8), inclusive.

[64] That is, the narrow question of what defences are available against a holder for value to whom the instrument is transferred after maturity. Other cases interpreting the term "defect of title" may be found: *e.g.*, *Canadian Bank of Commerce v. B.C. Interior Sales Ltd.* (1957), 11 D.L.R. (2d) 609 (B.C.C.A.), in which a right of set-off was characterized as something other than an "equity attaching to the bill" and, therefore, not available against a remote party, a holder for value, but not a holder in due course (because payee). See also *Glesby v. Mitchell*, [1932] 1 D.L.R. 641 (S.C.C.), where a new trial was required to determine whether the plaintiff was a holder for value.

[65] *Supra*, footnote 62.

[66] *Supra*, footnote 63. *Glesby v. Mitchell*, *supra*, footnote 64, raised the issue, but was remitted on a question of fact.

[67] [1974] C.S. 565.

[68] (1916), 49 C.S. 289.

[69] McDermid J.A. dissented, reluctantly considering himself bound by the *Ashley Colter* decision, *supra*, footnote 62.

[70] See Donald, *op. cit.*, footnote 50, and Geva, *op. cit.*, footnote 61. The willingness of the courts to permit the set-off of damages, in cases like this between remote parties, contrasts curiously with their reluctance to permit such claims between immediate parties and supports the author's conviction that the latter cases must be carefully construed and applied: see §23:80.

[71] *Edcal Industrial Agents Ltd. v. Redl*, *supra*, footnote 63.

[72] *Provincial Treasurer of Alberta v. Quinte-Canlin Ltd.*, *supra*, footnote 67.

[73] BEA, ss. 53 and 54.

[74] See 26:30.40(1), *supra*.

[75] *E.g.*, in *Brown v. Davies* (1789), 3 T.R. 80 (K.B.), one of the first cases to raise the point, there was an argument between Buller J. and Lord Kenyon C.J. over the terms in which the judgment of the court had been delivered by the former.

[76] (1868), L.R. 6 Eq. 344, and see the contemporary Comment, "Equities Attaching to Overdue Bills of Exchange" (1870), 49 L.T. 122.

[77] *Charles v. Marsden* (1808), 1 Taunt. 224; *Burrough v. Moss* (1830), 10 B. & C. 558; *Sturtevant v. Ford* (1842), 4 Man. & G. 101. See other cites collected by Byles, *op. cit.*, footnote 31, at pp. 198-200, and Maclaren, *op. cit.*, footnote 31, at p. 242, footnote 5.

[78] *Oulds v. Harrison* (1854), 10 Ex. 572; *O'Brien v. Johnston* (1897), 3 Terr. L.R. 50 (S.C.); *Wood v. Ross* (1858), 8 U.C.C.P. 299.

[79] Chalmers, *op. cit.*, footnote 52, at p. 122; Donald, *op. cit.*, footnote 50, at p. 79; and cases cited by them. See *contra*, Maclaren, *op. cit.*, footnote 31, at p. 186, footnote 4, citing *Rennie v. Jarvis* (1843), 6 U.C.Q.B. 329, and other early authorities.

[80] (1858), 3 H. & N. 891 (Ex.). See also *Britton v. Fisher* (1867), 26 U.C.Q.B. 338, to the same effect.

[81] See *Glesby v. Mitchell*, [1932] 1 D.L.R. 641 (S.C.C.).

[82] *Ching v. Jeffery* (1885), 12 O.A.R. 432.

[83] *Britton v. Fisher, supra*, footnote 80.

[84] *McDermit v. Eddy* (1919), 49 D.L.R. 333 (Sask. C.A.); *Friedman v. Scott* (1914), 24 B.R. 21 (Que. K.B., Appeal Side).

[85] This may be deduced from the use, in BEA, s. 69(1), of the term "defect of title affecting it at its maturity", interpreted in the light of the pre-BEA case law cited *infra*, this footnote. It is also supported by the inclusion, in BEA, s. 55(2), as a defect of title, of negotiation "in breach of faith" when that term is interpreted in the light of pre-BEA cases such as *Holmes v. Kidd, supra*, footnote 80, and *Ching v. Jeffery, supra*, footnote 82. See *Goulet v. Frenette and Allard*, [1957] C.S. 1 ("abus de confiance").

[86] See BEA, s. 141(4), and §29:50.20.

[87] See the commentary on BEA, s. 138 at §29:20.20.

[88] See §§23:30.30 ("Infants") and 23:30.40 ("Mental Incompetents"), *inter alia*.

[89] Geva, *op. cit.*, footnote 61.

[90] (1960), 22 D.L.R. (2d) 177 (S.C.C.), interpreting what is now the *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16, s. 18, which requires an election between seizure of security and action on the covenant in certain conditional sales.

[91] [1969] 1 O.R. 240 (Dist. Ct.).

[92] S.O. 1966, c. 23, s. 21 (repealed).

[93] See the analyses of fraud in the *Criminal Code*, R.S.C. 1985, c. C-46, s. 381 by the Supreme Court in *R. v. Theroux* (1993), 100 D.L.R. (4th) 624 (S.C.C.), and *R. v. Zlatic* (1993), 100 D.L.R. (4th) 642 (S.C.C.) (issuing post-dated cheques without reasonable expectation of being able to pay them at due date).

[94] This term and "remote parties" are explained at §26:30.10(1), *supra*.

[95] That is, the statutory engagements of the parties as set out in BEA, ss. 127 to 132, discussed at §§28:20 to 28:50.

[96] See, *e.g.*, *Sleen v. Auld*, [1967] S.C.R. 88.

[97] For example, if A defrauds B, not only is A's title to any item obtained from B defective, but it is anticipated that the title of C to any item fraudulently procured by A, to be made payable by B to C, would also be defective (see *McCallum v. Cohoe* (1918), 46 D.L.R. 733 (Ont. S.C. App. Div.)), unless C takes for value and without notice as a holder in due course (see §24:30.60). Note that a title to an instrument may be defective because of fraud affecting the consideration underlying transactions, or because of fraud in the negotiation. The closing words of BEA, s. 55(2) make negotiation in breach of faith a defect

of title (see §26:30.40(4)(d), *infra*).

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98 See below, this section.

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99 *National Money Mart v. Amaz Property Management* (2004), 140 A.C.W.S. (3d) 1049 (Ont. S.C.J.); *Ierullo v. Rovan* (2000), 46 O.R. (3d) 692 (Ont. S.C.J.); *Williams v. Shuster*, [1952] 3 D.L.R. 574 (Man. C.A.); *Trans Canada Credit Corp. v. Zaluski* (1969), 5 D.L.R. (3d) 702 (Ont. Co. Ct.); *Gestion Malgraf inc. v. Reinblatt*, 2009 QCCQ 6082.

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100 (1977), 76 D.L.R. (3d) 585 (B.C.S.C.).

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101 *Supra*, at p. 587.

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102 [1989] 1 W.L.R. 1340 (C.A.).

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103 That is, if he were the maker of a note, drawer of a cheque or acceptor of a bill, the item would not be properly payable by him or from his account. If he were an endorser, the item would not be properly negotiated unless his endorsement was unnecessary for negotiation. No title whatever can be made through a forgery. See also *Blain v. Rose*, [1960] C.S. 196.

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104 Lord Wilberforce, in *Gallie v. Lee*, [1971] A.C. 1004 *sub nom. Saunders v. Anglia Building Society* (H.L.) at p. 1024, insisted that that is a "plea" rather than a defence, but where the plea is successful, there is no liability. The cases and authorities appear to use the two terms indiscriminately.

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105 *Supra, per* Lord Wilberforce and speeches of other Law Lords.

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106 (1869), L.R. 4 C.P. 704.

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107 See *Gallie v. Lee, supra*, footnote 104, at p. 1035.

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108 BEA, s. 130. See §28:60.10.

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109 *Foster v. Mackinnon, supra*, footnote 106, at p. 710.

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110 [1907] 1 Ch. 537, affd [1908] 1 Ch. 1 (C.A.). *Cf. Bradley v. Imperial Bank of Canada*, [1926] 3 D.L.R. 38 (Ont. S.C. App. Div.); *Blay v. Pollard*, [1930] 1 K.B. 628 (C.A.); Comment (1930), 46 L.Q.R. 263; and Smith, "Case and Comment" (1930), 8 Can. Bar Rev. 606, with references to earlier Canadian cases.

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111 *Prudential Trust Co. Ltd. v. Cugnet* (1956), 5 D.L.R. (2d) 1 (S.C.C.), now overruled by *Maryco Color Research Ltd. v. Harris* (1982), 141 D.L.R. (3d) 577 (S.C.C.).

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112 *Gallie v. Lee, supra*, footnote 104.

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113 *Ibid.* See also *Cheshire, Fifoot and Furmston's Law of Contract*, 13th ed. by Furmston (London: Butterworths, 1996) at p. 269, for an assessment of how effective the prior tests have been in actual decisions.

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114 Compare the illustration of material difference given by Lord Reid in *Gallie v. Lee, supra*, footnote 104, at p. 1017 (a guaranty for $1,000 instead of for £10), with the ruling in *Canadian Imperial Bank of Commerce v. Dura Wood Preservers Ltd.* (1979), 102 D.L.R. (3d) 78 (B.C.S.C.), that a guaranty for $50,000 is not "substantially different" from one for $15,000.

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115 [1911] 1 K.B. 489 (C.A.).

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116 The decision was adversely criticized by Anson (1912), 28 L.Q.R. 190, and by Guest (1963), 79 L.Q.R. 346, and has been generally condemned by text writers. See especially Underhay, "The Doctrine of Carlisle and Cumberland Banking Co. v. Bragg" (1930), 8 Can. Bar Rev. 661, for a critical analysis of the case itself and of the Canadian cases. For more recent comment, see Stone, "The Limits of Non Est Factum After Gallie v. Lee" (1972), 88 L.Q.R. 190.

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117 *Prudential Trust Co. Ltd. v. Cugnet, supra*, footnote 111.

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118 [1971] A.C. 1004 *sub nom. Saunders v. Anglia Building Society* (H.L.).

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119 *E.g.*, see *Marvco Color Research Ltd. v. Harris, supra,* footnote 111, in which Grange J. in the High Court wistfully reviewed the criticisms of *Cugnet*, but followed it as by duty bound, and was affirmed by the Court of Appeal, but reversed by the Supreme Court of Canada. See also *W.T. Rawleigh Co., Ltd. v. Dumoulin*, [1926] 4 D.L.R. 141 (S.C.C.), a Quebec appeal in which the court reinforced its interpretation of the *Civil Code* by reference to, and reliance upon, the *Bragg* decision, *supra,* footnote 115. However, there have also been some breaks with *stare decisis*: see *Bank of Nova Scotia v. Omni Construction Ltd.*, [1981] 3 W.W.R. 301 (Sask. Q.B.), affd [1983] 4 W.W.R. 577 (C.A.).

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120 *Marvco Color Research Ltd. v. Harris, supra,* footnote 111.

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121 See, *e.g., Carlisle and Cumberland Banking Co. v. Bragg, supra,* footnote 115, and *Prudential Trust Co. Ltd. v. Cugnet, supra,* footnote 111. Presumably, these special rules do not prevent the clarification of what is meant by "negligence" in these cases being applied to bills, cheques and notes. Lord Pearson showed, in *Gallie v. Lee, supra,* footnote 118, at p. 1038, how the Court of Appeal in *Bragg* was wrong to equate negligence in this context with "the technicalities of negligence as they have been developed in the tort of negligence".

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122 *Gallie v. Lee, supra,* footnote 118, at p. 1016, *per* Lord Reid ("all reasonable precautions in the circumstances"), at p. 1019, *per* Lord Hodson, and at p. 1023, *per* Viscount Dilhorne, etc.

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123 Which is well in line with the announced policy of the courts to restrict the scope of the plea: see *Gallie v. Lee, supra,* footnote 118, at p. 1019, *per* Lord Hodson, and *Commerce Credit Corp. v. Carroll Bros.* (1970), 16 D.L.R. (3d) 201 (Man. Q.B.) at p. 209, *per* Tritschler C.J.Q.B., affd 20 D.L.R. (3d) 504 (C.A.); *Roth Estate v. Juschka*, 2013 ONSC 4437 (Ont. S.C.J.), *per* Glithero J. at para. 143.

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124 *Supra,* footnote 118, at p. 1034.

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125 *Puffer v. Mastorkis* (1966), 59 D.L.R. (2d) 427 (Ont. H.C.J.); *Beneficial Finance Co. of Canada v. Telkes*, [1977] 6 W.W.R. 22 (Man. Q.B.); *Bradley v. Imperial Bank of Canada*, [1926] 3 D.L.R. 38 (Ont. S.C. App. Div.).

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126 See *Provincial Bank of Canada v. Whiteoak Construction Ltd.* (1976), 15 N.B.R. (2d) 408 (Q.B.).

126.1 *Confederation Leasing Ltd. v. Cana-Drain Services Inc.* (1993), 44 A.C.W.S. (3d) 859, supp. reasons 49 A.C.W.S. (3d) 995 (Ont. Ct. (Gen. Div.)), at para. 28.

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127 *Prince Albert Credit Union v. Diehl*, [1987] 4 W.W.R. 419 (Sask. Q.B.).

127.1 *Confederation Leasing, supra,* footnote 126.1, at para. 39.

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128 *Laurentian Bank of Canada v. Wiley* (1996), 33 B.L.R. (2d) 82 (Ont. Ct. (Gen. Div.)); *Edelweiss Credit Union v. Beck* (1991), 27 A.C.W.S. (3d) 404 (B.C.S.C.); *Kootenay Savings Credit Union v. Toudy* (1987), 17 B.C.L.R. (2d) 203, supp. reasons 22 B.C.L.R. (2d) 201 (S.C.).

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129 *Trans Canada Credit v. Judson* (2002), 217 Nfld. & P.E.I.R. 1 (P.E.I.S.C.); *Laurentian Bank of Canada v. Wiley, supra.*

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130 *Nordic Acceptance Ltd. v. Switzer* (1965), 50 D.L.R. (2d) 600 (Ont. H.C.J.), affd 55 D.L.R. (2d) 385*n* (C.A.) (finding of no negligence). *Cf. Hankinson v. Royal Bank of Canada*, [1954] 2 D.L.R. 345 (N.S.S.C.); *Atlantic Acceptance Corp. v. Facette*, [1958] O.W.N. 327 (C.A.); *Bank of Montreal v. Amireault* (1938), 65 B.R. 1 (Que. K.B., Appeal Side), leave to appeal to S.C.C. refused *loc. cit.* p. xix.

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131 *Bhuvanendra v. Sivapathasundram*, 2014 ONSC 278, 2014 CarswellOnt 634 (Ont. S.C.J.), at para. 50; *Pelletier v. Morin* (1988), 92 N.B.R. (2d) 165 (Q.B.).

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132 *United Dominions Trust Ltd. v. Western*, [1976] Q.B. 513 (C.A.). *Cf. Commerce Credit Corp. v. Carroll Bros., supra,* footnote 123, where the relations between signer and payee, as well as those between payee and endorsee, led to a different conclusion.

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133 See Jackson, *The History of Quasi-Contract in English Law* (Cambridge: University Press, 1936) at pp. 64*ff.*; Bradley Crawford, *Restitution Cases and Notes* (Toronto: University of Toronto, 1971) at pp. 411*ff.*

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134 *Rogers v. Rogers*, [1938] 1 D.L.R. 99 (N.S.S.C. *in banco*) at p. 102, *per* Doull J., quoting *Halsbury's Laws of England*; also cited and found in *Bursaw Estate (Re)*, [1924] 3 W.W.R. 807 (Sask. C.A.).

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135 American Law Institute, *Restatement of the Law of Contracts*, §492 (now *Restatement (Second) of Contracts*, §174.

136 See American Law Institute, *Restatement in the Courts* (annual volumes), *passim*.

136.1 [1979] 3 All E.R. 65, [1980] A.C. 614 (P.C.) at p. 78.

136.2 *Gordon v. Roebuck* (1992), 92 D.L.R. (4th) 670 (Ont. C.A.).

136.3 *Ro-Am Holdings Ltd. v. Cianfarani*, 2008 CarswellOnt 8083 (Ont. S.C.J.), at para. 32.

137 *Wingrove v. Wingrove* (1885), 11 P.D. 81 at p. 82, *per* Hannen P., aprvd by Mathers C.J.K.B. in *National Trust Co. v. Taylor* (1922), 68 D.L.R. 339 (Man. K.B.) at p. 376, affd [1923] 3 D.L.R. 1196 (C.A.).

Footnote 138 deleted.

139 See Crawford, "Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties" (1966), 44 Can. Bar Rev. 142.

140 See *Blanchard v. Jacobi* (1918), 43 O.L.R. 442 (H.C.), *per* Middleton J.

141 See *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231 (B.C.C.A.) at p. 237, *per* McIntyre J.A.

142 This term and "remote parties" are explained at §26:30.10, *supra*.

143 *Commercial Bank v. Rokeby* (1894), 10 Man. R. 281 (Q.B., Appeal Side); *Seear v. Cohen* (1881), 45 L.T. 589 (Div. Ct.).

144 *Pacific Finance Acceptance Co. v. Turgeon* (1978), 93 D.L.R. (3d) 301 (B.C.S.C.); *Western Bank of Canada v. McGill* (1902), 32 S.C.R. 581; *Rosenblat v. Bencze*, [1941] 4 D.L.R. 459 (Man. C.A.).

145 *Trans Canada Credit Corp. v. Hawkes* (1992), 129 N.B.R. (2d) 12 (Q.B.).

146 *Cox v. Adams* (1904), 35 S.C.R. 393, which, however, was disapproved by the Privy Council in *Bank of Montreal v. Stuart*, [1911] A.C. 120 (P.C.), in so far as it held that a wife can bind herself as guarantor for her husband's business debts only if in receipt of independent legal advice. It is conceived that there is now no presumption of influence: *MacKenzie v. Royal Bank of Canada*, [1934] 4 D.L.R. 1 (P.C.). The onus is on the wife to show that she was under influence: *McCallum v. Cohoe* (1918), 46 D.L.R. 733 (Ont. S.C. App. Div.); *Hutchinson v. Standard Bank of Canada* (1917), 36 D.L.R. 378 (Ont. S.C. App. Div.); *Lewis Furniture Co. v. Campbell* (1911), 19 W.L.R. 465 (Man. C.A.) (duress); *Bank of Montreal v. Scott* (1905), 6 O.W.R. 411 (H.C.J.); *Dettmar v. Metropolitan & Provincial Bank Ltd.* (1863), 1 H. & M. 641 (Ch.); *Maitland v. Backhouse* (1847), 16 Sim. 57 (Ch.) (undue influence).

147 This may be deduced from the BEA, and has been decided: see *McCallum v. Cohoe*, *supra*. It was the law before the BEA: *Kearns v. Durell* (1848), 6 C.B. 596 (Com. Pleas).

148 [1967] S.C.R. 88.

149 *E.g.*, in *Nordic Acceptance Ltd. v. Switzer* (1965), 50 D.L.R. (2d) 600 (Ont. H.C.J.), affd 55 D.L.R. (2d) 385n (C.A.), the judgment of Moorhouse J. gives the impression that if the case had been pleaded that way, he would have found for the defendant on that ground as well. Of course, any such facts would now fall to be decided under Part V of the BEA: see Chapter 36.

150 See §20:30.10 "History of Codification".

151 (1836), 2 M. & W. 150 (Ex. Ct.). The inspiration for Parke B. may have been a *dictum* of Holt C.J. to the same effect in the earlier decision of *Bartlett v. Vinor* (1602), Carth. 251, 90 E.R. 750.

152 See §26:30.40(4)(c) "Illegal Consideration".

153 (2004), 235 D.L.R. (4th) 385 (S.C.C.), *per* Arbour J. *per maj.* at para. 21.

154 (1863), 8 S.C.R. 603 (S.C.C.).

154.1 *Supra*, at p. 610.

154.2 In s. 55(2); see §24:30.30(2)(b) "Defects of Title".

154.3 See the recital of legislative intent from *An Act to amend the laws regulating Inland Bills of Exchange and Promissory Notes &c.* (1849), 12 Vict. c. 22, s. 23, which I quote in §24:50.10 "Effect of Section 58".

154.4 *Wood v. Adams* (1905), 10 O.L.R. 631 (Div. Ct.). Similarly, endorsement of a note given to stifle a prosecution does not make the endorser liable to the endorsee: *Begin v. Allen* (1931), C.S. 511 (Que. K.B., App. Side).

154.5 *E.g., Paquette v. Metropolitan Plumbing & Heating Co. Ltd.*, [1942] C.S. 430 (sale of car in violation of *Wartime Prices and Trade Board Regulations*); *Beaulieu v. Ouellett* (1936), 65 C.C.C. 355 (N.B. Co. Ct.) (sale of smuggled goods in violation of *Customs Act*).

154.6 R.S.C. 1985, c. C-46.

154.7 See §1:30.90(8)(b) "Offences by Lenders".

154.8 See §24:50.60 "Payday Loans". It is important, however, to observe a fundamental distinction: provincial law is applicable only on the issue of illegality of the consideration. Provincial law may not validly void or nullify the negotiable instrument in which the promise to pay is expressed. This is because the scope of defences under the BEA is a matter of bills of exchange law "in the strict sense" (see BEA s. 9 and §21:40.80 "Rules of the Common Law of England"), and beyond the competence of a provincial legislature, accordingly.

154.9 *Bank of Nova Scotia v. MacGuigan* (1982), 136 D.L.R. (3d) 185 (P.E.I.S.C.); *Bank of Montreal v. White and White* (1976), 10 Nfld. & P.E.I.R. 346 (Nfld. C.A.).

154.10 See §24:50 "Knowledge of Usury".

154.11 *E.g.*, the old *Gaming Act* of Ontario R.S.O. 1980, c. 183, s. 2 (now repealed), permitted recovery by the maker or drawer against the payee in the event the maker or drawer was called upon to pay by a remote party holder in due course. It was characterized as limiting its effects to matters of property and civil rights in the province in *McGillis v. Sullivan*, [1947] 4 D.L.R. 114 (Ont. C.A.), affd [1949] 2 D.L.R. 306 (S.C.C.).

154.12 Master Quinn observed, tongue in cheek, in *MGM Grand Hotel, Inc. v. Kiani*, [1998] 5 W.W.R. 118 (Alta. Q.B.), that "gambling appears to be one of the most popular indoor sports in Alberta".

154.13 The leading case is *Boardwalk Regency Corp. v. Maalouf* (1992), 88 D.L.R. (4th) 612 (Ont. C.A.) .

154.14 *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257 (S.C.C.). However, see *Rosen v. Pullen* (1981), 126 D.L.R. (3d) 62 (Ont. H.C.J.) (letter of credit given as security for payment of sum agreed in cohabitation agreement).

154.15 *Boardwalk Regency Corp. v. Maalouf, supra*, footnote 154.13.

154.16 See §26:30.10(1) "Immediate and Remote Parties Distinguished".

154.17 *Supra.*

154.18 See §24:30.60 "Re-Establishing Holding in Due Course Status".

154.19 See §24:30 "Holder in Due Course".

154.20 See §20:30.10 "History of Codification".

154.21 *Supra*, footnote 154.5.

154.22 See §24:50 "Knowledge of Usury".

154.23 See *Transport North American Express Inc. v. New Solutions Financial Corp.* (2004), 235 D.L.R. (4th) 385 (S.C.C.), and §1:30.90(8)(b) "Offences by Lenders".

154.24 *Supra*, footnote 154.

154.25 See, *e.g.*, *Loans Till Payday v. Brown*, 2010 ONSC 6639 (Ont. S.C.J. (Div. Ct.)); *Loans Till Payday v. Brereton*, 2010 ONSC 6610 (Ont. S.C.J. (Div. Ct.)); *Derek's Cheque Cashing & Pawn Shop Inc. v. Stubits* (2007), 40 C.B.R. (5th) 105 (Alta. Q.B.). *Whitrow v. Hamilton* (2010), 472 W.A.C. 279 (Sask. C.A.) is to the same effect, but the payee was not a payday loan company.

154.26 [1991] 1 W.W.R. 749 (Man. Q.B.), affd 98 D.L.R. (4th) 697 (Man. C.A.), leave to appeal refused 101 D.L.R. (4th) viii (S.C.C.).

154.27 See §24:30.60 "Re-Establishing Holder in Due Course Status".

155 [1961] 1 Q.B. 374 (C.A.).

156 *E.g.*, *Consumers Acceptance Corp. v. Gendron*, [1962] C.S. 203; *Wolf Bass Ltd. v. B.J. Baittle Ltd.* (1923), 62 C.S. 48; *Marcus v. Laufer* (1923), 29 Rev. Leg. (N.S.) 362; *Quebec Bank v. Weinstein* (1916), 51 C.S. 60 (Que. Ct. of Review). This approach had its foundation in the perception that contracts expressly or impliedly prohibited by statute were void: see *Cope v. Rowlands* (1836), 2 M. & W. 150 (Ex. Ct.), and *Bank of Toronto v. Perkins* (1863), 8 S.C.R. 603 (S.C.C.), and §24:50 "Knowledge of Usury".

157 *Supra* (Ont. C.A. and S.C.C.).

158 *E.g.*, *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.*, *supra*, footnote 155, and other cases cited by S.M. Waddams, *The Law of Contracts*, 2nd ed. (Aurora: Canada Law Book, 1984) at pp. 424-26; *Bank of Nova Scotia v. Edwards* (1981), 126 D.L.R. (3d) 615 (Ont. Co. Ct.); *Norley v. Skillman* (1972), 31 D.L.R. (3d) 30 (Ont. Co. Ct.). For other strictly "bills" cases (although older and less explicitly reasoned, accordingly), see *Chamandy Bros. Ltd. v. Albert*, [1928] 2 D.L.R. 577 (Ont. S.C. App. Div.); *Stavert v. McMillan* (1911), 24 O.L.R. 456 (C.A.), affd 13 D.L.R. 761 (P.C.).

159 *E.g.*, *Paquette v. Metropolitan Plumbing & Heating Co. Ltd.*, [1942] C.S. 430 (sale of car in violation of *Wartime Prices and Trade Board Regulations*); *Beaulieu v. Ouellett* (1936), 65 C.C.C. 355 (N.B. Co. Ct.) (sale of smuggled goods in violation of *Customs Act*).

160 *E.g.*, *Paquette v. Metropolitan Plumbing & Heating Co. Ltd.*, *supra*; *Plisson v. Skinner* (1902), 5 Terr. L.R. 391 (S.C.) (*pro tanto* recovery allowed when only part of consideration illegal); *Hammer v. Finkelstein*, [1931] 2 D.L.R. 738 (Man. C.A.); *Robinson v. Marsh*, [1921] 2 K.B. 640 at pp. 645-46.

161 *Davis (Re); Muir v. Chamberlain* (1869), 13 L.C. Jur. 184.

162 (2010), 100 O.R. (3d) 288 (S.C.J.).

162.1 *Supra*, at para. 67-68.

162.2 R.S.C. 1985, c. 1 (5th Supp.), s. 227(9).

162.3 See *Wilson v. First County Trust Ltd.*, [2002] Q.B. 74 (C.A.).

Footnotes 163-174 omitted.

175 *Ierullo v. Rovan* (2000), 46 O.R. (3d) 692 (S.C.J.).

176 Nor did Dean Falconbridge in the early editions of his treatise.

177 *Ierullo v. Rovan, supra,* footnote 175; *Royal Bank of Canada v. Klip 'N Kurl Salon (Lynwood) Ltd.*, [1977] 2 W.W.R. 8 (Alta. Dist. Ct.); *Bank of Montreal v. Normandin*, [1925] 3 D.L.R. 975 (S.C.C.); *Rand Investments v. Bertrand* (1966), 58 D.L.R. (2d) 372 (B.C.S.C.); *Goulet v. Frenette and Allard*, [1957] C.S. 1; *Imperial Bank v. Heisz; Imperial Bank v. Hundt*, [1930] 1 D.L.R. 339 (Ont. H.C.); *Stirton v. Harvey* (1908), 8 W.L.R. 185 (Man. K.B.); *Swaisland v. Davidson* (1883), 3 O.R. 320 (H.C.J.). See also *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia* (1975), 64 D.L.R. (3d) 78 (B.C.C.A.) at p. 135, *per* Robertson J.A.

178 *Banque Provinciale du Canada v. Beauchemin* (1959), 18 D.L.R. (2d) 584 (S.C.C.). Pigeon J. applied similar reasoning in *Range v. Belvedere Finance Corp.* (1969), 5 D.L.R. (3d) 257 (S.C.C.) at pp. 260-61, where he observed that negotiating a conditional note without delivering the promised goods would be a fraud, and that knowledge of that by the transferee would be knowledge of a defect of title. However, note his conclusion, at p. 262, that the instruments were not "bills of exchange" (see §22:30).

179 *Hornby v. McLaren* (1908), 24 T.L.R. 494 (C.A.).

180 *Begley v. Imperial Bank of Canada*, [1935] 2 D.L.R. 12 (S.C.C.), affd [1936] 3 D.L.R. 1 (P.C.); *Dominion Bank v. Fassel and Baglier Construction Co. Ltd.*, [1955] 4 D.L.R. 161 (Ont. C.A.); *Interior Finance Ltd. v. Nichols and Nichols* (1958), 16 D.L.R. (2d) 294 (B.C.C.A.).

181 [1892] A.C. 201 (H.L.) at p. 221.

182 (1858), 3 H. & N. 891 (Ex.).

183 (1885), 12 O.A.R. 432.

184 (2000), 46 O.R. (3d) 692 (S.C.J.).

184.1 2001 CarswellOnt 9827 (Ont. Div. Ct.).

185 *MacArthur and Commercial Bank of Manitoba v. MacDowall* (1893), 23 S.C.R. 571.

186 *Grant v. Winstanley* (1871), 21 U.C.C.P. 257; *Britton v. Fisher* (1867), 26 U.C.Q.B. 338.

187 *Britton v. Fisher, supra*; *Assaf v. Sulman and Levant; Assaf v. Carr and Sulman*, [1944] 1 D.L.R. 402 (Ont. C.A.) (cheque not to be "good" until delivery of furniture in a few days).

188 *Ching v. Jeffery, supra,* footnote 183; *Aube v. Letellier*, [1943] Rev. Leg. 3; *Huot v. Beaudoin* (1917), 52 C.S. 381 (Que. Ct. of Review).

189 (1915), 23 D.L.R. 507 (Ont. H.C.). See also *M'Quin v. Sorell* (1851), 7 N.B.R. 140 (S.C.) (endorsement).

190 (1902), 32 S.C.R. 98. To the same effect is *Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd.* (1981), 123 D.L.R. (3d) 612 (B.C.C.A.), affd 147 D.L.R. (3d) 577 (S.C.C.).

190.1 See §3:50.10(3.5) "Statutory Defences Available to Banks".

190.2 *Supra,* footnotes 189 and 190, resp.

190.3 See §10:50.10(2) "Legislative Reform".

190.4 BEA, s. 57(2).

190.5 (1996), 140 D.L.R. (4th) 463 (S.C.C.).

190.6 *Ibid.*, at para. 41.

190.7 *A fortiori,* if the security agreement does not expressly or impliedly prohibit diversion of proceeds to persons other than the secured creditor.

190.8 There is support for such an analysis in the old decision of *M.A. Hanna Co. v. Provincial Bank of Canada*, [1935] S.C.R. 144, as noted by Ziegel and Denomme, *infra* footnote 190.9, at p. 212.

190.9 Ziegel and Denomme, *The Ontario Personal Property Security Act Commentary and Analysis*, 2nd ed. (Toronto: Butterworths, 2000) at p. 210, come to the same conclusion on the basis of US authority.

190.10 (1990), 70 D.L.R. (4th) 627, 1990 CarswellSask 41 (Sask. C.A.), affirming [1989] 6 W.W.R. 659, 1989 CarswellSask 295 (Sask. Q.B.).

190.11 (1990), 91 Sask. R. 220, 1991 CarswellSask 111 (Sask. Q.B.), affirmed 97 D.L.R. (4th) 462, 1992 CarswellSask 358, (Sask. C.A.).

190.12 2013 CarswellBC 2807, 2013 BCSC 1715 (B.C. S.C.).

190.13 See §10:50.20(1)(f) "Person Entitled to the Proceeds".

190.14 See §3:05 50(2) "Debtor-Initiated Payments".

190.15 I am not ignoring the fact that, in footnotes 190.10 and 190.11 I cite decisions interpreting these *ultra vires* provisions of the PPSAs. On the contrary, I consider that the decisions are correct in result, although based on inapplicable provincial law, rather than federal bills of exchange principles.

191 *Scott v. Ashley Colter Ltd.*, [1942] 3 D.L.R. 538 (S.C.C.).

192 *Royal Bank v. Guardian International Gold Corp.*, 2007 CarswellOnt 7743 (Ont. S.C.J.); *Bank of Montreal v. Abrahams* (2002), 59 O.R. (3d) 180 (S.C.J.) at pp. 200-201, affd 68 O.R. (3d) 34 (C.A.), leave to appeal to S.C.C. refused [2004] 1 S.C.R. v; *Traders Finance Corp. Ltd. v. Casselman* (1958), 16 D.L.R. (2d) 183 (Man. C.A.) at p. 186, *per* Coyne J.A., affd 22 D.L.R. (2d) 177 (S.C.C.) at p. 179, *per* Locke J.

193 See §26:40.10(3) for a discussion of these criteria.

194 See *Iraco Ltd. v. Staiman Steel Ltd.* (1986), 27 D.L.R. (4th) 69 (Ont. S.C.), affd 45 D.L.R. (4th) 158*n* (C.A.); *1485625 Ont. Inc. v. Peel Halton Kitchens Inc.* (2004), 185 O.A.C. 383 (Div. Ct.); *Cellulose Marketing International A.B. v. Taylor Trading Inc.* (1995), 82 O.A.C. 216 (Div. Ct.), order of motions judge set aside 58 A.C.W.S. (3d) 953 (Div. Ct.).

195 See, *e.g.*, *Cherrington v. Mayhew's Perma-Plants Ltd.* (1990), 71 D.L.R. (4th) 371 (B.C.C.A.); *Barclays Bank Ltd. v. W.J. Simms, Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522 (Q.B.) (Goff J., as he then was).

196 See *Cellulose Marketing International A.B. v. Taylor Trading Inc.*, *supra*, footnote 194, at pp. 219-20 (Ont. Div. Ct.), *per* White J., esp. the quotations to the same effect by Bridge L.J. in *Montecchi v. Shimco (UK) Ltd.; Navone v. Shimco (UK) Ltd.*, [1979] 1 W.L.R. 1180 (C.A.), and Sachs L.J. in *Cebora S.N.C. v. S.I.P. (Industrial Products) Ltd.*, [1976] 1 Lloyd's Rep. 271 (C.A.). Note the force of the quotations since both involved, and expressly addressed, the relations of immediate parties. The case for refusing a defence of failure of consideration between remote parties is *a fortiori*.

197 *Cebora S.N.C. v. S.I.P. (Industrial Products) Ltd.*, *supra*, at p. 278, *per* Sachs L.J.

198 *Scott v. Ashley Colter Ltd.*, *supra*, footnote 191, and §25:60.10.

199 *Supra*, footnote 192.

200 R.S.S. 1953, c. 95; now R.S.S. 1978, c. L-16.

201 (1978), 92 D.L.R. (3d) 87 (N.S.C.A.). See also *Hoeller v. Roberts* (1980), 19 B.C.L.R. 333 (Co. Ct.).

202 *Levenhurst Investments Ltd. v. Oakfield Country Club Ltd.* (1968), 68 D.L.R. (2d) 79 (N.S.S.C.).

203 *Copenhagen Handelsbank A/S v. Peter Makos Furs Ltd.* (1984), 28 B.L.R. 26 (Ont. H.C.J.), affd 23 A.C.W.S. (3d) 358 (C.A.); *Bibaud v. Banque de Montréal*, [1975] C.A. 186; *Algonquin Building Credits Ltd. v. Scholz* (1966), 56 W.W.R. 331 (Alta. Dist. Ct.); *Consumers Acceptance Corp. v. Gervais*, [1965] C.S. 235; *Union Acceptance Corp. Ltd. v. St. Amour* (1957), 8 D.L.R. (2d) 2 (Ont. C.A.). In *Royal Bank of Canada v. Klip 'N Kurl Salon (Lynwood) Ltd.*, [1977] 2 W.W.R. 8 (Alta.

Dist. Ct.), Cormack D.C.J. accepted the general propositions, but felt some concern over their application to a holder who had given value, but not in good faith.

204 The leading case is *A.E. LePage Real Estate Services Ltd. v. Rattray Publications* (1994), 120 D.L.R. (4th) 499 (Ont. C.A.). See also *Repet Equipment Inc. v. Canadian Imperial Bank of Commerce* (1999), 43 O.R. (3d) 135 (Gen. Div.).

205 As in *Edmonton Motors Ltd. v. Edmonton Savings & Credit Union Ltd.* (1988), 58 Alta. L.R. (2d) 370 (Q.B.).

206 *City Front Developments Inc. v. Bank of Nova Scotia* (1998), 41 O.R. (3d) 599 (Gen. Div.); *Edmonton Motors Ltd., supra.* Such matters are, in the ordinary cases, best left to separate actions unless considerations of the needs of justice require that special procedures be followed: see §23:80.

207 As in *Ierullo v. Rovan* (2000), 46 O.R. (3d) 692 (S.C.J.).

208 See the comments of Goff J. in *Barclays Bank Ltd. v. W.J. Simms, Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522 (Q.B.) at pp. 542-43.

209 Bill C-564, 39th Parl., 2nd Sess.

210 Bill C-305, 40th Parl., 2nd Sess., First Reading February 10, 2009.

211 See Chapter 36.

212 Cayo, "If Money Mart sues you, you'll probably lose" (March 31, 2008), available at www.canada.com/vancouversun/news/business/story.html?id=fee8ff50-cd4d--4dc0-9716-15b8940e67b2 (accessed November 17, 2009).

213 See §26:30.40(2), *supra.*

214 Cheques drawn by corporations would not be affected, because the drawers could not qualify as "purchasers" under s. 188, regardless of the reason for which the cheque was given.

214.1 See §28:100.20 "Statutory Exceptions".

214.2 See §28:100.30 "Case Law Exceptions".

215 The formal requirements are completely contained within the BEA: see §22:20. A party who has not signed a bill cannot be liable upon it in the absence of grounds for preclusion: see, *e.g.*, §23:40.40 "Preclusion from Denying Forgery".

216 As, *e.g.*, where an earnest is given in negotiations that fail to culminate in a binding agreement: see *Devlin v. Moore's Mills Creamery Ltd.*, [1927] 3 D.L.R. 479 (N.B.S.C. App. Div.); *Moody v. Scott and Klein* (1921), 68 D.L.R. 707 (Que. K.B., Appeal Side).

217 *Semble, Eastern Elevator Services Ltd. v. Wolfe* (1981), 119 D.L.R. (3d) 643 (N.S.S.C.).

218 *Jefferies v. Austin* (1738), 1 Str. 675; *Steinberg v. Steinberg* (1963), 45 D.L.R. (2d) 162 (Sask. Q.B.); *Irvine v. Irvine*, [1917] 2 W.W.R. 184 (Man. K.B.).

219 *Palcic v. Sadek*, 2012 BCSC 1651 (B.C. S.C.), affirmed 2013 BCCA 440 (B.C. C.A.); *Pacific Finance Acceptance Co. v. Turgeon* (1978), 93 D.L.R. (3d) 301 (B.C.S.C.); *Canadian Imperial Bank of Commerce v. Copeland* (1974), 5 O.R. (2d) 382 (Div. Ct.); *Royal Bank of Canada v. Mendel*, [1977] 6 W.W.R. 10 (B.C. Co. Ct.).

220 The leading case of *Kelly v. Solari* (1841), 9 M. & W. 54, involved a payment by cheque.

221 [1987] 4 W.W.R. 419 (Sask. Q.B.).

222 *Bank of Nova Scotia v. MacGuigan* (1982), 136 D.L.R. (3d) 185 (P.E.I.S.C.); *Bank of Montreal v. White and White* (1976), 10 Nfld. & P.E.I.R. 346 (Nfld. C.A.).

223 See §20:30.20.

224 *Bank of Nova Scotia v. MacGuigan, supra*, footnote 222, at p. 188, *per* Campbell J.

225 See §23:70.10.

226 See *Beaumont (Re); Beaumont v. Ewbank*, [1902] 1 Ch. 889 at pp. 893-95, and other cases discussed at §23:70.10(1).

227 *Palcic v. Sadek*, 2012 BCSC 1651, at para. 141; *Bibco Inc. v. Young* (2005), 197 Man. R. (2d) 242 (Q.B.); *Patterson v. Bremner* (2001), 107 A.C.W.S. (3d) 60 (B.C.S.C.); *Quantum Financial Services (Canada) Ltd. v. Yip* (1999), 173 D.L.R. (4th) 366 (B.C.S.C.).

228 As where there are not sufficient funds to pay it, it is expressly countermanded by the drawer, or payment is refused by the drawee bank after learning of the drawer's death. The ability of a remote holder for value to enforce such obligations is discussed at §26:30.40(4)(e), *supra*.

229 For a discussion of the ability of a remote party to enforce such obligations, see §26:30.40(4)(c), *supra*.

229.1 *Cellulose Marketing International A.B. v. Taylor Trading Inc.*, 1995 CarswellOnt 1263 (Ont. Ct. (Gen. Div.)).

229.2 1995 CarswellOnt 2850 (Ont. Ct. (Div.Ct.)).

229.3 *Supra*, footnote 229.1, at paras. 16-18.

229.4 *Supra*, footnote 229.2, at paras. 2, 3 and 5.

230 Geva, "Equities as to Liability on Bills and Notes: Rights of a Holder Not in Due Course" (1980-81), 5 C.B.L.J. 53, at pp. 73 and 79.

231 See §26:30.40, *supra*.

232 Byles (8th ed.), at pp. 119-20. The passage appeared at least until the 23rd ed., at p. 223, but was dropped from the discussion of consideration in the 26th ed., at pp. 264-66.

233 *Darnell v. Williams* (1817), 2 Stark. 166; *Barber v. Backhouse* (1791), 170 E.R. 88.

234 Byles (8th ed.), at pp. 119-20, citing early authorities.

235 (1839), 3 Y. & C. Ex. 436.

236 *Supra*, at p. 443, *per* the Lord Chief Baron. The whole judgment rewards the reader: "The account which a court of equity adjusts must be one of debtor and creditor and not an account of debts one way and of damages the other way." See, too, at pp. 444-45, where the learned judge distinguished between cases "so complicated that a jury could not in a day take the account" and "other cases of a more simple nature, and which might be taken within a reasonable compass of time". He covered his conclusion at the end by expressing it as a rule of law ("not a matter of set-off but . . . damages"). However, his reasoning was all based on practical considerations of procedure. Geva expanded on his thesis in *Financing Consumer Sales and Product Defences in Canada and the United States* (Toronto: Carswell Co. Ltd., 1984), Chapter 5.

237 Geva, *op cit.*, footnote 230, at pp. 73 and 79.

238 *E.g., Dutton v. Lake* (1834), 4 U.C.Q.B. (O.S.) 15; *Dixon v. Paul* (1836), 4 U.C.Q.B. (O.S.) 327,

and other cases cited in *Maclaren's Bills, Notes and Cheques*, 6th ed. by Read (Toronto: Carswell, 1940), at p. 185, footnote 2.

239 (1874), 35 U.C.Q.B. 64.

240 *Supra*, at p. 72, *per* Wilson J. *per cur.*

241 *Dixon v. Paul, supra*, footnote 238, at p. 327. The idea is plainly the same.

242 *An Act to facilitate the Remedies on Bills of Exchange and Promissory Notes by the Prevention of frivolous or fictitious Defences to Actions thereon* (1855) (U.K.), 18 & 19 Vict., c. 67.

243 *Statute Law Revision and Civil Procedure Act, 1883* (U.K.), 46 & 47 Vict., c. 49.

244 (1866), L.R. 2 Exch. 56.

245 *Georgian Bay Lumber Co. of Ontario v. Thompson, supra*, footnote 239.

246 English statute law was received in Ontario in 1792 as of that date: see Arthur W. Rogers, *Falconbridge on Banking and Bills of Exchange*, 7th ed. (Toronto: Canada Law Book Ltd., 1969), at pp. 11-14.

247 The dates on which the various provinces "received" English law vary. The last was British Columbia in 1858: see Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969) at pp. 5*ff.*, and Falconbridge, *op. cit.*, footnote 246, at pp. 11-14.

248 See *Topping v. Marling* (1910), 13 W.L.R. 319 (B.C.C.A.) (no authority); *Krauss v. Luciuk*, [1928] 1 D.L.R. 1132 (Sask. C.A.), citing Chalmers (9th ed.), at p. 118, and Falconbridge (3rd ed.), at p. 696. In *Fuller & Co. v. Holland* (1910), 9 E.L.R. 110 (N.S.S.C.), the only question the court would entertain was whether there was any consideration for the bill. There was, and it was therefore enforced.

249 Maclaren, *op. cit.*, footnote 238, at p. 186, illustration 3. See, *e.g.*, *Gordean v. Douglas* (1912), 7 D.L.R. 458 (Alta. S.C.) (not counterclaim, but possibility of partial failure of consideration disclosed in affidavit of merits filed in response to a motion for summary judgment; Stuart J. ordered the plaintiff's claim on a cheque to be tried). Other authors routinely support the rule without critical examination: see, *e.g.*, Chalmers and Guest, *op. cit.*, footnote 25, at para. 982.

250 Falconbridge, *Banking and Bills of Exchange*, 2nd ed. (Toronto: Canada Law Book, 1913), at p. 619.

250.1 *Supra*, citing Maclaren!

250.2 See §26:40.10(3) "The Current Practice [of summary judgment on cheques and notes].

251 *Jade Int'l Steel Stahl und Eisen GmbH & Co. KG v. Robert Nicholas (Steels) Ltd.*, [1978] 1 Q.B. 917 (C.A.).

252 See *supra*, at p. 924, *per* Cumming-Bruce L.J.: "[B]etween the immediate parties contractual rights and liabilities and equities can be raised in any proceedings between them on the bill".

253 *Scott v. Ashley Colter Ltd.*, [1942] 3 D.L.R. 538 (S.C.C.).

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Chapter I

OVERVIEW

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§1.1 Estoppel is the general legal term for the doctrines whose basic effect is to hold a person to his or her word.[1] If one of these doctrines applies, then a person is prevented ("estopped") from resiling from what he or she has said. There are, of course, different formulations of this basic legal principle. One of the more vivid is that of Glen Loutzenhiser,[2] who says that the doctrine is based on a principle of justice that may be colloquially referred to as "you cannot send someone out on a limb, and saw that limb off."[3]

I. - A. ORIGINS AND HISTORY

§1.2 Estoppels of various kinds have long existed in the common law.[4] Coke said of estoppel:

> Comes of the French word *estoupe*, from whence the English word 'stopped': and it is called an estoppel or conclusion, because a man's own

---

1 *Richards v. Law Development Group (Georgetown) Ltd.*, [1994] O.J. No. 2914 (Ont. Gen. Div.).

2 In Glen Loutzenhiser, "Holding Revenue Canada to its Word: Estoppel in Tax Law" (1999) 57 U.T. Fac. L. Rev. 127 at 131.

3 See also *Rodin Law Firm v. Pedherney*, [2010] A.J. No. 830, 2010 ABQB 307 (Alta. Q.B.).

4 A treatment of the history of estoppel is found in Adam Ship, "The Primacy of Expectancy in Estoppel Remedies: An Historical and Empirical Analysis" (2008) 46 Alta. L. Rev. 77.

§4.1 Estoppel by representation is a doctrine whereby the maker of a false statement can be nonetheless held by the recipient to that statement as being true if the recipient has relied on it to his or her detriment.

IV. - A. INTRODUCTORY MATTERS

§4.2 In *Jorden v. Money*,[1] estoppel by representation was described by Lord Cranworth L.C. as "a principle well known in the law, founded upon good faith and equity, a principle equally of law and of equity"[2]. The essence of the

[1] (1854), 5 H.L. Cas. 185 at 210, 10 E.R. 868 at 880 (P.C.).
[2] *Ibid.*, at 210 (H.L. Cas.), 880 (E.R.).

CARSWELL

Law of Cheques and Promissory Notes

the law and practice

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Consideration

§ 1. CONSIDERATION - DEFINED

A valuable consideration, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. The promisee provides something of value while the promisor accepts, whether for his or another's benefit, as the cause of giving the promise, or in practice, signing a note.[1] Consideration to support a cheque does not have to be equivalent to the total amount of the debt due to the payee.[2]

"Value" means valuable consideration.[3]

A party whose signature appears on a bill is, prima facie, deemed to have become a party thereto for value. This means prima facie proof of value having been given is made by the production into the court record of the bill, and proof of the drawer signature: no other extrinsic evidence is necessary.[4]

Under section 54 of the *Bills of Exchange Act,* the presence of consideration is presumed. The onus of proving the lack of consideration is upon the drawer of a bill.[5]

Valuable consideration for a bill may be constituted by any consideration sufficient to support a simple contract or an antecedent debt or liability.

An antecedent debt provides consideration for a note.[6] In one instance where the accommodation party was sued, the court found absence of consideration where the payee on a note had already made an advance to the maker, and did not rely on the credit of the

1 *Misa v. Currie* (1875), L.R. 10 Ex. 153 (Ch. Ex.) cited by *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.) at p. 860 within an extract from , Falconbridge, *Banking and Bills of Exchange*, (7th. ed. 1969) at page 605.

2 *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.), citing at p. 11 Falconbridge, Banking and Bills of Exchange (7th ed. 1969) at p. 605; *Glesby v. Mitchell* (1931), [1932] S.C.R. 260 (S.C.C.), at p. 8; *Voce Enterprises Ltd. v. SHE Apparel Inc.*, 2016 BCSC 1080 (B.C. S.C.)

3 *Bills of Exchange Act*, s. 2.

4 *Prince George Hotel Co. v. Richardson*, 1933 CarswellOnt 138 (Ont. C.A.); *Slater v. Laberee* (1905), 9 O.L.R. 545 (Ont. Div. Ct.); *Clarkson v. Roberts* (1930), 66 O.L.R. 102 (Ont. C.A.); *Heintzman v. Young* (1923), 54 O.L.R. 13 (Ont. C.A.).

5 *Luther v. Westcott*, [1933] S.C.R. 251 (S.C.C.) per Lamont J., at p. 256.

6 *Bills of Exchange Act*, s. 53(1)(*b*).

accommodation party. Nor was there here any forbearance or other benefit conferred on the accommodation party.[7]

Where a bill is taken for or on account of a pre-existing debt, the presumption is that it is only conditional payment. If it is dishonoured the debt revives. If it is given in exchange for goods or other securities sold at the time, the transaction amounts to a barter of the bill, with all its risks.[8]

§ 2. PRESUMPTION

A bill as between immediate parties is evidence of money lent or that value has been given for the purposes of establishing a security interest. The fact that a promissory note is taken at the same time that the debtor has granted a security interest is further evidence money or value has been advanced.[9]

§ 3. MUST FLOW TO THE MAKER

Consideration must flow to the maker or promisor of a note. Where the funds advanced upon a note are not paid to the maker, there must be a sufficient link between the advance and the promise to constitute valid consideration flowing to the promisor in order to make the note enforceable.[10]

If funds have not been advanced upon the issue of the note but prior to the requirement that a note be issued, as for example to be used as a guarantee, the promisor would have to establish a "sufficient link" between the prior advance and the issuance of the note the basis of mixed fact and law.[11]

The antecedent debt may arise from the maker's act of embezzlement, which he now wishes to repay through a note.[12]

7 *Mollot v. Monette*, [1981] 2 S.C.R. 133 (S.C.C.).

8 *Dean Capital Corp. v. Geneen Automobiles Ltd.*, 2005 CarswellOnt 2300 (Ont. S.C.J.) citing *McGlynn v. Hastie* (1918), 46 D.L.R. 20 (Ont. C.A.) at p. 51.

9 *Erjo Investments Ltd. v. Michener Allen Auctioneering Ltd.* (2004), 238 D.L.R. (4th) 32, [2005] 3 W.W.R. 55, 241 Sask. R. 228 (Sask. C.A.).

10 *Bank of Montreal v. Khouw* (1984), 56 B.C.L.R. 270 (B.C. C.A.) where the promise had lent funds to a third party and not for the benefit of the promisor.

11 *Caligiuri v. Tumillo* (2003), 38 B.L.R. (3d) 163, [2004] 7 W.W.R. 677 (Man. C.A. [In Chambers]).

12 *Ackworth v. General Accident Assurance Co.* (1961), [1962] O.R. 183 (Ont. C.A.).

§ 4. CONSIDERATION - PAST

"Past consideration" is "good consideration" sufficient to support a note if

(1) the act was done at the request of the promisor;

(2) the parties understood that payment would be made or some other benefit conferred; and

(3) the payment or conferment of the benefit, if it had been promised in advance, was legally recoverable or enforceable.[13]

Colloquially put, old money owed can serve as consideration for the present issuance of a note.[14]

§ 5. FOR BENEFIT OF ANOTHER

So long as consideration flows from the promisee of a note, it does not matter that the consideration so far as it is in reference to one of the debtors, does not flow to the other debtor. The intensity of the relationship between a personal debtor and his controlled company as the other debtor may be sufficient to attribute consideration received by one to the other in support of a note signed by only one of them.[15] Such may be the case where the principal treats the company and its assets as his own, applies the assets as he likes, draws for his own personal use whatever the corporate account would stand, and instructs the company accountant to debit the books in whatever way is beneficial or appropriate.[16]

§ 6. FORBEARANCE AS CONSIDERATION

A promisee's promise to forbear from enforcing a debt is sufficient consideration for a promisor's promise to pay.[17] The act of forbearance may benefit the promisor or a third party.[18] Payment

13 *Wilburn Properties Inc. v. Silver Peak Resources Ltd.*, 2001 BCSC 1084 (B.C. S.C. [In Chambers]) at para. 83.

14 *Kong v. Kong*, 2013 BCSC 2252 (B.C. S.C.), reversed 2014 CarswellBC 3854 (B.C. C.A.).

15 *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.) citing In *Eisenberg v. Bank of Nova Scotia*, [1965] S.C.R. 681 (S.C.C.) at p. 694: *Therefore, upon a consideration of the above authorities, I have been led to the conclusion that a corporation, when a matter is intra vires of the corporation, cannot be heard to deny a transaction to which all the shareholders have given their assent even when such assent be given in an informal manner or by conduct distinguished from a formal resolution at a duly convened meeting.*

16 *Bonior v. Siery Ltd.*, [1968] N.Z.L.R. 254 (New Zealand S.C.) at p. 260.

17 *Francis v. Allan* (1918), 57 S.C.R. 373 (S.C.C.) at p. 376; and *British Columbia (Attorney General) v. Deeks Sand Gravel Co.*, [1956] S.C.R. 336 (S.C.C.) at p. 343.

18 *Moss v. 158339 Canada Inc.*, 2003 MBCA 101, [2003] M.J. No. 267 (Man. C.A.) at para. 24,

for another party's forbearance with respect to another party's debt constitutes valid consideration. In other words, it does not matter that the drawer is not the debtor of the payee.[19] Courts may infer a promise to forbear from the facts of a case. Whether a forbearance is valid consideration is a question of law and whether the act amounts to a forbearance is a question of fact.[20]

The forbearance or extension of time limited for the balance of payments on a transaction by the giving of a note, is valuable consideration within the meaning of the common law of England under section 9, or under section 52 of the *Bills of Exchange Act*.

In *Ross, Re*,[21] the drawer of a note had pledged $150,000 for the construction and equipment of a university gymnasium. He later promised to contribute $200,000 on the condition that the previous pledge of $150,000 would be included in the subsequent one. Once he paid $100,000, he asked for and received an extension of time for payment of the balance. He therefore issued a promissory note for $100,000 payable three years after date. Without paying, he went bankrupt and the trustee in bankruptcy disallowed the university claim for the amount of the note. It was held on appeal that the agreement of pledge of funds was valid under the law of Quebec, and that the evidence afforded proof of valuable consideration for the making of the note in the form of a natural obligation and forbearance of payment. The *Bills of Exchange Act* did not and was not intended to affect civil liability arising from with the agreement to pay the pledge.

An agreement between the immediate parties to forebear demanding payment on a bill does not render the bill conditional: forbearance constitutes a simple collateral agreement which does not affect the validity of the bill.

For example, a payee sued the maker after death on an alleged promissory note payable one year after date. The note was given in consideration for services rendered on a farm; and the parties agreed to withhold demand for payment until the occurrence of the maker's death. The court found that the acceptance by the payee of the maker's requests amounted to no more than a collateral engagement

Noren Investments Ltd. v. Brownie's Franchises Ltd. (1986), 33 D.L.R. (4th) 359 (B.C. S.C.) at p. 370, affirmed (1987), 37 D.L.R. (4th) 1 (B.C. C.A.), and *Royal Bank v. Kiska* (1967), 63 D.L.R. (2d) 582 (Ont. C.A.) at p. 590.

19 *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.), citing at p. 11 Falconbridge, Banking and Bills of Exchange (7th ed. 1969) at p. 605; *Glesby v. Mitchell* (1931), [1932] S.C.R. 260 (S.C.C.), at p. 8; *Voce Enterprises Ltd. v. SHE Apparel Inc.*, 2016 BCSC 1080 (B.C. S.C.).

20 *Caligiuri v. Tumillo* (2003), 38 B.L.R. (3d) 163, [2004] 7 W.W.R. 677 (Man. C.A. [In Chambers]).

21 (1931), [1932] S.C.R. 57 (S.C.C.).

not to enforce his rights until the condition had been respected. That did not make the document any the less an unconditional promise in writing by the maker to pay at a fixed time a sum certain in money to the payee. The agreement not to enforce payment while the maker lived was not a condition of the note, which otherwise bore terms importing a present and unqualified obligation. Even if the maker could have been enjoined from enforcing payment in the maker's lifetime, the document was still a valid promissory note.[22]

A promise by the payee to forbear is a good consideration. Actual forbearance at the request, express or implied, of the drawer or maker also constitutes good consideration.[23]

Consideration may consist of a forebearance to sue, or even an extension of credit or payment terms for the benefit of another party. In *Gallagher v. Murphy*,[24] the debtor of royalties for patent use, obtained from another a promissory note to cover the debt payable to the creditor and which the debtor endorsed. The note was delivered to the creditor which accepted it, reserving its rights for payment of the royalties if the note were not paid. After maturity, the creditor transferred the note to a holder for value who sued the maker and endorser. Neither the payee nor holder for value knew that the maker had purchased from the debtor an interest in another patent. The court held the note was valid given the presence of consideration which was not purchase money for a patent right or interest therein. Rather, the consideration was the extension of time to the debtor by the payee for payment of the royalties due by him.

While an extension of time for payment of a debt owing by a third person may be a good consideration from the payee to the maker of a promissory note, a person, unable for the time being to collect from a debtor, may arrange with another to take that other's note for the same amount for his own accommodation, without thereby extending the time for payment by his debtor.[25]

If a drawer of a bill promises the payee, in consideration for the payee's forbearance to sue, to pay the bill "whenever my circumstances may enable me to do so and I may be called upon for that purpose", or "as soon as she possibly could after they got going", the promise is not too vague to be enforced; and the bill was enforceable when the condition of ability to repay is established.[26]

22 *Luther v. Westcott*, [1933] S.C.R. 251 (S.C.C.).

23 *Ross, Re* (1931), [1932] S.C.R. 57 (S.C.C.) where Newcombe J. at p. 67 quoted from Lopes L.J. at page 346 of *Crears v. Hunter* (1887), 19 Q.B.D. 341 (Eng. C.A.).

24 *Gallagher v. Murphy*, [1929] S.C.R. 288 (S.C.C.).

25 *Glesby v. Mitchell* (1931), [1932] S.C.R. 260 (S.C.C.).

26 *Waters v. Earl of Thanet* (1842), 2 Q.B. 757 (Eng. K.B.) cited with approval in *Gould, Re*, [1940] O.R. 250 (Ont. C.A.).

The fact that a cheque is post-dated may create the presumption that it was so to support a forebearance, and hence demonstrate consideration for the cheque.[27]

§ 7. VALUE RECEIVED

The words "value received" inscribed on a note raises the presumption that the maker received consideration[28] or that there is an antecedent debt. The antecedent debt or liability may be found in a prior agreement, the obligations arising from which have not been discharged.

Where payment is in accordance with a promissory note drafted to establish the creditor-debtor relationship of the parties, a juristic reason is established to validate the enrichment of the payee, and which enrichment cannot be considered unjust.[28.1]

§ 8. PARTIAL FAILURE

An agreement which calls for an adjustment following shipment of goods in the event of quantity shortage does not create an inherent equity which affects the rights of a holder for value. Even if there is a partial failure of consideration between the immediate parties to a bill, that failure cannot affect the title of remote parties, such as a party whose endorsement on a note was not given pursuant to any agreement in respect of the immediate parties.

Section 69 of the *Bills of Exchange Act* provides that when an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it. The endorsee of an overdue bill takes it subject to its equities, meaning the equities of the bill, not the equities of the parties. He takes it subject to a right inherent in a contractual relation represented by the bill.[29]

27 *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.), citing at p. 11 Falconbridge, *Banking and Bills of Exchange* (7th ed. 1969) at p. 605; *Glesby v. Mitchell* (1931), [1932] S.C.R. 260 (S.C.C.), at p. 8; *Voce Enterprises Ltd. v. SHE Apparel Inc.*, 2016 BCSC 1080 (B.C. S.C.).

28 *Riml v. Greger* (November 22, 1991), Doc. CA012802 (B.C. C.A.) where the agreement dealt with the sale of a part of a business: $7,000.00 downpayment with the balance of $14,000.00 to be paid on a 60% - 40% interest free split of the total monthly gross sales, 60% to be paid to Hubert Riml, until the total balance is paid unless purchaser wishes to pay off balance sooner.

28.1 *Bilin v. Sidhu*, 2017 BCSC 36 (B.C. S.C.); *Ontario (Hydro-Electric Power Commission) v. Brown*, [1960] O.R. 91 (Ont. C.A.).

29 *Scott v. Ashley Colter Ltd.*, [1942] S.C.R. 331 (S.C.C.).

§ 9. USURY

It is a criminal offence to enter into an agreement or arrangement to receive interest at a criminal rate, or receive a payment or partial payment of interest at a criminal rate.[30] "Criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement. For these purposes, "interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced. It does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes. A rebuttable presumption exists of knowledge by the recipient of the nature of the payment and that it was received at a criminal rate.

In an appropriate case, the court may sever only those provisions of the loan agreement that put the effective interest rate over 60 percent through the blue-pencil technique (drawing a line through the illegal portion) resulting in the severance of the offending excess of interest rate from the acceptable rate. However, given the resulting change or disequilibrium caused to the agreement by blue pencilling, the more appropriate approach is to vest the greatest possible amount of remedial discretion in judges in courts of first instance reviewing the agreement, thereby permitting a number of remedies including notional severance. As the Supreme Court of Canada noted:

> *Four considerations are relevant to the determination of whether public policy ought to allow an otherwise illegal agreement to be partially enforced rather than being declared void ab initio in the face of illegality in the contract: (1) whether the purpose or policy of s. 347 would be subverted by severance; (2) whether the parties entered into the agreement for an illegal purpose or with an evil intention; (3) the relative bargaining positions of the parties and their conduct in reaching the agreement; (4) the potential for the debtor to enjoy an unjustified windfall. Given that the present case involved a commercial transaction engaged in by experienced and independently advised commercial parties, it is difficult to see why the choice of a 30.8 percent rather than 60 percent rate better fosters compliance with s. 347(1)(a) of the Code. The other considerations also militate in favour of a flexible remedy. There is no evidence on the record to suggest that the appellant has been charged with violating s. 347(1)(a). The contract was entered into for ordinary commercial purposes and there was nothing inherently illegal or evil about this intention. With respect to the third factor, each party in this case had independent legal advice, was commercially experienced and knew what it was getting into. Finally, any potential for an unjustified windfall in this case arises from the respondent possibly not having to repay the*

30 Section 347 *Criminal Code* R.S.C. 1985, c. C46.

principal and interest, or from the respondent possibly not having to pay a commercially appropriate rate of interest on the loan. Given that each party had independent legal advice and knew precisely the obligations that it was taking on, the equities of the situation favour the appellant.[31]

A bill given for a usurious consideration or on a usurious contract is not void in the hands of the holder, unless at the time of its transfer to him he had actual knowledge that it was originally given for a usurious consideration or on a usurious contract. Section 58 of the *Bills of Exchange Act* does not remove a judge's discretion to sever the principal of the note from usurious interest in appropriate circumstances, even though its purpose is to protect a holder of a note given in usurious circumstances.

Interest on a note which for one month amounted to 92.3% with interest thereafter at 30% per annum, was not considered usurious. The court held it was entitled to take into account a number of factors when determining whether the principal sum should be paid where there is a usurious rate of interest.[32] Although there was usury for the first month, at 30%, the rate was less than the criminal rate of interest, namely 60%, which demonstrated there was no attempt at loan sharking, or that the parties entered into their agreement with an evil intention.

§ 10. CONSIDERATION UNDER THE UNIFORM COMMERCIAL CODE (UCC)

Under *UCC* section 3-303, consideration is any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an

31 *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 70 O.R. (3d) 255, 40 B.L.R. (3d) 18, 18 C.R. (6th) 1, 235 D.L.R. (4th) 385, 183 O.A.C. 342 (S.C.C.) at paras. 19 - 40, discussing the factors set out in *William E. Thomson Associates Inc. v. Carpenter* (1989), 61 D.L.R. (4th) 1 (Ont. C.A.), leave to appeal refused (1990), 65 D.L.R. (4th) viii (note) (S.C.C.). In *Transport North America*, the court reworked a proposed credit facility which provided for the following payments: (a) interest at four percent per month calculated daily, payable monthly in arrears; (b) a monthly monitoring fee of $750; (c) a one percent standby fee; (d) royalty payments of $160,000 in eight quarterly installments; (e) payment of legal and other fees; and (f) a commitment fee of $5,000. The parties had executed an accounts receivable factoring agreement, a promissory note, a general security agreement and personal guarantees of the indebtedness for up to $500,000. The Court permitted the application of "notional severance" to reduce the effective annual interest rate to 60 percent.

32 *271053 N.B. Ltd. v. Burton*, 1996 CarswellNB 477 (N.B. C.A.).

instrument is issued for value, the instrument is also issued for consideration.

An instrument is issued or transferred for value if:

(1) the instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;

(2) the transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;

(3) the instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

(4) the instrument is issued or transferred in exchange for a negotiable instrument; or

(5) the instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

Court File No. CV-16-11549-00CL

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 URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")AND IN THE MATTER OF TCC URBANCORP (BAY) LIMITED PARTNERSHIP

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

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