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., KRI RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

RESPONDING BOOK OF AUTHORITIES OF TARION WARRANTY CORPORATION
(motion returnable June 26, 2018)

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Brown v. Belleville (City)

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Graeme Brown and Monica Brown, Plaintiff (Respondents) and The Corporation of the City of Belleville, Defendant (Appellant)

E.A. Cronk, Robert P. Armstrong, Gloria Epstein JJ.A.

Heard: December 7, 2012
Judgment: March 12, 2013
Docket: CA C55618

Proceedings: affirming *Brown v. Belleville (City)* (2012), 2012 CarswellOnt 7621, 2012 ONSC 2554, 99 M.P.L.R. (4th) 296, 21 R.P.R. (5th) 313 (Ont. S.C.J.); additional reasons at *Brown v. Belleville (City)* (2012), 2012 ONSC 3232, 2012 CarswellOnt 7609 (Ont. S.C.J.)

Counsel: R. Benjamin Mills, for Appellant
Robert J. Reynolds, for Respondent

Subject: Civil Practice and Procedure; Property; Public; Contracts; Torts; Tax — Miscellaneous; Municipal

APPEAL by defendant city from judgment reported at *Brown v. Belleville (City)* (2012), 2012 CarswellOnt 7621, 2012 ONSC 2554, 99 M.P.L.R. (4th) 296, 21 R.P.R. (5th) 313 (Ont. S.C.J.), granting motion to answer questions on stated case in plaintiff property owners' favour.

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

1 This appeal concerns the enforcement of an agreement entered into in 1953 between a municipality and a local farmer. Under the agreement, the municipality agreed to perpetually maintain and repair that part of a storm sewer drainage system that it had constructed on and near the farmer's lands. About six years after it entered into the agreement, and in breach of its covenants under it, the municipality ceased all maintenance and repair work on the drainage system.

2 After the farmer's death in 1966, the affected lands were sold by his heirs to third parties. When the third parties sought in 1980 to hold the municipality to its obligations under the agreement, the municipality unilaterally repudiated the agreement.

3 As a result of a corporate amalgamation carried out in the late 1990s, the appellant, the Corporation of the City of Belleville (the "City"), stepped into the shoes of the original municipality under the agreement.

4 In 2003, the lands were again sold, this time to the respondents, Graeme and Monica Brown. Within months of their acquisition of the lands, the Browns requested the City to honour its maintenance and repair obligations under the agreement. The City refused and, in mid-December 2004, again unilaterally repudiated the agreement.

5 The Browns eventually sued the City for specific performance of the agreement or, in the alternative, damages for its breach. The City defended the action, asserting that the agreement was unenforceable, on numerous grounds.

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6 After the exchange of pleadings, the parties stated a Special Case under Rule 22 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking the court's opinion on 14 questions concerning the agreement. The parties ultimately agreed on the proper determination of six of the questions posed for the court's consideration and the motion judge's answers to those questions proceeded on consent. The motion judge granted various declarations of right in favour of the Browns in relation to the remaining eight questions.

7 The City appeals to this court in respect of three issues. Contrary to the motion judge's rulings, the City argues that: (1) the Browns' claims concerning the agreement are statute-barred; (2) the Browns have no standing to enforce the agreement since they have no privity of contract with the City; and (3) the agreement is contrary to public policy and, hence, unenforceable.

8 For the reasons that follow, I would dismiss the appeal.

I. Facts

9 The background facts are set out in the Special Case and are undisputed. As relevant to the issues on appeal, the agreed facts are as follows.

(1) The Agreement

10 The Browns are the owners of approximately 230 acres of farmland in the City (formerly in the Township of Thurlow ("Thurlow")). Their property forms part of lands that were owned in the 1950s by Roy W. Sills.

11 In 1953, Thurlow constructed a storm sewer drainage system along the frontage of Mr. Sills's lands and those of his neighbours, and on one of several lots owned by Mr. Sills. In order to maintain and repair the drainage system, as needed, the municipality required continuing access to Mr. Sills's lands. Accordingly, on April 27, 1953, Thurlow entered into a written agreement with Mr. Sills (the "Agreement"), whereby Mr. Sills agreed to provide the necessary access on an indefinite basis in exchange for Thurlow's covenants that:

> (1) it would maintain the storm sewer in good working condition "at all times"; and
>
> (2) it would make good "any and all damage caused the Owner either by virtue of the original construction of the said sewer interfering now or in the future with the Owner's use and enjoyment of his land in any way or as a result of lack of repair or of acts done at any time by the Corporation in maintaining and repairing the said sewer".

12 The Agreement identifies Mr. Sills as the "Owner" of the affected lands and Thurlow as the "Corporation". The recitals to the Agreement state that Mr. Sills had or would receive "material benefits from the construction of the ... sewer" and that he paid the sum of $200 to Thurlow in consideration for these benefits.

13 The Agreement also contains an 'enurement clause'. It reads: "THIS INDENTURE Shall [*sic*] inure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, successors and assigns."

14 The Agreement was never registered on title to the affected lands.

15 Mr. Sills died on June 26, 1966. By deed dated August 11, 1973, his heirs sold the property now owned by the Browns to John and Wendy Pleizier. No express assignment of the Agreement in favour of the Pleiziers formed part of this transaction.

16 The drainage system functioned satisfactorily for some years. However, when Thurlow ceased maintaining it after 1959, the system gradually began to deteriorate. As a result, over time, the Pleiziers and other affected landowners became unable to effectively drain their lands.

(2) Thurlow's 1980 Repudiation of the Agreement

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17 In the fall of 1980, the Pleiziers brought the Agreement to Thurlow's attention. On December 10, 1980, Thurlow's solicitors wrote to the Pleiziers, indicating that Thurlow was "no longer bound" by the Agreement and that Thurlow was "not prepared to take any action with respect to the repair or maintenance of the ditch".

18 The parties agree that the Pleiziers took no action to enforce the Agreement or to otherwise pursue it with Thurlow. Indeed, there is no evidence that the Pleiziers responded in any way to the December 1980 letter from Thurlow's solicitors.

19 Thurlow and the City of Belleville amalgamated in 1998. The City acknowledges that as a result of the amalgamation, by operation of law, it is bound by Thurlow's obligations under the Agreement. The City also accepts that those obligations are perpetual.

(3) The City's Subsequent Repudiations of the Agreement

20 The Browns purchased their property from the Pleiziers on August 27, 2003. As with the Pleiziers' acquisition in 1973, no express assignment of the Agreement formed part of this transaction.

21 The Browns were unaware of the existence of the drainage system and the Agreement when they agreed to buy their property from the Pleiziers. However, the Browns were provided with a copy of the Agreement around the time of the closing of the sale transaction.

22 On September 20, 2004, the Browns requested that the City "meet its obligations under the Agreement". By letter dated December 15, 2004 to the Browns, the solicitors for the City responded: "[D]ue to the considerable lapse of time of approximately 45 years, it is Council's position that they are not bound by the Agreement and are not prepared to take any action in constructing or maintaining the drainage works."

23 There is no evidence in the Special Case regarding what, if anything, transpired between the City and the Browns concerning the Agreement for about the next five and one-half years. The agreed facts merely stipulate that after the City's December 2004 letter, "further discussions went nowhere", and that this litigation followed.

24 Correspondence cited in the Special Case includes a letter to the Browns dated August 3, 2010, in which the City's solicitors mentioned a meeting among the parties and their solicitors held on May 31, 2010. In the same letter, the City's lawyers reiterated: "[I]t is the City's position that it bears no responsibility to the present landowners under the 1953 Agreement and accordingly the City is not prepared to take any action in constructing or maintaining the drainage works."

(4) The Special Case

25 On July 20, 2011, the Browns sued the City for specific performance of the Agreement or, in the alternative, for damages for its breach. The City defended the action, asserting, on numerous grounds, that it is not bound by the Agreement and that the Agreement is unenforceable as against it. Shortly thereafter, the parties agreed to submit a Special Case to the Superior Court of Justice for determination of a variety of their respective rights and obligations in relation to the Agreement.

26 Fourteen questions were posed by the parties for the opinion of the court on the Special Case. The City conceded that six of the questions should be answered in favour of the Browns and the motion judge issued declarations of right in the Browns' favour, on consent, in respect of those questions. After argument, he also granted declarations of right in favour of the Browns concerning the remaining questions on the Special Case.

II. Issues

27 On this appeal, the City challenges the motion judge's rulings on three issues. It contends that the motion judge erred by holding that:

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(1) there is no statutory limitation period that acts to bar an action by the Browns;

(2) the Browns, as "successors of the Agreement", are entitled to enforce the Agreement without an express assignment; and

(3) the Agreement is not void as against public policy as fettering the City's discretion with respect to future uses of public roads and road allowances.

III. Analysis

(1) The Limitation Period Arguments

28 The City's principal limitation period argument, set out in its factum, concerns Thurlow's unilateral 1980 repudiation of the Agreement. The City submits that the Pleiziers "accepted" this repudiation by reason of their inaction in the face of Thurlow's repudiation. As a result, the City says, the applicable six-year limitation period under the *Limitations Act*, R.S.O. 1980 c. 240 (the "1980 Act") began to run in December 1980 and expired in 1986.

29 During oral argument, the City expanded its limitation period argument to include a second, alternative submission regarding the Browns. It maintained that even if the Pleiziers did not accept Thurlow's 1980 repudiation of the Agreement, the Browns accepted the City's subsequent repudiation of it when they failed to respond to the City's notice, in its solicitors' letter of December 15, 2004, of its position that the Agreement did not bind it and that it was not prepared to take any action regarding the drainage system.

30 Based on the admitted 2004 repudiation and its alleged acceptance by the Browns, the City argues that if the applicable limitation period did not expire in 1986, it must be taken to have expired either in 2010 under the *Limitations Act*, R.S.O. 1990, c. L.15 (the "1990 Act") (a six-year limitation period) or in 2006 under the *Limitations Act, 2002*, S.O., 2002, c. 24, Sch. B. (the "Current Act") (a two-year limitation period). Under either scenario, the City asserts, the lawsuit commenced by the Browns in July 2011 is statute-barred.

31 In essence, therefore, the City contends that some limitation period must apply to the Agreement and that, on the agreed facts, it expired either in 1986, 2006 or 2010 by reason of the acceptance of the municipality's repudiations of the Agreement by the Pleiziers and/or the Browns.

32 The motion judge disagreed. Question 13 on the Special Case stated:

Whether or not a statutory limitation period acts to bar an action by the Plaintiff [*sic*] (or its predecessors in title) and to what extent it should apply if at all (performance of the contract and/or consequential damages).

The motion judge answered this question this way: "[T]here is no statutory limitation period that acts to bar an action by the Plaintiffs." He granted declaratory relief in the same terms.

33 For the reasons that follow, I see no error by the motion judge on this issue.

(a) City's Pleading and Questions on the Special Case

34 I begin with the City's pleading and the questions posed on the Special Case. In its statement of defence, the City alleged that the Browns' claims were statute-barred under the Current Act. It did not invoke either the 1980 or the 1990 Acts or plead the expiry of a limitation period in 1986 or 2010. Rather, it claimed that the applicable limitation period was that provided for under the Current Act, which would have expired in 2006, two years after the City's 2004 repudiation of the Agreement.

35 It is true that the City alleged in its pleading that "Thurlow and later Belleville had maintained that the Agreement was at an end and that they were no longer obliged to perform any work stipulated in the Agreement." However, this

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allegation was pleaded in connection with a claim by the City that any losses suffered by the Browns were avoidable. It was not advanced in relation to an acceptance of repudiation claim. In other words, the termination of the Agreement was pleaded in connection with the City's claim that the Browns had failed to mitigate their damages. The City did not plead the acceptance by the Browns or the Pleiziers of a repudiatory breach or an anticipatory repudiation of the Agreement.

36 Nor did the agreed questions on the Special Case expressly refer to any repudiation of the Agreement by Thurlow and, later, by the City, or to any acceptance by the Pleiziers or the Browns of such a repudiaton. Indeed, before the motion judge, the City agreed to affirmative answers to the following questions:

> Question No. 1:
>
> 1. Did the Agreement of April 27, 1953, properly interpreted, impose a perpetual obligation on the Township of Thurlow to maintain the drainage system it has installed in good working condition at all times and to make good any and all damage caused to the property owner whoever that may be from time to time as a result of lack of repair or of acts done at any time by the corporation in maintaining and repairing the system.
>
> Question No. 2:
>
> 2. Whether as a result of the amalgamation of the Township of Thurlow and the Defendant City in 1998, the Defendant City is bound by the contractual obligations of the former Township which are found to have been created by the Agreement.

37 The motion judge answered these questions in the manner agreed by the parties, and granted declaratory relief accordingly, in the language of the questions as posed.

38 In his reasons on the Special Case, the motion judge observed, at para. 71, that the parties' agreement regarding the answers to these two questions "would appear to defeat or bar any limitation period defence".

39 I agree that the consent responses to Question Nos. 1 and 2 on the Special Case significantly undercut the City's limitation period arguments. By consenting to these answers, the City acknowledged that it was bound by Thurlow's obligations under the Agreement (Question No. 2) and that the Agreement imposed "*a perpetual obligation*" "to maintain the drainage system...in good working condition *at all times*" and "to make good any and all damage caused to the property owner *whoever that may be from time to time*" as a result of the City's conduct (Question No. 1) (emphasis added). This is not the language of a finite or terminable obligation.

40 That said, the motion judge's reasons confirm that all the City's limitation period arguments were live issues during argument of the Special Case. It appears that, before the motion judge, the City acknowledged that it is bound by Thurlow's obligations under the Agreement, and that those obligations are perpetual, but it nevertheless maintained its position that the Agreement is unenforceable on several grounds. These grounds included the claim that Thurlow and the City had repudiated the Agreement and that the Pleiziers and/or the Browns had elected to terminate the Agreement in the face of those repudiations. This had the effect, the City says, of bringing the parties' future obligations under the Agreement to an end, thereby triggering the com-mencement of a limitation period in respect of the municipality's breach of the Agreement.

41 As I read the record, there was no dispute before the motion judge as to whether a repudiation or repudiations of the Agreement had occurred. Nor is the fact of these repudiations challenged on appeal. The critical issue, therefore, is whether the repudiations were accepted or adopted by the relevant property owners: the Pleiziers and, later, the Browns. In these circumstances, I will first address the governing principles regarding the consequences of a repudiatory breach or anticipatory repudiation of contract.

(b) Governing Principles

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42 A repudiatory breach or an anticipatory repudiation of contract does not, in itself, terminate or discharge a contract. In *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at para. 40, the Supreme Court explained:

> Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each [party] has a right to sue for damages for *past or future breaches*" (emphasis in original): *Cheshire, Fifoot & Furmston's Law of Contract* (12th ed. 1991), by M.P. Furmston at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.

See also *Canada Egg Products Ltd. v. Canadian Doughnut Co.*, [1955] S.C.R. 398 (S.C.C.), at pp. 406-7; *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.*, [2006] O.J. No. 1964, 270 D.L.R. (4th) 181 (Ont. C.A.), at para. 49.

43 In his leading textbook, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005), John D. McCamus refers to the election right of the innocent party on repudiation as an option to disaffirm or affirm the contract. Disaffirmation of the contract, in this sense, constitutes an election to terminate the contract in the face of the non-innocent party's repudiation of the contract. In the applicable authorities, it is frequently said that an election to disaffirm the contract is an 'acceptance' [1] or 'adoption' of the repudiation. On this view, an election to affirm the repudiated contract constitutes rejection or denial of the repudiation and a decision to treat the contract as subsisting and on-going.

44 Professor McCamus puts it this way, at p. 654:

> [I]n the context of a repudiatory breach of an agreement, the victim of the breach is entitled either to affirm or disaffirm the agreement and, in either event, pursue remedies for breach of contract. Similarly, in the context of anticipatory repudiation, the effect of the repudiation is to confer an option upon the innocent party either to disaffirm or affirm the contract. Thus, although the innocent party is entitled to disaffirm the agreement immediately and sue, that party may prefer to affirm the agreement and encourage or insist upon performance by the repudiating party or, more passively, simply wait and see whether the repudiating party does in fact eventually refuse to perform his or her contractual obligations when they fall due. [Citations omitted.]

45 It appears to be settled law in Canada that where the innocent party to a repudiatory breach or an anticipatory repudiation wishes to be discharged from the contract, the election to disaffirm the contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time. Communication of the election to disaffirm or terminate the contract may be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: McCamus, at pp. 659-61.

46 In *American National Red Cross v. Geddes Brothers* (1920), 61 S.C.R. 143 (S.C.C.), rev'g (1920), 47 O.L.R. 163 (Ont. C.A.), the Supreme Court of Canada addressed the means by which the adoption of a repudiation may be effectively communicated. Sir Louis Davies said, at p. 145:

> The question then, it seems to me, in every such case must be whether under the proved facts adoption of one party to a contract of its repudiation by the other party may be inferred from the proved facts, or whether an actual notice of acceptance or adoption must be given by the party receiving notice of the repudiation to the party repudiating.
>
> It seems to me from reading the authorities that such an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved.

47 In *American National*, Davies C.J. concluded, at p. 147, that a direct communication to the repudiating party of the election to disaffirm the repudiated contract is not essential "where facts proved allow of a fair inference of acceptance

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of renunciation [repudiation in this context] being drawn". This view was endorsed by a majority of the Supreme Court in *Kamlee Construction Ltd. v. Oakville (Town)* (1960), 26 D.L.R. (2d) 166 (S.C.C.), at 182.

48 More recently, in *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167, 239 N.S.R. (2d) 270 (N.S. C.A.), at para. 91, Saunders J.A. of the Nova Scotia Court of Appeal accepted the following description of what constitutes 'acceptance' of repudiation, set out in Chitty on Contracts, 28th ed. (London: Sweet & Maxwell, 1999), Vol. I, at p. 25-012:

> Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must "accept the repudiation." It is usually done by communicating the decision to terminate [to] the party in default although it may be sufficient to lead evidence of an "unequivocal overt act which is inconsistent with the subsistence of the contract ... without any concurrent manifestation of intent directed to the other party" ... *Acceptance of a repudiation must be clear and unequivocal and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose. But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation. It all depends on "the particular contractual relationship and the particular circumstances of the case."*
>
> [Emphasis added.]

(c) The 1980 Repudiation

49 In this case, the City argues that Thurlow's repudiation of the Agreement was "accepted" by the Pleiziers when they failed to take any steps to enforce the Agreement from the date of repudiation (1980) to the date of the sale of the property to the Browns (2003). Both the passage of time and the sale transaction, the City submits, are inconsistent with the notion that Thurlow continued to be bound to perform the Agreement. I would not give effect to this argument.

50 The motion judge found that the Pleiziers' conduct "can be viewed as no more than inactivity." The agreed facts on the Special Case lend strong support to this finding. Those facts include the stipulation that when informed by letter dated December 10, 1980, of Thurlow's position that it was "no longer bound by the provisions of the [Agreement]", the Pleiziers "took no action to enforce the Agreement or otherwise pursue the issue of the Agreement with [Thurlow]". The parties also agreed: "There is in fact no evidence that Mr. and Mrs. Pleizier responded in any way to [Thurlow's] letter."

51 I agree with the motion judge that the Pleiziers' silence or inaction in the face of Thurlow's repudiation of the Agreement falls short of satisfying the requirement of clear and unequivocal communication to the repudiating party of the adoption of a repudiatory breach or anticipatory repudiation of contract.

52 As Saunders J.A. of the Nova Scotia Court of Appeal noted in *White*, at para. 91, citing Chitty on Contracts at p. 25-012, "mere inactivity or acquiescence will generally not be regarded as acceptance" of a repudiation. While there are circumstances where some overt act by the innocent party, viewed in the context of all the parties' dealings, may constitute an acknowledgement or affirmation that the repudiated contract has been terminated, there is simply no evidence in this case of such an overt act by the Pleiziers. Unlike some of the authorities relied on by the City, this is not a case where the innocent party, after repudiation, fails to honour the terms of the contract. There is no evidence that the Pleiziers did not comply with the Agreement or stand ready to perform under it.

53 I underscore that an act of repudiation, in itself, does not terminate the repudiated contract. Rather, as I have indicated, the innocent party must elect to disaffirm or affirm the contract. Where disaffirmation is intended, this election must be clearly and unequivocally communicated to the repudiating party on a timely basis.

54 Thus, contrary to the City's submission, Thurlow's December 1980 letter to the Pleiziers did not terminate the Agreement. Absent an election by the Pleiziers to disaffirm the Agreement and thereby adopt or accept Thurlow's repudiation of it, the Agreement continued in full force and effect. In my opinion, the fact that the municipality did not seek access to the affected lands to carry out maintenance or repair activities does not mean that such access was unavailable.

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55 Moreover, as the motion judge held, the burden to establish the acceptance of the repudiation of a contract is on the party asserting acceptance: see for example, *Ginter v. Chapman* (1967), 60 W.W.R. 385 (B.C. C.A.), at para. 17, aff'd [1968] S.C.R. 560 (S.C.C.). On the agreed record, the motion judge found, as a fact, that the City failed to discharge this burden. I see no palpable and overriding error in this key finding. Indeed, in my view, it is firmly supported by the record.

56 The City relies on *Ginter* and *Picavet v. Salem Developments Ltd.*, [2000] O.J. No. 2806 (Ont. S.C.J.) for the proposition that, in some circumstances, the parties to a repudiated contract will be seen to have mutually abandoned it notwithstanding that the innocent party to the repudiation might have failed to clearly communicate a disaffirmation of the contract. I would not accept this argument in this case.

57 First, none of the questions on the Special Case addressed the issue of abandonment. Similarly, there were no agreed facts on the Special Case that bear on the issue of abandonment save, arguably, for those relied upon by the City to support its acceptance of repudiation argument. Further, the City acknowledged before this court that a claim of abandonment, *per se*, was neither argued before the motion judge nor pleaded in the manner now asserted by the City.

58 An allegation of abandonment cannot be evaluated in a factual vacuum. A finding of abandonment must be based on an assessment of the full circumstances of the innocent party's conduct in the aftermath of the other party's repudiation of the contract at issue. This critical assessment was not and cannot be properly undertaken on this record. This is dispositive of the City's ability to raise an abandonment claim on this appeal.

59 Moreover, and in any event, I do not regard the cases relied upon by the City in support of its abandonment claim as being on all fours with the facts of this case. In *Picavet*, the post-repudiation conduct of the victim of the repudiation was inconsistent with the continuation of the contract at issue: the victim failed to perform any of his post-repudiation obligations under the contract. This conduct strongly supported the conclusion that the victim had accepted and treated the contract as at an end. It was in this context that the court held, at para. 72, that both parties had "walked away from the agreement and abandoned it".

60 In this case, however, there is no evidence that the Pleiziers, after Thurlow's repudiation, conducted themselves in a manner inconsistent with their obligation under the Agreement to provide Thurlow with access to their lands. This was the landowner's only obligation under the Agreement. I will return to this issue later in these reasons.

61 *Ginter* is also factually distinguishable from this case. In *Ginter*, the non-repudiating parties sought damages for breach of contract against the repudiating party on the basis that they had disaffirmed the relevant contract when it was repudiated. However, no election to accept or adopt the repudiation was in fact communicated to the repudiating party within a reasonable time. Instead, the victims of the repudiation twice sought to extend the time for their election to disaffirm and attempted to negotiate a new agreement. It was only when these negotiations failed, that they claimed to have disaffirmed the repudiated contract.

62 Again, that is not this case. Here, the Pleiziers did not seek to disaffirm the Agreement by clear and unequivocal communication to Thurlow, nor did they take legal action to recover damages or other relief based on Thurlow's repudiation. Indeed, as essentially agreed by the parties, they took no steps to terminate the Agreement after Thurlow's repudiation. Nor is there any evidence that they otherwise acted in a manner inconsistent with the continuation of the Agreement.

63 Notwithstanding the City's acknowledgment on the Special Case that the Agreement imposes perpetual obligations, the City argues that a commercially reasonable interpretation of the Agreement requires that it be construed as including an implied term that it could be terminated on notice. As I understood the City's submission, it essentially contends that even if Thurlow's repudiation of the Agreement was not accepted or adopted by the Pleiziers, the City's obligations cannot be viewed as enforceable indefinitely.

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64 While the courts no longer presume that an indefinite term contract is perpetual, the specific terms of the contract as well as the relationship between the parties and the surrounding circumstances may dictate enforcement of an indefinite term contract on a perpetual basis: *1397868 Ontario Ltd. v. Nordic Gaming Corp.*, 2010 ONCA 101, 258 O.A.C. 173 (Ont. C.A.), at paras. 13-14. Thus, when the term of a contract is indefinite and there is no provision for termination on reasonable notice, a court may treat the contract as perpetual in nature or the court may imply a provision of unilateral termination on reasonable notice.

65 In this case, by reason of its consent to the answer to Question No. 1 on the Special Case, the City explicitly conceded that the Agreement imposes perpetual obligations on the City. The suggestion that the Agreement contains, by implication, a termination on notice term is inconsistent with that concession. In my view, it is also inconsistent with the intentions of the parties as reflected in the express provisions of the Agreement.

66 The courts are loathe to imply a term in a contract that is inconsistent with the express terms of the contract: see *G. Ford Homes Ltd. v. Draft Masonry (York) Co.* (1983), 43 O.R. (2d) 401 (Ont. C.A.), at p. 403; *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 (S.C.C.), at pp. 712-13. This is especially so where, as here, there is no basis on which to reasonably conclude that the parties would have agreed to such a term had it been raised at the time the contract was originally entered into. In this case, the precise purpose of the Agreement — securing indefinite access to Mr. Sills's property — and the specified nature of the obligations created under the Agreement — perpetual maintenance and repair of the drainage system — tell strongly against the implication of such a term.

67 Accordingly, I conclude that the City's limitation period argument concerning the 1980 repudiation of the Agreement fails.

(d) The 2004 Repudiation

68 I will also briefly address the City's contention that its 2004 repudiation of the Agreement triggered the running of a limitation period that expired either in 2010, under the 1990 Act, or in 2006, under the Current Act. As I have already indicated, this claim was not advanced directly by the City in its factum and only brief mention of it was made by the City in oral argument.

69 Like the limitation period argument mounted in respect of Thurlow's 1980 repudiation of the Agreement, the City's limitation period argument in respect of the 2004 repudiation rests on the contention that the innocent parties to the repudiation (the Browns), by their conduct, adopted or affirmed that repudiation, thereby terminating the Agreement. There is no evidentiary foundation for this assertion.

70 The motion judge rejected the City's claim that the Browns had accepted the City's 2004 repudiation of the Agreement. He stated, at paras. 81 and 83:

> The facts as to the conduct of the [Browns] are less clear [than the facts regarding the Pleiziers' conduct] ... What occurred between the December 15, 2004 letter and the August 3, 2010 letter is not a matter of record. Clearly, there were ongoing discussions that the City saw fit to end in its August 3, 2010 letter.
>
> . . . . .
>
> On the record before me, I cannot find that the letter of December 15, 2004 started the time of a limitation defence to begin to run. For example, *bona fide* settlement discussions can suspend the commence-ment of a limitation period and its running in certain circumstances. The onus is on the [City] to prove the date that the limitation began.

71 I agree with the motion judge's assessment of the state of the record and his conclusion. On the agreed facts, it is clear that the Browns did not directly accept the City's repudiation of the Agreement. And there is virtually a complete paucity of evidence and agreed facts regarding what, if anything, transpired between the Browns and the City concerning

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the Agreement from the date of the 2004 repudiation until August 2010. The agreed facts merely stipulate that, after the City's December 2004 letter, "further discussions went nowhere" and litigation followed.

72 Given this significant evidentiary gap, I agree with the motion judge that the City failed to discharge its onus to prove facts regarding conduct by the Browns from which it could reasonably be inferred that they elected to disaffirm the Agreement in the face of the City's repudiatory breach.

(2) The Browns' Standing to Sue

73 The common law doctrine of privity of contract, an established principle of contract law, stands for the proposition that "no one but the parties to a contract can be bound by it or entitled under it": *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.*, [1980] 2 S.C.R. 228 (S.C.C.), at para. 9. See also *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), at p. 416; *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847 (U.K. H.L.), at p. 853. In this case, it is common ground that the Browns have no privity of contract with the City in respect of the Agreement. They are not signatories to the Agreement and no explicit assignment or transfer of the Agreement was made in their favour.

74 Relying on this lack of privity, the City argues that the Browns have no standing to enforce the Agreement because none of the recognized exceptions to the privity of contract doctrine applies on the facts of this case. The City submits that: (1) its covenants under the Agreement are positive covenants which, by operation of law, cannot run with the land; (2) because the Agreement was not assigned or transferred to the Browns, there is no equitable basis on which the Browns are entitled to enforce it; and (3) in the alternative, even if an equitable basis exists for recognition of an assignment or transfer of the Agreement to the Browns, it is defeated by the application of the doctrine of laches.

75 In response, the Browns rely on what they describe as three exceptions or qualifications to the privity of contract doctrine, any one of which, they maintain, affords them standing to enforce the Agreement. In his factum, counsel for the Browns identified these three "exceptions" or qualifications in this fashion: (1) the enurement clause of the Agreement, under which the benefit of the Agreement flowed to the Browns; (2) the benefit of the City's covenants in the Agreement runs with the lands to the benefit the Browns, as Mr. Sills's successors in title; and (3) the 'principled exception' to the privity rule established by the Supreme Court in *London Drugs*.

76 The motion judge ruled that the first two suggested exceptions or qualifications apply on the facts of this case. He held that the Browns are successors of Mr. Sills and that the benefit of the Agreement flowed to them under the express terms of the Agreement. He also held that the benefit of the City's covenants under the Agreement run with the land and are enforceable against the City, as the original covenantor under the Agreement. Given these holdings, the motion judge found it unnecessary to address the Browns' argument that the principled exception to the privity doctrine also applies.

77 In the result, the motion judge granted declarations that the Browns are "successors of the Agreement" and, thus, they are entitled to enforce it without an express assignment (Question No. 3 on the Special Case); the City does not have a valid defence to the Browns' claims on the basis that they are trying to enforce "a positive covenant in regard to their land" (Question No. 8 on the Special Case); and, the Browns' claim for damages for breach of the Agreement is not defeated by the doctrine of laches (Question No. 14 on the Special Case).

78 For reasons that differ in some respects from those of the motion judge, I am of the view that he was correct in concluding, in effect, that the Browns have standing to enforce the Agreement.

79 It is important to note at the outset that the doctrine of privity of contract is of considerably diminished force in Canada as a continuing principle of contract law. It has been subject to a wealth of repeated academic and judicial criticism, leading to frequent calls for law reform in Canada and elsewhere. See for example, *London Drugs*, at pp. 418-26; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.), at para. 26; McCamus, at pp. 296-301. Indeed, several Commonwealth jurisdictions have abrogated the privity doctrine entirely, or in specific contexts, by statute. In other instances, the reach of the doctrine has been "significantly undermined by a growing list of exceptions

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to the rule": McCamus, at p. 299. See also Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham: LexisNexus Canada Inc., 2012) at p. 229. Several of the leading cases cited by the parties on this appeal afford abundant evidence of the relaxation of the ambit of the doctrine in particular cases. Thus, while the doctrine survives in Canada, it persists only in weakened form.

(a) The Enurement Clause

80 The analysis of the City's standing challenge must begin with consideration of the intentions of the parties at the time the Agreement was entered into, as reflected in the provisions of the Agreement. The Browns rely, especially, on the enurement clause in the Agreement, which they characterize as an "exception" or qualification to the privity of contract doctrine. While I view the use of the term "exception" in this context as misconceived — the enurement clause does not fall within or constitute, by itself, a recognized exception to the privity rule, such as trust or agency — I do accept that the language of the provision is critical in this case. For convenience, I again set out the terms of the enurement clause, as agreed between Thurlow and Mr. Sills:

> THIS INDENTURE Shall [*sic*] inure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, successors and assigns.

81 The motion judge held, at para. 30, that the words of the enurement clause "clearly demonstrate that it was in the contemplation of the parties that there would be subsequent owners of Mr. Sills' [*sic*] property". He found, as a fact, that the Browns are successors of Mr. Sills, as contemplated under the enurement clause. I agree. Moreover, I did not understand the City to challenge these findings on appeal. To the contrary, counsel for the City candidly conceded during oral argument that the Browns are successors in interest to Mr. Sills. This was a proper concession.

82 The motion judge did not comment further on the effect of these findings in relation to the privity rule, saying merely, at para. 31: "Therefore, I find that the [Browns] fit within this exception to the privity of contract rule as successors."

83 The question therefore arises as to what legal consequences flow from the language employed by the parties in the enurement clause. As I have already said, I do not think this type of contractual provision can properly be termed an "exception" to the doctrine of privity of contract on the current state of the law.

84 That said, the broad and unqualified language of the enurement clause constitutes an express stipulation by the contracting parties that they intended the benefit of the Agreement to be shared by future owners of Mr. Sills's lands, as his successors or assigns or by way of inheritance. The language of the enurement clause unequivocally confirms that the contracting parties intended and agreed that the benefit of the Agreement would extend to an aggregation or class of persons that includes successor landowners of Mr. Sills. On the admitted findings of the motion judge, the Browns are Mr. Sills's successors. In this sense, the Browns are not strangers or 'third parties' to the Agreement. Rather, they step into Mr. Sills's shoes and have standing to enforce the Agreement as against the City as if they were the original covenantee(s) to the Agreement: see Angela Swan and Jakub Adamski, *Canadian Contract Law*, at p. 169 and, generally, at pp. 163-226.

85 In these circumstances, given the intention of the contracting parties stipulated in the Agreement under the enurement clause, I conclude that 'relaxing' the doctrine of privity in this case does not frustrate the reasonable expectations of the parties at the time the Agreement was formed. To the contrary, it gives effect to them.

86 This conclusion is fortified by the agreed answers to Questions Nos. 1 and 2 on the Special Case, quoted earlier in these reasons. As I have said, by those answers, the City agreed that the Agreement imposes: "a *perpetual* obligation" on it to maintain the drainage system "*at all times*" and to make good damage caused "*to the property owner whoever that may be from time to time*" as a result of lack of repair or acts done "*at any time*" by the City "in maintaining and repairing the system" (emphasis added). As the motion judge aptly observed, at para. 23, the wording of these answers "appears clearly to favour a determination of [the privity of contract] issue in favour of the [Browns]".

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87 I agree. On the language of the enurement clause and the agreed proper interpretation of the Agreement as a whole, the City and Mr. Sills clearly understood that the continuing access sought by the City to the affected lands could only be provided by the property owner "whoever that may be from time to time". In consideration for such continuing access, the City undertook to maintain and repair the drainage system, indefinitely, for the benefit of the property owner.

88 It is also important to emphasize that the City itself is not a stranger to the Agreement, against whom it is sought to enforce contractual covenants. The City acknowledged on the Special Case that, as a result of the 1998 amalgamation of Thurlow and the City of Belleville, the City stands in Thurlow's shoes and is bound by Thurlow's contractual obligations created under the Agreement. Thus, as a matter of law, the City, in effect, is the original covenantor under the Agreement.

89 The City relies strongly on the decision of the Supreme Court in *Greenwood* in support of its privity-based attack on the enforceability of the Agreement. I agree that *Greenwood* is the principal obstacle to the Browns' standing claim. However, for several reasons, I do not think that *Greenwood* and its progeny bar the Browns' action against the City.

90 In *Greenwood*, the employees of a corporate tenant of a shopping centre, while acting in the course of their employment, negligently caused a fire that destroyed part of the centre. The question arose whether the provisions of the lease that required the landlord to insure the premises protected the tenant's employees from liability. The Supreme Court held that the employees, who were strangers to the lease and, hence, had no privity of contract with the landlord, could not claim the benefit and protection of the insurance provisions. As this court said in *Tony & Jim's Holdings Ltd. v. Silva* (1999), 43 O.R. (3d) 633 (Ont. C.A.), at para. 15, in so holding, the Supreme Court in *Greenwood* essentially refused to relax the application of the privity rule beyond the then-recognized exceptions of trust or agency. On the limited evidence before it, the Supreme Court concluded that neither exception was made out.

91 In my opinion, although not explicitly overruled, *Greenwood* has been overtaken by the subsequent decisions of the Supreme Court in *London Drugs* and *Fraser River*, which established the principled exception to the doctrine of privity of contract.

92 I will return to the facts and significance to this case of *London Drugs* and *Fraser River* later in these reasons. At this point, however, I note that *London Drugs* involved the question whether third-party beneficiaries to a contract could invoke the protection of a limited liability clause agreed upon by the original contracting parties. In addressing this question, Iacobucci J., writing for a majority of the Supreme Court, considered and distinguished *Greenwood* on several grounds. As relevant here, he noted, at p. 431, that unlike the facts in *London Drugs*, (1) *Greenwood* involved a lease rather than a contract for services; (2) there was little, if any, evidence to support a finding that the parties to the contract at issue in *Greenwood* intended to confer a benefit on the parties who sought the protection of the limited liability clause; and (3) in *Greenwood*, the parties seeking to obtain benefits under the contract were viewed as complete strangers and not third-party beneficiaries. In light of these distinguishing features, Iacobucci J. concluded, at p. 431, that *Greenwood* is of limited use in a determination of third-party beneficiary rights. This conclusion, and the distinguishing aspects of *Greenwood* identified by Iacobucci J. in *London Drugs*, apply equally to this case.

93 Indeed, in my view, this case is even more distinct from *Greenwood* than the factors identified in *London Drugs* suggest. *Greenwood* did not involve the consideration of an enurement clause or the rights of persons who stood in the shoes of the original contracting parties. In contrast, this case involves the right of successors to an original covenantee — who were expressly intended by the original contracting parties to share in the benefit of their bargain — to rely on and enforce the benefit of perpetual contractual covenants given by the original covenantor. As I have said, by reason of the enurement clause in the Agreement, Mr. Sills's successors effectively assume the position of first parties to the Agreement by stepping into his shoes, as the original covenantee. In this capacity, the Browns simply seek to require the City to make good on the promises it saw fit to make under the Agreement.

94 On these particular facts, the strict application of the doctrine of privity would ignore the nature, stated purpose and express terms of the Agreement and allow the City, as the original covenantor, to escape the covenants to which, as

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a matter of law, it must be seen to have expressly consented. In these circumstances, I conclude that the strict application of the doctrine of privity should not stand in the way of justice: *London Drugs*, at p. 446.

(b) The Principled Exception to the Privity Rule

95 Given my conclusion that the Browns have standing to enforce the Agreement by operation of the enurement clause, it is not technically necessary to consider the other arguments advanced by the City in support of its privity of contract objection to the enforceability of the Agreement. Were it necessary to do so, however, I would also rest the rejection of this objection on the principled exception to the privity rule established in *London Drugs*, as amplified and applied in *Fraser River*. The principled exception may be explained by brief reference to *London Drugs* and *Fraser River*.

96 In *London Drugs*, the Supreme Court was concerned with whether a contractual limitation of liability clause in favour of a warehouseman applied to protect the warehouseman's employees from liability in a lawsuit brought against them and their employer by a customer whose goods were damaged through the employees' negligence while the goods were in storage at the employer's warehouse. A majority of the Supreme Court held, at pp. 414 and 452, that the concept of "warehouseman" under the contract between the employer and the customer must be taken to implicitly cover the warehouseman's employees. As the employees were thus third-party beneficiaries to the limitation of liability clause set out in the relevant storage contract between their employer and the customer, and as they were performing the precise services contracted for by the customer, the employees could benefit from the clause notwithstanding that they were not signatories to the contract.

97 As this court stated in *Madison Developments Ltd. v. Plan Electric Co.* (1997), 36 O.R. (3d) 80 (Ont. C.A.), at para. 30, leave to appeal to S.C.C. refused, (1998), [1997] S.C.C.A. No. 659 (S.C.C.), the Supreme Court in *London Drugs* not only distinguished and declined to follow *Greenwood*, it also applied new reasoning to create an incremental change in the law of privity and set forth a test for the application of this change.

98 More specifically, the majority of the Supreme Court held in *London Drugs*, at p. 448, that while none of the traditionally-recognized exceptions to the privity of contract doctrine applied to assist the employees, the privity rule should be relaxed where the following requirements were satisfied:

> 1. the limitation of liability clause must, either expressly or impliedly, extend its benefits to the employees (or employee) seeking to rely on it; and
>
> 2. the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred.

99 The principled exception to the privity rule introduced in *London Drugs* was again considered and applied, this time unanimously, by the Supreme Court in *Fraser River*. In that case, at paras. 28-29 and 32, the court clarified that satisfaction of the first branch of the *London Drugs* test is a threshold requirement: to invoke the exception, there must be a showing that the contracting parties intended to extend the benefit in question to the third party seeking to rely on the contractual provision. Further, under the second branch of the test, the intention to extend the benefit of the contractual provision to the actions of a third-party beneficiary is irrelevant unless the actions of the third party come within the scope of the contract in general, or the provision in particular, between the initial contracting parties.

100 The Supreme Court emphasized in *Fraser River*, at para. 32, as did the majority of the court in *London Drugs*, at p. 449, that the extension of the principled approach to create a new exception to the doctrine of privity of contract, "first and foremost must be dependent upon the intention of the contracting parties". Finally, the application of the principled approach is not confined to situations involving only employer-employee relationships or limited liability: see *Fraser River*, at para. 31; *Madison*, at para. 30.

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101 I am satisfied that the first branch of the test for the application of the principled exception to the privity rule is met in this case. There can be no question that under the terms of the Agreement, the original contracting parties intended to extend the benefit of the City's covenants under the Agreement to an ascertainable group or class of persons that includes the Browns. Thus, there is a compelling argument in favour of relaxing the doctrine of privity in this case, given the inclusion of an enurement clause that expressly refers to "successors" of Mr. Sills, like the Browns. On this aspect of the facts, this case is closer to *Fraser River* than to *London Drugs*.

102 Not without some hesitation, I am also persuaded that the second branch of the principled exception test is satisfied. The Agreement required that Mr. Sills provide access to his lands for the purpose of the maintenance and repair of the drainage system that Thurlow had installed. This was the activity of the convenantee for which the parties bargained. There is no evidence nor any agreed facts in the Special Case indicating that Mr. Sills, or the Browns as his successors in interest, failed to perform or stand ready to perform this obligation under the Agreement by denying or impeding the City's access to their lands for the purposes envisaged by the Agreement.

103 I appreciate that the last repair work on the drainage system appears to have been carried out in 1959, more than 50 years ago. But nothing on the Special Case indicates that any of Mr. Sills, the Pleiziers or the Browns ever denied access to their property or would have done so if such access had been sought by the municipality.

104 The City submits that it was incumbent on the Browns and their predecessors in title to call on the City for the maintenance or repair of the drainage system and that their failure to do so further signals that they elected to disaffirm the contract.

105 I disagree. This assertion is wholly unsupported by the language of the Agreement. Moreover, on the evidence, both the Pleiziers and the Browns did draw the City's attention to its obligations under the Agreement to maintain and repair the drainage system. The City (and Thurlow) responded to the requests that it honour its obligations with unilateral repudiations of the Agreement. In these circumstances, I do not think that it is open to the City to now assert that the landowners were obliged, yet failed, to seek to hold the City to its obligations.

106 For the same reasons, I would reject the City's claim that the Browns' entitlement to enforce the Agreement is defeated by laches. This equitable defence is of limited application in the case of a claim for enforcement of the benefit of a contract. These claims, as here, relate to the alleged contractual entitlement to specific performance or damages. They are, therefore, founded in law rather than equity.

107 In this case, we are concerned with the City's continuing breach of its obligations under the Agreement following its unilateral repudiations of the Agreement. I see no dispositive effect of delay by the Browns on the liability of the City in these circumstances.

108 Further, and importantly, there is no evidence that the Pleiziers' or the Browns' conduct resulted in prejudice to the City. The City's bald claim of prejudice is based solely on the historical nature of the Agreement — no particulars of actual prejudice to the City were proven or agreed upon by the parties.

109 In sum, no agreed facts or other evidence on this record suggests that any of Mr. Sills, the Pleiziers or the Browns resiled from or failed to perform the Agreement. To paraphrase the language of *Fraser River*, at para. 39, the provision by them of access to their property was the "very activity" contemplated by and required of them under the Agreement containing the provision upon which they seek to rely.

110 I recognize that *London Drugs* and *Fraser River* were cases where the third-party beneficiaries sought to rely, by way of defence, on the benefit of the contractual provisions at issue to resist claims brought against them — they were not seeking to enforce the affirmative benefit of the relevant contractual provisions.

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111 Nonetheless, it is my view that the Browns' status as the successors of the original covenantee under the Agreement affords them the right to seek to enforce the original covenantor's contractual obligations, as against the original covenantor. In effect, for the purpose of enforcement of the Agreement, the Browns are Mr. Sills and the City is Thurlow. Further, insofar as the performance of the City's obligations under the Agreement are concerned, there is a clear identity of interest between Mr. Sills and the Browns. As Mr. Sills's successors, the Browns stood ready to comply with the activity required of them under the Agreement — the provision of access to their lands. In all these circumstances, the application of the principled exception to the privity rule advances the interests of justice.

(3) The Agreement is not Void on Public Policy Grounds

112 The City raises two public policy-based arguments as further impediments to the enforcement of the Agreement by the Browns. It argues that the Agreement is unenforceable as against it because a perpetual contract that admits of no right of termination offends public policy and is unconscionable. Further, the City says, the enforcement of perpetual obligations of the kind created under the Agreement offends public policy because it fetters the City's discretion regarding the future use of public roads and road allowances. In my opinion, these arguments cannot succeed on this record.

113 With respect to the first argument, Question No. 4 on the Special Case reads: "Whether or not the Agreement, if properly interpreted as imposing a perpetual obligation, is invalid as contrary to public policy because it does impose a perpetual obligation". In respect of this question, the motion judge ruled: "[T]he Agreement, which imposes a perpetual obligation upon the City, is not invalid as contrary to public policy because it does impose a perpetual obligation."

114 Although the City raised Question No. 4 in its Notice of Appeal, it did not challenge the motion judge's ruling on this issue or otherwise mention the matter in its factum. Instead, the City sought to advance this claim during oral argument. The procedural unfairness to the Browns arising from this tactic is manifest. In the circumstances, in my view, the City is precluded from attempting to raise this issue on appeal. To conclude otherwise would offend basic fairness.

115 The City's second public-policy based argument fails for lack of evidentiary support. As the Browns submit, there is simply no evidence or agreed facts to support the City's assertion that its discretion regarding the future use of public roads and road allowances will be fettered or impeded if it is held to its obligations under the Agreement.

116 I would reject this ground of appeal.

IV. Concluding Comments

117 I conclude with these comments. The disposition of this appeal on the basis that I propose does not deprive the City of any recourse. As acknowledged by the Browns during oral argument, it is open to the City to pursue those defences to enforcement of the Agreement pleaded by it in its statement of defence that were not dealt with on the Special Case, *e.g.* the City's claim that the Agreement was frustrated. Further, on a properly amended pleading, there is nothing to prevent the City from pursuing, if so advised, its claim that Mr. Sills's successors in title abandoned the Agreement. These matters were not dealt with on the Special Case and formed no permissible part of the issues raised before this court. Of course, the adjudication of the Browns' entitlement to the specific remedies sought by them also remains for another day.

V. Disposition

118 For the reasons given, I would dismiss the appeal. If the parties are unable to agree on the costs of this appeal, the Browns may submit their brief written costs submission to the Registrar of this court, within 15 days from the date of the release of these reasons. The City shall submit its brief responding submissions on costs to the Registrar, within 15 days thereafter.

***Robert P. Armstrong J.A.*:**

I agree

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***Gloria Epstein J.A.*:**

I agree

Appeal dismissed.

Footnotes

1 Professor McCamus, at p. 658, queries the appropriateness of this term, suggesting that it can be misleading. He emphasizes that the right of the innocent party on repudiation is to elect to terminate (disaffirm) or affirm the contract.

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Tab 2

2001 SCC 58, 2001 CSC 58
Supreme Court of Canada

Naylor Group Inc. v. Ellis-Don Construction Ltd.

2001 CarswellOnt 3340, 2001 CarswellOnt 3341, 2001 SCC 58, 2001 CSC 58, [2001] 2 S.C.R. 943, [2001] S.C.J. No. 56, 108 A.C.W.S. (3d) 284, 10 C.L.R. (3d) 1, 153 O.A.C. 341, 17 B.L.R. (3d) 161, 204 D.L.R. (4th) 513, 277 N.R. 1, 55 O.R. (3d) 312 (headnote only), 55 O.R. (3d) 312 (note), 55 O.R. (3d) 312, J.E. 2001-1790, REJB 2001-25835

Ellis-Don Construction Ltd., Appellant/Respondent on cross-appeal v. Naylor Group Inc., Respondent/Appellant on cross-appeal

McLachlin C.J.C., Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Judgment: September 27, 2001
Heard: January 22, 2001
Docket: 27321

Proceedings: varying (1999), 171 D.L.R. (4th) 243, 45 C.L.R. (2d) 42, 119 O.A.C. 182, 43 O.R. (3d) 325, 49 B.L.R. (2d) 45 (Ont. C.A.); reversing in part (1996), 30 C.L.R. (2d) 195, 13 O.T.C. 141 ((Ont. Gen. Div.)

Counsel: *Earl A. Cherniak, Q.C.*, *Kirk F. Stevens*, *Sandra L. Coleman*, for Appellant/Respondent on cross-appeal
Alan A. Farrer, *Leah K. Bowness*, for Respondent/Appellant on cross-appeal

Subject: Contracts

APPEAL by contractor and CROSS-APPEAL by subcontractor from judgment reported at (1999), 45 C.L.R. (2d) 42, 171 D.L.R. (4th) 243, 119 O.A.C. 182, 43 O.R. (3d) 325, 49 B.L.R. (2d) 45 (Ont. C.A.), reversing in part (1996), 30 C.L.R. (2d) 195, 13 O.T.C. 141, (Ont. Gen. Div.).

POURVOI de l'entrepreneur et POURVOI INCIDENT du sous-traitant à l'encontre du jugement publié à (1999), 45 C.L.R. (2d) 42, 171 D.L.R. (4th) 243, 119 O.A.C. 182, 43 O.R. (3d) 325, 49 B.L.R. (2d) 45 (C.A. Ont.), qui a infirmé en partie (1996), 30 C.L.R. (2d) 195, 13 O.T.C. 141 (Div. Gén. Ont.).

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

1 This appeal raises the issue of a prime contractor's legal obligations (if any) to a prospective subcontractor whose bid it has incorporated in its own successful tender for a construction project under the rules of a structured bid depository. The appellant's Project Manager testified that a bid depository "is just a fancy name for somebody collecting prices". This, as will be seen, is something of an understatement.

2 The appellant, one of the largest construction firms in Ontario, acknowledges that it generally subcontracts with the trades "carried" in its own bid for a job, but says it has no legal obligation to do so. In this case, the respondent subcontractor was deemed unacceptable because its employees belonged to the wrong trade union. The respondent subcontractor replies that the appellant not only knew from the outset that the respondent's workers belonged to an in-house union ("The Employees Association of Naylor Group Incorporated"), but with full knowledge of that fact invited it to bid for the electrical work on a multi-million dollar project for renovations and additions to the Oakville-Trafalgar Memorial Hospital ("the owner" or "OTMH"). Worse, the appellant used the respondent's low bid to get the job, then "shopped" its bid elsewhere to get the work done at a very favourable price. All of this, says the respondent, undermined the integrity of the Bid Depository process and breached the terms of the tender contract.

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3 The Ontario Court of Appeal rejected the appellant's arguments. It held that the terms of the contract governing this particular tender required the appellant to enter into the electrical subcontract with the respondent in the absence of reasonable cause not to do so. I think that on the facts of this particular tender arrangement, this conclusion is correct. The issue, then, is whether reasonable cause existed. The appellant had invited the respondent to participate with the assurance that there would be no objection at a later date to its union affiliation, and affirmed this position repeatedly thereafter. The appellant's eventual reversal of that position was unreasonable. It is in accordance with the tendering contract that it bear the commercial consequences. The appeal must therefore be dismissed.

4 The respondent subcontractor cross-appeals the award of damages. It says it was entitled to its loss of profit on the lost contract (which the trial judge assessed at $730,286) and that this figure was inappropriately reduced by the Ontario Court of Appeal to $182,500 because of alleged "contingencies" which were not established in the evidence. I think the respondent is partly correct in this respect. Accepting the dollar figures generated by the courts below, but deleting one of the contingencies allowed by the Ontario Court of Appeal, I would allow the cross-appeal and give judgment for the respondent in the sum of $365,143.

I. Facts

5 In 1991, the OTMH called for tenders for the construction of an addition and renovation of its hospital through the Toronto Bid Depository.

1. The Bid Depository System

6 A bid depository is, in effect, a structured bidding process. The model used here was devised in the late 1950s by the construction industry with the participation of the Ontario government. It is designed to achieve fairness on building construction projects where the owner requires a lump sum tender based on plans and specifications, and where a multitude of prime contractors, trade contractors and suppliers are expected to get involved in the tendering process. At the relevant time, it worked as follows.

7 The Bid Depository's staff was notified of a new project by an owner who wished to make use of their services. A date was fixed by which the pre-qualified subcontractors were to submit on a standard form document (for ease of comparison) a breakdown of their prices. Identical project documentation was made available to all interested bidders in each of the subtrades. Their tenders were sealed and delivered to the Bid Depository office by a specified date and time and deposited in a designated locked box. On the due date, the subtrade bid documents were made available to interested prime contractors who selected the subcontractors (not necessarily the lowest bidder) they wanted to carry as part of their own bid to the owner. Prime contractor bids were required to be filed on a standard form on a fixed date (here, two days after the opening of the subtrade bids). The system offered conformity and comparability. The prime contractor bids were open for the owner's acceptance for a fixed period (here 90 days) and the subcontractor bids were open for acceptance by the prime contractor for a fixed period after the award of the prime contract (here 7 days). Each prime contractor was required to undertake "to place a Sub-Contract with one of the trade contractors who used the Bid Depository" (Rule 13(c) of the *Ontario Bid Depository Standard Rules and Procedures*, also known as the rules of the Toronto Bid Depository). These were not informal arrangements for the convenience of prime contractors (i.e., "just a fancy name for somebody collecting prices"). Each participant in the tendering process bound itself by contract to certain obligations and acquired thereby certain rights. The content of those rights and obligations is the subject matter of this litigation.

8 Thomas Hitchman, President of the respondent, explained it thus:

> ... the purpose of the Bid Depository is that the sub-trade contractors submit their price through the Bid Depository and then the general contractor has a time frame, in this case two days, to assemble his bid and in so doing he can use the numbers that come out of the various sub-trades that bid through the Bid Depository two days earlier.

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Q. I gather in the process there are more than just electrical sub-contractors tendering, is that correct?

A. Yes.

9 The process is considered fair to all participants because all parties bid on identical information, and their bids are disclosed to the relevant parties at the same time. In particular, it assures subtrades that their bids will not be "shopped" by a prime contractor to competing subcontractors to lever a price advantage. "Bid shopping" was defined by the trial judge as "the practice of soliciting a bid from a contractor, with whom one has no intention of dealing, and then disclosing or using that in an attempt to drive prices down amongst contractors with whom one does intend to deal" ((1996), 30 C.L.R. (2d) 195 (Ont. Gen. Div.), at p. 200). The Court of Appeal thought it sufficient if the "shopping" was to get a bid "for the same value or less" ((1999), 43 O.R. (3d) 325 (Ont. C.A.), at p. 330, footnote 3).

2. The Bidding History in This Case

10 The owner notified the Toronto Bid Depository of the project and a timetable was established whereby the bids of interested trade subcontractors were required to be made by December 10, 1991. A preliminary procedure was established by the owner and its architect to "pre-qualify" acceptable subcontractors by reference to such factors as their competence, track record on other projects, and financial viability. It being in the interest of prime contractors to have as many qualified firms as possible competing for the subcontracts, the appellant approached the respondent in early November 1991 to bid on the job. The respondent volunteered the important information that its workers were not affiliated with the International Brotherhood of Electrical Workers ("IBEW"). It was told there would be no objection on that account. The head of the respondent's construction division, Mr. Colin Harkness, testified as follows:

A. Mr. Quinless [the appellant's senior estimator] was inquiring whether or not we would, indeed, be bidding the job. I returned the call to Mr. Quinless and spoke to him personally. We had never worked with Ellis-Don. I wanted to advise him at that time of what our union situation was. I told him we were not affiliated with the I.B.E.W.

THE COURT: Hold on, please. Mm-hmm.

A. And in that conversation Mr. Quinless identified to me that Ellis-Don were not bound to work with contractors affiliated with the I.B.E.W. and they could work with anyone. I asked him if we were low bidder through the Bid Depository and met the bidding requirements, that is, our tender form etc. were correct, would they carry us. He identified that if we were low bidder they would carry us.

. . . . .

A. We have had requests from contractors in the past to quote jobs and they say you must be "union" and I usually call to clarify what that implies. Quite often general contractors have told me that we must be affiliated with the international union of electrical workers. We had never worked with Ellis-Don through Naylor and I wanted to clarify with them that we, indeed, could work with them.

Q. After that telephone conversation, what impression were you left with about the union issue?

A. I was under the impression there was no problem whatsoever from their side.

Q. And do you recall whether you communicated this conversation at some point to Mr. Hitchman?

A. I definitely did.

11 Mr. Quinless, in his testimony, confirmed the substance of that conversation, and added that prior to giving the assurances, he had "checked it out" with responsible people in the appellant organization, as mentioned below. (See para. 66 of these reasons.)

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12 The fact is that the appellant had been in a continuing if sporadic argument over bargaining rights with the IBEW for the previous 30 years. The dispute, in which the IBEW claimed to have been the *exclusive* bargaining agent for electrical workers on the appellant's jobs since 1962, came to a head in an 18-day hearing before the Ontario Labour Relations Board ("OLRB") in 1990. The issues before the OLRB were whether the IBEW had validly obtained bargaining rights in 1962 and, if so, whether those rights had been subsequently abandoned. The OLRB ruling was still under reserve in January 1991. The appellant was undoubtedly convinced of the correctness of its position before the OLRB, but it was aware, whereas the respondent was not, of the details of the IBEW grievance and whether or not an adverse ruling would cause it serious difficulty on the OTMH job.

13 The respondent tendered a price of $5,539,000. Approximately six weeks of work and 118 pages of calculations went into preparation of the bid. The next lowest bid for the electrical work was Comstock, an IBEW subcontractor, whose bid was $411,000 higher than the respondent's bid. Comstock also bid for the mechanical work.

14 The appellant carried the respondent's low bid for the electrical work and Comstock's bid for the mechanical work in its own tender for the prime contract. It was low bidder at $38,135,900 for the OTMH project. The trial judge found as a fact that if the appellant had carried Comstock's bid for the electrical work instead of the respondent's bid, it would not have been low bidder overall and might on that account have lost the prime contract.

15 By January 1992 it was common knowledge in the industry that the appellant had submitted the lowest bid. Acting on the appellant's assurances that its "in-house" union affiliation presented no problem, the respondent "assigned personnel to study drawings, set crew sizes and plan the phasing of the electrical work". At no time did it receive any formal communication from the appellant that it would get the subcontract.

16 Nor had the appellant received confirmation of the prime contract from the owner. The hospital is partly funded by the Ontario government, and there ensued an unexpected delay in obtaining a commitment of government funds. In February 1992, the owner, OTMH, asked the appellant to extend the date for acceptance of its tender for 60 days (i.e., until May 1992). The appellant, in turn, asked for similar extensions from the subcontractors it had carried in its tender, including the respondent. The respondent prudently requested from the appellant a letter confirming its intent to give it the subcontract for the electrical work, if its prime bid was accepted. The appellant declined, it said, "because it was Ellis-Don s practice not to enter into letters of intent prior to the award of the prime contract."

17 The OLRB decision was released on February 28, 1992 (Ont. L.R.B.) (QL)). The IBEW grievance was upheld. The OLRB decision confirmed the appellant's collective bargaining commitment to use only electrical subcontractors whose employees were affiliated with the IBEW. The details of this dispute are set out at length in the decision of this Court upholding the OLRB decision: *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, [2001] 1 S.C.R. 221, 2001 SCC 4 (S.C.C.). The appellant acknowledged in pre-trial discovery that the OLRB decision had been received by its in-house Director of Legal and Labour Operations, Mr. Paul Richer, on that date or soon thereafter although apparently it was not communicated to their manager on the OTMH project, Mr. Bruno Antidormi, until about March 10, 1992.

18 In the meantime, the owner had incorporated various changes to its project into Bid Revision No. 1 (also known as Post Tender Addendum No. 1). Despite the OLRB ruling, the appellant asked the subtrades, *including the respondent*, to submit prices for the contract changes by March 12. The respondent quoted $132,192 (bringing its total bid to $5,671,192). This quote, too, was carried by the appellant in its tender to the owner on March 17, 1992, i.e., three weeks after the OLRB decision and seven days after the appellant's *project* management had been made fully aware of the contents of the decision, and had given themselves sufficient time to digest its impact.

19 When word reached the respondent from some of its suppliers that the appellant was seeking bids from competing electrical subcontractors, one of its managers, Mr. Colin Harkness, called the appellant's Project Manager to confront him with this information. Mr. Harkness recorded his version of the call on April 15, 1992 in a contemporaneous handwritten note:

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> Q. Perhaps you could read to the Court given that it is in your handwriting what this note says.
>
> A. It says, "Informed by Bruno Antidormi during phone conversation that he is seeking other electrical prices but is unable to get anyone to do it at our price. Actual comments . . . " and this is in italics, " . . . I can't use Naylor on this project and I can't get anyone else to do it at your price."

20 The respondent concluded, quite understandably in the trial judge's view, that the appellant was now "shopping its bid" to rival firms.

21 On May 4, 1992, the President of the respondent wrote a letter to the owner, OTMH, complaining of the appellant's apparent double game. He obtained no satisfaction. On May 6, 1992, the owner awarded the prime contract, incorporating Bid Revision No. 1 (Post Tender Addendum No. 1), to the appellant, who at that time still had no other electrical subcontractor prepared to do the project at the respondent's price. In fact, the prime contract contained Article 10.2 under which the appellant ostensibly undertook to hire the respondent:

> 10.2 The Contractor agrees to employ those Subcontractors proposed by him in writing and accepted by the Owner at the signing of the Contract.

22 On May 5, 1992, the appellant offered to subcontract the electrical work to the respondent at the bid price if the respondent would align itself with the IBEW. The respondent, which already had a union, understandably saw this offer as a ploy by the appellant to download its union problems onto the respondent and its workforce. It declined.

23 On May 13, 1992, the appellant wrote to the respondent to say that because of the OLRB decision of February 28, 1992, "we regrettably will be unable to enter into a Subcontract Agreement with your firm for the electrical work".

24 In July 1992, the appellant provided Guild Electric (an IBEW subcontractor) with a letter of intent to award the electrical subcontract for $5,671,192, precisely the same amount as had been bid by the respondent. Guild Electric had been pre-qualified for the OTMH project, but had decided not to submit a bid. It was therefore an ineligible subcontractor under Rule 13(c) of the Bid Depository, which was treated by the appellant as of no further relevance. The final subcontract was subsequently signed with Guild with a minor price difference which was conceded to be insignificant.

25 The respondent sued for breach of contract and unjust enrichment. Its contractual claim was dismissed but it was awarded damages for unjust enrichment at trial in the amount of $14,560, an amount corresponding to the costs of preparing its bid. The respondent appealed and was awarded damages for breach of contract in the amount of $182,500 plus pre-judgment interest and costs. The appellant appeals from that decision on the issue of liability alone. The respondent cross-appeals on the issue of quantum of damages.

II. Judgments

1. Ontario Court (General Division) (1996), 30 C.L.R. (2d) 195 (Ont. Gen. Div.)

26 Langdon J. concluded that under the tender process agreed to by the parties, the award of the prime contract to the appellant did not automatically trigger a subcontract between the appellant and the respondent for the electrical work. According to traditional rules of contract formulation, communication of acceptance was required, and the appellant had never communicated its acceptance to the respondent. In any event, if any such contract for the electrical work had come into existence, it was frustrated by the OLRB decision of February 28, 1992, which precluded the appellant from contracting with a non-IBEW electrical subcontractor. He concluded that if he was in error on the issue of liability, he would have awarded the respondent's damages for breach of contract as the lost profit on the project, which he assessed at $730,286.

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27 The trial judge then allowed the respondent's claim for unjust enrichment. He analysed the work of the estimators in preparing the bid, and the costs of overhead relating to same, and gave judgment to the respondent for $14,560.

2. Court of Appeal for Ontario (1999), 43 O.R. (3d) 325 (Ont. C.A.)

28 Weiler J.A., for the Court, held that the prevention of bid shopping is one the objectives of the Bid Depository. She concluded that the appellant had acted in an "unethical" manner in negotiating the respondent's bid price with Guild Electric.

29 On the contract issue, she proceeded in accordance with the analysis of tendering procedures set out in *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 (S.C.C.). Those using the Bid Depository system mutually agree to be bound by its terms, so that upon submission of a bid by a subcontractor or of a tender by a prime contractor, this "signifies acceptance of all the terms of the Bid Depository System and constitutes a preliminary contract or contract A". The rules stipulated that the respondent's bid was irrevocable for a period of time. The bidding process is dependent upon subcontractors being bound by their bids once they have been incorporated into a prime contractor's tender and the tender has become irrevocable: *Northern Construction Co. v. Gloge Heating & Plumbing Ltd.* (1986), 19 C.L.R. 281 (Alta. C.A.).

30 In exchange for binding itself to an irrevocable bid, the subcontractor also acquires rights under Contract A. It is not automatically entitled to the award of the subcontract for the electrical work (Contract B), but such an award must be made unless the appellant (or the owner) has a "reasonable objection" pursuant to Article 10 of the *General Conditions* of the standard form contract.

31 Weiler J.A. held that the appellant's objection to the respondent was not reasonable because she found that: (a) Ellis-Don "shopped" Naylor's bid; (b) Ellis-Don ought to have made efforts to remove the impediment to its objection by applying to the OLRB to clarify whether it could contract with Naylor; and (c) Ellis-Don should have allowed Naylor the opportunity to enter into an arrangement with an IBEW-affiliated company to retain a share of the profit from the subcontract. In her view, the OLRB decision did not necessarily prohibit the appellant from employing the respondent. On the contrary, citing the OLRB decision in *Aluma Systems Canada Inc.* (Ont. L.R.B.) (QL), she stated that "the OLRB is sensitive to the prejudice a prime contractor may suffer once it has submitted a tender by which it is bound. It appears that, in such instances, the union would be estopped from claiming any damages". The appellant having failed to demonstrate that its objection was reasonable, it was held to have breached the terms of Contract A with the respondent.

32 Weiler J.A. accepted the trial judge's estimate of the respondent's loss of profit on the job ($730,286). She then discounted this figure by 50 percent for job site contingencies, and the resulting figure by a further 50 percent to account for the contingency that the OLRB would not have allowed the contract to be awarded to Naylor or that Naylor may have had to enter into a sub-subcontract with another electrical subcontractor with IBEW affiliation. With these factors in mind, the court allowed the appeal and awarded the respondent damages of $182,500.

III. Analysis

33 The prospect of a major construction job generally initiates a cascade of invitations to bid from the owner to prime contractors to the subcontractors to the suppliers and other participants. The invitations generate a corresponding flow of tenders upwards along the same food chain. The Bid Depository system promotes itself as designed to protect the reasonable expectations of all participants. It does this by establishing clear rules, fixed deadlines, simultaneous disclosure of bids, and an orderly contracting procedure. Those submitting bids incur the obligation to keep them open for acceptance for a fixed period of time. This of course ties up their resources and, depending on the circumstances, may incur some financial risk. In exchange, the tendering parties are assured that they will be fairly dealt with according to the rules established under the particular tendering procedure.

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34 For the last 20 years, the legal effect of tendering arrangements has been approached in accordance with the Contract A/Contract B analysis adopted in *Ron Engineering*, *supra*, per Estey J., at p. 119:

> There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of sixty days after the date of the opening of the tenders. Later in these reasons this initial contract is referred to as contract A to distinguish it from the construction contract itself which would arise on the acceptance of a tender, and which I refer to as contract B.

35 Subsequently, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.), the Court allowed the appeal of an unsuccessful bidder against the award of a prime contract to an unqualified bidder, contrary to an implied term in Contract A. The Court took the opportunity on that occasion to affirm that Contract A does not automatically spring into existence upon the making of a tender, and if it does, its terms must be ascertained as with any other contract, and not be derived from some abstract legal paradigm. Iacobucci J. reinforced this point at para. 17:

> ... it is always possible that Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call.

See also: *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860, [2000] SCC 60 (S.C.C.), at para. 80.

36 Both *Ron Engineering, supra*, and *M.J.B. Enterprises* dealt with owners and prime contractors. The present appeal raises an issue at a lower level of the cascade. Nevertheless, as those decisions made clear, the Contract A/Contract B approach rests on ordinary principles of contract formation, and there is no reason in principle why the same approach should not apply at this lower level. The existence and content of Contract A will depend on the facts of the particular case. Accordingly, the prime contract having been awarded in this case to the appellant, the issue is whether the respondent had any contractual rights under its Contract A with the appellant either to the making of Contract B (the electrical subcontract) or to damages for the appellant's refusal to do so.

37 This appeal thus raises five issues:

1. Was a Contract A formed between the appellant and respondent with respect to this project and, if so, what were its terms?

2. Was the contract frustrated by reason of the OLRB decision of February 28, 1992?

3. If not, did the appellant breach the terms of Contract A?

4. If so, what are the damages?

5. In the alternative, is the respondent entitled to recover on the basis of unjust enrichment?

38 There lurked in the background to some of the respondent's submissions in this Court occasional allegations which seemed grounded in tort, including negligent misrepresentation. However, tort was neither pleaded nor argued in the courts below and tort law will play no role in the disposition of this appeal.

1. Was There a Contract A and, if So, What Were the Terms?

39 The respondent contended at trial that the appellant, upon winning the prime contract, became automatically obligated to it under the terms of Contract A to enter into the electrical subcontract, i.e., Contract B. The respondent

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relies in this respect on the decision of the British Columbia Supreme Court in *M.J. Peddlesden Ltd. v. Liddell Construction Ltd.* (1981), 128 D.L.R. (3d) 360 (B.C. S.C.).

40 It is possible that under a different set of bidding rules this *could* be the outcome, but there is nothing in the call for tender or related documents in this case to give rise to such a result. On the contrary, as pointed out by Weiler J.A. in the Ontario Court of Appeal, the tender documents clearly contemplate the possible substitution of a subcontractor that is different from the firm carried in the tender for the prime contract. Article 10.3 of the *General Conditions* that govern the tender provides that the owner may, on reasonable grounds, object to a subcontractor and, if so, the prime contractor is required to employ another subcontractor. Article 10.5 states that the prime contractor shall not be required to employ as a subcontractor a person or firm to whom he may reasonably object. These terms are incorporated into Contract A and are plainly inconsistent with the respondent's theory of a "deemed Contract B". In accordance with the usual principles of contract formation, communication of acceptance was required to make Contract B.

41 The tender documents are equally clear, however, that the prime contractor is not free under Contract A of contractual obligation to the subtrades it has carried in its own bid. The Bid Depository does not operate simply for the prime contractor's convenience.

42 The *Ontario Bid Depository Standard Rules and Procedures* assures participants that it "provides for the sanctity of the bid during the tendering process", and specifically assures a subcontractor that he [or she] is "[a]ble to bid Prime Contractors knowing his bid will not be 'shopped'". The mechanism by which this is achieved is by instructing prime contractors in Article 16.1 of the *Instructions to Bidders*:

> 16.1 Bidders shall submit with Bid Documents ... names of the Subcontractors bidder proposes to perform work under the Contract, and to include in the Agreement he would sign with the Owner.

The attached printed form that is required of prime contractors to submit to the owner includes as Article 3 the term:

> 3. In the Stipulated Price the following Subcontractors are carried and they will perform the work indicated. [Emphasis added.]

43 The appellant was therefore required to and did include as Article 3 of its tender for the prime contract:

> In the Stipulated Price the following Subcontractors are carried and they will perform the work indicated: ... Electrical ... Naylor Group Incorporated. [Emphasis added.]

44 Further, as noted above, the final contract between the owner and the appellant, which was in a standard form stipulated pursuant to the Bid Depository rules, provided as Article 10.2 of the *General Conditions* of the *Stipulated Price Contract*:

> 10.2 The Contractor agrees to employ those Subcontractors proposed by him in writing and accepted by the Owner at the signing of the Contract.

45 Outside the framework of a bid depository or comparable scheme, such provisions might operate solely between the owner and the prime contractor, and be of no assistance to a stranger to their contract, such as an aspiring subcontractor. However, in this case, there was a structured Bid Depository, and these standard printed-form documents between the prime contractor and the owner constituted part of the Bid Depository regime as implemented, and formed the contractual basis on which the subcontractors tendered. Indeed, it was on this basis that the Bid Depository *could* assure them that their bids would not be "shopped". The assurance of a subcontract to the carried subcontractor, subject to *reasonable* objection, was for subcontractors the most important term of Contract A.

46 This interpretation of Contract A is entirely consistent with the answers provided on discovery by the Vice-President of the appellant who actually signed the OTMH bid:

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> Question 91: Is it fair to say on the afternoon of December 10th, which was the closing of the sub-trade bids, you and Mr. Quinless decided you were going to use the Naylor Group for the electrical job.
>
> COUNSEL: He indicated the word was "carrying" and not "using".
>
> THE DEPONENT: We would carry their price.
>
> Then on 93, the question is:
>
> Question 93: So if the hospital accepted your bid you would then turn around and award the electrical sub-contract to Naylor at the price indicated.
>
> Answer: Subject to certain clarifications I can't say that it would be an absolute given.
>
> Question 94: You have mentioned "certain clarifications". What do you mean by that?
>
> Answer: We have a process where we will sit down with the sub-contractor and go through the job. We have to be assured that he is doing it in accordance with our schedule and he does have a complete scope of the work and certain things of that nature are in order. We would tender the job to the owner and based on the way the process is we are assuming that is the case.

The "certain clarifications" mentioned by the appellant's witness would, if lacking, go to the issue of reasonable objection. No other conditions precedent were mentioned.

47 I therefore reject the dismissive expression of the appellant's Project Manager that the Bid Depository was "just a fancy name for somebody collecting prices". It was contrary to the rules of the Bid Depository that a subcontractor's bid, once disclosed, would become merely a bargaining lever against other electrical subcontractors to obtain the same or a lower price.

48 The appellant complains that it did not "shop" the respondent's bid, as the trial judge defined it, because at the time it solicited the bid it *did* intend to subcontract the work to the respondent if it turned out to be the low bidder, and it subsequently used the respondent's price as "a budget" to get the work done, not as a lever to obtain a still lower price from other subcontractors. This, while plausible, misses the point. The question at this stage is not whether the appellant engaged in bid shopping as defined by the trial judge but whether the rules of the Bid Depository created an effective contractual barrier to the practice, which was a leading selling point to the industry. In my view, the documentation referred to above, read in light of the rules of the Toronto Bid Depository, were intended to and did bring into existence, upon tender, a Contract A which required the successful prime contractor to subcontract to the firms carried in the absence of a reasonable objection.

49 The appellant also complains that in effect the court here would be "implying" a term into Contract A without meeting the stringent requirements laid down in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.), and *Martel Building, supra*. In my view, however, the obligation to contract, subject to reasonable objection, arises directly out of the rules of the Bid Depository and related (and required) standard form documentation, and does not resort to an "implied" term.

50 Finally, the appellant warns that this conclusion "imposes highly dysfunctional constraints on the ability of prime contractors and owners to deal with unusual problems that may arise in the course of the tendering/bidding process". It seems to me the rules of the Bid Depository are *intended* to impose constraints. The prime contractor is protected by Article 10 of the *General Conditions* to the *Stipulated Price Contract* that would eliminate a subcontractor if the owner had "reasonable cause" to object (Art. 10.3) or if the prime contractor itself "may reasonably object" (Art. 10.5). The prime contractor's protection lies in the contractual right to object. The subcontractor's protection lies in the concept of

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"reasonableness". An *un*reasonable objection does not suffice. If other participants in the Bid Depository system agree with the appellant that such a constraint is "dysfunctional", the rules can always be amended.

51 I therefore agree with Weiler J.A. that the various terms and conditions governing the Toronto Bid Depository, when read together, compel the conclusion that, when the appellant chose to carry the respondent's bid in its tender to the owner, it committed itself to subcontract the electrical work to the respondent in the absence of a reasonable objection. What is "reasonable" depends on the facts of the case.

2. Was Contract A Frustrated by Reason of the OLRB Decision of February 28, 1992?

52 The appellant says that even if it was bound by Contract A, whatever its terms, it was nevertheless relieved of any obligation by the supervening event of the OLRB decision dated February 28, 1992 which required it to use IBEW electricians on its projects. The respondent's employees were members of a different union. Accordingly, it says, the possibility of a subcontract was out of the question.

53 Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract": *Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd.*, [1960] S.C.R. 361 (S.C.C.), *per* Judson J., at p. 368, quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (U.K. H.L.), at p. 729.

54 Earlier cases of "frustration" proceeded as an "implied term" theory. The court was to ask itself a hypothetical question: if the contracting parties, as reasonable people, had contemplated the supervening event at the time of contracting, would they have agreed that it would put the contract to an end? The implied term theory is now largely rejected because of its reliance on fiction and imputation.

55 More recent case law, including *Peter Kiewit*, adopts a more candid approach. The court is asked to intervene, not to enforce some fictional intention imputed to the parties, but to relieve the parties of their bargain because a supervening event (the OLRB decision) has occurred without the fault of either party. For instance, in the present case, the supervening event would have had to alter the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the tendering contract: *Hydro-Québec c. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1087 (S.C.C.); *McDermid v. Food-Vale Stores (1972) Ltd.* (1980), 14 Alta. L.R. (2d) 300 (Alta. Q.B.); *O'Connell v. Harkema Express Lines Ltd.* (1982), 141 D.L.R. (3d) 291 (Ont. Co. Ct.), at p. 304; *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1988), 59 Alta. L.R. (2d) 118 (Alta. Q.B.); *Victoria Wood Development Corp. v. Ondrey* (1978), 92 D.L.R. (3d) 229 (Ont. C.A.), at p. 242; and G.H.L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at pp. 677-78.

56 While the second approach ("a radical change in the obligation") is to be preferred and is now the established test, the appellant's argument would fail under either view. There has been no "supervening event" in the sense required by either approach to the doctrine of frustration and in fact the OLRB ruling against the appellant was a foreseeable outcome.

57 With all due respect to the learned trial judge, who concluded that any contractual obligation arising under Contract A had been frustrated by the OLRB decision of February 28, 1992, the appellant is in no better position than someone who sells his house to two successive buyers. At issue was the right to do the electrical work. The IBEW said that in 1962 it was promised for its members the electrical work on the appellant's projects and the OLRB found that the appellant had largely observed this collective bargaining obligation over the next 30 years. The OLRB decision of February 28, 1992 recognized and affirmed the appellant's obligation to the IBEW. It did not create it. Accordingly, when the appellant approached the respondent to do the OTMH work with non-IBEW workers, and subsequently carried the bid to the owner, it was promising work that, so far as the IBEW was concerned, the appellant had already bargained away.

58 In my view, the OLRB decision no more qualified as a "supervening " than would a court decision upholding the validity of the first of two inconsistent contracts for the sale of a house. The judicial decision, far from frustrating

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and putting to an end the second contract, simply lays the basis for a claim in damages by the second purchaser. The OLRB merely affirmed a pre-existing obligation voluntarily entered into by the appellant that was too late disclosed to the respondent.

59 There is another reason why the doctrine of frustration is inapplicable. Contract A left open the possibility that for some good reason the appellant might "reasonably object" to the awarding of the subcontract to the respondent. The owner and the appellant had satisfied themselves about the respondent's qualifications on the basis of information known to them at the time of carrying its bid in the tender for the prime contract. However, there might obviously have arisen subsequent events (e.g., loss of key personnel) or belatedly disclosed information (e.g., financial insolvency) that would render an objection reasonable. The parties to Contract A specifically provided their own test to deal with supervening circumstances by means of a flexible exit option based on reasonableness. As a matter of construction, there is no need here to consider court-imposed remedies based on the allegation of a radical change to the significance of the contractual obligation.

60 The legal issue raised on these facts is not the doctrine of frustration but whether, in light of its conduct under the rules of the Bid Depository, it was "reasonable" of the appellant to object to the respondent's union affiliation.

3. Did the Appellant Breach the Terms of Contract A?

61 The appellant has throughout taken the position that its *only* objection to the respondent is the fact that it is not an IBEW subcontractor. In my view, its conduct throughout the OTMH project disentitled it from characterizing such an objection as "reasonable".

62 This is not to understate the importance of the OLRB's affirmation of IBEW bargaining rights. I do not agree, as will be seen, with the Court of Appeal's optimism that the OLRB ruling could be abated or circumnavigated. (Neither, it seems does the OLRB itself: *Marathon-Delco Inc.* (Ont. L.R.B.) (QL)). The IBEW, having established the correctness of its position at much effort and expense, could be expected to insist on the fruits of victory. The respondent says that the appellant simply acted duplicitously and crassly. Depending on who got the electrical subcontract, it knew it was going to be sued by either the IBEW or the respondent. It apparently viewed a suit by the respondent as the softer option. This observation may have a measure of truth, but the more important fact is that the OLRB ruling is backed up by a statutory enforcement scheme that the appellant is obliged to recognize as paramount. An employer is required by the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1 (formerly *Labour Relations Act*, R.S.O. 1990, c. L.2), to comply with an OLRB order (s. 48(18)) which may be enforced in the same manner as an order of the Ontario Superior Court (s. 48(19)). A corporation that contravenes an order is guilty of an offence carrying a fine of not more than $25,000 (s. 104(1)(b)) and each day of a continuing contravention is a separate offence (s. 104(2)). (References are to the present numbering of the relevant sections of the Act.)

63 The appellant's argument, with respect, sets up a straw man. The severity of the Act's provisions simply exposes the folly of the appellant's assurances and conduct at a time when the OLRB decision was looming. If the appellant had instead been subjected to a court order to sell its house to an earlier purchaser (to revive the analogy), disobedience to the order of specific performance would also bring dire consequences, but nevertheless the court order would not relieve the appellant from its obligation to pay damages to the disappointed second purchaser. And so it is with Contract A. The appellant chose to carry the respondent instead of its IBEW affiliated rival, Comstock, and thereby assured itself as low bidder of winning the prime contract. It was held by the OLRB to have previously promised the work to IBEW electricians. By reason of that earlier obligation, it was unable to fulfill its subsequent obligation under Contract A. It couldn't keep both sets of promises. It is perfectly fair that it compensate the respondent for its non-performance of Contract A.

64 The appellant's dilemma is not without its sympathetic aspects. The OLRB decision was pending for about a year. In the meantime the appellant, as a practical operator, had either to bid carrying IBEW subcontractors (perhaps unnecessarily) and risk losing major projects, or bid carrying non-IBEW subcontractors (perhaps wrongly) and risk

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the subsequent wrath of the IBEW and, perhaps, the OLRB. The problem, in the end, is that it purported to solve its dilemma at the respondent's expense.

65 The appellant, with full knowledge of the IBEW situation, had gone out of its way to assure the respondent that its in-house union affiliation was no cause for concern and would be no basis for objection. It carried the respondent's bid in its tender for the prime contract in December 1991, with full knowledge both of the IBEW proceedings before the OLRB and the respondent's non-IBEW union affiliation. It affirmed its agreement to use the respondent when it put forward the respondent's addendum price in its submission to the owner on March 17, 1992, more than two weeks after its Director of Legal and Labour Operations had received full notice of the OLRB ruling and began to seek advice on its impact. It formally affirmed the respondent's expected role in the actual contract between the owner and the appellant dated May 6, 1992 because otherwise it would have been obliged to admit it was signing a multi-million dollar contract including major electrical work without anyone in sight who was prepared and IBEW-equipped to perform it at the respondent's price. The appellant was not prepared to give the electrical work to Comstock, which was already on the job as mechanical contractor, whose bid price had been $411,000 higher than the respondent.

66 The evidence on these matters was clear and uncontradicted. The potential IBEW problem was flagged by the respondent itself at the initial contact in early November 1991. The "no problem" assurance was given after consultation within the appellant organization by Mr. Paul Quinless, who as the senior estimator had responsibility for bidding on the OTMH project. Mr. Quinless testified as follows:

> . . . My first job would be to contact all the pre-qualified sub-contractors, all of the invited sub-contractors and basically invite them to bid on the job so a fax would be sent out, or a letter sent out inviting them to bid.
>
> . . . . .
>
> . . . I had a specific question from Naylor asking, explaining the fact that they were non-union, or non I.B.E.W., that they had their own in-house union affiliation and the question was asked could we use them? I checked it out and my response to Naylor was that we could use them. [Emphasis added.]

67 This erroneous advice was not corrected until a month and a half *after* the adverse OLRB ruling. Indeed, the appellant's Project Manager on the OTMH job, Mr. Bruno Antidormi, acknowledged that the respondent was not even given the signal that IBEW storm clouds *might* be gathering on the horizon:

> Q. You could have written to Naylor and said "We have had this hearing. We may lose the hearing. There could be a problem down the road."
>
> A. Okay, a bit of good advice.
>
> Q. But you didn't do that.
>
> A. No, we didn't do that.

68 On March 17, 1992 — well after the appellant acknowledges receiving and considering the OLRB decision — it affirmed its selection of the respondent by approving and submitting Naylor's price in its response to Bid Revision No. 1 (Post Tender Addendum No. 1). The appellant's Project Manager so testified:

> Q. This letter of March 17th is some 18 days or so after the Ontario Labour Relations Board decision was placed into the hands of Ellis-Don?
>
> A. That is correct. I was aware of the [OLRB] decision at this point.

69 Even more remarkably, the appellant signed the prime contract dated May 6, 1992 — about two months after the appellant was fully aware of the OLRB decision — undertaking to the owner once again to use the respondent to do the electrical work. This was confirmed in testimony by Bruno Antidormi, the appellant's Project Manager:

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> . . . In that paragraph [2.2] in the [prime] contract which you signed, sir, says "The contractor . . . " which is yourself there, Ellis-Don...
>
> A. Mm-hmm.
>
> Q. " . . . agrees to employ those sub-contractors proposed in writing and accepted by the owner at the signing of the contract." Do you agree with me?
>
> A. I agree with you.
>
> Q. Up until that date, May 6th, had you proposed in writing any other sub-contractor for electrical work other than Naylor?
>
> A. On May 6th? No, we did not. . . .

70 I agree with the appellant that the OLRB ruling of February 28, 1992 put an end to the lawful ability to use the services of the respondent. In my view, however, the fact it lost its OLRB gamble is not sufficient to absolve it of the financial consequences to the respondent. Its belated objection to the respondent, in light of this history, was unreasonable.

71 The respondent takes a darker view of the appellant's conduct. It contends that non-disclosure of the IBEW problem and the other matters referred to above were far from innocent. It insists that if the appellant had carried the lowest IBEW subcontractor (Comstock) for the electrical work, it would not have been low bidder on the OTMH project. The respondent says its bid was "used" to obtain the prime contract and "used" again to secure a substitute electrical subcontract at the same price from Guild Electric, all of which it says was contrary to the rules of the Toronto Bid Depository. The appellant's denial lacked much conviction:

> Q. So, Mr. Antidormi, you went to them, knowing Naylor's price, knowing their bid amount, told the full amount and said to Guild, "Do the job for this".
>
> A. Yes.
>
> Q. To your way of thinking that is not "shopping" the Naylor price.
>
> A. I didn't tell them to match the price. I said this is what you can do the job for.

72 While both the trial judge and Weiler J.A. in the Ontario Court of Appeal found the appellant's conduct in this respect distasteful, I think it is sufficient to dispose of the case on the narrow contractual ground that the appellant could only extricate itself from Contract A by demonstrating that, in all the circumstances, its objection was "reasonable", and this it has failed to do.

4. What Are the Respondent's Damages for Breach of Contract A?

73 The well accepted principle is that the respondent should be put in as good a position, financially speaking, as it would have been in had the appellant performed its obligations under the tender contract. The normal measure of damages in the case of a wrongful refusal to contract in the building context is the contract price less the cost to the respondent of executing or completing the work, i.e., the loss of profit: *M.J.B. Enterprises Ltd.*, *supra*, at p. 650; *Twin City Mechanical v. Bradsil (1967) Ltd.* (1996), 31 C.L.R. (2d) 210 (Ont. Gen. Div.), at pp. 225-26; S.M. Waddams, *The Law of Damages*, (3rd ed. 1997), at para. 5.890; H. McGregor, *McGregor on Damages* (16th ed. 1997), para. 1154.

74 The appellant accepts these general propositions as correct and, in the event of liability being found against it, does not contest the Court of Appeal's assessment. It is the respondent who complains in its cross-appeal that this award is too low. Its claim for lost profit was $1,769,412. This was a figure calculated by the President of the respondent, Mr.

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Hitchman, based on an average mark-up of 12.4 percent on the contract price plus addendum, grossed up to an average mark-up of 31.2 percent on the entire job because of Mr. Hitchman's demonstrated capacity to squeeze profit out of contract extras.

75 The trial judge concluded that Mr. Hitchman's projected profit of $1,769,412 was overly optimistic, and held the respondent to a more realistic mark-up of 11.2 percent plus minor adjustments, producing a figure of $730,286. In making what he called a "highly speculative assessment", he noted that Guild Electric had suffered a significant financial loss on the job.

76 The trial judge recognized that there had been unanticipated site problems including what he referred to as "[t]he disaster on the demolition/wireway". Guild had allowed almost twice the time as the respondent for the "demolition/wireway" (between 300 and 400 hours), but in fact spent 3000 hours investigating and altering the existing electrical conduits. The trial judge deducted $100,000 from the respondent's claimed loss of profit on this account.

77 The trial judge concluded that the respondent was better placed than Guild had been to turn a profit on the OTMH job because it was a tightly managed local Oakville firm with previous hands-on work experience at the OTMH, and had a labour rate advantage over its IBEW affiliated rivals.

78 He further found that the institutional construction market in Ontario went into a steep decline in 1992. "[T]he economic climate in this industry from 1992 to 1995," he concluded, "was disastrous". Accordingly, he ruled that the respondent was in no position to mitigate its damages with other work, and had not succeeded in doing so.

79 The Court of Appeal reduced the $730,286 by 50 percent because it felt the trial judge had failed to take into account a number of relevant features of the unexpectedly adverse conditions on the job site. It then reduced the resulting figure of $365,143 by a further 50 percent (i.e., to $182,500) for the contingency that the OLRB (if asked) might not have allowed the award of the contract to Naylor, or that Naylor might have been required to enter into an unprofitable arrangement with an IBEW subcontractor to carry out the OTMH work.

80 It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the trial judge had made an error of principle of law, or misapprehended the evidence: *Lang v. Pollard*, [1957] S.C.R. 858 (S.C.C.), at p. 862; or it could be shown there was no evidence on which the trial judge could have reached his or her conclusion: *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 (S.C.C.), at p. 435; or the trial judge failed to consider relevant factors in the assessment of damages, or considered irrelevant factors, or otherwise, in the result, made "a palpably incorrect" or "wholly erroneous" assessment of the damages: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.), at p. 235; *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 S.C.R. 705 (S.C.C.), at p. 810; *Widrig v. Strazer*, [1964] S.C.R. 376 (S.C.C.), at pp. 388 -89; *Woelk*, *supra*, at pp. 435-37; *Waddams, supra*, at ¶13.420; and H.D. Pitch & R.M. Snyder, *Damages for Breach of Contract* (2nd ed. 1989) 15¶5. Where one or more of these conditions are met, however, the appellate court is obliged to interfere.

81 I agree with Weiler J.A. that the trial judge failed to relate the unexpectedly severe site problems, which he found as facts to exist, to his rather summary treatment of lost profits. The severity of the site conditions raised highly relevant considerations that were not restricted to the "demolition wireway". Guild Electric may not have been a local Oakville firm, but it was a large, successful and experienced electrical contractor which, unlike the respondent, had previously done major jobs of this size. While recognizing the disastrous site conditions, the trial judge preferred to rest his calculation on the respondent's bidding practices and historical profit levels on other jobs rather than (apart from an imputed loss on the "demolition/wireway") on the facts of this particular job.

82 I propose to deal separately with the two contingencies applied by the Court of Appeal.

(a) Unanticipated Job Site Conditions

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83 The hospital no longer retained "as-built" drawings and immense time was wasted during construction trying to identify the source and purpose of various wiring installations before demolition could proceed. Moreover, as the hospital continued to function during demolition and renovation of various parts, scheduling became a serious constraint, as the appellant's Mr. Antidormi explained:

> . . . [i]f we had a renovation in a sensitive area such as the operating rooms or the intensive care facilities, it has to be properly scheduled, given the day to day delicate functions at the Oakville Hospital, which does a lot of eye surgery, there is no vibration allowed, no noise, no fumes. . . .

84 Guild had estimated a total labour cost of 46,000 hours for the project (working within the budget established by the respondent). It expended 66,000 hours. The trial judge found almost a 50 percent cost overrun (20,000 hours) in labour hours, only about half of which was paid for in "extras" by the owner.

85 While some of these factors were noted by the trial judge, they were not integrated into his calculation of loss of profit. They ought to have been. The correct principle is stated in 12 *Hals.*, 4th ed., at p. 437:

> 1137. *Possibilities, probabilities and chances*. Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with evaluating, in terms of money, future possibilities and chances. In assessing damages which depend on the court's view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will happen or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

86 The site conditions and related performance problems persuaded Weiler J.A. to reduce the loss of profit to $365,143 and, given the necessarily speculative nature of the exercise, we have been given no reason to interfere on this point.

(b) IBEW-Related Difficulties

87 Weiler J.A., having ruled that the appellant erred in refusing to contract with the respondent because the OLRB might have sanctioned a subcontract with the respondent, then reduced the respondent's damages to $182,500 on the basis that the OLRB might *not* have done so. In that event, the respondent might have had to do some sort of deal with an IBEW subcontractor, which would have further squeezed the respondent's profit, she concluded.

88 I think this line of reasoning carries the "speculative" exercise too far. As the appellant points out, "[t]he options posited by the Court of Appeal were contrary to what the parties had accepted as common ground (i.e., that the O.L.R.B. decision meant Ellis-Don could not sub-contract with Naylor)" (factum, para. 64). Section 161(4) of the *Labour Relations Act, 1995* (formerly s. 147(4)) provides that a collective agreement is binding on the parties when the union obtains bargaining rights and the Act does not provide for any exemptions from that result. As to a potential business arrangement between the respondent and another electrical subcontractor, the respondent itself wrote to the appellant on May 11, 1992 stating that it would be "impossible" for it to consider aligning itself with an IBEW affiliate. I agree with the appellant that there was no basis to expect any indulgence from the OLRB or the IBEW.

89 However, on the somewhat different view I take of this case, it was not necessary to establish liability for the respondent to show that the OLRB might have been persuaded to grant the appellant an indulgence. The unreasonableness of the appellant's objection relates to its own prior conduct and representations, not to speculation about the help the OLRB might have offered had the appellant sought its assistance to award Contract B to the respondent. The fact the OLRB might have been of no help at all is equally irrelevant.

90 The award of the subcontract to the respondent would have created severe legal problems for the appellant, but the issue at this point is what impact, if any, those problems would have had on the profitability of the subcontract from the respondent's perspective. If the appellant wished to demonstrate that the respondent could never have turned a profit on

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a job site already promised to IBEW members (and that the hoped-for Contract B would thus have been a sure loser), or that the respondent's profit would have been reduced by labour disruption, or some other such theory, there ought to have been evidence in that regard. On the contrary, the appellant's witnesses did not suggest that labour problems awaited the respondent on the job site, and the respondent filed a convenient letter dated May 5, 1992 from its lawyers expressing optimism on this point:

> If the I.B.E.W. pickets the construction project causing either a work slow down or stoppage of work by the various trades visiting the site, the general contractor can apply to the Ontario Labour Relations Board for a cease and desist order. The I.B.E.W. has signed a collective agreement with the Contractors Association thereby rendering any strike activity on their part illegal during the currency of that agreement. If the I.B.E.W. engages in picketing or other activity which causes an illegal strike by another trade, their picketing activity can be enjoined by the Ontario Labour Relations Board. It usually takes anywhere between 48 and 72 hours to proceed to a hearing before the Ontario Labour Relations Board and obtain a cease and desist order.

91 It seems to me the evidence did not justify the Court of Appeal's reduction of the respondent's loss of profit to $182,500 for labour relations contingencies. The cross-appeal, to that extent, should be allowed, and the damage award increased to $365,143.

5. In the Alternative, Is the Respondent Entitled to Recover on the Basis of Unjust Enrichment?

92 In light of the conclusion that the respondent is entitled to recover damages for breach of contract, there is no need to examine the alternative ground of unjust enrichment relied upon by the trial judge.

IV. Disposition

93 I would dismiss the appeal with costs to the respondent, and allow the cross-appeal with costs. Judgment will be entered for the respondent in the sum of $365,143 plus pre-judgment interest and costs.

Appeal dismissed; cross-appeal allowed.

Pourvoi rejeté; pourvoi incident accueilli.

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Tab 3

2002 CarswellOnt 3904
Ontario Superior Court of Justice

Optenia Inc., Re

2002 CarswellOnt 3904, [2002] O.J. No. 4395, 118 A.C.W.S. (3d) 225, 21 C.C.E.L. (3d) 44, 37 C.B.R. (4th) 308

In the Matter of the Bankruptcy of Optenia Inc. of the City of Ottawa, in the Province of Ontario

Chadwick J.

Judgment: November 18, 2002
Docket: 33-136500

Counsel: *Matthew J. Halpin*, for Trustee in Bankruptcy, Ernst & Young Inc.
Bruce Carr-Harris, for Respondent, Moris Simson, Creditor

Subject: Insolvency; Employment; Public; Estates and Trusts

MOTION by trustee in bankruptcy for advice and directions concerning effect of bankruptcy on employment contracts.

***Chadwick J.*:**

1 This is a motion by the trustee, Ernest & Young in its capacity as Trustee in the Bankruptcy of Optenia Inc. for advice and directions of the Court pursuant to Section 34 of the *Bankruptcy and Insolvency Act* R.S.C., 1992 c.27.

2 The motion concerns the effect on employment contracts when terminated by bankruptcy of the employer. Optenia was a new company created by Mitel to design, develop and market components for optical communication in what is known as the Photonics Sector. The Respondent creditor, Moris Simson was Senior Vice-President, Strategy and Corporate Development and Chief Technology and Marketing Officer for Mitel. Mitel approached Mr. Simson, to become the founder and Chief Executive Officer of Optenia. Mitel was prepared to provide the seed funding for Optenia only on the condition that Mr. Simson would be the founder and accept the position of President and Chief Executive Officer.

3 Moris Simson accepted the position and on December 4, 2000 entered into an employment contract with Optenia which contract set out his compensation. Also set out in paragraph 5 are provisions relating to cessation of employment. Relevant portions of paragraph 5, for the purpose of this motion are as follows:

> "**Just Cause**" means any grounds at common law for which an employer is entitled to dismiss an employee summarily.
>
> "**Termination without Cause**" means the occurrence of any of the following events:
>
> > (A) within 6 months of the occurrence of a Change of Control you resign your employment with Optenia for Good Reason; or,
> >
> > (B) Optenia terminates your employment without Just Cause.
>
> "**Termination Date**" means:
>
> > (A) if Optenia terminates your employment, the date designated by the company as the last day of your employment.

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(B) if you resign your employment with Optenia whether with or without Good Reason, the date designated by Optenia as the effective date of resignation;

(C) if you die, the date of death;

(D) if this Agreement is frustrated, which includes but is not limited to Incapacity, the date designated by Optenia as the last day of your employment.

(b) Resignation: You may resign at any time, for any reason, upon giving a minimum of 12 weeks advance written notice to Optenia. Optenia reserves the right to waive any resignation notice period in excess of two weeks, in which case your entitlement to salary and benefits will cease at the end of the two week period. Optenia also reserves the right to require you to immediately return all company property at any point during the resignation notice period, and to require you to refrain from attending at the workplace during the remainder of the resignation notice period.

(c) Resignation, Termination for Just Cause: If you resign or your employment is terminated for Just Cause, then you will be entitled to receive any compensation or benefits which have accrued up to the Termination Date, but will not be entitled to receive other compensation of any nature, whether under contract, statute, common law or otherwise. Any founder shares which have not vested as of the Termination Date, will be forfeited, in accordance with the terms of the SA.

(d) Death, Frustration of Agreement: If you die, or frustration of this Agreement occurs (which includes but is not limited to Incapacity), then:

(i) you (or your estate, in the event of your death) will be entitled to receive any compensation or benefits which have accrued up to the Termination Date;

(ii) any founders shares which have not yet vested as of the Termination Date will immediately vest in you (or your your estate, in the event of your death), in accordance with the terms of the SA,

but you will not be entitled to receive other compensation of any nature, whether under contract, statute, common law or otherwise.

(e) Termination without Cause: Optenia may terminate your employment at any time, for any reason, without Cause. If that occurs then:

(i) you will be entitled to receive any compensation or benefits which have accrued up to the Termination Date;

(ii) if you are participating in any company employee group benefit plans, coverage will continue to the extent permitted under the terms of the plans for any period prescribed by Employment Standards legislation.

(iii) you will be entitled to receive any vacation pay to which you are entitled under Employment Standards legislation;

(iv) you will be entitled to receive any pay in lieu of notice and, if applicable, severance to which you are entitled under Employment Standards legislation; and,

(v) conditional upon you providing to Optenia a full and final release in form and substance acceptable to the company, acting reasonably, you will be entitled to receive and will accept the following entitlements, all of which are subject to the usual applicable statutory deductions, in full and final satisfaction of any

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entitlements which you have or could have as a result of the cessation of employment whether under contract, statute, common law or otherwise:

(A) instead of the entitlements set out in sub-paragraph 5(e)(iv), you will received a lump sum payment (the "Severance Payment) equivalent to 24 months' worth of total target compensation" will be defined as the base salary in effect on the Termination Date, plus the target bonus in effect on the Termination Date, calculated as if you have fully successfully achieved but not exceeded the specific goals set in relation to the bonus.

(B) if you are participating in any company employee group benefit plans, you will receive a lump sum payment (the "Benefit Payment") equivalent to 15% of the Severance Payment in lieu of continued benefit coverage; plus,

(C) any founders shares which have not yet vested as of the Termination Date will immediately vest, in accordance with the terms of the SA.

(f) Resignation of Office: If your employment is terminated for any reason, you agree to resign in writing effective upon the Termination Date from any office or directorship held with the Optenia or any subsidiary or affiliated company.

4 The contract also provided the laws of Ontario would apply and the document represented all of the terms and conditions of employment between the parties.

5 Although Mr. Simson is the only creditor appearing at the motion, other creditors attended without counsel. It is agreed that all of the employees of Optenia are affected by the Trustee's application.

6 Two other Mitel employees entered into similar contracts to that of Mr. Simson. Dr. John Miller was employed in the position of Director of Product Development and reported to Moris Simson.

7 Tam Nguyen also entered into an employment contract, he held the position of Director of Product Planning and also reported to Moris Simson. Both of theses employment contracts were dated December 13, 2000 and are described as "Founders' Contracts". The relevant terms of the two Founders' Contracts as related to cessation of employment are as follows:

Cessation of Employment

(a) Definitions

For the purpose of this paragraph the following definitions apply...

"**Just Cause**" means any ***grounds at common law*** for which an employer is entitles to dismiss an employee summarily. (emphasis added)

"**Termination without Cause**" means Optenia terminates your employment without Just Cause.

"**Termination Date**" means:

(A) if Optenia terminates your employment, the date designated by the company as the last day of your employment;

(B) if you resign your employment with Optenia the date designated by Optenia as the effective date of resignation (but such date will not be any earlier than the last day of the two week resignation notice period referred to in paragraph 5(b);

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(C) if you die, the date of death;

(D) if this Agreement is frustrated, which includes but is not limited to Incapacity the date designated by Optenia as the last day of your employment.

(c) Resignation, Termination for Just Cause: If you resign or your employment is terminated for Just Cause, then you will be entitled to receive any compensation or benefits which have accrued up to the Termination Date, but will not be entitled to receive other compensation of any nature, whether under contract, statute, common law or otherwise. Any founders shares which have not vested as of the Termination Date, will be forfeited, in accordance with the terms of the SA.

(d) Death, Frustration of Agreement: If you die, or frustration of this Agreement occurs (which includes but is not limited to Incapacity), then:

(i) you (or your estate, in the vent of your death) will be entitled to receive any compensation or benefits which have accrued up to the Termination Date;

(ii) any founders shares which have not yet vested as of the Termination Date will immediately vest in you (or in your estate, in the event of your death) in accordance with the terms of the SA,

but you will not be entitled to receive other compensation of any nature, whether under contract, statute, common law or otherwise.

(f) Termination without Cause: Optenia may terminate your employment at any time, for any reason, without Cause. If that occurs then:

(vi) you will be entitled to receive any compensation or benefits which have accrued up to the Termination Date;

(vii) if you are participating in any company employee group benefit plans, coverage will continue to the extent permitted under the terms of the plans for any period prescribed by Employment Standards legislation.

(viii) you will be entitled to receive any vacation pay to which you are entitled under Employment Standards legislation;

(ix) you will be entitled to receive any pay in lieu of notice and, if applicable, severance to which you are entitled under Employment Standards legislation; and,

(x) ***conditional upon*** you providing to Optenia a full and final release in form and substance acceptable to the company, acting reasonably, you will be entitled to receive and will accept the following entitlements, all of which are subject to the usual applicable statutory deductions, in full and final satisfaction of any entitlements which you have or could have as a result of the cessation of employment whether under contract, statute, common law or otherwise:

(A) instead of the entitlements set out in sub-paragraph 5(e)(iv), you will received a lump sum payment (the "Severance Payment) equivalent to 24 months' worth of total target compensation" will be defined as the base salary in effect on the Termination Date, plus the target bonus in effect on the Termination Date, calculated as if you have fully successfully achieved but not exceeded the specific goals set in relation to the bonus.

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(B) if you are participating in any company employee group benefit plans, you will receive a lump sum payment (the "Benefit Payment") equivalent to 15% of the Severance Payment in lieu of continued benefit coverage; plus,

(C) any founders shares which have not yet vested as of the Termination Date will immediately vest, in accordance with the terms of the SA. (emphasis added)

15. Tam Nguyen entered into an employment contract with Optenia dated December 13, 2000 (the "Nguyen Contract"). Mr. Nguyen held the position of Director of Product Planning, reporting to Moris Simson.

16. Mr. Nguyen's compensation included an annual base salary of $160,000 and eligibility to earn an annual bonus equal to 20% of his base salary and 1.75% of the initial equity of Optenia through the issuance of shares subject to a subscription agreement.

17. The Nguyen Contract is very similar to the Miller Contract and contained the same terms as those found at paragraph (5) in the Miller Contract concerning cessation of employment and which terms are set out above.

Other Employees:

8 In addition to the three executives there were also forty other employees of Optenia at the time of the bankruptcy. All of the other employees had employment agreements. The relevant provisions of their employment contracts relating to termination of employment without cause are as follows:

(6) Termination of Employment without Cause

Optenia may terminate your employment at any time, for any reason, without cause. If that occurs, then Optenia will provide you with the following (subject to the usual statutory deductions):

(i) any compensation, benefits and vacation pay which have accrued up to the date Optenia designates as your last day of employment (the "Termination Date");

(ii) if you are participating in any company employee group benefit plans, continued coverage (only to the extent permitted under the terms of the plans) for 6 months after the Termination Date, or until you secure replacement coverage through new employment, whichever first occurs;

(iii) a lump sum payment equal to the greater of (a) and Employment Standards-prescribed pay in lieu of notice and severance pay, or (b) 6 months salary, calculated based on your base salary rate in effect on the Termination Date.

Your rights to any stock options granted to you will be determined by the terms of the Plan, and you will not be entitled to receive other compensation of any nature, whether under contract, statute, common law or otherwise.

9 Two employees, Fatima Aberle and Nancy Whitesell have no provisions in their employment for compensation in the event there is termination of employment by Optenia without cause.

10 There are five other employees whose employment contracts provided for accrued benefits and *Employment Standards Act* compensation as of the date of termination. Terms in their contracts include the following:

(6) Termination of Employment without Cause

Optenia may terminate your employment at any time, for any reason, without cause. If that occurs, then Optenia will provide you with the following (subject to the usual statutory deductions):

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(i) any compensation, benefits and vacation pay which have accrued up to the date Optenia designated as your last day of employment (the "Termination Date");

(ii) a lump sum payment equal to any Employment Standards-prescribed pay in lieu of notice and severance pay, calculated based on your base salary rate in effect on the Termination Date.

Your rights to any stock options granted to you will be determined by the terms of the Plan, and you will not be entitled to receive other compensation of any nature, whether under contract, statute, common law or otherwise.

11 There is one employee, James Carriere whose terms in his employment contract which upon termination without cause by Optenia provides for compensation and benefits accrued to the date of termination. However, his contract contains the provisions that if his employment is terminated after the first three months of employment, he is entitled to a lump sum payment equal to the greater of any *Employment Standards Act* entitlement or one month's pay per year of service to a maximum of six month salary. Mr. Carriere started his employment on February 18, 2002 and was employed less than two weeks by the time of bankruptcy on March 1 st , 2002.

12 On February 26, 2002 the Board of Directors of Optenia became aware that JDS Uniphase was no longer willing to follow through with its commitment to invest an additional $5 million U.S. This development precipitated a series of meetings of the Board of Directors to address the possible bankruptcy of Optenia.

13 At a meeting of the Board of Directors on February 27, 2002, the Board considered employment contracts of its employees and were satisfied that if the company made an assignment in bankruptcy, it would trigger the Without Cause termination benefits under the employee's agreements.

14 On March 1, 2002, the Board of Directors met and passed a resolution that the company make an assignment pursuant to the *Bankruptcy and Insolvency Act* and that Ernst & Young Inc. be appointed as Trustee in Bankruptcy of Optenia.

15 In his affidavit filed in these proceedings, Moris Simson states as follows:

The making of the assignment in bankruptcy was a voluntary and conscious decision of the Board of Directors, acting on behalf of Optenia. Further, the decision to make the assignment was made on the basis that it was in the best interests of Optenia's creditors and employees. Optenia's obligation to pay termination benefits under the employment agreements was considered by the Board of Directors to be a liability when it assessed whether Optenia should make the assignment.

16 On March 8, 2002 Mr. Simson filed a Proof of Claim which was accepted by the Trustee and subsequently amended to show evaluation of his unsecured claim at $1,063.167.30.

17 The secured and preferred creditors of Optenia have been paid and an interim partial dividend was paid to unsecured trade creditors. There will be, approximately, an additional $2 million available for distribution as a dividend to the unsecured creditors.

18 The total amount of the unsecured claims is approximately $4.3 million. This is comprised of trade claims in the amount of $1.1 million and employee claims in the amount of $3.2 million.

19 Approximately three-quarters of the claims by the unsecured creditors against the estate are claims by former employees. The former employee's claims are based on the respected employment contracts, most of which provide for some compensation upon termination of their employment by Optenia, without cause.

20 The issues identified for the purpose of giving direction to the Trustee are as follows:

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1) What is the effect on the employment relationship resulting from the bankruptcy of the employer?

2) Have the employment contracts been terminated without just cause?

3) Does the event of bankruptcy constitute frustration in law of the Employment Contracts?

21 It is the Respondent's position, both on his own behalf and on behalf of all of the employees of Optenia, that the voluntary assignment into bankruptcy constituted termination without cause by Optenia under the employment agreements and therefore the employees are entitled to have their proven claims under those agreements distributed pro rata with the other unsecured creditors.

22 They also take the position that the voluntary assignment into bankruptcy does not frustrate the employment contracts.

23 There does not appear to be any issue that the bankruptcy has the effect of terminating the employment relationship of all employees, whether the relationship is governed by an individual employment contract or a collective agreement.

24 The leading case dealing with this issue is *Rizzo & Rizzo Shoes* (1995), 22 O.R. (3d) 385 (Ont. C.A.).

25 In that case the company was petitioned into bankruptcy on April 13, 1989. Pete, Marwick Ltd. were appointed Receiver Manager, and Trustees of the bankrupt estate. The Ontario Minister of Labour filed a claim on behalf of 873 former employees of the bankrupt company. The proof of loss was for severance, termination and vacation pay, payable under the *Employment Standards Act (ESA)*. The Trustee in Bankruptcy took the position that the bankruptcy did not create any entitlement to severance, termination or vacation pay under the *ESA*.

26 Farley J. found that the bankruptcy acts as a termination of employment and this brings into play the termination, vacation, and severance pay provisions of the *ESA*. He noted that these obligations were obligations which had accrued prior to the bankruptcy and that it would be unfair to exclude the claims from being allowed in the bankruptcy based on the timing of the termination.

27 On appeal to the Ontario Court of Appeal, Austin J.A., on behalf of the Court, found that when bankruptcy occurs, employment cannot be said to be terminated by the employer and allowed the appeal. Austin J. at page 387 makes the following comment, "The employment of the individuals involved came to an end when a receiving order in bankruptcy was issued against their employer, on April 14, 1989, following a petition by one of its creditors."

28 Austin J.A. then goes on to review the provisions of the *Employment Standards Act*, at page 391 makes the following comment:

> Again, the language of the section is operative only when the employment is terminated by the employer. The operation of the statute is not triggered by the termination of employment by an act of law, such as bankruptcy.
>
> Unlike termination pay and severance pay, liability to pay vacation pay is not related to the cessation of employment.
>
> The conclusion I draw from a reading of the legislation is that termination pay and severance pay are payable only when the employer terminates the employment. This raises a question whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

29 He then goes on to adopt the following proposition:

> In *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. Reg.), Registrar Ferron heard an appeal from a trustee's disallowance of a claim for severance pay as an ordinary unsecured creditor, in the case now before the court. At p. 4 he said:

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> In addition, I am of the opinion that the bankruptcy of the company at the instance of a creditor does not constitute a dismissal although the employment relationship is thereby terminated.

I agree with that statement. He went on to say [at p. 4]:

> It might be otherwise if the bankruptcy had resulted from an assignment in bankruptcy at the instance of the company.

30 Austin J.A. concludes:

> As the case before us does not involve a voluntary assignment, there is no need to comment on that additional statement.

31 The Ministry of Labour on behalf of the employees appealed the Ontario Court of Appeal decision to the Supreme Court of Canada [*Rizzo & Rizzo Shoes Ltd., Re*, 1998 CarswellOnt 1 (S.C.C.)]. The Supreme Court of Canada allowed the appeal on the, basis that the *ESA* is remedial legislation and should be given liberal construction and interpretation and that to find that ss. 40 and 40*a* are inapplicable in a bankruptcy situation is incompatible with both the object of the *ESA* and the termination and severance pay provisions.

32 Iacobucci J. on behalf of the Court reviewed the various provisions of the *ESA* in particular noted that s. 7(5) states, "Every contract of employment shall be deemed to include the following provisions;". Section 40(1) sets out what the employee is entitled to upon termination.

33 At page 42 of his reasons, Iacobucci J. states:

> The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.
>
> If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

34 The Supreme Court of Canada only deals with the effects of the *ESA* and does not deal with the issue as to what happens to the employees who are governed by an employment contract and the employer makes a voluntary assignment of bankruptcy. The Trustee takes the position that these contracts terminated upon the bankruptcy of the employer, whether it is voluntary by way of an assignment or by was of a petition. The trustee, however, does acknowledge that the employees would be entitled to file as unsecured creditors based upon Common law. In applying Common-Law principles and it is accepted that the employees have been terminated without cause and the amount of compensation they would be entitled to would depend upon length of service with the company. There is no issue that the employment contracts give the employee a far more generous severance package that those provided at Common law.

35 Both counsel, in their very detailed submissions and factums have referred to a number of previous decisions to support their position. A number of these cases must be read in light of the *Rizzo* decision both in the Supreme Court of Canada and in the Court of Appeal in Ontario.

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36 In the Simson contract and the two Founders Contract provide a definition of the words "Just Cause". The definition is the same in all three contracts and is defined as, "any grounds at Common law for which an employer is entitled to dismiss an employee summarily". Their determination without cause occurs when "Optenia terminates your employment without Just Cause".

37 Although the balance of the contract does not define just cause, the above definition falls within the Common law definition of those words.

38 It is the Trustee's position, the employment contracts are terminated on bankruptcy by operation of law and not by the employer and as such can not constitute an unlawful breach of the employment contract, it merely brings the contract to an end without any attribution of blame or unlawful conduct.

39 There is no doubt this interpretation would result in all of the employees being treated unfairly. As soon as the Board of Directors learned that JDS Uniphase was not going to contribute the $5 million U.S. which had been previously promised, they recognized that the company could not continue. Rather than continue to operate the company and lay-off the employees and dissipate all of the assets, they made a voluntary assignment on the basis that the severance provisions in the employment contracts would be triggered and that the employees would get the benefits as prescribed in the contracts. There is no doubt in my mind that if they had known that this would be the position of the Trustee, that they would have terminated the employees prior to making the assignment and therefore this debate would not be taking place.

40 It also is recognized that if the contract included the word bankruptcy in its definition of just cause, the Trustee would be bound by the contractual provisions.

41 In *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28 (Ont. Bktcy.), Spence J., had to determine whether a collective agreement was terminated upon bankruptcy or whether a successor employer would be bound by the terms of the collective agreement. At p. 32 he makes the following comment:

> A determination to that effect would be apparently inconsistent with the rule in bankruptcy law that the collective agreement terminates on the occurrence of the bankruptcy: *Re St. Marys Paper Inc.* (1994), 26 C.B.R. (3d) 273 (Ont. C.A.), at p. 291 per Abella J.A.: "Contracts of employment with employees including collective agreements terminate with the bankruptcy." Such a determination would also be apparently inconsistent with the provision in the order of Mr. Justice Houlden of December 14, 1994 which provides that the trustee is not to be, and is not to be deemed to be a successor employer under the OLRA.

42 Likewise, the Court of Appeal in Nova Scotia dealt with another successor right matter in the effects of bankruptcy upon the collective agreement in *Saan Stores Ltd. v Nova Scotia Labour Relations Board* (1999), 172 D.L.R. (4th) 134 (N.S. C.A.), Hallett J.A. makes the following findings:

> The review of the jurisprudence has led me to conclude that it seems to be accepted that bankruptcy does terminate employment. (See statements to this effect in *Re Bryant Isard Co.* (1922), 3 C.B.R. 352; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. (Bkcy.)); *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Re St. Marys Paper Inc.* 1994, 26 C.B.R. (3d) 273, 116 D.L.R. (4th) 448 (Ont. C.A.); *Re 588871 Ontario Ltd.* (1995), 33 C.B.R. (3d) 28 (Ont. Ct. (Gen. Div.) Bkcy) and *Associated Freezers of Canada Inc. (Bankrupt) v. Retail, Wholesale Canada, Local 1015 (Division of United Steelworker of America)* (1995), 149 N.S.R. (2d) 385 (N.S.S.C. Bkcy).) This would include employment governed by the terms of a collective agreement. See also Annotation by Morawetz to *Re Pennington's Stores Ltd.* (1996), 42 C.B.R. (3d) 45 at p. 46 (Ont. Ct. (Gen. Div.) Bkcy) where he stated:
>
> > It has generally been assumed that bankruptcy terminates an employment contract.

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> I would have thought that, in the exercise of the trustee's power to affirm contracts, that a trustee could elect to affirm the employment of a bankrupt's unionized staff and affirm the collective agreement. I am of this view because bankruptcy of itself does not constitute a breach of contract...
>
> In my opinion, the statements in the case law stand only for the proposition that the relationship of the employer and the employee is terminated as between the bankrupt employer and the employees on the bankruptcy of the employer.
>
> A review of the decision of the Supreme Court of Canada in *Rizzo* and the majority decision of the Ontario Court of Appeal in *St. Mary's Paper* has led me to conclude that, although employment is terminated by bankruptcy, the termination of the employer/employee relationship between the bankrupt and the employee does not necessarily terminate benefits the terminated employee is entitled to by reason of statutory schemes. Statutes providing such benefits are to be given a liberal interpretation so as to achieve their objective.

43 Section 121 (1) of the *Bankruptcy and Insolvency Act* provides as follows:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under the Act. (Emphasis added)

44 There is no issue that on the day before the bankruptcy all of the employment contracts would be obligations binding upon Optenia and would be a financial liability. Although the termination of the employment is done by operation of law on the day of the bankruptcy and although the contracts of employment are silent as to whether bankruptcy is "just cause", I am of the view the contracts have to be interpreted in favour of the employees that it is implied bankruptcy would be termination without cause. As such, the Trustee would be bound by the severance provisions in the employment contracts.

Frustration:

Does the event of bankruptcy constitute frustration in law of the employment contracts?

45 The Simson contract and the Founders contracts there is a frustration provision. This frustration provision does not appear in any of the other employment contracts. It reads as follows:

> If you die, or frustration of this Agreement occurs (which includes but is not limited to Incapacity), then:
>
> (i) you (or your estate, in the event of your death) will be entitled to receive any compensation or benefits which have accrued up to the Termination Date;
>
> (ii) any founders shares which have not yet vested as of the Termination Date will immediately vest in you (or in your estate, in the event of your death), in accordance with the terms of the SA,
>
> but you will not be entitled to receive other compensation of any nature, whether under contract, statute, common law or otherwise.

46 The doctrine of frustration of contracts was referred to in *Tingley v. McKeen*, [1954] 4 D.L.R. 392 (N.B. C.A.). In that case there was a contract to cut and to haul lumber at a certain price. A party to the contract abandoned his performance as he had no money to continue with the operation. The issue is whether the contract was frustrated under the *Frustrated Contracts Act* or at common law. Richards C. J on behalf of the Court on p. 395 stated as follows:

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> In Salmond & Williams on Contracts, 2nd ed., p. 508 "frustration" is referred to as follows: By frustration is meant impossibility in the fulfillment of the purposes of the parties in entering into the contract. These purposes have been frustrated, disappointed, and made vain by some unknown or unanticipated circumstances or change of circumstance. The question for consideration is whether and how far the contract remains binding and operative notwithstanding this failure of the object with which it was made. The most important and familiar example of such frustration is that if impossibility in performance of the obligations of the contract. By some unknown circumstances or unanticipated change of circumstance a contractual obligation assumed in the belief that it was possible of performance turns out to be impossible.

Richards C.J. concludes as follows:

> It seems to me obvious that the present case does not come within the class of cases above referred to. The evidence does not disclose that the contract was impossible of performance — and that is the finding of this trial Judge. The appellant was not discharged; he quit because, as he states, he had no money. And that in fact is the explanation in the present case.

47 In *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.), in that case the Newfoundland Legislature passed an amendment to the *Public Utilities Act* reducing the numbers of commissioners and abolished the position of the Respondent, Andrew Wells. The Crown took the position that Wells' contract was frustrated by the passage of the new Act. Major J. dealt with this position at p. 219 where he states:

> The appellant Crown argues that the respondent's contract was frustrated by the passage of the new Act, which made further employment of Wells in his previous position impossible. The Crown again relied upon *Reilly*, as well as recent decisions applying it; *Welch*, *supra*; *Peddle*, *supra*, and *Petryshyn*, *supra*. In *Reilly*, at p. 180, Lord Atkin had stated that:
>
> > ...the present case appears to their Lordships to be determined by the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged. In the present case the office held by the appellant was abolished by statute: thenceforward it was illegal for the executive to continue him in the office or pay him any salary...So far as the rights and obligations rested on contract, further performance of the contract had been made by statute impossible, and the contract was discharged.
>
> The obvious objection to this submission is that self-induced frustration does not excuse non-performance: *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481; G.H.L. Fridman, *The Law of Contract in Canada* (3rd ed. 1994), at pp 642-43; *Chitty on Contracts* (27th ed. 1994), vol. 1, at para. 23-047. The Crown responds that the separation of powers between the legislative and executive branches means that a legislative act which bars the executive from performing pending contractual obligations does not constitute self-induced frustration, as these branches are independent entities.

48 In my view frustration of contract would not apply in this situation. The Board of Directors of Optenia carefully considered their financial position in view of JDS Uniphase withdrawing their financial support. They recognized their contractual obligation to the employees and wanted to benefit the employees. The voluntary assignment in bankruptcy was meant to accommodate the employees, not to deprive them of any contractual benefits. It was a self-induced act and therefore the doctrine of frustration would not apply.

Conclusion:

49 Answers to the questions raised by the Trustee are as follows:

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1) What is the effect on the employment relationship resulting from the bankruptcy of the employer?

Employment relationship is terminated.

2) Have the employment contract been terminated without "just cause"?

Yes.

3) Does the event of bankruptcy constitute frustration in law of employment contracts?

No.

50 Moris Simson will be entitled to his costs from the estate. If costs cannot be agreed upon I will receive written submissions regarding costs.

Order accordingly.

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Tab 4

2000 CarswellAlta 1585
Alberta Court of Queen's Bench

CIBC World Markets Inc. v. Blue Range Resources Corp.

2000 CarswellAlta 1585, [2000] A.J. No. 1622, [2001] A.W.L.D. 342, 102 A.C.W.S. (3d) 17, 12 B.L.R. (3d) 286, 290 A.R. 271

In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985 c. C-36, As Amended

In the Matter of Blue Range Resource Corporation

In the Matter of the Application of CIBC World Markets Inc.

CIBC World Markets Inc., Applicant and Blue Range Resources Corporation, Respondent

LoVecchio J.

Judgment: December 22, 2000 *
Docket: Calgary 9901-04070

Proceedings: refused leave to appeal (March 14, 2001), Doc. Calgary Appeal 01-00015 (Alta. C.A.)

Counsel: *P. Pastewka* and *C.J. Popowich*, for Applicant, CIBC World Markets Inc.
G.H. Poelman and *W.K. Johnston*, for Creditors' Committee of Respondent, Blue Range Resource Corporation

Subject: Corporate and Commercial; Insolvency

ACTION by financial advisor for recovery of fees claimed owing pursuant to agreement.

***LoVecchio J.*:**

Introduction

1 This is an application by CIBC World Markets Inc., claiming a fee of approximately $3.5 million pursuant to an agreement with Blue Range Resource Corporation. As Blue Range is under the protection of the *Companies Creditors Arrangement Act* [1], CIBC seeks an Order that PriceWaterhouseCoopers Inc., the Receiver Manager of Blue Range, pay to CIBC a percentage of the judgment or damages equal to the amount payable to the other unsecured creditors of Blue Range.

Background

2 CIBC, as a financial advisor to Blue Range, was of the view that Blue Range required additional capital to fund its operations. Blue Range agreed. As a result, on September 18, 1998, CIBC entered into an agreement (Exhibit 6) with Blue Range for CIBC to assist Blue Range in finding additional capital, specifically by finding a joint venture partner.

3 CIBC developed a list of prospective partners, assisted in drafting marketing materials, had meetings with prospective partners, and provided advice on transaction implementation and negotiation.

4 As part of the above, CIBC prepared a document entitled "Summary Blue Range Resource Corporation: 1998-2000 Joint Venture Proposal" (Exhibit 8) which was circulated to a number of parties CIBC thought might be interested. CIBC

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also met with those that expressed an interest and provided some of them with the more detailed information package, entitled "Blue Range Resource Corporation 1998-2000 Joint Venture Proposal" (Exhibit 9). This information package included a Confidentiality Agreement which was to be signed by the parties receiving the more detailed information.

5 On October 26, 1998, CIBC on their own initiative faxed a document, which CIBC referred to as a "mini-package", to Canadian National Resources Limited. Mr. Korpach, a Managing Director of CIBC and the only person who gave oral evidence during this application, believed this "mini-package" was the "Summary" referred to above. Mr. Korpach also testified that he had a brief conversation with Mr. Murray Edwards, the Chairman of the Board of CNRL, to discuss Blue Range. Mr. Korpach could not remember the date of the call or whether the topic of Blue Range simply arose in the course of a discussion regarding other matters. Regardless, Mr. Edwards expressed no interest in the opportunity. CIBC did not meet with CNRL, nor did CIBC send CNRL the more detailed information package, it being acknowledged their only "contact" with CNRL about a possible joint venture was the unsolicited fax and phone call.

6 On November 13, 1998, Big Bear made an unsolicited offer to purchase all the outstanding common shares of Blue Range. Blue Range sought the assistance of CIBC and Research Capital Corporation in this regard. The parties entered into an agreement on November 13, 1998 whereby CIBC and Research Capital agreed to provide advice and assistance to Blue Range in finding a bid competitive with Big Bear's offer. The November Agreement outlined a wide range of methods by which Blue Range could respond to the bid including the possibility of asset dispositions.

7 CIBC and Research Capital did not find a competing bid and no other action was taken by Blue Range. The bid was successful and Big Bear ultimately took control of Blue Range on December 11, 1998.

8 On March 2, 1998, Blue Range sought and obtained the protection of the CCAA. Substantially all of its assets were purchased by CNRL in court-supervised proceedings through a Plan of Arrangement dated June 29, 1999. It is because of this transfer of Blue Range assets to CNRL that CIBC claims a percentage of the proceeds through the operation of what is known as a "trailer clause" in the September Agreement.

Issues

9 This application raises the following issues:

(1) Was the September Agreement frustrated by the CCAA proceedings?

(2) Can the September Agreement and November agreement co-exist?

(3) If not, was it the intention of the parties to suspend or replace the September Agreement?

(4) If the answer to (2) is yes, or if the answer to (2) is no and the answer to (3) is that the September Agreement was only suspended, was there a sale of properties to a person contacted by CIBC as contemplated by the trailer clause?

Decision - Issue (1)

10 For the reasons that follow, the Court does not find the September Agreement to have been frustrated as a result of the CCAA proceedings.

Analysis

11 Did the CCAA proceedings make performance of the September Agreement impossible or, as the House of Lords suggests in *Davis Contractors Ltd. v. Fareham Urban District Council*,[2] has "the contractual obligation ... become incapable of being performed because the circumstances in which the performance is called for would render a thing radically different from that which was undertaken by the contract"?[3]

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12 The Creditors' Committee argues that the March 2nd Order, which placed Blue Range under the CCAA and restricted Blue Range from disposing of any assets outside the ordinary course of business without approval of the Court, resulted in the frustration of the September Agreement because an independent sale by Blue Range was made impossible.

13 I do not agree that the restriction on sale contained in the order may, by itself, lead to frustration. The principle purpose of CCAA protection is to provide a stay of proceedings against the company by the creditors of the company. As an adjunct to that protection, the company may also be restrained from disposing of assets pending the development of a plan to reorganize its affairs. This was also done in this case. One of the purposes of such restraint is to preserve the *status quo*. The enforcement of the September Agreement (assuming it was not rescinded by the November Agreement) simply became subject to the stay. To suggest that CCAA proceedings render contracts frustrated in these circumstances would not only expand the effect of a stay under the CCAA, it would substantially alter the *status quo* in the very relationships it was intended to preserve. Accordingly, the frustration argument cannot be sustained.

Decision - Issue (2)

14 For the reasons that follow, I find that the September Agreement and the November Agreement may not co-exist.

Analysis

15 CIBC argues that there is no express provision to replace the September Agreement by the November Agreement and that both agreements are capable of operating contemporaneously.

16 The Creditors' Committee argues that the two agreements cannot co-exist and that the September Agreement was rescinded and replaced by the November Agreement.

17 The Creditors' Committee cites the following principle from *Industrial Construction Ltd. v. Lakeview Development Co.* [4] as the test for implied rescission and replacement:

> It is well settled law that the parties to a contract may by express agreement or by their conduct rescind or vary their contract: see *Halsbury's Laws of England, Fourth Edition*, volume 9, paragraphs 561 and 570. Whether the parties intend to rescind or to vary must be determined in the light of all of the circumstances of the case; but the parties will be presumed to have intended to rescind the old contract and to have substituted a new one whenever the new agreement is inconsistent with the original contract to an extent which goes to the very root of it: see *Morris v. Baron and Company*, [1918] A.C. 1; *British and Beningtons Limited v. North Western Cachar Tea Company, Limited et al.*, [1923] A.C. 48. [5]

18 The purpose of the September Agreement was to find new capital for Blue Range through a joint venture partner.

19 The purpose of the November Agreement was to help Blue Range defend Big Bear's takeover bid.

20 From a business perspective, it is obvious that the mandates of the two agreements are quite different. Does this make them inconsistent, or, perhaps to expand the range of words, does it make them in conflict or incompatible? That really begs the question. The term inconsistent, like conflict or incompatibility, is a relative term. By this I mean, we express the view: "the operation of activity A is inconsistent with (in conflict with or incompatible with) the operation of activity B".

21 The common denominator is the inability to practically carry out the operation of both activities at the same time. For all practical purposes, Blue Range could not be looking for a joint venture partner at the same time its Board of Directors was seeking a competitive offer for the purchase of its shares. The most obvious practical impediment would be the reluctance of any third party to commit while the Big Bear bid was outstanding.

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22 Mr. Korpach himself recognized this fact when he testified that the focus of the company and their efforts shifted in November and, as a result, he advised Coastal Oil & Gas Corp., a party interested in the joint venture proposal, that the joint venture proposal was no longer viable given the Big Bear bid.

23 It can be inferred by the conduct of Blue Range and CIBC that they also recognized the mandates could not be pursued simultaneously when they orally agreed to conclude the monthly billings under the September Agreement at the end of November.

24 As a result, I find the two agreements to be inconsistent for the purposes of the test.

25 CIBC argues in the alternative, that if the two agreements are inconsistent, this does not in and of itself mean that replacement must follow. CIBC argues that the parties only intended the September Agreement to be suspended pending resolution of the success or failure of the Big Bear bid.

Decision - Issue (3)

26 For the reasons that follow, it must be inferred that the parties intended to replace the September Agreement in its entirety by the November Agreement.

Analysis

27 There are numerous clauses in the November Agreement that suggest the parties intended it to be an all-inclusive arrangement.

28 First, there is a duplication of roles: CIBC was appointed Blue Range's "exclusive financial adviser" in both agreements.

29 Second, in my view, there is a duplication of fees owing for a sale of Blue Range assets under the two agreements. As CIBC denies this potential overlap, it is necessary to examine the provisions in greater detail.

30 Clause 3 of the September Agreement, the "trailer" clause, provides for a completion fee (1.5 per cent of net sale proceeds) if Blue Range completes a sale of properties rather than or in addition to a joint venture arrangement during the term of the engagement or within 12 months of its termination.

31 Clause 7 of the November Agreement provides for a success fee based on the difference between the value of the Big Bear bid and the transaction that proceeded. Clause 7 (iv) states:

> iv) a success fee (the "Success Fee") calculated as follows:
>
> (a) With respect to any Proposed Transaction involving the direct or indirect acquisition or purchase of all the issued and outstanding common shares of Blue Range, an amount equal to 5% of the difference between:
>
> 1. the Aggregate Consideration (as defined below) offered to holders of Blue Range common shares under the Proposed Transaction; and
>
> 2. $6.05 multiplied by the number of those Blue Range common shares outstanding on the date such Proposed Transaction is completed.
>
> (b) With respect to a *Proposed Transaction that is consummated other than for the acquisition or purchase of all of the issued and outstanding common shares of Blue Range*, an amount equal to 5% of the difference between:
>
> • the product of the closing trading price of the common shares of Blue Range .... multiplied by the number of common shares of Blue Range (or equivalent) outstanding on a fully diluted basis as at such date;

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> provided if there is no closing trading price on such date for those shares, those shares shall be valued at their bid price or the most recent reported closing price, whichever is greater; and
>
> 2. $6.05 multiplied by the same number of those Blue Range common shares (or the equivalent) described in paragraph 7 iv) b) 1 above.

[Emphasis added.]

32 CIBC argues that there is no duplication of fees owing in the event of a sale of assets because the "Success Fee" under clause 7 iv)(b) is payable only where there is a purchase of shares (*e.g.* anything less than all of the shares), and it is not triggered when there is a sale of assets. They argue that this is so given the problems in calculating the success fee in a transaction other than one involving a sale of shares.

33 The problem with CIBC's interpretation is that they are, in essence, asking the Court to read down the definition of "Proposed Transaction" for the purposes of this clause only. Yet the plain wording of clause 7 includes a success fee based on a "Proposed Transaction" which, by definition, includes a sale of assets over $25 million. As discussed below, CIBC intended to encompass a wide range of transactions in its broad definition of "Proposed Transaction".

34 Moreover, the structure of clause 7 iv) is clearly divided between (a) and (b): a success fee based on a sale of all the shares of Blue Range under (a) and a success fee for the completion of any other "Proposed Transaction" under (b).

35 I therefore find that a sale of assets could trigger a fee owing under each agreement. I appreciate there may be some difficulty in the calculation of the fee under the November Agreement.

36 The definition of "Proposed Transaction" in the November Agreement is also indicative that the parties intended it to be an all-inclusive arrangement. The definition contemplates a wide range of eventualities such as any type of share purchase, restructuring, compensation arrangements, amalgamation, merger, or "any other form of business combination, reorganization or restructuring." Regardless of the outcome of the Big Bear offer, CIBC clearly intended to secure payment.

37 Although the above points all support a reasonable inference that the September Agreement was replaced, they could equally support an inference of suspension.

38 Most compelling, however, for replacement is the duplication of terms and fees owing if the trailer clauses become operative.

39 The trailer clause in the September Agreements states:

> In the event Blue Range completes a sale of properties (rather than or in addition to the Proposed Transaction) during the term of this engagement or during the 12 months following the termination of this engagement (provided that the purchaser was previously contacted as part of our engagement), a completion fee payable on closing of such sale of 1.5% of the net sales proceeds, subject to the credit of all fees referred to in subparagraph 2(i).

40 The trailer clause in the November Agreement provides:

> 18. Notwithstanding the foregoing, the services hereunder may be terminated with or without cause by either Blue Range or either of the Advisors with respect to their services at any time and without liability or continuing obligation to Blue Range or to either of the Advisors except for:
>
> . . . . .
>
> ii) in the case of termination by Blue Range, the Advisors' rights to the Base Fee or the Success Fee pursuant to this Agreement for any Proposed Transactions which occur in one year of such termination, and the Advisors' rights to any Independence fee which becomes payable pursuant to 7 vi)...

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41 While the wording of the November clause is different from that which appears in the September Agreement, the intended effect of the clause is the same: to ensure payment to CIBC in the event that a "Proposed Transaction" occurs in the year following the termination of the agreement.

42 If both agreements continued and Blue Range terminated each of the agreements, CIBC would be entitled to collect under both trailer clauses for the sale of assets to CNRL — another instance of a double fee. Yet unlike the double fee discussed above, this double fee would survive an implied agreement to suspend the operation of the September agreement. For this reason, suspension would be inappropriate as it would permit CIBC to be paid twice for the same transaction.

43 In my view, such a result would require specific language to this effect.

44 In coming to this conclusion, I am mindful of clause 9 of the September Agreement which states:

> 9. If CIBC Wood Gundy is requested to perform services in addition to those described above, the terms and conditions relating to such services will be outlined in a separate letter of agreement and the fees for such services will be negotiated separately and in good faith and will be consistent with fees paid to investment bankers in North America for similar services.

45 While this clause contemplates the existence of a separate agreement, it is not a true survivorship clause. Moreover, the precise wording of clause 9 contemplates a contract to perform services "in addition to those" in the September Agreement and states that fees are to be "negotiated separately". I do not read this clause as applying to the November Agreement, particularly since there is a duplication of fees owing for the sale of assets and, in both cases, CIBC is acting as a financial adviser. This situation cannot be said to be a contract to perform services "in addition" to those in the September Agreement with fees "negotiated separately".

Decision - Issue 4

46 For the reasons that follow, CIBC did not make contact with CNRL in such a manner as to engage the trailer clause in the September Agreement.

47 CIBC argues that because they previously contacted CNRL in relation to the September Agreement, they are owed 1.5% the net sale proceeds of assets to CNRL. CIBC argues that the unsolicited faxing of the mini-package and the brief telephone conversation of Mr. Korpach with Mr. Edwards constitutes "contact" under the trailer clause.

48 In this regard, Mr. Korpach testified that CIBC typically uses three types of trailer clauses. At the lowest level, the trailer clause is triggered by a sale of assets to any purchaser. The activity or inactivity of CIBC, in such case is irrelevant. At the other extreme, the trailer clause requires proof that the contact made by CIBC with the purchasing party and CIBC's participation in the process was an important part of the purchaser's decision to buy the assets of the company. Mr. Korpach testified that the trailer clause in the September Agreement contained a negotiated addition to CIBC's original proposal. CIBC's original proposal included a trailer clause at the lowest level. The addition was to establish what Mr. Korpach labelled the "mid-range" between the two extremes.

49 This trailer clause provides:

> In the event Blue Range completes a sale of properties (rather than or in addition to the Proposed Transaction) during the term of this engagement or during the 12 months following the termination of this engagement (*provided that the purchaser was previously contacted as part of our engagement*), a completion fee payable on closing of such sale of 1.5% of the net sales proceeds, subject to the credit of all fees referred to in subparagraph 2(i). [The parenthetical in italics is the negotiated addition.]

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50 The term "contacted" does not stand alone and must be interpreted in the context it appears: "previously contacted as part of our engagement". Accordingly, in attaching meaning to the term "contact", one must consider the scope of the engagement.

51 A description of the services encompassed by the engagement is set out in Schedule A of the Agreement. Schedule A includes, among other things, "[p]roviding *contact and liaison* with prospective partners". [Emphasis added.] Thus, the scope of the engagement creates an obligation on CIBC to find candidates for a joint venture arrangement. As part of its responsibilities, CIBC chose to send an unsolicited fax of the summary to CNRL and also had the unsolicited telephone call with Mr. Edwards. In my view, this level of activity would be encompassed within any minimum level of contact and liaison with prospective purchasers as required by the engagement.

52 I note, at the lowest level, notwithstanding the terms of the engagement, it is arguable that no contact of any nature is required to engage the trailer clause.

53 Does an unsolicited fax of preliminary information and an unsolicited telephone call, neither of which were met with any interest, constitute a sufficient level of activity to engage this trailer clause? In my view, this level of activity, which is required by the engagement in any event, so closely mirrors the lowest standard that such an interpretation would be inconsistent with Mr. Korpach's testimony that the present clause is to be at the "mid-range" of the required activity level.

54 I recognize that trailer clauses are there to protect legitimate interests of parties like CIBC when they have expended efforts and parties then seek to not pay the fees prescribed. However, this clause was added by negotiation to establish the mid-range as the bench mark. It must be given a purposeful meaning and, as I said, the unsolicited faxing of the mini-package and one brief telephone conversation should not be enough to engage this trailer clause.

55 The Creditors' Committee also invites me to conclude that CNRL's purchase of assets is not a "sale" in the ordinary sense of the word because a sale implies action of a voluntary nature on the part of the parties. In this case, they argue the sale of assets to CNRL was not of a voluntary nature by Blue Range because its activities are subject to the supervision of the Court. This approaches the issue of voluntariness through the capacity of a party to the sale.

56 Given my conclusion that CIBC's contact with CNRL was not sufficient to engage the trailer clause, it is not necessary for me to address this issue.

Conclusion

57 The application is denied.

Costs

58 If they wish, Counsel may speak to me in the next 30 days respecting the matter of costs. In the event they do not, I wish to take this opportunity to express my gratitude for their courtesy and their thoughtful and helpful submissions.

Action dismissed.

Footnotes

* Leave to appeal refused, 2001 ABCA 86, 2001 CarswellAlta 461 (Alta. C.A.).

1 R.S.C. 1985 c. C-36, as amended.

2 [1956] A.C. 696 (U.K. H.L.).

3 *Ibid.* at 728-29.

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4 (1976), 16 N.B.R. (2d) 287 (N.B. Q.B.)

5 *Ibid.* at at 289-90.

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Tab 5

1938 CarswellOnt 90
Ontario Court of Appeal

Rice v. Jones

1938 CarswellOnt 90, [1938] 4 D.L.R. 772 (note), [1938] O.W.N. 377, 20 C.B.R. 87

Rice v. Jones

Middleton, Masten and Gillanders JJ.A.

Judgment: September 22, 1938

Counsel: *J. R. Cartwright, K.C.*, and *J. D. Edison*, for the defendant (appellant).
H. F. Parkinson, K.C., for the plaintiff (respondent).

Subject: Corporate and Commercial; Insolvency; Contracts; Torts; Property

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

1 This is an appeal from the judgment of His Honour Judge Lovering, sitting in the 10th Division Court of the County of York, dated May 25, 1938, whereby he awarded judgment in favour of the plaintiff for the sum of $200.

2 The claim is for commission as a real estate agent, and is founded on an agreement under seal dated December 5, 1935, which reads as follows:

> To R. B. Rice & Sons
>
> Toronto, Ontario
>
> Toronto, December 5th, 1935.
>
> In consideration of your having obtained an offer from Monarch Marketerias, Limited, to lease premises No. 623 Danforth Avenue, Toronto, which has been accepted, I hereby agree to pay you a commission according to the tariff of the Toronto Real Estate Board and authorize you to apply the moneys received by you on account thereof.
>
> I agree that if upon the expiration of the present lease or tenancy the lessee, his executors, administrators, successors or assigns, agrees to remain in the premises on the terms contained in the said lease, or on any other terms for a further period that a commission for the additional term, according to the tariff of the Toronto Real Estate Board will be paid.
>
> In the event of the lessee, his executors, administrators, successors or assigns or nominee purchasing the said premises, or any part thereof, I/we agree to pay you forthwith a commission according to the tariff of the Toronto Real Estate Board upon such purchase price.
>
> In the event of the lessee, his executors, administrators, successors and/or assigns, leasing further or other premises from me, I also agree to pay you a commission in accordance with the above terms.
> Witness:
> 'B. W. Rice'
> 'C. M. Jones'

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Lessor (LS)

3 The defendant disputed the plaintiff's claim on the following grounds:

4 (1) That the plaintiff did not earn the commission claimed;

5 (2) That it was a condition precedent to the alleged commission agreement that the proposed tenant should pay rent;

6 (3) That the proposed tenant is bankrupt and the trustee in Bankruptcy has disclaimed the lease;

7 (4) That the plaintiff agreed that no commission should be payable unless and until the tenant paid the rent contemplated by the alleged offer to lease.

8 The plaintiff, acting on behalf of the defendant, procured a binding offer to lease from the Monarch Marketerias Limited, which offer is dated December 2, 1935, and this offer was accepted by the plaintiff, the lessor, on December 5, 1935. The lease was to be for a period of three years, commencing on January 1, 1938. Meantime, in the year 1936, the Monarch Marketerias Limited became bankrupt, and Mr. E. G. Clarkson was appointed trustee of the property. On July 30 he wrote to inform the defendant that he had disclaimed the existing lease as of July 31, and that he had no intention of exercising any rights which the debtor (the Monarch Marketerias Limited) may have to obtain a lease of the premises from the plaintiff.

9 The contentions put forward by the appellant are as follows:

10 1. That in point of fact the commission claimed upon the contract sued on and dated the 2nd of December, 1935 (Ex. 2, p. 12) was not earned in that the lease forming the basis for the claim to commission never became effective, the proposed tenant having become bankrupt before the commencement of the proposed tenancy which was not to commence until the 1st of January, 1938.

11 2. That the contract sued on (Ex. 2) does not truly set forth the real bargain which the parties made in that neither party contemplated the bankruptcy of the proposed tenant between the date of the offer to lease, i.e., December, 1935, and the date therein fixed for the commencement of the tenancy, i.e., 1st of January, 1938.

12 3. That by reason of the bankruptcy of the proposed tenant the whole basis for the contract to pay commission ceased to exist.

13 4. That it was an implied term of the contract for payment of the commission claimed that the proposed tenant would be in a position to take a lease of the property on the 1st of January, 1938.

14 5. That the (plaintiff) respondent recognized the (defendant) appellant's contention that no commission should be payable unless and until the proposed tenancy became effective.

15 So far as the claims advanced by the appellant were questions of fact, they were rejected by the Court in the course of the argument, and the determination of the appeal was reserved only on the question of frustration.

16 I am unable to reach the conclusion that the doctrine of frustration applies. Immediately after the contract for a lease between the appellant and the Monarch Marketerias Limited, was executed, the defendant (appellant) had in equity all the rights of a landlord, and the Monarch Marketerias Limited had all the rights of a tenant. These rights so arising out of the agreement to lease, continued in full force, notwithstanding the subsequent bankruptcy of the tenant. The trustee or liquidator had the right, if he regarded the lease as valuable, to affirm it and take it over. Consequently there was no frustration.

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17 But if, contrary to the view which I have just expressed, there was frustration of the original agreement as between the plaintiff and the Monarch Marketerias Limited, owing to the disclaimer of the trustee in pursuance of the statute, it was frustration of the contract between the appellant and its tenant, the Monarch Marketerias Limited, and not frustration of the contract between the appellant and the respondent. This latter contract was an independent collateral contract, under which the services of the respondent Rice had been fully performed, by securing a tenant for the appellant, which tenant had been accepted by him, and thereafter the defendant had executed under seal the agreement quoted above, undertaking to pay the commission sued for.

18 There was never any agreement making this payment conditional. The liability of appellant to respondent remained unimpaired. The oral agreement referred to in the grounds of appeal was merely to postpone the payment till January 1, 1938, and was unaffected by the bankruptcy.

19 The appeal should therefore be dismissed with costs.

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Tab 6

2005 CarswellOnt 1714
Ontario Court of Appeal

O.N.A. v. Mount Sinai Hospital

2005 CarswellOnt 1714, 2005 C.E.B. & P.G.R. 8146 (headnote only), [2005] O.J. No. 1739, 130 C.R.R. (2d) 320, 138 A.C.W.S. (3d) 1065, 139 L.A.C. (4th) 129, 197 O.A.C. 296, 2005 C.L.L.C. 210-023, 255 D.L.R. (4th) 195, 27 Admin. L.R. (4th) 275, 40 C.C.E.L. (3d) 206, 75 O.R. (3d) 245

Ontario Nurses' Association (Applicant / Respondent in Appeal) and Mount Sinai Hospital (Respondent / Appellant)

Goudge, Lang, Juriansz JJ.A.

Heard: February 1, 2005
Judgment: May 4, 2005
Docket: CA C41847

Proceedings: affirming *O.N.A. v. Mount Sinai Hospital* (2004), 11 Admin. L.R. (4th) 290, 2004 CarswellOnt 171, *(*sub nom. *Ontario Nurses' Association v. Mount Sinai Hospital)* 122 C.R.R. (2d) 100, 69 O.R. (3d) 267, 123 L.A.C. (4th) 97, 32 C.C.E.L. (3d) 75, 2004 C.L.L.C. 210-022, 181 O.A.C. 35 (Ont. Div. Ct.)

Counsel: Douglas K. Gray, Michael T. Doi for Appellant
Arif Virani for Intervener, Attorney General of Ontario
Elizabeth McIntyre, Amanda J. Pask for Respondent

Subject: Constitutional; Employment; Public; Labour; Human Rights

APPEAL by employer from judgment reported at *O.N.A. v. Mount Sinai Hospital* (2004), 11 Admin. L.R. (4th) 290, 2004 CarswellOnt 171, *(*sub nom. *Ontario Nurses' Association v. Mount Sinai Hospital)* 122 C.R.R. (2d) 100, 69 O.R. (3d) 267, 123 L.A.C. (4th) 97, 32 C.C.E.L. (3d) 75, 2004 C.L.L.C. 210-022, 181 O.A.C. 35 (Ont. Div. Ct.), dismissing employer's appeal from determination of Arbitration Board awarding severance pay to disabled employee.

***Juriansz J.A.*:**

I. Overview

1 The issue in this appeal is the constitutionality of s. 58(5)(c) of the *Employment Standards Act*, R.S.O. 1990, c. E.14, which creates an exception to an employer's obligation to pay severance pay to employees whose contracts of employment have been frustrated due to illness or injury. [1]

2 The issue first arose before an Arbitration Board that held that s. 58(5)(c) does not violate s. 15 of the *Charter*. The Divisional Court quashed the Board's order and held that s. 58(5)(c) violates s. 15 because it denies disabled employees an employment benefit to which they would have been entitled but for their disability, and in so doing devalues their past contributions to their employer's business.

3 For the reasons that follow, I would uphold the decision of the Divisional Court quashing the decision of the Board and declaring s. 58(5)(c) to be unconstitutional and of no force and effect.

II. Background

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4 On June 15, 1998, Mount Sinai Hospital dismissed Christine Tilley due to innocent absenteeism. Ms. Tilley was a neonatal intensive care nurse who had worked at the hospital for thirteen years. In August 1995, she injured her knee in a water-skiing accident. Following the accident, she suffered from depression and bulimia. After a number of unsuccessful attempts to return to work in January 1996, Ms. Tilley experienced a relapse and was approved for long-term disability benefits. Just prior to her termination, Ms. Tilley's doctor advised her that she would eventually be able to return to work, but was unable to estimate when.

5 Section 58(2) of the *Employment Standards Act* provides that an employer with a payroll of $2.5 million or more shall give severance pay to a terminated employee who has been with the employer for five years or more. Section 58(5) sets out those classes of employees who are entitled to receive severance pay. Section 58(5)(c) provides that severance pay is payable to an employee "who is absent because of illness or injury, if the employee's contract of employment has not become impossible of performance or has been frustrated by that illness or injury." The full text of these sections is set out in Appendix A. Because Ms. Tilley's employment contract had been frustrated as a result of her disability, she did not receive severance pay upon her termination. Ms. Tilley's union, the Ontario Nurses' Association ("the O.N.A."), filed a grievance disputing the termination [2] and the claiming that the denial of severance pay violated s. 15 of the *Charter*.

6 Section 15 of the *Charter* provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

7 In *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), the Supreme Court of Canada set out the approach for evaluating s. 15 claims. The analysis requires that the following three questions be addressed:

> 1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society, resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> 2. Is the claimant subject to differential treatment based on one or more enumerated or analogous grounds? and
>
> 3. Does the differential treatment discriminate by imposing a burden upon or withholding a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?

8 The Arbitration Board found that Ms. Tilley's contract of employment had been frustrated and upheld her termination. It also upheld the constitutionality of s. 58(5)(c) on the ground that while the impugned law imposes differential treatment on Ms. Tilley because of her disability, this differential treatment is not discriminatory. The key to this result was the majority's conclusion that the emphasis of the legislative distinction was not disability, but rather the "viability of the employment contract." The majority reasoned that severance pay was available to employees who are absent from work because of illness or injury, and the exception applied only those employees with disabilities severe and prolonged enough that their contracts of employment could no longer be fulfilled.

9 On judicial review, the Divisional Court disagreed with the Board's treatment of s. 15 and found that the subsection violated the *Charter* for the reasons set out above. Mount Sinai Hospital appeals from this ruling. The Attorney General of Ontario, who did not appear before the Board or the Divisional Court, intervened in the appeal to support the constitutionality of s. 58(5)(c).

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III. Positions of the Parties

10 Both the Board and the Divisional Court found, and all the parties agree, that the first two steps of the *Law* analysis are satisfied in this case. The Hospital and the Attorney General submit that the Board was correct in selecting as the appropriate comparator group those employees who are absent from work due to illness or injury but whose employment has not become impossible of performance or been frustrated by that illness or injury. The O.N.A. submits that the appropriate comparator group is composed of those employees who are not disabled and receive severance pay. In either case there is a distinction drawn on disability and the first two branches of the Law test are satisfied. The contested issue in this case is therefore the third step of the *Law* analysis, namely, whether this differential treatment is discriminatory.

11 The positions of the parties on this issue turn on their different characterizations of the purpose of severance pay.

12 The Hospital and the Attorney General argue that while there are multiple purposes of severance pay, the dominant purpose is prospective, and is directed toward compensating employees for capital losses going forward as they find new employment. Since employees whose contracts have been frustrated due to illness or injury are unlikely to re-enter the workforce, denying them severance pay is not discriminatory.

13 By contrast, the O.N.A. argues that the purpose of severance pay is retrospective, and is intended to compensate long-serving employees for their years of service and investment in the employer's business. Employees whose contracts have been frustrated due to illness or injury have made equally valuable contributions as have other employees who qualify for severance pay. Therefore, the O.N.A. submits the denial of severance pay to these employees constitutes discrimination.

14 The Divisional Court took the latter view. It concluded that "legislative history, together with relevant jurisprudence, make it clear that severance pay (in contrast to termination pay in lieu of notice) is an earned benefit that compensates long-serving employees for their past services and for their investment in the employer's business. It is properly payable for any non-culpable cessation of employment."

15 The Hospital and the Attorney General submit that the Divisional Court erred in describing severance pay as an "earned benefit." They assert, correctly, that severance pay is not payable "for any non-culpable cessation of employment" as stated by the Divisional Court. Rather, they point out that the legislation provides a number of exceptions to an employer's obligation to provide severance pay, regardless of the role played by the employee in the termination. For example, severance is not available to employees in the construction industry, or who retire on a full pension, or who are terminated as a result of the sale of a business but are hired by the purchaser. These exceptions, they submit, make it clear that severance pay is not available for every non-culpable cessation of employment.

16 The Hospital identified four purposes of severance pay: compensating employees for their investment in the employer's business; compensating employees for the capital losses they experience when their employment is terminated and they start new jobs; providing funds for job training to assist terminated employees in finding new employment; and serving as an additional income source while terminated workers look for work, thus acting as a bridge to other employment. The Attorney General mentioned other possible purposes as well, such as to provide an incentive to employers to provide pensions, and to discourage plant closings.

17 Of these various purposes, the Hospital and the Attorney General submitted that the most important purpose of severance pay is to compensate terminated employees who remain in the workforce for their capital losses as they seek and take up new jobs. The capital they refer to is the value to employees of their seniority, benefits and job-specific skills that accumulate with service. They relied on Michael J. McNeil's description of the capital loss an employee suffers from the loss of employment as follows:

> Certain benefits relating to a job cannot be transferred to a new workplace. Many of these accrue over the length of time the employee is associated with a particular job or employer. Seniority, control over shift selection and job

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> assignment, pension benefits, longer vacation periods and accumulated sick leave are all fringe benefits which may result in significant loss if the employee is forced to move from one job to another. If the employee loses his seniority rights, he will have less security at a new job because those with less seniority are likely to be let go earlier in cases of cutbacks. Unless there are arrangements for full portability of pension plans, losses may result from having pensions from two or more employers rather than a single continuous plan. It is clear that an employee suffers substantial losses of both economic and social benefits when terminated from a job.
>
> (M.J. MacNeil, "Plant Closings and Workers' Rights" (1982), 14 Ottawa L. Rev. 1 at 27-28.)

18 The Attorney General also notes that long-serving employees have a better understanding of the employer's operations and are therefore more proficient and more valuable to their employer. As a result, these employees often earn higher-than-market compensation. Severance pay therefore also addresses the capital loss, in the form of reduced wages, which a long-serving employee suffers when terminated.

19 The appellant and the Attorney General conclude that since the dominant purpose of severance pay is to compensate employees for their capital losses as they find new employment, the denial of severance pay to employees who will not return to the workforce and whose financial needs will be met in other ways is entirely in accord with that purpose. In support of this argument, they point out that employees retiring on a full pension would probably have the longest service with the employer, and would have made the greatest investment in the employer's business, and yet they do not receive severance pay. According to the appellant and the Attorney General, this makes sense because seniority and job specific skills are of no value to these employees upon retirement, and their financial needs will be met in other ways.

20 Similarly, the appellant and the Attorney General argue, employees whose contracts have been frustrated due to illness or injury are not likely to return to the workforce, and their financial needs will be met through CPP payments, disability benefits, or both. They submit that denial of severance pay to employees whose contracts are frustrated because of disability is consistent with the dominant purpose of severance pay, and also corresponds to the actual needs, capabilities and circumstance of these employees.

Analysis

21 While the Hospital's and the Attorney General's rationale for why the Act denies severance pay to retirees on full pensions is compelling, the next step of their argument is more problematic. Assuming for the sake of the argument that the dominant purpose of severance pay is to compensate those employees who will return to the workforce, the Hospital and the Attorney General must then establish that employees whose contracts have been frustrated due to illness or injury may be equated with employees who will not work again.

22 The appellant and the Attorney General attempt to do so by invoking *Gosselin c. Québec (Procureur général)*, [2002] 4 S.C.R. 429 (S.C.C.). In *Gosselin*, the majority of the Supreme Court found that a provincial regulation, which provided reduced welfare benefits to individuals under the age of thirty who were not participating in training or work experience employment programs, did not infringe the equality guarantee in s. 15 of the *Charter*. McLachlin C.J. writing for the majority found that the purpose of the challenged distinction, far from being stereotypical or arbitrary, corresponded to the actual needs and circumstances of individuals under thirty. In acknowledging that the program's premises may not apply to some people under thirty, McLachlin C.J. wrote:

> I add two comments. First, perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the Canadian Charter. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in Law, supra, at para. 105, we should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the Charter"...

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> Second, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were correct. Bastarache J. argues that the distinction between people under 30 and older people lacks a "rational basis" because it is "[b]ased on the unverifiable presumption that people under 30 had better chances of employment and lower needs" (para. 248). This seems to place on the legislator the duty to verify all its assumptions empirically, even where these assumptions are reasonably grounded in everyday experience and common sense. With respect, this standard is too high. Again, this is primarily a disagreement as to evidence, not as to fundamental approach. The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15, Law, at para. 106, provided these assumptions are not based on arbitrary and demeaning stereotypes.

23 Relying on these comments, the Hospital and Attorney General submit that the severance pay provisions of the Act make a reasonable assumption as to who will re-enter the workforce and who is unlikely to work again. They say there is no duty on the legislature to establish by evidence that employees whose contracts are frustrated due to disability do not rejoin the workforce. Rather, they say the legislature must be given considerable leeway to tailor specific benefits on policy grounds, and perfect correspondence between a program and the actual needs and circumstances of a claimant group is not required.

24 This argument fails. In *Gosselin*, the Chief Justice wrote that the legislature is entitled to proceed on informed general assumptions without running afoul of s. 15, *provided these assumptions are not based on arbitrary or demeaning stereotypes*. In that case, the differential treatment based on age was not based on such a stereotype; on the contrary, it was premised on the idea that people under thirty are better equipped to find employment than are people over thirty. By contrast, in this case the differential treatment based on disability is premised on the stereotype that people with severe and prolonged disabilities will not return to the workforce.

25 Moreover, in *Gosselin*, the court found that people under thirty did not suffer from pre-existing disadvantage and stigmatization because of their age. By contrast, an important contextual factor in this case is that people with disabilities have historically been undervalued in Canadian society generally, and in the area of employment in particular. Where, as in this case, the individuals who are treated differently by the legislation suffer from pre-existing disadvantage, vulnerability, stereotyping and prejudice, then as the Supreme Court made clear in *Law* (at para. 63) it is logical to conclude that "further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a severe impact upon them, since they are already vulnerable."

26 *Gosselin* does not assist the appellant in this case. The legislature may not use employees whose contracts have been frustrated due to disability as a proxy for employees who will never work again because this assumption is based on an impermissible stereotype that disabled persons cannot fully participate in the workforce.

27 Even if this were a case where an informed general assumption were permitted, the Hospital's and the Attorney General's argument would still fail because the generalization that individuals whose employment has been frustrated by disability are likely to never participate in the workforce again is not true.

28 First, although an employer has a duty under the *Human Rights Code* to consider disabled employees' personal characteristics in accommodating them to the point of undue hardship, accommodation may not be possible for reasons unconnected to their personal characteristics, such as the range of other work available and working conditions in the workplace, and in the case of innocent absenteeism, the employer's ability to cope with the employee's prolonged absence. It follows that employees with severe and prolonged disabilities, while unable to be employed in one workplace, may be able to be employed in another.

29 Second, things change. Employees with permanent disabilities may undergo retraining and acquire new skills, and new devices and techniques of accommodating special needs may be developed. Employees with temporary disabilities may recover and be able to return to work, even if their conditions persisted long enough to result in the frustration

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of their former employment contracts. For example, in this case, Ms. Tilley was told she would eventually be able to return to work, but the exact timetable was unknown. As already mentioned, Ms. Tilley did in fact find new employment following her termination by the Hospital.

30 In summary, this is not a case in which the government can rely on a generalization about the presumed characteristics of employees whose employment has been frustrated by disability to avoid a finding that the differential treatment violates s. 15 of the *Charter*. It treats the grievor and others in her position differently than others whose employment has not been frustrated. Disabled persons as a group suffer from pre-existing disadvantage and stereotyping. There is no correspondence between the ground of denial and the actual needs, capabilities and circumstances of the grievor and others in the claimant group. The differential treatment has the effect of perpetuating the view that individuals with disabilities, severe and prolonged enough to frustrate their employment, are not likely to be members of the workforce in the future. The denial affects an interest crucially important to one's dignity, namely, equal treatment and equal compensation in employment. I conclude that the denial of severance pay under s. 58(5)(c) is discriminatory.

31 I also note that, even if I was to find that the exclusion in s. 58(5)(c) was consistent with what the Hospital and the Attorney General submit is the dominant purpose of severance pay, the fact that the exclusion is inconsistent with other purposes of severance pay would have been sufficient to ground a s. 15 breach.

32 As the Hospital acknowledges, one of the other purposes of severance pay is to compensate employees for past contributions to the employer's business. The O.N.A. points out that s. 58(5)(d), which grants severance pay to employees who die before receiving notice of termination, is an expression of this compensatory purpose. The fact that such employees receive severance is not consistent with providing compensation to employees who remain in the workforce. It is only consistent with compensating employees for their past contributions to the employer's business during their years of service. However, by virtue of exclusion in s. 58(5)(c), employees whose employment has been frustrated by disability are not compensated for their years of service and investment in the employer's business. This devalues their contribution and treats their years of service as less worthy than others'.

33 In my view, where a statute has several purposes, adverse differential treatment that is discriminatory in light of one purpose is sufficient to establish a *prima facie* breach of s. 15. The fact that the differential treatment may correspond perfectly with another purpose of the statute is a matter to be considered under section 1.

Section 1 of the Charter

34 A detailed analysis under section 1 is unnecessary in this case because the Hospital and the Attorney General rely on the same "reasonable assumption" I have already rejected in order to ground their s. 1 arguments.

35 The Hospital argues that limiting employees' entitlement to severance pay only to those situations in which it is appropriate is a pressing and substantial legislative objective. The Attorney General submits that the objective of the severance pay provisions in the *Act* is to "ease the financial needs of those who lose their jobs but who are likely to find alternative employment albeit at a reduced compensation." The Attorney General also submits that in reviewing legislative choices in the areas of economic and social policy, courts should show substantial deference.

36 While I agree that the government is entitled to balance the interests of employers and employees by limiting the availability of severance pay, I am not convinced that this objective is sufficiently compelling to override the right of disabled persons to equal treatment in employment. However, regardless of my disposition of this issue, the appellant's argument fails at the next stage of the s. 1 analysis because there is no rational connection between the objective of granting severance pay to those employees who will rejoin the workforce and the law which denies severance pay to employees whose contracts have been frustrated due to illness or injury.

37 For the reasons discussed above, it cannot be said as a matter of logic and common sense that employees whose employment has been frustrated are not likely to work again. Quite the contrary, the generalization that is offered as the rational connection reflects a stereotypical presumption about the adaptability, industry, and commitment to the

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workforce of persons with disabilities severe and enduring enough to frustrate their employment. The generalization can only have the effect of perpetuating and even promoting the view that disabled individuals are less capable and less worthy of recognition and value as human beings and as members of Canadian society.

38 Further, to the extent that severance pay is intended to ease the transition of terminated employees to other employment, the need of disabled employees for support in retraining and the acquisition of new skills may be even more pressing than that of other terminated employees. Denying them the benefit of severance pay therefore does not further the objective of severance pay identified by Attorney General. To the contrary, it frustrates it.

39 Finally, s. 58(5)(c) does not impair the griever's *Charter* rights as minimally as possible. First, to the extent that compensating terminated employees for their past contributions to the employer's business is one purpose of severance pay, employees who are not likely to return to the workforce are entitled to be compensated for their past contributions to the employer's business in the same way as other employees who receive severance pay. Second, even if disabled persons who are denied severance pay receive other government benefits as a result of their disabilities, this does not minimize the extent to which their rights to equal treatment in employment are impaired by the impugned law. Finally, to the extent that one purpose of severance pay is to provide assistance for employees to rejoin the workforce, s. 58(5)(c) denies its benefits to all persons whose contracts of employment have been frustrated due to disability without regard to whether or not they attempt to rejoin the workforce. Section 58(5)(c) therefore cannot be justified as a reasonable limit on s. 15.

Conclusion

40 For the foregoing reasons, I would dismiss the appeal and uphold the decision of the Divisional Court declaring that s. 58(5)(c) is unconstitutional and of no force and effect.

41 I would award the Association costs against the Hospital fixed at $10,000 inclusive of G.S.T. and disbursements.

***Goudge J.A.*:**

I agree.

***Lang J.A.*:**

I agree.

Appeal dismissed.

APPENDIX — A

Employment Standards Act, R.S.O. 1990, c. E.14

Part XIV Termination of Employment

Severance Pay

58 (2) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years. R.S.O. 1990, c. E.14, s. 58 (2); S.O. 1993, c. 27, Sched.

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Where Location Deemed an Establishment

(3) Where,

(a) there is a permanent discontinuance of all or part of the business of an employer at a location which is part of an establishment consisting of two or more locations; and

(b) fifty or more employees have their employment terminated in a period of six months or less because of the permanent discontinuance,

the location shall be deemed to be an establishment for the purpose of determining the rights of the employees employed at that location under this section. R.S.O. 1990, c. E.14, s. 58 (3); S.O. 1993, c. 27, Sched.

Amount of Severance Pay

(4) The severance pay to which an employee is entitled under this section shall be in an amount equal to the employee's regular wages for a regular non-overtime work week multiplied by the sum of,

(a) the number of the employee's completed years of employment; and

(b) the number of the employee's completed months of employment divided by 12,

but shall not exceed twenty-six weeks regular wages for a regular non-overtime work week. R.S.O. 1990, c. E.14, s. 58 (4); S.O. 1993, c. 27, Sched.

Application

(5) Subsections (2), (3) and (4) apply to,

(a) a regular full-time employee and a regular part — time employee;

(b) an employee whose employment is terminated as a result of a strike or lock-out except where the employer establishes that the permanent discontinuance of all or part of the business at an establishment is caused by the economic consequences of the strike;

(c) an employee who is absent because of illness or injury, if the employee's contract of employment has not become impossible of performance or been frustrated by that illness or injury;

(d) an employee who received or was entitled to receive notice of termination but who died before his or her employment was terminated or would have been terminated if notice of termination had been given;

(e) a permanent discontinuance of all or part of a business at an establishment however caused, whether fortuitous, unforeseen or by act of God;

(f) an employee who loses his or her employment by the exercise by another employee of a seniority right; and

(g) an employee who, upon having his or her employment terminated, retires and is entitled to receive a reduced pension benefit. R.S.O. 1990, c. E.14, s. 58 (5).

Exceptions

(6) Subsections (2), (3) and (4) do not apply to,

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(a) an employee who refuses an offer by his or her employer of reasonable alternative employment with the employer;

(b) an employee who refuses to exercise his or her seniority rights to obtain reasonable alternative employment;

(c) an employee who has been guilty of wilful misconduct or disobedience or wilful neglect of duty that has not been condoned by the employer;

(d) an employee who, upon having his or her employment terminated, retires and receives an actuarially unreduced pension benefit;

(e) an employee whose employer is engaged in the construction, alteration, maintenance or demolition of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works where the employee works at the site thereof; or

(f) an employee who is employed under an arrangement whereby the employee may elect to work or not when requested to do so. R.S.O. 1990, c. E.14, s. 58 (6); S.O. 1993, c. 27, Sched.

Severance Pay in Addition to Other Payment

(7) Severance pay under this section is payable to the employee in addition to any other payment under this Act or contract of employment without set-off or deduction, except for,

(a) supplementary unemployment benefits payable to and received by the employee; or

(b) payments made to the employee under a contractual severance pay scheme under which payments for loss of employment based upon length of service are provided. R.S.O. 1990, c. E.14, s. 58 (7); S.O. 1993, c. 27, Sched.

Prior Employment Included

(8) Employment before the 1st day of January, 1981, shall be taken into account in calculating the years of employment of an employee to whom this section applies.

Employment Not Included

(9) A year of employment for which an employee has been paid severance pay shall be excluded in any subsequent calculation of severance pay for that employee. R.S.O. 1990, c. E.14, s. 58 (8, 9).

Sale of a Business

(9.1) If an employer who sells a business within the meaning of section 13 purports to pay severance pay to an employee employed by the purchaser and if the amount paid at least equals the amount of severance pay to which the employee would have been entitled had he or she not been employed by the purchaser, the amount paid shall be treated as severance pay for the purposes of subsection (9).

Same

(9.2) Subsection (9.1) applies with respect to payments made before or after that subsection comes into force.

Election by Employee

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(10) Where an employee who is entitled to severance pay under this section has a right to be recalled for employment under the terms and conditions of employment, the employee may elect to be paid the severance pay forthwith or may elect to maintain the right to be recalled.

Effect of Election to Accept Severance Pay

(11) Where the employee elects under subsection (10) to be paid the severance pay forthwith, the employee shall be deemed to have abandoned the right to be recalled.

Effect of Election to Maintain Right to Recall

(12) Where the employee elects to maintain the right to be recalled or fails to make an election, the employer shall pay the severance pay to the Director in trust to be paid by the Director,

> (a) to the employer, where the employee accepts employment made available under the right of recall and in such case the employee shall be deemed to have abandoned the right to severance pay; or
>
> (b) to the employee in any case other than a case mentioned in clause (a), including the case where the employee renounces the right to be recalled, and, upon payment, the employee shall be deemed to have abandoned the right to be recalled.

Where Employee Resigns

(13) Where an employee who receives notice of termination resigns from employment during the statutory notice period and provides the employer with at least two weeks written notice of resignation, the employee shall,

> (a) where the employee has been given notice of termination because of the permanent discontinuance of all of the employer's business at an establishment, be deemed to have had his or her employment terminated by the employer on the date the notice of termination was to have taken effect; and
>
> (b) in any other case, be deemed to have been laid off by the employer commencing on the date the notice of termination was to have taken effect.

Calculation of Severance Pay

(14) The amount of severance pay for an employee who is entitled to severance pay under subsection (13) shall be calculated on the employee's length of employment up to the date on which his or her notice of resignation takes effect.

Instalment Payments

(15) Despite subsections (2) and (12) and section 7, where the Minister so recommends, the Director may, on an application by the employer, approve the employer's plan to pay severance pay by instalment and, where such approval has been given, the employer shall be deemed to have complied with subsections (2) and (12) and section 7.

Where Employer Fails to Comply with Plan

(16) Where an employer fails to comply with the approved plan and the Director does not approve another instalment plan within thirty days of such failure, all unpaid severance pay shall be deemed to have become due and payable on the date the Director approved the original instalment plan.

Maximum Period for Payment of Instalments

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(17) No instalment plan shall extend payment of severance pay for a period longer than three years from the date on which such severance pay became due and payable.

Where Agreements Made by Trade Union

(18) Despite section 3, where an employee who is entitled to severance pay under this section is represented by a trade union, the trade union may enter into an agreement with the employer which includes a settlement of all severance pay claims, in which case this section does not apply.

Director to be Notified

(19) The parties to an agreement under subsection (18) shall forthwith notify the Director in writing.

Proceedings Terminated

(20) Where there is an agreement under subsection (18), any proceeding under section 68 or 69 to determine severance pay is terminated with regard to the employees represented by the trade union. R.S.O. 1990, c. E.14, s. 58 (10-20).

Failure to Pay Severance Pay

(21) If a trade union has entered into a settlement agreement under subsection (18) and the employer does not pay the severance pay agreed to or the trade union demonstrates that the agreement was made as the result of fraud or coercion, an employment standards officer may make an order under section 65 as to what action, if any, the employer shall take and may make an order to compensate the employee for the severance pay that is owed.

Calculation of Severance Pay

(22) For purposes of subsection (21), the amount of severance pay an employee is entitled to in an order under section 65 is the amount as calculated under subsection (4) or as negotiated in the collective agreement, whichever is the greater. S.O. 1991, c.16, s. 4.

No Offence

(23) An employer does not commit an offence under subsection 78(1) when his, her or its employees are deemed to have been terminated under subsection (1.1) and the employer does not comply with subsection (2). S.O. 1995, c. 1, s. 75 (2), part, deemed to be in force September 7, 1995 (Act, s. 86 (3) 2).

Same

(24) An officer, director or agent of a corporation or a person purporting to act in any such capacity does not commit an offence under subsection 79(1) when the corporation is an employer whose employees are deemed to have been terminated under subsection (1.1) and the corporation does not comply with subsection (2). S.O. 1995, c. 1, s. 75 (2), part, deemed to be in force September 7, 1995 (Act, s. 86 (3) 2).

R.S.O. 1990, c. E.14, s. 58; S.O. 1991, c.16, s. 4; S.O. 1993, c. 27, Sched.; S.O. 1995, c. 1, s. 75; S.O. 1997, c. 21, s. 3.

Footnotes

1 The Act was repealed effective September 4, 2001, and replaced with the *Employment Standards Act*, 2000. Severance pay is addressed in s. 64 of the new statute, and regulation 288/01 pursuant to it. An exception equivalent to ss. 58(5)(c) is located in ss. 9(2) of regulation 288/01.

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2 Strictly speaking a frustrated contract is not terminated. Rather the parties are excused from their obligations because the contract has become impossible to perform. The Act and labour practice treat the employer's decision to consider the employment contract frustrated as a "termination."

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Tab 7

1990 CarswellOnt 139
Ontario Court of Appeal

Nova Metal Products Inc. v. Comiskey (Trustee of)

1990 CarswellOnt 139, 1 C.B.R. (3d) 101, 1 O.R. (3d) 289, 23 A.C.W.S. (3d) 1192, 41 O.A.C. 282

ELAN CORPORATION et al. v. COMISKEY (TRUSTEE OF) et al.

Finlayson, Krever and Doherty JJ.A.

Heard: October 30 and 31, 1990
Judgment: November 2, 1990
Docket: Doc. Nos. CA 684/90 and CA 685/90

Counsel: *F.J.C. Newbould*, Q.C., and *G.B. Morawetz*, for appellant The Bank of Nova Scotia.
John Little, for respondents Elan Corporation and Nova Metal Products Inc.
Michael B. Rotsztain, for RoyNat Inc.
Kim Twohig and *Mel Olanow*, for Ontario Development Corp.
K.P. McElcheran, for monitor Ernst & Young.

Subject: Corporate and Commercial; Insolvency

APPEAL from order of Hoolihan J. dated September 11, 1990, allowing application under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

***FINLAYSON J.A. (KREVER J.A.* concurring) (orally):**

1 This is an appeal by the Bank of Nova Scotia (the "bank") from orders made by Mr. Justice Hoolihan [(11 September 1990), Doc. Nos. Toronto RE 1993/90 and RE 1994/90 (Ont. Gen. Div.)] as hereinafter described. The Bank of Nova Scotia was the lender to two related companies, namely, Elan Corporation ("Elan") and Nova Metal Products Inc. ("Nova"), which commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), for the purposes of having a plan of arrangement put to a meeting of secured creditors of those companies.

2 The orders appealed from are:

(i) An order of September 11, 1990, which directed a meeting of the secured creditors of Elan and Nova to consider the plan of arrangement filed, or other suitable plan. The order further provided that for 3 days until September 14, 1990, the bank be prevented from acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova, and that Elan and Nova could spend the accounts receivable assigned to the bank that would be received.

(ii) An order dated September 14, 1990, extending the terms of the order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990. This order continued the stay against the bank and the power of Elan and Nova to spend the accounts receivable assigned to the bank. Further orders dated September 27, 1990, and October 18, 1990, have extended the stay, and the power of Elan and Nova to spend the accounts receivable that have been assigned to the bank. The date of the meetings of creditors has been extended to November 9, 1990. The application to sanction the plan of arrangement must be heard by November 14, 1990.

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(iii) An order dated October 18, 1990, directing that there be two classes of secured creditors for the purposes of voting at the meeting of secured creditors. The first class is to be comprised of the bank, RoyNat Inc. ("RoyNat"), the Ontario Development Corporation ("O.D.C."), the city of Chatham and the village of Glencoe. The second class is to be comprised of persons related to Elan and Nova that acquired debentures to enable the companies to apply under the CCAA.

3 There is very little dispute about the facts in this matter, but the chronology of events is important and I am setting it out in some detail.

4 The bank has been the banker to Elan and Nova. At the time of the application in August 1990, it was owed approximately $1,900,000. With interest and costs, including receivers' fees, it is now owed in excess of $2,300,000. It has a first registered charge on the accounts receivable and inventory of Elan and Nova, and a second registered charge on the land, buildings and equipment. It also has security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1, as am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26. The terms of credit between the bank and Elan as set out in a commitment agreement provide that Elan and Nova may not encumber their assets without the consent of the bank.

5 RoyNat is also a secured creditor of Elan and Nova, and it is owed approximately $12 million. It holds a second registered charge on the accounts receivable and inventory of Elan and Nova, and a first registered charge on the land, buildings and equipment. The bank and RoyNat entered into a priority agreement to define with certainty the priority which each holds over the assets of Elan and Nova.

6 The O.D.C. guaranteed payment of $500,000 to RoyNat for that amount lent by RoyNat to Elan. The O.D.C. holds debenture security from Elan and secure the guarantee which it gave to RoyNat. That security ranks third to the bank and RoyNat. The O.D.C. has not been called upon by RoyNat to pay under its guarantee. O.D.C. has not lent any money directly to Elan or Nova.

7 Elan owes approximately $77,000 to the City of Chatham for unpaid municipal taxes. Nova owes approximately $18,000 to the Village of Glencoe for unpaid municipal taxes. Both municipalities have a lien on the real property of the respective companies in priority to every claim except the Crown under s. 369 of the *Municipal Act*, R.S.O. 1980, c. 302.

8 On May 8, 1990, the bank demanded payment of all outstanding loans owing by Elan and Nova to be made by June 1, 1990. Extensions of time were granted and negotiations directed to the settlement of the debt took place thereafter. On August 27, 1990, the bank appointed Coopers & Lybrand Limited as receiver and manager of the assets of Elan and Nova, and as agent under the bank's security to realize upon the security. Elan and Nova refused to allow the receiver and manager to have access to their premises, on the basis that insufficient notice had been provided by the bank before demanding payment.

9 Later on August 27, 1990, the bank brought a motion in an action against Elan and Nova (Court File No. 54033/90) for an order granting possession of the premises of Elan and Nova to Coopers & Lybrand. On the evening of August 27, 1990, at approximately 9 p.m., Mr. Justice Saunders made an order adjourning the motion on certain conditions. The order authorized Coopers & Lybrand access to the premises to monitor Elan's business, and permitted Elan to remain in possession and carry on its business in the ordinary course. The bank was restrained in the order, until the motion could be heard, from selling inventory, land, equipment or buildings or from notifying account debtors to collect receivables, but was not restrained from applying accounts receivable that were collected against outstanding bank loans.

10 On Wednesday, August 29, 1990, Elan and Nova each issued a debenture for $10,000 to a friend of the principals of the companies, Joseph Comiskey, through his brother Michael Comiskey as trustee, pursuant to a trust deed executed the same day. The terms were not commercial and it does not appear that repayment was expected. It is conceded by counsel for Elan that the sole purpose of issuing the debentures was to qualify as a "debtor company" within the meaning of s. 3 of the CCAA. Section 3 reads as follows:

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> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

11 The debentures conveyed the personal property of Elan and Nova as security to Michael Comiskey as trustee. No consent was obtained from the bank as required by the loan agreements, nor was any consent obtained from the receiver. Cheques for $10,000 each, representing the loans secured in the debentures, were given to Elan and Nova on Wednesday, August 29, 1990, but not deposited until 6 days later on September 4, 1990, after an interim order had been made by Mr. Justice Farley in favour of Elan and Nova staying the bank from taking proceedings.

12 On August 30, 1990 Elan and Nova applied under s. 5 of the CCAA for an order directing a meeting of secured creditors to vote on a plan of arrangement. Section 5 provides:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

13 The application was heard by Farley J. on Friday, August 31, 1990, at 8 a.m. Farley J. dismissed the application on the grounds that the CCAA required that there be more than one debenture issued by each company. Later on the same say, August 31, 1990, Elan and Nova each issued two debentures for $500 to the wife of the principal of Elan through her sister as trustee. The debentures provided for payment of interest to commence on August 31, 1992. Cheques for $500 were delivered that day to the companies but not deposited in the bank account until September 4, 1990. These debentures conveyed the personal property in the assets of Elan and Nova to the trustee as security. Once again it is conceded that the debentures were issued for the sole purpose of meeting the requirements of s. 3 of the CCAA. No consent was obtained from the bank as required by the loan terms, nor was any consent obtained from the receiver.

14 On August 31, 1990, following the creation of the trust deeds and the issuance of the debentures, Elan and Nova commenced new applications under the CCAA which were heard late in the day by Farley J. He adjourned the applications to September 10, 1990, on certain terms, including a stay preventing the bank from acting on its security and allowing Elan to spend up to $321,000 from accounts receivable collected by it.

15 The plan of arrangement filed with the application provided that Elan and Nova would carry on business for 3 months, that secured creditors would not be paid and could take no action on their security for 3 months, and that the accounts receivable of Elan and Nova assigned to the bank could be utilized by Elan and Nova for purposes of its day-to-day operations. No compromise of any sort was proposed.

16 On September 11, 1990, Hoolihan J. ordered that a meeting of the secured creditors of Elan and Nova be held no later than October 22, 1990, to consider the plan of arrangement that had been filed, or other suitable plan. He ordered that the plan of arrangement be presented to the secured creditors no later than September 27, 1990. He made further orders effective for 3 days until September 14, 1990, including orders:

> (i) that the companies could spend the accounts receivable assigned to the bank that would be collected in accordance with a cash flow forecast filed with the Court providing for $1,387,000 to be spent by September 30, 1990; and
>
> (ii) a stay of proceedings against the bank acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova.

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17 On September 14, 1990, Hoolihan J. extended the terms of his order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990 for final approval. This order continued the power of Elan and Nova to spend up to $1,387,000 of the accounts receivable assigned to the bank in accordance with the projected cash flow to September 30, 1990, and to spend a further amount to October 24, 1990, in accordance with a cash flow to be approved by Hoolihan J. prior to October 1, 1990. Further orders dated September 27 and October 18 have extended the power to spend the accounts receivable to November 14, 1990.

18 On September 14, 1990, the bank requested Hoolihan J. to restrict his order so that Elan and Nova could use the accounts receivable assigned to the bank only so long as they continued to operate within the borrowing guidelines contained in the terms of the loan agreements with the bank. These guidelines require a certain ratio to exist between bank loans and the book value of the accounts receivable and inventory assigned to the bank, and are designed in normal circumstances to ensure that there is sufficient value in the security assigned to the bank. Hoolihan J. refused to make the order.

19 On October 18, 1990, Hoolihan J. ordered that the composition of the classes of secured creditors for the purposes of voting at the meeting of secured creditors shall be as follows:

(a) The bank, RoyNat, O.D.C., the City of Chatham and the Village of Glencoe shall comprise one class.

(b) The parties related to the principal of Elan that acquired their debentures to enable the companies to apply under the CCAA shall comprise a second class.

20 On October 18, 1990, at the request of counsel for Elan and Nova, Hoolihan J. further ordered that the date for the meeting of creditors of Elan and Nova be extended to November 9, 1990, in order to allow a new plan of arrangement to be sent to all creditors, including unsecured creditors of those companies. Elan and Nova now plan to offer a plan of compromise or arrangement to the unsecured creditors of Elan and Nova as well as to the secured creditors.

21 There are five issues in this appeal.

(1) Are the debentures issued by Elan and Nova for the purpose of permitting the companies to qualify as applicants under the CCAA debentures within the meaning of s. 3 of the CCAA?

(2) Did the issue of the debentures contravene the provisions of the loan agreements between Elan and Nova and the bank? If so, what are the consequences for CCAA purposes?

(3) Did Elan and Nova have the power to issue the debentures and make application under the CCAA after the bank had appointed a receiver and after the order of Saunders J.?

(4) Did Hoolihan J. have the power under s. 11 of the CCAA to make the interim orders that he made with respect to the accounts receivable?

(5) Was Hoolihan J. correct in ordering that the bank vote on the proposed plan of arrangement in a class with RoyNat and the other secured creditors?

22 It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies, Elan and Nova, are entitled to a broad and liberal interpretation of the jurisdiction of the Court under the CCAA. Having said that, it does not follow that in exercising its discretion to order a meeting of creditors under s. 5 of the CCAA that the Court should not consider the equities in this case as they relate to these companies and to one of its principal secured creditors, the bank.

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23 The issues before Hoolihan J. and this Court were argued on a technical basis. Hoolihan J. did not give effect to the argument that the debentures described above were a "sham" and could not be used for the purposes of asserting jurisdiction. Unfortunately, he did not address any of the other arguments presented to him on the threshold issue of the availability of the CCAA. He appears to have acted on the premise that if the CCAA can be made available, it should be utilized.

24 If Hoolihan J. did exercise any discretion overall, it is not reflected in his reasons. I believe, therefore, that we are in a position to look at the uncontested chronology of these proceedings and exercise our own discretion. To me, the significant date is August 27, 1990 when the bank appointed Coopers & Lybrand Limited as receiver and manager of the undertaking, property and assets mortgaged and charged under the demand debenture and of the collateral under the general security agreement, both dated June 20, 1979. On the same date, it appointed the same company as receiver and manager for Nova under a general security agreement dated December 5, 1988. The effect of this appointment is to divest the companies and their boards of directors of their power to deal with the property comprised in the appointment: Raymond Walton, *Kerr on the Law and Practice as to Receivers*, 16th ed. (London: Sweet & Maxwell, 1983), p. 292. Neither Elan nor Nova had the power to create further indebtedness, and thus to interfere with the ability of the receiver to manage the two companies: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.).

25 Counsel for the debtor companies submitted that the management powers of the receiver were stripped from the receiver by Saunders J. in his interim order, when he allowed the receiver access to the companies' properties but would not permit it to realize on the security of the bank until further order. He pointed out that the order also provided that the companies were entitled to remain in possession and "to carry on business in the ordinary course" until further order.

26 I do not agree with counsel's submission covering the effect of the order. It certainly restricted what the receiver could do on an interim basis, but it imposed restrictions on the companies as well. The issue of these disputed debentures in support of an application for relief as insolvent companies under the CCAA does not comply with the order of Saunders J. This is not carrying on business in the ordinary course. The residual power to take all of these initiatives for relief under the CCAA remained with the receiver, and if trust deeds were to be issued, an order of the Court in Action 54033/90 was required permitting their issuance and registration.

27 There is another feature which, in my opinion, affects the exercise of discretion, and that is the probability of the meeting achieving some measure of success. Hoolihan J. considered the calling of the meeting at one hearing, as he was asked to do, and determined the respective classes of creditors at another. This latter classification is necessary because of the provisions of s. 6(a) of the CCAA, which reads as follows:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company.

28 If both matters had been considered at the same time, as in my view they should have been, and if what I regard as a proper classification of the creditors had taken place, I think it is obvious that the meeting would not be a productive one. It was improper, in my opinion, to create one class of creditors made up of all the secured creditors save the so-called "sham" creditors. There is no true community of interest among them, and the motivation of Elan and Nova in striving to create a single class is clearly designed to avoid the classification of the bank as a separate class.

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29 It is apparent that the only secured creditors with a significant interest in the proceeding under the CCAA are the bank and RoyNat. The two municipalities have total claims for arrears of taxes of less than $100,000. They have first priority in the lands of the companies. They are in no jeopardy whatsoever. The O.D.C. has a potential liability in that it can be called upon by RoyNat under its guarantee to a maximum of $500,000, and this will trigger default under its debentures with the companies, but its interests lie with RoyNat.

30 As to RoyNat, it is the largest creditor with a debt of some $12 million. It will dominate any class it is in because, under s. 6 of the CCAA, the majority in a class must represent three-quarters in value of that class. It will always have a veto by reason of the size of its claim, but requires at least one creditor to vote for it to give it a majority in number (I am ignoring the municipalities). It needs the O.D.C.

31 I do not base my opinion solely on commercial self-interest, but also on the differences in legal interest. The bank has first priority on the receivables referred to as the "quick assets", and RoyNat ranks second in priority. RoyNat has first priority on the buildings and realty, the "fixed assets", and the bank has second priority.

32 It is in the commercial interests of the bank, with its smaller claim and more readily realizable assets, to collect and retain the accounts receivable. It is in the commercial interests of RoyNat to preserve the cash flow of the business and sell the enterprise as a going concern. It can only do that by overriding the prior claim of the bank to these receivables. If it can vote with the O.D.C. in the same class as the bank, it can achieve that goal and extinguish the prior claim of the bank to realize on the receivables. This it can do, despite having acknowledged its legal relationship to the bank in the priority agreement signed by the two. I can think of no reason why the legal interest of the bank as the holder of the first security on the receivables should be overridden by RoyNat as holder of the second security.

33 The classic statement on classes of creditors is that of Lord Esher M.R. in *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.), at pp. 579-580 [Q.B.]:

> The Act [*Joint Stock Companies Arrangement Act, 1870*] says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes — classes which the Act of Parliament recognises, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

34 The *Sovereign Life* case was quoted with approval by Kingstone J. in *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.), at p. 659 [O.R.]. He also quoted another English authority at p. 658:

> In *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.*, [1891] 1 Ch. 213, a scheme and arrangement under the Joint Stock Companies Arrangement Act (1870), was submitted to the Court for approval. Lord Justice Bowen, at p. 243, says:
>
> > Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

35 Kingstone J. set aside a meeting where three classes of creditors were permitted to vote together. He said at p. 660:

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> It is clear that Parliament intended to give the three-fourths majority of any class power to bind that class, but I do not think the Statute should be construed so as to permit holders of subsequent mortgages power to vote and thereby destroy the priority rights and security of a first mortgagee.

36 We have been referred to more modern cases, including two decisions of Trainor J. of the British Columbia Supreme Court, both entitled *Re Northland Properties Ltd.* One case is reported in (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35, and the other in the same volume at p. 175 [C.B.R.]. Trainor J. was upheld on appeal on both judgments. The first judgment of the British Columbia Court of Appeal is unreported (16 September, 1988) [Doc. No. Vancouver CA009772, Taggart, Lambert and Locke JJ.A.]. The judgment in the second appeal is reported at 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122.

37 In the first *Northland* case, Trainor J. held that the difference in the terms of parties to and priority of different bonds meant that they should be placed in separate classes. He relied upon *Re Wellington Building Corp.*, supra. In the second *Northland* case, he dealt with 15 mortgagees who were equal in priority but held different parcels of land as security. Trainor J. held that their relative security positions were the same, notwithstanding that the mortgages were for the most part secured by charges against separate properties. The nature of the debt was the same, the nature of the security was the same, the remedies for default were the same, and in all cases they were corporate loans by sophisticated lenders. In specifically accepting the reasoning of Trainor J., the Court of Appeal held that the concern of the various mortgagees as to the quality of their individual securities was "a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both" (p. 203).

38 In *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.), the Court stressed that a class should be made up of persons "'whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'" (p. 8 [of C.B.R.]).

39 My assessment of these secured creditors is that the bank should be in its own class. This being so, it is obvious that no plan of arrangement can succeed without its approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed. This is another cogent reason for the Court declining to exercise its discretion in favour of the debtor companies.

40 For all the reasons given above, the application under the CCAA should have been dismissed. I do not think that I have to give definitive answers to the individual issues numbered (1) and (2). They can be addressed in a later case, where the answers could be dispositive of an application under the CCAA. The answer to (3) is that the combined effect of the receivership and the order of Saunders J. disentitled the companies to issue the debentures and bring the application under the CCAA. It is not necessary to answer issue (4), and the answer to (5) is no.

41 Accordingly, I would allow the appeal, set aside the three orders of Hoolihan J., and, in their place, issue an order dismissing the application under the CCAA. The bank should receive its costs of this appeal, the applications for leave to appeal, and the proceedings before Farley and Hoolihan JJ., to be paid by Elan, Nova and RoyNat.

42 Ernst & Young were appointed monitor in the order of Hoolihan J. dated September 14, 1990, to monitor the operations of Elan and Nova and give effect to and supervise the terms and conditions of the stay of proceedings in accordance with Appendix "C" appended to the order. The monitor should be entitled to be paid for all services performed to date, including whatever is necessary to complete its reports for past work, as called for in Appendix "C".

DOHERTY J.A. **(dissenting in part):**

I Background

43 On November 2, 1990, this Court allowed the appeal brought by the Bank of Nova Scotia (the "bank") and vacated several orders made by Hoolihan J. Finlayson J.A. delivered oral reasons on behalf of the majority. At the same time,

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I delivered brief oral reasons dissenting in part from the conclusion reached by the majority and undertook to provide further written reasons. These are those reasons.

44 The events relevant to the disposition of this appeal are set out in some detail in the oral reasons of Finlayson J.A. I will not repeat that chronology, but will refer to certain additional background facts before turning to the legal issues.

45 Elan Corporation ("Elan") owns the shares of Nova Metal Products Inc. ("Nova Inc."). Both companies have been actively involved in the manufacture of automobile parts for a number of years. As of March 1990, the companies had total annual sales of about $30 million, and employed some 220 people in plants located in Chatham and Glencoe, Ontario. The operation of these companies no doubt plays a significant role in the economy of these two small communities.

46 In the 4 years prior to 1989, the companies had operated at a profit ranging from $287,000 (1987) to $1,500,000 (1986). In 1989, several factors, including large capital expenditures and a downturn in the market, combined to produce an operational loss of about $1,333,000. It is anticipated that the loss for the year ending June 30, 1990, will be about $2.3 million. As of August 1, 1990, the companies continued in full operation, and those in control anticipated that the financial picture would improve significantly later in 1990, when the companies would be busy filling several contracts which had been obtained earlier in 1990.

47 The bank has provided credit to the companies for several years. In January 1989, the bank extended an operating line of credit to the companies. The line of credit was by way of a demand loan that was secured in the manner described by Finlayson J.A. Beginning in May 1989, and from time to time after that, the companies were in default under the terms of the loan advanced by the bank. On each occasion, the bank and the companies managed to work out some agreement so that the bank continued as lender and the companies continued to operate their plants.

48 Late in 1989, the companies arranged for a $500,000 operating loan from RoyNat Inc. It was hoped that this loan, combined with the operating line of $2.5 million from the bank, would permit the company to weather its fiscal storm. In March 1990, the bank took the position that the companies were in breach of certain requirements under their loan agreements, and warned that if the difficulties were not rectified the bank would not continue as the company's lender. Mr. Patrick Johnson, the president of both companies, attempted to respond to these concerns in a detailed letter to the bank dated March 15, 1990. The response did not placate the bank. In May 1990, the bank called its loan and made a demand for immediate payment. Mr. Spencer, for the bank, wrote: "We consider your financial condition continues to be critical and we are not prepared to delay further making formal demand." He went on to indicate that, subject to further deterioration in the companies' fiscal position, the bank was prepared to delay acting on its security until June 1, 1990.

49 As of May 1990, Mr. Johnson, to the bank's knowledge, was actively seeking alternative funding to replace the bank. At the same time, he was trying to convince the union which represented the workers employed at both plants to assist in a co-operative effort to keep the plants operational during the hard times. The union had agreed to discuss amendment of the collective bargaining agreement to facilitate the continued operation of the companies.

50 The June 1, 1990 deadline set by the bank passed without incident. Mr. Johnson continued to search for new financing. A potential lender was introduced to Mr. Spencer of the bank on August 13, 1990, and it appeared that the bank, through Mr. Spencer, was favourably impressed with this potential lender. However, on August 27, 1990, the bank decided to take action to protect its position. Coopers & Lybrand was appointed by the bank as receiver-manager under the terms of the security agreements with the companies. The companies denied the receiver access to their plants. The bank then moved before the Honourable Mr. Justice E. Saunders for an order giving the receiver possession of the premises occupied by the companies. On August 27, 1990, after hearing argument from counsel for the bank and the companies, Mr. Justice Saunders refused to install the receivers and made the following interim order:

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1. THIS COURT ORDERS that the receiver be allowed access to the property to monitor the operations of the defendants but shall not take steps to realize on the security of The Bank of Nova Scotia until further Order of the Court.

2. THIS COURT ORDERS that the defendants shall be entitled to remain in possession and to carry on business in the ordinary course until further Order of this Court.

3. THIS COURT ORDERS that until further order the Bank of Nova Scotia shall not take steps to notify account debtors of the defendants for the purpose of collecting outstanding accounts receivable. This Order does not restrict The Bank of Nova Scotia from dealing with accounts receivable of the defendants received by it.

4. THIS COURT ORDERS that the motion is otherwise adjourned to a date to be fixed.

51 The notice of motion placed before Saunders J. by the bank referred to "an intended action" by the bank. It does not appear that the bank took any further steps in connection with this "intended action."

52 Having resisted the bank's efforts to assume control of the affairs of the companies on August 27, 1990, and realizing that their operations could cease within a matter of days, the companies turned to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "Act"), in an effort to hold the bank at bay while attempting to reorganize their finances. Finlayson J.A. has described the companies' efforts to qualify under that Act, the two appearances before the Honourable Mr. Justice Farley on August 31, 1990, and the appearances before the Honourable Mr. Justice Hoolihan in September and October 1990, which resulted in the orders challenged on this appeal.

II The Issues

53 The dispute between the bank and the companies when this application came before Hoolihan J. was a straightforward one. The bank had determined that its best interests would be served by the immediate execution of the rights it had under its various agreements with the companies. The bank's best interest was not met by the continued operation of the companies as going concerns. The companies and their other two substantial secured creditors considered that their interests required that the companies continue to operate, at least for a period which would enable the companies to place a plan of reorganization before its creditors.

54 All parties were pursuing what they perceived to be their commercial interests. To the bank, these interests entailed the "death" of the companies as operating entities. To the companies, these interests required "life support" for the companies through the provisions of the Act to permit a "last ditch" effort to save the companies and keep them in operation.

55 The issues raised on this appeal can be summarized as follows:

(i) Did Hoolihan J. err in holding that the companies were entitled to invoke the Act?

(ii) Did Hoolihan J. err in exercising his discretion in directing that a meeting of creditors should be held under the Act?

(iii) Did Hoolihan J. err in directing that the bank and RoyNat Inc. should be placed in the same class of creditors for the purposes of the Act?

(iv) Did Hoolihan J. err in the terms of the interim orders he made pending the meeting of creditors and the submission to the court of a plan of reorganization?

III The Purpose and Scheme of the Act

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56 Before turning to these issues, it is necessary to understand the purpose of the Act, and the scheme established by the Act for achieving that purpose. The Act first appeared in the midst of the Great Depression (S.C. 1932-33, c. 36). The Act was intended to provide a means whereby insolvent companies could avoid bankruptcy and continue as ongoing concerns through a reorganization of their financial obligations. The reorganization contemplated required the cooperation of the debtor companies' creditors and shareholders: *Re Avery Construction Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.); Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587, at pp. 592-593; David H. Goldman, "Reorganizations Under the Companies' Creditors Arrangement Act (Canada)" (1985) 55 C.B.R. (N.S.) 36, at pp. 37-39.

57 The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy- or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

58 The purpose of the Act was artfully put by Gibbs J.A., speaking for the British Columbia Court of Appeal, in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, an unreported judgment released October 29, 1990 [Doc. No. Vancouver CA12944, Carrothers, Cumming and Gibbs JJ.A., now reported [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84], at pp. 11 and 6 [unreported, pp. 91 and 88 B.C.L.R.]. In referring to the purpose for which the Act was initially proclaimed, he said:

> Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A. ['the Act'], to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

59 In an earlier passage, His Lordship had said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.

60 Gibbs J.A. also observed (at p. 13) that the Act was designed to serve a "broad constituency of investors, creditors and employees." Because of that "broad constituency", the Court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. That interest is generally, but not always, served by permitting an attempt at reorganization: see S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at p. 593.

61 The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 14 [unreported, p. 92 B.C.L.R.].

62 The Act is available to all insolvent companies, provided the requirements of s. 3 of the Act are met. That section provides:

> 3. This Act does not apply in respect of a debtor company unless
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> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

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63 A debtor company, or a creditor of that company, invokes the Act by way of summary application to the Court under s. 4 or s. 5 of the Act. For present purposes, s. 5 is the relevant section:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

64 Section 5 does not require that the Court direct a meeting of creditors to consider a proposed plan. The Court's power to do so is discretionary. There will no doubt be cases where no order will be made, even though the debtor company qualifies under s. 3 of the Act.

65 If the Court determines that a meeting should be called, the creditors must be placed into classes for the purpose of that meeting. The significance of this classification process is made apparent by s. 6 of the Act:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
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> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* or is in the course of being wound up under the *Winding-up Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

66 If the plan of reorganization is approved by the creditors as required by s. 6, it must then be presented to the Court. Once again, the Court must exercise a discretion, and determine whether it will ap prove the plan of reorganization. In exercising that discretion, the Court is concerned not only with whether the appropriate majority has approved the plan at a meeting held in accordance with the Act and the order of the Court, but also with whether the plan is a fair and reasonable one: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 at 182-185 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.).

67 If the Court chooses to exercise its discretion in favour of calling a meeting of creditors for the purpose of considering a plan of reorganization, the Act provides that the rights and remedies available to creditors, the debtor company, and others during the period between the making of the initial order and the consideration of the proposed plan may be suspended or otherwise controlled by the Court.

68 Section 11 gives a court wide powers to make any interim orders:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

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(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

69 Viewed in its totality, the Act gives the Court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 at p. 165 (Q.B.).

IV Did Hoolihan J. Err in Holding that the Debtor Companies were Entitled to Invoke the Act?

70 The appellant advances three arguments in support of its contention that Elan and Nova Inc. were not entitled to seek relief under the Act. It argues first that the debentures issued by the companies after August 27, 1990, were "shams" and did not fulfil the requirements of s. 3 of the Act. The appellant next contends that the issuing of the debentures by the companies contravened their agreements with the bank, in which they undertook not to further encumber the assets of the companies without the consent of the bank. Lastly, the appellant maintains that once the bank had appointed a receiver-manager over the affairs of the companies on August 27, 1990, the companies had no power to create further indebtedness by way of debentures or to bring an application on behalf of the companies under the Act.

(i) Section 3 and "Instant" Trust Deeds

71 The debentures issued in August 1990, after the bank had moved to install a receiver-manager, were issued solely and expressly for the purpose of meeting the requirements of s. 3 of the Act. Indeed, it took the companies two attempts to meet those requirements. The debentures had no commercial purpose. The transactions did, however, involve true loans in the sense that moneys were advanced and debt was created. Appropriate and valid trust deeds were also issued.

72 In my view, it is inappropriate to refer to these transactions as "shams." They are neither false nor counterfeit, but rather are exactly what they appear to be, transactions made to meet jurisdictional requirements of the Act so as to permit an application for reorganization under the Act. Such transactions are apparently well known to the commercial Bar: B. O'Leary, "A Review of the Companies' Creditors Arrangement Act" (1987) 4 Nat. Insolvency Rev. 38, at p. 39; C. Ham, " 'Instant' Trust Deeds Under the C.C.A.A." (1988) 2 Commercial Insolvency Reporter 25; G.B. Morawetz, "Emerging Trends in the Use of the Companies' Creditors Arrangement Act" (1990) Proceedings, First Annual General Meeting and Conference of the Insolvency Institute of Canada.

73 Mr. Ham writes, at pp. 25 and 30:

Consequently, some companies have recently sought to bring themselves within the ambit of the C.C.A.A. by creating 'in stant' trust deeds, i.e., trust deeds which are created solely for the purpose of enabling them to take advantage of the C.C.A.A.

74 Applications under the Act involving the use of "instant" trust deeds have been before the Courts on a number of occasions. In no case has any court held that a company cannot gain access to the Act by creating a debt which meets the requirements of s. 3 for the express purpose of qualifying under the Act. In most cases, the use of these "instant" trust deeds has been acknowledged without comment.

75 The decision of Chief Justice Richard in *Re United Maritime Fishermen Co-op.* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), at 55-56 [67 C.B.R.], speaks directly to the use of "instant" trust deeds. The Chief Justice refused to read any words into s. 3 of the Act which would limit the availability of the Act depending on the point at which, or

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the purpose for which, the debenture or bond and accompanying trust deed were created. He accepted [at p. 56 C.B.R.] the debtor company's argument that the Act:

> does not impose any time restraints on the creation of the conditions as set out in s. 3 of the Act, nor does it contain any prohibition against the creation of the conditions set out in s. 3 for the purpose of obtaining jurisdiction.

76 It should, however, be noted that in *Re United Maritime Fishermen Co-op.*, supra, the debt itself was not created for the purpose of qualifying under the Act. The bond and the trust deed, however, were created for that purpose. The case is therefore factually distinguishable from the case at Bar.

77 The Court of Appeal reversed the ruling of the Chief Justice ((1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253) on the basis that the bonds required by s. 3 of the Act had not been issued when the application was made, so that on a precise reading of the words of s. 3 the company did not qualify. The Court did not go on to consider whether, had the bonds been properly issued, the company would have been entitled to invoke the Act. Hoyt J.A., for the majority, did, however, observe without comment that the trust deeds had been created specifically for the purpose of bringing an application under the Act.

78 The judgment of MacKinnon J. in *Re Stephanie's Fashions Ltd.*, unreported, Doc. No. Vancouver A893427, released January 24, 1990 (B.C. S.C.) [now reported 1 C.B.R. (3d) 248], is factually on all fours with the present case. In that case, as in this one, it was acknowledged that the sole purpose for creating the debt was to effect compliance with s. 3 of the Act. After considering the judgment of Chief Justice Richard in *Re United Maritime Fishermen Co-op.*, supra, MacKinnon J. held, at p. 251:

> The reason for creating the trust deed is not for the usual purposes of securing a debt but, when one reads it, on its face, it does that. I find that it is a genuine trust deed and not a fraud, and that the petitioners have complied with s. 3 of the statute.

79 *Re Metals & Alloys Co.* (16 February 1990) is a recent example of a case in this jurisdiction in which "instant" trust deeds were successfully used to bring a company within the Act. The company issued debentures for the purpose of permitting the company to qualify under the Act, so as to provide it with an opportunity to prepare and submit a reorganization plan. The company then applied for an order, seeking, inter alia, a declaration that the debtor company was a corporation within the meaning of the Act. Houlden J.A., hearing the matter at first instance, granted the declaration request in an order dated February 16, 1990. No reasons were given. It does not appear that the company's qualifications were challenged before Houlden J.A.; however, the nature of the debentures issued and the purpose for their issue was fully disclosed in the material before him. The requirements of s. 3 of the Act are jurisdictional in nature, and the consent of the parties cannot vest a court with jurisdiction it does not have. One must conclude that Houlden J.A. was satisfied that "instant" trust deeds suffice for the purposes of s. 3 of the Act.

80 A similar conclusion is implicit in the reasons of the British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. In that case, a debt of $50, with an accompanying debenture and trust deed, was created specifically to enable the company to make application under the Act. The Court noted that the debt was created solely for that purpose in an effort to forestall an attempt by the bank to liquidate the assets of the debtor company. The Court went on to deal with the merits, and to dismiss an appeal from an order granting a stay pending a reorganization meeting. The Court could not have reached the merits without first concluding that the $50 debt created by the company met the requirements of s. 3 of the Act.

81 The weight of authority is against the appellant. Counsel for the appellant attempts to counter that authority by reference to the remarks of the Minister of Justice when s. 3 was introduced as an amendment to the Act in the 1952-53 sittings of Parliament (House of Commons Debates, 1-2 Eliz. II (1952-53), vol. II, pp. 1268-1269). The interpretation of words found in a statute, by reference to speeches made in Parliament at the time legislation is introduced, has never found favour in our Courts: *Reference Re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d)

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554, 37 N.R. 138, at 721 [S.C.R.], 561 [D.L.R.]. Nor, with respect to Mr. Newbould's able argument, do I find the words of the Minister of Justice at the time the present s. 3 was introduced to be particularly illuminating. He indicated that the amendment to the Act left companies with complex financial structures free to resort to the Act, but that it excluded companies which had only unsecured mercantile creditors. The Minister does not comment on the intended effect of the amendment on the myriad situations between those two extremes. This case is one such situation. These debtor companies had complex secured debt structures, but those debts were not, prior to the issuing of the debentures in August 1990, in the form contemplated by s. 3 of the Act. Like Richard C.J.Q.B. in *Re United Maritime Fishermen Co-op.*, supra, at pp. 52-53, I am not persuaded that the comments of the Minister of Justice assist in interpreting s. 3 of the Act in this situation.

82 The words of s. 3 are straightforward. They require that the debtor company have, at the time an application is made, an outstanding debenture or bond issued under a trust deed. No more is needed. Attempts to qualify those words are not only contrary to the wide reading the Act deserves, but can raise intractable problems as to what qualifications or modifications should be read into the Act. Where there is a legitimate debt which fits the criteria set out in s. 3, I see no purpose in denying a debtor company resort to the Act because the debt and the accompanying documentation was created for the specific purpose of bringing the application. It must be remembered that qualification under s. 3 entitles the debtor company to nothing more than consideration under the Act. Qualification under s. 3 does not mean that relief under the Act will be granted. The circumstances surrounding the creation of the debt needed to meet the s. 3 requirement may well have a bearing on how a court exercises its discretion at various stages of the application, but they do not alone interdict resort to the Act.

83 In holding that "instant" trust deeds can satisfy the requirements of s. 3 of the Act, I should not be taken as concluding that debentures or bonds which are truly shams, in that they do not reflect a transaction which actually occurred and do not create a real debt owed by the company, will suffice. Clearly, they will not. I do not, however, equate the two. One is a tactical device used to gain the potential advantages of the Act. The other is a fraud.

84 Nor does my conclusion that "instant" trust deeds can bring a debtor company within the Act exclude considerations of the good faith of the debtor company in seeking the protection of the Act. A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the Court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the Court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors: see Lawrence J. Crozier, "Good Faith and the Companies' Creditors Arrangement Act" (1989) 15 Can. Bus. L.J. 89.

(ii) Section 3 and the Prior Agreement with the Bank Limiting Creation of New Debt

85 The appellant also argues that the debentures did not meet the requirements of s. 3 of the Act because they were issued in contravention of a security agreement made between the companies and the bank. Assuming that the debentures were issued in contravention of that agreement, I do not understand how that contravention affects the status of the debentures for the purposes of s. 3 of the Act. The bank may well have an action against the debtor company for issuing the debentures, and it may have remedies against the holders of the debentures if they attempted to collect on their debt or enforce their security. Neither possibility, however, negates the existence of the debentures and the related trust deeds. Section 3 does not contemplate an inquiry into the effectiveness or enforceability of the s. 3 debentures, as against other creditors, as a condition precedent to qualification under the Act. Such inquiries may play a role in a judge's determination as to what orders, if any, should be made under the Act.

(iii) Section 3 and the Appointment of a Receiver-Manager

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86 The third argument made by the bank relies on its installation of a receiver-manager in both companies prior to the issue of the debentures. I agree with Finlayson J.A. that the placement of a receiver, either by operation of the terms of an agreement or by court order, effectively removes those formerly in control of the company from that position, and vests that control in the receiver-manager: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd without deciding this point (1989), 65 Alta. L.R. (2d) 374 (C.A.). I cannot, however, agree with his interpretation of the order of Saunders J. I read that order as effectively turning the receiver into a monitor with rights of access, but with no authority beyond that. The operation of the business is specifically returned to the companies. The situation created by the order of Saunders J. can usefully be compared to that which existed when the application was made in *Hat Development Ltd.* Forsyth J., at p. 268 C.B.R., states:

> The receiver-manager in this case and indeed in almost all cases is charged by the court with the responsibility of managing the affairs of a corporation. It is true that it is appointed pursuant, in this case, to the existence of secured indebtedness and at the behest of a secured creditor to realize on its security and retire the indebtedness. Nonetheless, this receiver-manager was court-appointed and not by virtue of an instrument. As a court-appointed receiver it owed the obligation and the duty to the court to account from time to time and to come before the court for the purposes of having some of its decisions ratified or for receiving advice and direction. *It is empowered by the court to manage the affairs of the company and it is completely inconsistent with that function to suggest that some residual power lies in the hands of the directors of the company to create further indebtedness of the company and thus interfere, however slightly, with the receiver-manager's ability to manage*.

[Emphasis added.]

87 After the order of Saunders J., the receiver-manager in this case was not obligated to manage the companies. Indeed, it was forbidden from doing so. The creation of the "instant" trust deeds and the application under the Act did not interfere in any way with any power or authority the receiver-manager had after the order of Saunders J. was made.

88 I also find it somewhat artificial to suggest that the presence of a receiver-manager served to vitiate the orders of Hoolihan J. Unlike many applications under s. 5 of the Act, the proceedings before Hoolihan J. were not ex parte and he was fully aware of the existence of the receiver-manager, the order of Saunders J., and the arguments based on the presence of the receiver-manager. Clearly, Hoolihan J. considered it appropriate to proceed with a plan of reorganization despite the presence of the receiver-manager and the order of Saunders J. Indeed, in his initial order he provided that the order of Saunders J. "remains extant." Hoolihan J. did not, as I do not, see that order as an impediment to the application or the granting of relief under the Act. Had he considered that the receiver-manager was in control of the affairs of the company, he could have varied the order of Saunders J. to permit the applications under the Act to be made by the companies: *Hat Development Ltd.*, at pp. 268-269 C.B.R. It is clear to me that he would have done so had he felt it necessary. If the installation of the receiver-manager is to be viewed as a bar to an application under this Act, and if the orders of Hoolihan J. were otherwise appropriate, I would order that the order of Saunders J. should be varied to permit the creation of the debentures and the trust deeds and the bringing of this application by the companies. I take this power to exist by the combined effect of s. 14(2) of the Act and s. 144(1) of the *Courts of Justice Act*, 1984, S.O. 1984, c. 11.

89 In my opinion, the debentures and "instant" trust deeds created in August 1990 sufficed to bring the company within the requirements of s. 3 of the Act, even if in issuing those debentures the companies breached a prior agreement with the bank. I am also satisfied that, given the terms of the order of Saunders J., the existence of a receiver-manager installed by the bank did not preclude the application under s. 3 of the Act.

V Did Hoolihan J. Err in Exercising his Discretion in Favour of Directing that a Creditors' Meeting be Held to Consider the Proposed Plan of Reorganization?

90 As indicated earlier, the Act provides a number of points at which the Court must exercise its discretion. I am concerned with the initial exercise of discretion contemplated by s. 5 of the Act, by which the Court may order a meeting

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of creditors for purposes of considering a plan of reorganization. Hoolihan J. exercised that discretion in favour of the debtor companies. The factors relevant to the exercise of that discretion are as variable as the fact situations which may give rise to the application. Finlayson J.A. has concentrated on one such factor, the chance that the plan, if put before a properly constituted meeting of the creditors, could gain the required approval. I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made.

91 On the facts before Hoolihan J., there were several factors which supported the exercise of his discretion in favour of directing a meeting of the creditors. These included the apparent support of two of the three substantial secured creditors, the companies' continued operation, and the prospect (disputed by the bank) that the companies' fortunes would take a turn for the better in the near future, the companies' ongoing efforts — that eventually met with some success — to find alternate financing, and the number of people depending on the operation of the company for their livelihood. There were also a number of factors pointing in the other direction, the most significant of which was the likelihood that a plan of reorganization acceptable to the bank could not be developed.

92 I see the situation which presented itself to Hoolihan J. as capable of a relatively straightforward risk-benefit analysis. If the s. 5 order had been refused by Hoolihan J., it was virtually certain that the operation of the companies would have ceased immediately. There would have been immediate economic and social damage to those who worked at the plants, and those who depended on those who worked at the plants for their well-being. This kind of damage cannot be ignored, especially when it occurs in small communities like those in which these plants are located. A refusal to grant the application would also have put the investments of the various creditors, with the exception of the bank, at substantial risk. Finally, there would have been obvious financial damage to the owner of the companies. Balanced against these costs inherent in refusing the order would be the benefit to the bank, which would then have been in a position to realize on its security in accordance with its agreements with the companies.

93 The granting of the s. 5 order was not without its costs. It has denied the bank the rights it had bargained for as part of its agreement to lend substantial amounts of money to the companies. Further, according to the bank, the order has put the bank at risk of having its loans become undersecured because of the diminishing value of the accounts receivable and inventory which it holds as security and because of the ever-increasing size of the companies' debt to the bank. These costs must be measured against the potential benefit to all concerned if a successful plan of reorganization could be developed and implemented.

94 As I see it, the key to this analysis rests in the measurement of the risk to the bank inherent in the granting of the s. 5 order. If there was a real risk that the loan made by the bank would become undersecured during the operative period of the s. 5 order, I would be inclined to hold that the bank should not have that risk forced on it by the Court. However, I am unable to see that the bank is in any real jeopardy. The value of the security held by the bank appears to be well in excess of the size of its loan on the initial application. In his affidavit, Mr. Gibbons of Coopers & Lybrand asserted that the companies had overstated their cash flow projections, that the value of the inventory could diminish if customers of the companies looked to alternate sources for their product, and that the value of the accounts receivable could decrease if customers began to claim set-offs against those receivables. On the record before me, these appear to be no more than speculative possibilities. The bank has had access to all of the companies' financial data on an ongoing basis since the order of Hoolihan J. was made almost 2 months ago. Nothing was placed before this Court to suggest that any of the possibilities described above had come to pass.

95 Even allowing for some overestimation by the companies of the value of the security held by the bank, it would appear that the bank holds security valued at approximately $4 million for a loan that was, as of the hearing of this appeal, about $2.3 million. The order of Hoolihan J. was to terminate no later than November 14, 1990. I am not satisfied

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that the bank ran any real risk of having the amount of the loan exceed the value of the security by that date. It is also worth noting that the order under appeal provided that any party could apply to terminate the order at any point prior to November 14. This provision provided further protection for the bank in the event that it wished to make the case that its loan was at risk because of the deteriorating value of its security.

96 Even though the chances of a successful reorganization were not good, I am satisfied that the benefits flowing from the making of the s. 5 order exceeded the risk inherent in that order. In my view, Hoolihan J. properly exercised his discretion in directing that a meeting of creditors should be held pursuant to s. 5 of the Act.

VI Did Hoolihan J. Err in Directing that the Bank and RoyNat Inc. Should be Placed in the Same Class for the Purposes of the Act?

97 I agree with Finlayson J.A. that the bank and RoyNat Inc., the two principal creditors, should not have been placed in the same class of secured creditors for the purposes of ss. 5 and 6 of the Act. Their interests are not only different, they are opposed. The classification scheme created by Hoolihan J. effectively denied the bank any control over any plan of reorganization.

98 To accord with the principles found in the cases cited by Finlayson J.A., the secured creditors should have been grouped as follows:

— Class 1 — The City of Chatham and the Village of Glencoe

— Class 2 — The Bank of Nova Scotia

— Class 3 — RoyNat Inc., Ontario Development Corporation, and those holding debentures issued by the company on August 29 and 31, 1990.

VII Did Hoolihan J. Err in Making the Interim Orders He Made?

99 Hoolihan J. made a number of orders designed to control the conduct of all of the parties, pending the creditors' meeting and the placing of a plan of reorganization before the Court. The first order was made on September 11, 1990, and was to expire on or before October 24, 1990. Subsequent orders varied the terms of the initial order somewhat, and extended its effective date until November 14, 1990.

100 These orders imposed the following conditions pending the meeting:

(a) all proceedings with respect to the debtor companies should be stayed, including any action by the bank to realize on its security;

(b) the bank could not reduce its loan by applying incoming receipts to those debts;

(c) the bank was to be the sole banker for the companies;

(d) the companies could carry on business in the normal course, subject to certain very specific restrictions;

(e) a licensed trustee was to be appointed to monitor the business operations of the companies and to report to the creditors on a regular basis; and

(f) any party could apply to terminate the interim orders, and the orders would be terminated automatically if the companies defaulted on any of the obligations imposed on them by the interim orders.

101 The orders placed significant restrictions on the bank for a 2-month period, but balanced those restrictions with provisions limiting the debtor companies' activities, and giving the bank ongoing access to up-to-date financial

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information concerning the companies. The bank was also at liberty to return to the Court to request any variation in the interim orders which changes in financial circumstances might merit.

102 These orders were made under the wide authority granted to the court by s. 11 of the Act. L.W. Houlden and C.H. Morawetz, in *Bankruptcy Law of Canada*, 3d ed. (Toronto: Carswell, 1989), at pp. 2-102 to 2-103, describe the purpose of the section:

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and it creditors. This aim is facilitated by s. 11 of the Act, which enables the court to restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit.

103 A similar sentiment appears in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. Gibbs J.A., in discussing the scope of s. 11, said at p. 7 [unreported, pp. 88-89 B.C.L.R.]:

> When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

104 Similar views of the scope of the power to make interim orders covering the period when reorganization is being attempted are found in *Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) at 114-118 [C.B.R.]; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) at 12-15 [C.B.R.]; *Quintette Coal Ltd. v. Nippon Steel Corp.*, an unreported judgment of Thackray J., released June 18, 1990 [since reported (1990), 47 B.C.L.R. (2d) 193 (S.C.)], at pp. 5-9 [pp. 196-198 B.C.L.R.]; and B. O'Leary, "A Review of the Companies' Creditors Arrangement Act," at p. 41.

105 The interim orders made by Hoolihan J. are all within the wide authority created by s. 11 of the Act. The orders were crafted to give the company the opportunity to continue in operation, pending its attempt to reorganize, while at the same time providing safeguards to the creditors, including the bank, during that same period. I find no error in the interim relief granted by Hoolihan J.

VIII Conclusion

106 In the result, I would allow the appeal in part, vacate the order of Hoolihan J. of October 18, 1990, insofar as it purports to settle the class of creditors for the purpose of the Act, and I would substitute an order establishing the three classes referred to in Part VI of these reasons. I would not disturb any of the other orders made by Hoolihan J.

Appeal allowed.

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Tab 8

2014 ONSC 4488
Ontario Superior Court of Justice

Choo-Yick v. Tarion Warranty Corp.

2014 CarswellOnt 14874, 2014 ONSC 4488, 246 A.C.W.S. (3d) 480

Richard Choo-Yick and Kenisha Choo-Yick (Plaintiffs) and Tarion Warranty Corporation and Mike Hanas (Defendants)

H.A. Rady J.

Heard: July 25, 2014
Judgment: July 29, 2014
Docket: 270/13

Counsel: Richard Choo-Yick, Kenisha Choo-Yick, for themselves
Montgomery Shillington, for Defendants

Subject: Civil Practice and Procedure; Contracts; Insolvency

MOTION by new home warranty corporation and its employee to strike certain claims against them in action by purchasers of new home.

***H.A. Rady J.*:**

Introduction

1 The defendants move pursuant to Rule 21 for an order staying or dismissing the plaintiffs' claim against Mike Hanas; striking the claim for punitive damages; and striking the claim for "twenty year open claim on our family's health due to mould issue". The defendants submit that no cause of action lies against Mr. Hanas who is a Tarion employee; there is no basis for the claim for punitive damages; and the claim for an "open claim" is not available in law.

2 The plaintiffs filed no factum or book of authorities but rather delivered an affidavit setting out a detailed chronology of their dealings with their house builder and Tarion.

Preliminary Matter

3 The motion is primarily grounded in Rule 21.01(1)(b) and (3)(d). Rule 21.01(2)(b) provides that no evidence is admissible on a motion pursuant to Rule 21.01(1)(b). There is no residual discretion to admit evidence and therefore, the affidavit is not properly before the court on this motion.

Facts

4 The following facts are taken from the statements of claim and defence, the relevant legislation and the decision of the Licence Appeal Tribunal.

5 Tarion is the corporation designated by the Lieutenant Governor in Council pursuant the *Ontario New Home Warranties Plan Act* to administer the Ontario New Home Warranties Plan.

6 The Act serves a two-fold purpose: consumer protection and the regulation of the new home building industry. In order to protect consumers, the Act imposes limited mandatory warranties on new home builders in Ontario and

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provides for the payment of compensation to those purchasers whose builders have failed to honour them. The Act provides for the administration of a mandatory licensing scheme for all new home builders in Ontario.

7 The Act also sets out an administrative procedure to be followed after a warranty claim is made to the builder and Tarion. Timelines are imposed on builders to complete the warranted repairs. If the builder and homeowner do not agree on whether a defect amounts to a warranted item, Tarion may be contacted to conciliate the dispute and conduct an inspection. If an agreement cannot be reached, Tarion is to make a warranty assessment whether the claim is covered under the warranty.

8 If the builder is unwilling or unable to honour its warranty, after the prescribed time, Tarion provides the homeowner with compensation. Tarion has the right to arrange for the performance of repairs instead of paying compensation.

9 If a homeowner disagrees with Tarion's warranty findings, there is an automatic right of appeal to the Licence Appeal Tribunal, which conducts a hearing *de novo*. There is an automatic right of appeal of a decision made by the Tribunal to the Divisional Court.

10 The builder's warranty to a homeowner, as prescribed by the Act is subject to specific exclusions namely secondary damage caused by defects, such as property damage and personal injury; and damage caused by dampness or condensation due to an owner's failure to maintain adequate ventilation.

11 The Act and its regulations set out certain limits to Tarion's liability to provide compensation. The total maximum amount payable to homeowners is $300,000. The maximum amount payable for damage caused by environmentally harmful substances or hazards, deleterious substances, mould or any other fungal or bacterial contamination is $15,000 per home. As a result, the plaintiffs' claim is subject to the $15,000 limit on damages caused by mould contamination.

12 Mr. Hanas is an employee of Tarion. Mr. Hanas was a manager of claims at the time the plaintiffs made their warranty claim. Mr. Hanas, however, transferred to a different Tarion department before Tarion issued its Decision Letter. Tarion's field claims representatives inspected the plaintiffs' home. They reported to Mr. Hanas until he transferred to a different department. Thereafter, the field claims representatives reported to a new manager of claims.

13 On March 4, 2008, the plaintiffs entered into an agreement to purchase a new home located at 1920 Purcell Drive, London from Cameron Properties Inc. On July 24, 2008, the plaintiffs took possession. On July 15, 2010, the plaintiffs delivered a second-year warranty claim form to Tarion, complaining of mould growth in the basement among other things.

14 At the plaintiffs' request, on September 23, 2010, Tarion conducted an emergency inspection. No evidence of a window leak was found at the time. The plaintiffs advised that they were hiring a consultant to remove the basement drywall and prepare a report. Tarion's inspection report noted that the owner could request a conciliation inspection between November 24 and December 23, 2010.

15 Tarion was given a report by the builder's consultant, which concluded that any mould was caused by dampness or condensation due to failure by the owner to maintain adequate ventilation. Tarion also received a report by the plaintiffs' consultant that concluded the mould was the result of a leaking basement window. Tarion subsequently retained a consultant to evaluate the home.

16 On January 27, 2011, the builder was deemed bankrupt pursuant to the *Bankruptcy and Insolvency Act.*

17 On February 3, 2011, the consultant retained by Tarion released its report. The consultant determined that a leak in a window might be contributing to mould, but it was not a major contributor.

18 On February 8, 2011, Tarion's field claims representative reassessed the warranty claim in light of Tarion's consultant's report and found the claim to be warranted. Because the builder was unable to undertake the required remedial work, Tarion retained contractors to carry out the work recommended in its consultant's report.

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19 The required work was completed and on March 1, 2011, Tarion was given a Statement of Condition from an expert indicating that the home was fit for habitation. The defendants have pleaded that the cost of the work at that point had already exceeded the $15,000 maximum prescribed by the Act and its regulations.

20 The plaintiffs were not satisfied with the remedial work. They initially declined Tarion's request that they define the items that they wished to dispute, so that a Decision Letter could be issued. On October 30, 2012, Tarion issued a Decision Letter. On November 14, 2012, the plaintiffs filed a Notice of Appeal of Tarion's Decision Letter at the Licence Appeal Tribunal.

21 On January 11, 2013, the Tribunal made a prehearing order that Tarion arrange to have the home tested for mould by an independent qualified entity, as soon as possible, in order to determine if the mould remediation performed to date had eliminated the mould issue in the home.

22 On January 15, 2013, the testing referred to in the Tribunal prehearing order took place at the home. The testing was completed by Pure Balance Environmental Inc. and the results were released in a report dated January 29, 2013. The report concluded that, although there was no visible mould growth, there were significantly elevated spore trap samples in the basement of the home. The report recommended that certain cleaning and remedial work be done to remedy the problem.

23 Tarion offered to retain a contractor to undertake the cleaning and remedial work recommended in the Pure Balance Environmental Inc. report. Ultimately, on March 28, 201, Tarion issued a Supplementary Decision Letter, which indicated that, based on the findings of the Pure Balance Environmental Inc., Tarion was prepared to:

> a. conduct destructive testing on the two exterior walls of the basement bedroom to determine whether there was any active mould growth behind the walls causing the spores in the air. If active mould growth was found behind the walls, it would be remediated. The room would be reinstated to its original condition; and
>
> b. after the destructive testing was conducted, it would undertake the recommendations outlined in the Pure Balance Environmental Inc. report. These recommendations would be performed, even if no active mould growth was found as a result of the destructive testing.

24 The plaintiffs' appeal to the Tribunal was heard by Tribunal Member Keith Penner over three days, commencing on April 10, 2013. The Tribunal considered the appropriateness of Tarion's Decision Letter and Supplementary Decision Letter. It heard evidence from the plaintiffs and from representatives of Tarion, including Mr. Hanas.

25 The plaintiffs' appeal to the Tribunal involved essentially the same issues raised by the plaintiffs' statement of claim.

26 On April 29, 2013, the Tribunal's written reasons were released. The Tribunal reaffirmed Tarion's position in its Decision Letter and Supplementary Decision Letter. Tarion was directed to proceed as proposed in the Supplementary Decision Letter.

Analysis

27 The test on a Rule 21.01(1)(b) motion is whether it is plain and obvious that the claim discloses no reasonable cause of action. The facts as pleaded are assumed to be true and the pleading must be read generously in order to overcome any drafting defects. For the reasons that follow, I have concluded that it is plain and obvious that there is no claim against Mr. Hanas, for punitive damages or for an "open file".

28 First, it is clear that at all material times Mr. Hanas was acting in his capacity as a Tarion employee. Findings of liability against employees in their personal capacities are rare in the absence of findings of fraud, deceit or dishonesty none of which are pleaded by the plaintiffs. In *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.), at 9 , leave to appeal refused, [1996] S.C.C.A. No. 40 (S.C.C.), the court made the following comments:

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> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of the employees or officers, they are also rare... In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or which exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own."

29 In *Piedra v. Copper Mesa Mining Corp.*, 2011 ONCA 191 (Ont. C.A.), the court explained that claims against individuals in their personal capacities "must withstand a high degree of scrutiny" and that courts must be "scrupulous in weeding out claims that are improperly pleaded or where the evidence does not justify an allegation of a personal tort". See also *Baradaran v. Tarion Warranty Corp.*, 2014 ONCA 123 (Ont. C.A.), the facts of which bear a similarity to this case. In *Baradaran*, the Court of Appeal upheld a motions judge's decision to strike a claim made against a Tarion employee.

30 I see no basis on which the claim for punitive damages can be sustained. The statement of claim reveals no allegations of conduct that would justify such an award. The pleading does not articulate or particularize any high-handed, callous, malicious or vindictive conduct or a breach of any duty of good faith. The claim as pleaded is simply an expression of the plaintiffs' dissatisfaction with the defendants' conclusions and the remedy Tarion considered was appropriate. The plaintiffs' appeal was dismissed and as far as I am aware, no appeal of the Tribunal's decision was taken.

31 While negligent conduct can attract punitive damages, such cases are rare and exceptional and when the conduct in question was deliberate, intentional and extreme: *McIntyre v. Grigg* [2006 CarswellOnt 6815 (Ont. C.A.)], 2006 CanLII 37326. That is not this case.

32 Finally, the request for an "open claim" cannot succeed in the face of the Act which expressly excludes liability for secondary damages, including personal injury.

33 As a result, the claim against Mr. Hanas is struck as are the claims for punitive damages and for an "open claim" without leave to amend.

34 I will receive brief written submissions on costs from the defendants by August 15, 2014 and the plaintiffs by September 12, 2014.

Motion granted.

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Tab 9

1991 CarswellOnt 770
Ontario Court of Appeal

Ontario New Home Warranty Program v. Lukenda

1991 CarswellOnt 770, [1991] O.J. No. 320, 25 A.C.W.S. (3d) 978, 2 O.R. (3d) 675, 47 O.A.C. 388

ONTARIO NEW HOME WARRANTY PROGRAM v. LUKENDA

McKinlay, Catzman and Labrosse JJ.A.

Heard: February 18, 1991
Judgment: March 5, 1991
Docket: Doc. CA 171/89

Counsel: *Brian M. Campbell* and *Tanus Rutherford*, for plaintiff.
Joseph A. Bisceglia, for defendant.

Subject: Contracts

APPEAL from a decision of Fitzgerald J., reported at (1989), 33 C.L.R. 62, 3 R.P.R. (2d) 238 (Ont. H.C.), dismissing appellant's action to recover pursuant to respondent's guarantee for loss.

***Per curiam*:**

1 The only issue properly before us is whether the appellant, the Ontario New Home Warranty Program (the "Corporation") has the corporate power to require of an applicant, when it applies for registration under the program, that it provide from a third party a guarantee of liabilities to which the ap plicant may become subject pursuant to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1980, c. 350 (the "Plan Act").

2 The respondent argues that the Corporation has no general corporate power to require third party guarantees as a condition of registration, but can acquire such power only by virtue of a specific or necessarily implied power given by the Plan Act or regulations thereunder. We do not agree.

3 The HUDAC New Home Warranty Program was incorporated by letters patent under the *Corporations Act*, R.S.O. 1970, c. 89. The Corporation's name was changed by supplementary letters patent dated August 3, 1984, to "Ontario New Home Warranty Program". By Ont. Reg. 677/84, s. 1, the Lieutenant Governor in Council designated the Ontario New Home Warranty Program to be the "Corporation" for the purposes of the *Ontario New Home Warranties Plan Act*.

4 Section 4 of the *Corporations Act*, R.S.O. 1980, c. 95, provides that:

> The Lieutenant Governor may in his discretion, by letters patent, issue a charter to any number of persons, not fewer than three, of eighteen or more years of age, who apply therefor, constituting them and any others who become shareholders or members of the corporation thereby created a corporation for any of the objects to which authority of the Legislature extends.

5 Section 274 states:

> A corporation, unless otherwise expressly provided in the Act or instrument creating it, has and shall be deemed to have had from its creation the capacity of a natural person.

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6 Such capacity, of course, includes the capacity to require the providing of a guarantee as a term of any contract between the Corporation and any other party. Only if powers within the capacity of a natural person were specifically withdrawn from the Corporation would it be precluded from exercising such powers.

7 The major purpose of the Plan Act is to protect purchasers of new homes by requiring that vendors and builders be screened for financial responsibility, integrity and technical competence. To assure public protection, it provides for warranties, a guarantee bond and compensation in the event of loss by a purchaser resulting from dealings with a registrant. In order to effect the purposes of the Plan Act, a broad and liberal interpretation of its provisions is appropriate.

8 The respondent, Louis B. Lukenda, was president and major shareholder of Harbour View (Sault Ste. Marie) Ltd., at the time it applied for registration under the Plan Act. Harbour View covenanted by a vendor/builder agreement with the Corporation as follows:

> The vendor covenants with the Corporation as follows: The vendor at his own expense shall supply to the Corporation upon request, whether for the purpose of initial registration or renewal, documentation in the form of guarantees, surety bonds, statements of personal net worth, bank statements and other such documentation and records as the Corporation may reasonably require.

9 Such an agreement, in our view, constitutes consent by the applicant, Harbour View, within the terms of s. 7(2) of the Plan Act, which reads:

> A registration is subject to such terms and conditions to give effect to the purposes of this Act *as are consented to by the* applicant or imposed by the Tribunal or prescribed by the regulations.

[Emphasis added.] The Corporation, through its Registrar, required the guarantee, which Harbour View agreed to supply.

10 In summary, the Corporation had the corporate power to require, and did require, that Harbour View provide a third party guarantee, and Harbour View consented to, and did in fact, provide the guarantee.

11 Interlocutory matters raised by the appellant are not properly before this Court.

12 The appeal is allowed. The order of Judge Fitzgerald dated February 7, 1989, dismissing the plaintiff's action [reported at (1989), 33 C.L.R. 62, 3 R.P.R. (2d) 238 (Ont. H.C.)], is set aside with costs here and below.

Appeal allowed.

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Tab 10

1995 CarswellOnt 1050
Ontario Court of Appeal

Mandos v. Ontario New Home Warranty Program

1995 CarswellOnt 1050, [1995] O.J. No. 3647, 49 R.P.R. (2d) 1, 59 A.C.W.S. (3d) 423, 86 O.A.C. 382

JACK MANDOS and LIBBY MANDOS v. ONTARIO NEW HOME WARRANTY PROGRAM

Houlden, Osborne and Weiler JJ.A.

Heard: November 27-28, 1995
Judgment: November 29, 1995
Docket: Doc. CA C22141

Counsel: *Netanus T. Rutherford*, for appellant.
Paul N. Richardson, for respondents.

Subject: Property; Contracts

Appeal from judgment reported at (1993), 33 R.P.R. (2d) 298, 105 D.L.R. (4th) 627, 67 O.A.C. 247 (Div. Ct.), allowing respondents' appeal from decision of Commercial Registration Appeal Tribunal dismissing respondent's claim for compensation under *Ontario New Home Warranties Plan Act*.

***Per curiam*:**

1 The *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, is remedial legislation, and should be given a fair and liberal interpretation. Subsection 13(6) of the Act is a difficult subsection to construe. However, we believe that the interpretation given to it by counsel for the respondents is a proper one, i.e., that the warranties contained in s. 13(1) continue in force, irrespective of any agreement by the parties to the contrary. This interpretation, in our opinion, achieves a fair and just result. The Corporation is desirous that builders and owners should settle their differences, and s. 13(4) of the Regulations contemplates that if such a settlement is made, it will not affect the Corporation's rights of subrogation. When a mutual release is executed between an owner and a builder, it is quite possible, as in the present case, that there may be defects which could not be discovered by reasonable inspection. If it is the intention of the legislature that a release should be a bar to any action by an owner for breach of the warranties in s. 13(1), then, in our opinion, the legislation should clearly so provide, and owners should be warned of the dangers of entering into a release.

2 For these reasons, the appeal [from the judgment reported at (1993), 33 R.P.R. (2d) 298, 105 D.L.R. (4th) 627, 67 O.A.C. 247 (Div. Ct.)] will be dismissed. The costs of the respondents will be fixed at $4,000.

Appeal dismissed.

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Tab 11

2018 SCC 32, 2018 CSC 32
Supreme Court of Canada

Law Society of British Columbia v. Trinity Western University

2018 CarswellBC 1510, 2018 CarswellBC 1511, 2018 SCC 32, 2018 CSC 32

Law Society of British Columbia (Appellant) and Trinity Western University and Brayden Volkenant (Respondents) and Lawyers' Rights Watch Canada, National Coalition of Catholic School Trustees' Associations, International Coalition of Professors of Law, Christian Legal Fellowship, Canadian Bar Association, Advocates' Society, Association for Reformed Political Action (ARPA) Canada, Canadian Council of Christian Charities, Canadian Conference of Catholic Bishops, Canadian Association of University Teachers, Law Students' Society of Ontario, Seventh-day Adventist Church in Canada, BC LGBTQ Coalition, Evangelical Fellowship of Canada, Christian Higher Education Canada, British Columbia Humanist Association, Egale Canada Human Rights Trust, Faith, Fealty & Creed Society, Roman Catholic Archdiocese of Vancouver, Catholic Civil Rights League, Faith and Freedom Alliance, Canadian Secular Alliance, West Coast Women's Legal Education and Action Fund and World Sikh Organization of Canada (Interveners)

McLachlin C.J.C., Abella J., Moldaver J., Karakatsanis J., Wagner J., Gascon J., Côté J., Brown J., Rowe J.

Heard: November 30, 2017; December 1, 2017
Judgment: June 15, 2018
Docket: 37318

Proceedings: reversing *Trinity Western University v. Law Society of British Columbia* (2016), 92 B.C.L.R. (5th) 42, 405 D.L.R. (4th) 16, 366 C.R.R. (2d) 80, [2017] 3 W.W.R. 432, 12 Admin. L.R. (6th) 236, 2016 BCCA 423, 2016 CarswellBC 3008, Bauman C.J.B.C., Fenlon J.A., Groberman J.A., Newbury J.A., Willcock J.A. (B.C. C.A.); affirming *Trinity Western University v. Law Society of British Columbia* (2015), 344 C.R.R. (2d) 267, 392 D.L.R. (4th) 722, 2015 CarswellBC 3618, 2015 BCSC 2326, 85 B.C.L.R. (5th) 174, [2016] 8 W.W.R. 298, 100 Admin. L.R. (5th) 99, Hinkson C.J.S.C. (B.C. S.C.)

Counsel: Peter A. Gall, Q.C., Donald R. Munroe, Q.C., Benjamin J. Oliphant, Deborah Armour, for Appellant
Kevin L. Boonstra, for Respondents
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Eugene Meehan, Q.C., Daniel C. Santoro, for Intervener, the National Coalition of Catholic School Trustees' Associations.
Eugene Meehan, Q.C., Marie-France Major, for Intervener, the International Coalition of Professors of Law
Derek Ross, Deina Warren, for Intervener, the Christian Legal Fellowship
Susan Ursel, David Grossman, Olga Redko, for Intervener, the Canadian Bar Association.
Chris Paliare, Joanna Radbord, Monique Pongracic-Speier, for Intervener, the Advocates' Society
André Schutten, John Sikkema, for Intervener, the Association, for Reformed Political Action (ARPA) Canada.
Barry W. Bussey, Philip A. S. Milley, for Intervener, the Canadian Council of Christian Charities
William J. Sammon, Amanda M. Estabrooks, for Intervener, the Canadian Conference of Catholic Bishops.
Peter J. Barnacle, Immanuel Lanzaderas, for Intervener, the Canadian Association of University Teachers
Kristine Spence, for Intervener, the Law Students' Society of Ontario

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Gerald Chipeur, Q.C., Jonathan Martin, Grace Mackintosh, for Intervener, the Seventh-day Adventist Church in Canada
Karey Brooks, Elin Sigurdson, for Intervener, the BC LGBTQ Coalition
Albertos Polizogopoulos, Kristin Debs, for Interveners, the Evangelical Fellowship of Canada and Christian Higher Education Canada.
Wesley J. McMillan, Kaitlyn Meyer, for Intervener, the British Columbia Humanist Association.
Adriel Weaver, for Intervener, Egale Canada Human Rights Trust
Michael Sobkin, E. Blake Bromley, for Intervener, the Faith, Fealty & Creed Society
Gwendoline Allison, Philip Horgan, for Interveners, the Roman Catholic Archdiocese of Vancouver, the Catholic Civil Rights League and the Faith and Freedom Alliance.
Tim Dickson, Catherine George, for Intervener, the Canadian Secular Alliance.
Robyn Trask, Rajwant Mangat, for Intervener, the West Coast Women's Legal Education and Action Fund.
Avnish Nanda, Balpreet Singh Boparai, for Intervener, the World Sikh Organization of Canada

Subject: Civil Practice and Procedure; Constitutional; Public; Human Rights

APPEAL from judgment reported at*Trinity Western University v. Law Society of British Columbia* (2016), 2016 BCCA 423, 2016 CarswellBC 3008, 405 D.L.R. (4th) 16, 92 B.C.L.R. (5th) 42, 12 Admin. L.R. (6th) 236, [2017] 3 W.W.R. 432, 366 C.R.R. (2d) 80 (B.C. C.A.) , dismissing appeal from quashing of declaration by appellant law society.

***Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.*:**

I. Overview

1 Trinity Western University (TWU), an evangelical Christian postsecondary institution, seeks to open a law school that requires its students and faculty to adhere to a religiously based code of conduct prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman".

2 At issue in this appeal is a decision of the Law Society of British Columbia (LSBC) not to recognize TWU's proposed law school. TWU and Brayden Volkenant, a graduate of TWU's undergraduate program who would have chosen to attend TWU's proposed law school, successfully brought judicial review proceedings to the Supreme Court of British Columbia, arguing that the LSBC's decision violated religious rights protected by s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal for British Columbia found that the LSBC should have approved the law school.

3 In our respectful view, the LSBC's decision not to recognize TWU's proposed law school represents a proportionate balance between the limitation on the *Charter* right at issue and the statutory objectives governing the LSBC. The LSBC's decision was therefore reasonable.

II. Background

A. The Parties

4 TWU is a privately funded evangelical Christian university located in Langley, British Columbia. It offers around 40 undergraduate majors and 17 graduate programs spanning an array of academic disciplines and subjects, all taught from a Christian perspective. Its object is "to provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian" (*Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2)).

5 Its approach to Christian education is set out in its mission statement:

> The mission of Trinity Western University, as an arm of the Church, is to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.

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(A.R., vol. I, at p. 119)

6 Evangelical Christians believe in the authority of the Bible, the commitment to sharing the Christian message through evangelism, and sexual moral purity which requires sexual abstention outside marriage between a man and a woman. TWU's curriculum is developed and taught in a manner consistent with its religious worldview. The foundational beliefs of evangelical Christianity are also reflected in TWU's Community Covenant Agreement (Covenant). The Covenant requires TWU community members to "voluntarily abstain" from a number of actions, including harassment, lying, cheating, plagiarism, and the use or possession of alcohol on campus. At the heart of this appeal, however, is the Covenant's prohibition on "sexual intimacy that violates the sacredness of marriage between a man and a woman" (A.R., vol. III, at p. 403).

7 All TWU students and faculty must sign and abide by the Covenant as a condition of attendance or employment. The behavioural expectations set out in the Covenant apply to conduct both on and off campus. A student's failure to comply with the Covenant may result in disciplinary measures including suspension or permanent expulsion. Students are expected to hold each other accountable for complying with the Covenant; disciplinary processes may be initiated as a result of a complaint by a TWU student regarding another student's behaviour.

8 While a large proportion of the students who enroll at TWU identify as Christian, TWU says that its students may, and in fact do, hold and express diverse opinions on moral, ethical and religious issues and are encouraged to debate different viewpoints inside and outside the classroom.

9 Brayden Volkenant is a graduate of TWU's undergraduate program, who identifies as an evangelical Christian. He deposed that at the time he was applying to attend law school, TWU's proposed law school would have been his "top choice".

10 The LSBC is the regulator of the legal profession in British Columbia. The LSBC's structure, object and powers are set out in its governing statute, the *Legal Profession Act*, S.B.C. 1998, c. 9 (*LPA*). The LSBC has the statutory authority to determine who may be admitted to the British Columbia bar (see *LPA*, ss. 19 to 21).

B. TWU's Proposed Law School

11 Over two decades ago, TWU decided that it wished to establish a faculty of law and to add a three-year juris doctor (J.D.) common law degree program to its degree offerings. In June 2012, TWU submitted its proposal to British Columbia's Minister of Advanced Education for the approval required to be able to grant law degrees, pursuant to the Minister's authority under the *Degree Authorization Act*, S.B.C. 2002, c. 24, s. 4(1).

12 TWU also submitted its proposal to the Federation of Law Societies of Canada, which received delegated authority from each of the provincial law societies in 2010 to ensure that new Canadian common law degree programs meet established national requirements. In December 2013, the Federation granted preliminary approval to TWU's proposed law school program. The following day, the Minister granted approval to TWU's proposed law school, authorizing TWU to grant law degrees to its graduates.

C. The LSBC's Decision Not to Approve TWU's Proposed Law School

13 Under the LSBC's Rules, adopted pursuant to the *LPA*, enrollment in the LSBC's bar admission program requires proof of "academic qualification". Under Rule 2-27 (now Rule 2-54 of the *Law Society Rules 2015*), this requirement is met with a bachelor of laws or equivalent degree issued by an "approved" common law faculty of law in a Canadian university.

14 A common law faculty of law is "approved" for the purposes of Rule 2- 27 if it has been approved by the Federation "unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law".

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15 Therefore, when the Federation granted its preliminary approval to TWU's law school on December 16, 2013, the law school became an "approved" faculty of law under the LSBC's Rule 2-27, unless the Benchers declared that it was not.

16 At their meeting of February 28, 2014, the LSBC Benchers confirmed that they would vote on whether to adopt the following resolution at a meeting scheduled for April 11, 2014:

> Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies' Canadian Common Law Program Approval Committee, the proposed School of Law at Trinity Western University is not an approved faculty of law.
>
> (A.R., vol. VII, at p. 1136)

Ahead of the scheduled vote, the Benchers received written submissions and other information from TWU, submissions from the profession and the public, and various legal opinions. At the April 11, 2014 meeting, the resolution failed, and TWU's proposed law school remained approved under Rule 2-27.

17 This prompted a considerable response from members of British Columbia's legal profession. LSBC members requisitioned a Special General Meeting pursuant to what was then Rule 1-9(2) (now Rule 1-11(2) of the *Law Society Rules 2015*) to consider and vote on a resolution that would direct the Benchers to declare that TWU's law school not be an approved faculty of law under Rule 2-27. The members were provided with, and encouraged to review, the material that had been provided to the Benchers before their April 11, 2014 meeting, and to review the webcast or transcript of that meeting.

18 The Special General Meeting was held on June 10, 2014. By a vote of 3210 members for and 968 members against, the members voted to adopt the proposed resolution not approving the law school.

19 At a meeting held on September 26, 2014, the Benchers considered their response, debating among three alternative means of proceeding. The first was to hold a referendum of members on the question of whether the Benchers should be required to implement the resolution. The second was for the Benchers to immediately implement the resolution by declaring that TWU's proposed law school was not approved. The third was for the Benchers to postpone consideration of the issue until the release of a trial decision in any one of the three parallel litigation proceedings relating to recognition of TWU's law school then taking place in British Columbia, Ontario and Nova Scotia.

20 The Benchers chose the first option, voting to hold a referendum on the issue of TWU's law school approval. The Benchers agreed to be bound by the results only if one-third of members voted in the referendum and two-thirds of the votes were in favour of implementing the June 10, 2014 resolution.

21 The referendum of all members was conducted by mail-in ballot in October 2014: 5951 members voted to implement the resolution through a declaration that TWU's proposed law school was not an approved faculty of law, while 2088 members voted against the resolution.

22 On October 31, 2014, the Benchers passed a resolution declaring that TWU's law school was not an approved faculty of law. The resolution was passed with 25 votes in favour, one against, and four abstentions. On December 11, 2014, the Minister withdrew his approval of TWU's proposed law school under the *Degree Authorization Act*.

III. Prior Decisions

A. Judicial Review — 2015 BCSC 2326, 392 D.L.R. (4th) 722 (B.C. S.C.) (Hinkson C.J.)

23 TWU and Mr. Volkenant applied to the Supreme Court of British Columbia for judicial review of the LSBC's decision, arguing that it failed to appropriately take into account their freedom of religion under s. 2(*a*).

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24 The court concluded that while refusing TWU's proposed faculty of law based on its admissions policy was within the LSBC's statutory mandate, by putting the issue to a referendum, the Benchers had improperly fettered their discretion. The court further concluded that the Benchers were obligated to consider and balance TWU's and Mr. Volkenant's s. 2(*a*) *Charter* rights with the equality rights of current and prospective LSBC members, particularly the LGBTQ community. Since the LSBC had proceeded by referendum, this balancing had not taken place. The court quashed the LSBC's decision and restored the results of the April 11, 2014 vote whereby TWU's proposed law school remained "approved" under Rule 2-27.

B. Court of Appeal — 2016 BCCA 423, 405 D.L.R. (4th) 16 (B.C. C.A.) (Bauman C.J. and Newbury, Groberman, Willcock and Fenlon JJ.A.)

25 The Court of Appeal for British Columbia dismissed the appeal. The court was of the view that the Benchers had improperly fettered their discretion by binding themselves to the referendum results. As the Benchers were aware that the *Charter* was implicated by the decision, they were required to balance any potential infringement of *Charter* rights with the relevant statutory objectives.

26 In any case, the Court of Appeal also concluded that the decision not to approve TWU's law school did not represent a proportionate balance between the LSBC's statutory objectives and the relevant *Charter* protections. Applying *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.), and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.), the court found that the impact on TWU's religious freedom was severe, while any practical effect on access to the legal profession for LGBTQ persons was insignificant. The Court of Appeal therefore concluded that the LSBC's decision not to approve TWU's law school was unreasonable.

IV. Analysis

A. Questions on Appeal

27 At the outset, it is important to identify what the LSBC actually decided when denying approval to TWU's proposed law school. The LSBC did not deny graduates from TWU's proposed law school admission to the LSBC; rather, the LSBC denied TWU's proposed law school with a mandatory covenant.

28 In reviewing this decision, we must consider the following issues: whether the LSBC was entitled under its enabling statute to consider TWU's admissions policies and to hold a referendum of its members in deciding whether to approve its proposed law school; whether the LSBC's decision limited a *Charter* protection; and if so, whether that decision reflected a proportionate balance of the *Charter* protection and the statutory objectives.

B. The Scope of the LSBC's Statutory Mandate

29 This appeal requires us to address the scope of the LSBC's statutory mandate. At issue in this case is the LSBC's decision not to approve TWU's proposed law school as a route of entry to the legal profession in British Columbia — a decision that falls within the core of the LSBC's role as the gatekeeper to the profession. A question that arises is whether the LSBC was entitled to consider factors apart from the academic qualifications and competence of individual graduates in making this decision to deny approval to TWU's proposed law school.

30 TWU argues that the LSBC is only entitled to consider a law school's academic program, rather than its admissions policies, in deciding whether to approve it. It submits that Rule 2-27, the LSBC Rule under which the decision not to approve TWU's law school was made, was passed pursuant the Benchers' statutory authority to make rules to "establish requirements, including academic requirements, and procedures" for enrolment of articled students and for admission to the bar, set out in ss. 20(1)(a) and 21(1)(b) of the *LPA*. However, ss. 20(1)(a) and 21(1)(b) of the *LPA* both explicitly allow the Benchers to "establish requirements, *including* academic requirements". TWU's argument also ignores the Benchers' authority, under s. 11(1) of the *LPA*, to "make rules for the governing of the society, lawyers, law firms, articled students

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and applicants, and for the carrying out of [the *LPA*]". This authority is explicitly "not limited by any specific power or requirement to make rules given to the benchers" elsewhere in the *LPA* (see *LPA*, s. 11(2)).

31 In our view, the *LPA* requires the Benchers to consider the overarching objective of protecting the public interest in determining the requirements for admission to the profession, including whether to approve a particular law school.

32 The legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation. In exchange, the profession must exercise this privilege in the public interest (*Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.), at para. 36, quoting D. A. A. Stager and H. W. Arthurs in *Lawyers in Canada* (1990), at p. 31). The statutory object of the LSBC is, broadly, to uphold and protect the public interest in the administration of justice. That object is set out in s. 3 of the *LPA*, which reads as follows:

> **3** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

33 The LSBC's overarching statutory object in s. 3 of the *LPA* — to uphold and protect the public interest in the administration of justice — is stated in the broadest possible terms. While the provisions of s. 3 set out means by which this overarching objective is to be achieved, those means are framed expansively and include "regulating the practice of law" and "preserving and protecting the rights and freedoms of all persons". Section 3 of the *LPA*, read as a whole, manifests the legislature's intention to "leave the governance of the legal profession to lawyers" (see *Pearlman v. Law Society (Manitoba)*, [1991] 2 S.C.R. 869 (S.C.C.), at p. 888).

34 As the governing body of a self-regulating profession, the LSBC's determination of the manner in which its broad public interest mandate will best be furthered is entitled to deference. The public interest is a broad concept and what it requires will depend on the particular context.

35 This Court most recently considered the self-regulation of the legal profession in *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360 (S.C.C.). There, Wagner J. repeatedly noted the deference owed to law societies' interpretation of "public interest": that they have "broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest" (para. 22); that they must be afforded "considerable latitude in making rules based on [their] interpretation of the 'public interest' in the context of [their] enabling statute" (para. 24); and that they have "particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions" (para. 25).

36 *Green* affirmed a long history of deference to law societies when they self-regulate in the public interest. For many years, this Court has recognized that law societies self-regulate in the public interest (*Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) (*Canada (A.G.)*), at pp. 335-36; *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at pp. 187-88; *Pearlman*, at p. 887; *Ryan*, at para. 36). As Iacobucci J. explained in *Pearlman*, the regulation of professional practice through a system of licensing is directed toward the protection of vulnerable interests — those of clients and third parties.

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37 To that end, where a legislature has delegated aspects of professional regulation to the professional body itself, that body has primary responsibility for the development of structures, processes, and policies for regulation. This delegation recognizes the body's particular expertise and sensitivity to the conditions of practice. This delegation also maintains the independence of the bar; a hallmark of a free and democratic society (*Canada (A.G.)*, at pp. 335-36). Therefore, where a statute manifests a legislative intent to leave the governance of the legal profession to lawyers, "unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected" (*Pearlman*, at p. 888). As Iacobucci J. later explained in *Ryan*, we give deference to law society decisions to "giv[e] effect to the legislature's intention to protect the public interest by allowing the legal profession to be self-regulating" (para. 40).

38 In sum, where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar.

39 The LSBC in this case interpreted its duty to uphold and protect the public interest in the administration of justice as precluding the approval of TWU's proposed law school because the requirement that students sign the Covenant as a condition of admission effectively imposes inequitable barriers on entry to the school. The LSBC was entitled to be concerned that inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar. Ultimately, the LSBC determined that the approval of TWU's proposed law school with a mandatory covenant would negatively impact equitable access to and diversity within the legal profession and would harm LGBTQ individuals, and would therefore undermine the public interest in the administration of justice.

40 In our view, it was reasonable for the LSBC to conclude that promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a positive public *perception* of the legal profession. We arrive at this conclusion for the following reasons.

41 Limiting access to membership in the legal profession on the basis of personal characteristics, unrelated to merit, is inherently inimical to the integrity of the legal profession. This is especially so in light of the societal trust placed in the legal profession and the explicit statutory direction that the LSBC should be concerned with "preserving and protecting the rights and freedoms of all persons" as a means to upholding the public interest in the administration of justice (*LPA*, s. 3(a)). Indeed, the LSBC, as a public actor, has an overarching interest in protecting the values of equality and human rights in carrying out its functions. As Abella J. wrote in *Loyola High School*, at para. 47, "shared values — equality, human rights and democracy — are values the state always has a legitimate interest in promoting and protecting". Constitutional and *Charter* values have been recognized as an important tool in judicial decision making since *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.) (p. 136), affirmed in subsequent jurisprudence (see e.g. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at paras. 64-66; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704 (S.C.C.), at para. 25; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 (S.C.C.)). Far from controversial, these values are accepted principles of constitutional interpretation. In the administrative context, this Court has recognized that "any exercise of statutory discretion must comply with the *Charter* and its values" (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.), at para. 41. See also G. Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at pp. 94-100). There is no reason why *Charter* values should be seen as less significant in the context of administrative decision-making.

42 Eliminating inequitable barriers to legal education, and thereby, to membership in the legal profession, also promotes the competence of the bar and improves the quality of legal services available to the public. The LSBC is statutorily mandated to ensure the competence of lawyers as a means of upholding and protecting the public interest in the administration of justice (*LPA*, s. 3(b)). The LSBC is not limited to enforcing minimum standards of competence for the individual lawyers it licenses; it is also entitled to consider how to promote the competence of the bar as a whole.

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43 As well, the LSBC was entitled to interpret the public interest in the administration of justice as being furthered by promoting diversity in the legal profession — or, more accurately, by avoiding the imposition of additional impediments to diversity in the profession in the form of inequitable barriers to entry. A bar that reflects the diversity of the public it serves undeniably promotes the administration of justice and the public's confidence in the same. A diverse bar is more responsive to the needs of the public it serves. A diverse bar is a more competent bar (see *LPA*, s. 3(b)).

44 The LSBC's statutory objective of "protect[ing] the public interest in the administration of justice by ... preserving and protecting the rights and freedoms of all persons" entitles the LSBC to consider harms to some communities in making a decision it is otherwise entitled to make, including a decision whether to approve a new law school for the purposes of lawyer licensing. In the context of its decision whether to approve TWU's proposed law school, the *LPA*'s direction that the LSBC should be concerned with the rights and freedoms of all persons in our view permitted the LSBC to consider potential harm to the LGBTQ community as a factor in its decision making.

45 That the LSBC considered TWU's admissions policies in deciding whether to approve its proposed law school does not amount to the LSBC regulating law schools or confusing its mandate for that of a human rights tribunal. As explained above, the LSBC considered TWU's admissions policies in the context of its decision whether to approve the proposed law school for the purposes of lawyer licensing in British Columbia, in exercising its authority as the gatekeeper to the legal profession in that province. The LSBC did not purport to make any other decision governing TWU's proposed law school or how it should operate.

46 Respectfully, we disagree with the suggestion that in making a decision about whether to approve a law school for the purposes of lawyer licensing in British Columbia, the LSBC was purporting to exercise a free-standing power to seek out conduct which it finds objectionable. Nor did the LSBC usurp the role of a human rights tribunal in considering the inequitable barriers to entry posed by the Covenant in making its decision: the LSBC did not purport to declare that TWU was in breach of any human rights legislation or issue a remedy for any such breach. Its consideration of equality values is consistent with law societies historically acting "to remove obstacles ... such as religious affiliation, race and gender, so as to provide previously excluded groups the opportunity to obtain a legal education and thus become members of the legal profession" (*Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1 (Ont. Div. Ct.), at para. 96). In any case, it should be beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority — and may look to instruments such as the Charter or human rights legislation as sources of these values, even when not directly applying these instruments (see e.g. *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31, [2001] 1 S.C.R. 772 (S.C.C.) (*TWU 2001*), at paras. 12-14 and 26-28). This is what the LSBC, quite properly, did.

47 Thus, there can be no question that the LSBC was entitled to consider an inequitable admissions policy in determining whether to approve the proposed law school. Its mandate is broad. In promoting the public interest in the administration of justice and, relatedly, public confidence in the legal profession, the LSBC was entitled to consider an admissions policy that imposes inequitable and harmful barriers to entry. Approving or facilitating inequitable barriers to the profession could undermine public confidence in the LSBC's ability to self-regulate in the public interest.

C. The Referendum Procedure Adopted by the LSBC

48 TWU argues that the LSBC's decision not to approve TWU's proposed law school should be set aside because the LSBC Benchers improperly fettered their discretion by holding a referendum of members on the issue. We reject this argument.

49 The Benchers concluded that they were authorized under the *LPA* to proceed as they did. Section 13 of the *LPA* provides that the *LSBC members* can elect to bind the Benchers to implement the results of a referendum of members in certain circumstances. This provision indicates the legislature's intent that the LSBC's decisions be guided by the views of

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its full membership, at least in some circumstances. However, s. 13 does not limit the circumstances in which *the Benchers* can elect to be bound to implement the results of a referendum of members. The Benchers were therefore not precluded from holding a referendum merely because all of the circumstances described in s. 13 were not present.

50 The Court of Appeal held that the Benchers violated their statutory duties by holding a referendum on the approval of TWU's proposed law school because the issue implicated the *Charter*. That a decision may implicate the *Charter* does not, by itself, render the referendum procedure otherwise available under the *LPA* inappropriate. The legal profession in British Columbia is self-governing; the majority of Benchers are elected by the LSBC membership and make decisions on behalf of the LSBC as a whole. It is consistent with this statutory scheme that the Benchers may decide that certain decisions they take would benefit from the guidance or support of the membership as a whole. This is no less the case where a decision implicates the *Charter* and raises questions as to the best means to pursue the LSBC's statutory objectives. The LSBC Benchers were entitled to proceed as they did in this case.

D. Reasonableness Review in the Absence of Formal Reasons

51 As previously noted, the LSBC gave no formal reasons. The British Columbia Court of Appeal held that where *Charter* protections are implicated in an administrative decision, the decision-maker is required to balance the potential *Charter* limitation against the statutory objectives (para. 80). The court found that, in voting to affirm the results of the binding referendum, the Benchers failed to follow the "procedure to be adopted by a tribunal in balancing statutory objectives against *Charter* values", and did not "engage in any exploration of how the *Charter* values at issue in this case could best be protected in view of the objectives of the *Legal Profession Act*" (paras. 84-85).

52 We disagree. It is true that reasonableness review is concerned *both* with "the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 (S.C.C.), at para. 18). To be reasonable, a decision must "fal[l] within a range of possible, acceptable outcomes" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 47) *and* exhibit "justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, at para. 47).

53 However, not all administrative decision making requires the same procedure. Reasonableness "takes its colour from the context" (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), at para. 18) and the requirements of process will "vary with the context and nature of the decision-making process at issue" (*Catalyst Paper Corp.*, at para. 29). In *Catalyst Paper Corp.*, which involved the review of a by-law passed by a municipality, the Court held that there was no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process.

54 The decision in this case was made in similar circumstances. The vast majority of LSBC Benchers serve as elected representatives and they reached their decision to refuse to approve TWU's proposed law school by a majority vote. As this Court noted in *Green*, at para. 23:

> ... many of the benchers of the Law Society are elected by and accountable to members of the legal profession. ... Thus, McLachlin C.J.'s comments in *Catalyst Paper* in the context of municipal bylaws are apt here as well: ... "reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" (para. 19).

55 Given this context, the LSBC was not required to give reasons formally explaining why the decision to refuse to approve TWU's proposed law school amounted to a proportionate balancing of freedom of religion with the statutory objectives of the *LPA*. It is clear from the speeches that the LSBC Benchers made during the April 11, 2014 and September 26, 2014 meetings that they were alive to the question of the balance to be struck between freedom of religion and their statutory duties.

56 As the Benchers were alive to the issues, we must then assess the reasonableness of their decision. Reasonableness review requires "a respectful attention to the reasons offered or which *could be offered* in support of a decision" (*Dunsmuir*,

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at para. 48 (emphasis added); see also *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 11). Reviewing courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.), at para. 52, quoting *Newfoundland Nurses*, at para. 15). As we will explain, the Benchers came to a decision that reflects a proportionate balancing.

E. Review of the LSBC's Decision Under the Dorél/Loyola Framework

57 Having concluded that the LSBC had authority to consider factors outside of the competence of individual law graduates of TWU's proposed law school, the question now becomes whether the LSBC's decision to deny approval to TWU's proposed law school was reasonable. Discretionary administrative decisions that engage the *Charter* are reviewed based on the administrative law framework set out by this Court in *Doré* and *Loyola High School*. Delegated authority must be exercised "in light of constitutional guarantees and the values they reflect" (*Doré*, at para. 35). In *Loyola High School*, this Court explained that under the *Doré* framework, *Charter* values are "those values that underpin each right and give it meaning" and which "help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives" (para. 36, citing *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.), at para. 88). The *Doré/Loyola* framework is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context. In this way, *Charter* rights are no less robustly protected under an administrative law framework.

58 Under the precedent established by this Court in *Doré* and *Loyola* , the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola* , at para. 39). If so, the question becomes "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*Doré*, at para. 57; *Loyola High School*, at para. 39). The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives.

59 *Doré* and *Loyola High School* are binding precedents of this Court. Our reasons explain why and how the *Doré/Loyola* framework applies here. Since *Charter* protections are implicated, the reviewing court must be satisfied that the decision reflects a proportionate balance between the *Charter* protections at play and the relevant statutory mandate. This is the analysis we adopt.

(1) Whether Freedom of Religion Is Engaged

60 In this case, the first issue is whether, in applying its statutory public interest mandate — including the goals of equal access to and diversity within the legal profession — to the approval of TWU's proposed law school, the LSBC engaged the religious freedom of the TWU community.

61 TWU is a private religious institution created to support the collective religious practices of its members. For the reasons set out below, we find that the religious freedom of members of the TWU community is limited by the LSBC's decision. It is unnecessary to determine whether TWU, as an institution, possesses rights under s. 2(*a*) of the *Charter*.

62 This Court has adopted a broad and purposive approach to interpreting freedom of religion under the *Charter*. This encompasses "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 336).

63 Section 2(*a*) of the *Charter* is limited when the claimant demonstrates two things: first, that he or she sincerely believes in a practice or belief that has a nexus with religion; and second, that the impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief (*Syndicat Northcrest c. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (S.C.C.), at para. 65; *Ktunaxa Nation v. British*

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Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54, [2017] 2 S.C.R. 386 (S.C.C.), at para. 68). If, based on this test, s. 2(*a*) is not engaged, there is nothing to balance.

64 Although this Court's interpretation of freedom of religion reflects the notion of personal choice and individual autonomy and freedom, religion is about both religious beliefs and religious relationships (*Amselem*, at para. 40; *Loyola High School*, at para. 59, quoting Justice LeBel in *Hutterian Brethren*, at para. 182). The protection of individual religious rights under s. 2(*a*) must therefore account for the socially embedded nature of religious belief, as well as the "deep linkages between this belief and its manifestation through communal institutions and traditions" (*Loyola High School*, at para. 60). In other words, religious freedom is individual, but also "profoundly communitarian" (*Hutterian Brethren*, at para. 89). The ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(*a*).

65 On the sincerity of the belief, the respondents have articulated the religious interest at stake in various ways. In their factum, they contend that "[t]he sincere beliefs of evangelical Christians include 'the belief in the importance of being in an institution with others who either share that belief or are prepared to honour it in their conduct'" (para. 96, quoting *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296 (N.S. S.C.), at para. 235). Elsewhere they argue that evangelicals believe "they should carry their beliefs into educational communities" and in the value of educating the whole person with a Christian ethos (para. 113).

66 The affidavit evidence from TWU students focusses primarily on the spiritual growth that is engendered by studying law in a religious learning environment.

67 There is no doubt evangelical Christians believe that studying in a religious environment can help them grow spiritually. Evangelical Christians carry their religious beliefs and values beyond their private lives and into their work, education, and politics.

68 TWU seeks to foster this spiritual growth. It was founded on religious principles and was intended to be a religious community, primarily serving Christians. Indeed, the university teaches from a Christian perspective and aims to develop "godly Christian leaders" (R.R., vol. I, at p. 119). TWU's purpose statement further provides that TWU seeks to promote "total student development through ... deepened commitment to Jesus Christ and a Christian way of life" (p. 120).

69 Several alumni of TWU emphasized the spiritual benefits of receiving an education from a Christian perspective in an environment infused with evangelical Christian values. According to Mr. Volkenant, completing his undergraduate studies at TWU gave him "an appreciation for the importance of integrating [his] Christian faith into all areas of [his] life" (R.R., vol. I, at p. 68). For another alumna, Ms. Jody Winter, attending TWU was about more than obtaining a university education; it was a time of spiritual formation.

70 Because s. 2(*a*) protects beliefs which are sincerely held by the claimant, the court must "ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice" (*Amselem*, at para. 52; see also *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6, [2006] 1 S.C.R. 256 (S.C.C.), at para. 35). It is clear from the record that evangelical members of TWU's community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. In our view, this is the religious belief or practice implicated by the LSBC's decision.

71 This belief is, in turn, supported through the universal adoption of the Covenant. The Covenant "reflects both historic patterns of evangelical practice and widely accepted contemporary evangelical theological convictions" (R.R., vol. IV, at p. 89). A core value at TWU is "obeying the authority of Scripture" (R.R., vol. I, at 121), and the Covenant promotes this compliance. Specifically, it requires TWU community members to "encourage and support other members of the community in their pursuit of these values and ideals" (A.R., vol. III, at p. 402). Thus, the mandatory Covenant helps create an environment in which TWU students can grow spiritually. According to the Covenant:

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> The University is an interrelated academic community rooted in the evangelical Protestant tradition; it is made up of Christian administrators, faculty and staff who, along with students choosing to study at TWU, covenant together to form a community that strives to live according to biblical precepts, believing that this will optimize the University's capacity to fulfil its mission and achieve its aspirations.
>
> [Emphasis added.]
>
> (A.R., vol. III, at p. 401)

72 Members of the TWU community have noted that the mandatory Covenant "makes it easier" for them to adhere to their faith, and it creates an environment where their moral discipline is not constantly tested. The relationship between the Covenant and the religious environment at TWU is succinctly set out by Ms. Winter:

> I am grateful that students at TWU were asked to refrain from behaviour that was against my religious beliefs. It was easier for me to remain committed to my religious values living in a community like TWU's, where guidelines were put in place in respect to student behaviour.
>
> (R.R., vol. I, at pp. 59-60)

73 To summarize, it is clear from this evidence that evangelical Christians believe that studying in an environment defined by religious beliefs in which members follow particular religious rules of conduct enhances the spiritual growth of members of that community. And the Covenant supports the practice of studying in an environment infused with evangelical beliefs.

74 The next question is whether the LSBC's decision not to approve TWU's law school limits the ability of TWU's community members to act in accordance with these beliefs and practices in a manner that is more than trivial or insubstantial (*Amselem*, at para. 74; *Ktunaxa Nation*, at para. 68). Was this decision "capable of interfering with religious belief or practice" (*R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.), at p. 759; *Hutterian Brethren*, at para. 34)? This is an objective analysis that looks at the impact on the claimants, rather than the impact of the implicated practices or beliefs *on others* (*L. (S.) c. Des Chênes (Commission scolaire)*, 2012 SCC 7, [2012] 1 S.C.R. 235 (S.C.C.), at paras. 23-24; *Ktunaxa Nation*, at para. 70).

75 By interpreting the public interest in a way that precludes the approval of TWU's law school governed by the mandatory Covenant, the LSBC has interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious practices. The effect is a limitation on the right of TWU's community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct. Accordingly, their religious rights were engaged by the decision.

(2) Overlapping Charter Protections

76 Three other *Charter* protections are potentially implicated in this case, namely free expression (s. 2(*b*)); free association (s. 2(*d*)); and equality (s. 15).

77 The factual matrix underpinning a *Charter* claim in respect of any of these protections is largely indistinguishable. Further, the parties themselves have almost exclusively framed the dispute as centring on religious freedom. In our view, the religious freedom claim is sufficient to account for the expressive, associational, and equality rights of TWU's community members in the analysis.

78 Put differently, whether the *Charter* protections of prospective students of TWU's proposed law school are articulated in terms of their freedom to engage in the religious practice of studying law in a learning environment that is infused with the community's religious beliefs, their freedom to express and associate in a community infused with those

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beliefs, or their protection from discrimination based on the enumerated ground of religion, such limitations were, as we explain next, proportionately balanced against the LSBC's critical public interest mandate.

(3) Proportionate Balancing

79 In *Doré* and *Loyola High School*, this Court held that where an administrative decision engages a *Charter* protection, the reviewing court should apply "a *robust* proportionality analysis consistent with administrative law principles" instead of "a literal s. 1 approach" (*Loyola High School* , at para. 3). Under the *Doré* framework, the administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (see *Doré*, at para. 7; *Loyola High School*, at para. 32). *Doré*'s approach recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake (*Loyola High School*, at para. 42; *Doré*, at para. 54). Consequently, the decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case (*Doré* , at para. 54). It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance. *Doré* recognizes that there may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives (*Loyola*, at para. 41). As long as the decision "falls within a range of possible, acceptable outcomes", it will be reasonable (*Doré*, at para. 56). As this Court noted in *Doré*, "there is ... conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives" (para. 57).

80 The framework set out in *Doré* and affirmed in *Loyola High School* is not a weak or watered-down version of proportionality — rather, it is a robust one. As this Court explained in *Loyola High School*, at para. 38:

> The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the *Charter* in contexts where *Charter* rights are engaged, reasonableness requires proportionality: *Doré*, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality".
>
> [Emphasis added; text in brackets in original.]

For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision *proportionately* balances these factors, that is, that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola High School*, at para. 39). Put another way, the *Charter* protection must be "affected as little as reasonably possible" in light of the applicable statutory objectives (*Loyola High School*, at para. 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.

81 The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection *least*. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola High School*, at para. 41, citing *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 160). However, if there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.

82 The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Loyola High School*, at para. 68; *Doré*, at

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para. 56). The *Doré* framework therefore finds "analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola High School*, at para. 40). In working "the same justificatory muscles" as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

83 We now turn to whether the limitation on the religious freedom of the members of the TWU community is a proportionate one in light of the LSBC's statutory mandate.

84 The LSBC was faced with only two options — to approve or reject TWU's proposed law school. Given the LSBC's interpretation of its statutory mandate, approving TWU's proposed law school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to *Charter* protections more fully in light of the statutory objectives.

85 The LSBC's decision also reasonably balanced the severity of the interference with the *Charter* protection against the benefits to its statutory objectives. To begin, the LSBC's decision did not limit religious freedom to a significant extent. The LSBC did not deny approval to TWU's proposed law school in the abstract; rather, it denied a specific proposal that included the mandatory Covenant. Indeed, when the LSBC asked TWU whether it would "consider" amendments to its Covenant, TWU expressed no willingness to compromise on the mandatory nature of the Covenant. The decision therefore only prevents TWU's community members from attending an approved law school at TWU that is governed by a *mandatory* covenant.

86 The Court of Appeal described the limitation in this case as "severe" because it precludes graduates of TWU's proposed law school from practising law in British Columbia (para. 168). However, the LSBC's decision does not prevent any graduates from being able to practise law in British Columbia. Furthermore, it does not prohibit any evangelical Christians from adhering to the Covenant or associating with those who do. The interference is limited to preventing prospective students from studying law at TWU with a mandatory covenant.

87 First, the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue: namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct. The decision to refuse to approve TWU's proposed law school with a mandatory covenant only prevents prospective students from studying law in their *optimal* religious learning environment where everyone has to abide by the Covenant.

88 Second, the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community's religious beliefs as preferred (rather than necessary) for their spiritual growth. As McLachlin C.J. explained in *Hutterian Brethren*, at para. 89:

> There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.
>
> [Emphasis added.]

89 Attending TWU's proposed law school is said to make it "easier" to practise evangelical beliefs. That attending law at TWU, with a mandatory covenant, is a preference is clear from TWU's own affiants who, like Mr. Volkenant, expressed a desire to attend TWU's proposed law school:

> I do not know if I would have chosen to attend TWU law school, but I certainly would have appreciated the option.

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[Emphasis added.]

(R.R., vol. I, at p. 154)

I am familiar with TWU's proposal for its School of Law. Had this option existed when I was considering law schools, I likely would have applied to it.

[Emphasis added.]

(R.R., vol. I, at p. 7)

... I am familiar with the proposal put forward by TWU in respect to its School of Law and believe I would have considered attending had this option been available to me.

[Emphasis added.]

(R.R., vol. I, at p. 143)

90 Our point is that, on the record before us, prospective TWU law students effectively admit that they have much less at stake than claimants in many other cases that have come before this Court (see e.g. *Multani*, at para. 3; *Amselem*, at para. 6; and *Hutterian Brethren*, at para. 7; and *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 (S.C.C.), at para. 58). Put otherwise, denying someone an option they would merely appreciate certainly falls short of "forced apostasy" (*Hutterian Brethren*, at para. 89).

91 On the other side of the scale is the extent to which the LSBC's decision furthered its statutory objectives. As the regulator of the legal profession in British Columbia, its decision must represent a reasonable balance between the benefits to its statutory objectives and the severity of the limitation on *Charter* rights at stake.

92 It is clear that the decision not to approve TWU's proposed law school significantly advanced the LSBC's statutory objectives — to promote and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the competence of the legal profession (see *LPA*, ss. 3(a) and 3(b)).

93 First, the decision advances the LSBC's relevant statutory objectives by maintaining equal access to and diversity in the legal profession. While TWU submits that it "is open to all academically qualified people wishing to live and learn in its religious community" (R.F., at para. 10), the reality is that most LGBTQ people will be deterred from applying to its proposed law school because of the Covenant's prohibition on sexual activity outside marriage between a man and a woman. As this Court acknowledged in *TWU 2001*, "[a]lthough the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost" (para. 25). It follows that the 60 law school seats created by TWU's proposed law school will be effectively closed to the vast majority of LGBTQ students. This barrier to admission may discourage qualified candidates from gaining entry to the legal profession.

94 TWU submits that even if LGBTQ people are deterred from attending TWU's law school, there are many other options open to LGBTQ people who wish to attend law school (R.F., at para. 175). Even further, TWU asserts that its law school will result in an overall increase in law school seats, which expands choices for all students (para. 138). The British Columbia Court of Appeal accepted this argument, finding that the negative impact on access to law school by LGBTQ students would be "insignificant in real terms" (para. 179).

95 Such arguments fail to recognize that even if the net result of TWU's proposed law school is that more options and opportunities are available to LGBTQ people applying to law school in Canada — which is certainly not a guarantee — this does not change the fact that an entire law school would be closed off to the vast majority of LGBTQ individuals on the basis of their sexual identity. Those who are able to sign the Covenant will be able to apply to 60 *more* law school

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seats per year, whereas those 60 seats remain effectively *closed* to most LGBTQ people. In short, LGBTQ individuals would have fewer opportunities relative to others. This undermines true equality of access to legal education, and by extension, the legal profession. Substantive equality demands more than just the availability of options and opportunities — it prevents "the violation of essential human dignity and freedom" and "eliminate[s] any possibility of a person being treated in substance as 'less worthy' than others" (*Droit de la famille - 091768*, 2013 SCC 5, [2013] 1 S.C.R. 61 (S.C.C.), at para. 138). The public confidence in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending.

96 Second, the decision furthers the statutory objective — protecting the public interest in the administration of justice by preserving rights and freedoms — by preventing the risk of significant harm to LGBTQ people who attend TWU's proposed law school. The British Columbia Court of Appeal accepted that if LGBTQ students signed the Covenant to gain access to TWU "they would have to either 'live a lie to obtain a degree' and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion" (para. 172). TWU's Covenant prevents students who are not married to members of the opposite sex from engaging in sexual activity in the privacy of their own bedrooms. It requires non-evangelical LGBTQ students, whom TWU welcomes to its school, to comply with conduct requirements even when they are off-campus, in the privacy of their own homes. Attending TWU's law school would mean that LGBTQ students would have to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education (I.F., Egale Canada Human Rights Trust (file No. 37318), at para. 14; Start Proud and OUTlaws (file No. 37209), at para. 6).

97 Despite this, TWU asserts that LGBTQ students will suffer no harm to their dignity or personal identity while enrolled at TWU because the Covenant requires all members of TWU's community to "treat all persons with dignity, respect and equality, regardless of personal differences" (R.F., at para. 92). However, as this Court recognized in *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, [2013] 1 S.C.R. 467 (S.C.C.), it is not possible "to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood" (para. 123, quoting L'Heureux-Dubé J. in *TWU 2001* in dissent (though not on this point), at para. 69).

98 LGBTQ students enrolled at TWU's law school may suffer harm to their dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation (see evidence of Dr. Ellen Faulkner in A.R., vol. V, at pp. 828-29 and 834; Dr. Catherine Taylor in A.R., vol. V, at p. 904; Dr. Mary Bryson in A.R., vol. V, at pp. 967-68). The public confidence in the administration of justice may be undermined by the LSBC's decision to approve a law school that forces some to deny a crucial component of their identity for three years in order to receive a legal education.

99 The TWU community has the right to determine the rules of conduct which govern its members. Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices. Where a religious practice impacts others, however, this can be taken into account at the balancing stage. The Covenant is a commitment to *enforcing* a religiously based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community (D. Pothier, "An Argument Against Accreditation of Trinity Western University's Proposed Law School" (2014), 23:1 *Const. Forum Const*. 1, at p. 2). The effect of the mandatory Covenant is to restrict the conduct of others.

100 The limitation on religious freedom in this case must be understood in light of the reality that conflict between the pursuit of statutory objectives and individual freedoms may be inevitable. As this Court has held, state interferences with religious freedom "must be considered in the context of a multicultural, multi- religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs" (*Hutterian Brethren*, at para. 90; see also *Loyola High School*, at para. 47). Accordingly, minor limits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society.

101 In saying this, we do not dispute that "[d]isagreement and discomfort with the views of others is unavoidable in a free and democratic society" (C.A. reasons, at para. 188), and that a secular state cannot interfere with religious freedom

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unless it conflicts with or harms overriding public interests (para. 131, citing *Loyola High School*, at para. 43). But more is at stake here than simply "disagreement and discomfort" with views that some will find offensive. This Court has held that religious freedom can be limited where an individual's religious beliefs or practices have the effect of "injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (*Big M*, at p. 346). Likewise, in *Multani*, the Court held that state interference with religious freedom can be justified "when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others" (para. 26). Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion.

102 In the end, it cannot be said that the denial of approval is a serious limitation on the religious rights of members of the TWU community. The LSBC's decision does not suppress TWU's religious difference. Except for the limitation we have identified, no evangelical Christian is denied the right to practise his or her religion as and where they choose.

103 The refusal to approve the proposed law school means that members of the TWU religious community are not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSBC chose an interpretation of the public interest in the administration of justice which mandates access to law schools based on merit and diversity, not exclusionary religious practices. The refusal to approve TWU's proposed law school prevents *concrete*, not abstract, harms to LGBTQ people and to the public in general. The LSBC's decision ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU's proposed law school. It also maintains public confidence in the legal profession, which could be undermined by the LSBC's decision to approve a law school that forces LGBTQ people to deny who they are for three years to receive a legal education.

104 Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance. In other circumstances, a more serious limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.

105 In our view, the decision made by the LSBC "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola High School*, at para. 39). Therefore, the decision amounted to a proportionate balancing and was reasonable.

V. Disposition

106 The resolution of the LSBC to declare that TWU's proposed law school not be approved is restored. As a result, the appeal from the Court of Appeal for British Columbia is allowed, with costs.

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

107 Can a law society deny students from a religious-based law school the right to practise law, on the basis that the school discriminates against same-sex LGBTQ couples by requiring students to sign the Community Covenant Agreement ("Covenant") prohibiting sexual intimacy except between married heterosexual couples? That is the issue in this appeal.

108 I agree with the majority, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ., that the decision of the Law Society of British Columbia ("LSBC") to deny accreditation to Trinity Western University's ("TWU") proposed law school represents a proportionate balancing of freedom of religion, on the one hand, and the avoidance of discrimination, on the other. I would therefore allow the appeal. I differ from the majority, however, on certain aspects of the analysis.

1. Standard of Review

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109 The LSBC was exercising power delegated by the Province under the *Legal Profession Act*, S.B.C. 1998, c. 9. As such, it is a state actor, and its decisions, if challenged, are subject to judicial review.

110 I agree with the majority that the jurisdiction and decision-making process of the LSBC are reviewable on a standard of reasonableness. Where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This reflects the legislature's intent that the LSBC decide, on its behalf, who should be admitted to the practice of law. The LSBC has made graduation from an accredited law school one of the conditions of admission to the practice of law. That choice was within its delegated power.

2. Judicial Review of Charter-Infringing Administrative Decisions

111 I agree with the majority that discretionary administrative decisions that engage the *Canadian Charter of Rights and Freedoms* are reviewed on the framework set out in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.), and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.). However, the framework's contours continue to elicit comment from scholars and judges. [1] In what follows, I suggest how to address some of the gaps and omissions in the framework set out in those decisions.

112 This framework has two discrete steps, in my view. The reviewing court must: (1) determine if the decision limits a *Charter* right; and (2) determine whether the limitation of the right is proportionate in light of the state's objective, and hence is justified as a reasonable measure in a free and democratic society under s. 1 of the *Charter*.

113 Judicial review of the justifiability of a rights-infringing administrative decision will often put the emphasis on the later stages of the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). In *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6, [2006] 1 S.C.R. 256 (S.C.C.), LeBel J. stated that not all its steps must be followed when reviewing an individualized decision. Rather, "[t]he issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed" (para. 155). In the same vein, the majority of this Court wrote in *Loyola High School*: "A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (para. 40). In short, if *Oakes* continues to inspire the framework, *Doré* and *Loyola High School* tell us that there may be a greater emphasis on later steps of the analysis in the administrative context.

114 I agree with the majority that on judicial review of a rights-infringing administrative decision, the analysis usually comes down to proportionality, and particularly the final stage of weighing the benefit achieved by the infringing decision against its negative impact on the right (para. 58). Proportionality requires that the state objective capable of overriding a right be rationally connected to the decision; in the administrative context, where the decision falls within the scope of an unchallenged law, usually this is the case. Minimal impairment — whether the administrative decision infringes a *Charter* right more than necessary or is broader than reasonably required — arises, but the question is not whether "the law" catches more conduct than it should, as under *Oakes*, but whether an alternative less- infringing decision was possible. Particularly where the decision is a choice between only two options (for example, to accredit or not), this step will also easily be met. This leaves the final stage of the proportionality inquiry — assessing the actual impact of the decision. It follows that in reviewing administrative decisions, the analysis almost invariably comes down to looking at the effects of the decision and asking whether the negative impact on the right imposed by the decision is proportionate to its objective.

115 However, I would add four comments. First, to adequately protect the right, the initial focus must be on whether the claimant's constitutional right has been infringed. *Charter* values may play a role in defining the scope of rights; it is the right itself, however, that receives protection under the *Charter*.

116 Second, the scope of the guarantee of the *Charter* right must be given a consistent interpretation regardless of the state actor, and it is the task of the courts on judicial review of a decision to ensure this. A decision based on an

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erroneous interpretation of a *Charter* right will be unreasonable. Canadians should not have to fear that their rights will be given different levels of protection depending on how the state has chosen to delegate and wield its power.

117 Third, since this is a matter of justification of a rights infringement under s. 1 of the *Charter*, the onus is on the state actor that made the rights-infringing decision (in this case the LSBC) to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society.

118 Finally, I would note that relying on the language of "deference" and "reasonableness" in this context may be unhelpful. Quite simply, where an administrative decision-maker renders a decision that has an unjustified and disproportionate impact on a *Charter* right, it will always be unreasonable.

119 To summarize, in judicial review of administrative decisions for compliance with the *Charter*, the focus is on proportionality. The first question is whether the decision infringes a *Charter* right. If so, the state actor that made the infringing decision bears the onus of showing that the infringement is justified under s. 1 of the *Charter*. In most cases, the ultimate question will be whether the decision under review in the particular case balances the negative effects on the right against the benefits derived from the decision in a proportionate way.

3. Does the Decision of the LSBC Limit Charter Rights?

120 I agree with the majority that the LSBC's decision not to approve TWU's proposed law school limits the freedom of religion of members of the Trinity Western community (paras. 60-75). TWU bore the onus of satisfying the two-part test of a sincere religious belief or practice that has a nexus with religion and that is more than trivially or insubstantially interfered with by the impugned state conduct (*Syndicat Northcrest c. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (S.C.C.), at para. 65; *Multani*, at para. 34; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 384 (S.C.C.), at para. 68). This test is met.

121 The question at the second stage of the test is whether the LSBC's decision was "capable" of interfering with religious belief or practice (*R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.), at p. 759). At the stage of defining the right, we are not concerned with cataloguing the severity of the detrimental impact on the religious right of the challenged decisions; that is for the s. 1 analysis. The task at this stage is to determine whether the claims fall within the scope of the right.

122 I agree with the majority that the LSBC decision limits, or infringes, the s. 2(*a*) *Charter* guarantee of freedom of religion. I would add this, however. The majority finds it unnecessary to consider the guarantees of freedom of expression and freedom of association. While it may not be necessary to conduct a separate analysis of these guarantees, the Court must, in my view, include them in the ambit of the guarantee of freedom of religion. TWU's insistence on its Community Covenant Agreement *expresses* its believers' religious commitment and their desire *to associate* with people who commit to practices that accord with their religious beliefs. In *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31, [2001] 1 S.C.R. 772 (S.C.C.) ("*TWU 2001*"), this Court held that a decision not to approve TWU's teacher training program limited expressive and associational freedoms which may receive separate protection in the *Charter* but are also part of freedom of religion (paras. 34 and 93). The same is true here.

123 TWU also advances a s. 15(1) *Charter* equality claim. The majority does not decide this question. On the record before us, I would reject this claim. Even if members of the TWU community could show that the LSBC's decision creates a distinction on the enumerated ground of religion, it does not arise from any prejudice or stereotype and effects no discrimination on religious grounds but, rather, ensures equal access to all prospective law students (*Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.), at para. 108). Ultimately, the substance of TWU's claim is better dealt with as an infringement of its members' freedom of religion.

124 At this point, one must define the claim to freedom of religion. TWU says the LSBC's denial of accreditation limits its right to freedom of religion: (1) by impinging on its beliefs and practices; (2) by limiting its expression of its

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religious beliefs and practices; and (3) by limiting its right to associate as required by its religious beliefs and practices. I will briefly describe each of these claims.

125 First, the alleged limit on belief and practice. TWU says that as a community of evangelical Christians, it adheres to "the belief in the importance of being in an institution with others who either share [its beliefs on the wrongness of sex outside heterosexual marriage] or are prepared to honour it in their conduct" (R.F., at para. 96, quoting *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296 (N.S. S.C.), at para. 235). TWU concedes that eliminating the mandatory Covenant, which is the basis of the LSBC decision, would not prevent any believing member of the community from adhering to his or her beliefs. But, it alleges that the LSBC's insistence that it withdraw the Covenant is an interference in its members' belief that they must be in an institution with others who share or respect their practices on sexual relations. For TWU, providing education in this environment is a practice required by that belief. It says this is "core to [its] 'religious beliefs and way of life ... and its community of evangelical Christians'" (R.F., at para. 96, quoting C.A. reasons, 2016 BCCA 423, 405 D.L.R. (4th) 16 (B.C. C.A.), at para. 103). Requiring TWU to withdraw the mandatory Covenant would not prevent the TWU community members from believing in and practising their sexual mores. But it would prevent them from carrying out a practice flowing from that belief about the environment in which TWU would offer a legal education.

126 The limits on expression of religious beliefs and practices and on associational values flow from this description of beliefs. The Covenant expresses to the community and the public TWU's beliefs on sexual practices. And it reflects its religious-based belief that education should be conducted in a community of people, joined together in association, who accept these beliefs and practices or are prepared to respect and conform to them.

4. The Negative Impact of the Denial of Accreditation on Freedom of Religion

127 Having established that the LSBC decision limits TWU's freedom of religion, we come to the question of whether the LSBC has shown its infringement of that right to be justified under s. 1 of the *Charter*. In this case, no one suggests that there was not an objective capable of overriding the *Charter* right to freedom of religion. Moreover, I agree with the majority that the decision was minimally impairing. The LSBC was faced with the choice of either accrediting the law school or denying that accreditation. The central question, therefore, is whether, at the final stage of the proportionality analysis, the negative impacts on the *Charter* right are proportionate to the positive benefits flowing from the impugned decision.

128 The majority concludes that the negative impact on the freedom of religion of members of the TWU community is "of minor significance", for two reasons: (1) the Covenant is "not absolutely required for the religious practice at issue" (para. 87); and (2) TWU students view the environment created by the Covenant as "preferred (rather than necessary) for their spiritual growth" (para. 88).

129 With respect, I cannot agree that the impact of the decision on the freedom of religion of members of the TWU community is "of minor significance". The decision places a burden on the TWU community's freedom of religion: (1) by interfering with a religious practice (a learning environment that conforms to its members' beliefs); (2) by restricting their right to express their beliefs through that practice; and (3) by restricting their ability to associate as required by their beliefs.

130 These are not minor matters. Canada has a tradition dating back at least four centuries of religious schools which are established to allow people to study at institutions that reflect their faith and their practices. To say, as the majority does at para. 87, that the infringement is of minor significance because it "only prevents prospective students from studying law in their *optimal* religious learning environment" (emphasis in original), is to deny this lengthy and passionately held tradition. The majority seems to characterize the religious practice at issue in this case narrowly as "studying in a religious environment" (para. 67). In my view, the religious right at issue in this case is broader than that. It is not about merely studying in a religious environment — it is about studying in a religious environment where all members of the community have agreed, through the Covenant, to live in a certain way.

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131 The first reason the majority says the impact on the religious right is of minor significance is that the mandatory Covenant is "not absolutely required for the religious practice at issue" (para. 87). The issue here is that the majority fails to acknowledge the significance that all members abiding by the same code of conduct has for a religious community. Moreover, the majority's argument amounts to saying that where, in the view of a reviewing judge, it seems practically possible to give up a religious practice but an adherent refuses to do so, it will only be a minor infringement. We cannot, on the one hand, acknowledge the deep sincerity of the belief in a religious practice and then, on the other, doubt that sincerity by calling the practice relatively insignificant.

132 The second reason the impact on the right is said to be of minor significance is that it is optional (majority's reasons, at para. 88). I accept that optional practices, which allow the individual to *stay true to his or her religious practices* by adopting a different course, may reduce the degree of impairment of the right. This was the case in *Hutterian Brethren*. But the argument put forward by the majority would require members of the TWU community to *give up* the expressive and associational aspects of the religious practice. The fact that some individuals may be prepared to give up the religious practice does not make it a minor infringement.

133 Finally, I cannot accept that the mandatory Covenant should be devalued because it compels non-believers to follow TWU's practices. There is a deep tradition in religious schools of welcoming non-adherents as students, provided they agree to abide by the norms of the community. This has been the case at least since the Jesuits opened their first institutions more than four centuries ago. Students who do not agree with the religious practices do not need to attend these schools. But if they want to attend, for whatever reason, and agree to the practices required of students, it is difficult to speak of compulsion.

134 In my view, the limits the LSBC's decision imposes on the freedom of religion of members of the TWU community cannot be characterized as minor. I acknowledge that it does not prevent members from believing in, and themselves following, the Covenant. But, it precludes members of the TWU community from engaging in the practice of providing legal education in an environment that conforms to their religious beliefs, deprives them of the ability to express those beliefs in institutional form, and prevents them from associating in the manner they believe their faith requires.

5. The Objectives of the LSBC

135 The majority states that the decision advances the LSBC's statutory objectives (1) by maintaining equal access and diversity in the legal profession (paras. 93-95) and (2) by preventing significant harm to LGBTQ people who might attend TWU's proposed law school (paras. 96-99).

136 I agree that the decision of the LSBC may advance these objectives. That said, questions arise as to how much more diversity will be obtained as a result of refusal to accredit a TWU law school (particularly given its comparatively high tuition fees), and how many, if any, LGBTQ students will be forced to go to TWU as a school of last resort.

137 In my view, the most compelling law society objective is the imperative of refusing to condone discrimination against LGBTQ people, pursuant to the LSBC's statutory obligation to protect the public interest.

138 Because TWU is a private institution, the *Charter* does not apply and the Covenant does not constitute legally actionable discrimination. However, TWU's insistence on the mandatory Covenant is a discriminatory practice. It imposes burdens on LGBTQ people on the sole basis of their sexual orientation. Married heterosexual law students can have sexual relations, while married LGBTQ students cannot. The Covenant singles out LGBTQ people as less worthy of respect and dignity than heterosexual people, and reinforces negative stereotypes against them. It puts them to a choice — attend TWU or enjoy equal treatment. Those LGBTQ students who insist on equal treatment will have less access to law school and hence the practice of law than heterosexual students — heterosexual students can choose from all law schools without discrimination, while one law school, the TWU law school, would only be available to LGBTQ students willing to endure discrimination.

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139 In determining who should be admitted to the practice of law and thus whether a particular law school should be accredited, the LSBC is required by statute to consider the public interest. Section 3 of British Columbia's *Legal Profession Act* states that "[i]t is the object and duty of the society to uphold and protect the public interest" and subsection (a) states that it must do so by "preserving and protecting the rights and freedoms of all persons". The LSBC is also bound to consider the *Charter* and provincial human rights laws (*TWU 2001*, at para. 27) and to promote diversity within the legal profession.

140 The LSBC is under a duty to protect the public interest and preserve and protect the rights and freedoms of everyone, including LGBTQ people. As the collective face of a profession bound to respect the law and the values that underpin it, it is entitled to refuse to condone practices that treat certain groups as less worthy than others.

141 TWU seeks to counter this valid justification by arguing that it is beyond the statutory mandate of the LSBC to consider the effect the Covenant would have on the LGBTQ community. It argues that the public interest mandate of law societies is limited to ensuring that law students meet standards of learning and competence, and does not extend to the policies of a private institution. This ignores the broad public interest mandate the legislature has conferred on the LSBC, for reasons explored by the majority.

142 I add that a broad public interest mandate finds support in this Court's decision in *TWU 2001*. Although the Court found in favour of TWU in that case, it did not hesitate to acknowledge that the British Columbia College of Teachers did not err "in considering equality concerns pursuant to its public interest jurisdiction" (para. 26).

6. Are the Negative Impacts on the Right Proportionate to the Statutory Objective of the LSBC?

143 This brings me to the ultimate question: Was the decision of the LSBC to deny accreditation to the proposed TWU law faculty unreasonable because it fails to reflect a proportionate balancing of the respective interests?

144 The LSBC bears the onus of showing that the negative impacts on the *Charter* rights of the TWU community are proportionate to the benefits secured by its decision. At the same time, the Court must approach this question with deference to the LSBC's interpretation of its broad duty to protect the public interest and in light of the legislature's choice to confer on it the mandate to decide who should be admitted to the practice of law.

145 The negative impacts of the LSBC's denial of accreditation on the religious, expressive and associational rights of the TWU community are not of minor significance. If the community wishes to operate a law school, it must relinquish the mandatory Covenant it says is core to its religious beliefs, with the attendant ramifications on religious practices.

146 On the other hand, there is great force in the LSBC's contention that it cannot condone a practice that discriminates by imposing burdens on LGBTQ people on the basis of sexual orientation, with negative consequences for the LGBTQ community, diversity and the enhancement of equality in the profession. It was faced with an either-or decision on which compromise was impossible — either allow the mandatory Covenant in TWU's proposal to stand, and thereby condone unequal treatment of LGBTQ people, or deny accreditation and limit TWU's religious practices. In the end, after much struggle, the LSBC concluded that the imperative of refusing to condone discrimination and unequal treatment on the basis of sexual orientation outweighed TWU's claims to freedom of religion.

147 In a case like *Multani*, the claimant was vindicated because the school board could not show that it would be unable to ensure its mandate of public safety. In *Loyola High School*, we found that the limitation at issue did nothing to advance the ministerial objectives of instilling understanding and respect for other religions. This case is very different. The LSBC cannot abide by its duty to combat discrimination and accredit TWU at the same time.

148 The question we must answer is whether the decision of the LSBC was proportionate, and therefore reasonable. Despite the forceful claims made by TWU, I cannot conclude that the decision of the LSBC was unreasonable.

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149 In arriving at this conclusion, I am mindful of the fact that this Court has held that a decision to deny accreditation to TWU's school of education was unreasonable: *TWU 2001*. That case, however, is distinguishable from the one before us. There, the College of Teachers based its claim on the concern that teachers trained at TWU would bring discrimination into the classroom. The LSBC here has not impugned the competence of potential graduates from TWU. Instead, it is concerned with upholding its own mandate by seeking to avoid condoning or even appearing to condone discrimination.

150 On judicial review, each decision must be assessed for reasonableness (and where a *Charter* right is at issue — proportionality) on its own merits. This is a different case than *TWU 2001*, involving different state regulators weighing different arguments and considerations. The LSBC operates under a unique statutory mandate — a mandate that imposes a heightened duty to maintain equality and avoid condoning discrimination.

7. Conclusion

151 I would allow the appeal.

***Rowe J.*:**

I. Introduction

152 This appeal concerns the decision of the Law Society of British Columbia ("LSBC") to withdraw its approval of the proposed law program at Trinity Western University ("TWU"). Along with Brayden Volkenant — a prospective student of the proposed law school — TWU sought judicial review of this decision before the British Columbia courts. The applicants argued, *inter alia*, that the decision was based on considerations outside the mandate of the LSBC and that the LSBC had failed to consider a number of relevant rights under the *Canadian Charter of Rights and Freedoms*. The British Columbia Supreme Court and the Court of Appeal agreed with TWU and held that the decision of the LSBC was unreasonable.

153 This appeal is not about whether TWU can establish a law school with a mandatory covenant like the Community Covenant Agreement at issue in this case. Rather, the question is whether the LSBC infringed the *Charter* by withdrawing its accreditation of the proposed law school at TWU because of the effect of the Covenant on prospective law students. For the reasons that follow, I conclude that it did not.

154 First, I adopt the statement of facts set out by my colleagues in the majority, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ., as well as their account of the decisions below: Majority Reasons ("M.R."), at paras. 4-26.

155 Second, I agree with the majority and with the Chief Justice that it was within the statutory mandate of the LSBC to consider the effect of the Covenant on prospective law students as part of its accreditation decision. The LSBC has a broad mandate to regulate the legal profession in the public interest: M.R., at para. 31. As this Court has affirmed on numerous occasions, deference is called for when courts review the decisions of law societies as they self regulate in the public interest: *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at pp. 187-88; *Pearlman v. Law Society (Manitoba)*, [1991] 2 S.C.R. 869 (S.C.C.), at p. 887; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360 (S.C.C.) , at paras. 24-25. The LSBC was justified in considering the impact of the Covenant on prospective applicants to the proposed law school and, more generally, in considering the role of law schools as the first point of entry to the legal profession.

156 Third, I respectfully differ from the majority in its approach to assessing whether *Charter* rights have been infringed by the decision of the LSBC. In my view, this appeal raises issues that call for clarification of the framework set out in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.), and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.). I agree with the majority that this analysis has two steps, but, like the Chief Justice and Côté and Brown JJ., I would offer precisions to this approach.

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157 Fourth, I disagree with the analysis of my colleagues relative to s. 2(*a*) of the *Charter*. Rather than accepting the infringement as alleged at face value and proceeding to the balancing analysis, a review of the jurisprudence leads me to the conclusion that s. 2(*a*) is not infringed in this case. I also conclude that no other *Charter* infringements have been made out on the record in this appeal.

158 Finally, given the absence of a *Charter* infringement, the decision of the LSBC must be reviewed under the usual principles of judicial review rather than the framework set out in *Doré* and *Loyola High School*. In this case, the standard of review is reasonableness, as the decision under review falls within the category of cases where deference is presumptively owed to decision-makers who interpret and apply their home statutes: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 54; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 34; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (S.C.C.), at para. 46.

159 The decision of the LSBC will call for deference if it meets the criteria set out in *Dunsmuir*. In my view, the decision of the LSBC was reasonable. Accordingly, I would allow the appeal and affirm the decision of the LSBC.

II. The Jurisdiction of the Law Societies

160 I agree with the majority and the Chief Justice that the LSBC acted within its jurisdiction when it considered the discriminatory effect of the Covenant on prospective law students at TWU. With the privilege of self-government granted to the LSBC comes a corresponding duty to self-regulate in the public interest: *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.), at para. 36. In carrying out this duty, the LSBC was entitled to interpret its public interest mandate as including consideration of practices that are discriminatory in nature. For this reason, it was open to the LSBC to take the view that the "public interest in the administration of justice" (*Legal Profession Act*, S.B.C. 1998, c. 9 ("*LPA*"), s. 3) included consideration of the effect of the Covenant on prospective law students at TWU. The fact that the Covenant is a statement of religious rules and principles does not insulate it from such scrutiny.

161 Given that the LSBC acted within its jurisdiction in considering the effect of the Covenant, the next step is to ascertain whether its decision infringes any of the *Charter* rights raised by the applicants. Before proceeding to the *Charter* analysis, I would note that TWU has raised several concerns relating to the proper approach to adjudicating *Charter* claims in the administrative context. What follows in the next section is my response to these concerns.

III. The Proper Approach to Charter Rights

162 This Court employs a structured analysis for adjudicating *Charter* claims: see *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). This analysis has two steps. The first is to determine whether the government has infringed any rights guaranteed by the *Charter*. The claimant bears the burden of demonstrating such infringement. Once the court is persuaded that a right has been infringed, the second step is to determine whether the government can justify this infringement under s. 1 of the *Charter*. This requires the government to show that the infringement is a reasonable limit that is both prescribed by law and demonstrably justified in a free and democratic society.

163 This appeal raises issues that call for clarification of the application of this approach to the review of administrative decisions. Since *Doré*, this Court has applied the principles of judicial review to determine whether "the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives": *Doré*, at para. 58. When the decision-maker strikes a proportionate balance, the decision under review is deemed reasonable. The implication is that proportionate balancing justifies the *Charter* infringement arising from the impugned administrative decision.

164 In this appeal and in its appeal from the decision of the Law Society of Upper Canada, *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 (S.C.C.), TWU raised concerns about the application of this framework to the review of the law societies' decisions. TWU questioned, *inter alia*, the applicability of reasonableness review to the adjudication of *Charter* claims. This raises concerns about whether *Doré* provides a similarly rigorous protection of

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Charter rights as does *Oakes*: A.F., file No. 37209, at para. 40. TWU argued that there should be a single framework for examining compliance with the *Charter*, regardless of whether the source of the alleged infringement is a statute, regulation, or discretionary decision: R.F., file No. 37318, at para. 51. To this end, it proposed that the *Doré* framework reflect the more structured .*Oakes* analysis, which defines with clarity who bears the burden of justification and what that burden entails: A.F., file No. 37209, at paras. 53- 55.

165 I agree with TWU thus far: the *Doré* framework leaves many questions unanswered. As the Chief Justice notes, "the framework's contours continue to elicit comment from scholars and judges": Chief Justice's Reasons ("C.J.R."), at para. 111 (footnote omitted.) In what follows, I propose three clarifications to the framework.

A. The Problem With Charter Values

166 My first concern relates to the use of *Charter* values in the adjudication of *Charter* claims in the administrative context. In this, I share the view of the Chief Justice (C.J.R., at para. 115) and Justices Côté and Brown (Dissenting Reasons, at para. 307). When courts review administrative decisions for compliance with the *Charter*, *Charter* rights must be the focus of the inquiry — not *Charter* values. While *Doré* was intended to clarify the relationship between the *Charter* and administrative action, its reliance on values rather than rights has muddled the adjudication of *Charter* claims in the administrative context.

167 The concept of *Charter* values first appears in cases where the *Charter* had no direct application. In *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.), this Court held that, by virtue of s. 32 of the *Charter*, the *Charter* did not apply to litigation between private parties. As a limit on "the Parliament and government of Canada" and "the legislature and government of each province", its application was limited to the legislative and executive branches of government, as well as administrative agencies. Nonetheless, the Court held in *Dolphin Delivery* that courts must "apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution" (p. 603). This Court has since had regard to *Charter* values in the development of common law principles in a number of cases: *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.); *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.); *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.); *Simpson v. Mair*, 2008 SCC 40, [2008] 2 S.C.R. 420 (S.C.C.); *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.) .

168 This approach makes good sense in cases where the *Charter* has no direct application. Rather than subject common law rules to a s. 1 analysis, the concept of *Charter* values allows the courts to move the common law toward coherence with the *Charter*: M. Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014), 67 *S.C.L.R.* (2d) 361, at p. 365. Where the *Charter* applies by virtue of s. 32, however, there is no need to have recourse to *Charter* values.

169 *Charter* values — as opposed to *Charter* rights — have no independent function in the administrative context. As some commentators have noted, "it is not clear how consideration of Charter values fits within the constitutional requirements to respect Charter rights": E. Fox-Decent and A. Pless, "The Charter and Administrative Law Part II: Substantive Review", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 507, at p. 515.

170 That said, *Charter* values have played a supporting role in the adjudication of *Charter* claims. In *Loyola High School*, for instance, the majority employed *Charter* values as a guide to *Charter* adjudication. As Justice Abella wrote, "*Charter* values — those values that underpin each right and give it meaning — help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives": para. 36, citing *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.), at para. 88; L. Sossin and M. Friedman, "Charter Values and Administrative Justice" (2014), 67 *S.C.L.R.* (2d) 391, at pp. 403-4. This passage suggests that *Charter* values can assist in the adjudication of claims that are based on *Charter* rights.

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171 Confusion arises, however, when *Charter* values are used as a standalone basis for the adjudication of *Charter* claims. This is because the scope of *Charter* values is often undefined in the jurisprudence. In some cases, a *Charter* value aligns with a particular *Charter* right. In other cases, the value does not line up with earlier *Charter* jurisprudence. This lack of clarity heightens the potential for unpredictable reasoning. As Lauwers and Miller JJ.A. recently noted in their concurring reasons in *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52 (Ont. C.A.), at para. 79:

> *Charter* values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a measure of indeterminacy into judicial reasoning because of the irremediably subjective — and value laden — nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional and common law principles. The problem of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter* rights.
>
> (See also *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893, 397 C.R.R. (2d) 231 (Ont. C.A.), at paras. 103-4.)

172 This lack of clarity is an impediment to applying a structured and consistent approach to adjudicating *Charter* claims. At the outset, it is more difficult to ascertain whether a *Charter* value has been infringed: see A. Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014), 67 *S.C.L.R.* (2d) 561, at p. 571. This difficulty extends throughout the analysis. This is because the existence and severity of the infringement is informed by the scope of the value at issue. Without a proper understanding of the scope, it is "difficult if not impossible to apply" the proportionality analysis required by *Doré* and *Loyola High School*: C. D. Bredt and E. Krajewska, "*Doré*: All That Glitters Is Not Gold" (2014), 67 *S.C.L.R.* (2d) 339, at p. 353.

173 In this appeal, the majority employs the term *Charter* "protections" — meaning "both rights and values" — to refer to the constitutional guarantees of the *Charter*: M.R., at para. 58, citing *Loyola High School*, at para. 39. With respect, this language does little to clarify the role of *Charter* values in the adjudication of *Charter* claims. By equating "rights and values" under the umbrella term of "*Charter* protections", the majority undermines the view that rights and values are distinct in scope and function.

174 Where an infringement of *Charter* rights is alleged, there is no reason to depart from an approach based on those *Charter* rights. A claimant bringing a *Charter* challenge is entitled to a determination of whether his or her *Charter* rights have been infringed. If the claimant succeeds, the government then must have the opportunity to argue that this limit on *Charter* rights is justified under s. 1. This follows from the structure of the *Charter* itself.

175 The point is this. In cases where *Charter* rights are plainly at stake, courts and other decision-makers have a constitutional obligation to address the rights claims as such and to do so explicitly. An analysis based on *Charter* values should not eclipse or supplant the analysis of whether *Charter* rights have been infringed. Where *Charter* rights have been infringed by administrative actors, reviewing courts must determine whether the state meets the burden of justifying the infringement according to s. 1. This is not a matter of doctrinal preference. It is a constitutional obligation imposed by the *Charter*.

B. The Scope of Charter Rights

176 My next concern relates to the interpretation of *Charter* rights. As the majority reasons show, the *Doré*/*Loyola* framework follows a two-step analysis for adjudicating *Charter* claims. Under this approach, the initial burden is on the claimant to demonstrate that the impugned decision infringes his or her *Charter* rights. This requires that the reviewing court possess a proper understanding of the scope of the rights at issue in order to determine whether the *Charter* has been infringed. Accordingly, the proper delineation of the scope of *Charter* rights, based on the purposive approach set out in our jurisprudence, remains an essential step in all *Charter* adjudication, including under the *Doré*/*Loyola* framework.

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177 This delineation precedes any decision as to whether there has been a limitation of the guaranteed right or freedom: e.g. *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 967; *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405 (S.C.C.), at paras. 42-48; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386 (S.C.C.), at para. 61. In many cases, this step may be implied or conclusory, especially where the infringement of the right or freedom is evident. In others, an explicit delineation of the right or freedom determines the outcome of the *Charter* claim. In all cases, it remains a logically necessary — if from time to time unspoken — step in the analysis. In plain terms, there is no need for justification if there is no infringement, and there can be no infringement if the claim falls outside the scope of the right at issue.

(1) Purposive Delineation

178 Like most constitutional documents, the *Charter* is phrased in open- textured terms that allow for adaptation to changing circumstances. Its interpretation calls for a broad and purposive approach: *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.) [hereinafter Hunter], at p. 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.); *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 509; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), at para. 53; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.); *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912 (S.C.C.), at para. 20.

179 This approach requires courts to favour generous interpretations of the *Charter* and to avoid narrow or technical ones that could "subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*": *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), at para. 23. It also recognizes that the rights and freedoms guaranteed by the *Charter* "must ... be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers": *Hunter*, at p. 155. As part of this approach, the Court has cautioned against undue attention to the historical meaning of rights and freedoms as understood when the *Charter* was enacted. This allows the *Charter* to keep pace with societal change and ensures that its protections are not "frozen in time": *B.C. Motor Vehicle*, at p. 509; see also *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 (S.C.C.), at paras. 61-62; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 (S.C.C.).

180 The foundational case in defining this approach is *Big M*, in which Justice Dickson (as he then was) held that the language of the *Charter* must be read with a view to its purpose:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.
>
> [Emphasis added; p. 344.]

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181 Several points can be drawn from this passage. The first is that the purposive approach, like other approaches to constitutional language, creates a framework for elucidating meaning from general wording. Purpose defines the boundaries of this framework and is used to draw the line between valid and invalid interpretation.

182 The second point is that courts need to be mindful of extending the meaning of constitutional text beyond "the limits of reason" so as not to "overshoot the actual purpose of the right or freedom in question": *Hunter*, at p. 156; *Big M*, at p. 344; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460 (S.C.C.), at para. 24; *Divito v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157 (S.C.C.), at paras. 19-20. Such unreasonable extensions are not hard to envisage. Liberty as guaranteed by s. 7 of the *Charter*, for instance, could be read as barring all restrictions on the free choice of individuals. As one author explains, "[s]uch interpretations may be senseless, in that every law would presumptively violate the Charter and require a section 1 justification, but they are not precluded by the words [of the Charter] as such and are more 'broad' and 'generous' than the interpretations given to these terms by the courts": B. Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms" (2015), 65:3 *U.T.L.J.* 239, at p. 253 (emphasis deleted).

183 This explains the central role of purpose in our interpretive approach. As this Court noted in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (S.C.C.), at para. 17, "[w]hile the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose" (citing P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at pp. 36-30 and 36-31).

184 The aim of *Charter* interpretation, then, is to define the scope of protected rights and freedoms by reference to their purpose. This requires courts to ascertain the purpose of the *Charter* right or freedom so as to protect activity that comes within that purpose and exclude activity that does not: Hogg, *Constitutional Law of Canada*, at pp. 36-30 and 36-31. As discussed, this does not mean that the historical intention of those who drafted the *Charter* is determinative: *B.C. Motor Vehicle*, at p. 509. Rather, the focus is on the interests the *Charter* is meant to protect: *Big M*, at p. 344. In ascertaining the purpose of a right or freedom, the courts consider a number of indicators, including the text of the *Charter*; the context and overall purpose of the *Charter*; the historical and philosophical roots of the right or freedom, which provide insight into the interests that the *Charter* was intended to protect; the common law and pre-*Charter* jurisprudence dealing with similar rights; and, of course, the *Charter* jurisprudence as it has developed: see e.g. *Hunter*, at pp. 154-60; *Oakes*, at pp. 119-34; *Big M*; *Andrews*; *R. v. Therens*, [1985] 1 S.C.R. 613 (S.C.C.); *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.); *Irwin Toy*; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.).

185 This approach is meant to operate within and give effect to the structure of the *Charter*. Guided by a purposive reading, courts must delineate *Charter* rights based on considerations that are intrinsic to the rights themselves. If a claimant demonstrates an infringement, s. 1 then allows the court to consider extrinsic factors to determine whether the infringement is justified. These extrinsic factors do not affect the scope of the right. These steps — the delineation and infringement analysis, followed by the justification analysis — are conceptually distinct. On occasion, however, this Court has departed from this distinction.

(2) Delineation Through Justification

186 This Court has from time to time favoured an approach to *Charter* rights that avoids delineation and relies instead on s. 1 to ensure that rights are exercised within proper bounds. The rationale put forward for this approach is that, in contrast to an internal delineation followed by a distinct justification, jumping ahead to an analysis under s. 1 allows the Court to consider the full range of relevant factors, including the context in which the right operates in the circumstances of the case.

187 A number of cases have followed this approach. One example is the decision of Justice La Forest in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.), who noted that "[t]his Court has consistently

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refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*" (para. 109).

188 There are implications to adopting such an approach, some of which appear advantageous. The most obvious is that it allows claimants to discharge their burden of proof of infringement with relative ease, moving the analysis readily to s. 1. This shifts the burden of justification onto the government, which, intuitively, seems fair given its position of power relative to individual claimants. This approach also resolves ambiguity in favour of a broad scope for rights and freedoms. As Justice La Forest explained in *B. (R.)*, "[n]ot only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights" (para. 110). Subsequent expressions of this approach have relied primarily on the argument that s. 1, in contrast to "internal limits", allows for a more fulsome consideration of competing rights and interests: *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6, [2006] 1 S.C.R. 256 (S.C.C.), at paras. 24-31.

189 Whatever the advantages of giving this type of reading to rights and freedoms, an interpretive approach that blurs the distinction between infringement and justification ignores the architecture of the *Charter*. As discussed, the adjudication of *Charter* claims needs to follow a structured two-step process. A preference for reconciling competing rights and interests under s. 1 does not obviate the need for an initial determination of whether a *Charter* right has been infringed in the first place. This step — which requires defining the scope of the particular right — is anterior to and conceptually distinct from the consideration of extrinsic factors that may or may not justify limiting the exercise of that right in the circumstances of the case. These extrinsic factors come into play during the analysis of s. 1. They are, however, not relevant to the delineation of the right itself.

190 An approach that skims over the proper delineation of rights and freedoms runs the risk of distorting the relationship between s. 1 and the protections guaranteed by the *Charter*. As Chief Justice Dickson stated in *Oakes*, at p. 135:

> It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms which are part of the supreme law of Canada.
>
> [Emphasis added.]

191 The two functions of s. 1 operate in tandem. Because of the seriousness of finding an infringement of a *Charter* right — which, in essence, declares the breach of a constitutional guarantee — the delineation of these rights must be carried out with care corresponding to the gravity of the matter. If infringements are too readily found on the basis of activities that fall outside of the protective scope of the rights, then courts may well too readily find that the government has met the justificatory burden set out in *Oakes*. As Professor Hogg suggests, "[t]here is a close relationship between the standard of justification required under s. 1 and the scope of the guaranteed rights. If the courts give to the guaranteed rights a broad interpretation that extends beyond their purpose, it is inevitable that the court[s] will relax the standard of justification under s. 1 in order to uphold legislation limiting the extended right": *Constitutional Law of Canada*, at p. 38-6 (footnote omitted); see also P. W. Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990), 28 *Osgoode Hall L.J.* 817.

192 This can lead to situations whereby certain rights are routinely said to be infringed only for the claimant to be told that the infringement is justified by any number of countervailing considerations. As Professor Newman puts it, "[t]he situation becomes one in which the *prima facie* violation of rights by the state becomes a routine condition precisely because no distinctions are drawn between legitimate and illegitimate claims": D. Newman, "Canadian Proportionality Analysis: 5 $^{1}/_{2}$ Myths" (2016), 73 *S.C.L.R.* (2d) 93, at p. 99. This has a number of worrisome implications. It erodes the seriousness of finding *Charter* violations. It increases the role of policy considerations in the adjudication of *Charter*

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claims by shifting the bulk of the analysis to s. 1. And it distorts the proper relationship between the branches of government by unduly expanding the policy making role of the judiciary.

193 Taken to its logical end, this approach pushes the entire adjudication of *Charter* claims towards balancing, whereby rights and justifications are considered in a type of blended analysis. The result is an unstructured, somewhat conclusory exercise that ignores the framing of the *Charter* and departs fundamentally from the foundational *Charter* jurisprudence of this Court.

194 The adjudication of *Charter* claims involves questions of constitutional law. The fact that *Charter* rights are implicated in the work of administrative decision-makers on a day-to-day basis does not change this fact. On judicial review, as in other proceedings, *Charter* claims demand analytical rigour. This starts with the correct delineation of the scope of the rights and freedoms at issue. Such delineation provides to the reviewing court the framework within which the *Charter* claim is to be adjudicated. It determines, *inter alia*, the relevance of evidence adduced by the claimant and the standard against which the government conduct is to be evaluated. The aim is not to produce an unduly restrictive reading of the right or freedom at issue. Rather, it is to ensure that the rest of the analysis does not go off the rails because the right has been given an erroneous definition.

C. The Burden of Proof in Charter Litigation

195 My final concern relates to the burden of proof in *Charter* adjudication and what that burden entails. Under the usual rules of judicial review, it falls to the applicant to demonstrate that the impugned decision should be overturned. By contrast, under the approach set out in *Oakes*, it is government that bears the burden of justification once the claimant has demonstrated an infringement of his or her *Charter* rights. The *Doré*/*Loyola* framework lies at the intersection of administrative and constitutional law but it has remained conspicuously silent on where the burden of proof lies.

196 It is difficult to conclude that *Doré* changed the burden of proof for the adjudication of *Charter* claims in the administrative context in the absence of an explicit discussion to that effect. Thus, once the claimant has demonstrated that an administrative decision infringes his or her *Charter* rights, it remains incumbent on the state actor to demonstrate that the infringement is justified. In other words, if the claimant can demonstrate that an administrative decision infringes his or her *Charter* rights, the decision is presumptively unreasonable and the state must explain why this infringement is a reasonable limit. The reviewing court must ensure that the state actor has discharged this burden before upholding the impugned decision.

197 The majority states that "*Charter* rights are no less robustly protected under an administrative law framework": M.R., at para. 57. As discussed, however, the usual rules of administrative law require *the applicant* to demonstrate that an impugned decision should be overturned. It is unclear whether this burden persists under an administrative law framework once *Charter* rights are at stake. The majority is silent on this issue. One could infer from this that an impugned decision should be treated as presumptively reasonable *unless* the claimant demonstrates that the decision is not the result of proportionate balancing. This would provide for less robust protection of *Charter* rights. For the administrative law framework to provide for the *same* protection of *Charter* rights as the *Oakes* framework, the justificatory burden must remain on the government once an infringement of rights is demonstrated.

198 Such an approach follows from first principles. The administrative state is a statutory creation. As legislation must comply with the *Charter*, it follows that decisions taken pursuant to legislation must also comply with the *Charter*: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.); *Attis v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (S.C.C.) [hereinafter Ross]; *Eldridge*; *Multani*; *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.), at para. 117.

199 The *Constitution Act, 1982* gives normative primacy to the rights and freedoms guaranteed by the *Charter*. By virtue of s. 1, any limit on these guarantees is presumptively unconstitutional. This means that rights infringements can stand *only* if the limit complies with the requirements of s. 1 (or, in some cases, if the government invokes the override

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provision in s. 33 of the *Charter*). These are the *only* options: the government either justifies the infringement, exempts the infringement from constitutional scrutiny, or the infringement is remedied by the court.

200 Where the government opts for justification, it faces successive hurdles. Under the *Oakes* framework, to establish that an infringement is reasonable and demonstrably justified in a free and democratic society, the state must, first, identify an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, the state must show that the infringement passes a "proportionality test": *Oakes*, at p. 139. This entails showing that the measure is rationally connected to the identified objective, that the infringement is minimally impairing and that a balance is struck between the infringing effects of the measure and the importance of the objective. The *Oakes* framework expresses constitutional principles of fundamental importance — namely, that the rights and freedoms guaranteed by the *Charter* establish a minimum degree of protection that state actors must respect, and that any violation of these guarantees will be subject to close and serious scrutiny.

201 There is no question that these principles continue to guide our assessment of state action in the administrative context. Rather, the debate has centred on how to operationalise these principles. In this appeal, the majority explains that once an infringement has been shown, the question becomes "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play": M.R., at para. 58, citing *Doré*, at para. 57, and *Loyola High School*, at para. 39. I do not see this framework as fundamentally deviating from the principles set out in *Oakes*. Indeed, this Court sought in *Doré* to achieve "conceptual harmony between a reasonableness review and the *Oakes* framework" (para. 57). The key to achieving this harmony is not the substitution of the principles of *Charter* review for those of administrative law. Rather, as *Loyola High School* makes clear, the solution is to infuse judicial review with the considerations that make up the *Oakes* analysis.

202 All the elements in the *Oakes* test have a role to play in the judicial review of administrative decisions under *Doré*. In *Doré*, this Court said that a decision will be found reasonable if "the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives" that the decision-maker was bound to carry out (para. 58). This requires an identification of the statutory objective at issue, which corresponds to the first step under *Oakes*. Once a claimant has made out that a decision has infringed a *Charter* right on judicial review, the state must identify a "sufficiently important objective" that could make infringing the *Charter* right reasonable: *Oakes*, at p. 141. The proportionality analysis will then be carried out in relation to *that* objective. This objective must be sufficiently pressing and substantial to justify the infringement of *Charter* rights: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 (S.C.C.), at para. 20; *Hutterian Brethren*, at para. 42.

203 The state must then show that the decision reflects a "proportionate balancing of the *Charter* protections at play": *Doré*, at para. 57. This corresponds to the "proportionality test" under the second step of *Oakes*, which includes the analysis of rational connection, minimal impairment, and the balance between beneficial and deleterious effects.

204 First, if the state cannot demonstrate that the decision-maker has rendered a decision that is rationally connected to the identified statutory objective, then the decision, of necessity, cannot be reasonable. In other words, if the decision is not *rationally connected* to the statutory objective, then the decision-maker will have acted outside its mandate. Second, as the majority has stated, the decision will be *minimally impairing* if it affects the right "as little as reasonably possible" in furthering the statutory objectives identified by the state: M.R., at para. 80, citing *Loyola*, at para. 40. Finally, the state must show that the decision strikes "a reasonable balance between the benefits to its statutory objectives and the severity of the limitation on *Charter* rights at stake": M.R., at para. 91. If the state can meet this proportionality test, the decision will be reasonable despite having infringed a *Charter* right.

205 I recognize, as does the Chief Justice, that the main hurdle for the state will be the "final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola High School*, at para. 40; C.J.R., at para. 113). However, that is not to say that the identification of statutory objectives or the rational connection step cease to be relevant. The fact that most statutes reviewed under

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the *Oakes* test have failed at the minimal impairment or proportionality stages does not mean that courts have stopped looking to rational connection. Nor does it mean that consideration of the pressing and substantial objective has ceased to be relevant. Similarly, in the administrative context, the fact that most administrative decisions will be rationally connected to an identified statutory objective does not mean that the inquiry need not be carried out. It means only that this component of the analysis will often readily be met.

206 I add this. While the decision in *Doré* was motivated by a desire to streamline the review of administrative decisions for compliance with the *Charter*, its stated preference for a "robust conception of administrative law" should not have the (unquestionably unintended) effect of diluting the protection afforded to *Charter* rights (para. 34). Nor should it risk shifting the justificatory burden onto claimants once they have demonstrated an infringement of their rights. The justificatory burden must therefore remain where the *Charter* places it; on the government, whenever a claimant demonstrates that his or her *Charter* rights have been infringed. For the administrative state, this is no more than what s. 1 of the *Charter* requires.

207 As a final point, I do not dispute that *Doré* and *Loyola High School* are binding precedents: M.R., at para. 59. The suggestion that the *Doré*/*Loyola* framework requires clarification is in no way inconsistent with this. Whether in response to judicial, academic, or other criticism, this Court has on numerous occasions built on its jurisprudence to provide for greater clarity and consistency in the law: see e.g. *Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.), at para. 29; *Dunsmuir*, at para. 24; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 (S.C.C.), at para. 39. Indeed, *Doré* itself was an attempt at clarifying confusion in the jurisprudence (para. 23). These developments reflect how the common law works, through the application and, where warranted, the clarification of jurisprudence. On these matters, I can do no better than to quote Lord Denning from his book *The Discipline of Law* (1979), at p. 314:

> Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I am against is its too rigid application — a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it.

208 Having set out what I view as the proper approach to the adjudication of *Charter* rights in the administrative context, I turn now to the main *Charter* right at issue in this appeal: freedom of religion as guaranteed by s. 2(*a*).

IV. Section 2(a) of the Charter

209 The "freedom of conscience and religion" guaranteed by s. 2(*a*) is an essential part of life in Canadian society. From the most faithful believer to the most convinced atheist, it protects our right to believe in whatever we choose and to manifest those beliefs without fear of hindrance or reprisal. This freedom shields our most personal beliefs — among those that speak to the core of who we are and how we choose to live our lives — from interference by the state. Given the diversity of beliefs in our society and the manner in which those beliefs are manifested, the breadth of this freedom has the potential to create friction. Resolving this friction in a manner that reflects the purpose of s. 2(*a*) is, on occasion, a necessary exercise.

210 The friction in this case arises between the religious freedom claimed by TWU and the mandate of the LSBC to regulate the legal profession in the public interest. This requires an analysis of s. 2(*a*) and its role in our jurisprudence. In what follows, I canvass the jurisprudence relative to s. 2(*a*) and I delineate the scope of its protection based on the purposive approach described above. I then have regard to the infringement alleged by the claimants. My conclusion is that the alleged infringement does not fall within the scope of freedom of religion.

A. The Scope of Section 2(a) of the Charter

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211 The scope of freedom of religion was first set out by Justice Dickson in *Big M*:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> [Emphasis added; pp. 336-37.]

212 We can draw two conclusions with respect to the nature of religious freedom under s. 2(*a*) from this foundational jurisprudence. The first is that religious freedom is based on the exercise of free will. This is because religion, at its core, involves a profoundly personal commitment to a set of beliefs and to various practices seen as following from those beliefs: *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.) [hereinafter Edwards Books], at p. 759; *Syndicat Northcrest c. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (S.C.C.), at para. 39. The focus of religious freedom, then, is personal choice: *Amselem*, at para. 43. Whether this choice aligns with an official religion is not relevant. For the purposes of s. 2(*a*), what matters is that this choice is made freely.

213 The second conclusion is a corollary of the first: religious freedom is also defined by the absence of constraint. From this perspective, religious freedom aims to protect individuals from interference with their religious beliefs and practices. Its character is noncoercive; its antithesis is coerced conformity. This understanding of religious freedom is rooted in the philosophical tradition that conceives of freedom in terms of the absence of interference with individual choice: see e.g. I. Berlin, *Four Essays on Liberty* (1969), at pp. 15-22. In the jurisprudence, this freedom applies to believers and nonbelievers alike as the *Charter* provides both freedom of religion and freedom from it: *Big M*, at p. 347; *Saguenay*, at para. 70.

214 This emphasis on the free choice of the believer is reflected in the jurisprudence. In *Amselem*, for instance, the issue was whether Orthodox Jews could build succahs on the balconies of their condominium apartments for the duration of the Jewish holiday of Succot. Those who managed the apartment buildings opposed this on the basis that it violated bylaws of the condominium. While this case was decided under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 — which applies to the conduct of private individuals — the Court was explicit in stating that its decision was equally applicable under the Canadian *Charter* (para. 37). Writing for the majority, Justice Iacobucci explained that, at the first stage of the religious freedom analysis, an individual claimant need only demonstrate a sincere adherence to a belief or practice having a nexus with religion (para. 46). The focus of this approach was on the choice of the believer, regardless of whether the belief or practice was recognized by an official religion. Thus, it did not matter whether Orthodox Judaism objectively required the claimants to build individual succahs on their balconies. All that mattered was the claimants' sincere belief in their religious obligation to do so and their choice to act on that belief.

215 The majority decision in *Multani* provides a further example. In that case, the issue was whether Gurbaj Singh Multani, a thirteen year old Sikh boy, could bring his kirpan to school notwithstanding the refusal of the school board to grant him an exemption from its prohibition against bringing weapons to school. As the school board had effectively forced him to choose between "leaving his kirpan at home and leaving the public school system", Multani was only

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required to show that his "personal and subjective belief in the religious significance of the kirpan" was sincere in order to demonstrate that the decision infringed his rights under s. 2(*a*) (paras. 37- 41). The fact that other Sikhs might have compromised on their beliefs when faced with the prohibition was not relevant (para. 39). The only relevant factor was the personal choice by Multani to adhere to his beliefs.

216 As a final example, the decision in *Hutterian Brethren* is illustrative. In that case, the Hutterites of Wilson Colony sought an exemption from an Alberta law that required all drivers' licences to display a photograph of the licensee. The members of the Colony sincerely believed that permitting their photo to be taken violated the Second Commandment. Given this belief, the law forced individual Colony members to choose between their freely held religious beliefs and obtaining drivers' licences. Although a majority of this Court ultimately upheld the provincial law, the entire Bench accepted that it infringed s. 2(*a*).

217 This focus on the individual choice of believers does not detract from the communal aspect of religion. For many religions, community is critical to manifesting faith. Whether through communal worship, religious education, or good works, the community is often the public face of religion. In other words, it is how the religion engages with the world. To borrow from Justice Sachs then of the South African Constitutional Court:

> Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytise through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture. [Footnotes omitted.]
>
> (*Christian Education South Africa v. Minister of Education*, [2000] ZACC 11, 2000 (4) SA 757 (South Africa Constitutional Ct.), at para. 33)

218 This communal aspect of religion is recognized in our jurisprudence. As Justice LeBel stated in *Hutterian Brethren*, "[r]eligion is about religious beliefs, but also about religious relationships" (para. 182). This dimension of religious freedom was central to the decision of this Court in *Loyola High School*, where the majority held that "[r]eligious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions" (para. 60). In this respect, I agree with the majority that "[t]he ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(*a*)": M.R., at para. 64.

219 While acknowledging this communal aspect, I underscore that religious freedom is premised on the personal volition of individual believers. Although religious communities may adopt their own rules and membership requirements, the foundation of the community remains the voluntary choice of individual believers to join together on the basis of their common faith. Therefore, in the context of this appeal, I would decline to find that TWU, as an institution, possesses rights under s. 2(*a*). I note that, even if TWU did possess such rights, these would not extend beyond those held by the individual members of the faith community. For the remainder of the analysis, I will employ the term "claimants" to refer to the individual claimants in this appeal: Mr. Volkenant and other members of the evangelical Christian community at TWU. This excludes TWU as an institution.

220 To summarize, our jurisprudence defines the protection of s. 2(*a*) as extending to the freedom of individuals to believe in whatever they choose and to manifest those beliefs. While s. 2(*a*) recognizes the communal aspects of religion, its protection remains predicated on the exercise of free will by individuals — namely, the choice of each believer to adhere to the tenets of his or her faith.

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B. The Alleged Infringement of Section 2(a)

221 The claimants in this appeal argue that the decision of the LSBC infringes s. 2(*a*) because it interferes with their ability to attend an accredited law school at TWU with its mandatory Covenant. For the claimants, the Covenant is integral to their religious identity; it provides the basis for living and learning within an academic community based on the tenets of evangelical Christianity. The LSBC, however, found that the Covenant's mandatory proscription of certain forms of sexual intimacy conflicted with its mandate to regulate the legal profession in the public interest. The issue is whether the LSBC infringed s. 2(*a*) by refusing to accredit the proposed law school at TWU on this basis.

222 To establish an infringement of freedom of religion, the claimants must demonstrate that (1) they sincerely believe in a practice or belief that has a nexus with religion, and that (2) the impugned state conduct interferes, in a manner that is nontrivial or not insubstantial, with their ability to act in accordance with that practice or belief: *Amselem*, at para. 62; *Multani*, at para. 34; *Ktunaxa Nation*, at para. 68.

(1) Sincerity

223 The first step of the infringement analysis requires the claimant to demonstrate that "he or she sincerely believes in a practice or belief that has a nexus with religion": *Multani*, at para. 34; *Amselem*, at para. 56; *Ktunaxa Nation*, at para. 68. As this Court specified in *Multani*, "[t]he fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. What an individual must do is show that *he or she* sincerely believes that a certain belief or practice is required by his or her religion" (para. 35 (emphasis added)). This religious belief or practice must be asserted in good faith and must not be fictitious, capricious, or an artifice: *Amselem*, at para. 52; *Multani*, at para. 35.

224 The assessment of sincerity requires a precise understanding of the belief or practice at issue. In this appeal, the belief at issue is grounded in TWU's religious roots. Founded in 1962 by the Evangelical Free Church, TWU has always sought to provide its students with an education grounded in the values and philosophy of evangelical Christianity. Since 1969, the *Trinity Western University Act* has authorized TWU "to provide for young people of any race, colour, or creed university education in the arts and sciences *with an underlying philosophy and viewpoint that is Christian*": *Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2).

225 Part of the religious philosophy espoused by TWU includes a strong opposition to all forms of sexual intimacy outside of heterosexual marriage. This belief is reflected in the Covenant, which embodies the evangelical Christian values to which TWU is committed. Regardless of their personal beliefs, all TWU students must read and abide by the terms of the Covenant in order to attend the university.

226 At this point, it is useful to set out which beliefs and practices are clearly *not* at issue. The decision of the LSBC does not interfere with the claimants' freedom to believe that sexual intimacy outside heterosexual marriage "violates the sacredness of marriage between a man and a woman": TWU Covenant, A.R., vol. IV, at p. 403. The claimants remain free to hold this belief.

227 Similarly, the LSBC does not interfere with the claimants' ability to act in accordance with their beliefs about sexual intimacy. Unlike the claimants in *Multani* and *Hutterian Brethren*, for instance, Mr. Volkenant and other members of the evangelical Christian community at TWU remain free to act according to their religious beliefs in that they can personally abide by the Covenant's proscription against sexual intimacy that "violates the sacredness of marriage between a man and a woman".

228 What, then, is the religious belief or practice at issue? In my view, it relates to the religious proscription of sexual intimacy outside heterosexual marriage and the importance of imposing this proscription on all students attending the proposed law school at TWU. As the majority has stated, by creating an academic environment where their faith is not constantly tested, the mandatory Covenant "makes it easier" for the claimants to act according to their beliefs: M.R., at

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para. 72. It ensures that all students are obliged to obey "the authority of Scripture": M.R., at para. 71. This, in turn, "helps create an environment in which TWU students can grow spiritually": M.R., at para. 71.

229 By virtue of being denied the opportunity of attending an accredited law school with a mandatory covenant, the claimants allege that the LSBC has infringed (1) their belief in the importance of attending an accredited law school with a mandatory covenant and, (2) more importantly, their capacity to act in accordance with that belief by attending the proposed law school at TWU: R.F., at para. 96.

230 This stage of the analysis therefore turns on the sincerity of the claimants' belief in the importance of attending the proposed law school with its mandatory Covenant. The majority concludes that it "is clear from the record that evangelical members of TWU community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development": M.R., at para. 70.

231 With respect, I question whether this conclusion misses the mark. Does it suffice for the purposes of s. 2(*a*) that the claimants sincerely believe that studying in a community defined by religious beliefs *contributes* to their spiritual development (M.R., at para. 70)? Or must the claimants rather show that they sincerely believe that doing so is a practice required by their religion (*Multani*, at para. 35)? The claimants have argued the former on the basis that the jurisprudence only requires that they have a belief that "calls for a particular line of conduct", irrespective of whether that practice is "mandatory or perceived-as-mandatory": R.F., at para. 94, quoting *Amselem*, at paras. 47 and 56.

232 A careful reading of the jurisprudence does not support the claimants' position in this appeal. As this Court set out in *Amselem*, the question of whether a belief or practice is objectively required by official religious dogma is irrelevant (para. 47). It suffices that the claimant demonstrate a sincere belief, "having a nexus with religion, which *calls for a particular line of conduct*", irrespective of whether that "practice or belief is required by official religious dogma or is in conformity with the position of religious officials": *Amselem*, at para. 56 (emphasis added). All that matters, then, is that the claimant sincerely believes that their religion compels them to act, regardless of whether that line of conduct is "objectively or subjectively obligatory": *Amselem*, at para. 56. This is reflected in *Multani*, which states that all "an individual must do is show that he or she sincerely believes that a certain belief or practice is *required* by his or her religion" (para. 35 (emphasis added)).

233 If this reading is correct, then much of the affidavit evidence relied on by my colleagues undermines the view that the claimants have advanced a sincere belief or practice that is required by their religion. The majority states that "the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue": M.R., at para. 87. It explains that "the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community's religious beliefs as preferred (rather than necessary) for their spiritual growth": M.R., at para. 88. This evidence should have been considered as part of the infringement analysis because it runs counter to the claimants showing that they sincerely believe that their religious beliefs require a certain practice, per *Multani*, at para. 35.

234 With respect, I do not see how the majority can have it both ways. The logic of their position seems to come down to this: the claimants have a preference for a practice that is not required, but is nonetheless protected by s. 2(*a*); however, as the practice is not required, but only preferred, its infringement is of little consequence. In my view, this analysis reflects an overbroad delineation of the right, leading to the infringement being justified too readily.

235 Despite this concern, I proceed on the assumption that the claimants sincerely believe in the importance of studying in an environment where all students abide by the Covenant. For the purposes of my analysis, I will assume that the first stage of the analysis is satisfied.

(2) Interference

236 The second stage requires an objective analysis of the interference caused by the impugned state action. This interference must be more than trivial or insubstantial: *R. v. Jones*, [1986] 2 S.C.R. 284 (S.C.C.), at p. 314; *Edwards Books*,

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at p. 759; *Saguenay*, at para. 85; *Ktunaxa Nation*, at para. 70. In this case, the claimants must show that the decision of the LSBC is capable of interfering with their belief in the importance of attending law school with a mandatory covenant or with their capacity to act in accordance with that belief by attending the proposed law school at TWU.

237 In essence, the claimants have argued that the LSBC has interfered with their ability to study law in an academic environment where all students are required to abide by a set religious code of conduct. For the claimants, the rules set out in the Covenant — and, in particular, the proscription against sexual intimacy outside heterosexual marriage — must be applied to all students who attend law school at TWU. Their argument is that the refusal of the LSBC to accredit the proposed law school on this basis infringes their rights under s. 2(*a*). Thus, the claimants seek the protection of s. 2(*a*) not only for their own beliefs and the right to abide by them. They seek the protection of s. 2(*a*) for their effort to ensure that all students attending TWU abide by these beliefs — regardless of whether they personally share them.

238 The majority implicitly accepts this when it writes that "[t]he Covenant is a commitment to enforcing a religiously-based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community. The effect of the mandatory Covenant is to restrict the conduct of others": M.R., at para. 99 (citation omitted; emphasis deleted).

239 This is where the proper delineation of the scope of s. 2(*a*) comes into play. As discussed, the freedom of religion protected by s. 2(*a*) is premised on two principles: the exercise of free will and the absence of constraint. Where the protection of s. 2(*a*) is sought for a belief or practice that constrains the conduct of nonbelievers — in other words, those who have freely chosen *not* to believe — the claim falls outside the scope of the freedom. In other words, interference with such a belief or practice is not an infringement of s. 2(*a*) because the coercion of nonbelievers is not protected by the *Charter*.

240 On the record before us, the student body at TWU is not coextensive with the religious community of evangelical Christians who attend TWU. Although TWU teaches from a Christian perspective, its statutory mandate requires that its admissions policy not be restricted to Christian students. To the contrary, TWU admits students from all faiths and permits them to hold diverse opinions on moral, ethical, and religious issues. TWU itself states that it is open to "all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University's Christian identity": TWU Covenant, A.R., vol. IV, at p. 539.

241 This speaks to the argument that TWU is not for everyone. To the contrary, TWU, by virtue of its enabling statute, *literally* is for everyone. Its aim is to "provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian": *Trinity Western University Act*, s. 3(2). Accordingly, TWU must open the doors of its proposed law school to members of other religions as well as to nonbelievers.

242 The claimants seek to square this circle by requiring adherence to the Covenant by all who attend the proposed law school. Their attempt to do so is not protected by the *Charter*. This is because — by means of the mandatory Covenant — the claimants seek to require others outside their religious community to conform to their religious practices. I can find no decision by this Court to the effect that s. 2(*a*) protects such a right to impose adherence to religious practices on those who do not voluntarily adhere thereto.

243 Almost every decision of this Court finding an infringement of s. 2(*a*) involves some interference with the *personal* capacity of rights claimants to adhere to their beliefs or practices. In these cases, claimants were either personally compelled to comply with a rule or decision that conflicted with their beliefs, or they were forced to compromise in their personal capacity to act upon them: *Big M*; *Edwards Books*; *Ross*; *Amselem*; *Multani*; *Hutterian Brethren*; *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, [2013] 1 S.C.R. 467 (S.C.C.); *Saguenay*.

244 There are three possible exceptions to this, none of which undermine the principles set out above. The first is *B. (R.)*. In that case, a majority found that the decision of parents to prohibit doctors from giving their infant daughter

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a blood transfusion was protected by s. 2(*a*) because the decision was motivated by their religious beliefs as Jehovah's Witnesses. Writing for the majority, Justice La Forest held that the right of parents to choose the medical treatment of their children in accordance with their religion was a "fundamental aspect of freedom of religion" (para. 105). He consequently found that the statutory procedure that had allowed the doctors to override the parents' wishes infringed s. 2(*a*), only to find that this limit could be justified under s. 1. Writing for themselves and two others, Justices Iacobucci and Major found that the statute did not infringe s. 2(*a*) on the basis that "a parent's freedom of religion does not include the imposition upon the child of religious practices which threaten the safety, health or life of the child" (para. 225).

245 The majority in *B. (R.)* relies on both parental rights and freedom of religion to find an infringement of s. 2(*a*). Unlike the claimants in this appeal, the claimants in *B. (R.)* had an independent legal basis on which they could seek to impose their beliefs on their child — namely, their rights as parents. It goes without saying that the claimants in this appeal have no such rights over those upon whom they seek to impose their beliefs.

246 The second possible exception is *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31, [2001] 1 S.C.R. 772 (S.C.C.) ("*TWU 2001*"). In that case, the British Columbia College of Teachers ("the BCCT") refused to allow TWU to take full responsibility for its teacher education program, which had, until then, been run jointly with Simon Fraser University. In withholding its approval, the BCCT was concerned with the downstream impact of the TWU Community Standards — that is, with the possibility that teachers trained at TWU would perpetuate discriminatory beliefs in the classroom.

247 For the majority, Justices Iacobucci and Bastarache found that the issue at the heart of the appeal was "how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system": *TWU 2001*, at para. 28. Although they found that "[t]here is no denying that the decision of the BCCT places a burden on members of a particular religious group" (para. 32), they did not expressly find an infringement of ss. 2(*a*) or 15(1) nor did they conduct an analysis under s. 1. Rather, they found that "any potential conflict should be resolved through the proper delineation of the rights and values involved" given that "[n]either freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute" (para. 29). In resolving this conflict, the majority focused on the concern of the BCCT that the beliefs stated in the Community Standards pertaining to homosexuality would be transmitted to the public school system. Absent specific evidence of discrimination by TWU graduates, however, this concern was deemed insufficient to justify the decision of the BCCT (para. 38).

248 The alleged interference with religious freedom in *TWU 2001* did not relate to the capacity of rights claimants to adhere to their beliefs. Rather, it concerned the capacity of TWU to transmit its religious values by requiring its education students to adhere to the Community Standards. The Court, however, made no finding as to whether the BCCT had infringed s. 2(*a*) by considering the mandatory nature of the Community Standards; rather, the appeal was resolved based on an absence of evidence regarding possible downstream effects. Thus, I do not share the view that *TWU 2001* stands for the proposition that any adverse consideration of the Community Standards (or the Covenant) by a public decision- maker amounts to an infringement of s. 2(*a*).

249 The third possible exception is *Loyola High School*. In that case, Loyola High School applied to the Quebec Minister of Education for an exemption from teaching a compulsory "Ethics and Religious Culture" course on the basis that its own curriculum offered an equivalent course — albeit one taught from a Catholic perspective. The Minister denied the exemption on the basis that the equivalent course could only be taught from a neutral perspective. This Court found that the Minister's insistence that Loyola teach Catholicism and Catholic ethics from a neutral perspective amounted to a serious infringement of s. 2(*a*).

250 In *Loyola High School*, the infringement of s. 2(*a*) did not relate to personal capacity of rights claimants — the parents of students attending Loyola High School — to adhere to their own beliefs. It rather concerned their right to transmit these beliefs to their children through religious education. By contrast, the claimants in this appeal do not seek the accreditation of the LSBC to transmit their beliefs through religious education. Rather, they seek accreditation to

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provide a legal education while compelling the private conduct of adult law students, regardless of their personal beliefs. The religious education of children involves the transmission of religious beliefs; the legal education of adults does not.

251 In the end, I agree that "a right designed to shield individuals from religious coercion cannot be used as a sword to coerce [conformity to] religious practice": Canadian Secular Alliance, I.F., at para. 11. This follows if we accept that the freedom of religion guaranteed by the *Charter* is "a function of personal autonomy and choice": *Amselem*, at paras. 42. It is based on the idea "that no one can be forced to adhere to or refrain from a particular set of religious beliefs": *Loyola High School*, at para. 59. For this reason, it protects against interference with profoundly personal beliefs and with the voluntary choice to abide by the practices those beliefs require. It does not protect measures by which an individual or a faith community seeks to impose adherence to their religious beliefs or practices on others who do not share their underlying faith. I therefore conclude that what the claimants seek in this appeal falls outside the scope of freedom of religion as guaranteed by the *Charter*.

V. Other Charter Claims

252 In addition to their 2(*a*) claim, the claimants have alleged infringements to their expressive and associate freedom rights under ss. 2(*b*) and 2(*d*) and their equality rights under s. 15 of the *Charter*. They have not discharged their burden with respect to these claims. In this case, the claimants have provided little to go on regarding these subsidiary arguments, nor were these claims argued extensively before the courts below or before this Court. Accordingly, I would say only that their appeal based on these claims cannot succeed on the record before us.

VI. Application

253 Given the absence of any *Charter* infringement, the decision of the LSBC must be reviewed under the usual principles of judicial review. In this case, the standard of review is reasonableness, as the decision under review falls within the category of cases where deference is presumptively owed to decision-makers who interpret and apply their home statutes: *Dunsmuir*, at para. 54; *Alberta Teachers*, at para. 34; *Saguenay*, at para. 46.

254 Reviewed under the standard of reasonableness, the decision of the LSBC will command deference if it meets the criteria set out in *Dunsmuir* — namely, if the process by which it was reached provides for "justification, transparency and intelligibility" and if the outcome it provides falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at para. 47.

255 As indicated by the majority (at para. 34), the LSBC is "the governing body of a self-regulating profession". This means that, with respect to questions of procedure, the LSBC had discretion in determining how to carry out its duty to regulate the legal profession in the public interest. Along with the majority, I agree that the *LPA* does not preclude the Benchers from holding a referendum or choosing to be bound by the results of such a referendum. Rather, it only specifies the circumstances in which the members of the LSBC can bind the Benchers. In this case, the Benchers themselves agreed to be bound by the results of the referendum. Consequently, given the deference owed the LSBC in the interpretation of its home statute, I find that the procedure employed by the Benchers is not fatal to the reasonableness of their decision.

256 I note in passing, however, that had I found a *Charter* infringement, I do not see how it would be possible for the LSBC to proceed by way of a majority vote while upholding its responsibilities under the *Charter*. Is not one of the purposes of the *Charter* to protect against the tyranny of the majority? I fail to see how the LSBC could achieve a "proportionate balancing of the *Charter* protections at play" (M.R., at para. 58) simply by saying that a majority of its members were in favour of denying accreditation.

257 Turning next to the substance of the decision, the issue becomes whether the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". As explained by the majority (at para. 53), reasonableness does not always require the decision-maker to give formal reasons. The deference owed in applying the standard of reasonableness rather requires "respectful attention to the reasons offered or which could be offered in support of a decision": *Dunsmuir*, at para. 48, citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and

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Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286. Particularly in cases where no reasons are given, a reviewing court may thus look to the record to assess the reasonableness of the decision under review.

258 In this appeal, the range of possible outcomes was informed by the mandate of the LSBC to regulate the legal profession in the public interest and by the binary choice available to the Benchers. They could either adopt the resolution denying accreditation or not. Given the deference owed to the LSBC, it was open to the LSBC to conclude that it should not accredit the proposed law school at TWU given the Covenant's imposition of discriminatory barriers to admission. It was also reasonable for the LSBC to conclude that its mandate included promoting equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students (M.R., at para. 40). It was in this context that the LSBC declined to accredit the proposed law school. For these reasons, I conclude that the decision of the LSBC was reasonable.

VII. Conclusion

259 I agree with the majority in the result, in that I would allow the appeal and restore the decision of the LSBC denying its accreditation of the proposed law school at TWU.

***Côté and Brown JJ.*:**

I. Introduction

260 One way of understanding this appeal and the appeal in *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 (S.C.C.) — and reliance was frequently placed upon this metaphor during submissions from both sides at the hearing — is that they call upon this Court to decide who controls the door to "the public square". In other words, accepting that the liberal state must foster pluralism by striving to accommodate difference in the public life of civil society, where does that state obligation — that is, where does that public life — begin? With a private denominational university? Or with a judicially reviewable statutory delegate charged by the provincial legislature to regulate the profession and entry thereto in the public interest?

261 In our view, fundamental constitutional principles and the statutory jurisdiction of the Law Society of British Columbia ("LSBC"), properly interpreted, lead unavoidably to the legal conclusion that the public regulator controls the door to the public square and owes that obligation. The private denominational university, which is not subject to the *Canadian Charter of Rights and Freedoms* and is exempt from provincial human rights legislation, does not. And, in conditioning access to the public square as it has, the regulator has — on this Court's own jurisprudence — profoundly interfered with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices. While, therefore, the LSBC has purported to act in the cause of ensuring equal access to the profession, it has effectively denied that access to a segment of Canadian society, solely on religious grounds. In our respectful view, this unfortunate state of affairs merits judicial intervention, not affirmation.

262 We recognize, as has this Court, that "[Trinity Western University] is not for everybody; it is designed to address the needs of people who share a number of religious convictions" (*Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31, [2001] 1 S.C.R. 772 (S.C.C.) ("*TWU 2001*"), at para. 25). Prospective LGBTQ students could only sign the Covenant "at a considerable personal cost" (*TWU 2001*, at para. 25). Further, as the Ontario Divisional Court noted at para. 104, the restrictions contained in the Covenant are such that "those persons ... who might prefer, for their own purposes, to live in a common law relationship rather than engage in the institution of marriage ... and ... those persons who have other religious beliefs" would also not be tempted to apply for admission (*Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1 (S.C.C.)).

263 At the same time, qualities that go to a person's self-identity are also at stake for the members of the Trinity Western University ("TWU") community (*R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.) [hereinafter Edwards Books], at p. 759; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at pp. 341 and 346; *Hutterian Brethren of Wilson Colony*

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v. Alberta, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.), at para. 32). Religious freedom cases concern much more than mere belief, as Sachs J. recognized in *Christian Education South Africa v. Minister of Education*, [2000] ZACC 11, 2000 (4) SA 757 (South Africa Constitutional Ct.), at para. 33: "Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture." In particular, religion is also about religious relationships (*Hutterian Brethren*, at para. 182, per LeBel J., dissenting in the result but agreeing with the majority on this point).

264 These are challenging claims of right for courts to adjudicate, because the stakes for parties are sometimes not fully appreciable by those who do not share their experiences. But this does not mean that we should not try. Indeed, all who occupy judicial office and who assume its responsibilities, as well as lawyers who are called upon to represent members of a diverse public in a pluralistic society, must strive to see claims from the perspectives of all sides, and to "seek to understand groups with which they are unfamiliar" (D. Newman, "Ties that Bind: Religious Freedom and Communities" (2016), 75 *S.C.L.R.* (2d) 3, at p. 16). In a similar vein, McLachlin C.J., speaking extra-judicially, has described the "conscious objectivity" which judges must practise in fulfilling their duty of impartiality, by "recogniz[ing] the legitimacy of diverse experiences and viewpoints", and "systematically attempt[ing] to imagine how each of the contenders sees the situation" ("Judging: the Challenges of Diversity", Judicial Studies Committee Inaugural Annual Lecture (2012) (online), at pp. 10 and 12). For his part, Professor Benjamin L. Berger doubts the possibility of adopting a truly empathetic posture to the unfamiliar, but nonetheless finds "adjudicative virtue" in "stay[ing] the culturally forceful hand of the law" and "expand[ing] the margins of legal tolerance" by "furrow[ing one's] brow in non- comprehension of the religious culture [while turning] an unconcerned shoulder, satisfied that the practice or commitment at stake simply does not offend the culture of Canadian constitutionalism" (*Law's Religion: Religious Difference and the Claims of Constitutionalism* (2015), at p. 181).

265 At the end of the day, however, a court of law, particularly when dealing with claims of constitutionally guaranteed rights including freedom of religion, must have regard to the legal principles that guide the relationship between citizen and state, between private and public. And those principles exist to *protect* rights-holders from values which a state actor deems to be "shared", not to give licence to courts to defer to or impose those values. For the same reason, a court of law ought not in our respectful view to be concerned, as the majority (Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.) is explicitly concerned, with the "public perception" of what freedom of religion entails (Majority Reasons, at para. 101). The role of courts in these cases is "not to produce social consensus, but to protect the democratic commitment to live together in peace" (M. A. Waldron et al., "Developments in law and secularism in Canada", in A. J. L. Menuge, ed., *Religious Liberty and the Law: Theistic and Non-Theistic Perspectives* (2018), 106, at p. 111).

266 We note the invitation of several intervenors to reconsider the framework of analysis set out in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.) and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.). In the absence of full submissions on the point, we agree with the majority that this is not an appropriate case in which to reconsider these decisions. That said, we state below certain fundamental concerns we have about the *Doré*/*Loyola* framework which, in our view, betrays the promise of our Constitution that rights limitations must be demonstrably justified.

267 Irrespective, however, of which analytical framework is applied — the *Doré*/*Loyola* framework, or the more rigorous analytical framework described in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), that we suggest the Constitution may actually require — we would dismiss the appeal from the decision of the British Columbia Court of Appeal (2016 BCCA 423, 405 D.L.R. (4th) 16 (B.C. C.A.). Under the LSBC's governing statute, the only proper purpose of a law faculty approval decision is to ensure that individual graduates are fit to become members of the legal profession because they meet minimum standards of competence and ethical conduct. As the LSBC conceded that there are no concerns relating to the fitness of prospective TWU law graduates, the only defensible exercise of the LSBC's statutory discretion would have been to approve TWU's proposed law school.

268 Even if the LSBC's statutory "public interest" mandate were to be interpreted such that it had the authority to take considerations other than fitness into account, the decision not to approve TWU's proposed law faculty unjustifiably limited the TWU community's freedom of religion. The decision not to approve TWU's proposed law faculty because of

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the restrictions contained in the Covenant — a code of conduct protected by provincial human rights legislation — is a profound interference with religious freedom, and is contrary to the state's duty of religious neutrality.

269 Further, even were the "public interest" to be understood broadly, as the LSBC contends, accreditation of TWU's proposed law school would not be inconsistent with the public interest, so understood. Tolerance and accommodation of difference serve the public interest and foster pluralism. Acceptance by the LSBC of the unequal access effected by the Covenant would signify the accommodation of difference and of the TWU community's right to religious freedom, and not condonation of discrimination against LGBTQ persons. Approval of the proposed law school is, therefore, not inconsistent with "public interest" objectives of maintaining equal access and diversity in the legal profession, and indeed, it promotes those objectives. It follows that, in our view, approving TWU's proposed law school was the only decision reflecting a proportionate balancing between *Charter* rights and the LSBC's statutory objectives.

II. Analysis

F. The LSBC Exercised Its Discretion for an Improper Purpose and Relied on Irrelevant Considerations

270 At the outset, we emphasize that neither our interpretation of the LSBC's governing statute nor the majority's suggests that the LSBC's mandate is ambiguous, such that resort to "*Charter* values" is necessary to determine the limits of the LSBC's mandate (*Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 59). We do not dispute that foundational principles underlying the Constitution may aid in *its* interpretation (*Oakes*, at p. 136; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at paras. 64-66; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704 (S.C.C.), at para. 25; *R. v. Comeau*, 2018 SCC 15 (S.C.C.), at para. 52). But with respect, we fail to see what relevance "accepted principles of constitutional interpretation" (Majority Reasons, at para. 41) have to the interpretation of *the LSBC's statutory mandate*. Even accepting, for the sake of argument, that it is "beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority" (Majority Reasons, at para. 46), it is the LSBC's enabling statute, and not "shared values", which delimits the LSBC's sphere of authority.

271 And, as to that sphere of authority, the majority concludes that the LSBC acted pursuant to the broad statutory object of upholding and protecting the public interest in the administration of justice (para. 32). This object is said to grant the LSBC latitude to uphold a positive public perception of the legal profession (para. 40), to eliminate inequitable barriers to legal education (para. 42), and to consider harms to some communities (para. 44). The majority does not, however, properly account for the statutory limits to the LSBC's public interest mandate.

272 The importance of recognizing and respecting these limits cannot be overemphasized. This Court has warned against overstating the objective of any measure infringing the *Charter* (*RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 144). This is especially so when the statutory objective relied upon to justify a *Charter* infringement is a broad mandate to protect the "public interest", a notion that is inherently vague and difficult to characterize (see for example *R. c. Morales*, [1992] 3 S.C.R. 711 (S.C.C.), at pp. 731-32; *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.), at p. 762).

273 In our view, the majority's broad interpretation of the LSBC's public interest mandate eschews this prudent, rights-conscious methodology. It is completely untethered from the express limits to the LSBC's statutory authority found in the *Legal Profession Act*, S.B.C. 1998, c. 9 ("*LPA*"). The LSBC's mandate is limited to the governance of "the society, lawyers, law firms, articled students and applicants" (s. 11). It does not extend to the governance of law schools, which lie outside its statutory authority. It may only act with a view to upholding and protecting the "public interest" within the bounds of this mandate. These express limits to the LSBC's mandate cannot be disregarded in order to justify the infringement of *Charter* rights. A careful reading of the *LPA* leads us to conclude that the only proper purpose of an approval decision by the LSBC is to ensure that individual licensing applicants are fit for licensing. Given the absence of any concerns relating to the fitness of prospective TWU graduates, the only defensible exercise of the LSBC's statutory discretion for a proper purpose in this case would have been for it to approve TWU's proposed law school.

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(4) Limits to the Exercise of Discretion

274 It is a fundamental principle of administrative law that the exercise of discretion by statutory delegates must conform to the purposes authorized by their enabling statute (G. Cartier, "Administrative Discretion: Between Exercising Power and Conducting Dialogue", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 381, at p. 391; Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 894). "[A] power granted by legislation for one purpose cannot be used by a delegate for another purpose" (D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (6th ed. 2014), at p. 190). Nor may a statutory delegate exercise discretion on the basis of considerations that are, in light of the statute's purpose, improper or irrelevant (Van Harten et al., at p. 895; Cartier, at p. 391; Jones and de Villars, at p. 190).

275 This same principle lies at the heart of this Court's decision in *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.), where, despite the Quebec Liquor Commission's broad statutory discretion to cancel permits for the sale of alcoholic liquors, the Commission's decision to revoke Mr. Roncarelli's permit was "beyond the scope of [its] discretion" because the reasons therefor (Mr. Roncarelli's actions in support of Jehovah's Witnesses) were "totally irrelevant to the sale of liquor" (p. 141). The Court elaborated by way of a statement which continues to guide administrative decision making to this day:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute .... "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.
>
> [Emphasis added; p. 140.]

276 Traditionally, the exercise of discretion taken for an improper purpose or on the basis of irrelevant considerations formed specific grounds for judicial review as an "abuse of discretion" (Cartier, at p. 388). Notably, these grounds were applied by this Court in *R. v. Smith & Rhuland Ltd.*, [1953] 2 S.C.R. 95 (S.C.C.), and *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.). And, they persist under the modern "pragmatic and functional" approach to judicial review. Indeed, this Court, in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 53, reaffirmed that discretionary decisions must "be made within the bounds of the jurisdiction conferred by the statute", and

> in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

To be clear, these "general principles of administrative law governing the exercise of discretion" include the doctrines of improper purpose and irrelevant consideration, which continue to ensure that the bounds of a decision-maker's statutory powers are respected.

277 Cartier accurately summarizes the courts' task in assessing whether the exercise of discretion was taken for an improper purpose or on the basis of irrelevant considerations, respectively:

> In the first case, courts must identify the object authorized by the statute and then determine whether that object or purpose has been followed or not. Similarly, in the second case, the question whether a consideration is relevant or not is usually answered with reference to the object of the statute. [p. 391]

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(5) The Purpose of the LSBC's Approval Decision Is to Ensure That Individual Applicants Are Fit for Licensing

278 In deciding not to approve TWU, the LSBC purported to act under Rule 2-27(4.1) of the *Law Society Rules* (now Rule 2-54(3) of the *Law Society Rules 2015*) ("Rule"), which provides that, to satisfy the academic requirements for licensing, applicants must have a degree from an approved law faculty, a status which the LSBC may, in exercising its discretion, deny.

279 The Rule sets out no particular criteria for this discretionary decision. Its purpose, and the relevant considerations that may be taken into account in reaching such a decision, must therefore be found in the relevant objectives, duties and powers of the LSBC, as set out by the *LPA* (*Shell Canada Products Ltd.*, at pp. 275-79). Further, they must be consistent with a contextual and purposive reading of the Rule (see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21).

280 A plain reading of the Rule, in its entirety, leads to the obvious conclusion that its purpose is to ensure that individual applicants are fit for licensing. The Rule, which falls under the heading "Enrolment in the admission program", sets out the requirements for an applicant to become licensed, as follows:

> **2-27**
>
> . . . . .
>
> (3) An applicant may make an application under subrule (1) by delivering to the Executive Director the following:
>
> (a) a completed application for enrolment in a form approved by the Credentials Committee, including a written consent for the release of relevant information to the Society;
>
> (b) proof of academic qualification under subrule (4);
>
> (c) an articling agreement stating a proposed enrolment start date not less than 30 days from the date that the application is received by the Executive Director;
>
> (d) other documents or information that the Credentials Committee may reasonably require;
>
> (e) the application fee specified in Schedule 1.
>
> (4) Each of the following constitutes academic qualification under this Rule:
>
> (a) successful completion of the requirements for a bachelor of laws or the equivalent degree from an approved common law faculty of law in a Canadian university;
>
> (b) a Certificate of Qualification issued under the authority of the Federation of Law Societies of Canada;
>
> (c) approval by the Credentials Committee of the qualifications of a full-time lecturer at the faculty of law of a university in British Columbia.
>
> (4.1) For the purposes of this rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.
>
> . . . . .

It is readily apparent that the approval of law faculties is tied to the purpose of assessing the fitness of an individual applicant for licensing. And the LSBC had received a legal opinion to this effect. It concludes that "[t]he object of [setting out academic or other qualifications] is that the Benchers are satisfied that candidates are 'of good character and repute and ... fit to become a barrister and a solicitor of the Supreme Court' (s. 19(1))" (Legal Opinion re Academic

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Qualifications, May 8, 2013 reproduced in R.R., vol. III, pp. 87-116, at p. 90). Read in its entire context, the LSBC's authority to approve law schools acts only as a proxy for determining whether a law school's graduates, as individual applicants to the LSBC, meet the standards of competence and conduct required to become licensed.

281 This interpretation respects the express limits to the LSBC's rule-making powers. Section 11 of the *LPA* grants the LSBC rule-making powers "for the governing of the society, lawyers, law firms, articled students and applicants, and for the carrying out of [the *LPA*]". The powers are thus limited to the regulation of the legal profession and its constituent parts, extending no further than the licensing process — the doorway to the profession. Any exercise of the LSBC's discretion for a purpose extending beyond the express limits set out by s. 11 would be *ultra vires*.

282 More particularly, the Rule does not grant the LSBC authority to regulate law schools. Applying the maxim of statutory interpretation *expressio unius est exclusio alterius* ("to express one thing is to exclude another"), we can presume that the legislator did not intend to include the governing of law schools among the LSBC's rule-making powers at s. 11. The scope of its mandate is limited to governance of "the society, lawyers, law firms, articled students and applicants". Had the legislator intended to grant the LSBC supervisory powers over law schools, it would have explicitly provided for such a significant grant of authority.

283 This leads us to conclude that, in enacting the Rule under its power to make rules for the governing of applicants, the LSBC sought to regulate entrance into the legal profession by ensuring that individual applicants are fit for licensing.

284 This interpretation is consistent with the purpose of the *LPA* as a whole. A careful reading of the *LPA* reveals that the scope of the LSBC's mandate is limited to the governance of the practice of law. The *LPA*'s provisions only relate to matters relevant to the governance of the legal profession and its constituent parts (the LSBC, lawyers, law firms, articled students and applicants). Even its farthest-reaching provisions confirm its limited mandate. For example, Part 3 of the *LPA* (ss. 26 to 35), concerned with the protection of the public, is limited to allegations regarding the conduct or competence of a law firm, lawyer, former lawyer or articled student (s. 26). Similarly, s. 28, which, under the heading of "Education", empowers benchers to establish and maintain or otherwise support a system of legal education, grant scholarships, bursaries and loans, establish or maintain law libraries, and to provide for publication of court and other legal decisions, expressly confines these actions to those taken "to promote and improve the standard of practice *by lawyers*". The LSBC's object, duties and powers are, in short, limited to regulating the legal profession, starting at (but not before) the licensing process — that is, starting at the doorway to the profession.

285 Section 3 of the *LPA* states the LSBC's overarching object and duty, which includes upholding and protecting the public interest in the administration of justice by "preserving and protecting the rights and freedoms of all persons". It is on this basis that the majority concludes that the LSBC's decision to refuse to approve TWU's proposed law school because of its admissions policy was a valid exercise of its statutory authority. In doing so, it is our respectful view that it misconstrues the purpose underlying the LSBC's discretionary power to approve a law school under the Rule and extends the Rule's scope beyond the limits of the LSBC's mandate.

286 Section 3 of the *LPA* cannot be understood in isolation. It must be examined "in [its] entire context and ... harmoniously with the [*LPA*'s] scheme [and] object" *Rizzo & Rizzo Shoes*, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Section 3 does not grant the LSBC the authority to exercise its statutory powers for a purpose lying outside the scope of its mandate under the guise of "preserving and protecting the rights and freedoms of all persons". For example, the LSBC could not take measures to promote rights and freedoms by engaging in the regulation of the courts or bar associations, even though such measures might well impact "the public interest in the administration of justice". These matters fall outside of the scope of its statutory mandate, as does the governance of law schools.

287 It is the scope of the LSBC's statutory authority that defines how it may carry out its public interest mandate, not the other way around. Had the legislator intended otherwise, the rule-making powers at s. 11 would have presumably

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provided the LSBC with broad discretionary power to make rules "to uphold and protect the public interest in the administration of justice".

288 This is not to say that public interest considerations are irrelevant to the exercise of the LSBC's discretionary power. The LSBC's duty is to uphold and protect the public interest; however, this duty may only be exercised within the scope of its statutory mandate. The *LPA* does not empower the LSBC to police human rights standards in law schools. Provincial legislatures, including British Columbia's, have conferred that mandate upon provincial human rights tribunals. The LSBC does not enjoy a free-standing power under its "public interest" mandate to seek out conduct which it finds objectionable, howsoever much the "public interest" might thereby be served. Under the Rule, the LSBC can act in the public interest only for the purpose of ascertaining whether individual applicants are fit for licensing.

289 While ensuring the competence of licensing applicants clearly falls within the LSBC's mandate, this purpose does not rationally extend to guaranteeing equal access to law schools. The fact that the Rule sets out minimum requirements for licensing confirms that the LSBC is properly concerned with competence, not with merit. Setting admissions criteria to select the "best of the best" is up to law schools. To be clear, the selection of law students does not in any way fall within the LSBC's mandate, which is confined to the narrow task of ensuring that those who have graduated from law school and who apply for licensing meet minimum standards of competence and ethical conduct. Whether or not law schools have themselves selected the "best of the best" has no bearing on the LSBC's task of determining who is fit to practise law in British Columbia. Contrary to what the majority concludes at paras. 42 and 43 of their reasons, equal access to the legal profession and diversity in the legal profession are distinct from the duty to ensure competent practice. Indeed, the facts of this appeal are an example. Despite the unequal access effected by the requirement that applicants to TWU commit to a community covenant, the LSBC concedes its lack of concern regarding the competence or ethical conduct of TWU graduates. Relatedly, and while the majority notes (at para. 45) that "[t]he LSBC did not purport to make any other decision governing TWU's proposed law school or how it should operate", the majority's statement (at para. 39) that "[t]he LSBC was entitled to be concerned that inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar" would logically apply to other aspects of law school admissions which might be said to create inequitable barriers to legal education, such as tuition fees. By the majority's logic, then, the LSBC would be entitled (or indeed, required) to consider such barriers in accrediting law schools in order to promote the competence of the bar as a whole.

290 At their core, the majority's reasons err by assimilating legal education to the LSBC's mandate. They extend the reach — without any justification grounded in the terms of the *LPA* — of the LSBC's "authority as the gatekeeper *to the legal profession*" (para. 45 (emphasis added)) all the way back to the law school's threshold. The LSBC must, however, take licensing applicants as they come; its statutory mandate empowers it to control the doorway to the profession, not to decide who knocks on the door. No reference to the LSBC's history — again, unsupported by the actual terms of the *LPA* — can justify the majority's endorsement of such a distension of its mandate (see Majority Reasons, at para. 46). Any measures undertaken by the LSBC to promote diversity in the legal profession must fall within the bounds of its statutory mandate *as expressed at the time those actions are undertaken*. Though the majority denies it, by allowing the LSBC to refuse to accredit a law school solely on the basis of its admissions policies — and in the absence of any concerns relating to the fitness of that school's graduates — it allows the LSBC to do that which it is not statutorily empowered to do — govern law schools by regulating their admissions policies. It does, in effect, tell law schools "how [they] should operate" (Majority Reasons, at para. 45). But so long as a law school's admissions policies do not raise concerns over its graduates' fitness to practise law, the LSBC is simply not statutorily empowered to scrutinize them.

291 The majority's overextension of the LSBC's mandate is equally apparent in discussing the LSBC's duty to "preven[t] harm to LGBTQ law students" (para. 40). The majority correctly notes that any risk of harm falls on "LGBTQ people *who attend* TWU's proposed law school" (para. 96 (emphasis added); see also paras. 98 and 103); in other words, the harm occurs in the context of legal education rather than the legal profession. Again, it is conceded by the LSBC that it has no basis for doubting that the graduates of TWU's proposed law school will be competent lawyers that will practise in accordance with human rights codes prohibiting discrimination against LGBTQ persons. There is, therefore, no basis

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upon which to find that such harms will manifest in the legal profession. Any harms to marginalized communities in the context of legal education must be considered by provincial human rights tribunals, by legislatures, and by members of the executive, which grant such institutions the power to confer degrees. The LSBC is not a roving, free-floating agent of the state. It cannot take it upon itself to police such matters when they lie beyond its mandate.

292 Finally, as discussed in more detail below, the "imperative of refusing to condone discrimination against LGBTQ people" (McLachlin C.J.'s Reasons, at para. 137; see also Majority Reasons, at paras. 40 and 105), is not a valid basis for the LSBC's decision. This Court has already held that denying accreditation should be based on specific evidence rather than "general perceptions" (*TWU 2001*, at para. 38). As we explain below, the recognition of a private actor by the state cannot be construed as amounting to an endorsement of that actor's religious beliefs or practices.

293 The only proper purpose for the LSBC's approval decision is to ensure that individual applicants are fit for licensing. Given that the LSBC concedes that there are no concerns relating to the fitness of prospective TWU graduates, the only defensible exercise of the LSBC's statutory discretion for a proper purpose would have been to approve TWU.

G. The LSBC Benchers Fettered Their Discretion in a Manner Inconsistent With Their Statutory Duty

294 We disagree with the majority that the Benchers' decision to bind themselves to the results of a referendum on the approval of TWU's proposed law school did not violate their statutory duties (Majority Reasons, at para. 48). While the Benchers may not have had a duty to provide formal reasons (Majority Reasons, at para. 55), the rationale for deference under *Doré* — expertise in applying the *Charter* to a specific set of facts (paras. 47-48) — requires more engagement and consideration from an administrative decision-maker than simply being "alive to the issues", whatever that may mean (Majority Reasons, at para. 56). Irrespective of whether the Benchers had the authority to be bound by a referendum outside of the circumstances set out in s. 13 of the *LPA*, we agree with the Court of Appeal that, in this case, the Benchers abdicated their duty as administrative decision-makers to properly balance the objectives of the *LPA* with the *Charter* rights implicated by their approval decision.

295 As the majority recognizes at para. 52 of its reasons, judicial review has always been concerned with both the outcome *and the process* of administrative decision making. We stress that the issue identified by the Court of Appeal was with the lack of reasoning in the process adopted and not the sufficiency of reasons — whether formal or informal — themselves. The majority's reliance on *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), and *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360 (S.C.C.), elides this issue. Indeed, in *Catalyst Paper Corp.*, the Court explicitly relied on the municipal council's rich deliberative process in finding that there was no duty to provide formal reasons when passing a by-law (para. 29). Further, neither *Catalyst Paper Corp.* nor *Green* involved the adoption of a by-law that risked infringing the *Charter*. The importance of the reasoning process that must underlie administrative decision making where a *Charter* right is at issue was explicitly stated in *Doré* (at paras. 55-56). Yet, its absence in this case is given no significance whatsoever by the majority.

296 The LSBC violated its statutory duty by adopting the results of a referendum affecting *Charter* rights without engaging in the process of balancing *Charter* rights and statutory objectives required by *Doré*. It is plain from an examination of the LSBC's decision-making "process" that any balancing exercise engaged in by the Benchers was disconnected from the outcome the LSBC now seeks to justify, which was merely a rubber stamping of the outcome of a referendum of LSBC members.

297 As noted by the majority, the Benchers engaged in debate and deliberation on the *Charter* issues during their April 11, 2014 and September 26, 2014 meetings. They decided *against* adopting a resolution declaring TWU's proposed law school to *not* be an approved faculty of law at the conclusion of each of those meetings. But that particular deliberation did not lead to the outcome the LSBC now seeks to justify. Instead, despite having (arguably) twice balanced the *Charter* rights implicated with the LSBC's statutory objectives in fulfilment of their statutory duty, the Benchers — at the conclusion of the September 26, 2014 meeting — opted for a binding referendum on the issue of TWU's approval, with

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the results of that referendum being adopted with *no further discussion* and therefore no substantive debate on October 31, 2014.

298 In light of this background, it is, with respect, pure historical revisionism to suggest that the Benchers believed their decision "would benefit from the guidance or support of the membership as a whole" (Majority Reasons, at para. 50). Indeed, at the time of their *actual* deliberations on September 26, 2014, the Benchers *already had* the Resolution of the Special General Meeting of LSBC members adopted on June 10, 2014, and they took this expression of the membership's will into account during that meeting. By then opting for a binding referendum, the Benchers abdicated their duty as administrative decision-makers by deferring to a popular vote. It might, of course, be argued that the Benchers preferred any outcome dictated by popular vote to the outcome flowing from their own reasoning. The flaw, however, of such an approach is that the LSBC membership could never, through means of a referendum, engage in the balancing *process* required by *Doré*.

299 Such a serious error would normally require that the LSBC's decision be quashed and returned for a proper determination. As counsel for the LSBC conceded before us (transcript, at p. 341), however, "because of the failure of the [LSBC] to ... determine the proportionate balancing in this situation" it now falls to this Court to determine the "single answer", which we understand to refer to the proportionate balance between the severity of the limitation on the *Charter* right at issue and the statutory objectives governing the LSBC. The difficulty here is that (as we have already pointed out) the LSBC's decision is completely devoid of any reasoning.

300 And yet, the majority justifies deferring to that void by reminding us that reviewing courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (para. 56). But, for two reasons, this statement is untenable. First, it does not conform to this Court's recent direction, in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 (S.C.C.), at para. 27, that "reviewing courts must look at both the reasons *and* the outcome" (emphasis in original). In other words, it is never sufficient to consider the outcome alone. Indeed, the Court in *Delta Air Lines Inc.* went on (at para. 27) to caution that "[i]f we allow reviewing courts to replace the reasons of administrative bodies with their own, the outcome of administrative decisions becomes the sole consideration." In our respectful view, the majority does both these things: it replaces the (non-) reasons of the LSBC with its own, and makes the outcome the sole consideration.

301 The second objection to the majority's statement that courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" is that, of course, there is no record in this case of post-referendum deliberation allowing anyone to "ass[ess] the reasonableness of the outcome". Still, the majority, even without the benefit of reasons or a relevant record, assures us that "the Benchers came to a decision that reflects a proportionate balancing". But, and with respect, the majority simply cannot point to *any* basis whatsoever for suggesting that the Benchers conducted any balancing at all, let alone proportionate balancing.

H. The Doré/Loyola Framework

302 Our reasons apply the *Doré*/*Loyola* framework as we are able to understand it from the jurisprudence, but we note our concerns in relation to this framework for judicial review of *Charter*-infringing administrative decisions. The comments and scholars cited by the Chief Justice (para. 111, fn. 1) are overwhelmingly critical and make clear that the framework's contours are poorly defined. While we welcome the clarification of the framework articulated in the Chief Justice's reasons, we find the lack of rationale for insisting on a distinct framework for administrative decisions troubling, particularly in light of the fact that the application of the stages of the *Oakes* test in our jurisprudence is already context-specific (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.); *RJR- MacDonald*, at para. 132).

303 In our view, the suggestion in *Doré* (at para. 4) that "an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit" does not account for this Court's statement that, where a *Charter* infringement can be attributed to individualized decisions of state decision-makers, the proportionality test must apply (*Multani c. Marguerite-Bourgeoys (Commission scolaire)*,

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2006 SCC 6, [2006] 1 S.C.R. 256 (S.C.C.), at paras. 16 and 21, per Charron J.). Further, it is belied by the application of the Oakes test by this Court to administrative decisions in many cases prior to *Doré* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.); *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 (S.C.C.); *Dagenais*; *Attis v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (S.C.C.); *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.); *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 (S.C.C.); *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 (S.C.C.); *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31, [2009] 2 S.C.R. 295 (S.C.C.)). That suggestion is also doubtful in light of the ambivalent application of *Doré* in *Loyola High School*, and by its non-application in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (S.C.C.). Similarly, this Court avoided applying the deferential *Doré* framework when defining the scope of the *Charter* right in *Association des juristes de justice c. Canada (Procureur général)*, 2017 SCC 55, [2017] 2 S.C.R. 456 (S.C.C.), and *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386 (S.C.C.).

304 We acknowledge the majority's insistence (at para. 80) that "the framework set out in *Doré* and affirmed in *Loyola High School* is not a weak or watered-down version of proportionality". Rather, it maintains, it is "robust". But saying so does not make it so. Indeed, the Chief Justice's attempt to clarify that framework, combined with the majority's continued defence of the "robustness" of proportionality as set out in the *Doré*/*Loyola* framework, simply reinforce our view that the orthodox test — the *Oakes* test — must apply to justify state infringements of *Charter* rights, regardless of the context in which they occur. Holding otherwise subverts the promise of our Constitution that the rights and freedoms guaranteed by the *Charter* will be subject only to "such reasonable limits prescribed by law as can be demonstrably justified" (s. 1).

305 This is evident in the majority's own reasons. The state, it says need only show that its decision "gives effect, *as fully as possible* to the *Charter* protections at stake *given the particular statutory mandate*" (para. 80, quoting *Loyola High School*, at para. 39 (emphasis added)). Or, "[p]ut another way, the *Charter* protection must be 'affected as little as reasonably possible' *in light of the applicable statutory objectives*" (para. 80, quoting *Loyola High School*, at para. 40 (emphasis added)). In other words, under *Doré*, *Charter* rights are guaranteed *only so far as they are consistent with the objectives of the enabling statute*. When push comes to shove, statutory objectives — including, presumably, unconstitutional statutory objectives — trump the right. But s. 52 of the *Constitution Act, 1982*, which provides for the primacy of the Constitution, suggests to us that it should be the other way around — that *rights* trump statutory objectives and decisions taken thereunder. Further, s. 1 of the *Charter* does not guarantee certain rights and freedoms subject only "to the limits imposed by statutory objectives", but to limits that are "demonstrably justified in a free and democratic society". As, therefore, the Court of Appeal for Ontario recently stated, "[a] party bringing a *Charter* challenge is entitled to a judicial determination of whether the *Charter* right has been limited, and the government must have the opportunity to argue that such a limit is justified under s. 1 of the *Charter*: *Symes v. R.*, [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131 (S.C.C.), at para. 105 (*per* Iacobucci J.)" (*Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52 (Ont. C.A.), at para. 78).

306 The majority's continued reliance on "values" protected by the *Charter* as equivalent to "rights" (Majority Reasons, at para. 58), is similarly troubling. These "values" loom large in the majority's reasons, given its description (at para. 41) of the LSBC's interest in protecting "the values of equality and human rights". On this point, the majority also cites to Abella J.'s reference in *Loyola High School* (at para. 47) to "shared values — equality, human rights and democracy" as "values the state always has a legitimate interest in promoting and protecting".

307 We are in agreement with the Chief Justice and our colleague Rowe J. that *Charter* values do not receive independent protection under the *Charter*. In our view, and for several reasons, resorting to *Charter* values as a counterweight to constitutionalized and judicially defined *Charter* rights is a highly questionable practice.

308 First, *Charter* "values" — unlike *Charter* rights, which are the product of constitutional settlement — are unsourced. They are, therefore, entirely the product of the idiosyncrasies of the judicial mind that pronounces them to be so. And, perhaps one judge's understanding of "equality" might indeed represent a "shared value" with all Canadians, but perhaps another judge's might not. This in and of itself should call into question the legitimacy of judges or other state

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actors pronouncing certain "values" to be "shared". Canadians are permitted to hold different sets of values. One person's values may be another person's anathema. We see nothing troubling in this, so long as each person agrees to the other's right to hold and act upon those values in a manner consistent with the limits of core minimal civil commitments which are necessary to secure civic order — none of which are implicated here. What *is* troubling, however, is the imposition of judicially preferred "values" to limit constitutionally protected rights, including the right to hold other values. As W. A. Galston observes in *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (2002), at p. 131, this risks illiberal outcomes:

> When we are trying to decide what to do, we are typically confronted with a multiplicity of worthy principles and genuine goods that are not neatly ordered and that cannot be translated into a common measure of value. This is not ignorance but, rather, the fact of the matter. That is why practical life is so hard. If we could reduce it to some form of quantitative calculation or resolve its quandaries by bowing to clearly dominant values, it would not be so hard. But we cannot, at least not without oversimplifying moral experience and running grave risks. In practice, in both our personal and our public lives, the pursuit of a single dominant value, whatever the cost, typically produces side consequences ... that we ought not ignore and that few would willingly accept....
>
> ... Life would be simpler if there were clear rules to resolve the clashes between politics and its competitors. But there are not. When a parent, or artist, or faith community, or philosopher challenges the political system's right to constrain thought and action, those involved must seek ways of adjudicating the conflict that does not begin by begging the question and does not end in oppression.
>
> [Emphasis added.]

309 Secondly, and relatedly, *Charter* "values", as stated by the majority, are amorphous and, just as importantly, undefined. Lacking the doctrinal structure which courts have carefully crafted over the past 35 years to give substantive meaning to *Charter* rights (including the right to equality) and to guide their application, *Charter* values like "equality", "justice", and "dignity" become mere rhetorical devices by which courts can give priority to particular moral judgments, under the guise of undefined "values", over other values and over *Charter* rights themselves.

310 Take, for example, the majority's preferred value of "equality". In our view, without further definition this is too vague a notion on which to ground a claim to equal treatment in any and all concrete situations, such as admission to a law school. Of course, as a legal claim, equality relates to differential application of *a specific rule* to a certain group of people in a certain legal context. But the majority does not (and cannot) point to a specific legal rule or right to ground the application of a value of equality here. Rather, it advances "equality" in a purely abstract sense, such that it could mean almost anything. For example, an acceptable legal incarnation of the abstract notion, "equality" is a principle of the rule of law that all are equal before and under the law, such that all have a claim to equal protection and to equal application of the law (T. Bingham, *The Rule of Law* (2010), at pp. 55-59; F. C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies* (3rd ed. 2011), at p. 178). But equality in an absolute sense is also perfectly compatible with a totalitarian state, being easier to impose where freedom is limited. "Equality" as an abstraction could also mean tolerance of difference, as Justice Sachs said in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, [1998] ZACC 15 (South Africa Constitutional Ct.), at para. 132:

> ... equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference.
>
> [Emphasis added.]

311 None of these (or innumerable other) meanings of "equality" as an abstraction are relied on by the majority or are evident in its reasons. Rather, by relying on a sweeping abstraction, the majority avoids actually making explicit its

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moral judgment, its premises and the legal authority on which it rests. A "value" of "equality" is, therefore, a questionable notion against which to balance the exercise by the TWU community of its *Charter*-protected rights.

312 Finally, we echo McLachlin C.J.'s comment that "the onus is on the state actor that made the rights-infringing decision (in this case the LSBC) to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society" (para. 117). This Court has, however, been silent on who bears this onus in the administrative context, leaving a conspicuous and serious lacuna in the *Doré*/*Loyola* framework. Inexplicably, and despite the challenge *on this very question* posed by the reasons of the Chief Justice and of Rowe J., the majority maintains this silence, thereby failing to clarify the matter. With respect, this hardly bolsters the credibility of the *Doré*/*Loyola* framework.

313 It follows that we reject the majority's claim that its reasons "explain why *and how* the *Doré*/*Loyola* framework applies here" (Majority reasons, at para. 59 (emphasis added)). On the basic question of who bears the onus, the majority explains nothing about *how* that framework applies — whether here, or anywhere else. In particular, the majority's resort to the passive tense ("the reviewing court *must be satisfied* that the decision reflects a proportionate balance") fails to provide the necessary guidance, since it leaves reviewing courts guessing about precisely who must do the "*satisfying*" — the rights-holder, or the state actor. Further, and again with respect, the majority's invocation of *stare decisis* ("*Doré* and *Loyola High Schoo1* are binding precedents") is no answer to good faith attempts in concurring and dissenting judgments to clarify precedent. A precedent of this Court should be strong enough to withstand clarification of who carries the burden of proof.

314 As to how *we* would resolve the question of onus under *Doré*/*Loyola*, it is this simple: either the majority's statements about the *Doré*/*Loyola* framework's equivalency to *Oakes* and about the "same justificatory muscles" being flexed (Majority Reasons, at para. 82) are empty and meaningless words, or they are statements to be taken seriously. And if they are statements to be taken seriously, they must in our view mean that the burden to justify a rights limitation rests with the state actor under *Doré*/*Loyola*, just as it does when *Oakes* flexes its "justificatory muscles".

I. The LSBC Benchers' Decision Is an Infringement of TWU's Section 2(a) Charter Rights

315 We agree with the majority that the LSBC decision not to approve TWU's proposed law school infringes the religious freedom of members of the TWU community (Majority Reasons, at paras. 60-75). The LSBC was bound to make its accreditation decision regarding TWU's proposed law school in a way that conforms to the *Charter*-protected religious freedom of members of the TWU community who seek to offer and wish to receive a Christian education (*Loyola*, at para. 34). As the majority acknowledges, religious freedom is not just about private and individual beliefs and practices; it has a relational or communal character (*Hutterian Brethren*, at para. 182; *Loyola*, at paras. 59-60, 91 and 96). While it may not be necessary to determine whether TWU, *qua* institution, enjoys a right to religious freedom in its own right for the purposes of this appeal (Majority Reasons, at para. 61), in our view, ensuring full protection for the "constitutionally protected communal aspects of ... religious beliefs and practice" requires more than simply aggregating individual rights claims under the amorphous umbrella of an institution's "community" (*Loyola High School*, at paras. 33 and 130). That being said, for the purposes of this appeal we adopt the majority's description of the rights-holder as the "TWU community".

316 We emphasize, like our colleague McLachlin C.J. (paras. 122 and 124), that freedom of religion under the *Charter*, interpreted broadly and purposively, also captures the freedom of members of the TWU community *to express* their religious beliefs through the Covenant and *to associate* with one another in order to study law in an educational community which reflects their religious beliefs. Religious freedom is "not just about individuals praying alone but about communities of faith living out their traditions and religious lives" (Newman, at p. 9). Freedom of religion is among the "original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order" (*Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 (S.C.C.), at p. 329, per Rand J.).

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317 It follows, therefore, that we reject our colleague Rowe J.'s proposed narrowing of the scope of activity protected by the right to freedom of religion (paras. 231-34). In our view, looking only to circumstances in which "the claimant sincerely believes that their religion compels them to act" does not begin to account for the scope of activities identified by this Court in *Big M Drug Mart*, at p. 336. As this Court recognized in *Syndicat Northcrest c. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (S.C.C.), at para. 47, "[i]t is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection." Not every adherent will "declare religious beliefs openly" because they feel compelled to do so. Nor will every adherent "teach" or "disseminate" religious belief out of compulsion. Rather, they may freely choose to do so.

318 We agree with the analytical approach set out in the reasons of the majority (at paras. 62 and 63) and McLachlin C.J. (at para. 120): a s. 2(*a*) *Charter* infringement is made out where a claimant establishes that impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with their ability to act in accordance with a sincere practice or belief that has a nexus with religion (*Amselem*, at paras. 56 and 65; *Multani*, at para. 34; *Loyola*, at para. 134; *Ktunaxa Nation*, at para. 68).

319 In this case, it is the TWU community's expression of religious belief through the practice of creating and adhering to a biblically grounded Covenant that is at issue. The Covenant describes TWU as "a community that strives to live according to biblical precepts, believing that this will optimize the University's capacity to fulfill its mission" (TWU Community Covenant Agreement, reproduced in A.R., vol. III, pp. 401-5, at p. 401). For members of the TWU community, religious belief and education are inextricably linked (TWU Mission Statement; TWU Purpose Statement; TWU Core Values, reproduced in R.R., vol. I, at pp. 119-21). As described in the affidavit evidence of TWU students, the Covenant is a key mechanism for facilitating students' spiritual development and growth in the Christian faith so as to engender a personal connection with the divine (Affidavit #1 of Brayden Volkenant, July 30, 2014, reproduced in R.R., vol. V, pp. 42-46, at p. 44). Covenanting assists in the creation and strengthening of a religious community which includes all those who study and work at TWU. It fosters their moral and spiritual growth in an academic setting. Members of the TWU community sincerely believe that, as a manifestation of their creed, studying, teaching and working in a post- secondary educational environment where all participants covenant with those around them — regardless of their personal beliefs — subjectively engenders their personal connection with the divine.

320 The LSBC decision was "capable of interfering with religious belief or practice" in a manner that was not trivial or insubstantial (*Edwards Books*, at p. 759; *Amselem*, at para. 60). This assessment is an "objective" one (*Hutterian Brethren*, at para. 89), and the distinction between obligatory and non-obligatory practices is irrelevant to determining whether an interference is more than trivial or insubstantial (*Amselem*, at para. 75). The denial of the benefit of LSBC approval in this case negatively impacts the TWU community's ability to practise its beliefs through the Covenant at an approved law school. As we explain below, not only was this interference not trivial or insubstantial, it violated the state's duty of neutrality and profoundly interfered with the religious freedom of the TWU community.

J. Proportionality: The Infringement Was Not Proportionate

(1) The LSBC Approval Decision Does Not Balance the TWU Community's Section 2(a) Rights With a Relevant Statutory Objective

321 In *TWU 2001*, at para. 35, this Court emphasized that a "restriction on freedom of religion must be justified by evidence that the exercise of this freedom ... will, in the circumstances of [a] case, have a detrimental impact" on the statutory decision-maker's ability to fulfill its statutory mandate. Just as justifying the infringement in *TWU 2001* required a detrimental impact on the school system to be demonstrated, justification in this case requires evidence of a detrimental impact in the form of the unfitness of future graduates of TWU's proposed law school's to practise law.

322 At the justification stage, care must be taken not to overstate the objective of any measure infringing the *Charter*: "The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and

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nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised" (*RJR-MacDonald*, at para. 144 (emphasis deleted)). We accept that in the administrative law context, judicial review of individualized decisions made pursuant to statutory authority which is not itself challenged may not require the objectives of the legislation to be reviewed at the justification stage (*Multani*, at para. 155, per LeBel J.). Even, however, where a decision-maker's authority is not challenged (and particularly where a decision-maker does not provide any formal reasons whatsoever), we think it is worth emphasizing the importance of a reviewing court carefully ensuring that the objectives put forward by the state actor find their source in the actual grant of authority. Doing so avoids the danger that objectives said to advance a statutory mandate might be invented holus- bolus after an infringement is claimed. This is precisely the risk that materialized here: while the majority refers to the LSBC's "interpretation of its statutory mandate", the decision-making process adopted by the LSBC did not, at the time of the decision, involve *any* delineation or articulation of any particular statutory objectives.

323 As we have already recounted, the LSBC's statutory objective in rendering an approval decision is to ensure that individual applicants are fit for licensing. And, as the fitness of future graduates of TWU's proposed law school was not in dispute, this statutory objective cannot justify any limitations on the TWU community's s. 2(*a*) rights. But as we will explain (under heading (3) "Approving TWU's Proposed Law School Is Not Against the LSBC's Public Interest Mandate"), *even if* the LSBC's statutory mandate had permitted the consideration of broader "public interest" concerns invoked by the LSBC and the majority, the LSBC's decision would not be justified, since withholding approval substantially interferes with the TWU community's freedom of religion and approving TWU's proposed law school was not against the public interest, so understood.

(2) The LSBC Approval Decision Substantially Interferes With Freedom of Religion

324 In our view, the LSBC approval decision represents a profound interference with religious freedom: it is a measure that undermines the core character of a lawful religious institution and disrupts the vitality of the TWU community (*Loyola High School*, at para. 67). While the approval decision under review may appear to be facially neutral (as it denies a benefit and does not purport to directly compel or prohibit a religious practice), it is substantively coercive in nature. As the majority recognizes, at para. 99 of its reasons, "the TWU community has the right to determine the rules of conduct which govern its members" through its Covenant. Indeed, the TWU Covenant is protected by British Columbia's *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 41(1). Yet, notwithstanding that right and that statutory protection, the LSBC approval decision makes state acceptance contingent upon the TWU community manifesting its beliefs *in a particular way*. That this is so is, on this record, beyond dispute. As noted by the British Columbia Court of Appeal, "the Law Society was prepared to approve the law school if TWU agreed to remove the offending portions of the Covenant requiring students to abstain from 'sexual intimacy that violates the sacredness of marriage between a man and a woman" (para. 176; see also the respondents' Judicial Review Petition, reproduced in A.R., vol. I, pp. 125-55, at p. 136, at para. 45). This is highly intrusive conduct by a state actor into the religious practices of the TWU community. That conduct, like the ensuing LSBC decision to deny accreditation, contravened the state's duty of religious neutrality: each represented an expression by the state of religious preference which promotes the participation of non-believers, or believers of a certain kind, to the exclusion of the community of believers found at TWU (*Mouvement laïque québécois*, at paras. 74-78).

325 The majority concludes that the infringement in this case was "limited" and "of minor significance" (paras. 86-90). We agree with the Chief Justice (at paras. 128-32) that the fact the Covenant is not "absolutely required" and "preferred (rather than necessary)" does not diminish the severity of the infringement in this case.

(3) Approving TWU's Proposed Law School Is Not Against the LSBC's Public Interest Mandate

326 In our view, even were the majority's overbroad interpretation of the LSBC's statutory mandate to apply, approving TWU's proposed law school would not undermine the statutory objectives which the majority identifies as relevant to deciding whether or not to approve TWU's proposed law school. Accommodating religious diversity *is* in "the public

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interest", broadly understood, and approving the proposed law school does not condone discrimination against LGBTQ persons.

327 The majority states that the decision not to approve TWU's proposed law school furthers its public interest objective by "maintaining equal access to and diversity in the legal profession" (Majority Reasons, at paras. 93-95). We recognize, as this Court has previously recognized, that while there is evidence before us that some LGBTQ persons do attend TWU, the vast majority of LGBTQ students "would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions" (*TWU 2001*, at para. 25). In our view, however, the majority fails to appreciate that the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society.

328 The rights recognized in the *Charter* and the enshrinement of multiculturalism therein reflect the premise of our constitutional law and history that pluralism is intrinsically valuable. Our colleague McLachlin C.J. notes Canada's long history of religious schools (para. 130). Similarly, and writing extra-judicially, our colleague Karakatsanis J. has observed that, "[i]n a global environment where religious accommodation is sometimes seen as a detriment, Canada has found a way to welcome difference" (quoted in H. MacIvor and A. H. Milnes, eds., *Canada at 150: Building a Free and Democratic Society* (2017), at p. 9; see also M. A. Yahya, "Traditions of Religious Liberty in Early Canadian History" in D. Newman, ed., *Religious Freedom and Communities* (2016) 49, at p. 49).

329 But this generous and historically Canadian posture towards religious accommodation stands in stark contrast to the majority's view of the pursuit of statutory objectives as "unavoidabl[y]" limiting the individual freedoms protected by the *Charter* (Majority Reasons, at para. 100). This view fundamentally misconceives the role of the state in a multicultural and democratic society. As described by W. A. Galston, "[i]n a liberal pluralist regime, a key end is the creation of social space within which individuals and groups can freely pursue their distinctive visions of what gives meaning and worth to human existence" (*The Practice of Liberal Pluralism* (2005), at p. 3). Or as Sachs J. said in *Christian Education South Africa* (at paras. 23-24), "if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism" and allow "individuals and communities ... to enjoy what has been called the 'right to be different'".

330 We emphasize that it is the state and state actors — not private institutions like TWU — which are constitutionally bound to accommodate difference in order to foster pluralism in public life.

331 This is entirely consistent with this Court's jurisprudence. In *Big M Drug Mart*, this Court recognized (at p. 336) that "[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct." It is therefore not open to the state to impose values that it deems to be "shared" upon those who, for religious reasons, take a contrary view. The *Charter* protects the rights of religious adherents, among others, to participate in Canadian public life in a way that is consistent with *their own* values. By accommodating diverse beliefs and values, the state protects and promotes the *Charter* rights of all Canadians. As the five-member panel of the British Columbia Court of Appeal noted, where it attempts to do more, it risks "impos[ing] its views on the minority in a manner that is in itself intolerant and illiberal" (C.A. Reasons, at para. 193).

332 In *TWU 2001*, this Court held (at para. 35) that "freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society". This is, of course, consistent with the majority's acknowledgment (at para. 101) that "a secular state cannot interfere with religious freedom unless it conflicts with or harms overriding public interests". The majority then goes on to observe, correctly, that this Court in *Big M Drug Mart* (at p. 346) noted that a secular state can act to limit religious freedom "where an individual's religious beliefs or practices have the effect of 'injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own'" (para. 101). But, and with respect, the majority points to no legally cognizable injury here. Rather, it affirms the LSBC decision which undermines secularism itself. Properly understood, secularism connotes pluralism and respect for diversity, not the suppression of full participation in society by imposing a forced choice between conformity with a single majoritarian norm and withdrawal from the public square. Secularism does not exclude religious beliefs,

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even discriminatory religious beliefs, from the public square. Rather, it guarantees an inclusive public square by neither privileging nor silencing any single view.

333 Simply put, the secular state is a neutral state, which refrains from espousing "values" that undermine or go beyond what is necessary for the civic participation of all. As Iacobucci J. recognized in *Amselem*, at para. 50, "the State is in no position to be, nor should it become, the arbiter of religious dogma". We agree, and would add that the state is equally unfit to be the arbiter of *ir*religious dogma (see *Mouvement laïque québécois*, at para. 70). As this Court said in *Mouvement laïque québécois* (at para. 72 (emphasis added)), "[state] neutrality requires that the state neither favour nor hinder any particular belief, *and the same holds true for non-belief*". Either way, state neutrality must prevail.

334 It follows from the foregoing that accommodating diverse beliefs and values is a precondition to secularism and pluralism. Further, it is necessary to ensure that the dignity of all members of society is protected. "Tolerance", then, means forbearing, and allowing for difference. "[I]t is a feeble notion of pluralism that transforms 'tolerance' into 'mandated approval or acceptance'" (*Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710 (S.C.C.), at para. 132, per Gonthier J., dissenting in the result but agreeing with the majority on this point).

335 The "public interest", broadly understood, is therefore served by accommodating TWU's religious practices, including the Covenant. That this is so is confirmed by provincial and federal legislation. Contrary to the LSBC decision under review, the Legislative Assembly of British Columbia has already determined that the public interest is served by accommodating religious communities by providing that they do not contravene provincial human rights law when they grant a preference to members of their own group (*Human Rights Code*, s. 41). This provision was described by this Court in *TWU 2001*, at para. 28, as "accommodat[ing] religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion". The practical exclusion of LGBTQ individuals from attending TWU's proposed law school is therefore a direct result of *the Legislature's accommodation of the TWU community*. Further, that exclusion — which expresses a community code of conduct in conformity with orthodox evangelical beliefs — is not directed to LGBTQ persons; no one group is singled out, and many others (notably unmarried heterosexual persons) would be bound by it. The purpose of TWU's admissions policy is not to exclude LGBTQ persons, or anybody else, but to establish a code of conduct which ensures the vitality of its religious community.

336 In addition, the holding and expression of the moral views of marriage which underpin the portions of TWU's Covenant that are at issue here have been expressly recognized by Parliament as being not inconsistent with the public interest and worthy of accommodation (*Civil Marriage Act*, S.C. 2005, c. 33, preamble and s. 3.1):

. . . . .

> WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;
>
> . . . . .
>
> **3.1** For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

337 That federal and provincial legislators alike have taken this view should not surprise. Pluralism, and the religious accommodation necessary to secure it, is inherently valuable. In a country whose people sometimes harbour conflicting moral values that cannot be reconciled to a single conception of how one should live life, there is wisdom in the idea that the public sphere is for all to share, even where beliefs differ. Hence this Court's statement in *TWU 2001*, at para. 33, that "[t]he diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected." It follows that, while the public interest is served by the state's enforcement of minimal, core civil commitments which are necessary to secure civic order, legislators have also

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recognized that the public interest is also served by promoting the accommodation of difference. The LSBC's decision repudiates this wisdom and is unworthy of this Court's affirmation.

338 Finally, and contrary to our colleague McLachlin C.J.'s view (at paras. 137, 145-46 and 149-50), we see no basis for concern that approval by the LSBC would amount to "condoning" the content of the Covenant or discrimination against LGBTQ persons. As previously explained, the LSBC does not govern law schools. There is no basis upon which to conclude that law schools exercise a public function on behalf of the LSBC. It therefore cannot be said that the LSBC would, by accrediting TWU, condone discrimination indirectly. Nor, for that matter, can it be said that other provincial law societies (which decided to accredit TWU's law school on the recommendation of the Federation of Law Societies of Canada), or the Federation itself, condoned discrimination indirectly. State recognition of the rights of a private actor does not amount to an endorsement of that actor's beliefs, whether that recognition takes the form of an approval decision of the LSBC, or the Legislature's enactment of s. 41 of the *Human Rights Code*, or Parliament's inclusion of the preamble and s. 3.1 of the *Civil Marriage Act*. Equating approval to condonation turns the protective shield of the *Charter* into a sword by effectively imposing *Charter* obligations on private actors. And, it operates to exclude religious institutions, and therefore, religious communities, from the public sphere solely because they choose to exercise their *Charter*-protected religious beliefs. As noted by V. M. MuÑiz-Fraticelli, "if every accrediting decision implies complicity with the values of the program that is licensed, then there is no possibility for diversity of values in any field that requires state approval. Religious education, for instance, would be permitted only when religious doctrine is perfectly congruent with the ethos of the state" ("The (Im)possibility of Christian Education" (2016), 75 *S.C.L.R.* (2d) 209, at p. 220).

339 The implications of this logic are pernicious and potentially far-reaching. Even if, for example, the portion of the Covenant which pertains to sexual relations outside of traditional marriage were removed, on the Chief Justice's reasoning the LSBC *could not* approve the proposed law school, since the admissions policy would still exclude persons who could not agree to live by the tenets of the evangelical Christian faith as expressed by the Covenant. This, even though the LSBC's overtures to TWU (see para. 324, above) suggest that it found that particular part of the Covenant to be unobjectionable. This logic also runs counter to this Court's decision in the *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 (S.C.C.), which found that the state could not compel religious officials or houses of worship to perform civil or religious same-sex marriages contrary to their religious beliefs, even though the marriages performed by these officials are ultimately recognized by the state (paras. 59-60). The Court, in that instance, properly distinguished between endorsement by the state, and *Charter*-compliant accommodation of s. 2(*a*) rights by the neutral, secular state.

340 In short, both Parliament and British Columbia's Legislature have recognized the so-called "discriminatory" (McLachlin C.J.'s Reasons, at para. 138), "degrading and disrespectful" (Majority Reasons, at para. 101) practices represented by the TWU Covenant as consistent with the public interest, legal and worthy of accommodation. Such legislatively accommodated and *Charter*-protected religious practices, once exercised, cannot be cited by a state-actor as a reason justifying the exclusion of a religious community from public recognition. Approval of TWU's proposed law school would not represent a state preference for evangelical Christianity, but rather a recognition of the state's duty — which the LSBC failed to observe — to accommodate diverse religious beliefs without scrutinizing their content.

III. Conclusion

341 Under the LSBC's governing statute, the only proper purpose of a law faculty approval decision is to ensure the fitness of individual graduates to become members of the legal profession. The LSBC's decision denying approval to TWU's proposed law school has a profound impact on the s. 2(*a*) rights of the TWU community. Even if the LSBC's statutory "public interest" mandate were to be interpreted such that it had the authority to take considerations other than fitness into account, approving the proposed law school is not contrary to the public interest objectives of maintaining equal access and diversity in the legal profession. Nor does it condone discrimination against LGBTQ persons. In our view, then, the only decision reflecting a proportionate balancing between *Charter* rights and the LSBC's statutory objectives would be to approve TWU's proposed law school.

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342 The appeal should be dismissed. We therefore dissent.

Appeal allowed.

Footnotes

1 *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893 (Ont. C.A.), at paras. 108-25 (CanLII); E. Fox-Decent and A. Pless, "The Charter and Administrative Law: Cross-Fertilization or Inconstancy?", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 407; H. L. Kong, "*Doré* , Proportionality and the Virtues of Judicial Craft" (2013), 63 *S.C.L.R.* (2d) 501; P. Daly, "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the *Canadian Charter and Rights of Freedoms*" (2014), 65 *S.C.L.R.* (2d) 249; C. D. Bredt and E. Krajewska, "*Doré* : All That Glitters Is Not Gold" (2014), 67 *S.C.L.R.* (2d) 339; A. Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014), 67 *S.C.L.R.* (2d) 561; T. Hickman, "Adjudicating Constitutional Rights in Administrative Law" (2016), 66 *U.T.L.J.* 121; M. Liston, "Administering the *Charter*, Proportioning Justice: Thirty-five Years of Development in a Nutshell" (2017), 30 *Can. J. L. Admin. & Prac*. 211, at pp. 242-46.

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Tab 12

1993 CarswellOnt 150
Ontario Court of Justice (General Division) [Commercial List]

Ainsley Financial Corp. v. Ontario (Securities Commission)

1993 CarswellOnt 150, [1993] O.J. No. 1830, 106 D.L.R. (4th) 507, 10 B.L.R. (2d) 173, 14 O.R. (3d) 280, 16 O.S.C.B. 4077, 17 Admin. L.R. (2d) 281, 1 C.C.L.S. 1, 42 A.C.W.S. (3d) 165

AINSLEY FINANCIAL CORPORATION, ARLINGTON SECURITIES INC., BREGMAN SECURITIES CORP., E.A. MANNING LTD., GLENDALE SECURITIES INC., GORDON-DALY GRENADIER SECURITIES, MARCHMENT & MCKAY LIMITED, NORWICH SECURITIES LTD., and OXBRIDGE SECURITIES INC. v. ONTARIO SECURITIES COMMISSION and DONALD PAGE

R.A. Blair J.

Judgment: August 13, 1993
Docket: Docs. B46/93, 92-CQ-26469

Counsel: *Bryan Finlay, Q.C.*, *J. Gregory Richards* and *Philip Anisman*, for plaintiffs.
John I. Laskin and *James Doris*, for defendants.

Subject: Securities; Corporate and Commercial; Public

Application for summary judgment.

***R.A. Blair J.*:**

I — Overview

1 These proceedings bring into contention the validity of a policy statement issued by the Ontario Securities Commission and the jurisdiction of the O.S.C. to promulgate such policy statements.

2 O.S.C. Policy Statement 1.10, with which the Commission expects securities dealers to comply, contains very detailed and embracive measures regarding the trading of speculative penny stocks. Trading in such stocks comprises the predominant portion of the plaintiffs' business. They say that Policy 1.10 will drive them out of business and is designed to do just that.

3 The plaintiffs submit that the policy is invalid. As a result, they ask on this motion for:

(1) an order for summary judgment in the form of a declaration that the Commission is without jurisdiction to issue the policy statement; or, in the alternative,

(2) an interlocutory injunction restraining the Commission from requiring any of the plaintiffs to adhere to the policy pending the trial of the action.

4 In the action the plaintiffs seek declaratory and related relief, and damages. They submit:

(a) that the policy is invalid because the Commission has no jurisdiction to issue it; and, in the alternative,

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(b) that the policy is invalid because: (i) it fetters the Commission's discretion; (ii) it was adopted for an improper purpose; (iii) it is unreasonable in that it lacks a sufficient evidentiary basis, is unworkable, uncertain and arbitrary; (iv) it was issued in bad faith; (v) it is discriminatory; and, (vi) it is prohibitive in its effect.

II — Facts

5

Securities Dealers

6 The plaintiffs are registered as securities dealers under the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "Act").

7 A "securities dealer" is a category of registrant under s. 98(9) of the Regulation made under the Act (R.R.O. 1990, Reg. 1015, as amended). Securities dealers are persons or companies that are registered for trading in securities and that engage in the business of trading in securities in the capacity of agent or principal, but who do not come within another category in s.98 of the Regulation. The securities dealer category does not include "brokers", who are members of the Toronto Stock Exchange ("TSE") or "investment dealers", who are members of the Investment Dealers Association of Canada ("IDA"). The registration and examination requirements for securities dealers are the same as those for members of the TSE and the IDA, and securities dealers are entitled to the same trading rights as members of those organizations.

8 There is, however, no statutory or regulatory requirement that securities dealers be members of a self-regulatory organization such as the TSE or IDA. No such organization exists for securities dealers. Thus, they are governed exclusively by the provisions of the Act, the Regulation and the regulatory supervision of the Commission.

9 While there are approximately 64 securities dealers registered in the province, only the plaintiffs (and one other company which is not affected by the policy) are engaged predominantly in the business of dealing in the trading of penny stocks. Consequently, it is the plain tiffs which are primarily affected by the promulgation of the policy, and, indeed, there seems to be little controversy that it is the activities of the plaintiff securities dealers which the policy is intent upon reaching.

Policy 1.10

10 Policy Statement 1.10, entitled "Marketing and Sale of Penny Stocks", was issued in its final form on March 25, 1993, to come into effect on June 1, 1993. The Commission has agreed to hold the policy in abeyance pending the release of this decision.

Purpose of the Policy

11 Policy 1.10 was developed by the Commission as result of a growing concern over the employment of high pressure and unfair sales practices by securities dealers on a widespread basis in connection with the marketing and trading of low cost, highly speculative penny stocks in the over-the-counter market. The policy is designed to redress the abuses perceived by the Commission in this respect.

12 The purpose of the policy is stated at some length in the body of the text. I set out that statement of purpose in full, because it is of some importance. The policy asserts:

Purpose of this Policy

The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are

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not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.

The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.

The Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers, partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

This policy is not intended to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses.

13 In a section entitled "Appropriate Business Practices", the policy states:

The Commission has concluded that it is in the public interest that the business practices identified in this Policy be adopted by securities dealers in connection with the marketing and sale of penny stocks.

14 The operative portions of Policy 1.10 call for the following, in furtherance of this conclusion and the objectives of the policy:

(1) *the furnishing of a Risk Disclosure Statement* to the client — in Form 1, attached to the policy — together with a sufficient explanation of its contents to the client that the client understands he or she is purchasing a penny stock and is aware of and willing to assume the risks associated with such an investment; and, before any order to purchase a penny stock can be accepted,

(2) *the provision of a Suitability Statement* in Form 2 (also attached to the policy) to the client, completed and signed by the salesperson, together with an explanation of its contents; and

(3) *the return of the Suitability Statement, signed by the client*, to the securities dealer; *and thereafter*,

(4) *an agreement between the client and the securities dealer* with respect to the price of the penny stock to be purchased.

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15 *In addition*, Policy 1.10 provides,

> (5) that the securities dealer is to disclose to the client in advance of the trade that it is acting as principal or as agent for another securities dealer acting as principal on the transaction where that is so; *and*,
>
> (6) that the securities dealer is to disclose "the nature and amount of all compensation payable to the securities dealer, its salespersons, employees, agents and associates or any other person", including mark-ups, bonuses and commissions.

16 Only one risk disclosure statement is called for — "prior to effecting the first transaction in a penny stock with a client" — and a suitability statement "need not" be provided to or executed by a client after two transactions in penny stocks and the client's election not to have any further suitability statements provided.

Risk Disclosure Statement

17 Form 1, the Risk Disclosure Statement, is essentially a warning to those contemplating an investment in penny stocks, a "red flag", as it were. It states in bold block capitals that "THERE ARE SIGNIFICANT RISKS ASSOCIATED WITH INVESTING IN PENNY STOCKS", and explains under seven different headings the various ways and areas in which this is so, concluding with the bolded admonition in upper case letters:

> **Remember**
>
> IF YOU CANNOT AFFORD TO LOSE YOUR INVESTMENT YOU SHOULD NOT BE INVESTING IN PENNY STOCKS

Suitability Statement

18 Form 2, the Suitability Statement, is more complex and a greater source of concern and object of attack by the plaintiffs. Part A consists of a Client Information section to be completed by the salesperson. Part B is a Suitability Recommendation, also to be completed and signed by the salesperson, to the effect that the investment is suitable for and recommended to the client. Part C, entitled "Dealer Compensation", contains information for the client as to whether the dealer is acting as agent/principal and as to the details of all compensation or remuneration to be received. Finally, Part D, to be completed and signed by the client, is the Client Acknowledgement stating that the client,

> a) has received a copy of the penny stock risk disclosure statement;
>
> b) has reviewed the client information set out and that it is accurate;
>
> c) has reviewed the suitability recommendation and dealer compensation set out and agrees to purchase the stock in question "subject to agreement with respect to the price of [the securities]".

Exemptions

19 Policy 1.10 is to apply to all trades in penny stocks (as defined under the policy) conducted by securities dealers who are not members of the TSE or the IDA. There are some other exemptions, but they are not relevant. The Commission reserves to itself the right to determine, on what appears to be a transaction by transaction basis, that the practices need not be adopted.

20 The rationale for the exemption of members of the TSE and the IDA from the provisions of the policy is that they are members of self-regulatory organizations, whereas the plaintiffs are not. Accordingly, the plaintiffs are not subject to the wide array of compliance, investigation, enforcement, disciplinary and other rules, regulations, policies and by-laws of such self-regulatory organizations.

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21 The plaintiffs submit, on the other hand, that members of the TSE and IDA compete with them in the sale of penny stocks. They argue that the policy is targeted at them, the plaintiffs, for the purpose of putting them out of business or, at least, of driving them into the arms of the TSE or the IDA. Indeed, one of their group, A.C. MacPherson, is not a plaintiff because it has already made application to become a member of the IDA. In support of this contention, the plaintiffs point to the acknowledgement of the Commission itself that such an eventuality is likely. The Commission's minutes of November 19, 1991 reflect that staff was instructed to obtain an outside legal opinion on the *Charter* implications "of an approach which would have a disproportionate adverse impact upon a particular segment of the industry." In addition, the Commission minutes of July 14, 1992, noted "that the Policy could be expected to prompt broker-dealers to apply to become members of the TSE and the IDA."

Review of the Penny Stock Industry by the Commission

22 The Commission argues that Policy 1.10 is a reasonable response to a continuing incidence of investor complaints and mounting evidence of abusive and unfair sales practices employed by securities dealers. Staff and the Commission conducted a comprehensive review of the penny stock industry in Ontario. This examination included, amongst other things,

> a) a review of recent Court and Commission decisions involving abusive or unfair practices in the sale of penny stocks by securities dealers;
>
> b) a systematic review of investor complaints;
>
> c) interviews of investors who had lodged complaints, and of registered salespersons formerly employed by securities dealers;
>
> d) a study of the regulatory response in the United States to abusive sales practices in the penny stock industry, including meetings with officials of the S.E.C. and including an examination of the provisions of the U.S. *Penny Stock Act* enacted by Congress and the U.S. Penny Stock Rules arising thereunder; and,
>
> e) meetings with representatives of various groups in the securities industry.

23 With the completion of this review, the Commission was satisfied that it had found cogent evidence of abusive and unfair sales practices in the marketing of penny stocks, and in addition, I think it is fair to say, had concluded that these abuses were centered in the prac tices of the plaintiff securities dealers. It set out to remedy the situation for the reasons and in the manner outlined above.

III — Law and Analysis

24

A. Role and Jurisdiction of the O.S.C.

General

25 The Ontario Securities Commission is a creature of statute. Whatever power and authority it has must be derived from that source: see, for example, *R. v. Greenbaum*, [1993] 1 S.C.R. 674 at pp. 687-689; Wade, *Administrative Law*, 6th ed. (Oxford: Clarendon Press, 1988), at pp. 4-5.

26 As a statutory tribunal, the Commission has no inherent jurisdiction. Under the Ontario *Securities Act*, it has no statutory jurisdiction of a general discretionary nature, nor is there any general "mandating" section of a sweeping nature anywhere in the Act. The Commission has a discretionary jurisdiction, to be sure — and a broad one, at that — but its

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discretionary powers are to be found in a myriad of specific sections, each delegating to the Commission a particular task in the exercise of its regulatory function in the securities industry.

27 The role of the O.S.C. under the Act, in general terms, is to protect the investing public and to preserve the integrity of the capital markets in Ontario: see, for example, *Gordon Capital Corp. v. Ontario (Securities Commission)* (1991), 1 Admin. L.R. (2d) 199, at p. 208 (Div. Ct., per Craig J.). In *W.D. Latimer Co. v. Ontario (Attorney General)* (1973), 2 O.R. (2d) 391 at 393 (Div. Ct.), aff'd (1974), 6 O.R. (2d) 129 (C.A.), Wright J. (in the Divisional Court) described the Commission's mandate as follows:

> The Commission exists by virtue of the *Securities Act*, as amended by 1971, Vol. 2, c. 31. It can be said generally that it is the public agency charged by that statute with specific duties in relation to securities offered to or traded by the public in Ontario. The statute and the Regulations made under it give wide and strong powers of registration, administration, regulation, and investigation to the Commission with regard to securities, stock exchanges, dealers, salesmen, underwriters, promoters, advisers, offerings to the public, take-over bids, company practice, insider trading, financial disclosure and like matters.
>
> I propose to set out the provisions of the *Securities Act* which particularly concern the actions of the Commission here before us. *Before doing so I should state my conclusion from all the terms of that Act that the Commission has been given very wide powers and immunities and very heavy responsibilities and very broad discre tions to control those who seek the money of members of the public for securities or who deal in or are concerned with them. The Securities Act and the Commission are to protect the investing public in Ontario from grave and pressing perils clearly apprehended by the Legislature and calling for potent and unorthodox measures of control and protection*. (emphasis added)

28 These statements, and judicial pronouncements in a host of other decisions, make it abundantly clear that within its discretionary bounds the Commission and its decisions are to be accorded great curial deference. The exercise of its discretionary authority will not be interfered with unless it has been wielded in a fashion which fetters the application of the discretion, and provided it has been exercised in good faith, with an obvious and honest concern for the public interest and with evidence to support its opinion: *C.T.C. Dealer Holdings Ltd. v. Ontario (Securities Commission)* (1987), 37 D.L.R. (4th) 94, at pp. 110-113.

29 The special regulatory character of securities commissions and their paramount obligation to protect the public was commented upon by the Supreme Court of Canada in *Brosseau v. Albert (Securities Commission)* (1989), 57 D.L.R. (4th) 458, where L'Heureux-Dubé J. said, at p. 467:

> Securities Acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this court in *Gregory & Co. Inc. v. Quebec Securities Com'n* (1961), 28 D.L.R. (2d) 721 at p. 725, [1961] S.C.R. 584 at p. 588, where Fauteux J. observed:
>
> > The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the Province or elsewhere, from being defrauded as a result of certain activities initiated in the Province by persons therein carrying on such a business.
>
> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

30 To attract such judicial deference and to be insusceptible of attack in the courts, however, the Commission must be exercising a public interest discretion entrusted to it by the Act or the regulations. It must be acting within the scope of its statutory mandate. The question for determination in this case is whether it is doing so in the promulgation of Policy 1.10.

31 I have concluded that it is not.

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32 Policy 1.10 states that it "is intended to inform interested parties that the Commission will be guided by [the] Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario". These two sources would appear to be the jurisdictional underpinnings relied upon by the Commission in support of its authority to issue the policy, although in argument Mr. Laskin stated, on behalf of the Commission, that the Commission did not seek to rely upon s. 27(1) for that purpose.

33 In my opinion, the jurisdictional foundation for Policy 1.10 cannot be erected on either footing. The public interest jurisdiction of the Commission under section 27(1) of the Act does not support the promulgation of what is, in effect and by its own language, a regulation. The general public interest jurisdiction on which the Commission purportedly relied does not exist.

Is There a Need for the Policy?

34 Before pursuing this jurisdictional inquiry further, I pause to make the following, perhaps extraneous, observation. In concluding, as I have, that the Commission has exceeded its jurisdiction in issuing Policy 1.10, I am not meaning to suggest there may be no need for some sort of investor protection such as the measures provided for in it. There may, indeed, be such a need.

35 Much was made by the plaintiffs, in argument, of the nature and perceived frailties of the "evidence" relied upon by the Commission in making its determination to issue the policy statement and in devising the contents of that policy. I am satisfied, however, that the information which the Commission had before it, in its various forms, amply justified its concern and was adequate for the Commission's purposes in triggering the Commission's desire to act.

36 What is at issue here is not whether what the Commission proposes to do by way of Policy 1.10 is, or is not, a good idea. The issue is whether it has the jurisdiction to do what it purports to have done.

Does the O.S.C. Possess a General Public Interest Jurisdiction?

37 In arriving at my determination that the Commission has no general jurisdiction to regulate the securities industry in the public interest, I have considered carefully the various provisions of the *Securities Act* and the regulations made thereunder.

38 In a number of specific instances, in addition to s. 27(1), the Legislature has delegated to the Commission a discretion to act in the public interest. For example, the Commission may grant exemptions from prospectus requirements and from the requirements of Part XX dealing with take-over and issuer bids "where it is satisfied that to do so would not be prejudicial to the public interest" (ss. 74 and 104(2)(*c*)). It may order that the continued distribution of securities under a prospectus cease (s. 70) or that trading in a security cease (s. 127), each on a public interest basis. Finally, the Commission has the important power to order that various exemptions granted under the Act do not apply (s. 128) where, in its opinion, it is in the public interest to do so.

39 None of these provisions can support the jurisdiction to promulgate Policy 1.10, however.

40 There is nothing in the Act or the regulations which delegates to the Commission a general jurisdiction to regulate the securities industries in the public interest. Nor is there even a broad-sweeping mandating section of the sort found, for example, in the Quebec counterpart to Ontario's legislation.

41 In Quebec, section 276 of the Quebec *Securities Act*, R.S.Q., c. V-1.1, declares:

> *276.* ...
>
> The function of the [Quebec Securities] Commission is

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(1) to promote efficiency in the securities market;

(2) to protect investors against unfair, improper or fraudulent practices;

(3) *to regulate the information that must be disclosed to security holders and to the public in respect of persons engaged in the distribution of securities and of the securities issued by these persons;* (emphasis added)

(4) to define a framework for the professional activities of persons dealing in securities, for associations of such persons and for bodies entrusted with supervising the securities market.

42 In addition, s. 274 of the Quebec statute permits the Quebec Securities Commission to draw up policy statements defining the requirements following from the application of s. 276, within its discretionary powers.

43 Nor does the O.S.C. possess the rule-making power entrusted by Congress to its U.S. counterpart, the S.E.C.

44 Section 5(1) of the *Broadcasting Act*, S.C. 1991, Chap. 11, which provides that the Canadian Radio & Television Commission "shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in section 3(1) ...", is an example of an open-ended mandating provi sion of the sort which the Ontario *Securities Act* does not contain. It was in the context of this wide mandate under the old *Broadcasting Act* that the Supreme Court of Canada upheld a CRTC policy statement in *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141.

45 In *Capital Cities Communications*, the appellants alleged an excess of jurisdiction because the CRTC's decision which was under attack had been based on a policy statement and not on law or regulation. Chief Justice Laskin framed the question for the Court in this fashion, at p. 170:

> The issue that arises therefore is whether the [CRTC] or its Executive Committee acting under its licensing authority, is entitled to exercise that authority by reference to policy statements or whether it is limited in the way it deals with licence applications or with applications to amend licenses to conformity with regulations. I have no doubt that if regulations are in force which relate to the licensing function they would have to be followed even if there were policy statements that were at odds with the regulations. The regulations would prevail against any policy statements. However, absent any regulations, is the Commission obliged to act only *ad hoc* in respect of any application for a licence or an amendment thereto, and is it precluded from announcing policies upon which it may act when considering any such applications?

46 The Chief Justice answered that question in the negative as follows (at p. 171):

> In my opinion, *having regard to the embracive objects committed to the Commission under s. 15 of the Act* [now s. 5(1)], objects which extend to the supervision of "all aspect of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down *guidelines* from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance. (emphasis added)

47 The Commission relies heavily on this authority in support of its position that it possesses a broad power to implement policy statements in the exercise of a general public interest jurisdiction, even in the absence of a specific provision in its constating legislation, or the regulations thereunder, to that effect. There are a number of distinguishing features between the two situations, however. The first is that the *Securities Act* does not contain any broad mandating section like s. 5 of the *Broadcasting Act*, as I have already noted. The second is that Policy 1.10 is not a "guideline", in my view; it is a mandatory requirement of a regulatory nature. The third is that the CRTC policy statement had been

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arrived at after extensive hearings involving the interested parties, which is not the case here. I do not find, in the *Capital Cities Communications* decision, authority for the proposition that the O.S.C. has the jurisdiction to proclaim policy statements like Policy 1.10 in the absence of specific statutory authority to do so.

Policy 1.10: Its Mandatory and Regulatory Nature

48 In spite of the efforts of the Commission to cast Policy 1.10 in the light of a mere guideline, the policy is mandatory and regulatory in nature, in my view. Its language, the practical effect of failing to comply with its tenets, and the evidence with respect to the expectations of the Commission and staff regarding its implementation, all confirm this.

49 The policy is not simply, as it purports to be, "a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the *Act* in connection with the sale of penny stocks", focusing in that respect on the use of two forms, namely the risk disclosure statement and the suitability statement. Its effect is to impose a positive obligation upon securities dealers to follow those practices, thus *creating their status* as "appropriate practices". Failure to comply raises the spectre of disciplinary proceedings. The juxtaposition between the statement of the Commission's belief that the business practices set out in the policy should be adopted in the public interest — to be found in the section of the policy entitled "Purpose of the Policy" — and the reference to the draconian powers of the Commission under s. 27(1) of the Act — in the same paragraph — is telling in this respect.

50 This is regulation of the conduct of those engaging in the business of trading in penny stocks. Whatever the desirability of such regulation may be, the O.S.C. simply does not have the statutory mandate to regulate in such a fashion.

51 Very revealing as to the regulatory intention of Policy 1.10 is its wording in the final paragraph of the section outlining the purpose of the policy. I repeat the final paragraph here. It states:

> *This Policy is not intended* to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses. (emphasis added)

52 As the notice announcing the issuance of Policy 1.10 on March 25, 1993 states, the policy "contemplates that, except in specified circumstances, a penny stock risk disclosure statement *will be provided* ... and that a written suitability statement *will be obtained* ..." (emphasis added).

53 Both the notice and the policy go on to provide that in certain circumstances the contemplated business practices "need not be adopted", implying, at least, that save for the exceptions, those business practices "need" (i.e., "must") be adopted. Indeed, under the heading "Appropriate Business Practices" the Commission states flatly its conclusion "that it is in the public interest that the business practices identified in this Policy *be adopted* by securities dealers in connection with the marketing and sale of penny stocks." Having enunciated such a position, in what conceivable circumstances could the Commission resile therefrom and conclude "on the particular facts and circumstances of each case" — which it says it will continue to consider — that the failure to comply with such business practices did not contravene the public interest? When I asked counsel for the Commission for an example of such a circumstance, no answer was forthcoming.

54 Confirmation of the mandatory nature of the policy may be found in the approach of the Commission staff towards its implementation. In the staff report to the Commission, prior to the announcement of the policy, the following passage is found:

> We believe that *the key to the success of the Policy* in significantly reducing the unfair sales practices by broker/dealers in the sale of penny stocks *is strict enforcement of its terms and provisions*. The Policy provides a framework

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> for enabling staff of the Commission to verify that broker/dealers are complying with their know-your-client and suitability obligations as well as their obligation to deal fairly, honestly and in good faith with their clients. *In this regard it is recommended that the Compliance Unit conduct regular unannounced spot checks* of the various broker/dealers *to determine that suitability statements are being completed in compliance with the requirements of the Policy*. (emphasis added)

55 To conclude, in view of all of the foregoing, that the effect of Policy 1.10 is not to impose standards and a code of conduct upon the securities dealers affected by it, which are obligatory in nature, would be to ignore the plain language of the document itself and the reality of the regulatory environment in which it is to be implemented.

Section 27(1) and the Public Interest

56 The Commission has very broad powers to discipline and to sanction errant registrants. These are found in section 27 of the Act, which provides as follows:

> **Suspension, cancellation, etc.**
>
> *27. — (1)* The Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration or reprimand the registrant where in its opinion such action is in the public interest.

57 Section 27(1) contains the disciplinary teeth for the Commission's regulatory role under the Act and regulations. It is beyond dispute that the Commission is entitled to particular judicial deference and "a particularly broad latitude in formulating its opinion as to the public interest in matters relating to the activities of registrants ... under subs. [27(1)] of the Act": see, *Gordon Capital Corp. v. Ontario (Securities Commission)*, supra, at pp. 208 and 211. Speaking on behalf of the Divisional Court in that case, Craig J. said (at p. 211):

> There is no definition of the phrase "the public interest" in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion: *Ontario (Securities Commission) v. Mitchell* [[1957] O.W.N. 595], at p. 599.
>
> The scope of the OSC's discretion in defining "the public interest" standard under subs. 26(1) [now s. 27(1)] is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public ...

58 In spite of all of this, however, section 27(1) cannot provide the jurisdictional foundation for a policy statement such as Policy 1.10. It requires a hearing. No hearing was held. Indeed, one of the complaints of the plaintiffs in the action is that they were not consulted in any meaningful way, whereas others who would have been affected by the proposed policy — their competitors, the plaintiffs say, the registered brokers and investment dealers — were consulted (and, as an aftermath of the consultation, exempted from the dictates of the policy).

59 Even if the Commission had purported to hold a hearing under s. 27(1) for purposes of entertaining submissions regarding the promulgation of the policy, the section and the hearing would not sup port the jurisdiction for the policy, in my opinion. The Commission's discretionary jurisdiction under s. 27(1) is grounded in the consideration of specific cases. As Craig J. said in *Gordon Capital*, quoted above: "It is the function and duty of the OSC to form an opinion, *according to the exigencies of the individual cases that come before it*, as to the public interest ..." It is in that context in which the Commission's public interest discretion under this provision of the Act, and the broad latitude and judicial deference which the exercise of that discretion is afforded, must be considered. Section 27(1) does not clothe the Commission with authority to make prospective proclamations of general application for all affected registrants.

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60 Policy 1.10 is regulatory in nature. Its effect is to set up what are tantamount to mandatory requirements, as I have outlined above. It contemplates — with the sort of vigorous enforcement support called for in the staff report referred to earlier — that two specific types of forms "will be" utilized by the affected securities dealers and that certain specific information "must be" provided to investors prior to taking an order for the purchase of penny stocks. Included in the "guide" as to the disclosure of information regarding the securities dealer's compensation are instructions as to how the mark-up aspect of that remuneration is to be calculated.

61 To "regulate" is "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions", and "regulation" is "the act of regulating": *The Shorter Oxford English Dictionary*, 3rd ed., p. 1784. Policy 1.10 is regulation.

62 Even if the policy is not mandatory in its nature, as I have concluded, but simply issued "as a guide" which is "intended to inform interested parties that the Commission will be guided by [it] in exercising its public interest jurisdiction under subsection 27(1) of the Act", it still constitutes regulation, or is tantamount thereto, in my view. In either case it is clear that a failure to meet the "expectations" of the policy will attract disciplinary procedures under the Act, or at least carries with it the threat or intimation of such proceedings. Neither those whose activities in the securities industry are the object of the policy, nor their advisors, are likely to lose sight of the reality of the situation. The mere existence of such a state of affairs is a very effective weapon in the regulator's arsenal, of course.

63 It may be said — as the general section of the O.S.C.'s published collection of policy statements says — that "*O.S.C. Policy Statements do not have the force of law and are not intended to have such effect*". In the case of Policy 1.10, however, its language, its contents and its effect make such a statement meaningless. Moreover, the same section goes on to say — in the same passage as that cited above — that the policy statements "are intended to set forth certain basic policies of the Commission relating to securities regulation in the Province of Ontario and the role of the Commission with respect thereto and accordingly the *Commission expects issuers to comply with the O.S.C. Policy Statements unless compliance is waived*" (emphasis added).

64 The difference between something that is intended to have the force and effect of law, and something that is merely expected to be complied with unless compliance is waived by the agency proclaiming it, is a mystery to me.

65 The securities industry is a highly regulated area of endeavour. Provincial and federal legislation, and regulations made under such legislation, weave an intricate — and very necessary — web of legislative and administrative supervision and control over the industry. Ontario's *Securities Act* occupies about 90 pages of the Carswell compilation. Regulation 910, with forms and amending regulations, occupies 321 pages! Of these, Regulation 910 itself takes up 93 pages and the forms about 185. In short, the securities industry is governed by a carefully balanced blend of legislative edict, regulatory standards, and delegated administrative authority. The division of authority in different ways is not accidental.

66 In an interesting article entitled "The Excessive Use of Policy Statements by Canadian Securities Regulators", published in (1992), 1 Corporate Financing 19, an industry periodical, Professor Jeffrey G. MacIntosh emphasized this dichotomy. At p. 20 he wrote:

> It is vitally important to recognize, however, that the "public interest power" was never intended to be, nor could it logically be construed to be unlimited in nature. Had the legislature intended it to be unlimited, then it need not have troubled itself with the task of devising a *Securities Act*. The Ontario legislature, for example, need only have created the Ontario Securities Commission, ceded to it plenary powers, and instructed it to act "in the public interest". It need not have outlined in great detail precisely that which the Lieutenant Governor in Council can (and, implicitly, that which he cannot) do to add to the statutory rules by way of regulation. That the provincial legislatures have both created legislative law and limits to regulatory powers is not merely accidental.
>
> While it is clear that the ability to act remedially "in the public interest" cedes *some* residual discretionary authority to the regulators, *it was obviously the intention of the legislature not to delegate to the Ontario Securities Commission the power to make substantive law of a legislative or regulatory character*. Indeed, had the legislature wished to do

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> so, it could have easily accomplished that objective by giving the OSC rule-making authority like that possessed by the SEC in the United States. However much this might be a good idea, it has not been done. *It is thus impossible to escape the conclusion that policy statements must not be used [to] create substantive legal requirements of a legislative or regulatory character. Any other conclusion would be inconsistent with the Rule of Law*. (emphasis added)

67 I agree with this statement.

68 The Ontario Securities Commission is the regulator of the securities industry, but it is not empowered to make the regulations. That power has been delegated by the Legislature to the Lieutenant Governor in Council by the Act. Under s. 143 of the Act, the Lieutenant Governor in Council is granted the power to make regulations. The subject matter of Policy 1.10 falls directly within several of these regulation-making areas. It deals, for instance, with "the furnishing of information to the public ... by a registrant in connection with securities or trades therein": s. 143, No. 8. It involves regulation of "the trading of securities" in the over-the-counter market (i.e. "other than on a stock exchange recognized by the Commission"): No. 10. It prescribes "documents, ... statements, agreements and other information and the form, content and other particulars relating thereto that are required to be filed, furnished or delivered ..." and prescribes "forms for use under [the] Act and the regulations" (s. 143, Nos. 16 and 18). Finally, it encompasses matters "respecting the content and distribution of written, printed or visual material ... that may be distributed or used by a person or company with respect to a security whether in the course of distribution or otherwise" (s. 143, No. 32).

69 Where the Legislature has intended a regulation-making power to be delegated to the Commission, it has expressly said so. For example, in paragraph No. 1 of s. 143, the Lieutenant Governor in Council is entitled to make regulations "prescribing categories ... and the manner of allocating persons and companies to categories, including permitting the Director to make such allocations". Under paragraph 37 of the same section, regulations may be made permitting the Commission or the Director to grant exemptions from the various provisions of the regulations. In section 105 of the Regulation itself, the Commission is authorized to "prescribe conditions of registration" after holding a hearing to afford an opportunity for those affected by the proposed conditions to be heard (it has apparently chosen not to follow this route in paving the way for the introduction of the policy). Nowhere, however, is the Commission delegated the power to make regulations in the areas which are outlined above and which comprise so much of the substance of Policy 1.10.

70 Where the field has been occupied, as it were, by the Legislature or by the Lieutenant Governor in Council pursuant to s. 143 of the Act, the Commission has no authority to adopt measures of a regulatory nature in that occupied area, particularly where the measures have the effect of augmenting or amending what the Act and/or regulations say will suffice: see, *Pezim v. British Columbia (Superintendent of Brokers)* (1992), 96 D.L.R. (4th) 137 (B.C. C.A.); appeal to the Supreme Court of Canada pending [leave to appeal to S.C.C. granted (1993), 75 B.C.L.R. (2d) xxxii (note), 151 N.R. 132 (note)]); *Elizabeth Fry Society of Saskatchewan Inc. v. Saskatchewan (Legal Aid Commission)* (1988), 56 D.L.R. (4th) 95 (Sask. C.A.).

71 In *Pezim*, supra, the British Columbia Court of Appeal had before it a somewhat analogous situation to the case at bar. There, some of the directors and senior management of certain mining corporations were found by the B.C. Securities Commission to have violated the "material change" disclosure requirements of the British Columbia *Securities Act*. During the course of various option transactions they had received information concerning the results of the companies' drilling program but had not issued a press release disclosing that information. The Court concluded that the information in question did not constitute a "material change" in the affairs of the companies. Although possession of the information may have involved knowledge of a "material fact", and although insider trading in the face of such knowledge was forbidden under another section of the Act, there was no requirement under the Act to disclose such a "material fact" to the public. It was argued further, however, that even if this were so, the results from the drilling program were material facts which affected the market price or value of the securities of the companies and, accordingly, that there was an obligation to disclose the information as a result of the standards of the securities business as set out in National Policy No. 40, dealing with "Timely Disclosure".

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72 The Court of Appeal rejected this argument for reasons that seem apt to the case at bar. I cite from the majority decision of Lambert J.A., at p. 150:

> Without reaching any decision about whether there is any power in the Commission to inquire into and impose penalties for conduct falling short of what the Commission judges to be a proper standard of conduct for those engaged in the securities business, it is my opinion that where the particular type of conduct that is being considered is conduct that is so closely governed by legislative provisions as is the conduct relating to disclosure of material changes or material facts, the Commission does not have the power to impose different and more exacting standards than those specifically adopted and imposed by the legislature and then to make penal orders for a breach of those standards which is not a breach of the legislative standards.
>
> . . . . .
>
> That is not to say that higher standards are not desirable. That is a question of careful policy judgment. But they should not be regarded as mandatory where the legislature, in balancing the policy considerations, has specifically chosen not to make them mandatory.

73 Governance by policy statements and the sweep of such pronouncements have been matters of controversy and the subject of commentary by academics and members of the industry for some time. In addition to the article by Professor MacIntosh cited above, I have read the following: Hudson N. Janisch, "Regulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility", Law Society of Upper Canada, Special Lectures, 1989, p. 97; James C. Baillie and Victor P. Alboini, "The National Sea Decision — Exploring the Parameters of Administrative Discretion", Canadian Business Law Journal, Vol.2 (1977-1978), 454 at 468; W.J. Braithwaite, "Comment on Healy: National Policy Statement No. 41", Law Society of Upper Canada, Special Lectures, 1989, p. 379; James C. Baillie, "Coercion by Commission" (June 1990), CA Magazine, p. 20; Remarks of Robert J. Wright, "Ticker Club", October 19, 1990 (1990), 13 O.S.C.B. 4326 at 4327; Charles Salter, Q.C., "The Priorities of the O.S.C." (1991), 14 O.S.C.B. 2134 at 2142.

74 The issue of administrative agencies, such as the O.S.C., expanding their regulatory reach through the exercise, or purported exercise, of broad discretionary powers is an important one. The exercise of discretion is an essential tool for the effective supervision of an industry as complex as the securities industry. From a practical point of view, it would be impossible for the Commission to carry out its mandate, in either a long-term or day-to-day sense, without the broad discretionary powers delegated to it by the Act and regulations. And, if those ample discretionary powers are to be exercised, "there is merit", as Chief Justice Laskin noted in *Capital Cities Communications*, supra, at p. 171, "in having it known [how that will be done] in advance."

75 Resort to convenience and practicality can only be justified, however, when the measures adopted by the administrative agency in question fall within the scope of its statutory mandate. Were it otherwise, the carefully constructed legislative schemes governing the powers and conduct of the O.S.C., and other such agencies, would be rendered meaningless. The rule of law, a central concept in our legal system, would be undermined.

76 The importance of preserving the integrity of the legal framework within which the administrative agency must operate is emphasized in several of the commentaries referred to above, and is well stated in the following passage from Professor Wade's text, *Administrative Law*, supra, at p. 5, as follows:

> The primary purpose of administrative law is to keep the powers of government within their legal bounds so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. "Abuse", it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law they have to administer is frequently complex and uncertain. Abuse is therefore inevitable, and it is all the more necessary that the law should provide means to check it.

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77 Elsewhere in that same text, Professor Wade describes the import of the rule of law in the following terms, which are excerpted from the section of the text at pp. 23-24:

> The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong ..., or which infringes a [person's] liberty ..., must be able to justify its action as authorised by law — and in nearly every case this will mean authorised by Act of Parliament. *Every act of governmental power*, i.e. every act which affects the legal rights, duties or liberties of any persons, *must be shown to have a strictly legal pedigree*. The affected person may always resort to the courts of law, and *if the legal pedigree is not found to be perfectly in order the court will invalidate the act*, which [the person] can then safely disregard. (emphasis added)
>
> . . . . .
>
> The secondary meaning of the rule of law ... is that government should be conducted within a framework of recognised rules and principles which restrict discretionary power ... An essential part of the rule of law, accordingly, is a system of rules for preventing the abuse of discretionary power ... The rule of law requires that the courts should prevent its abuse ...

78 These passages accent the significance of requiring an administrative tribunal to observe its statutory limits.

79 For the foregoing reasons, I am satisfied that the O.S.C. lacks the statutory mandate to provide it with the jurisdiction to issue Policy 1.10. As there are no facts in dispute or other questions on this issue which require a trial for their resolution, this is a proper case for the granting of summary judgment under rule 20.01: see *Irving Ungerman Ltd. v. Galanis* (1991), 1 C.P.C. (3d) 248 (Ont. C.A.); *Pizza Pizza Ltd. v. Gillespie* (1990), 45 C.P.C. (2d) 168 (Ont. Ct. (Gen. Div.)).

Alternative Relief Claimed

80 In view of my disposition of this matter on the jurisdictional point, it is not necessary to deal at length with the alternative submissions made on behalf of the plaintiffs.

81 The plaintiffs' alternative assertions in the action, it will be recalled, are that Policy 1.10 is invalid because: (i) it fetters the Commission's discretion; (ii) it was adopted for an improper purpose; (iii) it is unreasonable in that it lacks a sufficient evidentiary basis, is unworkable, uncertain and arbitrary; (iv) it was issued in bad faith; (v) it is discriminatory; and, (vi) it is prohibitive in its effect. They seek an interlocutory injunction restraining the Commission from implementing the policy pending the trial of these issues.

82 Had I concluded that the promulgation of policy statements such as Policy 1.10 fell within the statutory mandate of the Commission, I would have declined to grant such an injunction.

83 I am satisfied on the materials before me that the plaintiffs have met the threshold test of establishing a serious question to be tried on the merits with respect to at least some of the alternative grounds put forward. This is particularly so, I think, with respect to the argument that the policy fetters the Commission's discretion, for the reasons outlined above regarding jurisdiction; with respect to the argument that it is unworkable in terms of its impact on the way securities dealers are to conduct their business; and with respect to the argument that the policy is discriminatory in that it is targeted at the plaintiffs and does not apply to members of the TSE and the IDA who also engage in the trading of low cost, highly speculative penny stocks.

84 It seems to me, as well, that the plaintiffs are likely to suffer irreparable harm if the policy were to be put into operation wrongly. Having regard to its detailed provisions and the impact they would have upon the plaintiffs' business

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operations, it is unlikely that any harm they would suffer could be adequately compensated for by the common law remedy of damages.

85 When it comes to a consideration of the balance of convenience and the question of maintaining the status quo, however, the scales tip in favour of declining an interlocutory injunction.

86 Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

87 I assume for the purposes of this discussion that the Commission was acting within its jurisdiction in issuing Policy 1.10. In such circumstances the Court should be reluctant to prevent the exercise of the Commission's statutory power, even where the challenge to the exercise of that authority is a serious one: see *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* (1987), 38 D.L.R. (4th) 321 (S.C.C.); *Esquimalt Anglers' Assoc. v. R.* (1988), 21 F.T.R. 304 (T.D.).

88 In the *Metropolitan Stores* case the Supreme Court of Canada was asked to consider the propriety of a stay of proceedings before the Manitoba Labour Relations Board. At stake was the constitutional validity of Manitoba's legislation empowering the board to impose a first collective agreement in labour disputes. The Court set aside the stay, applying the same principles that govern the granting of interlocutory injunctions, and holding that no such restraint should have been imposed in the circumstances.

89 Giving judgment on behalf of the Court, Mr. Justice Beetz reviewed the debate over the appropriate test to be applied upon the granting of an interlocutory injunction. He concluded, with respect to constitutional cases, that the "serious question to be tried" formulation of *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, was sufficient, provided that the public interest is taken into consideration in determining the balance of convenience. The consequences for the public as well as for the parties, of the granting of a stay or an injunction, he held to be "special factors" in assessing the balance of convenience. See pp. 333-334.

90 Cases in which it is sought to enjoin the law enforcement agency or administrative tribunal from enforcing the impugned provisions until their validity has been finally determined, Beetz J. referred to as "suspension cases". With regard to such cases he had this to say, at pp. 338-339:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically elected legislatures and are generally passed for the common good, for instance, ... the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases ... is susceptible temporarily to frustrate the pursuit of the common good.
>
> While respect for the Constitution must remain paramount, *the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest*, and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute. (emphasis added)

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91 While these remarks are made in the context of an attack upon the constitutional validity of provincial legislation, I see no distinction in principle between that kind of situation and one in which what is challenged is the validity of a measure imposed by an administrative tribunal or law enforcement agency acting within its jurisdiction.

92 Assuming as I have, for the purposes of this part of my decision, that the O.S.C. had the power within its statutory mandate to issue Policy 1.10 and that the validity of the measure is attacked on other grounds, I would refuse to grant the interlocutory injunction sought on the ground that the balance of convenience militates against it. In my view, the public interest in having the protection of the impugned provisions would outweigh the interests of the plaintiffs, as private litigants, in having the relief granted.

III — Conclusion

93 It was argued on behalf of the Commission that the plaintiffs' action was premature, and that they should await the bringing of disciplinary proceedings against them before raising the arguments put forward. However, the right of a litigant to challenge the jurisdiction of an administrative body to make rules, regulations or by-laws by bringing an action for a declaration that the administrative body has exceeded its jurisdiction under its enabling statute in issuing the disputed provisions, is well settled; see, *Dyson v. Attorney General*, [1911] 1 K.B. 410 (C.A.) [subsequent proceedings] [1912] 1 Ch 158 (C.A.); *Jones v. Gamache*, [1969] S.C.R. 119; *Turner's Dairy Ltd. v. Lower Mainland Dairy Products Board*, [1941] S.C.R. 573.

94 As I have already indicated, the case is a proper one, in my view, for the granting of summary judgment under the *Rules of Civil Procedure* on the jurisdictional issue. Accordingly, judgment is granted in favour of the plaintiffs in the form of a declaration that Policy 1.10 is invalid, the Commission having exceeded its jurisdiction under its enabling legislation in promulgating it.

95 In view of that disposition, it is not necessary to make any further order in relation to the interlocutory injunctive relief claimed. I may be spoken to with respect to costs.

96 I would like to thank all counsel for their thorough and skilful assistance in this difficult matter.

Application allowed.

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Tab 13

1991 CarswellOnt 947
Ontario Court of Justice (General Division) [Divisional Court]

Gordon Capital Corp. v. Ontario (Securities Commission)

1991 CarswellOnt 947, [1991] O.J. No. 934, 14 O.S.C.B. 2713,
1 Admin. L.R. (2d) 199, 27 A.C.W.S. (3d) 731, 50 O.A.C. 258

GORDON CAPITAL CORPORATION v. ONTARIO SECURITIES COMMISSION

Craig, Holland and Carruthers JJ.

Heard: May 16, 1991
Judgment: June 13, 1991
Docket: Doc. 552/90

Counsel: *J.E. Sexton, Q.C., J.M. Freedman, A.J. Stitt*, for appellant.
D. O'Connor, Q.C., J. Douglas, for respondent.

Subject: Securities; Public; Corporate and Commercial

Appeal from order of Ontario Securities Commission.

The judgment of the court was delivered by *Craig J*:

Nature of Proceedings

1 This appeal by Gordon Capital Corporation ("Gordon") is from the decision of the Ontario Securities Commission (the "OSC") dated May 24, 1990 [reported at (1990), 13 O.S.C.B. 2035]. After a hearing, the OSC ordered that a condition be placed on Gordon's registration as an investment dealer under the *Securities Act*, R.S.O. 1980, c. 466, as amended (the "Act"), such that Gordon would be prohibited from engaging, directly or indirectly, in principal trading (as later defined) for a period of 10 business days. The suspension, which was to commence June 18, 1980, was stayed by order of the OSC dated June 4, 1990, pending disposition of this appeal.

2 The hearing before the OSC was held pursuant to subs. 26(1) of the Act. Subsection 26(1) provides as follows:

> The Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration or reprimand the registrant where *in its opinion such action is in the public interest*.

[Emphasis added.]

3 The hearing was convened to consider whether it was in the public interest to impose any of the sanctions referred to in s. 26(1) on the registration of Gordon, a member of the Toronto Stock Exchange ("TSE"), and David Bond, a registered trader and senior floor trader employed by Gordon. Bond's functions on behalf of Gordon were the execution of agency trades for his firm and "pro-trading" trading for Gordon's own account. As a registered trader, his pro-trading serves to stabilize the market and enhance liquidity in his stocks of responsibility, including ITL Industries Limited ("ITL"). At the time of the events leading to the hearing, Donald Bainbridge ("Bainbridge") was president of Gordon and in charge of supervising the activities of its traders (including Bond) on the floor of the TSE.

4 As more particularly mentioned later herein, the OSC found as follows [at p. 2037]:

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Through Bond's trading purchases of common and preference shares of ITL in 1987 and 1988, Gordon Capital made a take-over bid for that company. In so doing, Gordon Capital breaches all of Ontario's take-over bid rules as well as the insider reporting rules. It is common ground that these breaches occurred and that they were inadvertent. The question, as put by Mr. Douglas for Commission staff, was whether this inadvertence was excusable or inexcusable.

5 The proceedings against Gordon and Bond were exclusively of a disciplinary or regulatory nature. Although other provisions of the Act may have permitted charges to be laid against Gordon and Bond in respect of the conduct in issue, no such quasi-criminal proceedings were taken against either of them.

6 The jurisdiction of this court on the appeal is set out in s. 9 of the Act as follows:

9.(1) Any person or company directly affected by a decision of the Commission, other than a decision under section 73, may appeal to the Divisional Court.

. . . . .

(5) Where an appeal is taken under this section, the court may by its order direct the Commission to make such decision or to do such other act as the Commission is authorized and empowered to do under this Act or the regulations and as the court considers proper, having regard to the material and submissions before it and to this Act and the regulations, and the Commission shall make such decision or do such act accordingly.

7 The issues in this case are:

(i) The jurisdiction of the OSC at a hearing pursuant to s. 26(1) of the Act, and in particular whether the evidence of "due diligence" advanced by Gordon is an answer in law or on the facts to proceedings under subs. 26(1) of the Act.

(ii) In the event that some penalty on Gordon was warranted, is a suspension of its trading privileges disproportionate to the conduct in question?

8 The O.S.C. found that as a consequence of its acquisitions of the common and preference shares of ITL Industries Limited ("ITL") during the calendar year 1988, Gordon committed the following breaches of the Act:

(a) on or about April 5, 1988, Gordon acquired 10 per cent or more of the common shares of ITL on a fully converted basis and failed to issue and file a press release and file a report contrary to the "early warning" requirements of subs. 100(1);

(b) throughout the remainder of 1988, Gordon continued to acquire further common shares or shares convertible into common shares of ITL and failed to issue and file a press release and file a report contrary to the "early warning" requirements of subs. 100(2) with each 2 per cent increment in its holdings of common shares on a fully converted basis;

(c) throughout the remainder of 1988, Gordon failed to observe the statutory waiting periods prescribed by subs. 100(3) respecting its further acquisitions of common shares or shares convertible into common shares of ITL;

(d) on or after April 22, 1988, Gordon made take-over bids as defined by subs. 88(1) for both the common shares of ITL as a class and the preference shares of ITL as a class without complying with the requirements relating to take-over bids as prescribed in Part XIX;

(e) in or about May or June 1988, Gordon became an "insider" of ITL as defined by para. 17(iii) of subs. 1(1) and failed to file an insider report as prescribed by subs 102(1);

(f) after becoming an insider of ITL, Gordon failed to file the continuous disclosure reports required by subs. 102(2) with subsequent changes in its ownership of ITL shares.

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9 These breaches of the Act were admitted by Gordon at the hearing but counsel relies on evidence adduced at the hearing that, in addition to being inadvertent, it was not reasonably foreseeable that a floor trader (Bond), on his own, could trigger the take-over bid provi sions of the Act. Counsel for Gordon relies particularly on the line of cases commencing with *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, at pp. 1325-1326 [S.C.R.]. His submission is that conduct of Gordon herein is a "public welfare" offence and prima facie a strict liability offence to which due diligence — the taking of reasonable care — is a complete defence.

Gordon's Knowledge of the Facts

10 On the evidence of Bainbridge, the OSC found that Gordon first became aware of Bond's abnormally large accumulation of stock in ITL on its behalf at the end of 1987. At that time, Gordon knew that Bond had acquired the position in ITL as an investment and not merely as part of his market-making responsibilities to the TSE.

11 On February 4, 1988, ITL issued a press release through the Canada News Wire service which announced that its board of directors would be submitting to ITL's shareholders a proposal to reorganize the share capital of the corporation at the annual and special meeting to be held in April 1988. The press release clearly stated that the proposed capital reorganization included changes to the preference shares that would make them fully voting and improve their conversion rate to common shares from .83 common shares for each preference share held to 3 common shares for each preference share held.

12 In or about February 1988, Gordon received notice of the annual and special meeting of shareholders of ITL to be held on April 6, 1988. The notice was accompanied by a proxy solicitation and management information circulation. The material described in detail the proposed capital reorganization of ITL.

13 It is clear from the reasons for the decision and the evidence of Bainbridge that, despite Gordon's combined knowledge of its own large shareholdings in ITL and the proposed capital reorganization of ITL, no one at Gordon considered the regulatory impact that the reorganization might have upon Gordon's share position in ITL. In the spring of 1988, Bainbridge noticed that Bond's heavy accumulation of ITL shares on behalf of Gordon was continuing and responded by asking Bond to "slow down a bit".

14 During the summer of 1988, Bond continued to accumulate an increasingly large position in ITL stock, far exceeding his market-making responsibilities to the TSE as a registered trader. When the position again came to the attention of Bainbridge, his response was to move the entire ITL position from Bond's trading account to a separate account, restore Bond's discretionary acquisitions to its former level of $2 million and instruct Bond not to increase his posi tion in ITL. The sole purpose of these initiatives was to restore Bond to normal and profitable trading activity on behalf of Gordon.

Gordon's Compliance Failures

15 It was clear from the evidence of Peter Hyland, a vice-chairman of Gordon, that, as a group, Gordon's registered traders on the floor of the TSE are provided by Gordon with $10 million in aggregate for the purpose of discretionary principal trading. Taking into account their ability to purchase certain equity securities on margin, this translates into $40 million in purchasing power on a daily basis.

16 The OSC found that Gordon had no procedures in place to ensure regulatory compliance on the part of its registered traders. The registered traders operated by the general "rules of thumb" that they should not commit more than 25 per cent of their capital to any one security and they should not be responsible for more than 25 per cent of the daily trading volume in any one stock. However, these were not hard-and-fast rules and there were no ceilings or restrictions upon the volume or the dollar value of security positions taken by Gordon's registered traders. The OSC found that Bond's trading was monitored by Gordon only to ensure that it was profitable and within margin. Important amendments relating to "take-over" bids were made to the Act in 1987 (S.O. 1987, c. 7) which came into force on June

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30, 1987. The effect of amendments relating to a "take-over" was that any offer for *voting* or *equity* securities — whether made in private negotiations, through the facilities of the Stock Exchange or by a circular — is a take-over bid if the number of securities sought, aggregated with the securities already held by the offeror, crosses the 20 per cent line.

17 The OSC found that Bond did not know of the 1987 amendments to the Act and that his knowledge of the regulatory requirement on take-over bids was limited; also, that Bainbridge, a skilled and experienced floor trader, was not aware of the 1987 amendments. They did not appreciate that the ITL preference shares Bond was buying attracted the take-over provisions of the Act.

18 The OSC dealt in part with the evidence of Peter Hyland as follows [at pp. 2057-2058 O.S.C.B.]:

> Peter Hyland is a Vice-Chairman of Gordon Capital, has some 27 years' experience in the securities industry and heads Gordon Capital's corporate finance operations. Take-over bids are very much within his area of responsibility. Outside legal counsel are invariably brought in on any acquisition proposal being considered by Gordon Capital clients. He stated that the corporate finance department operates behind a Chinese wall and floor traders have no knowledge whatsoever of corporate finance's operations. He described the several levels of activity in which the firm deploys its capital. The first of these is on the trading floor, in the hands of the firm's pro traders. The next level is 'upstairs' on the institutional trading desk. There the firm takes positions for its own account, including the facilitation of client orders by employing the firm's own capital to take the opposite side of such orders. Commitments made at this level, Hyland told us, might typically range from $10 million to $20 million. At the next higher level of commitment of capital is the taking of positions for the firm's own account in arbitrage, in soliciting takeovers or other opportunities of a longer term nature.

19 No one at Gordon with responsibility for supervision of Bond's trading activities knew anything about the take-over bid provisions of the Act. By way of contrast, the "upstairs" traders at Gordon, who like the registered traders engage in principal trading and who as a group have the same amount of discretionary capital to trade with, were educated by Gordon with respect to the take-over bid requirements of the Act.

20 In delivering its decision the OSC stated at p. 42 [p. 2066 O.S.C.B.]:

> In our consideration of the respondents' conduct in this matter, and the appropriate sanctions respecting that conduct, we have declined Mr. Sexton's invitation to study and draw upon the authorities and the decisions of the courts on the varying degrees of negligence addressed in the law of torts. We consider ourselves on better ground if we base our decision, as we do, on our sense of the standards that the investing community is entitled to expect of Exchange members, in the context of and consistent with previous decisions of the Commission and the courts.
>
> We do not accept the respondents' excuses based on the foreseeability of the breaches that occurred.

21 And later at p. 43 [p. 2067, O.S.C.B.]:

> In this rapidly changing regulatory environment, registrants have a continuing obligation to keep themselves aware of new developments and to determine their application to each registrant's particular business and operations. Further, they are under a continuing obligation to take appropriate steps — appropriate each to its own particular business and operations — *to ensure due compliance*. Gordon Capital, in the matters con sidered in this hearing, has failed to meet that obligation.

[Emphasis added.]

Gordon's Track Record

22 In rendering its decision, the OSC took into account, among other things, Gordon's past regulatory violations. These included:

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(a) proceedings before the OSC in 1985 against Gordon and Unicorp Canada Corporation ("Unicorp"), arising out of Unicorp's take-over bid for Union Enterprises Limited ("Union"), that were settled under an agreement which included a reprimand of Gordon and a $1.1 million contribution by Gordon to a fund established for compensation of minority shareholders of Union; and

(b) proceedings before the TSE in 1989 arising from alleged trading violations that resulted in a fine of $20,000 and costs against Gordon's head institutional trader and a fine of $15,000 and costs against Gordon.

23 Both of these regulatory violations involved compliance violations, the jurisdiction of the OSC pursuant to s. 26(1) and *the defence of "due diligence"*.

The Jurisdiction of the OSC and the "Due Diligence" Defence

24 In *Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd.* (1987), 10 O.S.C.B. 1771, 35 B.L.R. 117, 23 Admin. L.R. 285, (sub nom. *CTC Dealer Holdings Ltd. v. Ontario (Securities Commission)*) 59 O.R. (2d) 79, 37 D.L.R. (4th) 94, 21 O.A.C. 216 (Div. Ct.), Reid J., on behalf of the court, reviewed the authorities relating to the jurisdiction of the OSC and the powers conferred upon the court by s. 9 of the Act. He stated in part at p. 104 [D.L.R. (4th)]:

For reasons that have been expressed many times by many courts, the exercise of appeal powers such as these neither calls for nor justifies a trial de novo.

25 And later on the same page:

Such powers have, however, always been used with caution. Out of respect for the expertise of the Commission, for the weight of the responsibility it bears, and for the stature it has achieved in the industry it is called upon to regulate, the courts have repeatedly expressed the view that its actions should not lightly be interfered with.

26 Judicial deference towards the OSC has always been particularly evident in circumstances such as the case at bar where the OSC is exercising its discretionary powers under subs. 26(1) of the Act. The courts of this province have long recognized that it is the intention of the legislature that the commission shall have extremely wide powers of discretion in forming its opinion under this subs. of the Act as to whether, upon a given set of facts, a registrant such as Gordon should suffer suspension, cancellation or restriction of its registration or the imposition of terms and conditions thereupon: *Re Southern Brokerage & Holdings Co.* (June 1967), O.S.C.B. 4 (C.A.), pp. 4-5, and *Ontario (Securities Commission) v. Mitchell*, [1957] O.W.N. 595, 12 D.L.R. (2d) 221 (C.A.), at p. 599 [O.W.N.].

27 As indicated earlier, Gordon is not charged with an offence. We have not been referred to any case holding, either expressly or by analogy, that the due diligence defence applies to a subs. 26(1) hearing.

28 The general legislative purpose of the Act and the OSC's role thereunder is to preserve the integrity of the capital markets of Ontario and protect the investing public. In this context, the proceedings against Gordon and Bond under subs. 26(1) of the Act are properly characterized as regulatory, protective or corrective. The primary purpose of the proceedings is to maintain standards of behaviour and regulate the conduct of those who are licensed to carry on business in the securities industry. The proceedings are not criminal or quasi-criminal in their design or punitive in their object. This distinction has been made in a number of cases involving proceedings of a regulatory or public protective nature such as that under subs. 26(1) of the Act: *Barry v. Alberta (Securities Commission)* (1986), 67 A.R. 222, 25 D.L.R. (4th) 730, 24 C.R.R. 9 (C.A.), at pp. 735-736 [D.L.R.], affirmed (sub. nom. *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301, 35 Admin. L.R. 1, 93 N.R. 1, 65 Alta. L.R. (2d) 97, [1989] 3 W.W.R. 456, 57 D.L.R. (4th) 458, 96 A.R. 241, at pp. 314 and 320-321 [S.C.R.]; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, [1988] 1 W.W.R. 193, 61 Sask. R. 105, 60 C.R. (3d) 193, 81 N.R. 161, 28 Admin. L.R. 294, 24 O.A.C. 321, 45 D.L.R. (4th) 235, 32 C.R.R. 219, 37 C.C.C. (3d) 385, at p. 560 [S.C.R.]; and *Harmatiuk v. Pasqua Hospital* (1987), 25 Admin. L.R. 157, 87 C.L.L.C. 17,021, 17 C.C.E.L.

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121, [1987] 5 W.W.R. 98, 56 Sask.R. 241, 8 C.H.R.R. D/4242, 42 D.L.R. (4th) 134, 31 C.R.R. 174 (C.A.), at pp. 174-175 [Admin. L.R.].

29 For example in *Barry v. Alberta (Securities Commission)*, the appellants were charged with an offence under the Alberta *Securities Act*, S.A. 1981, c. S-6.1 (making false statements in a prospectus). Subsequently, the Alberta Securities Commission issued a notice of hearing to determine whether the appellants should be subjected to a cease-trading order and certain other disciplinary sanctions. These allegations under the *Securities Act* were the same as those forming the subject of the charges under the same Act. The hearing before the commission was postponed pending the disposition of the charges. The charges were dismissed by the Provincial Court. Thereafter the commission held that it had jurisdiction to proceed. The appellants then appealed to the Court of Appeal alleging, inter alia, that they were being tried twice for the same offence in violation of s. 11(*h*) of the *Canadian Charter of Rights and Freedoms*. In delivering the unanimousjudgment of the court dismissing the appeal, Stevenson J.A., as he then was, stated at p. 736 [D.L.R. (4th)]:

> I do not read s. 11 as touching upon all proceedings arising out of prohibited conduct, but only to those in which the sanctions can be characterized as criminal or *quasi*-criminal, as distinct from protective. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, proceedings to determine qualifications for a licence are not to be characterized as criminal or *quasi*-criminal.
>
> . . . . .
>
> While the result of these proceedings may be seen by the appellants as punitive, the object of both the hearing and the remedies available is a protective one. I have no hesitation in distinguishing these proceedings from criminal or *quasi*-criminal proceedings where public protection is but one object. In my view s. 11 has no application to this hearing.

30 As indicated above this decision was affirmed by the Supreme Court of Canada. However, it should be stated that, before the case was to be heard, the appellant to the Supreme Court of Canada informed the court that he was abandoning any argument based on the *Charter of Rights and Freedoms*.

31 In *R. v. Wigglesworth*, supra, the Supreme Court of Canada held that the conviction of an R.C.M.P. constable for a "major service offence" under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, did not preclude subsequent proceedings under the *Criminal Code*, R.S.C. 1985, c. C-46, for the same misconduct; it was held that the appellant constable did not have the benefit of s. 11(*h*) of the *Charter* because he was not being tried for the same offence.

32 *Barry v. Alberta (Securities Commission)* was expressly approved by the Supreme Court of Canada in *Wigglesworth*. In delivering judgment for the majority, Wilson J. stated at p. 560 [S.C.R.]:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Re Law Society of Manitoba and Savino, supra*, at p. 292, *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544 (H.C.), at p. 549, and *Re Barry and Alberta Securities Commission, supra*, at p. 736, *per* Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.

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33 Of course if Gordon had been charged with breaches of the Act under s. 118, the defence of due diligence would have been available to it. Such charges result in criminal or quasi-criminal proceedings with penal consequences; a conviction under s. 118 can lead to a fine or imprisonment or to both.

34 The decisions in the last-mentioned cases support the proposition that the classification of criminal and quasi-criminal offences into categories of "absolute liability", "strict liability" and full "mens rea" as defined in *R. v. Sault Ste. Marie* is irrelevant to proceedings under subs. 26(1). The fact that Gordon may have acted without malevolent motive and inadvertently is not determinative of the right of the OSC to exercise its regulatory and discretionary powers to impose a sanc tion upon Gordon.

35 For the above reasons, Gordon has failed to demonstrate that the OSC has committed any error in law in rejecting the defence of due diligence.

Was the Penalty Disproportionate to the Conduct in Question?

36 There is no definition of the phrase "the public interest" in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion: *Ontario (Securities Commission) v. Mitchell*, supra, at p. 599 [O.W.N.].

37 The scope of the OSC's discretion in defining "the public interest" standard under subs. 26(1) is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public: *W.D. Latimer Co. v. Bray* (sub nom. *W.D. Latimer Co. v. Ontario (Attorney General)* (1973), 2 O.R. (2d) 391, 43 D.L.R. (3d) 58 (Div. Ct.), at p. 393 [O.R.], affirmed (1974), 6 O.R. (2d) 129, 52 D.L.R. (3d) 161 (C.A.) and *Ontario (Securities Commission) v. Mitchell*, supra, at p. 599 [O.W.N.].

38 Based upon the activities, the OSC should be accorded a particularly broad latitude in formulating its opinion as to the public interest in matters relating to the activities of registrants such as Gordon under subs. 26(1) of the Act. As reflected in its decision, the OSC insists that registrants such as Gordon remain abreast of all of the laws and policies governing the securities industry in Ontario and that they abide by them in the operation of all aspects of their businesses. In my opinion, this insistence is imperative in the public interest. The OSC did not suspend Gordon's registration. The order merely imposed a condition on the registration of Gordon that for 10 business days it be restricted from engaging in principal trading.

39 In imposing this sanction the OSC commented as follows [at p. 2068 O.S.C.B.]:

> In this case, Gordon Capital is a successful and influential firm; Bainbridge and other senior management personnel at Gordon Capital have many years' experience in their fields and are perceived as leaders and setters of standards in the firm's areas of specialization. This status has its rewards and also carries with it a corresponding responsibility for the highest level of regulatory compliance.

40 I see no basis for interference with the order under appeal.

The Territorial Scope of the OSC Order:

41 After the OSC rendered its reasons for decision on May 24, 1990, Gordon requested and was granted a further hearing before the OSC (the second hearing). Among other things Gordon sought a stay of the OSC order pending the decision of the Divisional Court. Also, prior to the second hearing Gordon had written to the OSC staff raising a number of questions for clarification relative to the OSC order of May 24. None of the questions related in any way to the territorial scope of the OSC order.

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42 The issue of the territorial scope of the OSC order was raised for the first time by the TSE in a letter to the OSC staff dated May 30, 1990. The matter was put in issue by counsel for the TSE at the second hearing. However, counsel for the TSE did not take a position on the issue. In responding to a direct question from the OSC panel regarding Gordon's position on the issue, Thomas Allen ("Allen"), a lawyer and senior officer of Gordon, indicated that Gordon did not wish to make any submissions on the issue. Allen further assured the OSC panel that Gordon had no intention of engaging in activities which the panel "would regard as circumventing its order".

43 Still later, at the second hearing, counsel for Gordon assured the OSC that Gordon had no intention of moving its Toronto business elsewhere to circumvent the order, and confirming that its New York subsidiary would carry on only its normal business activities during the currency of the order, and undertaking to the OSC to advise its staff of any change in Gordon's stated position.

44 After the OSC had made its order at the conclusion of the second hearing, counsel for Gordon wrote to the OSC and, without purporting to resile from the assurances and undertaking given by Allen at the second hearing, requested that the issue of the territorial scope of the order be reopened. The OSC declined this request.

45 There was little or no evidence before the OSC concerning the nature and extent of Gordon's business activities outside of the province of Ontario. The OSC order at the second hearing dealt with this matter as follows:

> AND IT IS FURTHER ORDERED (but not in limitation of the power of the Commission under section 140 of the Act) that the Acting Director of Enforcement be and is hereby appointed to respond to any further questions which Gordon Capital may pose prior to and during the ten business days commencing June 18, 1990, with respect to the scope and effect of the Order so as to assist Gordon Capital in complying with the terms thereof.

46 In the circumstances herein the issue of territorial scope is one of some complexity. I do not propose to say more than that. In my opinion, there is not a sufficient evidentiary basis upon which this court could deal with this matter as a fresh issue on appeal.

47 The appeal is dismissed with costs to the respondents fixed at $3,500 plus assessable disbursements.

48 As indicated earlier, the OSC granted Gordon a stay of its order pending the disposition of this appeal. An order will go that this matter be returned to the OSC to fix a date for the commencement of the "10 business days" suspension imposed herein by its order of May 24, 1990.

Appeal dismissed.

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Tab 14

1997 CarswellOnt 31
Ontario Court of Appeal

Confederation Treasury Services Ltd., Re

1997 CarswellOnt 31, [1997] O.J. No. 67, 43 C.B.R. (3d) 4, 68 A.C.W.S. (3d) 396, 96 O.A.C. 75

In the matter of the Bankruptcy of Confederation Treasury Services Limited, a corporation incorporated under the laws of the Province of Ontario having its head office in the City of Toronto, in the Municipality of Metropolitan Toronto, Province of Ontario; in the matter of the Winding-Up Act; in the matter of the Liquidation of Confederation Life Insurance

Catzman, Carthy and Moldaver JJ.A.

Heard: December 19, 1996
Judgment: January 14, 1997
Docket: CA M19800, C24399

Counsel: *Peter H. Griffin* and *Risa Kirshblum*, for Ernst & Young.
A. Sternberg, for former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited.
William G. Horton, for rehabilitator of Confederation Life Insurance Company in the United States.
R.N. Robertson and *E. Lamek*, for trustee of estate of Confederation Treasury Services Limited, a bankrupt.

Subject: Insolvency; Insurance; Civil Practice and Procedure

MOTION for leave to extend time to appeal disallowance of claim in bankruptcy; APPEAL from order disallowing claim.

Endorsement. ***Per curiam*:**

1 Ernst & Young ("E&Y") filed a proof of claim, dated February 21 st, 1996, with the trustee of the estate of Confederation Treasury Services Limited ("the trustee"). In one of several orders made on April 8th, 1996, Farley J. granted a motion by the trustee disallowing E&Y's proof of claim. No appeal was taken from this order until its significance became apparent during the argument of the appeal from another order made by Farley J. on the same day. In that appeal, E&Y and the former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited ("the directors and officers") sought an order that would entitle them to assert a claim against the trustee for relief arising out of their potential liability in an action now pending in Michigan. But only a creditor may seek such leave: see ss. 69 *ff.* of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the *BIA*"). Section 2 of the *BIA* defines "creditor" to mean a person having a claim, preferred, secured or unsecured, provable as a claim under the *Act*, and defines "claim provable in bankruptcy", "provable claim" and "claim provable" to include any claim or liability provable in proceedings under the *Act* by a creditor. The trustee resisted the other appeal on a number of grounds, including the ground that, because E&Y's proof of claim had been disallowed, it was not a "creditor" entitled to the relief it sought.

2 E&Y immediately brought this motion for leave to extend the time to appeal from the order disallowing its proof of claim. The uncontradicted evidence of E&Y is that it always intended to appeal the whole of the disposition of Farley J. made on April 8th, 1996 which had the result of foreclosing its entitlement to assert a claim for contribution and indemnity from the trustee, and we are not satisfied that the trustee would suffer any prejudice from the granting of such leave. Leave to extend the time to appeal from the order disallowing the proof of claim is therefore granted.

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3 We turn to the appeal itself. Section 121 of the *BIA* deems all debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt to be claims provable in proceedings under the Act. Section 121(2) makes specific reference to contingent claims and unliquidated claims. The claim of E&Y is, on its face, a contingent claim and, because E&Y is subject to a claim for treble damages in the Michigan proceedings, is not the same as the claim asserted against the trustee in Ontario by the Rehabilitator and exceeds that claim to the extent that any such damages may be awarded over and above the amount that may be awarded against the trustee.

4 In so far as the cases of *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 (Sask. Q.B.), and *Re Wiebe* (1995), 30 C.B.R. (3d) 109 (Ont. Bktcy.), relied upon by the trustee, articulate as a test for a valid contingent claim the need for probability of liability arising from the court proceedings in question, we believe that they impose too high a threshold for the establishment of such a claim. While there may be claims so remote and speculative in nature that they could not properly be considered contingent claims, the claim of E&Y in the present case for contribution and indemnity in respect of the relief sought against it in the Michigan proceedings does not fall into that category and, in our view, constitutes a valid contingent claim within the contemplation of sec. 121 of the *BIA*.

5 Accordingly, the appeal from the order disallowing E&Y's proof of claim is allowed and, in its place, a declaration will issue that E&Y's contingent claim is a claim provable in the bankruptcy of Confederation Treasury Services Limited. Pursuant to s. 121(2) of the *BIA*, the matter is remitted to the Ontario Court (General Division) to value E&Y's claim upon such evidence as may be adduced by the parties in respect of such valuation and E&Y's claim shall be deemed a proved claim to the amount of its valuation.

6 It has been common ground throughout the argument of these appeals that the directors and officers, who have not yet filed a proof of claim with the trustee, fall into the same category as E&Y with respect to the relief sought against them in the Michigan proceedings. Such a proof of claim, as and when it is filed by the directors and officers, is to be treated in the same manner as we have directed in respect of E&Y's proof of claim.

7 Having regard to the circumstances out of which the appeal from the disallowance of E&Y's proof of claim arose, we order that there should be no costs of this appeal except the usual order for payment of the costs of the trustee out of the estate of Confederation Treasury Services Limited.

Order accordingly.

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Tab 15

HMANALY N§2
Houlden & Morawetz Analysis N§2

Houlden and Morawetz Bankruptcy and Insolvency Analysis
COMPANIES' CREDITORS ARRANGEMENT ACT
Section 1
L.W. Houlden and Geoffrey B. Morawetz

N§2 — Purpose of the CCAA

N§2 — Purpose of the *CCAA*

See s. 1

While the *CCAA* does not have an express objective clause, its long title, *An Act to facilitate compromises and arrangements between companies and their creditors* indicates that its objective is to assist insolvent companies in developing and seeking approval of compromises and arrangements with their creditors. The *CCAA* has a broad remedial purpose, giving a debtor company an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to devise a plan that will enable it to meet the demands of its creditors through refinancing with new lending, equity financing or the sale of the business as a going concern. This alternative may give the creditors of all classes a larger return and protect the jobs of the company's employees: *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.). However, the *CCAA* should not be the last gasp of a dying company; if it is to be implemented, it should be implemented at a stage prior to the death throes: *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.).

The decided cases have identified the following purposes of the legislation:

• to permit an insolvent company to avoid or be discharged from bankruptcy by making a composition or arrangement with its creditors: *Browne v. Southern Canada Power Co.* (1941), 23 C.B.R. 131, 71 Que. K.B. 136 (Que. C.A.); *Multidev Immobilia Inc. v. S.A. Just Invest.* (1988), 1988 CarswellQue 38, 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (Que. S.C.);

• to preserve the insolvent company as a viable operation and to reorganize its affairs to the benefit not only of the debtor but of the creditors: *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C. S.C.); *Milner Greenhouses, supra; Re D.W. McIntosh Ltd.* (1939), 1939 CarswellOnt 87, 21 C.B.R. 206 (Ont. S.C.); *Re Avery Construction Co.* (1942), 1942 CarswellOnt 86, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.); *Re Arthur Flint Co.* (1944), 1944 CarswellOnt 59, 25 C.B.R. 156, [1944] O.W.N. 325, [1944] 3 D.L.R. 13 (Ont. S.C.); *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165, 1991 CarswellOnt 182, 2 P.P.S.A.C. (2d) 21 (Ont. Gen. Div.);

• to maintain the *status quo* for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain the approval of its creditors for a proposed arrangement that will enable the company to remain in operation for the future benefit of the company and its creditors: *Meridian Dev. Inc. v. Toronto Dominion Bank, supra; Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C. S.C.); *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.); *Milner Greenhouses Ltd. v. Saskatchewan* (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.); *Re Blue Range Resource Corp.* (2000), 192 D.L.R. (4th) 281, 2000 ABCA 239, 20 C.B.R. (4th) 187, 2000 CarswellAlta 1004 (Alta. C.A.);

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• to protect the interests of creditors and to permit an orderly administration of the debtor company's affairs: *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 1984 CarswellAlta 259, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, [1984] 5 W.W.R. 215, 53 A.R. 39 (Q.B.);

• to protect an insolvent company from proceedings by creditors that would prevent it from carrying out the terms of a compromise or arrangement: *Feifer v. Frame Manufacturing. Corp.* (1947), 1947 CarswellQue 15, 28 C.B.R. 124, [1947] Que. K.B. 348 (Que. C.A.);

• to permit equal treatment of creditors of the same class: *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 1990 CarswellNS 33, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.);

• to permit a broad balancing of stakeholder interests in the insolvent corporation: *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 41 O.A.C. 282, 1990 CarswellOnt 139, 1 O.R. (3d) 289 (Ont. C.A.); *Re Air Canada [Greater Toronto Airport Authority re gates at new terminal (Toronto)]* (2004), 47 C.B.R. (4th) 189, 2004 CarswellOnt 870 (Ont. S.C.J. [Commercial List]);

• in appropriate circumstances to effect a sale, winding-up or liquidation of a debtor company and its assets: *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157, 2002 CarswellOnt 2254 (Ont. C.A.).

The Supreme Court of Canada has held that the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA,* making the former more responsive to complex reorganizations. The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called on to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. The Supreme Court of Canada held that Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected, notably creditors and employees; and that a workout that allowed the company to survive was optimal. It held that courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed. The Supreme Court of Canada has held that reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs: *Re Ted Leroy Trucking Ltd.*, 2010 CarswellBC 3419, 2010 CarswellBC 3420, [2010] 3 S.C.R. 379, 72 C.B.R. (5th) 170, 2010 SCC 60 (S.C.C.). For a full discussion of this case, see N§101 "Claims under the *Excise Tax Act*".

The Alberta Court of Queen's Bench dismissed the *CCAA* application of the debtor. Justice Romaine found that the debtor met the technical requirements for protection under the *CCAA*; however, it was also clear that if the application for an initial order under the *CCAA* did not succeed, a receivership would follow. In considering an initial order, Justice Romaine held that there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring. Justice Romaine acknowledged that the fundamental purpose of the *CCAA* is to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets. Here, the debtor was a company with very few employees; relatively minor unsecured debt; it did not carry on a business that had broader community; and there were no social implications that could require greater flexibility from creditors. The major stakeholders in this case were the secured creditors who opposed the application and the equity holders. Justice Romaine concluded that the restructuring options proposed by the debtor were not realistic or commercially reasonable. This case was not one where the secured creditors had acted precipitously, or where the debtor

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had not had a more than adequate opportunity to canvass the market for refinancing and restructuring options. The debtor was most likely a liquidating *CCAA*, and given the lack of confidence and the adversarial relationship between the debtor and the secured creditors at risk, a *CCAA* order was not appropriate in the circumstances: *Alberta Treasury Branches v. Tallgrass Energy Corp.*, 2013 CarswellAlta 1496, 2013 ABQB 432 (Alta. Q.B.).

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP 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., KRI RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

RESPONDING BOOK OF AUTHORITIES OF TARION WARRANTY CORPORATION
(motion returnable June 26, 2018)

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