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., URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KING TOWNS INC. AND DEAJA PARTNER (BAY) INC.

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

Court File No. CV-16-11389-00CL

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 TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (collectively, the "Applicants") AND THE AFFILIATED ENTITIES IN SCHEDULE "A" HERETO

BOOK OF AUTHORITIES OF CERTAIN HOMEBUYERS

April 7, 2017

DICKINSON WRIGHT LLP
Barristers & Solicitors
199 Bay Street
Suite 2200, P.O. Box 447
Commerce Court Postal Station
Toronto, Ontario, M5L 1G4
Fax: (416) 865-1398

LISA S. CORNE (27974M)
Email: lcorne@dickinsonwright.com
Tel: (416) 646-4608

MICHAEL J. BRZEZINSKI (63573R)
Email: mbrzezinski@dickinsonwright.com
Tel: (416) 777-2394

Lawyers for Home Buyers
from Woodbine and Bridlepath

TO: **SERVICE LIST**

BOOK OF AUTHORITIES
OF CERTAIN HOMEBUYERS

I N D E X

TAB

TAB

18. *Hurley v. Roy,* 1921 CarswellOnt 243

19. *Great Jordan Realty Group v. Genesis Marketing Organization, Ltd.,* 1977 15 O.R. (2nd)701

20. *Borthwick v. St. James Square Associates, Inc.,* [NTD: add cite]

21. *Freedman v Mason* [1958] S.C.R. 483, 14 D.L.R. (2d) 529

22. *Bhasin v. Hrynew*, 2014 SCC 71

Tab 1

LECTURES IN REAL ESTATE TRANSACTIONS

Paul M. Perell

CANADA LAW BOOK

that lay persons sometimes believe that their liability is "capped" by the amount of the deposit. This is obviously a serious mistake.

Purchasers' Damage Claims

Turning now to the details of a damage claim by a purchaser, it is first necessary to discuss the standard cancellation or "rescission" clause found in most agreements of purchase and sale, the near obsolete rule from the case of *Bain v. Fothergill*,[43] and the effect of the decision of the Supreme Court of Canada in *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*[44]

The rule from *Bain v. Fothergill* is that if the vendor is unable to perform his or her contract because of an inability to convey good title, then the purchaser is entitled only to a return of any proceeds paid and to compensation for the costs of investigating the vendor's title. In these circumstances, the purchaser is not entitled to damages for the loss of the bargain. The rule developed in England during a time when there was no reliable land registry system and it was not uncommon for purchasers to be disappointed because their vendors could not establish a good title to property. The rule was adopted as the law in Canada.[45]

Similar in effect to *Bain v. Fothergill* is the cancellation or rescission clause found in most agreements for purchase and sale. (Here again, we have the word "rescission" being used in the vernacular.) This clause provides that if, within the requisition deadline, the purchaser makes in writing any valid objection to title that the vendor is unable or unwilling to solve and that the purchaser will not waive, then the agreement ends and all moneys paid shall be returned without interest or deduction. The clause further provides that if the agreement is ended in this way, then the vendor is not liable for any costs or damages.

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compared to the vendor's actual losses and it would have to be unconscionable in the circumstances for the vendor to keep the money. These circumstances rarely arise so, in almost every case, the innocent vendor gets to keep the deposit. This means that in a rising market there may be no reason for a vendor to sue since his or her damages, if any, will be covered by the deposit. Even in a flat market, there may be no reason for a vendor to sue if the deposit is sufficient to cover the vendor's incidental damages.

43 (1874), L.R. 7 H.L. 158.

44 (1978), 92 D.L.R. (3d) 289, [1979] 2 S.C.R. 43.

45 *Ont. Asphalt Block Co. v. Montreuil* (1913), 19 D.L.R. 518 (S.C.), affd 52 S.C.R. 541, leave to appeal to P.C. refused 52 S.C.R. viii.

To obtain damages for the benefit of their lost bargain, purchasers must get around the effect of *Bain v. Fothergill* and the standard cancellation or rescission clause where there is a breach of contract. It is now relatively easy to do this.

In *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*,[46] the Supreme Court of Canada indicated in *obiter dicta* that, having regard to the land registry systems developed in Canada, the rationale of the rule from *Bain v. Fothergill* no longer made sense. This *obiter dicta* has been applied by lower courts as authoritative.[47] In any event, at common law, there are many exceptions to the rule. These exceptions may be relied upon by purchasers to base their damages claim for the loss of the benefit of the bargain. Some of the exceptional cases where a purchaser may claim the benefit of the bargain include the cases where the vendor commits fraud or purposely disables itself from completing the conveyance, or is able to remedy the title problem but refuses to do so.

As for the standard cancellation or rescission clause, notwithstanding its wide wording, the courts have limited the rights of vendors to rely on this clause to end a contract that they are unable to perform. The case law establishes that a vendor may not rely on the clause if he or she recklessly promised a title to property that he or she could not convey and a vendor may not arbitrarily, capriciously, or recklessly rely on the cancellation clause and the vendor must make a *bona fide* effort to satisfy any title requisition and must show some reasonable ground for being unable to do so.[48] The cancellation clause may be invoked only if these guidelines of good faith are met. Thus, if a vendor simply refuses to close, he or she will be liable for damages including the loss of the benefit of the bargain.

The elements and the legal concepts associated with a purchaser's claim for damages are similar to the situation for the vendor. The purchaser's expectation was to convert money into land. It still has the money, save for the deposit and any other advance payments, to invest in other land. The benefit of the bargain is the difference between the value of the land and the contract price. Once again, the variable in this calculation is the date for determining the value of the land and

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46 *Supra*, footnote 44.

47 *Mitchell v. Nagoda*, [1985] O.J. No. 482 (H.C.J.).

48 See for example in *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.* (1997), 15 R.P.R. (3d) 201, 36 O.R. (3d) 328, addt'l reasons 15 R.P.R. (3d) 234, 77 A.C.W.S. (3d) 234 (Gen. Div.), discussed in Lecture 2.

this date will be connected to the principle of mitigation. Assuming that the deposit or any purchase moneys are refunded, it is only when land values have risen above the contract price that the purchaser suffers a loss in not completing his or her transaction. In these circumstances, the purchaser has lost the benefit of his or her bargain with the vendor.

Like an innocent vendor, if an innocent purchaser accepts the vendor's anticipatory breach as ending the contract, then the measure of damages will be the difference in value between the contract price and the value of the land as at the time of closing subject to the purchaser's possible obligation to mitigate by finding a substitute property to purchase. If there is no anticipatory breach and if the innocent purchaser accepts the vendor's refusal to close on the scheduled date as ending the contract, then the measure of damages will be the difference in value between the contract price and the value of the land as at the time of closing or reasonably thereafter to allow the purchaser an opportunity to mitigate. If the innocent purchaser does not accept the vendor's breach as ending the contract and sues for specific performance, then subject to what we will say about *Domowicz v. Orsa Investments Ltd.*[49] and *Semelhago v. Paramadevan*[50] later, damages will be calculated when the claim for specific performance is abandoned or when specific performance becomes impossible.[51]

Examples of Purchaser's Claim for Damages

A few examples are helpful. A transaction is signed in January to build and to sell a house for $100,000 with the closing to be on December 1st. The purchaser pays a $10,000 deposit. On June 1st, the vendor repudiates the agreement and indicates that he or she will not complete the sale. This example is, of course, an anticipatory breach. The purchaser accepts the breach as ending the contract and immediately sues for the return of his or her $10,000 deposit plus interest for the loss of the use of the funds plus damages.[52] The benefit

[49] (1993), 15 O.R. (3d) 661, [1993] O.J. No. 2214 (Gen. Div.), and *Domowicz v. Orsa Investments Ltd.* (1994), 20 O.R. (3d) 722, 43 R.P.R. (2d) 300 (Gen. Div.), vard 40 O.R. (3d) 256, 77 A.C.W.S. (3d) 631 (C.A.).

[50] (1996), 136 D.L.R. (4th) 1, [1996] 2 S.C.R. 415.

[51] For an example, see *Johnson v. Agnew*, [1979] 1 All E.R. 883 (H.L.).

[52] If *Bain v. Fothergill* were to apply, then the purchaser's recovery would be limited to the $10,000 plus the relatively modest costs thrown away to pay for

Tab 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Skypower CL 1 LP v. Ontario (Minister of Energy) | 2012 ONSC 4979, 2012 CarswellOnt 11834, 355 D.L.R. (4th) 168, 298 O.A.C. 204, 220 A.C.W.S. (3d) 346, [2012] O.J. No. 4458 | (Ont. Div. Ct., Sep 10, 2012)

2010 SCC 4
Supreme Court of Canada

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)

2010 CarswellBC 296, 2010 CarswellBC 297, 2010 SCC 4, [2010] 1 S.C.R. 69, [2010] 3 W.W.R. 387, [2010] B.C.W.L.D. 1106, [2010] B.C.W.L.D. 1107, [2010] B.C.W.L.D. 1108, [2010] B.C.W.L.D. 1109, [2010] S.C.J. No. 4, 100 B.C.L.R. (4th) 201, 185 A.C.W.S. (3d) 81, 281 B.C.A.C. 245, 315 D.L.R. (4th) 385, 397 N.R. 331, 475 W.A.C. 245, 65 B.L.R. (4th) 1, 86 C.L.R. (3d) 163, J.E. 2010-321

Tercon Contractors Ltd. (Appellant) and Her Majesty The Queen in Right of the Province of British Columbia, by her Ministry of Transportation and Highways (Respondent) and Attorney General of Ontario (Intervener)

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

Heard: March 23, 2009
Judgment: February 12, 2010 *
Docket: 32460

Proceedings: reversing *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* (2007), 73 B.C.L.R. (4th) 201, 414 W.A.C. 103, 249 B.C.A.C. 103, 66 C.L.R. (3d) 1, 2007 BCCA 592, 2007 CarswellBC 2880, [2008] 2 W.W.R. 410, 40 B.L.R. (4th) 26, 289 D.L.R. (4th) 647 (B.C. C.A.); affirming *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* (2006), 2006 BCSC 499, 2006 CarswellBC 730, [2006] 6 W.W.R. 275, 18 B.L.R. (4th) 88, 51 C.L.R. (3d) 227, 53 B.C.L.R. (4th) 138 (B.C. S.C.)

Counsel: Chris R. Armstrong, Brian G. McLean, William S. McLean, Marie-France Major for Appellant
J. Edward Gouge, Q.C., Jonathan Eades, Kate Hamm for Respondent
Malliha Wilson, Lucy McSweeney for Intervener, Attorney General of Ontario

Subject: Contracts

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

II Contracts
II.1 Building contracts
II.1.a Execution of formal contract
II.1.a.i Tendering process
II.1.a.i.B Process and procedure
II.1.a.i.B.2 Compliance

Construction law

II Contracts
II.1 Building contracts

II.1.a Execution of formal contract
II.1.a.i Tendering process
II.1.a.i.B Process and procedure
II.1.a.i.B.3 Duty of fairness

Construction law

II Contracts
II.6 Breach of terms of contract
II.6.f Exclusion of liability

Headnote

Construction law --- Contracts — Breach of terms of contract — Exclusion of liability

In tendering process for construction of 25-km highway, Ministry of Transportation and Highways received submissions from B Ltd. and T Ltd. — Contract was awarded in name of B Ltd., notwithstanding that B Ltd. and E Co., ineligible proponent, planned to perform work as joint venture — T Ltd. brought action against Ministry for damages for failure to reject first ranked proposal from B Ltd., allegedly contrary to request for proposals — Action was allowed and T Ltd. was awarded damages — Trial judge found that Ministry breached "contract A" by accepting bid that was incapable of acceptance, for non-compliance, and breached duty of fairness by approving non-compliant bid as successful bidder — Trial judge further found that exclusion from liability clause in contract A did not apply to fundamental breaches that occurred — Ministry successfully appealed — It was determined that trial judge erred in interpreting exclusion clause and in refusing to give effect to it — T Ltd. appealed — Appeal allowed — Issues were whether successful bidder was eligible and, if not, whether T Ltd.'s claim for damages was barred — Trial judge reached right result on both issues — Foundation of tender contract was that only six, pre-selected bidders would be permitted to participate in bidding — Ministry not only breached express and implied terms of contract, it did so in way that was affront to integrity and business efficacy of tendering process — Exclusion clause did not protect Ministry from T Ltd.'s damage claim from Ministry's dealings with ineligible bidder, let alone from its breach of implied duty of fairness to bidders.

Construction law --- Contracts — Breach of terms of contract — Breach by owner — General principles

In tendering process for construction of 25-km highway, Ministry of Transportation and Highways received submissions from B Ltd. and T Ltd. — Contract was awarded in name of B Ltd., notwithstanding that B Ltd. and E Co., ineligible proponent, planned to perform work as joint venture — T Ltd. brought action against Ministry for damages for failure to reject first ranked proposal from B Ltd., allegedly contrary to request for proposals — Action was allowed and T Ltd. was awarded damages — Trial judge found that Ministry breached "contract A" by accepting bid that was incapable of acceptance, for non-compliance, and breached duty of fairness by approving non-compliant bid as successful bidder — Trial judge further found that exclusion from liability clause in contract A did not apply to fundamental breaches that occurred — Ministry successfully appealed — It was determined that trial judge erred in interpreting exclusion clause and in refusing to give effect to it — T Ltd. appealed — Appeal allowed — Issues were whether successful bidder was eligible and, if not, whether T Ltd.'s claim for damages was barred — Trial judge reached right result on both issues — Foundation of tender contract was that only six, pre-selected bidders would be permitted to participate in bidding — Ministry not only breached express and implied terms of contract, it did so in way that was affront to integrity and business efficacy of tendering process — Exclusion clause did not protect Ministry from T Ltd.'s damage claim from Ministry's dealings with ineligible bidder, let alone from its breach of implied duty of fairness to bidders.

Construction law --- Contracts — Building contracts — Execution of formal contract — Tendering process — Process and procedure

In tendering process for construction of 25-km highway, Ministry of Transportation and Highways received submissions from B Ltd. and T Ltd. — Contract was awarded in name of B Ltd., notwithstanding that B Ltd. and E Co., ineligible proponent, planned to perform work as joint venture — T Ltd. brought action against Ministry for damages for failure to reject first ranked proposal from B Ltd., allegedly contrary to request for proposals — Action was allowed and T Ltd. was awarded damages — Trial judge found that Ministry breached "contract A" by accepting bid that was incapable of acceptance, for non-compliance, and breached duty of fairness by approving non-compliant bid as successful bidder — Trial judge further found that exclusion from liability clause in contract A did not apply to fundamental breaches that occurred — Ministry successfully appealed — It was determined that trial judge erred in interpreting exclusion clause and in refusing to give effect to it — T Ltd. appealed — Appeal allowed — Issues were whether successful bidder was eligible and, if not, whether T Ltd.'s claim for damages was barred — Trial judge reached right result on both issues — Foundation of tender contract was that only six, pre-selected bidders would be permitted to participate in bidding — Ministry not only breached express and implied terms of contract, it did so in way that was affront to integrity and business efficacy of tendering process — Exclusion clause did not protect Ministry from T Ltd.'s damage claim from Ministry's dealings with ineligible bidder, let alone from its breach of implied duty of fairness to bidders.

Droit de la construction --- Contrats — Violation des conditions du contrat — Exonération de responsabilité

Dans le cadre d'un processus d'appel d'offres pour la construction d'une autoroute de 25 kilomètres, le ministère des Transports et de la Voirie a reçu des soumissions de la part de B Ltd. et T Ltd., entre autres — Contrat a été attribué au nom de B Ltd., sans tenir compte du fait que B Ltd. et E Co., un candidat inéligible, entendaient réaliser les travaux dans le cadre d'une coentreprise — T Ltd. a déposé un recours en dommages-intérêts à l'encontre du ministère parce qu'il n'avait pas rejeté la soumission de B Ltd., laquelle était arrivée au premier rang, alléguant qu'elle ne répondait pas aux exigences de l'appel d'offres — Recours a été accueilli et T Ltd. a été indemnisé — Juge de première instance a conclu que le ministère avait contrevenu au « contrat A » en acceptant une soumission qui était inacceptable, puisqu'elle n'était pas conforme, et avait manqué à son devoir d'équité à l'égard de T Ltd. en retenant une soumission non conforme — De plus, la juge de première instance a conclu que la clause d'exonération de responsabilité dans le contrat A ne s'appliquait pas aux violations fondamentales qui s'étaient produites — Ministère a interjeté appel avec succès — En appel, il a été déterminé que la juge de première instance avait commis une erreur en interprétant la clause d'exonération et en refusant de lui donner effet — T Ltd. a formé un pourvoi — Pourvoi accueilli — Il s'agissait de déterminer si l'adjudicataire était éligible et, sinon, si le recours de T Ltd. en dommages-intérêts était prescrit — Juge de première instance a eu raison sur les deux questions — Suivant le contrat issu du document d'appel d'offres, seules six entreprises présélectionnées pouvaient prendre part à l'appel d'offres — Ministère a manqué à ses obligations contractuelles expresses et tacites, et ce, d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres — Clause d'exonération ne mettait pas le ministère à l'abri du recours en dommages-intérêts de T Ltd. pour la mise en rapport du ministère avec une entreprise qui n'était même pas admise à soumissionner, sans compter le manquement à son obligation tacite d'équité envers les soumissionnaires.

Droit de la construction --- Contrats — Violation des conditions du contrat — Violation par le propriétaire — Principes généraux

Dans le cadre d'un processus d'appel d'offres pour la construction d'une autoroute de 25 kilomètres, le ministère des Transports et de la Voirie a reçu des soumissions de la part de B Ltd. et T Ltd., entre autres — Contrat a été attribué au nom de B Ltd., sans tenir compte du fait que B Ltd. et E Co., un candidat inéligible, entendaient réaliser les travaux dans le cadre d'une coentreprise — T Ltd. a déposé un recours en dommages-intérêts à l'encontre du ministère parce qu'il n'avait pas rejeté la soumission de B Ltd., laquelle était arrivée au premier rang, alléguant qu'elle ne répondait pas aux exigences de l'appel d'offres — Recours a été accueilli et T Ltd. a été indemnisé — Juge de première instance a conclu que le ministère avait contrevenu au « contrat A » en acceptant une soumission qui était inacceptable, puisqu'elle n'était pas conforme, et avait manqué à son devoir d'équité à l'égard de T Ltd. en retenant une soumission non conforme — De plus, la juge de première instance a conclu que la clause d'exonération

de responsabilité dans le contrat A ne s'appliquait pas aux violations fondamentales qui s'étaient produites — Ministère a interjeté appel avec succès — En appel, il a été déterminé que la juge de première instance avait commis une erreur en interprétant la clause d'exonération et en refusant de lui donner effet — T Ltd. a formé un pourvoi — Pourvoi accueilli — Il s'agissait de déterminer si l'adjudicataire était éligible et, sinon, si le recours de T Ltd. en dommages-intérêts était prescrit — Juge de première instance a eu raison sur les deux questions — Suivant le contrat issu du document d'appel d'offres, seules six entreprises présélectionnées pouvaient prendre part à l'appel d'offres — Ministère a manqué à ses obligations contractuelles expresses et tacites, et ce, d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres — Clause d'exonération ne mettait pas le ministère à l'abri du recours en dommages-intérêts de T Ltd. pour la mise en rapport du ministère avec une entreprise qui n'était même pas admise à soumissionner, sans compter le manquement à son obligation tacite d'équité envers les soumissionnaires.

Droit de la construction --- Contrats — Contrats de construction — Exécution d'un contrat solennel — Processus d'appel d'offres — Procédure

Dans le cadre d'un processus d'appel d'offres pour la construction d'une autoroute de 25 kilomètres, le ministère des Transports et de la Voirie a reçu des soumissions de la part de B Ltd. et T Ltd., entre autres — Contrat a été attribué au nom de B Ltd., sans tenir compte du fait que B Ltd. et E Co., un candidat inéligible, entendaient réaliser les travaux dans le cadre d'une coentreprise — T Ltd. a déposé un recours en dommages-intérêts à l'encontre du ministère parce qu'il n'avait pas rejeté la soumission de B Ltd., laquelle était arrivée au premier rang, alléguant qu'elle ne répondait pas aux exigences de l'appel d'offres — Recours a été accueilli et T Ltd. a été indemnisé — Juge de première instance a conclu que le ministère avait contrevenu au « contrat A » en acceptant une soumission qui était inacceptable, puisqu'elle n'était pas conforme, et avait manqué à son devoir d'équité à l'égard de T Ltd. en retenant une soumission non conforme — De plus, la juge de première instance a conclu que la clause d'exonération de responsabilité dans le contrat A ne s'appliquait pas aux violations fondamentales qui s'étaient produites — Ministère a interjeté appel avec succès — En appel, il a été déterminé que la juge de première instance avait commis une erreur en interprétant la clause d'exonération et en refusant de lui donner effet — T Ltd. a formé un pourvoi — Pourvoi accueilli — Il s'agissait de déterminer si l'adjudicataire était éligible et, sinon, si le recours de T Ltd. en dommages-intérêts était prescrit — Juge de première instance a eu raison sur les deux questions — Suivant le contrat issu du document d'appel d'offres, seules six entreprises présélectionnées pouvaient prendre part à l'appel d'offres — Ministère a manqué à ses obligations contractuelles expresses et tacites, et ce, d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres — Clause d'exonération ne mettait pas le ministère à l'abri du recours en dommages-intérêts de T Ltd. pour la mise en rapport du ministère avec une entreprise qui n'était même pas admise à soumissionner, sans compter le manquement à son obligation tacite d'équité envers les soumissionnaires.

In the tendering process for the construction of a 25-km highway, the Ministry of Transportation and Highways received submissions from B Ltd. and T Ltd., among others. The contract was awarded in the name of B Ltd., notwithstanding that B Ltd. and E Co., an ineligible proponent, planned to perform the work as a joint venture.

T Ltd. brought an action against the Ministry for damages for failure to reject the first ranked proposal from B Ltd., allegedly contrary to the request for proposals. The action was allowed and T Ltd. was awarded damages. The trial judge found that the Ministry breached "contract A" by accepting a bid that was incapable of acceptance, because of non-compliance, and breached duty of fairness owed to T Ltd. by approving a non-compliant bid as the successful bidder. The trial judge further found that the exclusion from liability clause in contract A did not apply to the fundamental breaches that occurred. The Ministry successfully appealed. In the appeal it was determined that the trial judge erred in interpreting the exclusion clause and in refusing to give effect to it. T Ltd. appealed.

Held: The appeal was allowed.

Per Cromwell J. (LeBel, Deschamps, Fish, Charron JJ. concurring): The issues were whether the successful bidder was eligible and, if not, whether T Ltd.'s claim for damages was barred. The trial judge reached the right result on both issues. The foundation of the tender contract was that only six, pre-selected bidders would be permitted to participate in the bidding. The Ministry not only breached the express and implied terms of contract, it did so in a way that was an affront to the integrity and business efficacy of the tendering process. The exclusion clause did not protect the Ministry from T Ltd.'s damage claim from the Ministry's dealings with an ineligible bidder, let alone from its breach of the implied duty of fairness to bidders.

Per Binnie J. (dissenting) (McLachlin C.J.C., Abella, Rothstein JJ. concurring): The important legal issue raised by this appeal was whether, and in what circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. T Ltd. pointed to public interest and the transparency and integrity of the government tendering process, but such a concern, while important, did not render unenforceable the terms of the contract T Ltd. agreed to. T Ltd. was a large and sophisticated corporation, and the Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. There was no reason why the clause should not have been enforced.

Dans le cadre d'un processus d'appel d'offres pour la construction d'une autoroute de 25 kilomètres, le ministère des Transports et de la Voirie a reçu des soumissions de la part de B Ltd. et T Ltd., entre autres. Le contrat a été attribué au nom de B Ltd., sans tenir compte du fait que B Ltd. et E Co., un candidat inéligible, entendaient réaliser les travaux dans le cadre d'une coentreprise.

T Ltd. a déposé un recours en dommages-intérêts à l'encontre du ministère parce qu'il n'avait pas rejeté la soumission de B Ltd., laquelle était arrivée au premier rang, alléguant qu'elle ne répondait pas aux exigences de l'appel d'offres. Le recours a été accueilli et T Ltd. a été indemnisé. La juge de première instance a conclu que le ministère avait contrevenu au « contrat A » en acceptant une soumission qui était inacceptable, puisqu'elle n'était pas conforme, et avait manqué à son devoir d'équité à l'égard de T Ltd. en retenant une soumission non conforme. De plus, la juge de première instance a conclu que la clause d'exonération de responsabilité dans le contrat A ne s'appliquait pas aux violations fondamentales qui s'étaient produites. Le ministère a interjeté appel avec succès. En appel, il a été déterminé que la juge de première instance avait commis une erreur en interprétant la clause d'exonération et en refusant de lui donner effet. T Ltd. a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Cromwell, J. (LeBel, Deschamps, Fish, Charron, JJ., souscrivant à son opinion) : Il s'agissait de déterminer si l'adjudicataire était éligible et, sinon, si le recours de T Ltd. en dommages-intérêts était prescrit. La juge de première instance a eu raison sur les deux questions. Suivant le contrat issu du document d'appel d'offres, seules six entreprises présélectionnées pouvaient prendre part à l'appel d'offres. Le ministère a manqué à ses obligations contractuelles expresses et tacites, et ce, d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres. La clause d'exonération ne mettait pas le ministère à l'abri du recours en dommages-intérêts de T Ltd. pour la mise en rapport du ministère avec une entreprise qui n'était même pas admise à soumissionner, sans compter le manquement à son obligation tacite d'équité envers les soumissionnaires.

Binnie, J. (dissident) (McLachlin, J.C.C., Abella, Rothstein, JJ., souscrivant à son opinion) : Le présent pourvoi soulevait une question de droit importante, celle de savoir si un tribunal peut refuser à la partie coupable d'inexécution — et dans l'affirmative, à quelles conditions — le bénéfice d'une clause d'exonération de la responsabilité à laquelle a consenti l'autre partie alors qu'elle n'était frappée d'aucune inaptitude. T Ltd. a invoqué l'intérêt public lié à la transparence et à l'intégrité du processus gouvernemental d'appel d'offres, mais, même s'il s'agissait d'une condition importante, son inobservation n'a pas rendu inapplicable les clauses du contrat auxquelles

T Ltd. avait consenti. T Ltd. était une grande entreprise dotée d'une vaste expérience, et le ministère, même s'il n'a pas respecté ses obligations contractuelles, bénéficiait de la clause de non-recours. Il n'y avait donc pas de raison de ne pas faire respecter celle-ci.

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***Cromwell J.*:**

I. Introduction

1 The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed. The main question on appeal, as I see it, is whether the Province succeeded in excluding its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract. I share the view of the trial judge that it did not.

2 The appeal arises out of a tendering contract between the appellant, Tercon Contractors Ltd., who was the bidder, and the respondent, Her Majesty the Queen in Right of the Province of British Columbia, who issued the tender call. The case turns on the interpretation of provisions in the contract relating to eligibility to bid and exclusion of compensation resulting from participation in the tendering process.

3 The trial judge found that the respondent (which I will refer to as the Province) breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. In short, a bid was accepted and the work awarded to a party who should not even have been permitted to participate in the tender process. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted "egregiously" (2006 BCSC 499, 53 B.C.L.R (4th) 138 (B.C. S.C.), at para. 150). The judge then turned to the Province's defence based on an exclusion clause that barred claims for compensation "as a result of participating" in the tendering process. She held that

this clause, properly interpreted, did not exclude Tercon's claim for damages. In effect, she held that it was not within the contemplation of the parties that this clause would bar a remedy in damages arising from the Province's unfair dealings with a party who was not entitled to participate in the tender in the first place.

4 The Province appealed and the Court of Appeal reversed (2007 BCCA 592, 73 B.C.L.R. (4th) 201 (B.C. C.A.)). Dealing only with the exclusion clause issue, it held that the clause was clear and unambiguous and barred compensation for all defaults.

5 On Tercon's appeal to this Court, the questions for us are whether the successful bidder was eligible to participate in the request for proposals ("RFP") and, if not, whether Tercon's claim for damages is barred by the exclusion clause.

6 In my respectful view, the trial judge reached the right result on both issues. The Province's attempts to persuade us that it did not breach the tendering contract are, in my view, wholly unsuccessful. The foundation of the tendering contract was that only six, pre-selected bidders would be permitted to participate in the bidding. As the trial judge held, the Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process. One must not lose sight of the fact that the trial judge found that the Province acted egregiously by "ensuring that [the true bidder] was not disclosed" (para. 150) and that its breach "attacke[d] the underlying premise of the [tendering] process" (para. 146), a process which was set out in detail in the contract and, in addition, had been given ministerial approval as required by statute.

7 As for its reliance on the exclusion clause, the Province submits that the parties were free to agree to limitations of liability and did so. Consideration of this submission requires an interpretation of the words of the clause to which the parties agreed in the context of the contract as a whole. My view is that, properly interpreted, the exclusion clause does not protect the Province from Tercon's damage claim which arises from the Province's dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders. In other words, the Province's liability did not arise from Tercon's participation in the process that the Province established, but from the Province's unfair dealings with a party who was not entitled to participate in that process.

8 I would allow the appeal and restore the judgment of the trial judge.

II. Brief Overview of the Facts

9 I will have to set out more factual detail as part of my analysis. For now, a very brief summary will suffice. In 2000, the Ministry of Transportation and Highways (the "Province") issued a request for expressions of interest ("RFEI") for designing and building a highway in northwestern British Columbia. Six teams made submissions, including Tercon and Brentwood Enterprises Ltd. Later that year, the Province informed the six proponents that it now intended to design the highway itself and would issue a RFP for its construction.

10 The RFP was formally issued on January 15, 2001. Under its terms, only the six original proponents were eligible to submit a proposal. The RFP also included a clause excluding all claims for damages "as a result of participating in this RFP" (s. 2:10).

11 Unable to submit a competitive bid on its own, Brentwood teamed up with Emil Anderson Construction Co. ("EAC"), which was not a qualified bidder, and together they submitted a bid in Brentwood's name. Brentwood and Tercon were the two short-listed proponents and the Ministry ultimately selected Brentwood as the preferred proponent.

12 Tercon brought an action seeking damages, alleging that the Ministry had considered and accepted an ineligible bid and that but for that breach, it would have been awarded the contract. The trial judge agreed and awarded roughly $3.5 million in damages and prejudgment interest. As noted, the Court of Appeal reversed and Tercon appeals by leave of the Court.

III. Issues

13 The issues for decision are whether the trial judge erred in finding that:

1. the Province breached the tendering contract by entertaining a bid from an ineligible bidder.

2. the exclusion clause does not bar the appellant's claim for damages for the breaches of the tendering contract found by the trial judge.

IV. Analysis

A. Was the Brentwood Bid Ineligible?

14 The first issue is whether the Brentwood bid was from an eligible bidder. The judge found that the bid was in substance, although not in form, from a joint venture of Brentwood and EAC and that it was, therefore, an ineligible bid. The Province attacks this finding on three grounds:

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture;

(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;

(iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent, in place and allowed it to enhance its ability to perform the work.

15 While these were the Province's main points, its position became more wide-ranging during oral argument, at times suggesting that it had no contractual obligation to deal only with eligible bidders. It is therefore necessary to take a step back and look at that threshold point before turning to the Province's more focussed submissions.

1. The Province's Contractual Obligations in the Bidding Process

16 The judge found, and it was uncontested at trial, that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. This finding is not challenged on appeal, although there was a passing suggestion during oral argument that there was no contractual obligation of this sort at all. The trial judge also held, noting that this point was uncontested, that a joint venture between Brentwood and EAC was ineligible to bid. This is also not contested on appeal. These two findings are critical to the case and provide important background for an issue that is in dispute, namely whether the Brentwood bid was ineligible. It is, therefore, worth reviewing the relevant background in detail. I first briefly set out the legal framework and then turn to the trial judge's findings.

2. Legal Principles

17 Submitting a compliant bid in response to a tender call *may* give rise to a contract — called Contract A — between the bidder and the owner, the express terms of which are found in the tender documents. The contract may also have implied terms according to the principles set out in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.); see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.), and *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.). The key word, however, is "may". The Contract A - Contract B framework is one that arises, if at all, from the dealings between the parties. It is not an artificial construct imposed by the courts, but a description of the legal consequences of the parties' actual dealings. The Court emphasized in *M.J.B.* that whether Contract A arises and if it does, what its terms are, depend on the express and implied terms and conditions of the tender call in each case. As Iacobucci J. put it, at para. 19:

> What is important ... is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call [Emphasis added.]

3. The Trial Judge's Findings Concerning the Existence of Contract A

18 The question of whether Tercon's submission of a compliant bid gave rise to contractual relations between it and the Province was contested by the Province at trial. The trial judge gave extensive reasons for finding against the Province on this issue. We are told that the Province did not pursue this point in the Court of Appeal but instead premised its submissions on the existence of Contract A. The Province took the same approach in its written submissions in this Court. However, during oral argument, there was some passing reference in response to questions that there was no Contract A. In light of the position taken by the Province on its appeal to the Court of Appeal and in its written submissions in this Court, it is now too late to revisit whether there were contractual duties between Tercon and the Province. Even if it were open to the Province to make this argument now, I can see no error in legal principle or any palpable and overriding error of fact in the trial judge's careful reasons on this point.

19 The trial judge did not mechanically impose the Contract A - Contract B framework, but considered whether Contract A arose in light of her detailed analysis of the dealings between the parties. That was the right approach. She reviewed in detail the provisions of the RFP which supported her conclusion that there was an intent to create contractual relations upon submission of a compliant bid. She noted, for example, that bids were to be irrevocable for 60 days and that security of $50,000 had to be paid by all proponents and was to be increased to $200,000 by the successful proponent. Any revisions to proposals prior to the closing date had to be in writing, properly executed and received before the closing time. The RFP also set out detailed evaluation criteria and specified that they were to be the only criteria to be used to evaluate proposals. A specific form of alliance agreement was attached. There were detailed provisions about pricing that were fixed and non-negotiable. A proponent was required to accept this form of contract substantially, and security was lost if an agreement was not executed. The Ministry reserved a right to cancel the RFP under s. 2.9 but in such event was obliged to reimburse proponents for costs incurred in preparing their bids up to $15,000 each. Proponents had to submit a signed proposal form, which established that they offered to execute an agreement substantially in the form included in the RFP package. Further, they acknowledged that the security could be forfeited if they were selected as the preferred proponent and failed to enter into good faith discussions with the Ministry to reach an agreement and sign the alliance agreement.

20 In summary, as the trial judge found, the RFP set out a specifically defined project, invited proposals from a closed and specific list of eligible proponents, and contemplated that proposals would be evaluated according to specific criteria. Negotiation of the alliance construction contract was required, but the negotiation was constrained and did not go to the fundamental details of either the procurement process or the ultimate contract.

21 There is, therefore, no basis to interfere with the judge's finding that there was an intent to create contractual obligations upon submission of a compliant bid. I add, however, that the tender call in this case did not give rise to the classic Contract A - Contract B framework in which the bidder submits an irrevocable bid and undertakes to enter into contract B on those terms if it is accepted. The alliance model process which was used here was more complicated than that and involved good faith negotiations for a contract B in the form set out in the tender documents. But in my view, this should not distract us from the main question here. We do not have to spell out all of the terms of Contract A, let alone of Contract B, so as to define all of the duties and obligations of both the bidders and the Province. The question here is much narrower: did contractual obligations arise as a result of Tercon's compliant bid and, if so, was it a term of that contract that the Province would only entertain bids from eligible bidders? The trial judge found offer, acceptance and consideration in the invitation to tender and Tercon's bid. There is no basis, in my respectful view, to challenge that finding even if it were open to the Province to try to do so at this late stage of the litigation.

4. The Trial Judge's Finding Concerning Eligibility

22 It was not contested at trial that only the six original proponents that qualified through the RFEI process were eligible to bid. This point is not in issue on appeal; the question is what this eligibility requirement means. It will be helpful, therefore, to set out the background about this limited eligibility to bid in this tendering process.

23 To begin, it is worth repeating that there is no doubt that the Province was contractually bound to accept bids only from eligible bidders. This duty may be implied even absent express stipulation. For example, in *M.J.B.*, the Court found that an implied obligation to accept only compliant bids was necessary to give business efficacy to the tendering process, noting, at para. 41, that a bidder must expend effort and incur expense in preparing its bid and must submit bid security and that it is "obvious" that it makes "little sense" for the bidder to comply with these requirements if the owner "is allowed, in effect, to circumscribe this process and accept a non-compliant bid". But again, whether such a duty should be implied in any given case will depend on the dealings between the parties. Here, however, there is no need to rely on implied terms. The obligation to consider only bids from eligible bidders was stated expressly in the tender documents and in the required ministerial approval of the process which they described.

24 As noted, in early 2000, the Province issued a RFEI based on a design-build model; the contractor would both design and build the highway. The RFEI contemplated that a short list of three qualified contractors, or teams composed of contractors and consultants, would be nominated as proponents. Each was to provide a description of the legal structure of the team and to describe the role of each team member along with the extent of involvement of each team member as a percentage of the total scope of the project and an organization chart showing each team member's role. Any change in team management or key positions required notice in writing to the Province which reserved the right to disqualify the proponent if the change materially and negatively affected the ability of the team to carry out the project.

25 Expressions of interest ("EOI") were received from six teams including Tercon and Brentwood. The evaluation panel and independent review panel recommended a short list of three proponents with Tercon topping the evaluation. Brentwood was evaluated fifth and was not on the short list. Brentwood was known to lack expertise in drilling and blasting and so its EOI had included an outline of the key team members with that experience. EAC did not participate and had no role in the Brentwood submission. The results of this evaluation were not communicated and the process did not proceed because the Province decided to design the project itself and issue an RFP for an alliance model contract to construct the highway.

26 It was clear from the outset that only those who had submitted proposals during the RFEI process would be eligible to submit proposals under the RFP. This was specified in the approval of the process by the Minister of Transportation and Highway's ("Minister") before the RFP was issued. It is worth pausing here to briefly look at the Minister's role.

27 Pursuant to s. 23 of the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311, the legislation in force at the relevant time, the Minister was required to invite public tenders for road construction unless he or she determined that another process would result in competitively established costs for the work. The section provided:

> **23** (1) The minister must invite tenders by public advertisement, or if that is impracticable, by public notice, for the construction and repair of all government buildings, highways and public works, except for the following:
>
> . . . . .
>
> (c) if the minister determines that an alternative contracting process will result in competitively established costs for the performance of the work.
>
> (2) The minister must cause all tenders received to be opened in public, at a time and place stated in the advertisement or notice.
>
> (3) The prices must be made known at the time the tenders are opened.

(4) In all cases where the minister believes it is not expedient to let the work to the lowest bidder, the minister must report to and obtain the approval of the Lieutenant Governor in Council before passing by the lowest tender, except if delay would be injurious to the public interest.

. . . . .

28 These provisions make clear that the work in this case had to be awarded by public tender, absent the Minister's approval of an alternative process, and had to be awarded to the lowest bidder, absent approval of the Lieutenant Governor in Council. As noted, ministerial approval was given for an alternative process under s. 23(1)(c). The Minister issued a notice that, pursuant to that section, he approved the process set out in an attached document and had determined it to be an alternative contracting process that would result in competitively established costs for the performance of the work. The attached document outlined in seven numbered paragraphs the process that had been approved.

29 The document described the background of the public RFEI (which I have set out earlier), noting that *only those firms identified through the EOI process would be eligible to submit proposals for the work* and that they would receive invitations to do so. The Minister's approval in fact referred to the firms who had been short-listed from the RFEI process as being eligible. If this were taken to refer only to the three proponents identified by the evaluation process of the RFEI, Tercon would be included but Brentwood would not. However, no one has suggested that anything turns on this and it seems clear that ultimately all six of the RFEI proponents — including both Tercon and Brentwood — were intended to be eligible. The ministerial approval then briefly set out the process. Proposals "by short listed firms" were to be evaluated "using the considerations set out in the RFP".

30 It is clear, therefore, that participation in the RFP process approved by the Minister was limited to those who had participated in the RFEI process.

31 The Province's factum implies that the Minister approved inclusion of the exclusion clause in the RFP. However, there is no evidence of this in the record before the Court. The Minister's approval is before us. It is dated as having been prepared on August 23, 2000 and signed on October 19, 2000, and approves a process outlined in a two-page document attached to it. It says nothing about exclusion of the Province's liability. The RFP, containing the exclusion clause in issue here, is dated January 15, 2001 and was sent out to eligible bidders under cover of a letter of the same date, some three months after the Minister's approval.

32 The RFP is a lengthy document, containing detailed instructions to proponents, required forms, a time schedule of the work, detailed provisions concerning contract pricing, a draft of the ultimate construction contract and many other things. Most relevant for our purposes are the terms of the instructions to proponents and in particular the eligibility requirements for bidders.

33 The RFP reiterates in unequivocal terms that eligibility to bid was restricted as set out in the ministerial approval. It also underlines the significance of the identity of the proponent. In s. 1.1, the RFP specifies that only the six teams involved in the RFEI would be eligible. The term "proponent", which refers to a bidder, is defined in s. 8 as "a team that has become eligible to respond to the RFP as described in Section 1.1 of the Instructions to Proponents". Section 2.8(a) of the RFP stipulates that *only* the six proponents qualified through the RFEI process were eligible and that *proposals received from any other party would not be considered.* In short, there were potentially only six participants and "Contract A" could not arise by the submission of a bid from any other party.

34 The RFP also addressed material changes to the proponent, including changes in the proponent's team members and its financial ability to undertake and complete the work. Section 2.8(b) of the RFP provided in part as follows:

If in the opinion of the Ministry a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed ... or if, for financial or other reasons, the Proponent's ability to undertake and complete the Work has changed, then the Ministry may request

> the Proponent to submit further supporting information as the Ministry may request in support of the Proponent's qualification to perform the Work. If in the sole discretion of the Ministry as a result of the changes the Proponent is not sufficiently qualified to perform the Work then the Ministry reserves the right to disqualify that Proponent and reject its Proposal.

35 The proponent was to provide an organization chart outlining the proponent's team members, structure and roles. If the team members were different from the RFEI process submission, an explanation was to be provided for the changes: s. 4.2(b)(i). A list of subcontractors and suppliers was also to be provided and the Ministry had to be notified of any changes: s. 4.2(e).

36 The RFP provided proponents with a mechanism to determine whether they remained qualified to submit a proposal. If a proponent was concerned about its eligibility as a result of a material change, it could make a preliminary submission to the Ministry describing the nature of the changes and the Ministry would give a written decision as to whether the proponent was still qualified: s. 2.8(b).

37 Brentwood tried to take advantage of this process. The trial judge thoroughly outlined this, at paras. 17-23 of her reasons. In brief, Brentwood lacked expertise in drilling and blasting and by the time the RFP was issued, it faced limited local bonding capacity due to commitments to other projects, a shorter construction period, the potential unavailability of subcontractors and limited equipment to perform the work. It in fact considered not bidding at all. Instead, however, it entered into a pre-bidding agreement with EAC that the work would be undertaken by a joint venture of Brentwood and EAC and that upon being awarded the work, they would enter into a joint venture agreement and would share 50-50 the costs, expenses, losses and gains. The trial judge noted that it was common in the industry for contractors to agree to a joint venture on the basis of a pre-bid agreement with the specifics of the joint venture to be worked out once the contract was awarded and that Brentwood and EAC acted consistently throughout in accordance with this industry standard.

38 Brentwood sent the Province's project manager, Mr. Tasaka, a preliminary submission as provided for in s. 2.8(b) of the RFP, advising of a material change in its team's structure in that it wished to form a joint venture with EAC. This was done, the trial judge found, because Brentwood thought it would be disqualified if it submitted a proposal as a joint venture without the Ministry's prior approval under this section of the RFP. The Province never responded in writing as it ought to have according to s. 2.8(b).

39 It seems to have been assumed by everyone that a joint venture of Brentwood and EAC was not eligible because this change would not simply be a change in the composition of the bidder's team, but in effect a new bidder. Without reviewing in detail all of the evidence referred to by the trial judge, it is fair to say that although Brentwood ultimately submitted a proposal in its own name, the proposal in substance was from the Brentwood-EAC joint venture and was evaluated as such. As the trial judge concluded:

> The substance of the proposal was as a joint venture and this must have been apparent to all. The [project evaluation panel] approved Brentwood/EAC as joint venturers as the preferred proponent. The [panel] was satisfied that Tercon had the capacity and commitment to do the job but preferred the joint venture submission of Brentwood/EAC. [para. 53].

40 There was some suggestion by the Province during oral argument that the trial judge had wrongly imposed on it a duty to investigate Brentwood's bid, a duty rejected by the majority of the Court in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116 (S.C.C.). In my view, the trial judge did no such thing. As her detailed findings make clear, the Province: (1) fully understood that the Brentwood bid was in fact on behalf of a joint venture of Brentwood and EAC; (2) thought that a bid from that joint venture was not eligible; and (3) took active steps to obscure the reality of the situation. No investigation was required for the Province to know these things and the judge imposed no duty to engage in one.

5. The Province's Submissions

41 I will address the Province's first two points together.

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture; and

(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;

42 I cannot accept these submissions. The issue is not, as these arguments assume, whether the Province contracted with a joint venture or whether EAC had contractual obligations to the Province. The issue is whether the Province considered an ineligible bid; the point of substance is whether the bid was from an eligible bidder.

43 At trial there was no contest that a bid from a joint venture involving an ineligible bidder would be ineligible. The Province's position was that there was no need to look beyond the face of the bid to determine who was bidding: the proposal was in the name of Brentwood and therefore the bid was from a compliant bidder. Respectfully, I see no error in the trial judge's rejection of this position. There was a mountain of evidence to support the judge's conclusions that first, Brentwood's bid, in fact if not in form, was on behalf of a joint venture between itself and EAC; second, the Province knew this and took the position that it could not consider a bid from or award the work to that joint venture; third, the existence of the joint venture was a material consideration in favour of the Brentwood bid during the evaluation process; and finally, that steps were taken by revising and drafting documentation to obfuscate the reality of the situation.

44 Brentwood was one of the original RFEI proponents and was of course eligible to bid, subject to material changes in the composition of its team. EAC had not submitted a proposal during the RFEI process. It had been involved in advising the Ministry in relation to the project in 1998 and, in the fall of 2000, the Ministry had asked EAC to prepare an internal bid for comparison purposes (although EAC did not do so) as EAC was not entitled to bid on the Project.

45 As noted earlier, after the RFP was issued, Brentwood and EAC entered into a pre-bidding agreement that provided that the work would be undertaken in the name of Brentwood-Anderson, a joint venture, that the work would be sponsored and managed by the joint venture and that upon being awarded the contract, the parties would enter into a joint venture agreement. Brentwood advised the Ministry in writing that it was forming a joint venture with EAC "to submit a more competitive price"; this fax was in effect a preliminary submission contemplated by s. 2.8(b) of the RFP and was written, as the trial judge found, because Brentwood assumed that it could be disqualified if it submitted a proposal as a joint venture unless prior arrangements had been made. The Province never responded in writing to this preliminary submission, as required by s. 2.8(b). There were, however, discussions with the Province's project manager, Mr. Tasaka who, the trial judge found, understood that a joint venture from Brentwood and EAC would not be eligible. As the judge put it, the Province's position appears to have been that the Brentwood/EAC proposal could proceed as long as the submission was in the name of Brentwood.

46 In the result, EAC was listed in the ultimate submission as a "major member" of the team. The legal relationship with EAC was not specified and EAC was listed as a subcontractor even though, as the trial judge found, their relationship bore no resemblance to a standard subcontractor agreement. The trial judge found as facts — and these findings are not challenged — that Brentwood and EAC always intended between themselves to form a joint venture and to formalize that arrangement once the contract was secured, and further, that the role of EAC was purposefully obfuscated in the bid to avoid an apparent conflict with s. 2.8(a) of the RFP.

47 During the selection process, it became clear that the bid was in reality on behalf of a joint venture. The project evaluation panel ("PEP") requested better information than provided in the bid about the structure of the business arrangements between Brentwood and EAC. Brentwood responded by disclosing the pre-bid agreement between them to form a 50/50 joint venture if successful. The PEP understood from this that Brentwood and EAC had a similar interest in the risk and reward under the contract and that this helped satisfy them that the "risk/reward" aspect of the alliance contract could be negotiated with them flexibly. The PEP clearly did not consider EAC to be a subcontractor although

shown as such in the bid. In its step 6 report, the PEP consistently referred to the proponent as being a joint venture of Brentwood and EAC or as "Brentwood/EAC" and the trial judge found that it was on the basis that they were indeed a joint venture that PEP approved Brentwood/EAC as the preferred proponent. This step 6 report was ultimately revised to refer only to the Brentwood team as the official proponent. The trial judge found as a fact that this revision was made because "it was apparent that a joint venture was not eligible to submit a proposal"(para. 56).

48 The findings of the trial judge and the record make it clear that it was no mere question of form rather than a matter of substance whether the bidder was Brentwood with other team members or, as it in fact was, the Brentwood/EAC joint venture. As she noted, at para. 121 of her reasons, the whole purpose of the joint venture was to allow submission of a more competitive price than it would have been able to do as a proponent with a team as allowed under s. 2.8(b) of the RFP. The joint venture permitted a 50/50 sharing of risk and reward and co-management of the project while at the same time avoiding the restrictions on subcontracting in the tendering documents. As the judge put it, the bid by the joint venture constituted "material non-compliance" with the tendering contract: "[t]he joint venture with EAC allowed Brentwood to put forward a more competitive price than contemplated under the RFEI proposal. This went to the essence of the tendering process" (para 126).

49 The Province suggests that the trial judge's reasons allow form to triumph over substance. In my view, it is the Province's position that better deserves that description. It had a bid which it knew to be on behalf of a joint venture, encouraged the bid to proceed and took steps to obfuscate the reality that it was on behalf of a joint venture. Permitting the bid to proceed in this way gave the joint venture a competitive advantage in the bidding process, and the record could not be clearer that the joint venture nature of the bid was one of its attractions during the selection process. The Province nonetheless submits that so long as only the name of Brentwood appears on the bid and ultimate contract B, all is well. If ever a submission advocated placing form above substance, this is it.

50 It is true that the Province had legal advice and did not proceed in defiance of it. However, the facts as found by the trial judge about this legal advice hardly advance the Province's position. The judge found that the Province's lawyer was not aware of the background relevant to the question of whether the Brentwood bid was eligible, never reviewed the proponent eligibility requirements in the RFP and was not asked to and did not direct his mind to the question of eligibility. As the trial judge put it, the lawyer "appears to have operated on the assumption that Brentwood had been irreversibly selected" (para. 70).

51 The Brentwood/EAC joint venture having been selected as the preferred proponent, negotiations for the alliance contract ensued. The trial judge found that by this time, all agreed that a joint venture was not an eligible proponent and the Ministry was taking the position that the contract could not be in the name of the joint venture. Brentwood and EAC executed a revised pre-contract agreement that provided, notwithstanding the letter of intent from the Ministry addressed to Brentwood indicating that the legal relationship between them would be contractor/subcontractor, the contract would be performed and the profits shared equally between them. The work was to be managed by a committee with equal representation, the bond required by the owner was to be provided by both parties and EAC indemnified Brentwood against half of any loss or cost incurred as a result of performance of the work. According to schedule B4 of the RFP, all subcontracts were to be attached to the RFP but no contract between Brentwood and EAC was ever provided or attached to the proposal.

52 The Province has identified no palpable and overriding error in these many findings of fact by the trial judge. I conclude, therefore, that we must approach the case on the basis of the judge's finding that the bid was in fact, if not in form, submitted by a joint venture of Brentwood and EAC, that the Ministry was well aware of this, that the existence of the joint venture was a material consideration in favour of the bid during the evaluation process and that by bidding as a joint venture, Brentwood was given a competitive advantage in the bidding process.

53 I reject the Ministry's submissions that all that matters is the form and not the substance of the arrangement. In my view, the trial judge's finding that this bid was in fact on behalf of a joint venture is unassailable.

54 I turn to the Province's third point:

> (iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent in place and allowed it to enhance its ability to perform the work.

55 This submission addresses the question of whether the joint venture was an eligible bidder. The Province submits that it is, arguing that s. 2.8(b) of the RFP shows that the RFP contemplated that each proponent would be supported by a team, that the composition of the team might change and that the Province under that section retained the right to approve or reject changes in the team of any proponent. I cannot accept these submissions.

56 Section 2.8 must be read as a whole and in light of the ministerial approval which I have described earlier. Section 2.8(a), consistent with that approval, stipulates that only the six proponents qualified through the RFEI process were eligible to submit responses and that proposals from any other party "shall not be considered". The word "proponent" is defined in s. 8 as a team that has become eligible to respond to the RFP. The material change provisions in s. 2.8(b) should not be read as negating the express provisions of the RFP and the ministerial approval of the process. When read as a whole, the provisions about material change do not permit the addition of a new entity as occurred here. The process actually followed was not the one specified in the bidding contract and was not authorized by the statute because it was not the one approved by the Minister.

57 Moreover, even if one were to conclude (and I would not) that this change from the Brentwood team that participated in the RFEI to the Brentwood/EAC joint venture by whom the bid was submitted could fall within the material change provisions of s. 2.8(b), the Province never gave a written decision to permit this change as required by that provision. As the trial judge noted, in fact the Province's position was that such a bid would not be eligible and its agents took steps to obfuscate the true proponent in the relevant documentation.

58 The trial judge also found that there was an implied obligation of good faith in the contract and that the Province breached this obligation by failing to treat all bidders equally by changing the terms of eligibility to Brentwood's competitive advantage. This conclusion strongly reinforces the trial judge's decision about eligibility. Rather than repeating her detailed findings, I will simply quote her summary at para. 138:

> The whole of [the Province's] conduct leaves me with no doubt that the [Province] breached the duty of fairness to [Tercon] by changing the terms of eligibility to Brentwood's competitive advantage. At best, [the Province] ignored significant information to its [i.e. Tercon's] detriment. At worst, the [Province] covered up its knowledge that the successful proponent was an ineligible joint venture. In the circumstances here, it is not open to the [Province] to say that a joint venture was only proposed. Nor can the [Province] say that it was unaware fo the joint venture when it acted deliberately to structure contract B to exclude EAC as fully responsible within a separate contract with Brentwood, so minimizing the [Province's] risk that the contract would be unenforceable against EAC if arrangements did not work out. .... The [Province] was ... prepared to take the risk that unsuccessful bidders would sue: this risk did materialize.

59 To conclude on this point, I find no fault with the trial judge's conclusion that the bid was in fact submitted on behalf of a joint venture of Brentwood and EAC which was an ineligible bidder under the terms of the RFP. This breached not only the express eligibility provisions of the tender documents, but also the implied duty to act fairly towards all bidders.

B. The Exclusion Clause:

1. Introduction

60 As noted, the RFP includes an exclusion clause which reads as follows:

> **2.10** ... Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim. [Emphasis added.]

61 The trial judge held that as a matter of construction, the clause did not bar recovery for the breaches she had found. The clause, in her view, was ambiguous and, applying the *contra proferentem* principle, she resolved the ambiguity in Tercon's favour. She also found that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the nature of the Province's breach. The Province contends that the judge erred both with respect to the construction of the clause and her application of the doctrine of fundamental breach.

62 On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, as Dickson C.J. was inclined to do more than 20 years ago: *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 (S.C.C.), at p. 462. I agree with the analytical approach that should be followed when tackling an issue relating to the applicability of an exclusion clause set out by my colleague Binnie J. However, I respectfully do not agree with him on the question of the proper interpretation of the clause in issue here. In my view, the clause does not exclude Tercon's claim for damages, and even if I am wrong about that, the clause is at best ambiguous and should be construed *contra proferentem* as the trial judge held. As a result of my conclusion on the interpretation issue, I do not have to go on to apply the rest of the analytical framework set out by Binnie J.

63 In my view, the exclusion clause does not cover the Province's breaches in this case. The RFP process put in place by the Province was premised on a closed list of bidders; a contest with an ineligible bidder was not part of the RFP process and was in fact expressly precluded by its terms. A "Contract A" could not arise as a result of submission of a bid from any other party. However, as a result of how the Province proceeded, the very premise of its own RFP process was missing, and the work was awarded to a party who could not be a participant in the RFP process. That is what Tercon is complaining about. Tercon's claim is not barred by the exclusion clause because the clause only applies to claims arising "as a result of participating in [the] RFP", not to claims resulting from the participation of other, ineligible parties. Moreover, the words of this exclusion clause, in my view, are not effective to limit liability for breach of the Province's implied duty of fairness to bidders. I will explain my conclusion by turning first to a brief account of the key legal principles and then to the facts of the case.

2. Legal Principles

64 The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. The approach adopted by the Court in *M.J.B.* is instructive. The Court had to interpret a privilege clause, which is somewhat analogous to the exclusion clause in issue here. The privilege clause provided that the lowest or any tender would not necessarily be accepted, and the issue was whether this barred a claim based on breach of an implied term that the owner would accept only compliant bids. In interpreting the privilege clause, the Court looked at its text in light of the contract as a whole, its purposes and commercial context. As Iacobucci J. said, at para. 44, "the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties."

65 In a similar way, it is necessary in the present case to consider the exclusion clause in the RFP in light of its purposes and commercial context as well as of its overall terms. The question is whether the exclusion of compensation for claims resulting from "participating in this RFP", properly interpreted, excludes liability for the Province having unfairly considered a bid from a bidder who was not supposed to have been participating in the RFP process at all.

3. Application to this Case

66 Having regard to both the text of the clause in its broader context and to the purposes and commercial context of the RFP, my view is that this claim does not fall within the terms of the exclusion clause.

67 To begin, it is helpful to recall that in interpreting tendering contracts, the Court has been careful to consider the special commercial context of tendering. Effective tendering ultimately depends on the integrity and business efficacy of the tendering process: see, e. g., *Martel*, at para. 88; *M.J.B.*, at para. 41; *Double N Earthmovers Ltd.*, at para. 106. As Iacobucci and Major JJ. put it in *Martel*, at para. 116,"it is imperative that all bidders be treated on an equal footing ... Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder".

68 This factor is particularly weighty in the context of public procurement. In that context, in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their purpose was to assure transparency and fairness in public tenders. As was said by Orsborn J. (as he then was) in *G.J. Cahill & Co. (1979) Ltd. v. Newfoundland & Labrador (Minister of Municipal & Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145 (N.L. T.D.), at para. 35:

> The owner — in this case the government — is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner — here the government — sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.

69 One aspect that is generally seen as contributing to the integrity and business efficacy of the tendering process is the requirement that only compliant bids be considered. As noted earlier, such a requirement has often been implied because, as the Court said in *M.J.B.*, it makes little sense to think that a bidder would comply with the bidding process if the owner could circumscribe it by accepting a non-compliant bid. Respectfully, it seems to me to make even less sense to think that eligible bidders would participate in the RFP if the Province could avoid liability for ignoring an express term concerning eligibility to bid on which the entire RFP was premised and which was mandated by the statutorily approved process.

70 The closed list of bidders was the foundation of this RFP and there were important competitive advantages to a bidder who could side-step that limitation. Thus, it seems to me that both the integrity and the business efficacy of the tendering process support an interpretation that would allow the exclusion clause to operate compatibly with the eligibility limitations that were at the very root of the RFP.

71 The same may be said with respect to the implied duty of fairness. As Iacobucci and Major JJ. wrote for the Court in *Martel*, at para. 88, "[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process." It seems to me that clear language is necessary to exclude liability for breach of such a basic requirement of the tendering process, particularly in the case of public procurement.

72 The proper interpretation of the exclusion clause should also take account of the statutory context which I have reviewed earlier. The restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. It seems unlikely, therefore, that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. Of course, it is true that the exclusion clause does not bar all remedies, but only claims for compensation. However, the fact remains that as a practical matter, there are unlikely to be other, effective remedies for considering and accepting an ineligible bid and that barring compensation for a breach of that nature in practical terms renders the ministerial approval process virtually meaningless. Whatever administrative law remedies may be available, they are not likely to be effective remedies for awarding a contract to an ineligible bidder. The Province did not submit that injunctive relief would have been an option, and I can, in any event, foresee many practical problems that need not detain us here in seeking such relief in these circumstances.

73 The Province stresses Tercon's commercial sophistication, in effect arguing that it agreed to the exclusion clause and must accept the consequences. This line of argument, however, has two weaknesses. It assumes the answer to the real question before us which is: what does the exclusion clause mean? The consequences of agreeing to the exclusion clause depend on its construction. In addition, the Province's submission overlooks its own commercial sophistication and the fact that sophisticated parties can draft very clear exclusion and limitation clauses when they are minded to do so. Such

clauses contrast starkly with the curious clause which the Province inserted into this RFP. The limitation of liability clause in *Hunter Engineering*, for example, provided that "[n]otwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise ..." (p. 450). The Court found this to be clear and unambiguous. The limitation clause in issue in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), provided that legal proceedings for the recovery of "any loss hereunder shall not be brought ... after the expiration of 24 months from the discovery of such loss" (para. 5). Once again, the Court found this language clear. The Ontario Court of Appeal similarly found the language of a limitation of liability clause to be clear in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1 (Ont. C.A.). The clause provided in part that if the defendant "should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% or the annual service charge or $10,000, whichever is less, as the agreed upon damages and not as a penalty, as the exclusive remedy ..." (p. 4). These, and many other cases which might be referred to, demonstrate that sophisticated parties are capable of drafting clear and comprehensive limitation and exclusion provisions.

74 I turn to the text of the clause which the Province inserted in its RFP. It addresses claims that result from "participating in this RFP". As noted, the limitation on who could participate in this RFP was one of its premises. These words must, therefore, be read in light of the limit on who was eligible to participate in this RFP. As noted earlier, both the ministerial approval and the text of the RFP itself were unequivocal: only the six proponents qualified through the earlier RFEI process were eligible and *proposals received from any other party would not be considered.* Thus, central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders, as the trial judge found the process followed by the Province to be, is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

75 The Province would have us interpret the phrase excluding compensation "as a result of participating in this RFP" to mean that compensation is excluded that results from "submitting a Proposal". However, that interpretation is not consistent with the wording of the clause as a whole. The clause concludes with the phrase that "by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim". If the phrases "participating in this RFP" and "submitting a Proposal" were intended to mean the same thing, it is hard to understand why different words were used in the same short clause to express the same idea. The fact that the Minister had approved a closed list of participants strengthens the usual inference that the use of different words was deliberate so as not to exclude compensation for a departure from that basic eligibility requirement.

76 This interpretation of the exclusion clause does not rob it of meaning, but makes it compatible with other provisions of the RFP. There is a parallel between this case and the Court's decision in *M.J.B.* There, the Court found that there was compatibility between the privilege clause and the implied term to accept only compliant bids. Similarly, in this case, there is compatibility between the eligibility requirements of the RFP and the exclusion clause. Not any and every claim based on any and every deviation from the RFP provisions would escape the preclusive effect of the exclusion clause. It is only when the defect in the Province's adherence to the RFP process is such that it is completely outside that process that the exclusion clause cannot have been intended to operate. What is important here, in my view, is that the RFP in its conception, in its express provisions and in the statutorily required approval it was given, was premised on limiting eligibility to the six proponents in the RFEI process. Competition among others was not at all contemplated and was not part of the RFP process; in fact, the RFP expressly excluded that possibility. In short, limiting eligibility of bidders to those who had responded to the RFEI was the foundation of the whole RFP. As the judge found, acceptance of a bid from an ineligible bidder "attacks the underlying premise of the process" established by the RFP: para. 146. Liability for such an attack is not excluded by a clause limiting compensation resulting from participation in this RFP.

77 This interpretation is also supported by another provision of the RFP. Under s. 2.9, as mentioned earlier, the Province reserved to itself the right to unilaterally cancel the RFP and the right to propose a new RFP allowing additional bidders. If the exclusion clause were broad enough to exclude compensation for allowing ineligible bidders to participate,

there seems to be little purpose in this reservation of the ability to cancel the RFP and issue a new one to a wider circle of bidders. It is also significant that the Province did not reserve to itself the right to accept a bid from an ineligible bidder or to unilaterally change the rules of eligibility. The RFP expressly did exactly the opposite. None of this, in my opinion, supports the view that the exclusion clause should be read as applying to the Province's conduct in this case.

78 To hold otherwise seems to me to be inconsistent with the text of the clause read in the context of the RFP as a whole and in light of its purposes and commercial context. In short, I cannot accept the contention that, by agreeing to exclude compensation for participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. I cannot conclude that the provision was intended to gut the RFP's eligibility requirements as to who may participate in it, or to render meaningless the Minister's statutorily required approval of the alternative process where this was a key element. The provision, as well, was not intended to allow the Province to escape a damages claim for applying different eligibility criteria, to the competitive disadvantage of other bidders and for taking steps designed to disguise the true state of affairs. I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook.

79 If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase "participating in this RFP" could reasonably mean "submitting a Proposal", that phrase could also reasonably mean "competing against the other eligible participants". Any ambiguity in the context of this contract requires that the clause be interpreted against the Province and in favour of Tercon under the principle *contra proferentem*: see, e.g. *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57 (S.C.C.), at pp. 68-69. Following this approach, the clause would not apply to bar Tercon's damages claim.

V. Disposition

80 I conclude that the judge did not err in finding that the Province breached the tendering contract or in finding that Tercon's remedy in damages for that breach was not precluded by the exclusion clause in the contract. I would therefore allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge. The parties advise that the question of costs has been resolved between them and that therefore no order in relation to costs is required.

***Binnie J.* (dissenting):**

81 The important legal issue raised by this appeal is whether, and in what circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. Traditionally, this has involved consideration of what is known as the doctrine of fundamental breach, a doctrine which Dickson C.J. in *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 (S.C.C.), suggested should be laid to rest 21 years ago (p. 462).

82 On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there is no reason why the clause should not be enforced. I would dismiss the appeal.

I. Overview

83 This appeal concerns a contract to build a $35 million road in the remote Nass Valley of British Columbia (the "Kincolith project"). The respondent Ministry accepted a bid from Brentwood Enterprises Ltd. that did not comply with the terms of tender. Tercon, as the disappointed finalist in the bidding battle, seeks compensation equivalent to the profit it expected to earn had it been awarded the contract.

84 Tercon alleged, and the trial judge found, that although the winning bid was submitted in the name of Brentwood (an eligible bidder) Brentwood in fact intended, with the Ministry's knowledge and encouragement, to do the work in a co-venture with an ineligible bidder, Emil Anderson Construction Co. ("EAC"). The respondent Ministry raised a number of defences including the fact that the formal contract was signed in the name of Brentwood alone. This defence was rejected in the courts below. The Ministry's substantial defence in this Court is that even if it failed to abide by the bidding rules, it is nonetheless protected by an exclusion of compensation clause set out clearly in the request for proposals ("RFP"). The clause provided that "no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP" and that "by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim" (s. 2.10 of the RFP).

85 The appeal thus brings into conflict the public policy that favours a fair, open and transparent bid process, and the freedom of contract of sophisticated and experienced parties in a commercial environment to craft their own contractual relations. I agree with Tercon that the public interest favours an orderly and fair scheme for tendering in the construction industry, but there is also a public interest in leaving knowledgeable parties free to order their own commercial affairs. In my view, on the facts of this case, the Court should not rewrite — nor should the Court refuse to give effect to — the terms agreed to by the parties.

86 I accept, as did the courts below, that the respondent Ministry breached the terms of its own RFP when it contracted with Brentwood, knowing the work would be carried out by a co-venture with Brentwood and EAC. The addition of EAC, a bigger contractor with greater financial resources than Brentwood, created a stronger competitor for Tercon than Brentwood alone. However, I also agree with the B.C. Court of Appeal that the exclusion of compensation clause is clear and unambiguous and that no legal ground or rule of law permits us to override the freedom of the parties to contract (or to decline to contract) with respect to this particular term, or to relieve Tercon against its operation in this case.

II. The Tendering Process

87 For almost three decades the law governing a structured bidding process has been dominated by the concept of Contract A/Contract B initially formulated in *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 (S.C.C.). The analysis advanced by Estey J. in that case was that the bidding process, as defined by the terms of the tender call, may create contractual relations ("Contract A") prior in time and quite independently of the contract that is the actual subject matter of the bid ("Contract B"). Breach of Contract A may, depending on its terms, give rise to contractual remedies for non-performance even if Contract B is never entered into or, as in the present case, it is awarded to a competitor. The result of this legal construct is to provide unsuccessful bidders with a *contractual* remedy against an owner who departs from its own bidding rules. Contract A, however, arises (if at all) as a matter of interpretation. It is not imposed as a rule of law.

88 In *Ron Engineering*, the result of Estey J.'s analysis was that as a matter of contractual interpretation, the Ontario government was allowed to retain a $150,000 bid bond put up by Ron Engineering even though the government was told, a little over an hour after the bids were opened, that Ron Engineering had made a $750,058 error in the calculation of its bid and wished to withdraw it. Estey J. held:

> The contractor was not asked to sign a contract which diverged in any way from its tender but simply to sign a contract in accordance with the instructions to tenderers and in conformity with its own tender. [p. 127]

In other words, harsh as it may have seemed to Ron Engineering, the parties were held to their bargain. The Court was not prepared to substitute "fair and reasonable" terms for what the parties had actually agreed to.

89 In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.), Contract A included a "privilege" clause which stated that the owner was not obliged to accept the lowest or *any* tender. The Court implied a term, based on the presumed intention of the parties, that notwithstanding the privilege clause, only compliant bids were open to acceptance. While the owner was not obliged to accept the lowest compliant bid, the privilege clause did not, as a matter of contractual interpretation, give the owner "the privilege" of accepting a non-compliant bid. *M.J.B.* stops short of the issue in the present appeal because in that case, there was a breach of Contract A but no clause purporting to exclude liability on the part of the owner to pay compensation in the event of a Contract A violation.

90 In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943 (S.C.C.), the Court enforced the rules of the bid depository system against a contractor whose bid was based on what turned out to be a mistaken view of its collective bargaining status with the International Brotherhood of Electrical Workers. The Court again affirmed that "[t]he existence and content of Contract A will depend on the facts of the particular case" (para. 36). Ellis-Don sought relief from its bid on the basis of a labour board decision rendered subsequent to its bid that upheld, to its surprise, the bargaining rights of the union. This Court held that no relief was contemplated in the circumstances under Contract A and none was afforded, even though this was a costly result when viewed from the perspective of Ellis-Don.

91 In *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), citing *M.J.B.*, the Court implied a term in Contract A obligating the owner to be fair and consistent in the assessment of tender bids. On the facts, the disappointed bidder's claim of unfair treatment was rejected.

92 Finally, in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116 (S.C.C.), the unsuccessful bidder claimed that Edmonton had accepted, in breach of Contract A, a competitor's non-compliant bid to provide heavy equipment of a certain age to move refuse at a waste disposal site. The Court refused to imply a term "requiring an owner to investigate to see if bidders will really do what they promised in their tender" (para. 50). Accepting the existence of a duty of "fairness and equality", the majority nevertheless held that "[t]he best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information" (para. 52). In other words, the majority's interpretation of the express terms of Contract A was enforced despite Double N Earthmovers' complaint of double dealing by the owner.

93 On the whole, therefore, while *Ron Engineering* and its progeny have encouraged the establishment of a fair and transparent bidding process, Contract A continues to be based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. Only in rare circumstances will the Court relieve a party from the bargain it has made.

94 As to implied terms, *M.J.B.* emphasized (at para.29) that the focus is "the intentions of the *actual* parties". A court, when dealing with a claim to an implied term, "must be careful not to slide into determining the intentions of *reasonable* parties" (emphasis in original). Thus "if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis".

95 Tercon is a large and experienced contractor. As noted by Donald J.A. in the B.C. Court of Appeal, it had earlier "successfully recovered damages from the [Ministry] on a bidding default on a previous case" (2007 BCCA 592, 73 B.C.L.R. (4th) 201 (B.C. C.A.), at para. 15). See *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197 (B.C. S.C.) aff'd, (B.C. C.A.). Thus Tercon would have been more sensitive than most contractors to the risks posed by an exclusion of compensation clause. It nevertheless chose to bid on the project on the terms proposed by the Ministry.

III. Tercon's Claim for Relief from the Exclusionary Clause it Agreed to

96 In these circumstances, the first question is whether there is either a statutory legal obstacle to, or a principled legal argument against, the freedom of these parties to contract out of the obligation that would otherwise exist for the Ministry to pay compensation for a breach of Contract A. If not, the second question is whether there is any other barrier to the court's enforcement of the exclusionary clause in the circumstances that occurred. On the first branch, Tercon relies on the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311 ("*Transportation Act*" or the "Act"). On the second branch, Tercon relies on the doctrine of fundamental breach.

A. The Statutory Argument

97 Section 4 of the *Transportation Act* provides that before awarding a highway contract, "the minister must invite tenders in any manner that will make the invitation for tenders reasonably available to the public", but then provides for several exceptions: "The minister need not invite tenders for a project ... if ... (c) the minister believes that an alternative contracting process will result in a competitively established cost for the project". Here the required ministerial authorization was obtained for an "alternative process". The reason is as follows. As noted by Cromwell J., the Ministry's original idea was to use a "design-build" model where a single contractor would design and build the highway for a fixed price. The Ministry issued a request for expressions of interest ("RFEI") which attracted six responses. One was from Tercon. Another was from Brentwood. EAC declined to bid because it did not think the "design-build" concept was appropriate for the job.

98 On further reflection, the Ministry decided not to pursue the design-build approach. It decided to design the highway itself. The contract would be limited to construction, as EAC had earlier advocated. EAC was not allowed to bid despite the Ministry coming around to its point of view on the proper way to tender the project. The Ministry limited bidding on the new contest to the six respondents to the original RFEI, all of whom had been found capable of performing the contract. But to do so, it needed, and did obtain, the Minister's s. 4 approval.

99 A question arose during the hearing of the appeal as to whether the Minister actually approved an "alternative process" that not only restricted eligibility to the six participants in the RFEI process (an advantage to Tercon and the other five participants), but also contained the "no claims" clause excluding compensation for non-observance of its terms (no doubt considered a disadvantage). In its factum, the Ministry states:

> In this case, the Minister approved an alternate process under [s. 4(2) of the B.C. *Transportation Act*]. That process was set out in the Instructions to Proponents, which included the No Claim Clause. Having been approved by the Minister, the package (including the No Claims Clause) complied with section 4 of the *Transportation Act*. [para. 70]

100 Tercon argued at the hearing of this appeal that as a matter of *law*, Contract A could not have included the exclusion clause because

> [t]he policy of the [*Transportation Act*] is to ensure that the Ministry is accountable; to preserve confidence in the integrity of the tendering process. To ensure that is so and that the Minister is accountable, the Ministry must be held liable for its breach of Contract A in considering and accepting a proposal from the joint venture....
>
> . . . . .
>
> **MADAM JUSTICE ABELLA:** Can I just ask you one question. Is it your position, sir, that you can never have — that a government can never have a no claims clause?
>
> **MR. McLEAN:** Yes. Under this statute because of the policy of the statute. [Transcript, at pp. 26-27]

101 While it is true that the Act favours "the integrity of the tendering process", it nowhere prohibits the parties from negotiating a "no claims" clause as part of their commercial agreement, and cannot plausibly be interpreted to have that effect.

102 In the ordinary world of commerce, as Dickson C.J. commented in *Hunter*, "clauses limiting or excluding liability are negotiated as part of the general contract. As they do with all other contractual terms, the parties bargain for the consequences of deficient performance" (p. 461). Moreover, as Mr. Hall points out, "[t]here are many valid reasons for contracting parties to use exemption clauses, most notably to allocate risks" (G. R. Hall, *Canadian Contractual Interpretation Law* (2007), at p. 243). Tercon for example is a sophisticated and experienced contractor and if it decided that it was in its commercial interest to proceed with the bid despite the exclusion of compensation clause, that was its prerogative and nothing in the "policy of the Act" barred the parties' agreement on that point.

103 To the extent Tercon is now saying that as a matter of *fact* the Minister, in approving the RFP, did not specifically approve the exclusion clause, and that the contract was thus somehow *ultra vires* the Ministry, this is not an issue that was either pleaded or dealt with in the courts below. The details of the ministerial approval process were not developed in the evidence. It is not at all evident that s. 4 *required* the Minister to approve the actual terms of the RFP. It is an administrative law point that Tercon, if so advised, ought to have pursued at pre-trial discovery and in the trial evidence. We have not been directed to any exploration of the matter in the testimony and it is too late in the proceeding for Tercon to explore it now. Accordingly, I proceed on the basis that the exclusion clause did not run afoul of the statutory requirements.

B. The Doctrine of the Fundamental Breach

104 The trial judge considered the applicability of the doctrine of fundamental breach. Tercon argued that the Ministry, by reason of its fundamental breach, had forfeited the protection of the exclusion of compensation clause.

105 The leading case is *Hunter* which also dealt with an exclusion of liability clause. The appellants Hunter Engineering and Allis-Chalmers Canada Ltd. supplied gearboxes used to drive conveyor belts at Syncrude's tar sands operations in Northern Alberta. The gearboxes proved to be defective. At issue was a broad exclusion of warranty clause that limited time for suit and the level of recovery available against Allis-Chalmers (i.e. no recovery beyond the unit price of the defective products). Dickson C.J. observed: "In the face of the contractual provisions, Allis-Chalmers can only be found liable under the doctrine of fundamental breach" (p. 451).

106 This doctrine was largely the creation of Lord Denning in the 1950s (see, e.g., *Harrow Karsales Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (Eng. C.A.)). It was said to be a rule of law that operated independently of the intention of the parties in circumstances where the defendant had so egregiously breached the contract as to deny the plaintiff substantially the whole of its benefit. In such a case, according to the doctrine, the innocent party was excused from further performance but the defendant could still be held liable for the consequences of its "fundamental" breach even if the parties had excluded liability by clear and express language. See generally S. M. Waddams, *The Law of Contracts* (5th ed. 2005), at para. 478; J. D. McCamus, *The Law of Contracts* (2005), at pp. 765 *et seq.*

107 The five-judge *Hunter* Court was unanimous in the result and gave effect to the exclusion clause at issue. Dickson C.J. and Wilson J. both emphasized that there is nothing inherently unreasonable about exclusion clauses and that they should be applied unless there is a compelling reason not to give effect to the words selected by the parties. At that point, there was some divergence of opinion.

108 Dickson C.J. (La Forest J. concurring) observed that the doctrine of fundamental breach had "spawned a host of difficulties" (p. 460), the most obvious being the difficulty in determining whether a particular breach is fundamental. The doctrine obliged the parties to engage in "games of characterization" (p. 460) which distracted from the real question of what agreement the parties themselves intended. Accordingly, in his view, the doctrine should be "laid to rest". The situations in which the doctrine is invoked could be addressed more directly and effectively through the doctrine of "unconscionability", as assessed at the time the contract was made:

> It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach

> will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded. [p. 462]

Dickson C.J. explained that "[t]he courts do not blindly enforce harsh or unconscionable bargains" (p. 462), but "there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong, rather than relying on the artificial legal doctrine of 'fundamental breach'" (p. 462). To enforce an exclusion clause in such circumstances could tarnish the institutional integrity of the court. In that respect, it would be contrary to public policy. However, a *valid* exclusion clause would be enforced according to its terms.

109 Wilson J. (L'Heureux-Dubé J. concurring) disagreed. In her view, the courts retain some residual discretion to refuse to enforce exclusion clauses in cases of fundamental breach where the doctrine of *pre*-breach unconscionability (favoured by Dickson C.J.) did not apply. Importantly, she rejected the imposition of a general standard of reasonableness in the judicial scrutiny of exclusion clauses, affirming that "the courts ... are quite unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them" (p. 508). Wilson J. considered it more desirable to develop through the common law a *post*-breach analysis seeking a "balance between the obvious desirability of allowing the parties to make their own bargains ... and the obvious undesirability of having the courts used to enforce bargains in favour of parties who are totally repudiating such bargains themselves" (p. 510).

110 Wilson J. contemplated a two-stage test, in which the threshold step is the identification of a fundamental breach where "the foundation of the contract has been undermined, where the very thing bargained for has not been provided" (p. 500). Having found a fundamental breach to exist, the exclusion clause would *not* automatically be set aside, but the court should go on to assess whether, having regard to the circumstances of the breach, the party in fundamental breach should escape liability:

> Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties' intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as a fundamental breach committed by the party seeking its enforcement through the courts. ... [T]he question essentially is: in the circumstances that have happened should the court lend its aid to A to hold B to this clause? [Emphasis added; pp. 510-11.]

111 Wilson J. reiterated that "as a general rule" courts should give effect to exclusion clauses *even in the case of fundamental breach* (p. 515). Nevertheless, a residual discretion to withhold enforcement exists:

> Lord Wilberforce [in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.)] may be right that parties of equal bargaining power should be left to live with their bargains regardless of subsequent events. I believe, however, that there is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances. [Emphasis added; p. 517]

Wilson J. made it clear that such circumstances of disentitlement would be rare. She acknowledged that an exclusion clause might well be accepted with open eyes by a party "very anxious to get" the contract (p. 509). However, Wilson J. did not elaborate further on what such circumstances might be because she found in *Hunter* itself that no reason existed to refuse the defendant Allis-Chalmers the benefit of the exclusion clause.

112 The fifth judge, McIntyre J., in a crisp two-paragraph judgment, agreed with the conclusion of Wilson J. in respect of the exclusion clause issue but found it "unnecessary to deal further with the concept of fundamental breach in this case" (p. 481).

113 The law was left in this seemingly bifurcated state until *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.). In that case, the Court breathed some life into the dying doctrine of fundamental breach

while nevertheless affirming (once again) that whether or not a "fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law" (at para. 52). In other words, the question was whether the parties *intended* at the time of contract formation that the exclusion or limitation clause would apply "in circumstances of contractual breach, whether fundamental or otherwise" (para. 63). The Court thus emphasized that what was important was not the label ("fundamental or otherwise") but the intent of the contracting parties when they made their bargain. "The *only limitation* placed upon enforcing the contract as written in the event of a fundamental breach", the Court in *Guarantee Co.* continued,

> would be to refuse to enforce an exclusion, of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or [note the disjunctive "or"] unfair, unreasonable or otherwise contrary to public policy, according to Wilson J. [Emphasis added; para. 52.]
>
> (See also para. 64.)

What has given rise to some concern is not the reference to "public policy", whose role in the enforcement of contracts has never been doubted, but to the more general ideas of "unfair" and "unreasonable", which seemingly confer on courts a very broad after-the-fact discretion.

114 The Court's subsequent observations in *Domtar Inc. v. Abb Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461 (S.C.C.), should be seen in that light. *Domtar* was a products liability case arising under the civil law of Quebec, but the Court observed with respect to the common law:

> Once the existence of a fundamental breach has been established, the court must still analyse the limitation of liability clause in light of the general rules of contract interpretation. If the words can reasonably be interpreted in only one way, it will not be open to the court, even on grounds of equity or reasonableness, to declare the clause to be unenforceable since this would amount to rewriting the contract negotiated by the parties. [Emphasis added; para. 84.]

While the *Domtar* Court continued to refer to "fundamental breach", it notably repudiated any judicial discretion to depart from the terms of a valid contact upon vague notions of "equity or reasonableness". It did not, however, express any doubt about the residual category mentioned in *Guarantee Co.*, namely a refusal to enforce an exclusion clause on the grounds of public policy.

115 I agree with Professor Waddams when he writes:

> [I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]

116 While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief *against* enforcement. As Duff C.J. observed:

> It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.
>
> (*Millar, Re* (1937), [1938] S.C.R. 1 (S.C.C.), at p. 4)

See generally B. Kain and D. T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2007* (2007), 1.

117 As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.

118 There are cases where the exercise of what Professor Waddams calls the "ultimate power" to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

119 A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650 (Alta. C.A.). The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that "a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause" (para. 53). (See also McCamus, at p. 774, and Hall, at p. 243). What was demonstrated in *Plas-Tex* was that the defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

120 Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

121 The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

122 The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

123 If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public

policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

IV. Application to the Facts of this Case

124 I proceed to deal with the issues in the sequence mentioned above.

A. Did the Ministry Breach Contract A?

125 The trial judge found that the parties intended to create contractual relations at the bidding stage (i.e. Contract A): 2006 BCSC 499, 53 B.C.L.R. (4th) 138 (B.C. S.C.), at para. 88. I agree with that conclusion. If there were no intent to form Contract A, there would be no need to exclude liability for compensation in the event of its breach.

126 The Ministry argued that Contract A was not breached. It was entitled to enter into Contract B with Brentwood and it did so. There was no privity between the Ministry and EAC. The Ministry would have had no direct claim against EAC in the event of deficient performance. I accept as correct that Brentwood, having obtained Contract B, was in a position of considerable flexibility as to how and with whom it carried out the work. Nevertheless, it was open to the trial judge to conclude, as she did, that the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. At the end of an unfair process, she found, Contract B was not awarded to Brentwood (the eligible bidder) but to what amounted to a joint venture consisting of Brentwood and EAC. I therefore proceed with the rest of the analysis on the basis that Contract A was breached.

B. What is the Proper Interpretation of the Exclusion of Compensation Clause and Did the Ministry's Conduct Fall Within its Terms?

127 It is at this stage that I part company with my colleague Cromwell J. The exclusion clause is contained in the RFP and provides as follows:

> **2:10** . . .
>
> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agree that it has no claim.

In my view, "participating in this RFP" began with "submitting a Proposal" for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon's bid *was* considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (ineligible) instead of Brentwood itself (eligible) would, I believe, take the Court up the dead end identified by Wilson J. in *Hunter*:

> ... exclusion clauses, like all contractual provisions, should be given their natural and true construction. Great uncertainty and needless complications in the drafting of contracts will obviously result if courts give exclusion clauses strained and artificial interpretations in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause. [p. 509]

Professor McCamus expresses a similar thought:

> ... the law concerning exculpatory clauses is likely to be more rather than less predictable if the underlying concern is openly recognized, as it is in *Hunter*, rather than suppressed and achieved indirectly through the subterfuge of strained interpretation of such terms. [p. 778]

128 I accept the trial judge's view that the Ministry was at fault in its performance of the RFP, but the conclusion that the process thereby ceased to be the RFP process appears to me, with due respect to colleagues of a different view,

to be a "strained and artificial interpretatio[n] in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause".

129 As a matter of interpretation, I agree with Donald J.A. speaking for the unanimous court below:

> The [trial] judge said the word "participating" was ambiguous. With deference, I do not find it so. The sense it conveys is the contractor's involvement in the RFP/contract A stage of the process. I fail to see how "participating" could bear any other meaning. [Emphasis added; para. 16.]

Accordingly, I conclude that on the face of it, the exclusion clause applies to the facts described in the evidence before us.

C. Was the Claim Excluding Compensation Unconscionable at the Time Contract A was Made?

130 At this point, the focus turns to contract formation. Tercon advances two arguments: firstly, that it suffered from an inequality of bargaining power and secondly, (as mentioned) that the exclusion clause violates public policy as reflected in the *Transportation Act*.

(1) Unequal Bargaining Power

131 In *Hunter*, Dickson C.J. stated, at p. 462: "Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded." Applying that test to the case before him, he concluded:

> I have no doubt that unconscionability is not an issue in this case. Both Allis-Chalmers and Syncrude are large and commercially sophisticated companies. Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract. [p. 464]

While Tercon is not on the same level of power and authority as the Ministry, Tercon is a major contractor and is well able to look after itself in a commercial context. It need not bid if it doesn't like what is proposed. There was no relevant imbalance in bargaining power.

(2) Policy of the Transportation Act

132 As mentioned earlier, Tercon cites and relies upon the policy of the Act which undoubtedly favours the transparency and integrity of the bidding process. I have already discussed my reasons for rejecting Tercon's argument that this "policy" operates as a bar to the ability of the parties to agree on such commonplace commercial terms as in the circumstances they think appropriate. In addition, the exclusion clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A (specific performance or injunctive relief, for example) were available.

133 In this case, injunction relief *was* in fact a live possibility. Although Tercon was not briefed on the negotiations with other bidders, the trial judge found that Glenn Walsh, the owner of Tercon, "had seen representatives of EAC with Brentwood following [the Brentwood/EAC interviews with the Ministry and Bill Swain of Brentwood]", and when asked whether Tercon was going to sue, Walsh had said "no" without further comment. Had Tercon pushed for more information and sought an injunction (as a matter of private law, not public law), at that stage the exclusion clause would have had no application, but Tercon did not do so. This is not to say that estoppel or waiver applies. Nor is it to say that injunctive relief would be readily available in many bidding situations (although if an injunction had been sought here, the unavailability of the alternative remedy of monetary damages might have assisted Tercon). It is merely to say that the exclusion clause is partial, not exhaustive.

134 The Kincolith road project presented a serious construction challenge on a tight time frame and within a tight budget. Contract A did not involve a bid for a fixed price contract but for the right to negotiate the bid details once the winning proponent was selected. In such a fluid situation, *all* participants could expect difficulties in the contracting process. Members of the construction bar are nothing if not litigious. In the circumstances, the bidders might reasonably

have accepted (however reluctantly) the Ministry's need for a bidding process that excluded compensation, and adjusted their bids accordingly. The taxpayers of British Columbia were not prepared to pay the contractor's profit twice over — once to Brentwood/EAC for actually building the road, and now to Tercon, even though in Tercon's case the "profit" would be gained without Tercon running the risks associated with the performance of Contract B. The Court should not be quick to declare such a clause, negotiated between savvy participants in the construction business, to be "contrary to the Act".

D. Assuming the Validity of the Exclusion Clause at the Time the Contract was Made, is There Any Overriding Public Policy That Would Justify the Court's Refusal to Enforce it?

135 If the exclusion clause is not invalid from the outset, I do not believe the Ministry's performance can be characterized as so aberrant as to forfeit the protection of the contractual exclusion clause on the basis of some overriding public policy. While there is a public interest in a fair and transparent tendering process, it cannot be ratcheted up to defeat the enforcement of Contract A in this case. There *was* an RFP process and Tercon participated in it.

136 Assertions of ineligible bidders and ineligible bids are the bread and butter of construction litigation. If a claim to defeat the exclusion clause succeeds here on the basis that the owner selected a joint venture consisting of an eligible bidder with an ineligible bidder, so also by a parity of reasoning should an exclusion clause be set aside if the owner accepted a bid ineligible on other grounds. There would be little room left for the exclusion clause to operate. A more sensible and realistic view is that the parties here expected, even if they didn't like it, that the exclusion of compensation clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

137 While the Ministry's conduct was in breach of Contract A, that conduct was not so extreme as to engage some overriding and paramount public interest in curbing contractual abuse as in the *Plas-Tex* case. Brentwood was not an outsider to the RFP process. It was a legitimate competitor. All bidders knew that the road contract (i.e. Contract B) would not be performed by the proponent alone. The work required a large "team" of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor (to which Tercon could not have objected) or identified with Brentwood as a joint venture "proponent" with EAC. All bidders were made aware of a certain flexibility with respect to the composition of any proponent's "team". Section 2.8(b) of the RFP provided that if "a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed, ... the Ministry may request [further information and] ... reserves the right to disqualify that Proponent, and reject its Proposal". Equally, "[i]f a qualified Proponent is concerned that it has undergone a material change, the Proponent can, at its election, make a preliminary submission to the Ministry, in advance of the Closing Date, and before submitting a Proposal. ... The Ministry will, within three working days of receipt of the preliminary submission give a written decision as to whether the Proponent is still qualified to submit a Proposal."

138 The RFP issued on January 15, 2001. The Ministry was informed by Brentwood of a "proposed material change to our team's structure" in respect of a joint venture with EAC by fax dated January 24, 2001. From the Ministry's perspective, the change was desirable. EAC was a bigger company, had greater expertise in rock drilling and blasting (a major part of the contract) and a stronger balance sheet. EAC was identified in Brentwood's amended proposal as a sub-contractor. In the end, the Ministry did not approve the January 14, 2001 request, presumably because it doubted that a change in the "composition of the Proponent's team's members" could, according to the terms of the RFP, include a change in the Proponent itself.

139 The Ministry did obtain legal advice and did not proceed in defiance of it. On March 29, 2001, the Ministry noted in an internal e-mail that a Ministry lawyer (identified in the e-mail) had come to the conclusion that the joint venture was not an eligible proponent but advised that Contract B could lawfully be structured in a way so as to satisfy both Brentwood/EAC's concerns and avoid litigation from disappointed proponents.

140 I do not wish to understate the difference between EAC as a sub-contractor and EAC as a joint-venturer. Nor do I discount the trial judge's condemnation of the Ministry's lack of fairness and transparency in making a contract B

which on its face was at odds with what the trial judge found to be the true state of affairs. Tercon has legitimate reason to complain about the Ministry's conduct. I say only that based on the jurisprudence, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

141 The construction industry in British Columbia is run by knowledgeable and sophisticated people who bid upon and enter government contracts with eyes wide open. No statute in British Columbia and no principle of the common law override their ability in this case to agree on a tendering process including a limitation or exclusion of remedies for breach of its rules. A contractor who does not think it is in its business interest to bid on the terms offered is free to decline to participate. As Donald J.A. pointed out, if enough contractors refuse to participate, the Ministry would be forced to change its approach. So long as contractors are willing to bid on such terms, I do not think it is the court's job to rescue them from the consequences of their decision to do so. Tercon's loss of anticipated profit is a paper loss. In my view, its claim is barred by the terms of the contract it agreed to.

V. Disposition

142 I would dismiss the appeal without costs.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the court on March 18, 2010 has been incorporated herein.

Tab 3

Canadian Contractual Interpretation Law

THIRD EDITION

Geoff R. Hall
B.A. (McGill), M.A., LL.B. (Toronto), LL.M. (Harvard)

Partner, McCarthy Tétrault LLP

LexisNexis®

2.2 A CONTRACT IS TO BE CONSTRUED AS A WHOLE WITH MEANING GIVEN TO ALL OF ITS PROVISIONS

2.2.1 The principle

It is a fundamental precept that contractual interpretation requires an examination of a contract as a whole, not just a consideration of the specific words in dispute.[35] Individual words and phrases must be read in the context of the entire document. "The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context."[36] The rule is so basic that it has aptly been described as a "well-known" principle of contractual interpretation.[37]

The corollary of this principle is the precept that meaning must be given to all of the words in a contract:

> To the extent that it is possible to do so, [a contract] should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof: *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57 at p. 66, 25 D.L.R. (4th) 649 at p. 655. The court should strive to give meaning to the agreement and "reject an interpretation that would render one of its terms ineffective": *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at p. 425, 71 D.L.R. (4th) 488 and p. 499.[38]

Put another way: "Words in a contract are presumed to have meaning."[39]

There is an important extension to the principle that a contract must be read as a whole: a contract must also be read in light of related contracts. Given how common it is that complex transactions are effected by a series of inter-related contracts, this elaboration is an important one. The related contracts doctrine is a very sensible extension of the precept that a contract must be read as a whole.

---

35 *Hnatiuk v. Court*, [2010] M.J. No. 52, 251 Man. R. (2d) 178 at para. 43 (Man. C.A.).

36 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69 at para. 64 (S.C.C.), per Cromwell J. See also *Canadian Newspapers Co. v. Kansa General Insurance Co.*, [1996] O.J. No. 3054, 30 O.R. (3d) 257 at 270 (Ont. C.A.), leave to appeal refused [1996] S.C.C.A. No. 553 (S.C.C.); *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1999] O.J. No. 3290, 45 O.R. (3d) 417 at para. 9 (Ont. C.A.); and *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 1083, 85 O.R. (3d) 254 at para. 24 (Ont. C.A.), which are to a similar effect.

37 *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (c.o.b. CAA Manitoba)*, [2003] M.J. No. 191, [2003] 9 W.W.R. 385 at para. 12 (Man. C.A.), citing *National Trust Co. v. Mead*, [1990] S.C.J. No. 76, [1990] 2 S.C.R. 410 (S.C.C.).

38 *Scanlon v. Castlepoint Development Corp.*, [1992] O.J. No. 2692, 11 O.R. (3d) 744 at 770-71 (Ont. C.A.), leave to appeal refused [1993] S.C.C.A. No. 62, [1993] 2 S.C.R. x (S.C.C.). This statement was quoted and followed in *369413 Alberta Ltd. v. Pocklington*, [2000] A.J. No. 1350, 88 Alta. L.R. (3d) 209 at para. 19 (Alta. C.A.).

39 *Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd.*, [2003] B.C.J. No. 2508 at para. 17 (B.C.C.A.).

Tab 4

2003 BCCA 580
British Columbia Court of Appeal

Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd.

2003 CarswellBC 2696, 2003 BCCA 580, [2003] B.C.J. No. 2508, [2004] B.C.W.L.D. 34, 126 A.C.W.S. (3d) 609, 188 B.C.A.C. 110, 308 W.A.C. 110

Pass Creek Enterprises Ltd. (Respondent / Plaintiff) and Kootenay Custom Log Sort Ltd. (Appellant / Defendant)

Hollinrake J.A., Saunders J.A., and Thackray J.A.

Heard: September 24, 2003
Judgment: November 3, 2003
Docket: Vancouver CA030165

Proceedings: reversing in part *Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd.* (2002), 2002 BCSC 1301, 2002 CarswellBC 2082 (B.C. S.C.)

Counsel: M.A. Koochin for Appellant
J.M. Hogg, Q.C. for Respondent

Subject: Natural Resources; Contracts; Property; Civil Practice and Procedure

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

V Sale of goods
V.8 Seller's remedies
V.8.b Action for damages
V.8.b.iv Measure of damages
V.8.b.iv.B Difference
V.8.b.iv.B.2 Between contract and resale price

Contracts

VII Construction and interpretation
VII.4 Resolving ambiguities
VII.4.b Contra proferentem

Natural resources

IV Timber
IV.4 Sale of timber
IV.4.b Interpretation of contract
IV.4.b.iv Measurement

Headnote
Timber --- Sale of timber — Interpretation of contract — Measurement

Parties entered into contract to purchase quantity of logs — Contract stated that estimated volume of logs was 4,000 cubic metres, although vendor delivered 4,700 cubic metres of logs — Purchaser did not accept delivery of certain logs on grounds that it was not required to accept log shipment of more than 4,000 cubic metres, and that certain logs did not meet measurement specifications — Vendor's action for damages for breach of contract was allowed — Trial judge found that agreement stating that contract involved 4,000 cubic metres of logs was merely estimate, and that agreement contemplated purchase of greater amount — Trial judge found that 4,700 cubic metres was reasonably within commitment entered into by purchaser — Trial judge found that measurement specification documents were inconsistent with agreement and were invalid — Purchaser appealed — Appeal allowed in part — Trial judge's findings regarding volume of logs ordered were reasonable and should not be interfered with — Trial judge erred by not incorporating into main agreement provisions of specification documents which were not inconsistent with main agreement — Re-hearing regarding damages ordered regarding validity of rejections of logs for not meeting specifications.

Contracts --- Construction and interpretation — Resolving ambiguities — Contra proferentem

Parties entered into contract to purchase quantity of logs — Contract stated that estimated volume of logs was 4,000 cubic metres, although vendor delivered 4,700 cubic metres of logs — Purchaser did not accept delivery of certain logs on grounds that it was not required to accept log shipment of more than 4,000 cubic metres, and that certain logs did not meet specifications — Vendor's action for damages for breach of contract was allowed — Trial judge found that agreement stating that contract involved 4,000 cubic metres of logs was merely estimate, and that agreement contemplated purchase of greater amount — Trial judge found that provisions regarding amount of lumber were ambiguous and should be interpreted against purchaser — Trial judge found that 4,700 cubic metres was reasonably within commitment entered into by purchaser — Trial judge found that specification documents were inconsistent with agreement and were invalid — Purchaser appealed — Appeal allowed in part — Trial judge's findings regarding volume of logs ordered were reasonable and should not be interfered with — Trial judge erred by not incorporating into main agreement provisions of specification documents which were not inconsistent with main agreement — Re-hearing regarding damages ordered regarding validity of logs rejected for not meeting specifications.

Table of Authorities

Cases considered by *Saunders J.A.*:

Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co. (1958), [1959] A.C. 133, [1958] 1 All E.R. 725, [1958] 1 Lloyd's Rep. 73 (U.K. H.L.) — followed

APPEAL by purchaser from judgment reported at *Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd.* (2002), 2002 BCSC 1301, 2002 CarswellBC 2082 (B.C. S.C.), allowing vendor's action for damages for breach of contract regarding sale of logs.

***Saunders J.A.*:**

1 Kootenay Custom Log Sort Ltd., the appellant, has been ordered to pay damages totalling $41,244, court ordered interest and costs to Pass Creek Enterprises Ltd. for breach of a log purchase agreement. Pass Creek was the vendor of logs and Kootenay was the purchaser. The damages were assessed for two wrongs found by the learned trial judge, that Kootenay wrongly declined to accept delivery of certain logs on the basis that the contract did not require it to accept logs beyond the volume of 4,000 cubic metres, and that Kootenay wrongly denied payment for logs that it said did not meet its specifications.

2 Kootenay contends on appeal that the trial judge erred in concluding that the agreement obliged it to accept logs beyond the volume of 4,000 cubic metres, in concluding that its specifications were not incorporated into the agreement

and in affording the weight given by the trial judge to the report of an expert witness, Mr. Marshall. As to the latter issue, it was argued at trial that the trial judge should conclude that Mr. Marshall lacked credibility. The trial judge, having heard the evidence and submissions, rejected that submission and gave weight to that report. In doing so he was well within the role of a trial judge; his assessment of that evidence is not a matter with which we can or should interfere in my view. I would not accede to that ground of appeal.

3 I turn then to the issues of interpretation of the contract. There are two issues, the first dealing with the volume which was contracted to be sold, and the second dealing with the quality of the logs which were required to be accepted by Kootenay.

The Volume Issue

4 The Log Purchase Agreement is a single page dated August 6, 2000. It identifies Pass Creek as the vendor and Kootenay as the purchaser, and provides:

> The Vendor warrants and represents to the purchaser that it has good right and title to the logs and agrees to sell to the purchaser, the logs described as follows:
>
> PROPERTY DESCRIPTION: TIMBER SALE A45672
>
> TIMBER MARK: 45672 ESTIMATED VOLUME: 4000m

5 The question is whether this provision required Kootenay to purchase more than 4,000 cubic metres. Kootenay says it did not, that the contract was to purchase only 4,000 cubic metres, and that it was entitled to reject, as it did, a volume over that amount. On this issue the trial judge said:

> [6] Kootenay submits the Agreement required it to accept just 4,000 cubic metres of logs, although it actually accepted approximately 4,100 cubic metres before log deliveries ended. Pass contends the Agreement required Kootenay to accept all the logs meeting specifications delivered from timber sale A45672, relying on the wording of the Agreement and the practice in the industry which was reflected in an earlier log purchase contract between the parties.
>
> [7] The Agreement refers to an estimated volume of 4,000 cubic metres of logs, indicating that Kootenay was aware that the volume of logs coming from timber sale A45672 could only be estimated. Before agreeing to purchase the estimated volume Kootenay's employees inspected the site of the timber sale and Kootenay's manager, Rick Biller, obtained from Pass a copy of the 1998 timber cruise prepared by the B.C. Forest Service which calculated the gross merchantable volume of logs in timber sale A45672 to be 4,066 cubic metres. Mr. Biller reviewed the cruise in order to evaluate his volume numbers.
>
> [8] I accept the evidence that a B.C. Forest Service cruise is merely an estimate of the volume of wood and that such a cruise can be as much as 20 percent lower than the actual merchantable volume of logs recovered during logging operations. The parties were aware of such variation prior to entering the Agreement as they encountered such in their first contract signed July 18 and 20, 2000, in which Kootenay contracted to purchase from Pass an estimated volume of 300 cubic metres of logs from timber sale A62231. Pursuant to that contract, also prepared on Kootenay's standard form, Pass delivered and Kootenay accepted without dispute some 400 cubic metres of logs, reflecting a 33 percent increase above the estimated 300 cubic metres referred to in the contract.
>
> [9] Kootenay submits that Pass agreed to limit the volume of logs to 4,000 cubic metres during a meeting between the parties on August 26, 2000. The meeting was difficult as Mr. Biller expressed concern about the quality of the wood delivered by Pass and Darryl Hunt, the manager of Pass, disagreed with the manner in which Kootenay was valuing the logs delivered. At one point Mr. Biller suggested that the Agreement end when 4,000 cubic metres were delivered and he testified that Mr. Hunt was upset, but seemed to accept the proposal, an interpretation with which

> Mr. Hunt disagrees. Given the hostility of the meeting, the vagueness of what was actually said and the absence of any written confirmation of a change to the Agreement, I am not prepared to find that Pass agreed to limit the volume of logs to 4,000 cubic metres.
>
> . . . . .
>
> [12] As a result of Kootenay's actions, Pass, after October 13, 2000 found other purchasers for the remaining logs from timber sale A45672 and claims from Kootenay the difference between the Agreement prices and the amount Pass eventually received for the logs.
>
> [13] The words "estimated volume" are found in Kootenay's standard form contract which forms the basis of the Agreement. The expression introduced ambiguity into the parties' arrangement thereby attracting the *contra proferentem* rule which provides that the words of the document should be construed against the party which drew them or, put another way, that the meaning least favourable to the author of the document prevails: *Manulife Bank of Canada v. Conlin* (1996), 139 D.L.R. (4th) 426 at paras 8 and 9 (S.C.C.). In this case, through its employment of the words "estimated volume" I find Kootenay is liable to purchase more than the 4,000 cubic metres of logs.
>
> [14] Both Kootenay and Pass in entering the Agreement were aware the volume could only be estimated and that the actual volume delivered by Pass to Kootenay might well be in excess of 4,000 cubic metres. I find from the wording of the Agreement that Kootenay agreed to purchase from Pass between August 3 and October 31, 2000, all the logs delivered from timber sale A45672 which met the specifications found in the Agreement and that such a conclusion is consistent with the parties' dealings in connection with the Agreement and the earlier contract relating to timber sale A62231.
>
> . . . . .
>
> [18] Prior to signing the Agreement the parties negotiated log prices and specifications, those being basic to the Agreement with Kootenay preparing several draft contracts for Mr. Hunt's consideration before the parties reached a consensus on the terms found in the Agreement. Mr. Hunt acknowledges receiving Kootenay's specification cards, but paid them little attention as he considered the specifications were fully set out in the Agreement.
>
> [19] At no point in the negotiations does it appear that the parties discussed Kootenay's specification cards and when Kootenay forwarded the Agreement acceptable to Pass with reference to log prices and specifications, Kootenay did not include the specification cards, incorporating them only by reference in the Agreement.

6 In my view the learned trial judge was correct in concluding that the term "estimated amount" contemplated a requirement to purchase more than 4,000 cubic metres. The question then is whether the amount not received, which would have taken the delivered volume to about 4,700 cubic metres, was within that commitment. The learned trial judge concluded it was, considering a previous contract between the parties in which the delivered volume was about 33 percent more than the stated amount. That conclusion was supported by the evidence, and is not one with which this Court should interfere, in my view. It follows that I would not accede to this ground of appeal.

The Specifications Issue

7 I turn now to the issue of the rejection of logs as failing the specifications of Kootenay. The log purchase agreement provided:

> The Purchaser agrees to pay the Vendor the amount of:

$100 **/m**	**for** BUSH RUN	**Specs:** SAWLOG SPECS 4" TOP
$100 **/m**	**for** GREEN WHITE PINE	**Specs:** PEELER SPECS INCLUDES SOME GRADE 3
$ 50 **/m**	**for** DRY WHITE PINE	**Specs:** GRADES 4, 5 AND SOME GRADE 3

$ 50 **/m** **for** DRY LODGEPOLE PINE **Specs:** 4, 5 GRADES 4" TOP

All logs delivered must be sorted according to the vendors current specification and quality standards as set out in the Purchaser's current "Log Specifications" card. Penalties will be applied and deducted for any log not meeting contract specifications and quality standards.

8 Kootenay had sent Pass Creek specification pages for sawlogs, peelers and lodgepole pine, accompanied by a fax cover sheet. The specification pages for sawlogs and peelers were headed "KCLS BUCKING SPECIFICATIONS" and were dated August 3, 2000. The sawlogs sheet provided sawlog log lengths, the minimum diameters of the tops of the logs and these terms:

1) Measure all logs from the shortest point on the butt. Top sizes are measured inside bark

2) Hemlock must be "white/bright"

3) No broken ends, crook or schoolmarms

4) Limbs must be cut flush with the stem

8) Cut all snipes, shortest log is 12'6"

9) No processor marks on logs over 10" top size, house logs are 10 - 18" tops

10) Logs not meeting specs are subject to penalty. Logs with excessive defect are scaled as "X" with no payment.

9 The peeler specification sheet provided peeler log lengths, the top size, and these terms:

1) Measure all logs from the shortest point on the butt

2) Top sizes are measured inside bark

3) No broken ends, crooks or schoolmarms

4) No center butt rot allowed, no dead white pine allowed

5) Cluster knots and knots over 2.5% not allowed

6) No shake or pitch in peelers

7) Limbs must be cut flush with the stem

8) Cut all snipes

9) Logs not meeting specs are subject to penalty. Logs with excessive defect are scaled as "X" with no payment.

10 The lodgepole pine specification sheet provided:

1. Dead, dry sound lodgepole (20% or less moisture content).

2. Minimum diameter of 9" tip and 12" butt (after butt swell is removed).

3. Maximum taper of 5" in a 40 foot log.

4. Minimum log length of 40 feet. For shorter logs, the minimum tip size needs to be 10".

5. No red rot or unremovable surface rot.

6. Straight - crown not to exceed 3" on a 40 foot log.

7. Check width not to exceed 3/8" wide.

8 Spiral checking not to exceed 1/4 turn in 16 feet or 1" in 10".

9. Catface acceptable as long as it is no more than 1/3 of the log diameter, and does not deform the log.

11 Pass Creek contended at trial that these specification sheets were inconsistent with the specifications particularized in the written contract, in particular the diameters.

12 On this issue the learned trial judge referred to the language of the agreement set out above and said:

> [17] The language is somewhat vague in referring to the "vendors current specifications and quality standards", however, I understand the standards referred to are those which Kootenay prepared; they are not standards prepared by Pass.
>
> [18] Prior to signing the Agreement the parties negotiated log prices and specifications, those being basic to the Agreement with Kootenay preparing several draft contracts for Mr. Hunt's consideration before the parties reached a consensus on the terms found in the Agreement. Mr. Hunt acknowledges receiving Kootenay's specification cards, but paid them little attention as he considered the specifications were fully set out in the Agreement.
>
> [19] At no point in the negotiations does it appear that the parties discussed Kootenay's specification cards and when Kootenay forwarded the Agreement acceptable to Pass with reference to log prices and specifications, Kootenay did not include the specification cards, incorporating them only by reference in the Agreement.
>
> [20] An issue arises because the specifications in the Agreement conflict in part with those found in the specification cards. For example, the Agreement allows for sawlogs with four-inch top, but the specification card calls for a minimum of an eight-inch top. There is a similar conflict between the specification cards and the Agreement regarding lodgepole pine, with the former calling for a nine-inch tip and the latter requiring a four-inch top.

13 After reviewing the evidence tendered on behalf of Pass Creek as to its understanding of the term specifications and explaining the grading references, he held:

> [23] Kootenay submits that the Agreement incorporates the terms found in the specifications cards and both the Agreement and specifications cards constitute the whole contract between the parties. Although I concur with counsel for Kootenay that parties to an agreement can incorporate the provisions in whole or in part of another document, there is a limitation to that incorporation as noted by Mr. Justice Gow in *French v. Victoria Aerie No. 12 Fraternal Order of Eagles*, [1987] B.C.J. No. 510 (B.C.S.C.). He held at p. 4 that the provisions of another agreement could be incorporated with a primary document, insofar as the incorporated provisions were not inconsistent with the primary document. In this case, the provisions Kootenay attempts to incorporate into the Agreement are inconsistent with the negotiated specifications found in the Agreement.
>
> [24] Further, even if Kootenay were correct in its submission that the specification cards form part of the Agreement, Kootenay would I conclude again run afoul of the *contra proferentem* rule. Kootenay filled in the specifications on what became the Agreement before forwarding it to Pass and I have concluded that the specifications found on the face of the Agreement brought the industry's scaling language into the Agreement. These specifications conflict with the contents of Kootenay's specification cards which are merely alluded to in the Agreement. If the cards were to form part of the Agreement they would introduce an ambiguity into the parties' Agreement.

> [25] I would resolve that ambiguity by applying the *contra proferentem* rule and conclude that the specifications found on the Agreement are applicable, not those on the specification cards, that being the interpretation least favourable to Kootenay.

14 On appeal Kootenay contends that the trial judge erred in failing to incorporate any portion of the specifications in the contract. Pass Creek supports the order, saying that the Kootenay specifications are so inconsistent with the specifications particularized in the contract that they must be considered as not forming a part of the contract. In addition to the diameter issue described by the trial judge, they refer to the reference in the contract to grades established by the Ministry of Forests (grades 3, 4 and 5) which they say covers the issue of log quality and is inconsistent with the particulars on the cards.

15 It is basic that clauses of a written agreement prevail in a contest between terms of a written agreement and an incorporated document: *Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co.*, [1959] A.C. 133, [1958] 1 Lloyd's Rep. 73 (U.K. H.L.). As Lord Keith observed, it is very much the same thing whether one reads in only as much of the incorporated document as is not inconsistent with the subject matter of the incorporated document, or one reads in the entire incorporated document and then treats an inconsistent term as insensible and to be disregarded. At p. 178, in a passage equally apt to this case, he said:

> The parties have incorporated the Act contractually into their contract of charterparty, and to say that the provisions of the Act shall not apply to their charterparty would render the incorporation nugatory and make no sense of what was intended to be a "paramount clause" in their contract. It is, of course, possible to read a clause in a contract as senseless and read it out of the contract altogether, but in commercial contracts that is a course that the court should be slow to adopt. As stated by Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd.*, [147 L.T. 503 at 514], it is "the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English law, Verba ita sunt intelligenda ut res magis valeat quam pereat.

16 I consider that the issue in this case is simply whether the specifications are included by reference, to any degree, into the contract, and not a case in which *contra proferentem* provides assistance. In the event the specifications are included by reference, then, to the extent that they are not inconsistent with provisions in the Log Purchase Agreement, they could be relied upon by Kootenay in refusing to pay for delivered logs.

17 Words in a contract are presumed to have meaning. The specification cards were sent to Pass Creek prior to execution of the agreement and were referred to in the agreement. In my view the interpretation of the trial judge effectively gives no meaning to the words "as set out in the Purchaser's current "Log Specifications" card". This is not a case in which the specification cards were so inconsistent with the words in the contract that the only reasonable interpretation is that they are not applicable. The log quality provisions of the specifications provided by Kootenay cannot be said to be entirely inconsistent with the lumber grading references. In my view they filled the role of particularizing the quality requirements beyond simple grading. For example, as to sawlogs the specifications provided they must not have broken ends, crooks or schoolmarms; for peelers, limbs must be cut flush with the stem, and for lodgepole pine, there could not be red rot or unremovable surface rot. These provisions are not, on the evidence, inconsistent with the references to its log grades. To the extent the diameter provisions are inconsistent with the cards, the tailor-made provision of the log purchase agreement of course prevailed and the specification card is to be disregarded in that respect.

18 It follows that I consider that the order for damages arising from rejection of logs for failing to meet specifications must be set aside. The issue of whether all the logs were properly rejected as failing to meet the specifications was addressed at trial by Pass Creek but not decided by the trial judge. It may be argued that the phrase "[P]enalties will be applied and deducted for any log not meeting contract specifications and quality standards" precludes complete rejection

by Kootenay of logs failing the specifications incorporated by reference. It is therefore appropriate, in my view, to remit the issue of damages, as it relates to the specifications issue, to the trial court for determination.

19 The damage award also included a small sum for general damages. No serious issue was taken on this head of damage, apart from the argument that there was no breach of contract at all. As I have concluded that Kootenay did breach the contract by failing to accept all of the logs required to be accepted under the contract, I would not interfere with that award.

Conclusion

20 The order appealed set out the orders for payment individually. I therefore would allow the appeal only to the extent of setting aside paragraph 1 of the order appealed relating to failure to meet specifications, paragraph 4 of the order to the extent it includes goods and services tax on the amount referred to in paragraph 1, paragraph 7 of the order as it relates to interest on the amounts of paragraph 1, and paragraph 9 to the extent required to correspond with these reasons, the matter of damages for failure to meet specifications and ancillary orders being remitted to the

21 trial court for determination. The parties may make submissions in writing on the issue of costs.

***Thackray J.A.*:**

22 I agree.

***Hollinrake J.A.*:**

23 I agree.

Appeal allowed in part.

Tab 5

1988 CarswellBC 439
British Columbia Supreme Court

Karroll v. Silver Star Mountain Resorts Ltd.

1988 CarswellBC 439, [1988] B.C.J. No. 2266, [1989] C.L.D. 118, 12 A.C.W.S. (3d) 354, 33 B.C.L.R. (2d) 160, 40 B.L.R. 212, 47 C.C.L.T. 269

KARROLL v. SILVER STAR MOUNTAIN RESORTS LTD., VERNON SKI CLUB and JOHN DOE

McLachlin C.J.S.C.

Heard: November 9, 1988
Judgment: November 22, 1988
Docket: Vancouver No. C866047

Counsel: *M.T. Blaxland*, for plaintiff.
R.B. Kennedy, for defendant Silver Star Mountain Resorts.
R.E. Williamson,, for defendants Vernon Ski Club and John Doe.

Subject: Corporate and Commercial; Torts; Contracts

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

V Mistake
V.5 Mistake as to nature of agreement (Non est factum)
V.5.a General principles

Headnote
Contracts --- Formation of contract — Mistake — Mistake as to nature of agreement (non est factum) — General

Damages — Bars to damage claims — Release — Plaintiff participating in ski race and signing release of liability in favour of defendant race organizer and its agents — Plaintiff suing for damages for personal injuries resulting from collision with another skier — Court finding release easy to read and consistent with the purpose of the contract among factors relieving defendant of obligation to bring its contents to plaintiff's attention — Court finding defendant's agents within scope of release — Plaintiff's action dismissed.

The plaintiff was injured in a downhill ski race. Prior to the race she had signed a one-page document, directed to the defendant and its agent, which contained the following heading at the top of the page: RELEASE AND INDEMNITY — PLEASE READ CAREFULLY. The defendants applied under R. 18A for a declaration that

the signed release precluded recovery by the plaintiff. At the same time, the plaintiff applied to amend her pleadings and for an order adding certain defendants.

Held:

Defendants' application allowed; plaintiff's applications dismissed.

The rule that a party proffering a release of liability must take reasonable steps to bring the contents of the release to the signer's attention is a limited principle applicable in special circumstances. Such an obligation arises where a reasonable person should have known that the party signing was not consenting to the terms of the document. Factors relevant to whether such a duty arises are the length and format of the contract, the time available for reading and comprehending it, and whether the exclusion clause runs contrary to the party's normal expectation. The release here was short and easy to read, was a common feature of ski races and was consistent with the purpose of the contract. Therefore, the defendant was not required to bring the contents of the release to the plaintiff's attention or to ensure that she read it. Even if that conclusion were wrong, the defendant had taken reasonable steps to advise the plaintiff.

The defendant's agent could rely on the release, since the release stated that the defendant was contracting on the agent's behalf, that it had the authority to do so and that the agent intended to limit liability. Finally, the agent had given consideration for the release by assisting in directing the race in which the plaintiff had wished to participate.

Table of Authorities

Cases considered:

Delaney v. Cascade River Holidays Ltd. (1983), 44 B.C.L.R. 24, 24 C.C.L.T. 6, affirming 34 B.C.L.R. 62, 16 B.L.R. 114, 19 C.C.L.T. 78 (C.A.) — *considered*

Dyck v. Man. Snowmobile Assn. Inc., [1982] 4 W.W.R. 318, 21 C.C.L.T. 38, 136 D.L.R. (3d) 11, 15 Man. R. (2d) 404, affirmed [1985] 1 S.C.R. 589, [1985] 4 W.W.R. 319, 32 C.C.L.T. 153, 32 M.V.R. 192, 18 D.L.R. (4th) 635, 35 Man. R. (2d) 22 — *referred to*

L'Estrange v. F. Graucob Ltd., [1934] 2 K.B. 394 (C.A.) — *considered*

Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446, [1962] 2 W.L.R. 186, [1962] 1 All E.R. 1 (H.L.) — *referred to*

Tilden Rent-A-Car Co. v. Clendenning (1978), 18 O.R. (2d) 601, 4 B.L.R. 50, 83 D.L.R. (3d) 400 (C.A.) — *distinguished*

Union SS. Ltd. v. Barnes, [1956] S.C.R. 842, 5 D.L.R. (2d) 535 [B.C.] — *referred to*

Rules considered:

British Columbia Supreme Court Rules, 1976

R. 18A [en. B.C. Reg. 178/83, s. 3; am. B.C. Reg. 18/85, s. 7]

Authorities considered:

Waddams, The Law of Contract.

Words and phrases considered:

MISREPRESENTATION BY OMISSION

Nemetz C.J. [said in *Delaney v. Cascade River Holidays* (1981), 16 B.L.R. 114]:

. . . provisions so onerous and unusual that it was the duty of Cascade to see that the provisions were . . . called to the attention of the other party . . . A reasonably intelligent person was entitled to assume that a form titled "standard" did not contain the unusual provisions contained in this one. This was indeed what Professor Waddams has termed "misrepresentation by omission".

RELEASE AND INDEMNITY

. . . the release was short, easy to read, and headed in capital letters "RELEASE AND INDEMNITY — PLEASE READ CAREFULLY". The most casual glance would reveal to a reasonable person that this was a legal document calculated to release those staging the race from liability.

Application by defendants under R. 18A for declaration that release signed by plaintiff precluding action for damages; Applications by plaintiff to amend pleadings and add defendants.

***McLachlin C.J.S.C.*:**

I. Introduction

1 This is an application by the defendants under R. 18A for an order declaring that the plaintiff is precluded by the terms of a release and indemnity agreement from recovering damages from them for an injury alleged to have been caused by their negligence. The plaintiff opposes this application and seeks an order adding certain individuals as defendants. She also seeks to amend her pleadings to delete the allegation that the ski club was the agent of Silver Star.

2 The plaintiff sustained a broken leg while participating in a downhill skiing competition at Silver Star, near Vernon, British Columbia, on 15th February 1986. The injury resulted from a collision between the plaintiff, who was racing on the downhill course, and another skier.

3 The plaintiff alleges that the defendants were negligent in failing to ensure that the downhill race course was clear of other skiers before permitting her to descend the course. The defendants deny responsibility for the collision.

4 Prior to participating in the race, the plaintiff signed a document releasing Silver Star and its agents from liability for any injuries sustained in the race:

Release And Indemnity

Please Read Carefully

RE: Over - the - Hill Downhill

TO: Silver Star Mountain Resorts Ltd. ("Resorts") and its directors, officers, employees, representatives, officials and agents (collectively called the "Agents")

I have read the guidelines, rules and regulations issued for the Event, which I understand, and I agree to be bound by them. In consideration of your acceptance of my entry to this Event by Resorts or my being permitted to take part in

the Event and/or any activity associated therewith, I agree to: RELEASE, SAVE HARMLESS; and INDEMNIFY Resorts and/or its Agents from and against all claims, actions, costs and expenses and demands in respect to death, injury, loss or damage to my person or property, wheresoever and howsoever caused, arising out of, or in connection with, my taking part in the Event and notwithstanding that the same may have been contributed to or occasioned by any act or failure to act (including, without limitation, negligence) of Resorts and/or any one or more of its Agents. I further agree and acknowledge that:

1) the rules governing the Event are solely for the purpose of regulating this Event and it remains the sole responsibility of me to act and govern myself in such a manner as to be responsible for my own safety;

2) I am aware of the risks inherent in participating in the event; and,

3) I assume the risks and waive notice of all conditions dangers or otherwise, in or about the Event.

I agree that this Release shall bind my heirs, executors, administrators and assigns. I have read this Release and understand it.

Date: _____ Signature: _____

Witness: _____

5 If the plaintiff is bound by this document, she has no action. She contends that she is not bound by it, arguing that she was given neither adequate notice of its content nor sufficient opportunity to read and understand it. Alternatively, she submits that the document affords a defence only to Silver Star and not to the Vernon Ski Club and its members.

II. The Circumstances Of Signing

6 The "Over-the-Hill Downhill Ski Race" is a recreational ski race. Silver Star sponsored, organized and conducted the ski race on its premises and retained the defendant Vernon Ski Club to provide starters, timers, recorders and gate keepers for the 1986 race.

7 The plaintiff, who was participating in the race for the fifth year, arrived at Silver Star mountain at 8:30 a.m. on 15th February 1986 to pick up her racing bib. She was with her friend, Dianna Pannell. The plaintiff was given her racing bib and told to go to another table to sign for it.

8 The plaintiff went to the other table and signed and dated the release, as well as a second release and indemnity agreement in favour of one of the sponsors of the event. She explained to her friend, Ms. Pannell, that she would have to sign the release if she wanted to race, advising her that the release precluded her from suing the mountain if she fell and hurt herself of her own accord.

9 The plaintiff does not recall whether she read the heading at the top of the form: "RELEASE AND INDEMNITY — PLEASE READ CAREFULLY". She asserts that she did not read the body of the document. She says she could have read it in one or two minutes and is unable to recall if she was in fact given an opportunity to take the time to read it.

III. Issues

10 The following issues arise on the application:

11 (a) Whether the plaintiff is bound by the terms of the release;

12 (b) Whether the terms of the release are broad enough to encompass the claims brought by the plaintiff against Silver Star.

IV. Discussion

(a) Whether the plaintiff is bound by the terms of the release

13 The defendants submit that while the plaintiff may not have read the release, she knew that the document she signed affected her legal rights and that that is sufficient to make it binding on her.

14 The plaintiff, on the other hand, contends that the release is not binding because she was not given a reasonable opportunity to read and understand it.

15 The parties referred to two distinct lines of authority. The first, relied on by Silver Star, supports the principle of general contract law that where a party signs a document which he knows affects his legal rights, the party is bound by the document in the absence of fraud or misrepresentation, even though the party may not have read or understood the document: *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 at 403 (C.A.), applied to a release in *Delaney v. Cascade River Holidays Ltd.* (1983), 44 B.C.L.R. 24, 24 C.C.L.T. 6, affirming 34 B.C.L.R. 62, 16 B.L.R. 114, 19 C.C.L.T. 78 (C.A.).

16 The second line of authority is cited in aid of the plaintiff's assertion that the party seeking to rely on an exclusion of liability which the signing party has not read must show that he has made a reasonable attempt to bring the signing party's attention to the terms contained on the form if he wishes to rely on the release: *Union SS. Ltd. v. Barnes*, [1956] S.C.R. 842, 5 D.L.R. (2d) 535 at 546 [B.C.]. What constitutes a reasonable attempt to bring the exclusion of liability to the attention of the other party depends on various factors, such as the nature of the contract and the practical possibility of apprising oneself of the exclusion of liability in view of such considerations as time and the fineness of the print in which the exclusion is couched: see, for example, *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601, 4 B.L.R. 50, 83 D.L.R. (3d) 400 (C.A.).

17 Stated thus, the legal propositions for which the plaintiff and the defendants respectively contend appear to be incompatible. How is the general contractual principle that a party signing a legal document is bound by its terms despite not having read them to be reconciled with a requirement that a party presenting a document for signature must take reasonable steps to bring them to the signing party's attention?

18 The key, in my opinion, is recognition of the limited applicability of the rule that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. It is not a general principle of contract law establishing requirements which must be met in each case. Rather, it is a limited principle, applicable only in special circumstances.

19 One must begin from the proposition set out in *L'Estrange v. F. Graucob*, supra, at pp. 406-407, that "where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents". Maugham L.J. went on to state two exceptions to this rule. The first is where the document is signed by the plaintiff "in circumstances which made it not her act" (non est factum). The second is where the agreement has been induced by fraud or misrepresentation.

20 To these exceptions a third has been added. Where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms, those terms should not be enforced: Waddams, The Law of Contract, quoted with approval in *Tilden Rent-A-Car v. Clendenning*, supra, per Dubin J.A. at p. 605. This new exception is entirely in the spirit of the two recognized in 1934 in *L'Estrange v. F. Graucob Ltd.* Where a party has reason to believe that the signing party is mistaken as to a term, then the signing party cannot reasonably have been taken to have consented to that term, with the result that the signature which purportedly binds him to it is not his consensual act. Similarly, to allow someone to sign a document where one has reason to believe he is mistaken as to its contents is not far distant from active misrepresentation.

21 In the usual commercial situation, there is no need for the party presenting the document to bring exclusions of liability or onerous terms to the attention of the signing party, nor need he advise him to read the document. In such situations, it is safe to assume that the party signing the contract intends to be bound by its terms.

22 But situations may arise which suggest that the party does not intend to be bound by a term. In *Tilden* the hasty, informal way in which the contract was signed, the fact that the clause excluding liability was inconsistent with the overall purpose of the contract, and the absence of any real opportunity to read and understand the document given its length and the amount of small print on its reverse side led the court to conclude that the defendant should have known that the plaintiff had no intention of consenting to the onerous exclusion in question. In these special circumstances, there was a duty on *Tilden* to take reasonable measures to bring the exclusion clause to the attention of Mr. Clendenning.

23 The British Columbia Court of Appeal in *Delaney v. Cascade River Holidays*, supra, did not dissent from the view expressed in *Tilden* that circumstances may arise where it is incumbent on the party presenting the document to take reasonable steps to bring an exclusion clause to the attention of the signator. The majority held, however, that no such duty arose on the facts of that case, McFarlane J.A., Taggart J.A. concurring, after stating that the release must be interpreted and understood having regard to the whole purpose of the relationship between the deceased signator and the corporate respondent, observed that there was no doubt of the intent of the language of the release (p. 44). He concluded:

> I think ... the trial judge was correct in applying the principles stated in *L'Estrange v. F. Graucob Ltd.* ...Having regard to the nature of the venture involved I think that there is no sufficient ground for making an exception to the general principles enunciated in that case.

Nemetz C.J.B.C. arrived at a different conclusion on the facts, taking the view that the language of the release was misleading and contained [p. 39]:

> ... provisions so onerous and unusual that it was the duty of Cascade to see that the provisions were ..."called to the attention of the other party" ...A reasonably intelligent person was entitled to assume that a form titled "standard" did not contain the unusual provisions contained in this one. This was indeed what Professor Waddams has termed "misrepresentation by omission" ...

24 It emerges from these authorities that there is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.

25 Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.

26 Applying these rules to this case, we start from the fact that Miss Karroll signed the release knowing that it was a legal document affecting her rights. Under the principles set forth in *L'Estrange v. F. Graucob Ltd.*, she is bound by its terms unless she can bring herself within one of the exceptions to the rule. This is not a case of non est factum. Nor was there active misrepresentation. It follows that Miss Karroll is bound by the release unless she can establish: (1) that in the circumstances a reasonable person would have known that she did not intend to agree to the release she signed; and (2) that in these circumstances the defendants failed to take reasonable steps to bring the content of the release to her attention.

27 Were the circumstances of the signing such that a reasonable person should have known that Miss Karroll did not intend to agree to what she signed? I think not. First, the release was consistent with the purpose of the contract. As in *Delaney*, the purpose of the contract was to permit Miss Karroll to engage in a hazardous activity upon which she, of

her own volition, desired to embark. The exclusion of legal liability was consistent with the purpose of permitting her and others to engage in this activity, while limiting the liability of the organizations which made the activity possible.

28 Second, the release was short, easy to read and headed in capital letters "RELEASE AND INDEMNITY — PLEASE READ CAREFULLY". The most casual glance would reveal to a reasonable person that this was a legal document calculated to release those staging the race from liability. There was no fine print. The printing was entirely contained by the page signed. This was not a case of a release buried in the fine print of a long document, but of a release that proclaimed its purpose in bold letters. In sum, the nature of the document does not give rise to the suggestion that a person signing would not be in agreement with its terms.

29 Third, it emerges from the evidence that signing such releases was a common feature of this ski race. Miss Karroll herself had signed such releases on previous occasions before similar races. This was not an unusual term; on the contrary, it was a standard aspect of this type of contract.

30 These facts negate the inference that a reasonable person in the defendant Silver Star's position would conclude that Miss Karroll was not agreeing to the terms of the release. In these circumstances, it was not incumbent on Silver Star to take reasonable steps to bring the contents of the release to her attention or ensure that she read it fully.

31 If I were wrong in this conclusion, I would nevertheless find that Silver Star took reasonable steps to discharge any obligation to bring the contents of the release to the attention of Miss Karroll. I have already referred to the heading at the top of the document, and the capitalized admonition to read it carefully. This was sufficient to bring the need to read the document to the attention of a reasonable person. Miss Karroll admitted that she could have read the release in one to two minutes. She further admitted that she could not recall if she had an opportunity to take one or two minutes to read through the document. Thus the evidence fails to establish that she was not given sufficient time to peruse the document had she wished to do so. These facts fall far short of those which established lack of reasonable efforts to bring the term to the signator's attention in *Tilden Rent-A-Car v. Clendenning*.

(b) Whether the terms of the release are broad enough to encompass the claims brought by the plaintiff against Silver Star

32 The release which Miss Karroll signed extended to Silver Star's agents. The question is whether the Vernon Ski Club and its members are entitled to rely on the release as agents of Silver Star.

33 It is agreed that Silver Star "sponsored, organized and conducted the downhill race on its premises and retained the ski club to provide starters, timers, recorders and gate keepers for the event". Silver Star paid the ski club an honorarium of $1,000 for the volunteer services of its members, which included their services on the occasion of the race in which the plaintiff was injured. There can be no doubt that the ski club was Silver Star's agent.

34 In 1982 when the Vernon Ski Club was first asked to assist Silver Star in the running of the race, the ski club raised a concern about its liability as the race was not a sanctioned British Columbia Ski Association race covered by that association's insurance plan. Silver Star informed the club that it and its members were covered by Silver Star's liability insurance and by waivers that released Silver Star and its agents from liability.

35 The Vernon Ski Club is not a party to the release which the plaintiff signed. Generally, benefits under a contract can be enforced only by parties who are privy to it. However, the Vernon Ski Club may rely on a release made by Silver Star if it establishes four propositions:

36 (1) That the release makes it clear that the club is intended to be protected by the provisions which limit liability;

37 (2) That the release makes it clear that Silver Star was contracting not only on its own behalf but on behalf of its agents;

38 (3) That Silver Star had authority from the club to contract on a release of liability on its behalf; and

39 (4) That the Vernon Ski Club gave consideration for the release: see *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446, [1962] 2 W.L.R. 186, [1962] 1 All E.R. 1 (H.L.); applied in *Dyck v. Man. Snowmobile Assn. Inc.*, [1982] 4 W.W.R. 318, 21 C.C.L.T. 38, 136 D.L.R. (3d) 11, 15 Man. R. (2d) 404, affirmed [1985] 1 S.C.R. 589, [1985] 4 W.W.R. 319, 32 C.C.L.T. 153, 32 M.V.R. 192, affirmed 18 D.L.R. (4th) 635, 35 Man. R. (2d) 22.

40 These requirements are met. The release clearly states that the waiver of liability extends to representatives and agents of Silver Star, which includes the ski club and its members assisting in the race. The release leaves no doubt that Silver Star was contracting on behalf of these persons as well as itself. The evidence establishes that the ski club and its members authorized Silver Star to obtain releases on its behalf. Finally, the ski club provided consideration to Miss Karroll for the release by assisting in the direction of the race in which she wished to participate.

41 I conclude that the Vernon Ski Club is entitled to rely on the release.

V. Conclusion

42 The defendants are entitled to a declaration that the plaintiff is precluded from recovering from them or from their members or employees.

43 The plaintiff's application to amend its pleadings and add parties is dismissed.

Order accordingly.

Tab 6

THE
LAW OF CONTRACTS

SIXTH EDITION

S. M. WADDAMS
M.A., LL.B., LL.M., S.J.D.

Of the Ontario Bar
Professor of Law, University of Toronto

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is personally liable on the contract.[38] Where the agent does not disclose that the agent is acting as agent at all, the third party may elect to sue the agent or the principal.[39] It would plainly be unjust if the agent could avoid personal liability after leading the third party to contract with the agent apparently as principal.[40] A contract under seal is enforceable against the agent only.[41]

[38] *Kelner v. Baxter* (1866), L.R. 2 C.P. 174 (company to be incorporated); *Phonogram Ltd. v. Lane*, [1982] Q.B. 938 (C.A.) (applying *European Communities Act, 1972*, s. 9(2)); *Trustee of Estate of Royal Inns Canada Ltd. v. Bolus-Revelas-Bolus Ltd.* (1982), 136 D.L.R. (3d) 272 (Ont. C.A.), leave to appeal to S.C.C. refused 38 O.R. (2d) 703*n*. But see *Newborne v. Sensolid (Great Britain) Ltd.*, [1954] 1 Q.B. 45 (C.A.) (agent not entitled to sue if defendant intended to contract with principal only); *Black v. Smallwood* (1966), 39 A.L.J.R. 405 (Aus. H.C.) (inference of intention in each case whether agent contracts personally); *General Motors Acceptance Corp. of Canada Ltd. v. Weisman* (1979), 96 D.L.R. (3d) 159 (Ont. Co. Ct.) (individual signing after word "per" held not personally liable). See *Business Corporations Act* (Ont.), s. 21; *Westcom Radio Group Ltd. v. MacIsaac* (1990), 63 D.L.R. (4th) 433, 70 O.R. (2d) 591 (Ont. Div. Ct.); *1394918 Ontario Ltd. v. 1310210 Ontario Inc.* (2002), 47 R.P.R. (3d) 10 (Ont. C.A.).

[39] *Supra*, footnote 15.

[40] See *Shuper v. Noble* (1982), 38 O.R. (2d) 64 (Ont. Ct.) (agent liable unless it is made clear that he is only acting in representative capacity); *Blackwood Hodge Atlantic Ltd. v. Connolly* (1977), 25 N.S.R. (2d) 621 (S.C.T.D.); *Pitzel v. Saskatchewan Motor Club Travel Agency Ltd; Les Voyages Electra Tours Ltd., Third Party* (1983), 149 D.L.R. (3d) 122 (Sask. Q.B.) (travel agent liable as principal).

[41] *Friedmann Equity Developments Inc. v. Final Note Ltd.* (2000), 188 D.L.R. (4th) 269, [2000] 1 S.C.R. 842. See also *642947 Ontario Ltd. v. Fleischer* (2001), 209 D.L.R. (4th) 182 (Ont. C.A.) (land sale agreement not deemed to be under seal).

Tab 7

1979 CarswellQue 157
Supreme Court of Canada

Consolidated Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.

1979 CarswellQue 157F, 1979 CarswellQue 157, [1979] S.C.J. No. 133, [1980] 1 S.C.R. 888, [1980] I.L.R. 1-1176, 112 D.L.R. (3d) 49, 1 A.C.W.S. (2d) 169, 29 O.R. (2d) 720, 32 N.R. 488, REJB 1979-109268

Consolidated-Bathurst Export Limited, (Plaintiff) Appellant and Mutual Boiler and Machinery Insurance Company, (Defendant) Respondent

Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, and McIntyre JJ.

Judgment: March 13, 1979
Judgment: December 21, 1979

Proceedings: affirmed *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* ((4 octobre 1977)), no C.A. Montréal 500-09-000267-757 ((Que. C.A.))

Counsel: *Guy Desjardins, Q.C.*, for the appellant.
Marcel Cinq-Mars, Q.C., for the respondent.

Subject: Insurance; Family

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

IV Principles of interpretation and construction
IV.2 Contra proferentem rule

Headnote
Insurance --- Principles of interpretation and construction — Contra proferentem rule

Products of factory damaged following corrosion of machinery -- Insurer having right to inspect and terminate contract -- Exclusion clause in policy excluding liability for damages directly caused by corrosion -- Other exclusion clauses excluding liability for damages caused directly or indirectly -- Insurer liable under contra proferentem doctrine in not employing less ambiguous language to exclude liability for corrosion -- Liability also being imposed using normal rules of construction to discern intent of parties.

The reasons of Martland, Ritchie and McIntyre JJ. were delivered by *Ritchie J.* (*dissenting*):

1 This is an appeal from a judgment of the Court of Appeal of the Province of Quebec affirming the judgment rendered at trial by Mr. Justice Bisson and dismissing the claim of the appellant against its insurer for damage sustained to its

property located at a plant which it operated at New Richmond in the Province of Quebec, where it was engaged in the manufacture of paper and paper and wood products.

2 By reason of their malfunction, direct damage was caused to several tubes in the heaters employed for the heating of bunker "C" fuel with the consequence that temporary closing of the plant became necessary. The appellant's claim in this action encompasses not only the direct damage done to the tubes, but the consequential loss allegedly sustained because of the breakdown of the tubes.

3 I have had the privilege of reading the reasons for judgment prepared for delivery by my brother Estey in this case, but as I reach a different conclusion concerning the risk insured against by the policy in question, I have found it necessary to express my views separately.

4 The appellant's claim is made pursuant to the terms of an insurance agreement with the respondent which was in force at the time of the events above referred to whereby the respondent agreed

> In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:
>
> . . . . .
>
> 1. ...To pay the Insured for loss or damage to property of the Insured directly caused by such Accident *to an Object*, or if the Company so elects, to repair or replace such damaged property; ...
>
> (The italics are my own.)

5 The objects covered by the policy are defined in the 1st Schedule thereof as follows:

> The Objects covered under this Schedule are of the type designated as follows:
>
> 1. Any metal fired or metal unfired pressure valve; and
>
> 2. Any piping, on or between premises of the Insured, connected with such vessel and which contains steam or other heat transfer medium or condensate thereof, air, refrigerant, or boiler feedwater between the feed pump or injector and a boiler, together with the valves, fittings, separators and traps on all such piping.

6 What is insured against by this agreement in my opinion is damage to the property of the insured "directly caused to an "object" by an "accident" as that word is defined in the policy. While the policy covers damage to property other than the object itself, it only covers that damage when it has been directly caused by "accident" to an "object". I am satisfied that the tubes were "objects" within the meaning of the above definition and that damage directly caused to the tubes would have been covered by the insurance agreement had it not been for the terms of the definition of "accident" contained therein which reads as follows:

> C. Definition of Accident — As respects any Object covered under this Schedule, 'Accident' shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or replacement of the Object or part thereof; but Accident shall not mean (a) *depletion, deterioration, corrosion, or erosion of material*, (b) wear and tear (c) leakage at any valve, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube, gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protection device.
>
> (The italics are my own.)

7 Both the trial judge and the Court of Appeal were satisfied that the damage to the tubes was occasioned by corrosion and this conclusion is supported by the fact that quantities of salt water did flow through the pipes. Expert evidence

was called on behalf of the appellant directed to supporting the submission that the damage was caused by an hydraulic hammer effect of sudden origin which placed an inordinate strain on the pipes and tubes causing them to break. This evidence was, however, not accepted either at trial or in the Court of Appeal and I do not find it necessary to discuss it. In the result it has been concurrently found at trial and on appeal that corrosion was the cause of the damage to the tubes and pipes and it follows from the terms of the "definition of accident" that this damage is not insured against by the policy in question.

8 It was contended also that even if the coverage afforded by the policy did not include damage by "depletion, deterioration, corrosion" or "wear and tear" within the meaning of the definition of "accident", it was nevertheless effective to make the insurer responsible for consequential loss suffered by the insured as a result of a sudden rupture of the heat exchanger, whether due to corrosion or not. In view of the fact that the coverage is limited to indemnity in respect of loss or "damage to property of the insured *directly* caused by such accident to an Object", I cannot adopt an interpretation which would result in affording coverage to the insured for *consequential* damage whether it was due to "corrosion" or otherwise. In my opinion, the only "direct" damage to any object in the appellant's plant was the damage to the tubes themselves and the plain language of the insuring agreement in defining "accident" appears to me to contemplate and exclude from coverage the very event which happened here, namely, damage being caused to an object which was the property of the insured as a result of "corrosion of ... material".

9 It has been suggested that the language employed in the policy should be construed against the insurance company which was the author of it in accordance with the *contra proferentem* rule which is frequently invoked in the construction of insurance contracts when it is found that all other rules of construction fail to assist the Court in determining the true meaning of the policy.

10 In this regard my brother Estey has made reference to the reasons for judgment of Cartwright J., as he then was, in *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company* [1] where he said at p. 953:

> The rule expressed in the maxim, *verba fortius accipiuntur contra proferentem*, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

It will however be seen from what I have said that I do not find it necessary to resort to this rule in the interpretation of the policy here at issue.

11 My brother Estey has, however, adopted the view that in construing the policy and particularly the definition of accident contained therein in the manner adopted in these reasons and in those of the majority of the Court of Appeal, the result is to "largely, if not completely, nullify the purpose for which the insurance was sold" which is "a circumstances to be avoided so far as the language used will permit". In this regard reliance is placed on the judgment of this Court in *Indemnity Insurance Company of North America v. Excel Cleaning Service* [2], at pp. 177-178, but with the greatest respect I am unable to relate the circumstances of that case to those with which we are here concerned.

12 The *Excel Cleaning Service* case was one in which an "on location cleaning service" business was covered by a property damage liability policy insuring it for damage to property caused by accident arising out of its work. This policy however contained an exclusion relating "to damage to or destruction of property owned, rented, occupied or used by or in the care, custody and control of the insured", and the insurer contended that a wall to wall carpet fixed to the floor of a house where the insured was employed which was damaged was "in the care, custody and control of the insured" and therefore excluded from the coverage. Consistent with this reasoning all of the customer's belongings on which the insured was working were similarly exclusions which would have meant that the policy afforded no coverage whatever for the business of the insured. It was in this connection that this Court said, at pp. 177-178:

> Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold — a circumstance to be avoided, so far as the language used will permit.

13 I am respectfully of the opinion that this case involves a very different situation from the one with which we are here concerned. The construction sought to be placed on the Excel Cleaning Service Policy would have meant that although it purported to be a property damage liability policy covering the insured's business, it in fact insured nothing whereas the present policy affords insurance "for loss or damage to property of the insured" directly caused by an accident as defined therein. The meaning assigned to the word "accident" in the policy does not constitute an exclusion from the coverage but is rather a part of the definition of the risk insured against.

14 For all these reasons, as well as for those stated by Mr. Justice Turgeon, I would dismiss this appeal with costs.

The judgment of Pigeon, Dickson, Beetz and Estey JJ. was delivered by *Estey J.*:

15 The appellant operates a manufacturing facility for the production of paper products, including paper boxes, at New Richmond, Quebec, and the respondent is the insurer under a policy of insurance issued in respect of certain property of the appellant including the property with which this action is concerned, being three heat exchangers. The heat exchangers in question are described by the trial judge as follows:

> [TRANSLATION] The parts of this system with which we are particularly concerned are three heat exchangers, a type of pipe measuring fifteen feet long with an interior diameter of ten inches.
>
> Within each of these three exchangers there are 102 tubes thirteen feet long, with an exterior diameter of $^{5}/_{8}$ inch and a metal casing measuring $^{1}/_{16}$ inch, or .065 inch.
>
> Inside each exchanger at the ends the 102 pipes pass through a tubular metal plate one inch thick.
>
> Further, the 102 tubes of each exchanger are themselves divided into three groups of 34 tubes each, so that oil flowing in the tubes passes around the exchanger three times and is heated to the right level before emerging and being directed towards the boilers as a fuel.
>
> Steam circulates in the exchangers, passing in through the left end immediately to the right of the tubular plate and emerging at the right end, just as it strikes the other tubular plate.
>
> Each exchanger is sealed at each end by a lid.
>
> As the exchanger measures fifteen feet and the tubes thirteen feet, it follows that a space of one foot remains at each end between the tubular plate and the lid closing the exchanger.
>
> The whole apparatus forms a sealed unit, which it was established cannot be opened without causing a breakdown and considerable damage.

16 Due to the failure of these heat exchangers, the appellant was required to shut down part of their facilities and thereby suffered a loss which the parties have agreed amounted to $158,289.24. This sum is set out in the Plaintiff's Declaration and includes "Direct Damage Loss" of $15,604.44. The insurer resists the appellant's claim on the basis that the damage was caused by corrosion of the tubes inside the heat exchanger and this risk was specifically excluded from the coverage provided by the policy of insurance. The material provisions of the policy of insurance issued by the respondent are as follows:

INSURING AGREEMENT

> In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:
>
> **COVERAGE A — PROPERTY OF THE INSURED**
>
> 1. ACTUAL CASH VALUE — To pay the Insured for loss of or damage to property of the Insured directly caused by such Accident to an Object, or if the Company so elects, to repair or replace such damaged property; and

The definition of accident as employed in the above excerpt is as follows:

> As respects any Object covered under this Schedule, "Accident" shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or replacement of the Object or part thereof; but Accident shall not mean (a) depletion, deterioration, corrosion, or erosion of material, (b) wear and tear, (c) leakage at any value, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube, gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protective device.

17 The employees of the appellant became aware of the failure of the heat exchangers when small fuel oil spots were noticed on linerboard being produced in the mill. The source of the oil was traced to the boiler and hence to the heat exchangers where a number of ruptured tubes were discovered.

18 The appellant advanced two main submissions:

> (a) that the damage was caused by hydraulic hammer effect; and,
>
> (b) alternatively, that the damage was caused by corrosion and that the terms of the policy do not exclude damage thus occasioned.

19 The learned trial judge found that the damage was caused by corrosion and discusses the contribution of pressure changes as follows:

> [TRANSLATION] There is no doubt that the damage occurred suddenly, but the phenomenon which led up to it, namely the chemical process of corrosion, was not of a sudden and accidental nature, so that it could not be regarded as an "accident".
>
> On December 4, 1968 some occurrence, probably a fall in the steam pressure in the heat exchanger, caused a failure in certain oil tubes, which moreover apparently broke in a relatively short space of time.
>
> The fact remains, however, that corrosion was the cause of the damage.

20 The majority of the Court of Appeal found the damage was the result of corrosion and thereby excluded from policy coverage. Turgeon J.A. dealt with the hydraulic hammer theory as follows:

> [TRANSLATION] This was a possibility, not a probability, mentioned by appellant's expert witness Mahoney in his examination in chief. However, when he was cross-examined, he admitted that he could not provide any direct evidence that a "hydraulic hammer" effect was produced, or that there was excessive pressure, or that the safety valves did not operate effectively.

Dissenting from the majority, Kaufman J.A. appears to have adopted in part the hydraulic hammer theory as being a "trigger" which precipitated the leaks in the tubes. The learned justice went on to state:

> But where, as here, the pressure suddenly increased, it will not do for the insurer to point to the corrosion and say that, sooner or later, the tubes would have burst anyway.

Thus it will be seen that in both courts below the cause of the damage was found to be corrosion of the tubes which both courts went on to conclude was a risk or peril not covered by the insurance contract.

21 The issue is simply, therefore, whether the admitted loss suffered by the appellant and which was occasioned by the corrosion of the heat exchangers is a loss recoverable under the above-quoted terms of the policy of insurance issued by the respondent to the appellant. This leaves the alternative submission advanced by the appellant, namely that the term of the contract of insurance covers the damages suffered by the appellant. The heart of this argument is that while the definition of accident does not include the event of corrosion or similar events such as "wear and tear, deterioration, depletion, or erosion of material", the definition does include, in the appellant's submission, events which succeed and which may be due to the event of corrosion. Thus the insurer would not be liable under the contract for the cost of repairing or replacing any insured property damaged by "depletion, deterioration, corrosion, wear and tear, etc.", but would be responsible for any consequential loss to the insured following the sudden rupture of the heat exchanger whether or not it be due to "corrosion" or "wear and tear", etc.

22 In the preliminary provisions setting up the coverage under the policy of insurance, the definition of accident is, of course, fundamental, and strip ping out the words not here relevant, the definition reads as follows:

> Accident shall mean a sudden and accidental occurrence to the object ... but accident shall not mean ... corrosion...

23 Some light may be thrown on this interpretation difficulty by reference to a latter portion of the policy of insurance headed "Exclusions". The following excerpts illustrate the drafting technique employed in the policy where risks are to be excluded from its coverage:

> **EXCLUSIONS**
>
> This policy does not apply to
>
> 1. *WAR DAMAGE* — Loss from an Accident *caused directly or indirectly* by
>
> (a) Hostile or warlike action, including action in hindering, combating or defending against an actual, impending or expected attack, by
>
> •
>
> . . . . .
>
> 2. *NUCLEAR HAZARDS* — Loss, *whether it be direct or indirect, proximate or remote,*
>
> (a) From an Accident *caused directly or indirectly* by nuclear reaction...
>
> (b) From nuclear reaction, nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, *caused directly or indirectly by, contributed to or aggravated by an Accident*;
>
> •
>
> . . . . .
>
> 3. *MISCELLANEOUS PERILS* — Loss under Coverages A and B from
>
> •
>
> . . . . .
>
> (b) An Accident *caused directly or indirectly by fire* or from the use of water or other means to extinguish fire;

•

. . . . .

(d) Flood *unless an Accident ensues and the Company shall then be liable only for loss from such ensuing Accident*;

•

. . . . .

(Emphasis added.)

Thus it may be argued that when the draftsman wished to exclude consequences from an event, the words "directly or indirectly" were employed. Had this technique been adopted in the primary coverage provisions excerpted above, it would have read;

Accident does not mean that which directly or indirectly results from corrosion.

Alternatively, if the consequences of corrosion were intended by the parties to be beyond the protection of the contract, such circumstances would have been included under the heading "Exclusions" as a subparagraph comparable to one of those set out above.

24 At best, one must conclude that the definition of accident, including as it does the reference to corrosion, leaves two clear alternative interpretations open. Firstly, the definition may not include an event relating to corrosion. Secondly, the definition may exclude only the cost of making good the corrosion itself.

25 Insurance contracts and the interpretative difficulties arising therein have been before courts for at least two centuries, and it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract. This is, of course, not entirely true because of statutory modifications to the contract, but we are not here concerned with any such mandated provisions. Meredith J.A. put the proposition in *Pense v. Northern Life Assurance Co.* [3] at p. 137:

There is no just reason for applying any different rule of construction to a contract of insurance from that of a contract of any other kind; and there can be no sort of excuse for casting a doubt upon the meaning of such a contract with a view to solving it against the insurer, however much the claim against him may play upon the chords of sympathy, or touch a natural bias. In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof, if I may use such a term in reference to the interpretation of a writing, is, upon each party respectively, precisely the same. We are all, doubtless, insured, and none insurers, and so, doubtless, all more or less affected by the natural bias arising from such a position; and so ought to beware lest that bias be not counteracted by a full apprehension of its existence.

(Adopted in this Court in 1908 [4].)

Such a proposition may be referred to as step one in the interpretative process. Step two is the application, when ambiguity is found, of the *contra proferentem* doctrine. This doctrine finds much expression in our law, and one example which may be referred to is found in *Cheshire and Fifoot's Law of Contract* (9th ed.), at pp. 152-3:

If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect himself against liability to

> which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.

This Court applied the doctrine in *Indemnity Insurance Company of North America v. Excel Cleaning Service*[5] where at pp. 179-180 it was stated:

> It is, in such a case, a general rule to construe the language used in a manner favourable to the insured. The basis for such being that the insurer, by such clauses, seeks to impose exceptions and limitations to the coverage he has already described and, therefore, should use language that clearly expresses the extent and scope of these exceptions and limitations and, in so far as he fails to do so, the language of the coverage should obtain ... Furthermore, the language of Lord Greene in *Woolfall & Rimmer, Ltd. v. Moyle*, [1942] 1 K.B. 66 at 73, is appropriate. He there states:
>
> > I cannot help thinking that, if underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is.

As has already been stated, this is, of course, the second phase of interpretation of such a contract. Cartwright J., as he then was, stated in *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[6] at p. 953:

> The rule expressed in the maxim, *verba fortius accipiuntur contra proferentem*, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

Lindley L.J. put it this way:

> In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.
>
> *Cornish v. Accident Insurance Company*[7], at p. 456.

26 Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, 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 of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

27 The *Cornish* case, *supra*, illustrates a course generally taken when such contracts reach the courts. There the court was interpreting an insurance contract in the light of the death of the insured while crossing a railway track. The policy included an exception from insured risks resulting from "exposure of the insured to obvious risk of injury". Lindley L.J., in the course of judgment, stated:

> The words are "exposure of the insured to obvious risk of injury." These words suggest the following questions: Exposure by whom? Obvious when? Obvious to whom? It is to be observed that the words are very general. There is no such word as "wilful," or "reckless," or "careless"; and to ascertain the true meaning of the exception the whole document must be studied and the object of the parties to it must be steadily borne in mind. The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory. A man who crosses an ordinary crowded street is exposed to obvious risk of injury; and, if the words in question are construed literally, the defendants would not be liable in the event of an insured being killed or injured in so crossing, even if he was taking reasonable care of himself. Such a result is so manifestly contrary to the real intention of the parties that a construction which leads to it ought to be rejected. But, if this be true, a literal construction is inadmissible, and some qualification must be put on the words used. (at p. 456)

An example of the application of the same principles is found in the *Indemnity Insurance Company of North America v. Excel Cleaning Service, supra*, where, at pp. 177-8, it was concluded:

> Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold — a circumstance to be avoided, so far as the language used will permit.

The appellant, as the owner and operator of a large forest products facility, sought insurance protection of the machinery employed in the plant in its industrial processes. There is no dispute that the heat exchangers in question were covered by the insurance contract. There is also no serious dispute, at least by the time the litigation had reached this Court, that corrosion of the tubes inside the heat exchanger, probably caused by the presence of sea water, was the effective cause of the breakdown of the heat exchanger, and the consequential release of oil into the processed steam. The insurer, as was its right, sought in the terms of the contract to limit its exposure to accidental loss and did so by seeking to confine the definition of accident. If a court were to accept the submissions of the respondent, that loss suffered by the insured by reason of the failure of a machine due to wear and tear and the consequential downtime of the plant was excluded by the definition of accident, then the insured would have purchased, by its premiums, no coverage for what may well be the most likely source of loss, or certainly a risk pervasive through much of the plant. Similarly, to interpret corrosion as that word is employed in the definition of accident in the manner sought by the respondent would be to eliminate from the insurance coverage any and all loss suffered by the insured mill operator by reason of the intervention of the condition of corrosion. Such an interpretation would necessarily result in a substantial nullification of coverage under the contract. It may well be argued by insurers that the premium will reflect such a narrowed coverage. There is no evidence that such is the case here.

28 It may also be argued by the insurance industry that applying the more favourable construction to this ambiguous provision will be to unnecessarily and unfairly burden the carrier. The carrier under this policy has at least two defensive mechanisms which it can readily call to its aid: firstly, the right of inspection which was exercised here both before and during the contract; and secondly, the right to terminate in the event the insurance carrier determines that the condition of the insured machinery is such as to make it impractical to extend coverage in the manner required by the contract.

29 I therefore would allow the appeal, set aside the judgment at trial and of the Court of Appeal and direct the entry of judgment in favour of the appellant in the amount of $158,289.24 with interest from the 1st of April, 1969, as claimed (it being the date of submission of claim and which date has not been contested in any court in these proceedings), together with costs throughout. In the event the parties are in disagreement as to whether the "Direct Damage" in the amount of $15,604.44 mentioned above is, in fact, repairs of the actual corrosion damage and should not therefore, on the basis of these reasons be included in judgment granted, the matter shall be determined on application to a Judge of the Superior Court.

Appeal allowed with costs, Martland, Ritchie and McIntyre JJ. dissenting.

Solicitors of record:
Solicitors for the appellant: *Desjardins, Ducharme*, Desjardins & Bourque, Montreal.

Solicitors for the respondent: *Martineau, Walker, Allison, Beaulieu, MacKell & Clermont*, Montreal.

Footnotes

1 [1956] S.C.R. 936.

2 [1954] S.C.R. 169.

3 (1907), 15 O.L.R. 131 (Ont. C.A.).

4 (1908), 42 S.C.R. 246.

5 [1954] S.C.R. 169.

6 [1956] S.C.R. 936.

7 (1889), 23 Q.B. 453 (C.A.).

Tab 8

Most Negative Treatment: Distinguished
Most Recent Distinguished: American Income Life Insurance Co. v. R. | 2008 TCC 306, 2008 CCI 306, 2008 CarswellNat 1512, 2008 CarswellNat 5586, [2009] 2 C.T.C. 2114, 2008 D.T.C. 3631 (Eng.), 168 A.C.W.S. (3d) 433 | (T.C.C. [General Procedure], May 16, 2008)

1981 CarswellOnt 630
Supreme Court of Canada

Davies v. Zurich Life Insurance Co. of Canada

1981 CarswellOnt 630F, 1981 CarswellOnt 630, [1981] 2 S.C.R. 670, [1982] I.L.R. 1-1471, 12 A.C.W.S. (2d) 92, 130 D.L.R. (3d) 748, 39 N.R. 457, J.E. 82-23

Zurich Life Insurance Company of Canada, Appellant and Barbara Wallace Davies, Respondent

Laskin C.J. and Ritchie, Estey, McIntyre and Lamer JJ.

Judgment: December 2, 1981
Judgment: December 17, 1981

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *Garfield Robert Green*, for the appellant.
Russell Kronick and *Ronald Prehogan*, for the respondent.

Subject: Contracts

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

III Contracts of insurance
III.3 Interim receipts and binders
III.3.c Termination or expiry

The judgment of the Court was delivered by *The Chief Justice*:

1 The principal issue in this appeal, one of first instance, is the proper construction and application of a document entitled "Conditional Insurance Agreement". This document, one of adhesion, was issued by the appellant insurer to George F. Davies upon the latter's application on April 11, 1978 for $10,000 of life insurance. A portion of the contractual premium was paid as required and the document in question then issued. Davies died on April 23, 1978 and his widow claimed the amount of the insurance. No policy had been issued pursuant to the agreement. R.E. Holland J. rejected the claim but the widow's appeal was allowed in a unanimous judgment of the Ontario Court of Appeal.

2 The conditional Insurance Agreement is in the following terms:

> **CONDITIONAL INSURANCE AGREEMENT**
>
> Zurich Life Insurance Company of Canada agrees to insure the Proposed Life Insured commencing on completion of Part 1 and Part 2 of the Application, subject to the following conditions:

1) The money acknowledged by the receipt was paid.

2) The Life to be Insured is insurable at standard rates, on completion of Part 1 and Part 2 of the Application under Zurich Life Insurance Company of Canada's underwriting rules and practices for the policy applied for.

3) This Agreement is governed by the terms of the policy to be issued except that the insurance under this and other Conditional Insurance Agreements with Zurich Life Insurance Company of Canada is the lesser of $100,000 and the total insurance applied for.

4) This Conditional Insurance terminates when a policy issued in response to the application becomes effective.

5) Zurich Life Insurance Company of Canada may terminate this Agreement by notice to the Applicant. Money paid shall be refunded.

NO REPRESENTATIVE OF ZURICH LIFE INSURANCE COMPANY OF CANADA IS AUTHORIZED TO MODIFY THIS AGREEMENT.

I have read this Conditional Insurance Agreement and I understand it.

Signature of Applicant _____

Upon receipt of a request from you, the Bureau will arrange disclosure of any information it may have in your file. (Medical Information will be disclosed only to your attending physician). If you question the accuracy of information in the Bureau's file, you may contact the Bureau and seek a correction. The address of the Bureau's Information office is:

Medical Information Bureau, 330 University Avenue, Suite 403, Toronto, M5G 1R7. Telephone (416) 597-0590

Zurich Life Insurance Company of Canada or its reinsurer(s) may also release information in our file to other life insurance companies to whom you may apply for life or health insurance, or to whom a claim for benefits may be submitted.

The purpose of the Bureau is to protect its members and their policyholders from bearing the expense created by those who would conceal facts relevant to their insurability. Information furnished by the Bureau may alert the insurer to the possible need for further investigation, but under Bureau rules cannot be used as the basis for evaluating risks. The Bureau is not a repository of medical reports from hospitals and physicians, and information in the Bureau file does not reveal whether applications for insurance are accepted, rated or declined.

3 The competing arguments of counsel for the parties raise the question whether the agreement stipulates a condition precedent to an undertaking of risk by the insurer or whether it is to be construed as an initial acceptance of the risk subject to a condition subsequent. The insurer contends, of course, that it did not come under any risk until the applicant had been shown to be insurable. The contrary contention was that the risk attached subject to a subsequent showing of uninsurability or to a subsequent termination of the agreement pursuant to clause 5 of the agreement. Neither of these events happened before the death of the applicant. It was a further submission of the respondent that there was an onus of proof on the insurer to show that the applicant was not insurable at standard rates under its underwriting rules and practices which were peculiarly within its knowledge. The Ontario Court of Appeal proceeded on this ground in upholding the widow's claim, holding that the onus on the insurer had not been discharged. Unlike the trial judge, who held that no risk attached because of an unfulfilled condition precedent, the Court of Appeal did not consider the condition precedent — condition subsequent submissions.

4 There is no doubt that a contract was concluded between the insurer and the applicant, as evidenced by the premium payment and the issue of the conditional insurance agreement. Although the agreement contemplates the issue of a policy,

it nowhere says expressly that coverage is dependent on prior proof of insurability. The insurer's answer to the question whether any benefit flowed to the applicant by reason of his premium payment was that the applicant's insurability was determinable as of the date of his application for insurance, and any subsequent disability which would make him uninsurable at the standard rate would not disqualify him. All that this means is that the applicant would get a kind of preferred consideration which is further qualified by the unilateral and untrammelled power of the insurer to cancel the agreement before death if no policy had previously issued.

5 This is a draconian approach to an agreement which is equally susceptible to an interpretation that it provides for interim insurance, subject to defeasance of the coverage. That it is so susceptible is evidenced by clauses 3 and 5 of the document. The Court was referred to two lines of authority in the United States, one asserting that coverage depends on prior fulfilment of a condition precedent and the other supporting a condition subsequent construction. The view taken by the New Jersey Supreme Court in *Allen v. Metropoli tan Life Insurance Co.* [1] commends itself to me. There are two passages in the reasons that are relevant here, as follows (at pp. 642-43):

> Indeed, the very acceptance of the premium in advance tends naturally towards the understanding of immediate coverage though it be temporary and terminable; any collateral advantage other than interim coverage is insubstantial and is not what the lay applicant is generally seeking by his advance payment.
>
> . . . . .
>
> Its position is that if Allen was actually insurable at the time of the application, he had full interim coverage, otherwise not, and that its own later determination of uninsurability, though made after knowledge of Allen's death, is binding so long as it was made in good faith. That involves an interpretation of the receipt which does not appear in its terms. ...Nowhere within the four corners of the receipt is there any reference to insurability or to the manner in which insurability is to be ascertained. It may well be doubted whether an applicant would ever understandingly agree to accept, as binding, a nonobjective determination of insurability first made by the company after knowledge of his death.

In addition, there is every reason to apply a *contra proferentem* construction to a contract of adhesion such as we have here.

6 The agreed statement of facts on which this case proceeded shows that the deceased died of natural causes. He had had a check-up by his own physician in the month preceding his death.

7 The insurer thereupon required a summary of clinical history from that physician on April 19, 1978. It was received by the insurer on April 28, 1978 after death occurred. The deceased had been experiencing some pain and his physician suggested a myelogram test and, if it proved negative, an aortagram. The deceased died before either of the tests could be taken. It was agreed that if the deceased had been suffering from an aortic aneurysm he would not have been insurable at standard rates. The opinion of the deceased's doctor was that the accused could have been suffering from an aortic aneurysm. The insurer's underwriting department determined that the deceased could not be insured until the possibility of an aortic aneurysm had been negated. Of course, it was not known whether or not the deceased was insurable at standard rates at the time he applied for life insurance.

8 In so far as the result in this case depends on whether the deceased was insurable at the date of his application, I see no reason to differ from the view of the Ontario Court of Appeal that there was an onus in this respect on the insurer which it had not met. Moreover, as counsel for the respondent asserted, the mere recommendation of a medical consultant does not determine insurability.

9 On both of the grounds canvassed above, the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors of record:
Solicitors for the appellant: *McKeown, Yoerger, Spearing*, Toronto.

Solicitors for the respondent: *Goldberg, Shinder, Gardner & Kronick*, Ottawa.

Footnotes

1 (1965), 208 A.2d 638.

Tab 9

Most Negative Treatment: Not followed
Most Recent Not followed: Miller Estate v. Co-operators General Insurance Co. | 2005 NSSC 260, 2005 CarswellNS 417, 145 A.C.W.S. (3d) 1131, 29 C.C.L.I. (4th) 134, 754 A.P.R. 33, 237 N.S.R. (2d) 33, [2005] N.S.J. No. 382 | (N.S. S.C., Sep 27, 2005)

1992 CarswellOnt 544
Supreme Court of Canada

Brissette v. Westbury Life Insurance Co.

1992 CarswellOnt 544, 1992 CarswellOnt 999, [1992] 3 S.C.R. 87, [1992] I.L.R. 1-2888, [1992] S.C.J. No. 86, 13 C.C.L.I. (2d) 1, 142 N.R. 104, 36 A.C.W.S. (3d) 449, 47 E.T.R. 109, 58 O.A.C. 10, 96 D.L.R. (4th) 609, J.E. 92-1622, EYB 1992-67552

GERALD M. BRISSETTE and BERNARD BEZAIRE (Executor and Trustee of Last Will and Testament of MARY CECILE BRISSETTE, Deceased) v. WESTBURY LIFE INSURANCE COMPANY (Formerly Known as PITTS LIFE INSURANCE COMPANY)

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

Heard: February 27, 1992
Judgment: October 29, 1992
Docket: Doc. No 22125

Counsel: *Robert E. Barnes, Q.C.*, for appellants.
John S. McNeil, Q.C., for respondent.

Subject: Estates and Trusts; Insurance

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

IX Claims
IX.8 Payment of insurance proceeds
IX.8.d Entitlement to proceeds
IX.8.d.iii Life insurance
IX.8.d.iii.A General principles

Insurance

XI Principles applicable to specific types of insurance
XI.2 Beneficiaries under contracts of life insurance
XI.2.h Where beneficiary killing insured

Headnote

Insurance --- Claims — Payment of insurance proceeds — Entitlement to proceeds — Life insurance — General

Insurance — Life insurance — Public policy — Beneficiary of life insurance policy murdering insured — Executor of insured's estate not being entitled to enforce payment of proceeds of life insurance policy.

Insurance — The contract — Interpretation and construction of contract — Beneficiary of life insurance policy murdering insured — Executor of insured's estate not being entitled to enforce payment of proceeds of life insurance policy.

Public policy — The Beneficiary of life insurance policy murdering insured — Executor of insured's estate not being entitled to enforce payment of proceeds of life insurance policy.

A husband and wife bought a term life insurance policy which named the two of them as the insured and the survivor as the beneficiary. The husband later murdered the wife and was convicted of this crime. He made a claim against the insurance policy, in his capacity as executor of the wife's estate and as beneficiary under the policy, asking that the proceeds of the policy, including the accidental death benefit, be paid to him. He later renounced his executorship and surrendered any rights arising under the insurance policy in favour of his wife's estate. The insurance company brought proceedings seeking the dismissal of his claim against them and the husband brought a cross-motion for a declaration that his wife's estate was entitled to the insurance proceeds including the accidental death benefits.

At trial, the wife's estate was held to be entitled to the insurance proceeds but this decision was reversed on appeal. The Court of Appeal reasoned that the rule of public policy preventing the husband from benefiting from his crime did not have the effect of permitting the court to rewrite the insurance contract so as to provide that the proceeds went to some other party who was innocent of the crime. The wife had an interest in the policy but that interest was not enlarged by any rule of public policy. It was to be determined by the contract of insurance itself. The policy named the survivor of the husband and wife as beneficiary. The survivor, by definition, could not be the estate of the first to die, and was in fact the husband. Additionally, the parties did not explicitly designate the estate of the insured as the alternate beneficiary. Section 171 of the *Insurance Act* (Ont.) did not create an implied designation of the wife's estate as alternate beneficiary. That section only applied "where a beneficiary predeceases the person whose life is insured", but the beneficiary under this policy was the survivor of the husband and wife, who by definition could never predecease the insured.

The husband further appealed to the Supreme Court of Canada.

Held:

The appeal was dismissed.

Per Sopinka J. (La Forest, L'Heureux-Dubé and Iacobucci JJ. concurring)

The insurance contract could not be construed to require payment to the wife's estate. This was not the intention of the parties as expressed in the contract. The wording in the contract was not ambiguous. The insurance money was to be paid to the survivor. Given that the husband acceded to the status of survivor by killing his wife, public policy prevented him from being paid in accordance with the strict terms of the contract.

Denial of recovery was consistent with public policy because it prevented the insured from insuring against his own criminal act. There was, therefore, nothing unjust about the application of public policy in this case and even if there were, it would not be appropriate to employ a constructive trust because no claim of unjust enrichment, which is fundamental to the imposition of a constructive trust, had been made out here. The husband did not benefit from

his own wrong and the insurer, in complying with the contract, was not in breach of its duty to the wife. Moreover, because of the operation of public policy, the husband held no property to which a trust could be fastened.

Per Cory J. dissenting (Gonthier J. concurring)

Although the doctrine of public policy that a wrongdoer should not profit from his or her wrongdoing applies to insurance contracts, the rule should be narrowly construed and not ordinarily be used by an insurance company to avoid payment of its obligations. Generally, the reasonable intention of the parties must be taken into account in interpreting the insurance policy. This intention should be gleaned from the insurance contract as a whole and any ambiguity that arises should be construed in favour of the insured. The reasonable intention of the parties in this case was that the proceeds of the policy should be paid to the husband should the wife predecease him. Ambiguity arose in that the policy did not cover the situation where one spouse murdered the other. Interpreting this ambiguity in favour of the insured would require the insurancecompany to pay the proceeds to the survivor who, in order to comply with public policy, would hold them as trustee for the wife's estate.

Regarding the double indemnity provision for accidental death, the meaning of the contract would be distorted and s. 171 of the *Insurance Act*, which provides for payment to an estate for want of a surviving beneficiary, would be given a perverse meaning if the survivor were deemed to have predeceased the murder victim. Where a party to the contract, as opposed to a third party, deliberately murders the insured, the death cannot be said to be by "accidental means" and therefore cannot bring the double indemnity clause into play.

Table of Authorities

Cases considered:

By Sopinka J. (La Forest, L'Heureux-Dubé and Iacobucci JJ. concurring)

Becker v. Pettkus, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384 — *referred to*

Cleaver v. Mutual Reserve Fund Assn., [1892] 1 Q.B. 147, [1891-94] All E.R. Rep. 335 (C.A.) — *distinguished*

Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. (1979), [1980] 1 S.C.R. 888, 32 N.R. 488, 112 D.L.R. (3d) 49, [1980] I.L.R. 1-1176 — *referred to*

Demeter v. Dominion Life Assurance Co., (sub nom. *Demeter v. Occidental Life Ins. Co.; Demeter v. Br. Pac. Life Ins. Co.)* 11 E.T.R. 209, 35 O.R. (2d) 560, 132 D.L.R. (3d) 248, [1982] I.L.R. 1-1501 (C.A.) — *applied*

International Corona Resources Ltd. v, LAC Minerals Ltd., [1989] 2 S.C.R. 574, 35 E.T.R. 1, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 — *considered*

Schobelt v. Barber, [1967] 1 O.R. 349, 60 D.L.R. (2d) 519 (H.C.) — *considered*

Spicer v. New York Life Insurance Co., 268 F. 500 (5th Cir. 1920), certiorari denied 255 U.S. 572 (1921) — *considered*

Syncrude Canada Ltd. v. Hunter Engineering Co., [1989] 1 S.C.R. 426, [1989] 3 W.W.R. 385, 35 B.C.L.R. (2d) 145, 92 N.R. 1, 57 D.L.R. (4th) 321 — *referred to*

By Cory J. (dissenting) (Gonthier J. concurring)

Cleaver v. Mutual Reserve Fund Assn., [1892] 1 Q.B. 147, [1891-94] All E.R. Rep. 335 (C.A.) — *considered*

Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. (1979), [1980] 1 S.C.R. 888, 32 N.R. 488, 112 D.L.R. (3d) 49, [1980] I.L.R. 1-1176 — *considered*

Demeter v. Dominion Life Assurance Co., 33 O.R. (2d) 839, 125 D.L.R. (3d) 708, [1981] I.L.R. 1-1450 (H.C.), affirmed (sub nom. *Demeter v. Occidental Life Ins. Co.; Demeter v. Br. Pac. Life Ins. Co.*) 11 E.T.R. 209, 35 O.R. (2d) 560, 132 D.L.R. (3d) 248, [1982] I.L.R. 1-1501 (C.A.) — *considered*

Equitable Life Assurance Society of United States v. Weightman, 160 P. 629 (Okla. 1916) — *considered*

Horwitz v. Loyal Protective Insurance Co., [1932] O.R. 467, [1932] 3 D.L.R. 378 (H.C.) — *considered*

Knights and Ladies of Honor v. Menkhausen, 70 N.E. 567 (1904) — *referred to*

National Union Fire Insurance Co. v. Reno's Executive Air Inc., 100 Nev. 360 (1984) — *referred to*

Spicer v. New York Life Insurance Co., 268 F. 500 (5th Cir. 1920) [certiorari denied 255 U.S. 572 (1921)] — *considered*

Stats v. Mutual of Omaha Insurance Co., [1978] 2 S.C.R. 1153, [1978] I.L.R. 1-1014, 22 N.R. 91, 87 D.L.R. (3d) 169 — *considered*

Trudeau v. Standard Life Insurance Co. (1900), 31 S.C.R. 376 — *referred to*

Wigle v. Allstate Insurance Co. of Canada (1984), 49 O.R. (2d) 101, 10 C.C.L.I. 1, 30 M.V.R. 167, 14 D.L.R. (4th) 404, [1985] I.L.R. 1-1863 (C.A.), leave to appeal to S.C.C. refused (1985), 8 O.A.C. 320 (S.C.C.) — *considered*

Statutes considered:

Insurance Act, R.S.O. 1980, c. 218 [R.S.O. 1990, c. I.8] —

s. 171 [R.S.O. 1990, c. I.8, s. 194]

s. 171(1)(*c*) [R.S.O. 1990, c. I.8, s. 194(1)(*c*)]

Married Woman's Property Act, 1882 (U.K.), 45 & 46 Vict., c. 75 —

s. 11

Appeal from decision of Ontario Court of Appeal, reported at 39 E.T.R. 86, [1990] I.L.R. 1-2631, 49 C.C.L.I. 282, (sub nom. *Brissette v. Crown Life Insurance Co.*) 74 O.R. (2d) 1, 40 O.A.C. 38, (sub nom. *Brissette Estate v. Westbury Life Insurance Co.*) 72 D.L.R. (4th) 138 , allowing appeal from judgment reported at 33 E.T.R. 153, 69 O.R. (2d) 215, 41 C.C.L.I. 1, 60 D.L.R. (4th) 78, [1989] I.L.R. 1-2503, (sub nom. *Brissette v. Pitts Life Insurance Co.*) [1989] I.L.R. 1-2483 (H.C.), declaring entitlement to proceeds under life insurance policy.

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

1 I have read the reasons prepared by my colleague Justice Cory and find that I cannot agree with the conclusion that he has reached. I would dismiss the appeal essentially for the reasons expressed by Finlayson J.A. in the Court of Appeal for Ontario, 39 E.T.R. 86, [1990] I.L.R. 1-2631, 49 C.C.L.I. 282, (sub nom. *Brissette v. Crown Life Insurance Co.*) 74 O.R. (2d) 1, 40 O.A.C. 38, (sub nom. *Brissette Estate v. Westbury Life Insurance Co.*) 72 D.L.R. (4th) 138. Inasmuch as the reasons of my colleague take issue with some aspects of those reasons, some amplification is required of the reasons of Finlayson J.A.

2 In order to decide this appeal two issues must be resolved:

(1) can the insurance contract be interpreted so as to require payment of the insurance proceeds to the estate of Mary Brissette; and

(2) if the contract of insurance cannot be so interpreted, can the court achieve the same result by resort to the device of a constructive trust.

3 Since I would resolve both these issues against the appellant, it is not necessary for me to deal with the issue of double indemnity.

Interpretation Of The Contract

4 In interpreting an insurance contract the rules of construction relating to contracts are to be applied as follows:

(1) The court must search for an interpretation from the whole of the contract which promotes the true intent of the parties at the time of entry into the contract.

(2) Where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected.

(3) Ambiguities will be construed against the insurer.

(4) An interpretation which will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided. See *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888, 32 N.R. 488, 112 D.L.R. (3d) 49, [1980] I.L.R. 1-1176.

5 The contract in this case is not reasonably capable of the interpretation contended for by the appellant. It cannot be construed to require payment to the estate of Mary Brissette. That was never the intention of the parties. As stated by the Fifth Circuit Court of Appeals in *Spicer v. New York Life Insurance Co.*, 268 F. 500 (1920), at p. 501, certiorari denied, 255 U.S. 572 (1921):

> There is no promise to pay anything to the estate, or the personal representative, of that one of the two insured whose death first occurs during the continuance of the contract.

6 Moreover, there is nothing ambiguous about the wording of the contract. The money is to be paid to the survivor. The problem is that something has occurred that the parties neither contemplated nor provided for. The survivor acceded to this status by killing the other party. Public policy prevents the money from being paid in accordance with the explicit terms of the contract. These terms cannot simply be rewritten under the guise of interpretation. The resort to a constructive trust to achieve the result contended for by the appellant is an acknowledgement that this is so. A constructive trust is ordinarilyresorted to when the application for other accepted legal principles would produce a result that is unjust and that would not be countenanced by a court applying the principles of equity. The question, therefore, is not one of interpretation but whether the result of the application of the rules of interpretation are unjust so as to require the court to employ a constructive trust and whether it can do so in accordancewith the applicable principles of equity.

Constructive Trust

7 In order to determine whether, as a matter of public policy, the court should resort to the device of a constructive trust, it is appropriateto consider whether the application of public policy which denies payment to the felonious beneficiary would work an injustice if recovery is denied to the appellants. After all, it is this policy that prevents the contract from taking effect in accordance with its terms. If denial of recovery by the estate is not inconsistent with this policy, then there is no misuse of public policy which would warrant a conclusion that its application is unjust.

8 The results reached in *Demeter v. Dominion Life Assurance Co.*, (sub nom. *Demeter v. Occidental Life Ins. Co.; Demeter v. Br. Pac. Life Ins. Co.)* 11 E.T.R. 209, 35 O.R. (2d) 560, 132 D.L.R. (3d) 248, [1982] I.L.R. 1-1501 (C.A.), and *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147, [1891-94] All E.R. Rep. 335 (C.A.), define the parameters of the application of this public policy. In *Demeter* the assured took out an insurance policy on his wife's life naming himself as beneficiary. He then arranged for her murder. Although the claim for the proceeds of insurance was made by the daughter of the deceased wife, the court made it clear that it would have been equally consistent with public policy to deny recovery to the wife's estate. MacKinnon A.C.J.O. concluded as follows (at p. 562 [O.R.]):

> We are in agreement with the Motions Court judge that the life insured had no interest in the policy, legal or equitable, which vested in her estate. In our view it could be stretching equitable principles beyond recognizable limits to grant either the infant plaintiff or her mother's estate an equitable interest in the policies and the proceeds of those policies.

9 The rationale of the policy which denies recovery to the felonious beneficiary is that a person should not profit from his or her own criminal act. It is consistent with this policy that a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds. Denial of recovery in *Demeter* to either the daughter or the wife's estate would have been consistent with public policy. There was nothing unjust about such a result calling for the special assistance of equitable principles.

10 On the other hand, in *Cleaver* the insured took out an insurance policy on his own life with his wife as beneficiary. The wife-beneficiary who murdered the insured-husband was not a party to the contract of insurance. By virtue of the *Married Woman's Property Act, 1882* (U.K.), 45 & 46 Vict., c. 75, the moneys were payable to the estate of the insured to be held in trust for the beneficiary. Public policy stepped in to deny payment to the wife-beneficiary leaving the insurance moneys in the estate. Public policy was not allowed to abrogate a right that the estate had by virtue of the statute. The principles of equity were not resorted to in order to remedy a perceived injustice.

11 The contract of insurance in this case is not identical to the contract in either *Demeter* or *Cleaver*. It is necessary, therefore, to examine the whole of the contract in order to determine whether in its essential features it more closely resembles one or other of the contracts in those cases so as to attract the policy underlying that decision. After review of the contract of insurance in this case, I am of the opinion that it cannot be viewed as two separate contracts with each of Gerald and Mary insuring their own lives with the other as beneficiary so as to resemble the policy in *Cleaver*. The contrast lists the two of them together as the "insured" and provides for payment to "the beneficiary" who is defined as "the survivor". I agree, therefore, with the following characterization of the policy by Finlayson J.A. in his reasons at p. 9 [O.R.]:

> I think the approach of counsel for Westbury reflects a sounder construction of the policy and thus the contract of insurance. He submits that Mary and Gerald insured their joint lives in favour of the survivor, or the survivor's designated beneficiary.

12 On this basis, the result reached in *Demeter* is appropriate in this case. There is nothing unjust in refusing to pay the proceeds of insurance to a beneficiary not designated by the insurance contract when to do so would allow the insured to insure against his own criminal act. Moreover, even if the contract of insurance can be characterized as two separate contracts, as submitted by the appellants, so as to resemble the contract in *Cleaver*, the result in *Cleaver* cannot

be achieved in the absence of a provision, statutory or in the contract, providing for payment to the estate of the wife. Such a result can only be attained by invoking the equitable principle of a constructive trust. Those principles should only be invoked to cure an unjust application of public policy. There is nothing unjust about the applicationof that public policy in this case.

13 But, even if I had concluded that the denial of recovery to the estate was inconsistent with public policy, in my opinion it would be contrary to established principles of equity to employ a constructive trust in this case. A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her own wrongful conduct. For example, in *Schobelt v. Barber*, [1967] 1 O.R. 349, 60 D.L.R. (2d) 519 (H.C.), the court imposed a constructive trust on property which passed to a joint tenant who had murdered his co-tenant. By virtue of the instrument creating the joint tenancy the surviving tenant acceded to the whole property. In order to prevent the wrongdoer from being unjustly enriched, the whole property was impressed with a constructive trust with the estate of the deceased joint tenant as beneficiary of one-half of the property.

14 The requirement of unjust enrichment is fundamental to the use of a constructive trust. In *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 35 E.T.R. 1, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, Justice La Forest referred to Dickson C.J.'s review of the development of the constructive trust in *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426, [1989] 3 W.W.R. 385, 35 B.C.L.R. (2d) 145, 92 N.R. 1, 57 D.L.R. (4th) 321. At pages 673-674 [S.C.R.], La Forest J. stated:

> This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker, supra*, where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker, supra*, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriateremedy to redress that unjust enrichment. In *Hunter Engineering Co. v. Syncrude Canada Ltd.*, a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.

15 In *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384, at p. 847 [S.C.R.], Dickson J. (as he then was) stressed that, "The principle of unjust enrichmentlies at the heart of the constructive trust".

16 In this case, no claim of unjust enrichment has been made out. It cannot be said that but for Gerald's act, Mary's estate would have recovered the money. The wrongdoer does not benefit from his own wrong, nor is the insurer in breach of its duty to Mary. It is simply complying with the express terms of the contract. Moreover, there is no property in the hands of the wrongdoer upon which a trust can be fastened. By virtue of public policy the provision for payment in the insurance policy is unenforceable and no money is payable to the wrongdoer. The effect of a constructive trust would be to first require payment to the wrongdoer and then impress the money with a trust in favour of the estate. A constructive trust cannot be used to bring property into existence by determining the liability of the insurer to pay. The situation would be different, if, as in *Cleaver*, the insurance money were payable to the estate to be held in trust for the beneficiary. Public policy would step in to prevent the execution of the trust leaving the proceeds in the hands of the estate. But where, as here, there is no provision for payment to the estate, a constructive trust cannot be used to rewrite the contract which clearly and explicitlyprovides that the insured "agrees to pay the sum insured at its Head Office to the beneficiary."

17 I agree with my colleague that s. 171 of the *Insurance Act*, R.S.O. 1980, c. 218, has no application to the facts of this case.

18 In the result I would dismiss the appeal with costs.

***Cory J.* (dissenting) (*Gonthier J.* concurring):**

19 Two questions must be resolved in this appeal. First, and most importantly, where a joint policy of insurance with the proceeds payable to the survivor is issued to a couple, does the murder of the wife by the husband absolve the insurance company from paying anything under the policy? Second, if the insurance company must pay, then is the accidental benefit clause applicable as a result of the murder?

Factual Background

20 Gerald Brissette and Mary Brissette were married and living in Windsor, Ontario. In 1980, when Gerald was 32 and Mary 31, the couple purchased a life insurance policy from Pitts Life Insurance Company (now Westbury Life Insurance Company). The policy was issued on June 18, 1980. The insurance was said to be joint, five-year and convertible level term insurance. The expiry date was June 16, 1985 with a provision for renewal for a further five-year term on that date. The sum insured was $200,000 which was payable to the survivor. The premium was fixed at $712 per annum.

21 Two years and two months later, Gerald Brissette murdered his wife. There is no question that, at the time of death, the policy was in effect and none of the conversion clauses had been exercised by either Gerald or Mary. The wife had, by her will, appointed her husband as executor and prime beneficiary of her estate. The appellant Bernard Bezaire was named as the alternate executor.

22 The husband in his capacity as a beneficiary and executor made a claim against the insurance company for the proceeds of the life insurancepolicy. The statement of claim sought judgment for the amount of the policy, including the accidental benefit. It went on to allege that in the event that Gerald Brissette was not personally entitled to the proceeds, the estate of his late wife was entitled to them. The husband was subsequently convicted of his wife's murder by a Michigan court and all avenues of appeal from his conviction have been exhausted. During the course of his criminal proceedings, the husband renounced his appointment as executor and trustee of his wife's estate and surrendered to Bernard Bezaire any rights he may have had under the policy. An order was then made that the claim initiated against the insurance company by the husband in May, 1986 be continued with Bernard Bezaire as executor.

23 In March, 1989, the respondent insurance company brought a motion for summary judgment seeking the dismissal of the appellant's claim. The appellant brought a cross-motion for a declaration that the estate was entitled to payment of the insurance proceeds including the accidental death benefits.

Judgments Below

24 Supreme Court of Ontario (1989), 69 O.R. (2d) 215, 41 C.C.L.I. 1, 60 D.L.R. (4th) 78, [1989] I.L.R. 1-2503, (sub nom. *Brissette v. Pitts Life Insurance Co.)* [1989] I.L.R. 1-2483.

25 Chilcott J. first considered whether the wife's estate was entitled to the insurance proceeds. He reviewed the decision in *Demeter v. Dominion Life Assurance Co.* (1981), 33 O.R. (2d) 839, 125 D.L.R. (3d) 708, [1981] I.L.R. 1-1450 (H.C.), affirmed (sub nom. *Demeter v. Occidental Life Ins. Co.; Demeter v. Br. Pac. Life Ins. Co.)* 11 E.T.R. 209, 35 O.R. (2d) 560, 132 D.L.R. (3d) 248, [1982] I.L.R. 1-1501 (C.A.), but distinguished it on the ground that, here the wife, unlike Mrs. Demeter, was indeed a party to the insurance contract since she was a joint owner of the policy and therefore she (or her executor) had a legal interest in the policy and in its proceeds.

26 The judge of first instance then considered the decision in *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147, [1891-94] All E.R. Rep. 335 (C.A.). He determined that it was applicableto this case. He found that Bernard Bezaire, as executor of Mary Brissette's estate, was a party to the contract. As a result, he could enforce the insurance contract without raising public policy con cerns.

27 With regard to the second issue, Chilcott J. determined, based on the decision of *Horwitz v. Loyal Protective Insurance Co.*, [1932] O.R. 467, [1932] 3 D.L.R. 378 (H.C.), that the murder of Mary Brissette constituted death by

accidental means. He noted that although the act causing the injury was not accidental as regards the person inflicting the injury, it was accidental so far as the murdered victim was concerned.

28 He also applied the doctrine of contra proferentum resolving any doubt as to the meaning and scope of the contract against the party who inserted it. Ontario Court of Appeal, 39 E.T.R. 86, [1990] I.L.R. 1-2631, 49 C.C.L.I. 282, (sub nom. *Brissette v. Crown Life Insurance Co.)* 74 O.R. (2d) 1, 40 O.A.C. 38, (sub nom. *Brissette Estate v. Westbury Life Insurance Co.)* 72 D.L.R. (4th) 138.

29 Finlayson J.A., for the court, expressed the opinion that the question as to whether Mary Brissette's estate could recover turned upon the proper interpretation of the insurance contract. He found that the judge of the first instance had erred in finding that Mary Brissette had a legal interest in the Westbury policy and its proceeds. He expressed the view that the case was governed by *Demeter*, supra, and that the decision in *Cleaver*, supra, did not apply.

30 Finlayson J.A. then considered the argument that s. 171 of the *Insurance Act*, R.S.O. 1980, c. 218, could be applied so as to designate Mary Brissette's estate as the alternate beneficiary. That section provides that where a beneficiary predeceases the person whose life is insured, and no disposition of the share of the deceased beneficiary in the insurance money is provided in the contract or by a declaration, the share is payable to the personal representative of the deceased beneficiary. Finlayson J.A. rejected this argument on two grounds. First, the insurance policy named the survivor of Gerald Brissette or Mary Brissette as the beneficiary. By definition, the survivor can never be the estate of the first to die. Second, s. 171 cannot be relied on to create on "implied designation" of the wife's estate as the alternate beneficiary.

31 He held that on a proper construction of the contract the beneficiary of the policy was the survivor of Gerald and Mary Brissette or the survivor's designated beneficiary. The husband as the survivor was incapable of making a claim. He concluded that neither could anyone else claim through the husband. In the result the appeal was allowed.

Analysis

32

Entitlement to the Insurance Proceeds

33 What then is the effect of Gerald Brissette's conviction for the murder of his wife on the liability of Westbury Life Insurance Company to pay under the insurance policy? The answer to this question will turn upon the interpretation of the contract itself and on the applicable public policy principles.

1. The Contract

34

(a) Interpretation of an Insurance Contract

35 A policy of insurance constitutes a contract. Yet there are some significant differences between a contract for insurance and an ordinary commercial contract. It must be remembered that the policy itself is drawn by the insurance company. It is the company that chooses the language which sets out the terms and conditions of the policy. That language is not always a model of clarity which can be readily understood by lay persons. The policy is not negotiated between the parties. Rather it is submitted to a potential policy holder on a take-it-or-leave-it basis, with, I am sure, an emphasis by the insurancecompany representative on benefits that the purchaser will receive. Further, the insurance company will enter into a great number of contracts for insurance while the insured will but rarely enter into such a contract. The sole obligation resting upon the insured is to pay the premiums as they fall due.

36 Life insurance policies impose upon the insurance company the obligation to pay the stipulated sum upon the death of the insured. It should be remembered that it is the insurance companies that have ready access to actuaries and the actuarial statistics which enable them to calculate their risk effectively. It is on this basis that they can assess and fix

the premium to be paid by the insured that will permit them to meet their obligations and to profit from the transactions. How then should these contracts of insurance be interpreted?

(i) The American Approach

37 In the United States, a doctrine of "reasonable expectations" has been applied in the interpretation of the insurance contracts. Generally, the aim of that doctrine is to make certain that insurance policies provide the coverage which the insured can reasonably expect to receive. There the courts have essentially applied three variations of the doctrine. In the first variation, the doctrine is applied wherever there is an ambiguity in the policy of insurance, so that ambiguities are resolved in favour of the insured in order to satisfy his or her reasonable expectation. See *National Union Fire Insurance Co. v. Reno's Executive Air Inc.*, 100 Nev. 360 (1984). The American courts have reasoned that insurance policies are contracts of "adhesion" and therefore ambiguities contained in them should be resolved in favour of the insured. A contract of "adhesion" has been defined as a written contract with the following characteristics:

1. drafted by one party to the transaction;

2. on a form regularly used by the drafter;

3. presented to the adherent on a take-it-or-leave-it basis;

4. one in which the adherent enters into relatively few such transactions as compared with the drafting party;

5. one in which the principal obligation of the adherent is the payment of money.

38 See Leitner, in "Enforcing the Consumer's 'Reasonable Expectations' in Interpreting Insurance Contracts: A Doctrine in Search of Coherent Definition" (1988) 38 F.I.C.C. Quarterly 379, at pp. 379-380.

39 The second application of the doctrine operates to provide that the insured is entitled to all the coverage that might reasonably be expected to be provided under the policy. Only an unequivocal plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation.

40 The third application of the principle is even broader and more controversial than the second. It was originally advocated by Professor Keeton who stated:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

[In Keeton, "Insurance Law Rights at Variance with Policy Provisions" (1970) 83 Harv. L. Rev. 961, at p. 967.]

41 In a thoughtful article, "Insurance Law: The Doctrine of Reasonable Expectations" (1988) 37 Drake L. Rev. 741, at p. 746, Holz sets out the pros and cons of this last approach:

> ... the reasonable expectations of a policyholder, having an ordinary degree of familiarity with the policy coverage, should be given effect for three reasons: (1) policy forms are long and complex and cannot be understood without detailed study; (2) rarely do policyholders read their policies carefully enough to acquire such understanding; (3) most insurance transactions are final before a policyholder has a chance to see the detailed policy terms. The Keeton doctrine has been criticized on the grounds that: (1) if there is to be any predictability and uniformity of decisions, the courts need to establish more precise guidelines for the doctrine; (2) the analysis fails to consider the well-established rule of adhering to express contract language; (3) it would allow recovery to insureds who fail to read and understandtheir policies despite clear and unambiguous policy language; (4) the insurer would no longer be able to rely on the terms of a written insurance policy.

42 I have set out the American approaches not with any intention of slavishly following any of them but as an indication of how far some jurisdictions have gone to give effect to the reasonable expectations of the insured and the reasoning that led to the adoption of that approach.

(ii) The Canadian Approach

43 It has been held that the reasonable intention of the parties must be taken into account in the interpretation of the policy. Generally it would be expected that the intention of the parties entering into a life insurance contract would be that the insurance company would pay out the sum stipulated by the policy upon the death of the insured party, provided that the death was not within one of the listed exceptions to the policy. The principle that the reasonable intention of the parties must be taken into account in the interpretation of insurance contracts was set out by this court in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888, 32 N.R. 488, 112 D.L.R. (3d) 49, [1980] I.L.R. 1-1176. In that case, Estey J. wrote at pp. 901-902 [S.C.R.]:

> *... 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.* [Emphasis in original.] 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.* [Emphasis in original.] Similarly, an interpretation which defeats the intention of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that *an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided.* Said another way, *the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.*

[Emphasis added.]

44 That same case also stressed the principle that any ambiguities found in the insurance contract should be construed in favour of the insured. At p. 899 the following appears:

> ... it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author,or at least the party in control of the contents of the contract.

45 In *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101, 10 C.C.L.I. 1, 30 M.V.R. 167, 14 D.L.R. (4th) 404, [1985] I.L.R. 1-1863 (leave to appeal to S.C.C. refused, [1985] 1 S.C.R. v, 8 O.A.C. 320), the Ontario Court of Appeal considered the principles that should be applied to an interpretation of a standard policy of insurance. There the majority of the court adopted some but certainly not all of the rules that have been applied in the United States to the interpretation of an insurance contract. It was said that the basic rules which should apply are as follows, at p. 117 [O.R.]:

1. The court should look at the words in the contract to determine if there is ambiguity;

2. the court should ascertain the intention of the parties concerning specific provisions by reference to the language of the entire contract;

3. the court should construe ambiguities found in the insurance contract in favour of the insured, and

4. the court should limit the construction in favour of the insured by 'reasonableness' ....

46 In my view, it is just and appropriate that the rules referred to in those cases be applied in interpreting insurance contracts.

(b) The Aspect of Public Policy

47 It is trite to say that a wrongdoer cannot profit from his or her wrongdoing. This principle is clearly applicable to contracts of insurance. See *Cleaver v. Mutual Reserve Fund Life Assn.*, supra. The insurance policy in that case was owned by the husband who insured his own life with the proceeds of the policy payable to his wife if she were living at the time of his death and if she were not, to his legal representatives. The wife was subsequently convicted of murdering her husband. The English Court of Appeal found that the proceeds of the policy should go to the husband's estate. It was noted that the right to recover on the policy vests in the owner/deceased and "it is only when it is a question as to the application of the money by them that consideration of public policy arise" (at p. 149). Lord Esher wrote at pp. 151-152:

> The contract is with the husband, and with nobody else. The wife is no party to it. Apart from the statute, the right to sue on such a contract would clearly pass to the legal personal representatives of the husband. The promise is one which could only take effect upon his death, and therefore it must be meant to be enforced by them. The condition on which the money is to become payable is the death of James Maybrick. There is no exception in case of his death by the crime of any other person, not even by the crime of the wife. Therefore the condition expressedby the policy, as that on which the money is to become payable, has been fulfilled. Consequently, so far, and if no question of public policy came in, there would be no defence to an action against the defendants by the executors of James Maybrick.

48 It should be noted that the reasoning there was tied to the operation of s. 11 of the *Married Woman's Property Act, 1882* (U.K.), 45 & 46 Vict., c. 75. The effect of that section was that the husband's estate would hold the insurance proceeds in trust for the wife/beneficiary. It was held that where the objects of the trust could not be performed by reason of public policy, then the proceeds would form part of the es tate.

49 Lord Esher M.R. stressed that, although a wrongdoer cannot profit from his or her crime, neither should an insurance company be allowed to abrogate its responsibilities under a contract by invoking a rule of public policy. At pp. 151-153 he wrote:

> No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity; but when people vouch that rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the applicationof the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires.
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> . . . . .
>
> ... and, if the matter can be dealt with so that such person should not be benefited, I do not see any reason why the defendants in such a case should be allowed to say, though they might have received premiums perhaps for thirty years and still retained the same, that public policy forbade their paying the sum of money which they had contracted to pay.

At p. 160 of the same case, Fry L.J. said:

> ... it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights.

50 These reasons correctly observe that the doctrine of public policy should be narrowly applied and should not be used as an excuse by an insurance company to avoid its obligations under its policies. See also *Trudeau v. Standard Life Insurance Co.* (1900), 31 S.C.R. 376.

(c) Constructive Trust

51 An eminently fair and sensible solution to the legal problem as to what should be done with the proceeds of a life insurance policy in a situation such as the present case was set out in *Equitable Life Assurance Society of United States v. Weightman*, 160 P. 629(Okla. 1916). The facts of that case are strikingly similar to those of the case at bar. The insurance policy jointly insured both the husband and the wife and the beneficiary was to be the survivor of them. No alternative beneficiary was named. The wife killed the husband and the wrongdoer was barred from taking the benefits of the policy.

52 There the court held that a trust arose in favour of the estate of the insured. By virtue of that trust, the representative of the insured was entitled to recover the benefits of the policy. In reaching this decision, the court concluded that the policy in question was in the nature of two separate policies upon the life of each of the insured. With respect to an individual policy, the court cited several leading authorities and concluded at p. 634:

> ... if the insured be murdered by his beneficiary, or if for any other reason the beneficiary be disqualified, the policy and the law not specifically providing an alternative beneficiary, a resulting or constructive trust arises by operation of law, by which the benefits of the policy vest in the insured, or his estate in event of his death.
>
> . . . . .
>
> We cannot reason ourselves away from the rights of the assured. The insurer assumed the risk of death, without any reservation, and death has occurred. The company received every consideration for its unreserved risk, received them from [the husband], who has done no wrong and has received no return. If such rights exist, the law does not strike down the rights of an innocent person, but finds a way, if one there be, to sustain these rights.

53 In that same case, the court dealt in an appropriate way with the rather far-fetched argument of the insurance company that a beneficiary might be incited to commit murder knowing that if he or she was unable to collect the benefit, it would still be payable to some other person in whose welfare he or she was interested. The court rejected this argument and set out with approval (at p. 635) a quotation from a decision in *Knights and Ladies of Honor v. Menkhausen*, 70 N.E. 567 (1904), at p. 568:

> Human experience teaches us that those willing to commit murder and assume the risk of punishment for the benefit of others are so few in number that consideration thereof becomes well-nigh inconsequential.

54 A contrary conclusion was reached in *Spicer v. New York Life Insurance Co.*, 268 F.500 (1920). In that case the administrator of the wife's estate was claiming the proceeds of a joint insurance policy following the conviction of the husband for murdering the wife. The Circuit Court of Appeals, Fifth Circuit was not convinced that the decision in *Weightman* would govern the payment of the proceeds of the insurance policy in issue. Rather, the court emphasized that the law of Alabama did not interpret such contracts in a way that would make the insurer liable to the personal representative of the deceased in a situation where the policy provides that the proceeds are payable to the survivor.

55 It is significant that the reasoning in *Weightman* was referred to with approval in the text *The Law of Trusts*, vol. 5 (4th ed. 1989), by Scott and Fratcher. At p. 495 of that text, the following appears:

> **494.3 Joint Life insurance policies.**
>
> Where a policy of insuranceis taken out on the lives of two persons, the proceeds payable on the death of one to the survivor and one of them murders the other, it has been held that the murderer is not entitled to the proceeds of the policy but can be compelled to surrender them to the estate of the decedent. Had it not been for the murder, the victim might have survived the murderer, in which case he would have been entitled to the proceeds of the policy.

> The murderer by his criminal act has made himself the survivor, which he might not otherwise have been, and he should not be permitted to profit thereby.

56 The same text goes on to point out situations in which the insurancecompany would be relieved of liability. For example, where the murder of the insured by the beneficiary is specified as an excepted risk in the policy, there would be no liability on the insurance company. Similarly, where the contract is fraudulent in its inception, no liability would rest on the insurance company. Lastly, in the situation where the murderer was the sole owner and beneficiary of the policy and no one but the beneficiary, or someone claiming through the beneficiary, had any interest in the policy, then the insurance company would be under no obligation to pay. It is interesting to observe that the decision in *Demeter v. Dominion Life Assurance Co.*, supra, stands as an example of the application in Canada of this last category.

57 Support for the use of the doctrine of constructive trust can be found in an article written by Professor Youdan, entitled "Acquisition of Property by Killing" (1973) 89 L.Q. Rev. 235. In that article the author points out that the use of the constructive trust to prevent the unjust enrichment of the wrongdoer reduces or eliminates the element of confusion involved in deciding who is entitled to the proceeds of the policy. The beneficiary of the constructive trust, he explains, is the person who, in the eyes of equity, has the best right to the proceeds. He sets out these principles for making this determination, at pp. 257-258:

> ... where there are circumstances showing that a particular person has a better equity than anybody else the property should be given to that person but otherwise it should be given to the estate of the victim for lack of 'any other suitable recipient,' and in all cases the wrongdoer or anyone ... claiming through him should be excluded.
>
> . . . . .
>
> Where the wrongdoer is beneficiary under the victim's life insurancethe proceeds of the policy will in the normal case be held for the estate of the victim but if there is an alternative beneficiary then he should gain the proceeds and similarly if there is evidence that the victim would have changed the beneficiary then that second person should benefit and gain the proceeds.

In my view, this expresses an eminently fair and reasonable approach.

2. Summary

(a) Interpretation of Insurance Contracts

58 The following are general principles of interpretation which apply to contracts of insurance, particularly those of a standard nature such as life insurance policies:

> (1) the court should search for an interpretation which, by reference to the language of the entire contract, would appear to promote the true and reasonable intention of the parties at the time of entering into the contract;
>
> (2) the court should look at the words of the contract to determine if there is an ambiguity; and
>
> (3) the court should construe any ambiguity found in the insurancecontract in favour of the insured.

(b) Public Policy

59 The doctrine of public policy should apply to insurance contracts to ensure that a wrongdoer will not profit from his or her wrongdoing. Nevertheless, that rule should be narrowly construed and should not ordinarily be utilized by an insurance company to avoid payment of its obligations.

3. Application of the Principles to This Case

(a) Interpretation of the Contract as a Whole

60 The policy provided that the insurance company "hereby insures the life of Gerald Brissette and Mary Brissette herein called the Insured, and agrees to pay the Sum Insured at its Head Office to the beneficiary in accordance with this policy of insurance, the particulars of which are as follows". The beneficiary was "The Survivor". The "Sum Insured" was $200,000. Included among the general provisions of the policy was the following:

> (m) This policy does not insure against death as a result of suicide of the Insured (whether the Insured be sane or insane), should the death of the Insured occur within two years from the date of issue, or within two years from the date of any reinstatement of this policy; provided that in such an event, the Company will pay in one sum an amount equal to the premiums paid under this policy.

61 The contract did not contain any specific exemption from payment of the sum insured as a result of the murder of either of the joint owners of the policy by the other. However, it was very specific with regard to the exemption pertaining to suicide. Further, the policy explicitlystated the exemptions with regard to the double indemnity provision for accidental death. Those exemptions included:

> (b) Committing, attempting or provoking an assault or criminal offence;
>
> (c) Insurrection, war or hostilities of any kind or any act incidentthereto, whether or not the life insured was actually participating therein;
>
> (d) Participating in any riot or civil commotion;

Moreover, the General Provisions of the policy provided:

> (n) Accidental Death Benefits shall not be payable for any loss: (1) if the Insured is affected by alcohol or drugs to the extent as to cause or contribute to the accident, (2) due to travel or flight in any aircraft, (a) while the Insured is a pilot or member of the crew or (b) while the aircraft is operated for instructional testing or training purposes, or (c) while being flown for the purpose of descending from the aircraft by parachute or (d) while travelling or flying as a passenger or otherwise in any aircraft of a military, naval or air force.

62 What then can be learned from this contract as to the reasonable and true intention of the parties? From the point of view of the wife and husband, they were purchasing insurance that would provide proceeds if one of them died during the term of the policy. They paid the not insubstantial premiums ($712 per annum commencing in June of 1980) in order to obtain this life insurance coverage. So far as the insurance company was concerned, it was receiving premiums for which it agreed to pay the sum insured upon the death of one of the insured.

63 The insurance company undoubtedly drafted the policy and fixed the premiums based on actuarial statistics pertaining to the lives of the young couple (31 and 32 years of age). The actuarial assessment of the risk would have taken into account death from *all* causes. The assessment would include the unfortunately significant incidents of spousal killings. Contrary to the contentions of the insurer, it would seem ridiculous to assume that, in the absence of a specific exempting clause, the insurance company intended that this type of death would constitute an exemption for payment of the sum insured. It did not matter to the insurance company how the parties died except insofar as one of the exemption clauses might apply. At the same time, it would be equally far-fetched to assume that either spouse contemplated death as a result of being murdered by the other.

64 Whether it is called the reasonable intention or the reasonable expectation of the parties, the result is the same. In simple terms, the husband and wife paid for insurance coverage. Both the husband and the wife "owned" the policy as joint owners. They were jointly liable for the payment of the premiums. The parties to the policy intended that the sum insured under the policy would be paid upon the death of one of the insured. The wife predeceased the husband. Setting aside for the moment any consideration of public policy, it can properly be assumed that the reasonable intention of the parties, gleaned from the contract as a whole, was that the sum insured should be paid to the husband.

(b) Ambiguity

65 Looking at the policy as a whole it is apparent that ambiguity exists. The policy does not cover the situation of one spouse's murdering the other. The absence of such a provision is particularly significant in light of the care the insurer has taken in other portions of the policy to stipulate the suicide exemption clause and the other specific exemption provisions pertaining to accidental death.

(c) Construing the Ambiguities in Favour of the Insured

66 It is right and just to interpret the ambiguities in favour of the insured. It is the insurance company which draws up a contract of insurance. It is the company which determines the clauses which will go into a standard form of contract. It is that standard form of contract which is offered to the people in all walks of life on a take-it-or-leave-it basis. It is open to the insurance company to revise its policies whenever it deems it appropriate. Little sympathy can be bestowed upon the insurance companies if, in these circumstances, ambiguities occur. Here, the policy specifically provided that the sum insured would be paid to the survivor of the joint owners of the policy. It follows that the monies would be paid to the murdering spouse. Public policy, however, prevents that result.

(d) Application of the Principles of Public Policy

67 Again, it is trite to say that the husband cannot benefit from his crime of murder. This principle of public policy should be strictly interpreted. The insurance company entered into a contract to pay the sum insured in the event of the death of one of the spouses. That event has occurred and payment should be made by the insurer. There is no reason for the insurance company to now benefit from the public policy doctrine. That principle evolved from the natural repugnance of society to permitting a wrongdoer to benefit from his or her crime. It was never intended that it would be utilized by insurers to avoid contractual obligations. If the doctrine of public policy is not to benefit the insurer, what then should be the result?

(e) Constructive Trust

68 At this point, it is clear that the reasonable intention of the parties, derived from the wording of the policy as a whole, indicates that the proceeds were to be paid upon the death of the survivor of the joint owners. However, since that death was occasioned by the mur der of one joint owner by the other, it would be contrary to public policy to permit the survivor to benefit from his or her criminal act. That same public policy should not operate to permit the insurance company to escape liability for payment of the funds which it had undertakento make. If it wished to avoid payment, the insurer should have provided an exemption from payment where one spouse murdered the other.

69 It follows then that the proceeds should be paid by the insurance company. In order to comply with the principles of public policy, the survivor must hold those funds as trustee for the administrator of the estate of the murdered spouse. This is an approach that is eminently fair and reasonable. It ensures the performance of the contract in compliance with the real intent of the parties. That should be the result in this case unless there is a legal impediment to that solution.

70 The Ontario Court of Appeal in their decision placed great reliance upon the decision of *Demeter v. Dominion Life Assurance Co.*, supra. There, it was held that an estate must have a "legal or beneficial interest in the policies or their proceeds" in order to be able to claim them. However, the factual situation is very different from this case. In *Demeter* the murderer was the *sole* owner and the only named beneficiary of the insurance policy on his wife who was his victim. There was nothing to connect the life insured (the deceased wife) or her daughter, through the estate, to the policy of insurance. The court held that it would be "stretching equitable principles beyond recognizable limits" to grant the estate of the wife an interest in the proceeds of the insurance policy in those circumstances.

71 However, in this case, Mary Brissette had *both* a legal and beneficial interest in the policy. She was the co-owner of the policy. She was equally responsible with her husband for the payment of the premium and equally entitled to the

benefits of the policy. She was properly described as an owner and was, in fact, an owner of the policy of insurance. It follows that her estate has an interest in the policy and thus a firm foundation upon which to base a claim for the proceeds of the policy.

72 It makes little sense to say, in all the majesty of the law, that if an individual is the sole owner of a contract of insurance then the principle enunciated in *Cleaver* will apply so that the insurance policy proceeds will be paid to the estate of the deceased while in the case of a jointly owned policy of insurance the insurer will escape liability. To take such a position says little for common sense and less for any sense of justice.

73 In the absence of a specific term excluding coverage in this situation, the resulting ambiguity should be resolved in favour of the insured. By means of the constructive trust the proceeds should be paid to the executor of the estate of the deceased wife. That is the basis upon which I would resolve the issue as to the payment of the proceeds of the insurance policy.

(f) Does s. 171 of the Insurance Act Apply?

74 The alternative argument of the appellant was that if the constructive trust doctrine did not apply, then public policy should deem the survivor to have predeceased the murder victim. Since there would then be no surviving beneficiary, it was said that s. 171 of the *Insurance Act*, R.S.O. 1980, c. 218, would require that the proceeds of the policy should be paid to the insured wife or to her estate. That section provides:

> 171.-(1) Where a beneficiary predeceases the person whose life is insured, and no disposition of the share of the deceased beneficiary in the insurance money is provided in the contract or by a declaration, the share is payable,
>
> . . . . .
>
> (*c*) if there is no surviving beneficiary, to the insured or his personal representative.

75 That submission cannot be accepted. On this issue, I agree with the reasoning of Finlayson J.A. To give effect to this alternative argument would not only distort the meaning of the contract but would also require that an almost perverse meaning be given to the section. This is in contrast to the constructive trust solution which not only gives effect to the words of the contract but also imposes a trust to deal with the consequences of public policy.

The Double Indemnity Provision for Accidental Death

76 The second issue to be determined is whether the death of the insured was "accidental" within the meaning of that word as used in the insurance contract. If the death was accidental, then that would trigger the double indemnity clause in the contract. It is the contention of the appellant that the murder was "accidental" as it was unintended by the insured even though it was the result specifically intended by the murderer. On the other hand, the respondent submits that the term "accidental" should not be determined from the point of view of the victim but rather in light of the relationship between the insurer and the insured.

77 The trial judge relied on the decision in *Horwitz v. Loyal Protective Insurance Co.*, supra, and found that the wife's death was by "accidental means". In the *Horwitz* case, the insured was shot and killed by a third person and the issue was whether the death was by "accidental means". Logie J., in *Horwitz*, found that the injuries received by the insured were unexpected and fortuitous so far as he was concerned and were caused directly by violent, accidental and external means. The Court of Appeal found it unnecessary to deal with the issue in light of their dismissal of the appellant's claim under the policy.

78 The policy provides that accidental death benefits will be paid if the death of the life insured occurred:

> directly and independently of all other causes, as the result of bodily injury caused solely by external, violent and accidental means.

The contract sets out various exceptions to the accidental death payment which did not include the present situation.

79 In *Stats v. Mutual of Omaha Insurance Co.*, [1978] 2 S.C.R. 1153, [1978] I.L.R. 1-1014, 22 N.R. 91, 87 D.L.R. (3d) 169, it was held that the question as to whether the death occurred by "accidental means" should be resolved by utilizing the ordinary meaning of the words "accident" or "accidental" and applying them in the context to the circumstances giving rise to the death. At pp. 1163-1164 [S.C.R.], the position is set out in this way:

> A variety of dictionary definitions have been attempted and text writers have used very astute and logical analyses of what would constitute an accident, but remembering that it is an ordinary word to be interpreted in the ordinary language of the people, I ask myself what word would any one of the witnesses of this occurrence use in describing the occurrence.

80 The resolution of the question of whether the wife's death in this case was by "accidental means" should take into account the fact that her killing was an intentional act which resulted in a conviction for murder. More importantly, it was committed by one of the parties to the insurance policy. It is this which distinguishes the case at bar from the decision in *Horwitz*, supra, where the injuries were caused by a third party. Where a party to the contract deliberately murders the insured, the death cannot be said to be by "accidental means". It therefore cannot bring into play the double indemnity clause.

Disposition

81 For the reasons set out above, I would allow the appeal and direct that the executor of the deceased wife is entitled to the sum in sured under the insurance policy by the application of the doctrine of constructive trust. On the second issue, the executor is not entitled to the accidental death benefits. The appeal is therefore allowed with costs throughout.

Appeal dismissed.

Footnotes

* Stevenson J. took no part in the judgment.