Court of Appeal File No. C65891

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES INC., BRIDGE ON KING INC. (COLLECTIVELY, THE "APPLICANTS") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

BRIEF OF AUTHORITIES OF THE APPELLANT KSV KOFMAN INC., IN ITS CAPACITY AS MONITOR

VOLUME I OF III

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Court of Appeal File No. C65891

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES INC., BRIDGE ON KING INC. (COLLECTIVELY, THE "APPLICANTS") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

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2017 ONCA 980
Ontario Court of Appeal

2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club)

2017 CarswellOnt 19616, 2017 ONCA 980, 138 O.R. (3d) 561, 286 A.C.W.S. (3d) 589

2105582 Ontario Ltd. o/a Performance Plus Golf Academy and 627496 Ontario Ltd. o/a D & D Electric (Plaintiffs / Respondents) and 375445 Ontario Limited o/a Hydeaway Golf Club and Nicholas Panasiuk, Jr., also known as Nick Panasiuk (Defendants / Appellants)

375445 Ontario Limited o/a Hydeaway Golf Club and Nicholas Panasiuk Jr., also known as Nick Panasiuk (Plaintiffs by counterclaim / Appellants) and 2105582 Ontario Ltd. o/a Performance Plus Golf Academy, 627496 Ontario Ltd. o/a D & D Electric and David Forcellini (Defendants by counterclaim / Respondents)

J.C. MacPherson J.A., R.G. Juriansz J.A., L.B. Roberts J.A.

Heard: October 20, 2017
Judgment: December 14, 2017
Docket: CA C62455

Proceedings: reversed in part *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club)* (2016), 2016 CarswellOnt 21900, 2016 ONSC 3746 ((Ont. S.C.J.)); affirmed *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club)* (2016), 2016 CarswellOnt 21901, 2016 ONSC 5262 ((Ont. S.C.J.))

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***R.G. Juriansz J.A.*:**

1 Hydeaway Golf Club, incorporated as 375445 Ontario Limited, and Nicholas Panasiuk Jr. (collectively, the appellant) leased land to Performance Plus Golf Academy and D & D Electric, incorporated as 2105582 Ontario Ltd. and 627496 Ontario Ltd. (collectively, the respondent), in fall 2006 under an oral agreement. The respondent constructed and operated a driving range on the leased land. The respondent fell into arrears of rent and the appellant terminated the lease on December 6, 2007.

2 The respondent sought damages for the appellant's unlawful distraint and conversion of its trade fixtures and chattels. The trial judge held that all of the claimed assets were trade fixtures and that the appellant was liable to the respondent for compensatory and exemplary damages. On appeal, the appellant argues the trial judge erred by finding liability for conversion, and in any event, the damage award was excessive.

3 For the reasons that follow, I would reject the appellant's attack on the finding of liability, but would allow the appeal in part and set aside the exemplary damages award.

A. FACTUAL BACKGROUND

4 The appellant owned and operated a golf course near Tecumseh, Ontario. Around March 2006, the parties began negotiating a lease for a portion of the appellant's land, which adjoined the golf course but was substantially empty and undeveloped at the time. The respondent intended to construct and operate a driving range on the leased lands.

5 In May through June 2006, the respondent's lawyer prepared drafts of a commercial lease. Ultimately, however, the parties did not execute a written lease. The parties agreed orally that rent would be $3,000 a month, except during winter when it would be $2,000 a month. The tenancy was at will. The lease was governed by the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 ("*CTA*") and the *Statute of Frauds*, R.S.O. 1990, c. S.19.

6 The respondent invested approximately $200,000 to construct the driving range and purchase the necessary equipment. The driving range went into operation around September 2006. The parties' relationship deteriorated and the respondent failed to pay rent for September, October, and November 2007.

7 On November 16, 2007, the appellant gave the respondent a notice of default. Then 10 days later on November 26, 2007, the appellant served a notice of termination of the lease. The notice provided:

> Re: ***"10 Day Prior Written Notice"* — Notice of Termination of Land Lease**
>
> Performance Plus Land Lease

Dave:

> Due to repeated defaults in rent payments,
>
> **Your land lease will terminate 11:59 PM Thursday December 6, 2007.**

If you continue to occupy the leased premises after the expiration date, Section 12.2 "Overholding" will apply and legal action will commence

[Emphasis in original.] [1]

8 On December 3, 2007, via email, the respondent asked to meet the appellant to discuss the lease. The appellant replied the same day:

> No good
>
> I have been forced into legal action
>
> And I am meeting with my lawyer Tues after noon to check on my legal options He will advise you as to the action we will take after our meeting

9 The respondent replied on December 4, 2007:

> Nick: I received your e-mail in which you refuse to meet to resolve this issue therefore I have no choice but to terminate
>
> Our business relation. I am willing to discuss terms for the sale of the Driving facility, along with the teaching academy
>
> I only ask that you wait until after the holidays. I am sure this will meet with your approval as it makes good sense

10 The respondent vacated the premises and removed certain assets from the property on December 6, 2007. However, the appellant called the Ontario Provincial Police ("OPP") and prevented the respondent from removing other assets that evening.

11 On December 20, 2007, the respondent's solicitor sent a letter advising the appellant that the respondent intended to return and remove its "fixtures" prior to January 31, 2008, among other things.

12 The appellant replied to the December 20 letter the next day, stating the respondent would not be allowed on the premises and that their differences would have to be settled in court.

13 Despite the appellant's letter, the respondent returned to the premises on December 23, 2007 to remove an "Xplornet antenna" that was owned by a third party. While the record shows that an argument ensued between the parties on that date, the appellant nonetheless allowed the respondent to remove the antenna.

14 The respondent returned to the premises for the second and final time on February 15, 2008. The respondent was accompanied by a work crew and the OPP. During this visit, the respondent attempted to remove the driving range barrier poles and nets. The appellant claimed ownership of the assets and prevented the respondent from removing them. The OPP suggested the respondent leave and obtain a court order for the return of the disputed assets.

15 The respondent commenced the underlying action by issuing a statement of claim on March 11, 2008.

16 The appellant operated the driving range with the disputed assets until 2014, when the golf course and driving range went out of business. By the time the trial commenced in May 2016, the golf course and driving range had been closed for two years.

B. THE TRIAL JUDGE'S DECISION

17 The parties agreed on a list of disputed assets, which was attached as Schedule A to the trial judge's reasons. [2]

18 The trial judge found the appellant terminated the lease on December 6, 2007. He held that all of the assets in Schedule A were trade fixtures. He found that the respondent attempted to remove the trade fixtures, but was prevented from doing so by the appellant on several occasions. Accordingly, he held the appellant unlawfully distrained the trade fixtures and was liable for damages for the tort of conversion.

19 The trial judge found that the value of the converted trade fixtures was $200,035.28, but reduced that amount by $12,002.11, representing depreciation for the year and a half the respondent had use of them. He ordered $188,033.17 in compensatory damages. In addition, he ordered $80,000 in exemplary damages, calculated as $10,000 per year for the eight years the appellant used the converted assets. The total damages award was $268,033.17.

C. ISSUES ON APPEAL

20 The appellant raises the following issues:

(a) Did the trial judge err by classifying certain assets as trade fixtures or chattels, as opposed to fixtures or leasehold improvements?

(b) Did the trial judge err by holding that the appellant unlawfully distrained the respondent's trade fixtures or chattels?

(c) Did the trial judge err by failing to consider whether the respondent had abandoned its chattels?

(d) Did the trial judge err by awarding exemplary damages in addition to compensatory damages?

D. THE APPELLANT'S POSITION

21 The appellant submits the trial judge erred by classifying the following assets (the "Structural Assets") as trade fixtures:

(a) a driving range deck worth $50,499.81;

(b) a deck canopy worth $23,286.58;

(c) a ball shack worth $7,046.56;

(d) driving range barrier net poles worth $32,264.23; and

(e) driving range barrier nets worth $31,747.65.

22 The appellant describes the deck as a 9,000 square foot wooden platform,[3] with a permanently attached ball shack, covered by a steel canopy. It was affixed to the land with pressure treated wood beams and a cement base. In addition, water and electrical wiring ran through the structure. The 60 foot high barrier poles were drilled 5 feet into the ground and secured with steel anchors. The nets were fastened to the poles with steel clips and cables and were not taken down during winter.

23 The appellant submits that its distraint of the respondent's assets was allowed by s. 41 of the *CTA* and further argues the Structural Assets were not removable trade fixtures. In the appellant's view, the distinction between a removable trade fixture and an immovable fixture is whether the asset is capable of being removed without causing material damage to the premises or the asset. The appellant contends that the Structural Assets were not removable trade fixtures since they could not be removed without material damage to the land.

24 In what it advances as an alternative argument, the appellant repeats its position that the Structural Assets could not be removed without material damage to the lands, and consequently, the trial judge should have found them to be leasehold improvements that remain with the land at the end of a tenancy.

25 Furthermore, the appellant argues that a tenant must remove its trade fixtures before the lease ends or before they vacate the premises. Otherwise, the appellant submits a tenant must be taken to have abandoned them.

26 In a similar vein, the appellant submits that many of the assets, such as the 35,000 golf balls, were not trade fixtures at all but chattels. The respondent was aware of the lease termination date and could have removed the chattels by that date but chose to leave them. The appellant notes the respondent removed certain chattels, such as desks and chairs, by December 6, 2007. This, in the appellant's submission, supports the inference that the respondent abandoned the remaining chattels.

27 Finally, with respect to damages, the appellant submits that exemplary damages should only be awarded in exceptional cases. The appellant argues that courts only award exemplary damages where there is misconduct amounting to a marked departure from ordinary standards of decent behaviour. Since there was no such misconduct in the instant case, the appellant contends the trial judge erred in law by awarding exemplary damages.

E. THE RESPONDENT'S POSITION

28 The respondent submits the trial judge applied the correct law of distress and that all of his findings deserve deference. The respondent submits there is no palpable or overriding error in the trial judge's factual determination that the Structural Assets could be removed without causing material damage. The respondent recognizes that some of the assets in Schedule A are chattels, but submits the appellant prevented it from removing them.

29 Finally, the respondent argues that deference also applies to this court's review of the trial judge's discretionary award of exemplary damages.

F. ANALYSIS

(1) The standard of review

30 The Supreme Court set out the guiding principles on standard of review for appeals from judicial decisions in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.). Questions of law are reviewable for correctness, and questions of fact or questions of mixed fact and law are reviewable for palpable and overriding error, unless there is an extricable question of law: *Housen*, at paras. 8, 10, and 36.

31 The identification of the correct legal standard or test is an extricable question of law, but the application of a legal standard to a set of facts is a question of mixed fact and law: *Housen*, at paras. 27 and 31. I address the standard of review applicable to each issue in the reasons below with this framework in mind.

(2) Did the trial judge err by finding the Structural Assets were trade fixtures?

32 Fixtures are assets that are sufficiently affixed to real property such that they are considered permanent in nature and part of the land. Whether fixtures become part of the land depends on the degree and object of annexation to the land: *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335, 1902 CarswellOnt 399 (Ont. Div. Ct.). This case concerns the fate of fixtures upon termination of a lease. The general rule is that fixtures remain with the land following the end of a tenancy; but not all fixtures fall within this rule.

33 Trade fixtures are assets that are affixed to leased premises by a tenant for trade or commercial purposes. Courts have consistently held that tenants are presumptively allowed to remove trade fixtures at the end of a tenancy so long as the removal does not materially damage the premises: *859587 Ontario Ltd. v. Starmark Property Management Ltd.* (1997), 34 O.R. (3d) 43 (Ont. Gen. Div.), at p. 54, 1997 CarswellOnt 2308 (Ont. Gen. Div.), at para. 31, affirmed, (1998), 40 O.R. (3d) 481, 1998 CarswellOnt 2937 (Ont. C.A.); *Caledonia Service Station Inc. v. Cango Inc.*, 2011 ONCA 184 (Ont. C.A.), at para. 14; *Newfoundland and Labrador Housing Corp. v. Humby*, 2013 NLCA 7 (N.L. C.A.) *per* Rowe J.A. (as he then was), at paras. 22-27. This exception — that trade fixtures do not remain with the land post-tenancy — has a long history in the common law: *Don v. Warner* (1896), 26 S.C.R. 388 (S.C.C.), at pp. 391-92, 1896 CarswellNS 102 (S.C.C.), at para. 8; *Stack*, at p. 338; and *Richardson v. Equitable Fire Insurance Co.*, [1953] 3 D.L.R. 583 (Ont. C.A.), at p. 586, 1953 CarswellOnt 67 (Ont. C.A.), at para. 8.

34 Importantly, as this court held in *Bank of Nova Scotia v. Mitz* (1979), 106 D.L.R. (3d) 534 (Ont. C.A.), at p. 538, 1979 CarswellOnt 741 (Ont. C.A.), at para. 11, there is a distinction in the analysis depending on whether the attempted removal of the disputed asset occurs in the context of a lease versus the sale of real property. In the former case, there appears to be a presumption that a tenant would not have an objective intent to affix an asset on a permanent basis such that it would become part of the real property at the end of the lease: *Bank of Nova Scotia*, at pp. 538-39. In other words, the object of annexation is presumptively not one of permanence.

35 The jurisprudence demonstrates that the determination of whether an asset is a fixture or trade fixture upon termination of a lease is highly fact specific. For example, in *Webb v. Frank Bevis Ltd.*, [1940] 1 All E.R. 247 (dummy), the English Court of Appeal held that a 6,750 square foot shed was a trade fixture and removable by the tenant at the end of the lease. The shed in that case was covered with a corrugated iron roof that rested on wooden posts. The wooden posts, in turn, were affixed to a concrete floor — but not embedded in the concrete. The court held that the shed could be taken apart without damage to the leased premises and was a trade fixture. By contrast, the concrete floor was not a trade fixture since it could not be removed without damage to the leased premises.

36 *Webb* was implicitly affirmed by the United Kingdom House of Lords in *Elitestone Ltd. v. Morris*, [1997] 1 W.L.R. 687 (U.K. H.L.), at p. 691. In *Elitestone*, the House of Lords was asked to determine whether a bungalow constructed on leased real property was a chattel or fixture that was part of the land. The House of Lords affirmed the trial judge's conclusion that the bungalow was part of the land because such determinations depended on the facts of each case: *Elitestone*, *per* Lord Berwick at p. 692 and *per* Lord Clyde at p. 696. It was also significant that the tenant claiming the bungalow did not construct the bungalow. It existed prior to the tenant occupying the premises.

37 Justice Rowe of the Newfoundland Court of Appeal (as he then was) found *Webb* and *Elitestone* to be persuasive authorities in *Humby*. *Humby* concerned a "Butler building", which was a pre-engineered 1,500 square foot steel frame building. It was built by the tenant and supported by metal beams that were bolted into a concrete foundation. There was also electrical wiring throughout the structure. Nevertheless, Rowe J.A. held that the building was a trade fixture that could be removed by the tenant at the end of the lease: *Humby*, at para. 31.

38 The above cases — as well as *Richardson* and *Starmark Property* — demonstrate that the determination of whether an asset is a fixture versus a trade fixture or chattel, is a question of mixed fact and law. In this case, the trial judge applied the three requisite elements of the legal test for a trade fixture: (i) whether the asset is affixed to the ground by the tenant; (ii) whether the asset is used for the purpose of a trade or commerce; and (iii) whether the asset can be removed without material damage to the premises. Only element (iii) was in question at trial.

39 The trial judge found the Structural Assets could be removed without damage to the premises at para. 29 of his reasons. The trial judge was entitled to reject the appellant's evidence regarding material damage that might result if the Structural Assets were removed. Indeed, there was evidence the appellant removed the barrier poles and nets at a later date without material damage. The trial judge committed no palpable or overriding error in concluding the Structural Assets were removable trade fixtures. I would not give effect to this ground of appeal.

(3) Were the Structural Assets leasehold improvements?

40 The appellant's alternative argument that the Structural Assets were actually leasehold improvements has no merit. The Structural Assets cannot be simultaneously both trade fixtures and leasehold improvements. The test for whether an asset is a leasehold improvement is the same as the test for whether an asset is a fixture: *Caledonia Service*, at para. 14. There must be a sufficient degree and object of annexation such that the assets become part of the land. In this sense, a true "fixture" is the same as a leasehold improvement in the context of leases. As explained above, the trial judge made no palpable or overriding error in finding the Structural Assets were trade fixtures. By necessary implication, he found the Structural Assets were not leasehold improvements. I see no basis to interfere with this decision.

(4) Was the appellant's distraint permitted by s. 41 of the CTA?

41 The appellant submits that s. 41 of the *CTA* allows it to distrain the respondent's assets within six months following the end of a lease even if it chose to terminate the lease. I disagree. Section 41 of the *CTA* states:

> **Distress for arrears on leases determined**
>
> 41. A person having any rent due and in arrear, upon any lease for life or lives or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the lease, in the same manner as the person might have done if the lease had not been ended or determined, if the distress is made within six months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.

42 This section has been passed down largely intact from the original English statute in 1709, 8 Anne c. 14, and has remained in its current form since its adoption into Ontario property law at the turn of the 20th century.

43 There is a long history of English courts interpreting the section as extending only the time in which a landlord may exercise distress to six months after the end of a lease so long as the tenant is overholding. See, for example, *Grimwood v. Moss* (1872), L.R. 7 C.P. 360 (Eng. C.P.), *per* Willes and Keating JJ.

44 The basis for this interpretation is that distress is a landlord's self-help remedy that is only available where there is a landlord and tenant relationship. A landlord who terminates a lease and re-takes possession of the premises loses the right to distrain tenant chattels for rent arrears.

45 Contemporary Canadian courts have similarly held that s. 41 only supplants the common law with respect to the time period in which the distress remedy must be exercised. It allows a landlord to distrain an overholding tenant's chattels within six months following the end or determination of a lease. It does not change the common law rule that a landlord cannot distrain tenant chattels, regardless of timing, if the landlord terminates or forfeits the lease: *Mundell v. 796586 Ontario Ltd.*, [1996] O.J. No. 2532 (Ont. Gen. Div.), at para. 8; and *Dubien v. Beechwood Promenade Inc.*, 1992 CarswellOnt 555 (Ont. Gen. Div.), at para. 8 (discussing s. 41 of the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, which was the precursor to the *CTA*). See also *Ian F. Brown Ltd. v. Carling O'Keefe Breweries of Canada Ltd.* (1989), 64 D.L.R. (4th) 710 (Alta. Q.B.), at pp. 713-14, [1989] A.J. No. 1172 (Alta. Q.B.); *Mybrie Investments Ltd. v. Icana Techno Corp.*, [1997] B.C.J. No. 2475 (B.C. S.C.), at paras. 42-43; and *C.K. Franchising Inc. v. Kassett*, 2012 SKQB 52 (Sask. Q.B.), at para. 133. The appellant lost the right to distrain the respondent's assets when it elected to terminate the lease.

46 In any event, the appellant cannot rely entirely on s. 41 of the *CTA* because this case involves trade fixtures. This court made clear that trade fixtures, while they remain affixed to the land, are never subject to the landlord's remedy of distress in *859587 Ontario Ltd. v. Starmark Property Management Ltd.* (1998), 40 O.R. (3d) 481 (Ont. C.A.), at pp. 487-88, 1998 CarswellOnt 2937 (Ont. C.A.), at paras. 13-15, affirming (1997), 34 O.R. (3d) 43 (Ont. Gen. Div.), at p. 54, 1997 CarswellOnt 2308 (Ont. Gen. Div.). As Doherty J.A. explained in *Starmark Property*, at para. 9, this is because "distraint runs against the tenant's property found on the land and not against the land itself". Trade fixtures may only be distrained when they have been severed from the land and resume their nature as chattels. The *ratio* from *Starmark Property* alone disposes of the appellant's argument that it was entitled to distrain the Structural Assets.

47 The trial judge did not err in concluding the appellant engaged in an unlawful distraint in this case.

48 Nevertheless, the appellant argues that certain assets classified by the trial judge as trade fixtures were in fact chattels. The appellant submits that it did not convert the respondent's assets because they were abandoned. I turn then to analyze these issues.

(5) Did the trial judge misclassify certain chattels as trade fixtures?

49 The list of assets in Schedule A includes:

- 6 custom refuse containers;
- 8 outdoor bench tables;
- a number of flower pots and planters;
- a desk and chair; and
- 35,000 recovered golf balls.

50 As noted, one of the elements of the legal test for a trade fixture is that the asset must be affixed to the ground. It is not surprising that the evidence indicated these assets were not affixed to the ground in any manner. The respondent concedes the trial judge erroneously misclassified these assets as trade fixtures instead of chattels.

(6) Did the trial judge err by not finding the respondent's assets were abandoned?

51 The appellant submits the respondent abandoned its assets by not removing them before December 6, 2007. Abandonment was raised at trial but was not addressed in the trial judge's reasons. As a result, it falls to this court to determine the issue of abandonment based on the trial judge's findings of fact.

52 Abandonment is a defence to conversion. It occurs when there is a "giving up, a total desertion, and absolute relinquishment" of one's interest in chattels: *Simpson v. Gowers* (1981), 121 D.L.R. (3d) 709 (Ont. C.A.), at p. 711, quoting

R.A. Brown, *The Law of Personal Property*, 2nd ed. (1955), at p. 9. The party alleging abandonment bears the onus of proving, on a balance of probabilities, an objective intent to abandon the chattels. The determination of whether there is a sufficient intent to abandon is a question of fact governed by factors such as the length of time, nature of the chattels, conduct of the parties, and context of the case: *1083994 Ontario Inc. v. Kotsopoulos*, 2012 ONCA 143 (Ont. C.A.), at paras. 17-18.

53 Here, the respondent attempted to either negotiate a sale of his assets to the appellant or a time he could retrieve them. The respondent's lawyer sent letters shortly after the termination of the lease indicating the respondent intended to remove the chattels. The respondent attempted to retrieve the chattels multiple times, each time being thwarted by the appellant. As such, there were no facts to suggest abandonment of chattels or trade fixtures in the instant case.

54 However, with respect to trade fixtures, the appellant also submits a tenant may not remove them after a lease ends and the tenant has given up possession.[4] I disagree.

55 There are exceptions to the appellant's otherwise correct articulation of the general time limit in which a tenant may remove trade fixtures. One such exception is where a lease is for an uncertain term or where the landlord's actions create the circumstance that the tenant had insufficient time to remove its trade fixtures. In those cases, absent a contract otherwise, a tenant may remove its trade fixtures within a reasonable period of time following the end of a lease and after possession of the premises has been given up: *Devine v. Callery* (1917), 40 O.L.R. 505, [1917] O.J. No. 121 (Ont. C.A.); and *Elliot Mortgage & Investment Co. v. Savage* (1979), 14 B.C.L.R. 191, [1979] B.C.J. No. 1153 (B.C. S.C.).

56 The appellant terminated the lease with 10 days' notice in this case. The appellant also prevented the respondent from removing the disputed assets on December 6, 2007 by calling the OPP. As such, the respondent did not abandon its trade fixtures and was entitled to return to the premises to remove them within a reasonable time following the end of the lease and after it vacated the premises.

(7) Did the trial judge err in awarding exemplary damages?

57 As alluded to above, I would set aside the order for exemplary damages. To explain my analysis of this issue, I will first review some general legal principles concerning private law damages before turning to the appropriate measure of damages for conversion in this case.

(a) Compensatory purpose of private law damages

58 The fundamental principle underlying private law remedies is *restitutio in integrum*. Private law damages are meant to be compensatory. In tort, the aim is to restore the plaintiff to the position he or she occupied before the tort occurred. Private law damages are generally not intended to punish the defendant, nor are they intended to place the plaintiff in a position better than the *status quo ex ante*: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C. S.C.), at p. 78 *per* McLachlin J. (as she then was), affirmed (1987), 49 B.C.L.R. (2d) 99 (B.C. C.A.); *Barber v. Vrozos*, 2010 ONCA 570 (Ont. C.A.), at para. 86; and *Rougemount Capital Inc. v. Computer Associates International Inc*, 2016 ONCA 847 (Ont. C.A.), at para. 44.

59 Of course, as the Supreme Court held in *Waterman v. IBM Canada Ltd.*, 2013 SCC 70, [2013] 3 S.C.R. 985 (S.C.C.), at para. 36, there are exceptions to the general compensatory principle of damages in certain circumstances. Some cases call for the additional award of exemplary damages.

60 Exemplary damages could take the form of punitive damages, which are designed to address retribution, deterrence, and denunciation of malicious, oppressive, or high-handed conduct: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.), at paras. 36 and 43; and *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.), at paras. 61-63. Other cases may justify the award of disgorgement damages (*i.e.*, a measure of damages is based upon the tortfeasor's gain as opposed to the plaintiff's loss), which are an alternative to compensatory damages: *United Australia Ltd. v. Barclays Bank Ltd.* (1940), [1941] A.C. 1 (U.K. H.L.); *Cassell & Co. v. Broome*, [1972] 2 W.L.R.

645 (U.K. H.L.), at pp. 675-76 *per* Lord Hailsham and pp. 723-24 *per* Lord Diplock; and *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477 (S.C.C.), at para. 93.

(b) Measure of damages for conversion

61 Conversion is a strict liability tort. If established, a tortfeasor will be forced to purchase the converted asset from the plaintiff. The general measure of damages is the market value of the converted asset as of the date of conversion: *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.) [hereinafter Asamera], at p. 652.

62 Conversion is distinct from its companion tort — detinue. Whereas conversion is a single wrongful assertion of dominion over personal property, detinue is the continuous wrongful detention of personal property: *General & Finance Facilities Ltd. v. Cooks Cars Ltd.*, [1963] 1 W.L.R. 644 (Eng. C.A.), at p. 648; *Simpson*, at p. 711; *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 (S.C.C.), at paras. 31-32; and *Musson v. Memorial University of Newfoundland*, [2002] O.J. No. 668 (Ont. S.C.J.), at para. 85, affirmed 2002 CarswellOnt 3336 (Ont. C.A.). The general remedy in detinue is the return of the asset (or damages for its market value as of the end of trial) plus damages representing the "rental" of the asset by the tortfeasor during the detention: *Asamera*, at p. 652.

63 Nevertheless, the general measure of damages for intentional proprietary torts, such as conversion, may be substituted in certain circumstances. One such circumstance is known as "waiver of tort". Waiver of tort allows a plaintiff to claim disgorgement damages based on the tortfeasor's gain or benefit, instead of compensatory damages based on the loss suffered. However, a plaintiff cannot claim both compensatory damages as well as disgorgement damages since that would result in overcompensation. A plaintiff must elect either compensatory or disgorgement damages: *United Australia*, at pp. 29-30; and *Pro-Sys*, at para. 93.

(c) Standard of review on appeals of damage awards

64 A trial judge's damages award is owed considerable deference: *Rougemount*, at para. 41. In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943 (S.C.C.), at para. 80, the Supreme Court held that an appellate court should only intervene in the award of damages where:

> the trial judge made an error of principle or law, or misapprehended the evidence, or it could be shown there was no evidence on which the trial judge could have reached his or her conclusion, 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. Where one or more of these conditions are met, however, the appellate court is obliged to interfere.
>
> [Citations omitted.]

65 The failure to apply the compensation principle underlying private law damages is an error of law: *Barber*, at para. 86. Here, the trial judge's award of both compensatory and disgorgement damages absent factual findings that support such an exceptional order resulted in double recovery for the respondent. As a result, the trial judge's award of damages is reviewable for correctness.

(d) The award of "exemplary" damages in this case

66 The trial judge stated at paras. 32 and 34-35 of his reasons:

> In addition to this amount, the plaintiffs are claiming unjust enrichment, loss of use, general damages, punitive damages, exemplary damages, trespass and conversion as the defendants continued to use the trade fixtures of the plaintiffs for a period of approximately eight years. Mr. Panasiuk alleges he did not make money and ultimately the golf course has closed but the fact is he was using the plaintiffs' equipment illegally.
>
> [. . .]

> Mr. Panasiuk alleges that the golf course, because of the relocation of certain of the holes to accommodate the driving range, had an adverse impact on the golf course itself which ultimately ended up in it being closed but as I have indicated previously it was he who selected the location of the driving range and it was he who terminated the lease and <u>used the driving range equipment and structures illegally for his own purpose</u>.
>
> In my opinion, the plaintiffs were entitled to additional damages and that <u>$80,000 is the appropriate dollar amount for the exemplary damages claim being $10,000 per year for eight years use</u>.
>
> [Emphasis added.]

67 These reasons do not provide any basis for an award of punitive or disgorgement damages. The trial judge did not find the conversion was malicious or high-handed in a manner constituting a marked departure from ordinary standards of decent behaviour. Rather, the record shows that the appellant had an honest belief that the Structural Assets did in fact become part of the land and should have remained with the land.

68 Furthermore, it is not clear whether the trial judge's "exemplary" damages order was meant to be a punitive damages award. The language he used is more consistent with an award of disgorgement damages that was measured based on the appellant's gain from the unlawful use of the converted assets. However, the respondent did not specifically claim disgorgement damages in its amended statement of claim and the trial judge made no factual findings that supports an order of both disgorgement damages and compensatory damages. As such, it was an error to award the additional $80,000 for the conversion of the respondent's assets even if the trial judge intended to award disgorgement damages.

(e) Propriety of the "exemplary" damages in this case

69 The record before this court shows the instant case was framed in terms of conversion. Moreover, the trial judge's reasons, at paras. 20-22 and 29, indicate he considered the case to be one of conversion and not detinue. As such, the applicable measure of damages was the market value of the converted assets as of the date of conversion.[5] The trial judge found the market value of those assets to be $188,033.17 and awarded compensatory damages in this amount.

70 The trial judge should not have awarded the additional $80,000 in "exemplary" damages. The respondent's witness' testimony demonstrated that the respondent wanted the return of the assets because the respondent intended to sell them to a buyer. In fact, the respondent's witness testified that the respondent wanted to sell certain assets to the appellant. Therefore, the $188,033.17 damages award, reflecting the market value of the converted assets, fully compensated the respondent in this case.

71 There was no evidence to suggest the respondent intended to continue operating a driving range business elsewhere or that the converted assets appreciated in value. As such, there was no basis to award additional compensatory damages for consequential lost chance of profits. The respondent's loss of the time value of money due to the conversion is satisfied by an award of prejudgment interest.

72 The "exemplary" damages award in this case results in double recovery for the respondent because the appellant has already "purchased" the converted assets at their market price. They became the appellant's assets. Absent an exceptional circumstance as referenced above, any benefit that the appellant might obtain from the converted assets after they were purchased rightly accrues to the appellant.

73 The respondent was fully compensated by the damages award of $188,033.17 for conversion of the trade fixtures and chattels. The respondent is not entitled to additional "exemplary" damages reflecting the purported benefits obtained by the appellant after the date of conversion in this case.

G. DISPOSITION

74 I would allow the appeal in part and would set aside the award of the additional $80,000 described as "exemplary" damages. I would dismiss all the other grounds of appeal.

75 Counsel for both parties agreed that partial indemnity costs of the appeal were approximately $30,000 at the hearing. In light of the appellant's partial success, I would fix costs of the appeal in the appellant's favour at $10,000. I would not disturb the trial judge's costs award for the proceedings below.

***J.C. MacPherson J.A.*:**

I agree.

***L.B. Roberts J.A.*:**

I agree.

Schedule "A" — List of Assets

Schedule "A"

Equipment, Supplies And Materials	*Costs (excluding labour)*
L.B. Jack Tree and Pole Line Construction Invoices: 05 - 60? wood poles; 31 - 55 foot' class 3 pine poles; 01 - 55? class 3 pine pole Used to hold up barrier nets	$32,264.23
South Padre Island Nets, Inc. ("SPI") invoices 35 Golf Barrier Nets No. 15 Used to prevent balls from escaping golf range	$31,747.65
L.B. Jack Tree and Pole Line Construction Invoices: Snap Hooks Used to secure nets to poles	$2,120.87
Nearly New Golf Balls Inc. Invoices: Used to position the user and provide stability	$10,633.80
Nearly New Golf Balls Inc. Invoices: 27 Bagrests and Steel Dividers Used to separate space for each bay at driving range	$4,309.00
Wooden Deck Chart Supplies, various vendors	$50,499.81
Steel Canopy Chart Supplies, various vendors	$23,286.58
Titan Vending Invoices: 3 Pop vending machines	$3,300.00
Holy Name Tech Dept. Invoice: 6 Custom refuse containers	$557.48
8 Outdoor Sealing Bench Tables, various vendors	$744.95
Flowers/Plants, various vendors 10 Balcony Style Cocoa Basket Planters 18? Window Box Planter	$243.87
Nearly New Golf Balls Inc. invoices Ball Dispenser E-Range Reader	$8,382.42
Wildwood Golf & RV Resort Invoice: Refurbished Ball Picker and Dispenser	$750.00
Ball Shack, RONA Sauve's Home Centre Invoice: Used for Storage of Equipment and Balls	$7,046.56
Nearly New Golf Balls Inc. Invoices:	$1,168.17

05 CAC-RBH Range Banner 13 CAC-RBH 50 02 CAC-RBH 50 Range Banners Used as Yardage Markers	
Recovered Balls Interall Invoice:	$10,584.37
35,000 Golf Balls	
Engle Office Furnishings Invoice:	$983.82
Reception Counter Used inside the Academy	
Monarch Office Supplies Invoice	*$411.70*
Desk and Chair Used inside the Academy	
TOTAL	*$189,035.28*

Footnotes

1 The record contains no explanation of what Section 12.2 is or where it comes from. It may be the case that Section 12.2 came from one of the draft leases, but the parties admitted at trial that the draft written leases were never signed and were of no force or effect.

2 Schedule A has been attached as a schedule to these reasons as well.

3 Based on the diagram filed in the trial record and in the Appeal Book and Compendium, Volume 2, Tab 17(F), the square footage of the deck appears to be approximately 7,000 square feet.

4 The appellant also submits that leasehold improvements may not be removed post-tenancy. However, leasehold improvements may never be removed by a tenant, absent a contract otherwise, since they become part of the land. Moreover, the Nova Scotia cases of *Frank Georges Island Investments Ltd. v. Ocean Farmers Ltd.* (2000), 182 N.S.R. (2d) 201 (N.S. S.C. [In Chambers]), at paras. 69-73, 2000 CarswellNS 74 (N.S. S.C. [In Chambers]) and *Carabin v. Offman* (1988), 55 D.L.R. (4th) 135 (N.S. C.A.), at pp. 137 and 151, 1988 CarswellNS 86 (N.S. C.A.) cited by the appellant do not support the appellant's proposition as those cases concerned trade fixtures.

5 The trial judge's award of damages would have also been incorrect assuming he considered the claim to be for detinue. In that case, he should have deducted eight years' worth of depreciation from the value of the disputed assets instead of one and a half.

At para. 16

2003 CarswellOnt 115
Ontario Court of Appeal

Algoma Steel Inc. v. Union Gas Ltd.

2003 CarswellOnt 115, [2003] O.J. No. 71, 119 A.C.W.S. (3d) 520, 169 O.A.C. 89, 39 C.B.R. (4th) 5, 63 O.R. (3d) 78

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 and the Business Corporations Act, R.S.O. 1990, c. B-16

In the Matter of a Proposed Plan of Arrangement With Respect to Algoma Steel Inc.

Algoma Steel Inc., Applicant (Respondent in Appeal) and Union Gas Limited, Respondent (Appellant in Appeal)

Weiler, Rosenberg, Feldman JJ.A.

Heard: September 10, 2002
Judgment: January 17, 2003
Docket: CA C37904

Proceedings: reversing in part (2001), 30 C.B.R. (4th) 163 (Ont. S.C.J. [Commercial List])

Counsel: *Geoff R. Hall*, for Algoma Steel Inc.
James P. Dube, for Union Gas Ltd.

***Rosenberg J.A.*:**

1 This appeal from an Order of Farley J. concerns the application of legal and equitable set-off in the context of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. On April 23, 2001, the respondent Algoma Steel Inc. obtained an initial order under the *CCAA*. At that time, Algoma was indebted to the appellant Union Gas Limited under two contracts (the 2000 contracts) for gas services in March and April of 2001 amounting to just under $2 million. At the same time, Algoma was entitled to a rebate from Union of approximately $2.2 million plus interest as a result of an overpayment for gas services in 1999. Union sought to set off amounts owed to it by Algoma against the 1999 rebate. The motions judge held that Union had not established a claim for legal set-off. He held that Union had made out a claim for an equitable set-off but only in relation to one of the contracts in the amount of $461,244. Because of various orders made in the *CCAA* proceedings this means that Union must pay the entire amount of the 1999 rebate less the $461,244 and is not entitled to payment of $1,265,934 owed to it under the 2000 contract. Union submits that the motions judge erred in refusing to allow legal set-off and, in the alternative, erred in limiting the scope of equitable set-off.

2 In my view, the motions judge did not err with respect to legal set-off but did err with respect to equitable set-off. Accordingly, I would allow the appeal with costs.

The Facts

The relationship between Algoma and Union

3 The facts are based entirely upon affidavits filed by two employees of Union. Algoma filed no affidavits and did not cross-examine the Union employees. I begin with a summary of the facts that lead to Algoma's entitlement to the $2.2 million rebate. In 1999, Algoma obtained gas on a buy/sell arrangement under which Algoma bought natural gas from a resource supplier (presumably in Western Canada) and sold the gas to Union. Union arranged for the transportation of the gas on its own account and then sold the gas back to Algoma in Ontario when it was needed. In 1999, the relationship

between Union and Algoma was governed by a contract commencing November 1, 1998 and terminating on October 31, 1999. This contract was subject to automatic renewal for successive one-year periods. [1]

4 Under the 1998 contract, Algoma was required to pay for the gas services in accordance with Union's rate schedule as approved by the Ontario Energy Board. These rates are based on many factors including projected costs of gas. If those projections are found to be either too high or too low following the end of a calendar year, Algoma may have either overpaid or underpaid Union. To track actual costs with projected costs, Union established deferral accounts for the various classes of customers. Algoma is in a Rate 100 class. As it happened, in 1999, Algoma and the other Rate 100 customers overpaid and were entitled to a rebate. However, Union could not repay its customers without approval from the Board. Union therefore made an application to the Board in which it proposed to pay the rebates to the customers. The total rebate for the Rate 100 class is just under $4 million. According to the affidavit of the Union employee, Algoma's share of the rebate "approximates $2.2 million". Algoma is also entitled to interest on the rebate accruing from January 1, 2000 at a rate set by the Board.

5 In its July 21, 2001 decision, the Board approved Union's proposal. But instead of authorizing immediate payment, the Board directed Union to bring forward the balances in all of the year 2000 deferral accounts for review. In a further decision dated October 16, 2001, the Board directed Union to continue to hold the balances in the deferral accounts until the 2001 and 2002 rates are implemented and 2000 and 2001 deferral balances are disposed of. According to the Union employee's affidavit, this will not affect Algoma's rebate because it is not entitled to share in the 2000 and 2001 deferral accounts. By the time of the hearing before the motions judge, the Board had not yet indicated when Union could pay the rebate to its customers, including Algoma.

6 I will now deal with the contracts that governed the Union/Algoma relationship when the *CCAA* orders were made. In 2000, Algoma changed its relationship with Union so that it no longer had a buy-sell arrangement. In October 2000, the parties entered into two new contracts. These contracts may conveniently be referred to as the 2000 gas services contract and the assignment agreement. Both contracts covered almost the same period; from November 1, 2000 to October 31, 2001 for the 2000 gas services contract and November 1, 2000 to November 1, 2001 for the assignment agreement. As a result of the new arrangement, Algoma no longer sold the gas to Union and repurchased it from Union in Ontario. Rather, Union assigned its right to access gas transportation capacity directly from TransCanada Pipelines Limited ("TCPL") through Union's contract with TCPL. Algoma thus paid TCPL directly. Importantly, however, if Algoma failed to pay TCPL for use of gas transportation capacity being accessed by it, Union was required to pay TCPL. Algoma was then required to indemnify Union.

7 Under the 2000 gas services contract, Union continued to transport the gas from Union's metering station at the TCPL pipeline to the Algoma plant. That contract included this term:

> This agreement is contingent upon the TCPL Assignment Agreement which is attached as Schedule D and forms an integral part of this arrangement. In the event either of these agreements terminate, the other agreement shall also terminate, unless agreed to otherwise by the parties.

8 As of the April 23, 2001 *CCAA* order, Algoma owed Union $461,244 under the 2000 gas services contract. Further, because Algoma failed to pay TCPL for gas transportation services obtained by Algoma under the assignment agreement, Union was obliged to indemnify TCPL in the amount of $1,265,934. It is these two amounts that Union seeks to set off against the 1999 rebate. As indicated, the motions judge only allowed Union to set off the former amount.

The CCAA Proceedings

9 On April 23, 2001, Algoma obtained an initial order under the *CCAA*. As part of that order, the right of any claimant to assert, enforce or exercise any right of set-off or consolidation of accounts was stayed during the stay period. On November 9, 2001, while the stay period was still in force, Algoma obtained an order to authorize meetings of its creditors to consider its Plan of Arrangement, to establish a process for proving claims and for the subsequent barring

of those claims in return for participating in the Plan. Under this order, an unsecured creditor that had not filed a proof of claim was deemed to have filed one in the amount as valued by Algoma. The creditor was then barred from making or enforcing any such deemed claim after December 12, 2001. Union did not file a proof of claim since it took the view that there was no net balance due from Algoma to Union once the 1999 rebate was factored in. Algoma denied that Union was entitled to a set-off and deemed Union's claim to be in the amounts of $461,244 and $1,265,934.

10 As a result, on November 27, 2001, Union moved before Farley J. for a declaration that its rights of set-off referable to its dealings with Algoma up to April 23, 2001 were not affected by the *CCAA* proceedings. In this way, it sought to prevent its claims from being deemed to have been the subject of a proof of claim and then deemed to have been barred after December 12, 2001. Union relied upon s. 18.1 of the *CCAA*, which preserves rights of set-off. I will set out that section in full below.

The Reasons of the Motions Judge

11 The motions judge noted that a condition for application of legal set-off is that the obligations must be debts, in the sense that they are liquidated amounts. After reviewing the Board rulings and various letters by Union to Algoma, the motions judge concluded that the 1999 rebate was not a liquidated amount. He noted that in the Union employee's affidavit the rebate "approximates $2.2 million". Further communications between Union and its Rate 100 customers suggested that there might not even be a rebate, depending on the decision of the Board. He therefore held that legal set-off had not been made out.

12 As to equitable set-off, the motions judge held that the 2000 gas services contract was in substance a continuation of the 1998 contract. He concluded that there was a "close connection sufficient to ground equitable set-off as to the gas supply portion of the October 15, 2000 Agreement vis-à-vis any rebate which is authorized by the Board, but not any monies owing by Algoma to Union as a result of the November 1, 2000 Transportation Agreement." He therefore limited the equitable set-off as indicated above.

Analysis

General Principles

13 Algoma does not dispute that the law of set-off applies notwithstanding the *CCAA* proceedings. Section 18.1 of the Act makes this clear:

> The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

14 Algoma does, however, submit that set-off claims should be carefully scrutinized where *CCAA* proceedings are underway because the effect is to give preference to certain creditors. As Rowles J.A. said in *Cam-Net Communications v. Vancouver Telephone Co.* (1999), 71 B.C.L.R. (3d) 226 (B.C. C.A.), at 235:

> Using, or rather misusing, the law of set-off is one example of how persons with a claim against the company in reorganization might attempt to escape the CCAA compromise. A party claiming set-off ... realizes its claim on a dollar-for-dollar basis while other creditors, who participated in the CCAA proceedings, have their claims reduced substantially. For this reason, the legislative intent animating the CCAA reorganization regime requires that courts remain vigilant to claims of set-off in the reorganization context.

15 I accept this principle, but I do not see it as a concern in this case. Union operates within a highly regulated regime and the disposition of the rebate is subject to scrutiny by a specialized tribunal. The amounts owing by Algoma to Union are not in doubt.

16 There was some dispute between the parties about the standard of review by this court of the decision of the motions judge. Counsel for Union seemed to suggest that because there is no right of appeal in *CCAA* proceedings and appeals are relatively rare, it was open to this court to review the decision of the motions judge on a standard of correctness even where that decision turned on findings of fact and inferences to be drawn from those facts. In my view, the usual standard of review in appeal proceedings applies and this court is required to give deference to the findings of the motions judge even where, as here, the decision is based on a paper record. The fact that there is no right of appeal and the appeal is only with leave under s. 13 of the Act only reinforces that conclusion. Decisions in the *CCAA* context must often be made quickly. They are, as in this case, usually made by a judge with considerable expertise in the area who has been managing the *CCAA* proceedings and is intimately familiar with the context and the issues at stake.

17 This court and the Supreme Court of Canada have variously described the standard of appellate review. In *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.), at 336, Laskin J.A. wrote as follows:

> Therefore, although the entire record before a trial judge or a motion judge consists of documentary or written evidence, as it does in this case, the judge's factual findings are entitled to deference on appeal. What standard of deference applies in such a case? It is not easy to articulate a standard less deferential than "manifest error" but falling short of "correctness". I suggest that it may simply be a matter of weight or emphasis, or that, plausibly, a uniform standard of appellate review should be applied to a trial judge's findings of fact, whether the evidence is entirely oral, entirely documentary or, more typically, a combination of the two.
>
> What is important for this appeal is the kind of error that justifies intervention by an appellate court. An error of law obviously justifies intervention. An appellate court may interfere with a finding of fact if the trial judge or motion judge disregarded, misapprehended, or failed to appreciate relevant evidence, made a finding not reasonably supported by the evidence, or drew an unreasonable inference from the evidence.

18 More recently the Supreme Court in *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577 (S.C.C.), discussed at some length the standard of appellate review where the appellate court is called upon to review inferences from facts. The court concluded that the standard is one of considerable deference. Iacobucci and Major JJ. described the standard at para. 23 as follows:

> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. *If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion*. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts [emphasis added].

19 On the other hand, where the issue concerns application of a legal standard to a set of facts the question is one of mixed fact and law and a somewhat less deferential standard may be appropriate, although not the standard of correctness required for questions of law. This was described as follows at para. 28:

> However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: Southam, supra, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in Southam, supra, at para. 37:
>
> > ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as

a precedent. *In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact*. See R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future [emphasis added].

20 It seems to me that this appeal concerns both inferences from facts and a question of mixed fact and law. The motions judge's decision about the application of legal set-off turned exclusively on the inferences to be drawn from the undisputed facts in the affidavits. His decision that Union had not shown the rebate as a debt was fact specific. Although Union argues that the motions judge overlooked important facts and misapprehended certain facts, I am not persuaded that the motions judge made any palpable or overriding error. To the contrary, I am satisfied that his decision is supported by the evidence.

21 The decision about equitable set-off is somewhat different since it involves application of a legal standard to a set of facts. As such, it is a question of mixed law and fact. While the assessment by the motions judge is entitled to deference, I am nevertheless of the view that the motions judge erred in his application of the test for equitable set-off to these particular facts.

Legal Set-Off

22 Section 111 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides the statutory framework for legal set-off. Subsections (1) and (2) provide:

(1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

(2) Mutual debts may be set off against each other even if they are of a different nature.

23 The only question on the application of legal set-off in this case was whether the rebate was a debt for the purpose of s. 111. Union accepts that debt means a liquidated sum and argues that the rebate is a liquidated sum because the amount is ascertainable and, save for interest, can neither increase nor decrease. Union submits that the amount is ascertainable and fixed because the Board has accepted its proposal for calculating the amount of the rebate. It also relies on the affidavit evidence that Algoma's share of the rebate for Rate 100 customers will be unaffected by the adjustments for the years 2000 and 2001 deferral accounts.

24 The motions judge, however, was not prepared to draw that inference from the affidavit evidence. He relied upon the fact that Union only provided an estimate of the rebate and his reading of the Board decisions that did not explicitly state that Algoma or any of the other customers would receive a rebate. He also relied upon Union's own communications to its Rate 100 customers that suggested the amount of the rebate was not fixed. In his submissions, counsel for Algoma pointed out a number of facts upon which the decision by the motions judge could rest and that could support the inferences drawn. Counsel pointed out that to overturn the decision of the motions judge, this court would have to be satisfied of the following:

(1) That it was appropriate to sever off the interest part of the rebate, since the rate had not yet been set by the Board.

(2) That no significance should be attached to the use of the term "approximate" in the Union employee's description of the amount of the rebate.

(3) That no significance should be attached to the fact that Union had not provided an exact figure for the amount of the rebate.

(4) That the communications by Union to Algoma and its other customers concerning the uncertainty of the amount of the rebate had no significance.

(5) That there is no significance to the fact that the Board continues to prevent Union from releasing the rebate to Algoma; put another way, that the Board has no good reason for holding up disposition of the rebate.

(6) That the amounts of the rebates cannot change as a result of events in 2002.

25 I am not prepared to say that the motions judge's decision disclosed a palpable and overriding error. Since his decision is supported by the evidence, the evidence supplied by Union itself, this aspect of the appeal must be dismissed.

Equitable Set-Off

26 Equitable set-off is available where there is a claim for a sum whether liquidated or unliquidated. In *Telford v. Holt* (1987), 41 D.L.R. (4th) 385 (S.C.C.) at 398-99, Wilson J., speaking for the court, approved a statement of the applicable principles for equitable set-off found in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C. C.A.) at 696-97. Those principles can be summarized as follows:

1. The party relying on a set-off must show some equitable ground for being protected against the adversary's demands.

2. The equitable ground must go to the very root of the plaintiff's claim.

3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.

4. The plaintiff's claim and the cross-claim need not arise out of the same contract.

5. Unliquidated claims are on the same footing as liquidated claims.

27 In one way or another the first three principles, but particularly the third, are in issue in this case. Put shortly, is the 1999 rebate from the 1998 gas services contract so clearly connected with the amounts owing under the 2000 assignment agreement that it would be manifestly unjust to enforce payment of the rebate without taking into account the amounts owing under the assignment agreement? The motions judge recognized that the assignment agreement was integral to the 2000 gas services agreement, but he refused equitable set-off for the amounts owing under the assignment agreement because it was not the same type of contract as the supply of gas by Union. In my view, this was not a sufficient reason to refuse equitable set-off given the interrelationship between the two 2000 agreements.

28 Kelly R. Palmer in *The Law of Set-Off in Canada* (1993) traces the evolution of the doctrine of equitable set-off from a very strict test in which the "claim raised in set-off had to impeach the title of the plaintiff's claim" [at p. 89] to a somewhat more flexible approach based upon fairness. The leading cases describing, in some fashion, the more modern test are *Coba Industries*; *Telford* and *Federal Commerce & Navigation Co. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066 (Eng. Q.B.) [affirmed on other grounds at (1978), [1979] A.C. 757 (U.K. H.L.)].

29 It seems to me that a very helpful test is set out in a passage from the reasons of Lord Denning in *Federal Commerce* at p. 1078 and which was quoted with apparent approval by Wilson J. in *Telford* at p. 400:

> *We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties?* ... This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. *It is only cross-claims that arise out of the same transaction or are closely connected with it*. And it is only cross-claims

which go directly to impeach the plaintiff's demands, *that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim* [emphasis added].

30 In my view, there is such a close connection between the 2000 gas services contract and the 2000 assignment agreement, that the amounts owing on them cannot be severed for the purposes of equitable set-off. The assignment agreement is attached as a schedule to the 2000 gas services contract and in the event either of the agreements terminates, the other terminates, unless otherwise agreed to by the parties. The parties agreed in the 2000 gas services contract that it was "contingent upon" the assignment agreement and that the latter formed an integral part of the latter. Accepting the correctness of the motion judge's determination that the 1998 and 2000 gas services contracts exhibit a sufficient degree of connection to justify equitable set-off, it seems to me that it would be manifestly unjust to allow Algoma to insist on payment of the rebate arising under the former without allowing Union to set-off all the amounts owing under the 2000 arrangement.

31 The relationship between the parties under the 2000 contracts is different than the relationship under the 1998 contract but they are in a sense nothing more than a successor arrangement to accomplish what had been done under the 1998 contract. Admittedly, under the 2000 assignment agreement, the underlying relationship was between TCPL and Union. Union only became entitled to collect from Algoma because Algoma failed to pay the charges that TCPL was entitled to collect from Union. Under the agreement, Algoma agreed to indemnify Union in those circumstances. However, there is a close connection between the 1998 contract and both of the 2000 contracts because they all, in one way or another, facilitate the supply of gas to Algoma.

32 A helpful example is *Coba Industries*, which was approved by Wilson J. in *Telford*. Palmer describes the facts of *Coba Industries* at p. 133 of his text:

> Hp entered a sale and leaseback of property with the defendant, in the course of which Hp obtained a second mortgage over the property and granted a lease to the defendant. The lease payments were calculated to be sufficient to cover the mortgage payments. Hp assigned the mortgage to the plaintiff who notified the assignment to the defendant. When Hp fell into arrears on the lease, the defendant ceased making mortgage payments. The plaintiff sued for foreclosure, and was met with a claim for set-off.

33 Macfarlane J.A., writing for the court in *Coba Industries*, found several facts that established the close connection necessary for equitable set-off. He wrote at p. 700:

> I think this evidence demonstrates that, from the outset, it was at the heart of any liability on the part of [the defendant] that [Hp] provide and assure payments under the leases sufficient to satisfy payments from time to time under both mortgages.

34 The 1998 contract and 2000 agreements exhibit this kind of connection. Given that the motions judge found that it would be manifestly unjust not to permit Union to set off the amounts owing on the 2000 gas services contract, I conclude that it would be manifestly unjust to allow Algoma to enforce payment of the 2000 rebate without taking into account its liability to Union under the assignment agreement, which formed an integral part of the arrangement between the parties.

Disposition

35 Accordingly, I would allow the appeal with costs on a partial indemnity basis. In accordance with the written submissions of the parties, costs are fixed at $33,111.29.

Appeal allowed in part.

Footnotes

1 Although not stated explicitly in the affidavits, it appears that the contract did renew for a further year.

At p. 713

ANDERSON v. BRADLEY.

Ont.

App. Div.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. October 7, 1921.

FRAUDULENT CONVEYANCES (§VI—30)—GRANT TO SON-IN-LAW—DEBTS—DEATH—CREDITORS—FRAUDULENT PREFERENCE.

The grant of the only property of real value to a relative, leaving no assets for other creditors, will be presumed a fraudulent preference, and will be set aside.

[*Spirett* v. *Willows* (1864), 3 DeG. J. & S. 293; *Freeman* v. *Pope* (1870), L.R. 5, Ch. 538, referred to.]

APPEAL by defendants from the judgment of Orde, J. in an action by the plaintiff, on behalf of himself and all other creditors for a declaration that a conveyance was made with intent to defeat, hinder, and delay creditors, and that the sum paid by the purchaser was an asset of the estate and available for the benefit of such creditors, and for other incidental relief.

The judgment appealed from is as follows:—

The late Robert Sproule had been originally a farmer, but for about 30 years before his death had lived in Cannington, where he carried on a small fur business. The business never prospered, and when he died on the 20th March, 1920, he was insolvent.

On the 7th June, 1915, the plaintiff lent Sproule $225, taking a 12 months' note, with interest at 7 per cent. Sproule paid the interest regularly to the 5th August, 1919. On the 29th December, 1915, the plaintiff lent Sproule a further $200 upon the same terms, upon which interest was paid to December, 1919. Evidence was also given of loans made by other persons to Sproule both before and after April, 1917. One Phillip Dawson lent him $400 in 1916, and in 1917 and 1919 further sums to the amount of $600, making in all $1,000 owing to Dawson at the date of Sproule's death. There were also loans by others within a year before his death.

Sproule's business was not of a substantial character, and when he died he apparently had no business assets whatever. He lived in a house in Cannington built upon two lots which he had purchased in 1888. His daughter, the defendant Phœbe Margaret Bradley, for some time after her marriage had lived with her husband, the defendant Luther Bradley, on his farm in East Whitby, but about 16 years ago, her mother, the defendant Jane Ann Sproule, was taken ill, and the Bradleys gave up their farm and came to Cannington to live with the Sproules. According to the evidence of the Bradleys, it was arranged with Sproule that the Bradleys were to bear half the expense of the house, including the taxes, but that Bradley was to pay for any improve-

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ANDERSON
v.
BRADLEY.

ments to the house. Bradley says that in 1914 he advanced $600 to Sproule on the understanding that the latter was to convey the house to Phœbe Bradley, but subject to the condition that Sproule and his wife were to be maintained during their lives. Bradley says that he had to borrow $300 from the Home Bank and $300 from his mother to enable him to lend the $600 to Sproule. Sproule required the money to pay a note for $600 held by the Standard Bank, and Bradley says he paid the money to the bank, took the note home, and one day, when clearing up, he burned it. He did not get the deer from Sproule in 1914, due he says to his own carelessness. In 1916, he says, the arrangement as to sharing the household expenses was changed and that from then onwards he and Mrs. Bradley assumed all the burden of caring for Mr. and Mrs. Sproule. Sproule was then about 81 years of age and Mrs. Sproule about 84. Bradley says that even prior to the alteration in the arrangement made in 1916 he had been bearing a good deal of the household expenses, but that after that date he bore it wholly, and he estimates his expenditure upon Mr. and Mrs. Sproule for board and clothing and doctors' bills at from $500 to $600 per annum. He spoke to Sproule once or twice after the loan of $600, and asked him if this "fixed everything up," by which he doubtless meant, "if that paid everything Sproule owed." Sproule said it did.

In 1917 Bradley, wanting to get matters "straightened out," asked Sproule for the deed, and accordingly on the 14th April, 1917, Sproule and his wife executed a conveyance of the property to Phœbe Margaret Bradley in fee simple, in consideration of parental love and affection and the sum of one dollar. The habendum is followed by this clause, "and subject also to the said grantor and his said wife and the survivor of them having and enjoying a comfortable and peaceable home on the said lands and premises so long as they or either of them live." And the grantee also covenants "to allow the said grantor and his said wife to have and enjoy a comfortable and peaceable home on said lands and premises as aforesaid," and the bar of dower by Mrs. Sproule is made "subject to the full enjoyment of a comfortable and peaceable home on the said lands and premises as long as she may live." The deed was registered on the 17th April, 1917, but there was no outward or visible change in the occupation of the house, nor did Bradley or his wife or Sproule notify the assessor, the assessment continuing as before in the name of Robert Sproule. Upon his examination for discovery, Bradley had said that the $600 was advanced to Sproule in 1916, but in his cross-examination he explains that upon looking up the bank records he found he was mistaken and that the loan was made in 1914.

The manager of the Standard Bank says that the bank records shew that in December, 1912, Sproule was indebted to the bank upon a note endorsed by one Wilson for $600, and that this was renewed from time to time, the debt being finally paid on the 26th July, 1914. One peculiar feature about this transaction is that the bank records shew that Bradley's name appeared in the liability record on the occasion of the last renewal. Bradley does not explain this, but he says that the reason Sproule had to have the money was that Wilson refused to endorse any further renewals, and it may be that Bradley endorsed for Sproule pending the raising of the money. The records of the Home Bank shew an advance of $300 to Bradley in July, 1914, and Howard Bradley, his brother, says that he went to the bank in Oshawa and got $300 for his mother in the summer of 1914. The elder Mrs. Bradley is now dead, so that it is not possible to corroborate Luther Bradley's statement that he borrowed $300 from his mother. Phœbe Bradley says that the deed was handed to her husband and herself, and was kept in a box in a clothes closet in their bedroom. She corroborates her husband as to their having supported her father and mother during the past 4 years.

It was agreed by counsel that the examination for discovery of Mrs. Sproule should be treated as evidence given by her at the trial. She says she knew nothing about the $600 advance or about the arrangement as to the deed. The first she knew about the deed was Mr. Sproule's telling her that he was going to give the place over to Luther and Phœbe, and the latter were to support them while they lived. Nothing was said then about the $600 loan. Mr. Hart, the conveyancer who drew the deed and witnessed its execution, says he drew it upon instructions received from Mr. Sproule. Nothing was said to him about the $600.

Bradley says he knew nothing of Sproule's fur business, that he knew nothing of Sproule's having any debts until after the deed had been signed, and that it was about two years ago that he first learned that Sproule owed Dawson some money. But he admits on cross-examination that he wanted to get the house for his wife because he was afraid he and his wife might lose it and also that he wished to secure the $600.

On the 20th July, 1920, after Sproule's death, the property was conveyed to one Johnston for $3,000. There was some correspondence between the solicitors for the parties to this action a few days before this, and it is suggested that the sale to Johnston was hurried through to avoid the issue of the writ and the registration of a certificate of *lis pendens*. Bradley denies this and says that the negotiations for the sale had begun 10 days after Sproule's death, but that they did not wish to close with John-

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ston until they had succeeded in getting another house in Orillia, where the Bradleys now live with Mrs. Sproule.

If Bradley were seeking to establish a claim to the $600 which he says he advanced to Sproule in 1914, against Sproule's estate, he could not succeed, because there is not in my judgment sufficient corroboration of his statement to establish the claim. The evidence of the bank manager that a note for $600, upon which Bradley and Sproule were liable, was paid in 1914, adds no weight to Bradley's statement whatever, as it does not appear that it was Bradley who made the payment. Mrs. Bradley says that she remembers Bradley speaking to her about the $600 and she remembers a note for $600 being put in the box in which she and Bradley kept their papers, but she does not identify the note in any way and does not say that it was Sproule's note.

Section 12 of the Evidence Act (R.S.O. 1914, ch. 76) requires corroboration in an action "against the heirs, next of kin, executors, administrators or assigns of a deceased person." This is not an action of that character, but the provisions of sec. 12 are in reality a declaration of the law and practice which had prevailed prior to the legislation. There was some doubt in England (where the rule has not been made the subject of legisation, as it has been here) as to whether the rule was one of law or of practice, but it seems now to be regarded as one of practice. Notwithstanding the fact that this is not an action by or against the estate of a deceased person, the principle applicable to the weight is to be given to Luther Bradley's uncorroborated statement as to the advance or payment of $600 to the deceased, in a contest with the creditors of the deceased, ought to be precisely the same as if the claim were against the estate of the deceased. And I find that this rule has been applied in cases of this character: *Merchants Bank* v. *Clarke* (1871), 18 Gr. 594; *Morton* v. *Nihan* (1880), 5 A.R. 20.

There being therefore no evidence to corroborate Bradley as to the $600 advance, I am unable to consider it as any consideration whatever for the deed in question, which must stand, if it can stand at all, upon the alleged arrangement that the Bradleys would assume the whole obligation of maintaining the household during the lives of Mr. and Mrs. Sproule.

So far as the deed itself is concerned, it is a voluntary one. There is no covenant on the part of the grantee to maintain the Sproules, or even any implied obligation to do so. The provision that the grantor and his wife shall have and enjoy a comfortable and peaceable home on the lands is in reality nothing more than a reservation in their favour, and the covenant of the grantee to allow the Sproules to have and enjoy a comfortable

and peaceable home on the lands does not carry the reservation any further. There is not involved either in the reservation or in the covenant any consideration passing from the grantee to the grantor. The retention by Mr. and Mrs. Sproule of a comfortable and peaceable home is nothing more than an exception from the grant. The grantee takes what is left; she is not giving anything in exchange.

It is contended, however, by the defendants that the agreement to maintain the Sproules alleged to have been made in 1916 constituted sufficient consideration for the conveyance. As the deed itself does not express this consideration, it is important to examine carefully the evidence upon which the contention is based. Bradley says that the arrangement was made between himself and Sproule in the early part of 1916. In making the bargain it may be assumed that Bradley was acting for his wife, to whom the lands were ultimately conveyed. There is nothing in her evidence which really corroborates her husband's story as to the bargain. It is true that she says that a change took place in the household arrangements, but her evidence does not connect that fact with any arrangement that her father was to convey the land to her. Mrs. Sproule, in her examination for discovery, which by agreement was treated as evidence, says that she knew nothing about any arrangement until the spring of 1917, when she was asked to join in executing the deed; that her husband came in two or three hours before Mr. Hart, the conveyancer, came, and told her that Mr. Hart was coming, and then he said, "I am going to give the place over to Luther and Phœbe and they are to support us while we live."

Later she says that her husband did not say why he was making it over to Bradley and his wife; "he said he was making it over and we were to have a comfortable living while we lived with them." She knew nothing as to the $600 loan. Asked as to the change in the arrangements, she says that the taking over of the complete burden of the household expenses by the Bradleys followed the execution of the deed, but she admits that her memory is weak in regard to that. Her evidence in that respect contradicts that of Bradley, who says the change in the arrangement took place in 1916.

Apart from Mrs. Sproule's statement as to what her husband told her when she was asked to sign the deed, there is no corroboration of Bradley's evidence as to the agreement to maintain the Sproules being made the consideration for the promise by Sproule to convey the lands to his daughter. The necessity for corroboration does not rest upon quite the same footing as that required when proving a claim against the estate of a deceased

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person, which has already been discussed with regard to the alleged $600 advance, but upon the principle to which effect was given in *Koop* v. *Smith* (1915), 25 D.L.R. 355, 51 Can S.C.R. 554, that when a conveyance between near relations is impeached as being a fraud on creditors, and the circumstances attending its execution are such as to arouse suspicion, the Court may, as a matter of prudence, exact corroborative evidence in support of the reality of the consideration and the *bona fides* of the transaction. If the alleged bargain had been made simultaneously with the execution of the deed, Mrs. Sproule's evidence might have afforded some corroboration of it, but the bargain is alleged to have been made the year before, and Mrs. Sproule knew nothing of it. I find it difficult to accept her evidence as sufficiently corroborating Bradley's story, in view of all the surrounding circumstances. Bradley alleges a definite agreement in 1916, the terms of which were explicit. Notwithstanding that, he accepts from Sproule a year later, a deed which does not incorporate all the terms of the agreement and which on its face is a purely voluntary conveyance. The burden of shewing the real nature of the transaction which rests upon the defendants is, in my judgment, increased by the fact that, with all the terms of the bargain in mind, the grantee does not insist upon incorporating them in the deed, but accepts a deed which is silent as to the obligation to maintain the Sproules. Bradley admits that one of his reasons for accepting the deed was that he was afraid he and his wife might lose the property. While the existence of a desire to prevent the property from falling into the hands of creditors is not in itself a ground for setting aside a conveyance which can be otherwise supported (*Gibbons* v. *Tomlinson* (1891), 21 O.R. 489, at p. 497, and *Bank of Montreal* v. *Stair* (1918), 44 O.L.R. 79, at p. 83, 46 D.L.R. 718), yet when the evidence of the consideration upon which the grantee seeks to support a conveyance, voluntary on its face, is so weak as it is here, the desire to secure the property may well be regarded as the real motive for the transaction.

For these reasons, I hold that the defendants have failed to establish that there was any consideration for the conveyance, and that the same was voluntary and was given with intent to defeat, delay, and hinder the plaintiff and the other creditors of the deceased, and that the $3,000 for which the lands were sold by the defendants is an asset of the estate of the deceased available for the benefit of the plaintiff and other creditors of the deceased. The defendants Phœbe Bradley and Luther Bradley should be directed to pay the sum of $3,000 with interest from the date when they received it, into Court, and there should be

a reference to the Local Master at Lindsay to receive and adjudicate upon the claims of the plaintiff and the other creditors of the deceased entitled to the benefit of this judgment, and to report. The claim of Jane Ann Sproule, the widow of the deceased, to her dower interest in the proceeds of the sale, must be preserved and be dealt with by the Local Master, and this judgment should not prejudice the defendants upon the reference as to any objections they may take that all or any portion of the claim of any creditor is not entitled to the benefit of this judgment, on the ground that it arose subsequent to the conveyance in question.

The costs of the trial will be paid by the defendants. The costs of the reference will be dealt with by the Master.

J. M. Ferguson, K.C., for appellants.

R. J. McLaughlin, K.C., and *J. E. Anderson*, for respondents.

MEREDITH, C.J.C.P.:—The direct effect of the deed in question was to transfer to the male defendant all the property, of any real value, of his father-in law, leaving nothing for creditors, present or future, with the exception of the father-in-law's bankers, who were to be or had been paid $600 by the son-in-law.

Commonly, and in such transactions more so, the parties to such a transaction should be held to have had the intention to do that which was the result of it; that is, have intended to defeat creditors: and so the judgment in question should stand: see *Spirett* v. *Willows* (1864), 3 DeG. J. & S. 293; and *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538.

But, quite apart from such imputation, and apart from anything that the testimony discloses, the case seems to me to be a plain one of intent to defraud creditors.

The property in question was the home of the father-in-law; and he and his wife, for many years and up to the time of his death, lived there. For several years before the making of the deed in question their daughter and her husband—the main defendants in this action—had lived with them; and, after the making of the deed until the father-in-law's death, there was no apparent change in that state of affairs. The father-in-law was not decrepit, nor was there anything in his mental or physical condition that made any change in that state of affairs necessary. He had kept and still continued to keep a small retail fur "store:" a business which the son-in-law is obliged to describe as precarious—to make it appear that the father-in-law's large indebtedness at the time of his death is attributable to subsequent losses in it.

Nothing in any of the other circumstances of the case shew

any cause for the transfer of the property; except that which all the circumstances point to—that the purpose was to save the property from creditors.

The fact that the bankers were to be paid $600 gives no support to the deed: the bankers had to be pacified to enable the father-in-law to carry on his business: and a mortgage would have been the usual and proper way of securing the bankers, or the son-in-law if he demanded security.

The assertion that the son-in-law was to support his father-in-law and mother-in-law is opposed to the plain words of the deed and to all the circumstances of the case and is quite as unbelievable by me as it was by the trial Judge. If that were the consideration for the deed, what are we to think of all the parties to it and of the conveyancer who drew it, the plainly expressed consideration being natural love and affection only?

If the man were feeble in mind or body, too old or too ill to look after his own affairs, there might be some ground for giving some effect to a repudiation of the plainly expressed purposes of the deed, but when he was mentally and bodily able to continue carrying on his mercantile business and to incur debts just as he had done before, I must decline to give any weight to such a repudiation.

The case, even thus far only, seems to me to be a very plain one of a deed made for the purpose of defeating creditors,, present and future: of keeping the property in the family in case creditors should desire it for the payment of their debts. What other reason could there be? In the ordinary course of events the family would have continued to live together and the father-in-law would have disposed of his property by his will: not have denuded himself and his wife of all they had, and have left them dependent upon the charity of their daughter and her husband, who, with the deed as it is, could very easily have defended themselves against any claim for maintenance; though probably not against an action to set aside the deed on the ground of improvidence.

Then, coming to the testimony adduced at the trial, we find that these views of the transaction are substantiated by the son-in-law himself, who, in the most unmistakable manner possible, swore, at the trial, that the deed was made for the purpose of defeating his father-in-law's creditors: what reason, what excuse indeed, can there be for further discussion?

I am in favour of dismissing the appeal; and do not perceive how any useful purpose would be gained in discussing the reasons given by the trial Judge, which, though not expressed just as I think would have been best, are, in my opinion, gener-

ally speaking, right. The learned Judge did not say that corroboration was necessary to support the transaction in question: he did say that if the defendant Bradley was suing to recover the money said to have been paid by him to the bank for the now deceased father-in-law at his request, corroboration would be necessary.

Riddell, J.:—Upon the argument of this appeal I was inclined to think that sufficient was made to appear to support the transaction in question, when properly interpreted.

But a careful and repeated perusal of the evidence has convinced me that the defendant has himself by his testimony made it impossible.

I do not agree with the somewhat stringent view of my learned brother Orde as to the necessity of corroboration in this case; but it is unnecessary here to discuss the law in that regard, as in any aspect of the defendants' evidence, the appeal fails.

Middleton, J.:—Appeal from the judgment of Mr. Justice Orde, pronounced at the trial of the action, setting aside the conveyance complained of.

I have considered this matter with great care, because there was much in the argument of Mr. Ferguson calling for careful consideration. In the result, however, I have come to the conclusion that the appeal should be dismissed.

The conveyance is dated the 17th April, 1917, and purports to be in consideration of parental love and affection and the sum of $1 of lawful money. There is no provision for maintenance. At the time of the conveyance, there is no doubt the grantor was hopelessly insolvent. In the statement of defence filed, the defendant sets up that in August, 1916, he agreed to advance to his father-in-law $600 to clear his then existing debts, and that he also agreed to maintain his father-in-law and his wife, for the term of their natural lives.

The evidence discloses that the advance of $600 was not made in 1916, but in 1914, and the evidence as to the obligation to support and maintain is most unsatisfactory.

My learned brother has based his judgment largely upon what I think is an erroneous view of the law, holding that in actions such as this, where the grantor is dead, it is necessary for the evidence of the grantee to be corroborated. This is not the true effect of the statute. Corroboration is required where the action is by or against the estate of a deceased person. This action does not fall within the terms of the statute. The action is by the creditor of the deceased person against the grantee of the deceased person.

The true situation is, I think, well indicated in the judgment

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of Sir J. Hannen in the case of *In re Hodgson* (1885), 31 Ch. D. 177, where he says (at p. 183):—

"Now, it is said on behalf of the defendants that this evidence is not to be accepted by the Court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence giving by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon."

I would also refer to the views of Sir W. N. James, L.J., in *Hill* v. *Wilson* (1873), L.R. 8 Ch. 888, at p. 900, where he indicated the great caution necessary before uncorroborated evidence can be accepted to alter or vary a written document, particularly where the other party to the transaction is dead.

In this case there are many circumstances of suspicion. It seems to me to be impossible to credit the statement that the $600 was advanced on the faith of the promise suggested. I think the truth may be more accurately gleaned from the evidence of the defendant's wife and of his mother-in-law, which fails to corroborate the evidence of the defendant in this respect. The more reasonable view is that the money having been advanced, as no doubt it was, and not having been repaid, the defendant became apprehensive of its loss, and that the conveyance was the result of an endeavour to protect the grantor from the risks of the mercantile business he was carrying on. The truth is substantially told by the defendant at p. 30 of the notes of evidence, where he says that he knew that the old gentleman was in a mercantile trading business, and then he is asked:—

"Q. You deliberately refrained from asking him whether he had any other debts or not? A. Mr. Sproule was a very close man about his business.

"Q. You wanted to get the house for your wife? Wanted to see that it was secured to her? A. I did.

"Q. That it would not be lost? A. I did.

"Q. And you were afraid if he went on in the fur business you might lose it? A. Yes.

"Q. That was your reason for the anxiety to get this house? A. That and to secure my $600.

"Q. And to see that the house would not be lost through the risk of the fur business? A. Yes.

"Q. And secured to your wife at all hazards? A. Secured to my wife."

The defendant admits that at the time of the conveyance, and at the time of the advance of the $600, he knew that this left his father-in-law absolutely impecunious.

The appeal will therefore be dismissed with costs.

LATCHFORD and LENNOX, JJ., agreed in the result.

Appeal dismissed.

Re LINDERS LIMITED.

Ontario Supreme Court in Bankruptcy, Orde, J. October 7, 1921.

BANKRUPTCY (§II—19)—ARRANGEMENT UNDER SEC. 13—MOTION FOR APPROVAL OF COURT — OBJECTION BY CREDITORS — APPROVAL BY MAJORITY—REFUSAL OF ORDER.

A scheme of arrangement under sec. 13 of the Bankruptcy Act must have for its object the satisfaction of the debts owing by means of payment in cash either immediately or at some future date.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

MOTION by an authorised trustee for an order, under sec. 13 of the Bankruptcy Act, approving a scheme of arrangement.

H. H. Davis, for the trustee and for Lindners Limited, the debtor company.

J. M. Bullen, for the Bowes Company Limited, a dissenting creditor.

I. F. Hellmuth, K.C., for the Union Bank of Canada, a secured creditor.

ORDE, J.:—The scheme of arrangement proposed by the insolvent company, in its modified form, as accepted by the majority of the creditors, is, shortly, that all the preferred and secured claims shall be duly paid by the debtor, and that the unsecured creditors shall be paid in full by the allotment and issue to them of fully paid-up preference shares either in the present debtor company or in a new company to be incorporated and organised to take over the business of the present company. Such preferred shareholders are to be entitled to elect four out of the five directors constituting the board.

The proposal was accepted by a majority of the creditors, but was opposed by certain creditors, among them the Bowes Company Limited.

The trustee reports in favour of the scheme; and the sole question to be determined is, whether or not the scheme is one which ought to be forced upon an unwilling creditor.

At para. 85

2009 CarswellOnt 2906
Ontario Superior Court of Justice

Bank of Montreal v. Peninsula Broilers Ltd.

2009 CarswellOnt 2906, [2009] O.J. No. 2129, 177 A.C.W.S. (3d) 405

BANK OF MONTREAL (Plaintiff) and PENINSULA BROILERS LIMITED and MARK LOUIS FIORENTINO also known as MARK LOUIS FOREN (Defendants)

J.W. Quinn J.

Heard: March 9, 2009; April 17, 2009
Judgment: May 21, 2009
Docket: St. Catharines 50188/08

Counsel: Sean N. Zeitz for Plaintiff / Moving Party
Bryan B. Skolnik for Defendants / Responding Party

***J.W. Quinn J.*:**

I Introduction

1 The plaintiff ("Bank") has brought an action seeking a declaration that the sale of a certain mobile home by the defendant, Mark Louis Fiorentino ("Mark"), to the defendant, Peninsula Broilers Limited ("corporate defendant"), is fraudulent, null and void and ineffective as against the Bank, pursuant to the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29.

2 The Bank now moves for summary judgment under rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, contending that there is no genuine issue for trial.

II Overview

3 Peninsula Food & Poultry Distributors Ltd. ("Borrower") operated as a wholesaler of food and poultry products in the Niagara Falls area, targeting the hospitality industry. In 2002, the Bank made available to the Borrower a demand operating loan with a limit of $250,000 ("loan"). I gather that this was in the nature of a line of credit.

4 In consideration for the loan, Mark provided his personal guarantee, as did the corporate defendant.

5 Mark is the sole officer, director and shareholder of the Borrower.

6 Mark's father, Peter Louis Fiorentino ("father") and mother, are the only shareholders of the corporate defendant.

7 The loan fell into arrears. The Bank sued and obtained default judgment against the Borrower and Mark.

8 In the course of examining Mark in aid of execution, the Bank learned that a mobile home, listed as an asset in personal financial statements prepared by Mark for the Bank, actually had been sold by him to the corporate defendant. The Bank alleges that the sale of the mobile home is a fraudulent conveyance.

9 The central issue both in the action and in the motion is whether the sale or transfer of the mobile home was for good consideration.

III The Evidence

Mark provides first personal financial statement

10 On June 5, 2002, Mark provided a personal financial statement for the Bank in which he showed, as an asset, beach-front property at Sherkston, Ontario (a mobile-home enclave on the shore of Lake Erie), with an estimated value of $200,000. This property, in fact, proved to be a 1989 Chariot Eagle, 38' × 12' mobile home, serial number 9185 ("mobile home").

Borrower's account transferred to special Bank management unit

11 In the years following the loan, the Borrower was in a state of near-constant financial stress.

12 In October of 2003, because the Borrower "continued to experience excesses, it was transferred to [the Bank's] SAMU [Special Accounts Management Unit]."

Mark provides second personal financial statement

13 On December 13, 2003, Mark provided a second personal financial statement for the Bank, again disclosing the same mobile home as an asset. [1]

Bank expresses concern with Borrower's financial performance

14 By letter dated December 1, 2004, the Bank wrote to the Borrower:

> We confirm our advice that the Bank is still concerned with the Borrower's financial performance.

Accordingly, in order "to continue to provide financing" the Bank requested a number of additional security documents [2] and it reduced the operating loan ceiling from $250,000 to $175,000. [3]

15 Both the Borrower and the corporate defendant signed an acknowledgement of these new "terms and conditions," as did Mark and the father in their personal capacities. All signatures were witnessed on December 10, 2004 by Daniel J. McDonald, a lawyer practicing in the City of Niagara Falls.

Certificate of Independent Legal Advice

16 Also, on December 10, 2004, Mr. McDonald signed a Bank certificate of independent legal advice certifying that the corporate defendant:

> . . . has consulted me as to the nature and effect of signing or endorsing the following documents:
>
> - guarantee for indebtedness of an incorporated company for $104,000;
> - pledge of instrument and assignment of proceeds for $54,000;
> - pledge of instrument and assignment of proceeds for $50,000; [4]
>
> which have been executed for the purposes of securing the debts of [the Borrower] to Bank of Montreal up to the amount of $104,000 . . .

These are the same documents that were set out in the Bank's letter of December 1st. [5]

17 Thus, in December of 2004, the corporate defendant granted a guarantee of the Borrower's obligations to the Bank and pledged $104,000 in securities to back up that guarantee.

Bank memorandum

18 On June 30, 2005, the Bank created a memorandum outlining the account history of the Borrower. It stated that, "although the [Borrower]'s cash flow has improved from previous years, it is still tight with occasional excesses." Additional security and further monitoring were recommended.

Borrower defaults on loan

19 In July of 2005, the Borrower on the loan. [6]

Bank again expresses concern with Borrower's financial performance

20 By letter dated July 7, 2005, the Bank wrote to the Borrower, saying, in part:

> We confirm our advice that the Bank is still concerned with the [Borrower]'s financial performance. Such concerns include but are not limited to tight cash flow and high leverage. However, the Bank is prepared to renew the credit facility with the following terms and conditions . . .

One of the "terms and conditions" was an immediate and permanent reduction of the loan limit to $175,000. The balance owing on the loan at that time was $75,000, which was converted to a non-revolving demand loan to be retired over a period of 36 months by way of monthly principal payments. However, the Borrower was at liberty to draw on the available $100,000 loan limit.

21 The Borrower, the corporate defendant, Mark and the father acknowledged their agreement to the new terms and conditions. Their signatures, dated July 13, 2005, again were witnessed by Mr. McDonald.

Mark sells mobile home

22 On that same date, Mark sold the mobile home to the corporate defendant. The bill of sale evidencing the transaction was prepared by Mr. McDonald's office and it includes this passage regarding the consideration that allegedly passed (emphasis added):

> NOW THEREFORE THIS INDENTURE WITNESSETH, that in pursuance of the said Agreement, and *in consideration of the sum of one hundred and four thousand ($104,000) dollars of lawful money of Canada, paid by the [corporate defendant] to [Mark]* at or before the sealing and delivery of this Indenture (the receipt of which is hereby acknowledged), [Mark] does bargain, sell, assign, transfer and set over unto the [corporate defendant], ALL THOSE goods, namely:
>
> 1989 Chariot Eagle 38' × 12' Mobile Home Serial No. 9185

23 This sale occurred seven months after the corporate defendant gave its guarantee of the Borrower's obligations to the Bank and pledged $104,000 as security (the Borrower being, as I have mentioned, Mark's company).

McDonald's reporting letter re sale of mobile home

24 By letter dated July 13, 2005, Mr. McDonald wrote to Mark, confirming that the sale of the mobile home was prompted by the continued uncertain financial performance of the Borrower (emphasis added):

> Re: [Borrower's] guarantee to Bank of Montreal Further to you (sic) office attendance of this date and the execution and delivery of the Bill of Sale to [the corporate defendant] with respect to your 1989 Chariot Eagle Mobile Home

> located at Sherkston, Ontario. I wish to confirm the terms of your arrangement with your father and [the corporate defendant] concerning this transaction.
>
> As you are aware [the corporate defendant] delivered a guarantee to the Bank of Montreal in the amount of $104,000.00 in December 2004 to guarantee the debts of your company, [the Borrower]. In addition at that time it pledged to the bank certain securities having a value of $104,000.00 in support of the guarantee.
>
> *In view of the continued uncertain financial performance of [the Borrower] and the real possibility that the bank would seize the security pledged by [the corporate defendant] you agreed to transfer ownership of the mobile home to the [the corporate defendant] at this time.*

25 The letter goes on to state the legal effect of the transfer (emphasis added):

> As I advised, the legal effect of this transaction is that [the corporate defendant] is now the legal owner of the mobile home notwithstanding that *you will be permitted to use and occupy it and that you will continue to be responsible for all expenses in connection with same.*[7] In addition I confirm that it was agreed that *a notice of change in ownership would not be sent to Sherkston Resorts Inc. because* of their policy of charging a substantial fee when ownership of a mobile home is transferred.

26 The letter also speaks of a re-transfer of the mobile home:

> In addition it is intended that ownership will be retransferred to you if [the corporate defendant] is relieved from its guarantee and the pledged security returned to it.
>
> In the event however that the bank calls upon [the corporate defendant] to honour its guarantee and the pledged securities are retained by the bank ownership of the mobile home will remain with [the corporate defendant].

Mark provides a third personal financial statement

27 In a third personal financial statement required by, and provided to, the Bank, dated January 20, 2007, Mark continued to list, as an asset, a 100% unencumbered interest in the mobile home (which he still valued at $200,000).

Borrower again defaults, Bank makes demand and realizes on its security

28 In August of 2007, the Borrower defaulted on the loan. Also in that month, the Bank, through its solicitors, made a written demand upon the Borrower and upon Mark (in accordance with his personal guarantee).

29 Thereafter, the Bank seized the securities pledged by the corporate defendant and called upon the father's personal guarantee, thereby reducing the indebtedness of the Borrower by $107,000, from $139,000 to $32,000.

Related Action

30 The Bank brought an action ("related action") against the Borrower and Mark for the balance owing on the loan. The statement of claim was issued on October 25, 2007.

Default Judgment in Related Action

31 On December 17, 2007, the Bank obtained default judgment in the related action for the sum of $46,253.77.

Mark examined in aid of execution in related action

32 In April of 2008, Mark was examined in aid of execution in the related action. I will review his evidence under seven headings:

1. value of the mobile home

33 Mark was asked about the value of the mobile home:

> Q.43 . . . in July 2002, did you own a [mobile home] at Sherkston . . . free and clear, worth approximately $200,000?
>
> A. Yes, I don't know if it was worth $200,000 . . . That's just ball-parking it.
>
> Q.44 Okay. Did you tell the Bank that it was worth $200,000?
>
> A. I can't remember. I don't, I can't remember. I don't have the paper.

2. consideration for the sale of mobile home

34 Mark admitted that no money changed hands when the mobile home was sold:

> Q.103 Okay. And did [the corporate defendant] pay $104,000 to you for this?
>
> A. Did [it] pay for - no, no, no, no, no.
>
> . . . . .
>
> Q.157 Okay. When you transferred the mobile home on July 15, 2005 to [the corporate defendant], what did you get?
>
> A. . . . I just had to secure the hundred and seventy-five [thousand] and I could do it with the motor home which I did, and what I got was the bank off my back for that hundred and seventy-five thousand.
>
> Q.161 Okay. Could you just clarify what you mean by getting the bank off your back?
>
> A. Well they were either going to pull the loan, take the inventory, if I didn't come up with the $175,000 and that's the only way that I could have come up with it was through my father putting up his collateral, his cash.

3. the timing of the sale

35 With the corporate defendant having pledged its securities to the Bank in December of 2004, Mark was asked about the seven-month delay before the mobile home was transferred to the corporate defendant:

> Q.164 . . .
>
> A. Because I was still trying to get financing, so I can pay off that one hundred and seventy-five and not have to do it . . . But I didn't get the financing so I had to put up something, I had to give my father something . . . my accountant was telling me, you've got to give him something . . . [and] was advising my father . . . you've got to get something . . .

36 He was questioned further about the timing of, and reason for, the sale:

> Q.115
>
> . . . . .
>
> A. When the bank started wanting security for the two fifty, down to the one seventy-five, my accountant. . . and my father's accountant . . . mentioned to me that . . . my father . . . should get some security, you know, from all the money that he's putting in. And then when the Bank want this hundred seventy-five thousand, that's when everything started hitting the fan and I said, 'Here, take the motor home for the security of the one-seventy-five.'
>
> . . . . .

> A. . . . My accountant said, you know, your father has a lot of money invested, you're going to have to give him some kind of security. This happened, you know, just prior to July of 2005 that he was mentioning it to me . . .
>
> . . . . .
>
> Q.133. No, so this was - so [the corporate defendant] did not, in fact, pay $104,000 but you transferred title
>
> A. Yes.
>
> Q.134 . . . in return for the guarantee on your loan from the bank?
>
> A. Yeah, 'cause he guaranteed - he lost the $175,000.[8]

37 I also note that the father gave this evidence when he was cross-examined on his affidavit filed on the motion:

> Q.37 . . . Now why was the transfer [of the mobile home] completed approximately six months after your pledge [of securities] was made? The pledge was made in December 2004 and then the transfer takes place approximately six months later on July 13, 2005.
>
> A. I don't know. I imagine that's when the bank required the money.
>
> . . . . .
>
> Q.42 Wouldn't you agree that when the pledge was given to the [Borrower] in December 2004, you would have asked for the mobile home to be transferred at that time?
>
> A. I can't remember . . .

4. Mark has no further assets

38 Mark was asked whether the sale of the mobile home "was effectively a transfer of substantially all of your assets":

> Q.171 . . .
>
> A. Yes, that was pretty much it.

39 I take his answer (which uses "was" instead of "is") to be referring to the point in time when the mobile home was sold[9] and not to some other date, such as that of his examination in aid of execution.

5. his personal financial statements

40 In his cross-examination, Mark exhibits a nonchalance towards his personal financial statements provided to the Bank:

> Q.23 Okay. Now in Mr. Schu's[10] affidavit, he stated that the Bank relied on your personal financial statement when it decided to accept your guarantee.
>
> A. No, I didn't believe that.
>
> Q.24 Okay. Would you agree that in 2002 and in 2003 and then again in 2007, you provided personal financial statements to the Bank?
>
> A. At the beginning I provided one and I believe, there was another one that was sent, I think via fax, I believe, and it was the same statement, all I did was pull it out of the file and fax it over. It was, that's all I did. I was too busy to be doing anything other than what I was geared to do that day. I'd get on the phone if him or her called and said she needed this, I just dug through, if it was there, it was sent.
>
> Q.25 Okay. Would you agree that there was three financial statements?

A. I don't know. I know, I'll say two for sure. They were exactly the same.

Q.26 So what I'm suggesting to you sir, is that there were three separate time periods in which you sent a personal financial statement to the Bank, and I suggest to you that it was sent in 2002, another statement in 2003 and then another statement in 2007, do you agree?

A. I can't remember. I know there was two different times, the same one was sent.

Q.27 When you say 'the same one' - do you mean you took the same document - and just signed it - dated it and sent it off?

A. Yes.

. . . . .

Q.31 Did you review the statement to ensure that it was accurate?

A. No, sir . . . I never even looked at it. I just, I'm too busy, too much stuff on my plate.

. . . . .

Q.107 . . . the information that's listed here [in Mark's personal financial statement dated January 20, 2007] was identical as the first statement in 2002 . . .?

A. It should be, yes.

. . . . .

Q.109 Now on the third page of the statement dated January 20, 2007, you disclose an interest in [the mobile home at] Sherkston . . .

A. Yes.

Q.110 As at January 20, 2007, did you in fact enjoy an ownership interest in that [mobile home]?

A. No.

. . . . .

Q.113 Why did you include it in the statement if you didn't own it?

A. It's the same statement. I just sent the same statement.

6. financial difficulties of the Borrower

41 Mark was questioned about the financial difficulties of the Borrower at the time the Bank created its memorandum of June 30, 2005:

Q.74 Okay. And would you agree that at that time, about June 30, 2005, the [Borrower] was experiencing financial difficulty?

A. I just can't place the date with what was happening . . . there was always a strain because our accounts receivable were a little high . . . So I don't know if we were anymore tight with money that date or the date prior.

42 Mark was asked about the Bank's letter of July 7, 2005:

> Q.87 . . . would you agree . . . that you were aware, at least when you got this letter, that the Bank was concerned with the performance of the [Borrower]?
>
> A. Yeah, the bank was. I thought everything was just fine. I thought they were a little scared that they had so much money out with no security whatsoever on it. [11]

7. other questionable conduct by Mark

43 Mark did not inform Sherkston Resorts Inc. about the sale of the mobile home:

> Q.177 Okay. Why didn't you disclose [the sale] to Sherkston?
>
> A. Sherkston . . . wants a piece of everything that they can get their hands on. If I would have told them that I was selling this motor home to my father, they'd want their commission [12] which runs 25 to 30% . . . And then if everything worked out okay and I wanted my motor home back . . . I'd have to give [Sherkston] another 25% to get it back in my name . . .

44 Also, in his three personal financial statements Mark included a 1947 Cadillac as an asset. However, it actually was owned by the father who said so in his cross-examination:

> Q.73 [Mark's personal financial statements refer to] a Jag and then Cad, which I assume is a Cadillac . . . a 1947 vehicle . . . the Jag is a 2004 vehicle, are those your vehicles, sir?
>
> A. The 1947 Cadillac is.

Mark an officer of corporate defendant

45 On May 8, 2008, the Bank learned (through a Corporation Profile Report from the Ministry of Consumer and Business Services) that Mark was actually an officer and director of the corporate defendant. [13] The sale of the mobile home, therefore, was from a son to his father's company, and from an officer of a company to that company.

Within Action Commenced

46 The statement of claim in the within action was issued on May 13, 2008. Among other relief, the Bank seeks, as I indicated at the outset, a declaration that the transfer of the mobile home is fraudulent, null and void and ineffective as against the Bank. The court is asked to set aside the sale as being a fraudulent conveyance.

Interlocutory Injunction Granted

47 On May 15, 2008, Ramsay J. granted an interlocutory injunction, enjoining the corporate defendant and Mark from selling, transferring or encumbering the mobile home until the trial or other disposition of the action.

Statement of Defence

48 A statement of defence was served in June of 2008. It pleads that the transfer of ownership of the mobile home was a *bona fide* transaction for valid consideration:

> 6. In July 2005 the [Borrower]'s indebtedness to the [Bank] by way of its . . . [loan] was reduced to $175,000 as a result of, inter alia, a pledge of certain securities from the [corporate defendant] and the personal guarantee of . . . [the father].

> 7. The mobile home was transferred from . . . [Mark] to the [corporate defendant] on or about July 13, 2005. The consideration paid for the mobile home was $104,000. This amount represented the [corporate defendant]'s risk/exposure to the [Bank] by way of its pledge of the securities to the [Bank].
>
> 8. The [Borrower] encountered financial difficulties in the summer of 2007. At that time, the [Bank] realized on its security by seizing the securities and calling upon [the father]'s personal guarantee. As a result, the [Borrower]'s indebtedness was reduced to approximately $32,000 as of August 2007.
>
> 9. In light of matters referred to in paragraphs 6 through 8 herein, the [corporate defendant] satisfied in excess of $107,000 of the [Borrower]'s debt to the [Bank]. The defendants state and the fact is that [the $107,000] represents good, valuable and just consideration for the mobile home.

Statement of Claim Amended

49 The statement of clam was amended on August 20, 2008, pursuant to Rule 26.02(b) of the *Rules of Civil Procedure*. The amendments read as follows (I have omitted the underlining):

> 7. . . . In fact, this was the third personal financial statement that [Mark] delivered to the Bank wherein he disclosed that he owned the mobile home.
>
> 8. . . . [Mark] first provided a personal financial statement to the Bank dated June 5, 2002 followed by an additional personal financial statement dated December 13, 2003. These statements were required by the [Bank] as part of its ongoing monitoring of the [Borrower] and to evaluate the strength of the Bank's security which included . . . [Mark]'s personal guarantee.
>
> 9. . . . [Mark] disclosed and represented to the [Bank] that he owned the mobile home on all three of the personal financial statements.
>
> 10. . . . The [Bank] continued to rely on the representations contained in . . . [Mark]'s personal financial statements including his ownership interest in the mobile home between on or about June 5, 2002 through to and including Judgment against the [Borrower] . . .

50 The defendants have not delivered an amended statement of defence. Therefore, they are deemed to have admitted that the Bank relied on the representations described in paragraph 10 of the amended statement of claim.

evidence of Mr. McDonald

51 In 2009, Mr. McDonald was cross-examined on the affidavit he delivered in support of the defendants and in opposition to the summary judgment motion. He was questioned about consultations with Mark regarding asset protection:

> Q.11 Did you consult with [Mark] with respect to asset protection . . .
>
> . . . . .
>
> A. And what period are you speaking of ? Q.13 Any period?
>
> A. The only discussions I would have had with [Mark], or not the only, sorry, but the discussions I had with [Mark] is with respect to asset protection that occurred in the spring of 2007, at which time we had a meeting and he indicated to me that he was having trouble with his business [the Borrower] and that he was just having difficulty meeting his obligation . . .
>
> . . . . .
>
> A. No, if you listened to my response I said it was in the spring of 2007 that I discussed his and the [Borrower]'s financial circumstances . . .

52 I would have thought that asset protection was also discussed on July 13, 2005, as the effect of the sale of the mobile home to the corporate defendant was to protect it from seizure by the Bank while in Mark's hands.

53 Mr. McDonald deposed that the consideration of $104,000 for the sale of the mobile home "represented the [corporate defendant]'s risk/exposure to the [Bank] by way of its pledge of securities to the [Bank]."

54 At paragraph 9(c) of his affidavit he stated:

> 9(c) . . . the transaction was entered into for the entirely legitimate purpose of transferring an asset of equivalent value to the guarantee and the pledge of the securities . . . The [corporate defendant] . . . was concerned that the securities which it has pledged might be seized. The transfer of the mobile home gave the [corporate defendant] the protection it required;

55 Again, on the issue of consideration, he answered:

> Q.42 . . .
>
> A. The consideration, the figure of a hundred and four thousand as reflected by the bill of sale was the one hundred and four thousand in specific securities that were pledged by [the corporate defendant] to the Bank.

56 Mr. McDonald was asked what Mark got for the transfer of the mobile home:

> Q.35 . . .
>
> A. I suppose if you ask what he got was he got some reduction of his exposure from his personal guarantee to the Bank. He had personally guaranteed the indebtedness to the Bank . . . his exposure was reduced . . .

the evidence of Mark and the father

57 Mark and the father both delivered affidavits in opposition to the Bank's motion upon which they were cross-examined. Their affidavits largely adopt the affidavit of Mr. McDonald.

IV Summary judgment

No Genuine Issue for Trial

58 On a motion for summary judgment, the responding party "must set out, in affidavit or other evidence, specific facts showing that there is a genuine issue for trial": see rule 20.04(1) of the *Rules of Civil Procedure*.

59 The "court shall grant summary judgment if . . . the court is satisfied that there is no genuine issue for trial with respect to a claim or defence": see rule 20.04(2)(a).

60 It is implicit in rule 20.04 that the genuine issue for trial is as to any material fact: see *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) at 550.

Burden of Proof

61 "The appropriate test to be applied on a motion for summary judgment is satisfied when the [moving party] has shown that there is no genuine issue of material fact requiring trial . . . Once the moving party has made this showing, the [responding party] must then 'establish his claim as being one with a real chance of success' (*Hercules*,[14] *supra*, at para. 15)": see *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at para. 27, reversing (1998), 38 O.R. (3d) 563 (Ont. C.A.).

62 Yet, this two-part test does not affect the legal burden of proof that rests on the moving party "and it never shifts": see *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (Ont. C.A.) at 105.

63 While the onus of establishing the absence of a triable issue is on the moving party, the responding party "must lead trump or risk losing": see *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (Ont. C.A.) at 557.

Self-Serving Affidavits Not Sufficient

64 ". . . a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence": see *Guarantee Co. of North America v. Gordon Capital Corp.*, *supra*, at para. 31.

Responding Party Not to Rest on the Pleadings

65 ". . . the party responding to a summary judgment motion . . . may not rest on the pleadings, but must provide evidence from which the motions judge can conclude that there is no genuine issue for trial": see *Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank* (1999), 44 O.R. (3d) 97 (Ont. C.A.) at 110.

Motions Judge Not to Resolve Issues of Credibility

66 "A motions judge, on a Rule 20 summary judgment motion, should not resolve issues of credibility, draw inferences from conflicting evidence, or from evidence that is not in conflict when more than one inference is reasonably available": see *Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank*, *ibid.*

67 "Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact": see *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (Ont. C.A.) at 173.

68 ". . . the mere existence of an issue of credibility will not defeat a motion for summary judgment. The issue of credibility must be a genuine issue": see *Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank*, *ibid*, citing *Irving Ungerman Ltd. v. Galanis*, *supra*, at 551-52.

Records to Contain ALL the Evidence

69 The motions judge is entitled to assume that the motion records contain all the evidence that the parties would adduce if there were to be a trial.

"Best Foot Forward" and "Hard Look"

70 On a motion for summary judgment, the parties must "put their best foot forward" and the motions judge is required to "take a hard look at the merits of the action": see *Rozin v. Ilitchev*, [2003] O.J. No. 3158 (Ont. C.A.) at para. 8, (2003), 66 O.R. (3d) 410 (Ont. C.A.), citing a number of earlier cases.

71 Even where matters of credibility must be determined on conflicting evidence, the court must take "a 'hard look' at the merits [and] must decide if any conflict is more apparent than real": see *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Ont. S.C.J.) at 238.

V Fraudulent conveyances

"Conveyance"

72 "Conveyance" is defined in s. 1 of the *Fraudulent Conveyances Act*, R.S.O 1990, c. F.29 ("*Act*") to include "gift, grant, alienation, bargain, charge, encumbrance . . . of . . . personal property by writing or otherwise." [15] And, "personal property" means "goods, chattels . . ."

Where Conveyances Void as Against Creditors

73 "Every conveyance of . . . personal property . . . made with intent to defeat, hinder, delay or defraud creditors . . . of their just and lawful actions, suits, debts, accounts . . . are void as against such persons and their assigns": see s. 2 of the *Act.*

Where "Good Consideration," s. 2 Not Applicable

74 "Section 2 does not apply to an estate or interest in . . . personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section": see s. 3 of the *Act.*

75 "Pursuant to section 3, if the conveyance is made upon good consideration, it is not subject to section 2, if the transferee was acting in good faith and without notice or knowledge of the fraudulent intent of the transferor. But if the conveyance was not made for good consideration it is not protected under section 3 and is subject to being set aside under section 2 regardless of the intent of the transferee. Accordingly, where a plaintiff establishes *prima facie* that a conveyance was made with fraudulent intent for purposes of section 2 and without good consideration for purposes of section 3, the conveyance is subject to be set aside unless the defendant establishes either that the transferor lacked the fraudulent intent or else (as required by section 3) that the conveyance was made for good consideration and that the transferee acted in good faith and without notice or knowledge of the fraudulent intent of the transferor": see *CIT Financial Ltd. v. Zaidi* (2006), 24 R.F.L. (6th) 78 (Ont. S.C.J.) at para. 21.

76 Where the conveyance was made for good consideration, "the plaintiff must show the fraudulent intent of both parties to the conveyance": see *Commerce Capital Mortgage Corp. v. Jemmett*, 1981 CarswellOnt 147 (Ont. H.C.) at para. 41.

Burden of Proof for Fraudulent Conveyances

77 The Bank must prove the necessary fraudulent intent.

78 When determining whether a conveyance is fraudulent, "the applicable standard of proof is proof on a balance of probabilities, but to a higher degree of probability than would apply in an ordinary civil case. Where misconduct such as fraud is alleged, the degree of proof required must be commensurate with the gravity of such allegations. Proof commensurate with the occasion requires particular attention to the cogency of the evidence of fraud offered against the defendant": see *CIT Financial Ltd. v. Zaidi*, *supra*, at para. 23, citing *Continental Insurance Co. v. Dalton Cartage Co.* (1982), 131 D.L.R. (3d) 559 (S.C.C.) at 563 - 564.

79 "In other words, 'clear and sufficient proof' is required": see *CIT Financial Ltd. v. Zaidi*, *supra*, at para. 24, citing *Hickerson v. Parrington* (1891), 18 O.A.R. 635 (Ont. C.A.) at 643.

80 "This may be equated with 'substantial evidence' ": see *CIT Financial Ltd. v. Zaidi*, ibid, at para. 24, citing *Dwyer v. Fox* (1996), 43 Alta. L.R. (3d) 63 (Alta. Q.B.) at 73-74.

81 The court "is not compelled to draw this inference of fraudulent intent from badges of fraud pleaded by the plaintiff . . . The court may dismiss a fraudulent conveyance action because it has decided that the surrounding circumstances taken as a whole explain away the plaintiff's evidence": see *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.* (2007), 85 O.R. (3d) 561 (Ont. C.A.) at para. 40.

82 In cases where there are badges of fraud or suspicious circumstances surrounding a conveyance, "there is no 'onus' shift, but simply a question of legitimate explanation that may be required in circumstances of suspicion": see *Park v. Bhandari* [2007 CarswellOnt 3604 (Ont. S.C.J.)] CanLII 20981 at para. 38, aff'd 2008 ONCA 884 (Ont. C.A.) (CanLII).

Burden on Motion

83 This same enhanced burden of proof that I have been describing is applicable on a motion for summary judgment where the subject-matter involved is an alleged fraudulent conveyance.

Each Case Stands on Own Facts

84 In the area of fraudulent conveyances, "each case must stand on its own facts": see *Keystone Industries (1970) Ltd. v. Craleeco Ltd.*, 1997 CarswellOnt 5330 (Ont. Gen. Div.) at para. 20, affirmed 1999 CanLII 1053 [1999 CarswellOnt 2325 (Ont. C.A.)].

Intent

85 ". . . it is established by the authorities that in the absence of any . . . direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settler to have been to defeat or delay his creditors . . .:" see *Sun Life Assurance Co. of Canada v. Elliott*, 1900 CarswellBC 17 (S.C.C.) *per* Sedgewick J., at para. 4, quoting Lord Hatherley L.C. in *Freeman v. Pope* (1870), 5 Ch. App. 538 (Eng. Ch. Div.) at 541.

86 "Where there is a voluntary conveyance, if the result of the transaction is to defeat the rights of the creditor, then there is an assumption that it was a conveyance to defeat the creditors": see *Atlantic Acceptance Corp. v. Distributors Acceptance Corp.*, [1963] 2 O.R. 18 (Ont. H.C.) at 21.

87 "Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance": see *Fancy, Re* (1984), 46 O.R. (2d) 153 (Ont. Bktcy.) at 159, followed in *Nuove Ceramiche Ricchetti S.p.A. v. Mastrogiovanni*, [1988] O.J. No. 2569 (Ont. H.C.) at p. 4 and in *392278 Ontario Ltd. v. Miletich Estate*, [2001] O.J. No. 400 (Ont. S.C.J.) at para. 38.

Where No Consideration, Intent Need Be Proved Only of Vendor

88 "It is only where a conveyance is made upon good consideration that it is necessary under the statute in order to set it aside to shew the fraudulent intent of both parties to it. But where a conveyance is voluntary, it is only necessary to shew the fraudulent intent of the maker of it": see *Oliver v. McLaughlin* (1893), 24 O.R. 41 (Ont. C.A.) at p. 51, per Armour, C.J., cited in *Solomon v. Solomon* (1977), 16 O.R. (2d) 769 (Ont. S.C.) at 774.

Intent to Defeat Future Creditors

89 "It is not too liberal a construction of the [*Fraudulent Conveyances Act*] to extend it to a case where the conveyance was made to defeat future creditors and it in fact defeats, delays or hinders existing creditors even though there might have been no intention to do so at the time of the conveyance": see *Petrone v. Jones*, [1995] O.J. No. 1478 (Ont. Gen. Div.) at para. 23.

Transaction Between Close Relatives

90 "Where the impugned transaction was . . . between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on *bona fides* be corroborated by reliable independent evidence": see *Fancy, Re*, *ibid*, followed in *Nuove Ceramiche Ricchetti S.p.A. v. Mastrogiovanni*, *ibid* and in *392278 Ontario Ltd. v. Miletich Estate*, *ibid*.

Badges of Fraud

91 In *Solomon v. Solomon*, *supra*, at p. 778, Krever J., as he then was, referring to a New Brunswick decision, accepted the following as badges of fraud:

1. Secrecy

2. Generality of conveyance, by which is meant the inclusion of all or substantially all of the debtor's assets

3. Continuance in possession by debtor

4. Some benefit retained under the settlement to the settlor

92 "But all the circumstances surrounding the conveyance of the property must be examined to determine if there are among them some which have been termed 'badges of fraud' ": see *Solomon v. Solomon*, *ibid.*

93 ". . . the existence of one or more of the traditional 'badges of fraud' may give rise to an inference of intent to defraud in the absence of an explanation from the defendant": see *Fancy, Re*, *ibid*, followed in *Nuove Ceramiche Ricchetti S.p.A. v. Mastrogiovanni*, *ibid*, and in *392278 Ontario Ltd. v. Miletich Estate*, *ibid.*

Where Debtor Still Solvent

94 It may be that, in circumstances where a debtor is still "perfectly solvent after the conveyance," it is difficult to impute "any intent to hinder or delay": see *Sun Life Assurance Co. of Canada v. Elliott*, 1900 CarswellBC 17 (S.C.C.) at para. 8, (1900), 31 S.C.R. 91 (S.C.C.) and *Crombie v. Young* (1894), 26 O.R. 194 (Ont. C.A.).

VI The positions of the parties

95 Although the positions taken by the parties should be apparent by now, I will briefly outline them again.

The Defendants

96 On behalf of the defendants, it is argued that the consideration of $104,000, set out in the bill of sale, represented the dollar value of the risk or exposure by the corporate defendant to the Bank, arising from the former's pledge of securities for $104,000 (which securities were seized by the Bank). As Mr. McDonald deposed in his affidavit, at paragraph 9(c), the sale was the transfer of "an asset of equivalent value to the guarantee and the pledge of the securities . . ."

97 Furthermore, when cross-examined on his affidavit, and asked what Mark got for the sale of the mobile home, Mr. McDonald said: "I suppose . . . he got some reduction of his exposure from his personal guarantee to the Bank."

the Bank

98 The Bank submits that the sale of the mobile home was the transfer of a substantial asset at a time when Mark ought to have known of the financial difficulties of the Borrower and of the Bank's concern.

99 The Bank maintains that it relied on Mark's ownership interest in the mobile home when it decided to advance funds to the Borrower and when it agreed to accept Mark's personal guarantee of the Borrower's obligations to the Bank.

100 The sale was made with the intent and sole purpose of defeating, hindering, delaying and defrauding the Bank, as contemplated by the *Act*. It was a strategic move to put Mark's sole exigible asset beyond the reach of the Bank at a time when Mark knew that the Borrower was at risk of having the Bank seize its assets and call upon him pursuant to his personal guarantee.

VII Discussion

101 The bill of sale for the mobile home is dated July 13, 2005. On that date, as I have pointed out, Mark agreed that the Bank was concerned with the performance of the Borrower, but *he* believed "everything was just fine." There is some basis for Mark's belief because the Bank memorandum of June 30, 2005 referred to the Borrower's cash flow as having "improved from previous years." As well, in the letter of July 7, 2005, the Bank expressed its willingness "to renew the credit facility" for the Borrower (albeit on new terms and conditions). When all of this is added to the fact that the precipitating default by the Borrower did not happen until two years later (August 2007), the sale does not appear to have occurred on the eve of insolvency. Accordingly, despite the existence of some badges of fraud, it is difficult to impute an intent to "defeat, hinder, delay or defraud creditors," in the words of s. 2 of the *Fraudulent Conveyances Act*.

102 While there is much here to attract the suspicion of the court, I am not satisfied that the Bank, on this motion, has discharged the serious burden of proof needed to establish the fraudulent intent alleged. There is a triable issue in that regard. Yes, it is correct to say that the parties and Mr. McDonald have delivered affidavits upon which they have been cross-examined and it is true that the advantage of a trial judge's ability to see the testimony unfold from the witness box is sometimes more talked about than real, but, here, I think the advantage may exist. [16]

103 However, there is reason to doubt the legitimacy of the sale of the mobile home on other grounds. The bill of sale clearly stipulated that the consideration was (emphasis added): ". . . the sum of one hundred and four thousand ($104,000) dollars of lawful money of Canada, *paid* by the [corporate defendant] to [Mark] *at or before the sealing and delivery of this Indenture* (the receipt of which is hereby acknowledged) . . ." At the time of the bill of sale no money had been paid to Mark by the corporate defendant. Although, seven months earlier, the corporate defendant had given a guarantee and a pledge of securities for $104,000 in respect of the Borrower's indebtedness, that guarantee had not been called by the Bank (and it would not be called for two years). The guarantee was a conditional liability of the corporate defendant which, as of July 13, 2005, might, or might not, have ripened into something more. The consideration set out in the bill of sale did not pass as described. The bill of sale is a false document. [17]

104 The integrity of contracts and the world of commerce cannot condone documents deliberately saying one thing and the parties suggesting that they really mean something else. If I were left to my own devices, I would declare the sale of the mobile home to be void on the basis of the bill of sale itself. However, the notice of motion asks for summary judgment in accordance with paragraph 1 of the statement of claim "and such further and other relief as this Honourable Court may deem just." Paragraph 1 of the statement of claim seeks various fraud-related remedies, along with the same general prayer for relief. Neither the pleadings nor the argument on the motion addressed an invalid bill of sale as a discrete basis for a remedy.

105 I do not think that it would be fair to the defendants for me to grant summary judgment based upon an unargued issue. Consequently: (1) the Bank, if so advised, may return the motion, in its present form, before me for argument upon that issue alone; or (2) the Bank, if so advised, may amend its statement of claim to address the issue of the bill of sale and bring a fresh motion for summary judgment based upon that issue alone. The Bank shall, by June 15, 2009, notify the defendants of its intentions in respect of (1) and (2).

VIII Conclusion

106 Subject to paragraph [105], the motion of the plaintiff is dismissed. Alleging, but failing to prove, fraud would usually attract substantial-indemnity costs. However, due to my views on the bill of sale, those costs are nullified (as are costs under subrule 20.06(1) of the *Rules of Civil Procedure*). [18] The costs of this motion, therefore, shall be in the cause (unless the Bank takes either of the courses of action described in paragraph [105], in which case the disposition of costs on this motion shall be left until then).

107 The order of Ramsay J. (enjoining the sale, transfer or encumbering of the mobile home) shall continue in force until trial or otherwise ordered.

Motion dismissed.

Footnotes

1 Mark was required by the Bank, from time to time, to provide personal financial statements as part of the Bank's ongoing monitoring of the Borrower and its security.

2 They included a guarantee from the corporate defendant for $104,000, backed by a pledge of its securities for that amount along with the father's personal guarantee for $71,000.

3 As well, the letter said that the loan was to be permanently reduced to, and capped at, $175,000 by

January 31, 2005.

4 I believe that the two pledged instruments were investment certificates.

5 The certificate does not mention the $71,000 personal guarantee from the father that had been listed in the Bank's letter of December 1, 2004, presumably because the guarantee was not something to be signed by the corporate defendant..

6 I understand that there were earlier defaults, but I do not have the dates.

7 This arrangement was confirmed by the father when he was cross-examined on the affidavit he swore in opposition to this motion:
Q.58 Who pays for the costs of the mobile home?

A. [Mark] does.

Q.59 . . . Why does [Mark] continue to pay them if he doesn't own the home anymore?

A. He uses it on a regular basis, so he pays the expenses.

. . . . .
Q.63 Okay. So he's responsible for all the fees and expenses?

A. Yes.

8 The reference to "he" is to the corporate defendant, the father's company.

9 And this, despite the fact that his personal financial statements purported to show other assets.

10 Ben Schu is an account manager with the Bank. He delivered two affidavits in support of the motion for summary judgment.

11 The father was questioned along the same line when he was cross-examined on his affidavit:
Q.47 Okay. Now you were aware on July 7, 2005, that [the Borrower] was experiencing financial difficulty with the Bank, right?

A. Yes, I think so, I can't remember exactly.

. . . . .
Q.51 [On July 7, 2005] you were aware that the Bank had some concerns about the [Borrower]?

A. Mm-hmm.

12 This is confirmed in Mr. McDonald's letter.

13 However, he is not a shareholder.

14 *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.).

15 Although the word "sale" is not used in s. 1, a "sale" is obviously included, for example, in the terms "grant" and "alienation."

16 I also observe that the defendants' accountant may be an important witness at trial, as the sale seems to have flowed from his advice.

17 I cannot go so far as to conclude, on this motion, that the bill of sale is a fraudulent document.

18 Subrule 20.06(1) states: Where, on a motion for summary judgment, the moving party obtains no relief, the court shall fix the opposite party's costs of the motion on a substantial indemnity basis and order the moving party to pay them forthwith unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable.

At para. 24

2004 CarswellOnt 2521
Ontario Court of Appeal

Boucher v. Public Accountants Council (Ontario)

2004 CarswellOnt 2521, [2004] O.J. No. 2634, 132 A.C.W.S. (3d) 15, 188 O.A.C. 201, 48 C.P.C. (5th) 56, 71 O.R. (3d) 291

SALLY ANNE BOUCHER, RANDOLPH BROWN, PAUL TURNER, DAVID VENN (Applicants / Appellants) and PUBLIC ACCOUNTANTS COUNCIL FOR THE PROVINCE OF ONTARIO, DOUGLAS J. WHYTE, ALASTAIR SKINNER, GILBERT H. RIOU, RALPH T. NEVILLE, RONALD W. MIKULA, BARRY G. BLAY, DAVID H. ATKINS, JENNIFER L. FISHER, JERALD D. WHELAN, PRISCILLA M. RANDOLPH, BRYAN D. MEYER, THOMAS A. HARDS and THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO (Respondents / Respondents in Appeal)

Abella, Armstrong, Cronk JJ.A.

Heard: December 15, 2003
Judgment: June 22, 2004
Docket: CA C40044

Proceedings: varying *Boucher v. Public Accountants Council (Ontario)* (2002), 2002 CarswellOnt 4142, 166 O.A.C. 281, 28 C.P.C. (5th) 25 (Ont. Div. Ct.)

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Robert D. Peck for Institute of Chartered Accountants of Ontario

***Armstrong J.A.*:**

1 This case is another chapter in the long simmering dispute between the Certified General Accountants and the Chartered Accountants concerning the practice of public accounting in Ontario. At issue in this litigation was the control of the licensing granting authority, the Public Accountants Council for the Province of Ontario, by a majority of members who were Chartered Accountants.

2 The appellants, who are Certified General Accountants, brought an application for judicial review against the Public Accountants Council. The appellants alleged reasonable apprehension of bias against the Council in its review of applications for licences to practise public accounting by members of the Certified General Accountants Association of Ontario.

3 Before the appellants' application was heard it was abandoned. The respondents then moved to have their costs fixed by a judge of the Divisional Court on a substantial indemnity basis. After a two-day hearing, Epstein J. fixed the respondents' costs, on a partial indemnity basis, at $187,682.51 inclusive of disbursements and Goods and Services Tax. The appellants now appeal from this costs order pursuant to leave granted by this court on May 22, 2003.

Background of the Proceedings

4 The judicial review application had its genesis in the prior proceeding of *Boucher v. Public Accountants Council (Ontario)*, [2000] O.J. No. 3126 (Ont. S.C.J.) before Lax J. of the Superior Court. In the earlier proceeding, the appellants and two other parties sought to have the court appoint disinterested persons to hear the appellants' applications for public accounting licences. The appellants claimed that the court could do so under the *Public Officers Act*, R.S.O. 1990, c. P.45. The proceeding was stayed by Lax J. on the basis that the court lacked jurisdiction under the *Public Officers Act* to make the order requested.

5 In granting the stay, Lax J. said in *obiter dicta*:

> The particulars of bias described by the applicants are sympathetic, compelling and disturbing. They are offensive to fundamental notions of fairness. They invoke a primordial judicial instinct to intervene and second-guess what appears to be a flawed legislative scheme and what is a flawed process.
>
> Professional discipline is not in issue here, but professional licensure by an apparently biased tribunal is. Although the Court lacks jurisdiction to grant the proposed remedy under section 16 of the *Public Officers Act*, there may be other creative ways for the applicants to have their concerns addressed.

6 Lax J. suggested that the appellants had other specific courses of action available to them which they could pursue.

7 The appellants then commenced their judicial review application, naming as parties the same respondents with the addition of the Institute of Chartered Accountants of Ontario who had been an intervenor before Lax J. In their application, the appellants sought a broad range of remedies, including a declaration that the Public Accountants Council is institutionally biased in its granting of licences to practise public accounting. Central to the appellant's allegations of reasonable apprehension of bias is the fact that the *Public Accountancy Act*, R.S.O. 1990, c. P. 37 authorizes the Institute of Chartered Accountants of Ontario to appoint 12 of the 15 members of Council.

8 At the request of the appellants, Lax J. made an order that the materials used in the application before her should be filed in the judicial review application in the Divisional Court. However, this judicial review application was not one of the courses of action suggested by Lax J.

9 The respondents moved to quash or stay the judicial review application as being premature on the basis that the appellants' applications for licence before the Public Accountants Council had not yet been adjudicated on the merits.

10 The appellants then brought a motion to consolidate the motions to quash with two pending statutory appeals arising from the Council's refusal to grant licences. The consolidation motion was dismissed.

11 The motions to quash were scheduled to be heard on May 27, 28 and 29, 2002. On May 8, 2002, counsel for the appellants advised by letter that they had received instructions to withdraw the application for judicial review and agree to the dismissal of the motions to quash on a without costs basis. The respondents insisted on the payment of their costs of the application and the motions to quash and advised that they would continue to prepare for the motions to quash pending resolution of the matter. The appellants served their notice of abandonment on May 17, 2002. The respondents then brought their motion to have their costs fixed.

12 The motions judge fixed the costs of the application for judicial review and the motions to quash on a partial indemnity basis including disbursements and GST as follows:

Public Accountants Council of Ontario	$ 88,896.45
Individual Respondents	$ 60,033.96
Institute of Chartered Accountants of Ontario	$ 38,752.10

Total	$187,682.51

Grounds of Appeal

13 The appellants raise the following grounds of appeal:

> (i) the motions judge erred in fixing the costs of the abandoned application rather than referring them for assessment; and
>
> (ii) the costs awarded are excessive in that they are approximately 178% of the costs awarded in the proceedings before Lax J. that involved substantially the same parties and issues without deduction for any amount claimed.

Did the motions judge err in fixing costs?

14 The appellants accept that the respondents are entitled to their costs of the abandoned application pursuant to rule 37.09(3) of the *Rules of Civil Procedure* which provides:

> 37.09(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

However, the appellants submit that those costs ought not to be fixed by a judge in accordance with the costs grid established by rule 57.01(3). The appellants rely upon rule 57.01(3.1) which states:

> Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Rule 58 sets out a code of procedure for the assessment of costs by an assessment officer.

15 The motions judge concluded, correctly in my view, that there is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. The appellants submitted to the motions court and to this court that the case at bar is such a case. The motions judge, in deciding that this was not an exceptional case, said:

> Only if the assessment process will be more suited to effect procedural and substantive justice should the Court refer the matter for assessment. There must be some element to the case that is out of the ordinary or unusual that would warrant deviating from the presumption that costs are to be fixed. Neither complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional. The judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket. If that type of scrutinizing analysis is required, then perhaps, the matter would fall within the exception and be referred to assessment: *BNY Financial corp.-Canada v. National Automotive Warehousing Inc.*, [1999] O.J. No. 1273(Commercial List, Gen. Div.) (*BNY Financial*).

16 I agree with the motions judge that if a judge is able to effect procedural and substantive justice in fixing costs, she ought to do so. See *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (Ont. C.A.), at 245 *per* Morden A.C.J.O.

17 The appellants argued before us that an abandoned motion falls into the category of an exceptional case because the judge fixing the costs does not have the benefit of a hearing involving the presentation of evidence and legal argument. While there is no doubt that the judge who has heard a case is in the best position to determine a just costs award, it does not follow, that in the circumstances which exist here, the motions judge was obliged to decline the task.

18 I also observe that rule 57.01(3.1) is discretionary. It provides that in an exceptional case, the trial judge *may* refer costs for assessment. It is not required that she do so. This is a somewhat complex case with several parties and a number of counsel, including one party with two senior counsel. Although another judge might have exercised his or

her discretion under rule 57.01(3.1) differently, I see no basis upon which to interfere with the motions judge's discretion not to refer the costs for assessment.

Was the costs award excessive?

19 The motions judge's decision is entitled to a high degree of deference. The standard of review for interfering with the exercise of the discretion by a judge of first instance was articulated by Lamer, C.J.C. in *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CarswellNat 264 (S.C.C.) at p. 32:

> This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042, at p. 1046, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

20 In a more recent case, Arbour J. said in *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 (S.C.C.) at para. 27:

> A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (*Duong v. NN Life Insurance Company of Canada* (2001), 141 O.A.C. 307, at para. 14).

21 The appellants point out that the costs awarded in these proceedings are approximately 178% of the costs awarded in the proceedings before Lax J. that involved the same parties and similar issues. The respondents, on the other hand, argue that the proceedings before Lax J. were significantly different from the abandoned judicial review application. However, it is to be noted that the same record was used in the judicial review application. When pressed in argument, counsel for the respondents had some difficulty in explaining the extent to which the factual substrata of the two applications differed. At the heart of both applications is the assertion that the Public Accountants Council of Ontario is effectively controlled by the Institute of Chartered Accountants of Ontario.

22 Counsel for the appellants submitted that there was much duplication of the work done by the three sets of counsel for the respondents. They also drew attention to the fact that the Public Accountants Council retained another senior counsel to prepare their factum, resulting in a duplication of services. We were assured by counsel for the respondents that the bills of costs submitted to the motions judge were appropriately adjusted to take into account such duplication.

23 The respondents also submitted that the appellants were the authors of their own misfortune. The appellants said that they abandoned their application for judicial review because the Ontario Red Tape Commission recommended changes to the *Public Accountancy Act*; and a panel appointed under the Agreement on Internal Trade found that the Act offended provisions of the Agreement. The appellants claimed that the reports of these two bodies addressed the issues of concern to them, causing them to abandon their application for judicial review. However, the respondents observed that the report of the panel appointed under the Agreement on Internal Trade was released on October 5, 2001 and the Red Tape Commission report was released on December 10, 2001. It was several months later that the appellants abandoned their application. The respondents submit that the lion's share of the costs were generated in this period of delay, and particularly after February 2002 when the dates for the motion to quash were fixed for May 2002. Although this delay caused some concern to the motions judge, she concluded that:

> In the circumstances of this case I do not find that the timing of the events that took place in the spring of 2002 leading up to the abandonment of the application was in bad faith or amounted to an abuse of the process of the court.

24 The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs

grid. While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 where it said:

> In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

See also *Stellarbridge Management Inc. v. Magna International Inc.*, [2004] O.J. No. 2102 (Ont. C.A.) para. 97.

25 *Zesta Engineering Ltd.* and *Stellarbridge Management Inc.* simply confirmed a well settled approach to the fixing of costs prior to the establishment of the costs grid as articulated by Morden A.C.J.O. in *Murano v. Bank of Montreal* at p. 249:

> The short point is that the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which comprised the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts. An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.

26 It is important to bear in mind that rule 57.01(3), which established the costs grid, provides:

> When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

27 In considering whether the amounts claimed in the bills of costs were appropriate, the motions judge said:

> Here there is another point of departure between the applicants and the respondents. The respondents take the position that they are entitled to claim reimbursement for all the time spent and disbursements incurred in responding to the application for judicial review and in preparing the motion to quash. Conversely, the applicants contend that the factual background and the issues raised in the judicial review and the motion to quash are the same, or at least nearly the same, as those fully argued before Lax J. As a result, the time necessary for the respondents to respond to the judicial review application and to prepare for the motion to quash was, [or] should have been, minimal. It follows that the costs fixed should similarly be minimal.
>
> While it is apparent that the various proceedings have centred on the same complaints about the same licensing regime, the issues in each proceeding have differed. For example, the relief claimed in the matter before Lax J. was different than that claimed in the judicial review application. This different perspective requires a different analysis and different research. In addition, the various proceedings were spread over time and each new matter necessitated new preparation even in respect to issues that were the same or similar as those raised in earlier challenges to the licensing system. In these circumstances I do not consider it appropriate effectively to give the applicants a credit for costs ordered and paid in earlier proceedings .
>
> I agree with what Nordheimer J. said in *Basedo v. University Health Network*, [2002] O.J. No. 597 (Sup. Ct.) that "it is not the role of the court to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered." As mentioned earlier, counsel

> for the respondents filed substantial material in support of the detailed bills of costs. In addition, they took me through the various entries, in a general fashion, to explain the nature of the work done and why it was necessary. I have conducted my own detailed review of the functions performed, time spent and amounts claimed. In my view, the amounts for fees and disbursements, on a partial indemnity basis, are appropriate.

28 With respect, I disagree with the motions judge. The total amount of $187,682.51 was not a fair and reasonable sum to award in the circumstances of this case, even given the respondents' separate bills of costs, which produced totals of $88,896.45, $60,033.96, and $38,752.10. It is my view that the costs awards in this case are so excessive as to call for appellate interference.

29 While I accept that the bills of costs accurately reflect the time spent by all of the lawyers in this matter, it is inconceivable to me that the total amounts claimed are justifiable. In this regard, I accept the submission of the appellants that:

(a) the record in this application was the same record filed in the earlier proceedings;

(b) the respondents filed no evidence;

(c) the respondents conducted no cross-examination of any witness;

(d) the notices of motion to stay filed by the respondents were substantially the same; and

(e) the arguments to be advanced on the return of the motions to quash were substantially the same.

30 In addition, I note that the amount claimed on a substantial indemnity scale, including disbursements and Goods and Services Tax, was in total only $14,528.86 more than the total partial indemnity award. In the result, the respondents received an award which is tantamount to a substantial indemnity award. This is significant in view of the fact that the motions judge expressly rejected the respondents' submission that they be awarded their costs on a substantial indemnity basis.

31 The similarity of the amounts claimed on a substantial indemnity basis and on a partial indemnity basis appears to arise because the hourly rates applied were not significantly different on either scale.

32 The Public Accountants Council employed four lawyers. One of the two senior counsel on the file charged three different hourly rates on a substantial indemnity basis -$350, $385 and $425. On a partial indemnity basis, he claimed $350 per hour. The time spent by the other senior counsel was listed at a rate of $300 per hour on both a substantial indemnity scale and on a partial indemnity scale. In addition, one of the two junior counsel charged the same rate on both a substantial indemnity basis and on a partial indemnity basis. The second junior counsel docketed only 17 hours and the difference between the two rates produced a total differential of only $295.

33 Counsel for the Institute of Chartered Accountants charged his time on the substantial indemnity scale at $400 per hour and at $350 per hour on the partial indemnity scale.

34 There were three counsel for the individual respondents. The senior counsel charged hourly rates on a substantial indemnity basis of $330 and $350. Her partial indemnity rate was $300. For the first junior, the substantial indemnity rate was $230 and the partial indemnity rate was $225. The second junior had minimal time on the file and her time was claimed at rates of $85 on a substantial indemnity basis and $60 on a partial indemnity basis.

35 In *Wasserman, Arsenault Ltd. v. Sone* (2002), 164 O.A.C. 195 (Ont. C.A.) at para. 4, this court referred to a judgment of the Superior Court in *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.* (2002), 17 C.P.C. (5th) 334 (Ont. S.C.J.), where Nordheimer J. observed at paragraph 16:

> As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

36 In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. This court took a similar view in *Stellarbridge Management Inc.* at para. 96.

37 The failure to refer, in assessing costs, to the overriding principle of reason-ableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the *Rules of Civil Procedure*, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

38 In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See *Toronto (City) v. First Ontario Realty Corp.* (2002), 59 O.R. (3d) 568 (Ont. S.C.J.), at 574. I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

39 Turning to what the quantum should be in this case, I would give consideration to the fact that the costs in the earlier proceeding were fixed in the amount of $97,563 by Lax J. While I accept, as the motions judge did, that there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the Public Accountants Council of Ontario by the Chartered Accountants. The fact that all parties were satisfied to have the same evidentiary record in both cases suggests that there was much in common between the two applications.

40 No doubt there was much more work to be done in respect of the second application. However, having expended partial indemnity costs of nearly $100,000 in response to the first application, I am confident that counsel were not starting *tabula rasa* when served with the application for judicial review. They would have been fully informed of the licensing application procedure, the make up and operation of the Public Accountants Council, the statutory regime and the issues that divided the Institute of Chartered Accountants for Ontario and the Certified General Accountants of Ontario. I simply cannot accept that counsel for the respondents did not take advantage of the work already done on the first application to better inform themselves in their approach to the second.

41 I also take into account the other factors referred to in paragraph 29 above, i.e. the respondents filed no evidence; conducted no cross-examination; and advanced substantially the same arguments in support of the motions to quash.

42 Finally, I consider that there is no proportionality between the costs claimed on a substantial indemnity scale and a partial indemnity scale.

43 These factors suggest that the amounts claimed on a partial indemnity basis call for a significant reduction. The appellants submitted that the award to each of the three groupings of respondents should be $2,500 for a total of $7,500. I do not accept that submission.

44 In my view, a fair and reasonable award, taking into consideration all the factors discussed above, would be:

Public Accountants Council of Ontario	$ 30,000.00
Individual Respondents	$ 20,000.00
Institute of Chartered Accountants of Ontario	$ 13,000.00
Total	$ 63,000.00

These figures are inclusive of disbursements and Goods and Services Tax.

Disposition

45 In the result, I would allow the appeal, set aside the costs award of the motions judge and in its place substitute the award set out in paragraph 44 above.

46 I would also order that the appellants are entitled to their costs of the motion for leave to appeal and the appeal, fixed on a partial indemnity basis in the total amount of $12,000, including disbursements and Goods and Services Tax.

***Abella J.A.*:**

I agree.

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

I agree.

Appeal allowed; amount awarded varied.

[From the Court of Appeal, England.]

BROWNE v. DUNN.*

1893, *November* 28.

Defamation — Privilege—Solicitor and Client — Retainer — Malice—Practice — Evidence—Cross-examination of Witness—Point not raised at Trial argued on Appeal.

If a solicitor reasonably believes that his services may be required by a possible client who does afterwards retain him, all communications passing between the solicitor and the client, leading up to the retainer and relevant to it, and having that, and nothing else, in view are privileged.

If the retainer is a genuine proceeding, the fact that the solicitor is not well disposed to the person said to be defamed is not evidence of malice.

Per Lord Bowen: Whether, when a professional relation is created between a solicitor and a client, and communications pass between the solicitor and the client with reference to the prosecution of a third person, or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, provided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client. *Quære.*

If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story, or (*per* Lord Morris) the story is of an incredible and romancing character.

If one party at a trial deliberately elects to fight one question on which he is beaten, he cannot afterwards on appeal raise another question, although that question was at the trial open to him on the pleadings and on the evidence.

Martin v. *Great Northern Railway* (1), approved.

Appeal from the judgment of the Court of Appeal ordering that a verdict for the plaintiff be set aside and that judgment be entered for the defendant.

The action was brought by the appellant against the respondent, who is a solicitor, for a libel contained in the following document, which the respondent had had drawn up by his clerk and had

* Lord Herschell, L.C., Lords Halsbury, Morris and Bowen.

(1) 16 C. B. 179; 24 L. J. C. P. 209; 3 W. R. 477.

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exhibited to the persons who signed it, for the purpose of obtaining their authority to take proceedings against the plaintiff:—

"To Mr. Cecil W. Dunn,

"The Vale, Hampstead.

"We, the undersigned residents in the Vale of Health, Hampstead, N.W., hereby authorize and request you to appear before the magistrates sitting at the Hampstead Police Court on Wednesday, the 5th day of August, 1891, and apply, on our behalf, respectively, in whatever way may seem proper and best, against James Loxham Browne, of Woodbine Cottage, The Vale, Hampstead, for a summons and order *that the said James Loxham Browne, for the reason that he has continuously for many months past, both by acts and words, seriously annoyed us, and each of us, and other residents in the Vale aforesaid, whereby he has endeavoured to provoke a breach or breaches of the public peace or whereby a breach or breaches of the public peace has been in danger of being committed.* That the said James Loxham Browne be bound over for such time as the said magistrates shall think fit, to keep the peace, or for such other order as the said magistrates shall deem proper to make."

The document was dated 4 August, 1891, and was signed by the following persons: Samuel Hoch, S. Jones, E. Cooke, George McCombie, Thomas Henderson, William Schröder, Benjn. Paine, R. Henderson, H. King.

At the time this document was made the defendant and plaintiff were not on friendly terms, and the defendant knew that two summonses were to be heard the next morning before the local magistrates, one taken out by the plaintiff against Paine, one of the above signatories, for assault, the second taken out also by the plaintiff against Mrs. Hoch, the wife of another signatory, for abusive language. On the morning appointed for the hearing of these summonses, and before the hearing, the defendant mentioned his application to the magistrates, but, at their request, postponed it until the summonses had been heard, and, on the hearing of a cross-summons by Paine, the plaintiff was bound over to keep the peace.

The plaintiff subsequently discovered the document and brought, or threatened, actions of libel against all the parties to it.

At the hearing of the action against the defendant, which was tried before MATHEW, J., it appeared that S. Jones and E. Cooke were a mother and daughter living together, and that Mrs. Jones, the mother, had died before the trial. Mrs. Cooke gave evidence for the plaintiff. All the rest of the signatories, except H. King, who was not called, gave evidence for the defendant.

At the trial, in the language of Lord HERSCHELL, the case made on behalf of the plaintiff appears unquestionably to have been this, that the whole thing was a sham, that Mr. Dunn did not draw up this document having information that people had this ground of complaint, and would desire to retain him as solicitor; but that it was a gratuitous affair, and merely carried out, without any honest or legitimate object, for the purpose of annoyance and injury to Mr. Browne.

The rest of the signatories who were called gave evidence which showed that they had really employed the defendant. McCombie and Hoch, whose evidence is set out in full in Lord HALSBURY'S judgment, were not cross-examined at all, and the rest of these witnesses were cross-examined as to the merits of the various quarrels they had had with the plaintiff. The only evidence as to King was that he had signed the document.

The jury found a verdict for the plaintiff, and assessed the damages at 20*l*.

The defendant appealed. The Court of Appeal set aside the verdict and entered judgment for the defendant. From this judgment the plaintiff now appealed.

Willis, *Q.C.* and *Blake Odgers*, *Q.C.* (*Lincoln Reed* with them) for the plaintiff, in support of the appeal, urged that the document was really a sham, that it was not couched in ordinary language, and contained much that was unnecessary, and on this point they particularly complained of the words printed in italics in this report.

That the document was not privileged, because the fact that each person to whom it was shown signed it eventually was immaterial. Even supposing that all the persons signing knew what the document was, and desired thereby to retain the defendant to apply on their behalf for a summons against the plaintiff, that was not a

circumstance rendering the publication privileged, as the relation of solicitor and client must exist at the moment of publication between the publisher and the person to whom the publication is made.

The unnecessary words were inserted maliciously.

Murphy, Q.C., and *Hugh Fraser*, for the respondents, were not called upon.

Lord HERSCHELL, L.C.: [after reading the document, stated the facts from which it arose, and said that it was hopeless for the appellant to contend, with regard to the six signatories who had given evidence for the defendant, that the document was not perfectly genuine, drawn up in a perfectly legitimate way, and really intended by the parties to be what it appeared on the face of it to be. On this subject his Lordship added :]

These witnesses all of them depose to having suffered from such annoyances; they further depose to having consulted the defendant on the subject, and to having given him instructions which resulted in their signing this document; and when they were called there was no suggestion made to them in cross-examination that that was not the case. Their evidence was taken; to some of them it was said, "I have no questions to ask;" in the case of others their cross-examination was on a point quite beside the evidence to which I have just called attention.

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but

is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

It seems to me, therefore, that it must certainly be taken that these witnesses, whether they were exaggerating somewhat Mr. Browne's acts towards them or not (that is immaterial), were telling the truth when they said, "We did bring before Mr. Dunn the fact that we had these causes of complaint;"—that, at all events, was the impression which they produced on his mind;—"we did consult him about them, we did want him to act for us, and we did sign this document because we wanted him to act for us."

Now, my Lords, as regards all these persons, except the three whom I will deal with presently, the case is all one way. Having regard to the conduct of the case, it was not open to the learned counsel to ask the jury to disbelieve all their stories, and to come to the conclusion that nothing of the kind had passed. If that is so, there is an end of the case so far as it rests upon the whole of this transaction being a sham, and we start with this, that, as regards all these persons except three, it was a genuine transaction, because the solicitor was really asked to act by people who really felt themselves aggrieved.

Now, my Lords, how is it possible to dispute that a communication of that sort was privileged? It seems to me, further, that there

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is no evidence of malice, because malice means making use of the occasion for some indirect purpose, that the transaction was not genuine, and was not really directed to that to which it appeared to be directed.

Now it has been ingeniously argued that, as regards these persons, this document was shown to them before they signed it, and therefore before they retained Mr. Dunn; that at that time he was not acting as their solicitor, and that therefore, although it was shown to them with a view to his acting, and although it resulted in their retaining him to act, yet there was a publication before any such relation existed between them. My Lords, of course that would not be true as regards the first signatory, and I refer to that because, as I threw out in the course of the argument, I am by no means prepared to adopt the view that was suggested and was said to extend even to the case of a shorthand writer, that a person to whom another communicated by word of mouth defamatory matter, and who wrote it down and merely handed it back to the person who made the communication, would by so doing publish the defamatory matter. I am not prepared, as at present advised, to lay down such a proposition.

But then it is said, as regards all except the first signatory (and no doubt with more plausibility in their case), that the document was shown signed already by certain people, and that when so shown at that moment there was publication, and at that moment there could be no privilege. Now, my Lords, I will assume that showing it under those circumstances was sufficient publication; but I cannot for a moment accede to the argument that the occasion was not a privileged one. I do not think that it was a point taken at the trial, because, as I say, the only point taken at the trial, as far as I can see, was that the whole thing was a sham; but it seems to me that when communications pass between a solicitor and those who he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of those communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged. There is no authority, so far as I know, to

the contrary, and it seems to me that to lay down any other doctrine would be very gravely contrary to the public interest. Therefore, my Lords, as regards this transaction the occasion appears to me to have been very clearly privileged, and I can see no evidence of malice. If the occasion was privileged in the sense to which I have alluded, and if the transaction was a genuine one, and what passed between people who were really desirous of retaining a solicitor, and that solicitor was retained, it seems to me that the fact that that solicitor was not particularly friendly in his disposition towards the person against whom proceedings were to be taken does not take away the privilege or make the action a malicious action on his part in the eye of the law.

Then it was said that the language of the document may be so extravagant and so much in excess of the necessities of the occasion that that of itself is evidence of malice. My Lords, I should not for a moment dispute that proposition; but in the present case I do not see anything in this document which was not strictly relevant to the purpose and object of the document. It may be that there were some unnecessary words in it, that a shorter form might have sufficed to serve the purpose; but the fact that the document is more full in its terms than is necessary certainly would not in itself be any indication of malice, unless you come to the conclusion that the words are put in in such a way, or have such an effect, as to point to the conclusion that they were not put in for a legitimate purpose, but were put in with the object of defaming the plaintiff. I can see no evidence of that kind here.

Now, my Lords, I for my own part conceive that when once that conclusion is arrived at there is an end of the case; because I do not think that any separate case was made at the trial as regards showing the document to Mrs. Cook, Mrs. Jones or Mr. King. Nevertheless, that point having been made here, I will deal with it and will say a few words upon it. As regards Mr. King, I will dismiss it at once; I see nothing in the point as regards Mr. King. All that we know with respect to Mr. King is that on the morning of the trial, or rather of the proposed application to the magistrates, Mr. King signed this document at the Court. There is no suggestion that his reason for signing it was not that he was anxious to retain Mr. Dunn. There is no evidence that he had never

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previously made any complaints or that he had not been a person who to Mr. Dunn's knowledge would be likely to sign such a document, because he had represented himself as an aggrieved person. Having no evidence of that, we must take the document and the signature; and I cannot see the slightest ground for supposing that Mr. King's position is in the least different from that of the other signatories.

As regards Mrs. Cook and Mrs. Jones, we have certain facts proved by Mrs. Cook. Mrs. Cook's case, as stated in her evidence, is that she did not know what was in this document at all, that she never read it, that something was said to her about Mr. Browne, but that as to the terms of the document and as to her assenting to them she did not assent to them because she did not read them. As regards Mrs. Cook's case, I confess that the dilemma seems to me to be complete. If she read this document and signed it, she has not even herself said that she did not understand what she read, or that she did not mean what she signed. Her only case is that she did not read it. If she signed it, she must be taken to have understood it, and to have meant what she said. If she did not read it, then there was no publication. Therefore it seems to me that, as regards her case, there is this absolute dilemma: either it was not published to her, or if it was published to her, she is in exactly the same position as the other signatories, and she is not a person who can be regarded as a stranger to the entire transaction, because she herself admits that she had brought it home to Mr. Dunn's mind, not that she had been annoyed—she will not use that word—but that she had been at least worried, because she had been informed by the neighbours that Mr. Browne had been in the habit of haunting her house, and she thought that it might prejudice her if her lodgers came to know of it. Therefore it is natural, as it seems to me, and in no way improper, that Mr. Dunn having had that communication from her, and finding that other people thought that the nuisance had grown too intolerable to be submitted to, he should go to see Mrs. Cook to ascertain whether she also would desire to put the matter into his hands, and to have the same steps taken. In that view of the case, as regards Mrs. Cook, it seems to me that there is either no publication, or that her case is the same as that

of the other signatories with whom I have already dealt. And so as regards Mrs. Jones. We do not know the circumstances under which Mrs. Jones signed. She was the mother of Mrs. Cook, and living in the same house she would be certain to go and talk to her daughter about it; and, if she was confined to the house, she was at least as likely as any other inmate of the house to be annoyed. Under those circumstances she signs this document, and I say that she must be taken to have intended Mr. Dunn to act for her. What passed in relation to her signing the document was strictly confined to matter relevant to the question of her employing him, as others had employed him, to act for her on account of Mr. Browne's proceedings.

Therefore, my Lords, I cannot see anything here to entitle the plaintiff to rest his case upon the transactions with Mr. King, Mrs. Cook, and Mrs. Jones, unless it be a fact which would cut away the whole foundation for his case by showing that there was no publication.

Under these circumstances, I submit to your Lordships that the judgment appealed from ought to be affirmed and the appeal dismissed.

Lord Halsbury: My Lords, I am entirely of the same opinion. [His Lordship then referred to a misdirection by the learned Judge at the trial, which does not call for report, and continued:]

My Lords, I cannot but think that this case, although the amount involved is small, raises very important questions indeed. Amongst other questions, I think it raises a question as to the conduct of the trial itself, and the position in which people are placed, when, apart altogether from the actual issues raised by the written pleadings, the conduct of the parties has been such as to leave one or more questions to the jury, and those questions being determined, they come afterwards and strive to raise totally different questions, because, upon the evidence, it might have been open to the parties to raise those other questions.

My Lords, it is one of the most familiar principles in the conduct of causes at Nisi Prius, that if you take one thing as the question to be determined by the jury, and apply yourself to that one thing, no Court would afterwards permit you to raise any other question. It

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would be intolerable, and it would lead to incessant litigation, if the rule were otherwise. I think *Dr. Blake Odgers* has, with great candour, produced the authority of *Martin* v. *Great Northern Railway* (1), which lays down what appears to me to be a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it.

My Lords, so far as regards the conduct of the trial, it appears to me that nothing could be stronger than what the learned Judge himself said at the very commencement of his remarks in the presence of the learned counsel, who, if it was not accurate, were bound then and there to intervene and say so. The learned Judge says at the commencement of his summing up, after he has introduced the facts to the jury: "We have to deal with the law in this matter, and the case is fairly put by *Mr. Willis* in the only way in which he could put it. He cannot ask you to treat this as a libel, unless you are satisfied that the whole thing was a sham got up by the defendant for the mere purpose of disparaging the character of the plaintiff." My Lords, after that statement by the learned Judge, which is at the commencement of his summing up, the learned counsel, not intervening at all, but allowing the learned Judge to leave that as the one question to the jury, it appears to me that it is absolutely hopeless, in any other Court, afterwards to attempt to raise any other question than that which the learned counsel deliberately elected to allow the learned Judge at all events to leave to the jury as the only one which was to be put to them.

My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not

one question has been directed either to their credit or to the accuracy of the facts they have deposed to. In this case I must say it would be an outrageous thing if I were asked to disbelieve what Mr. Hoch says, and what Mr. McCombie says, after the conduct of the learned counsel when they were examined at the trial. Mr. George McCombie is called and asked: "(Q.) Did you give him any instructions?—(A.) I said, could nothing be done to prevent Mr. Browne annoying us as he was every night? (Q.) Did you receive advice from him as to what could be done?—(A.) Yes. (Q.) Will you look at this document? Is that your signature? —(A.) (Looking at the document.) Yes, sir. (Q.) Was that document brought to you by Mr. Dunn?—(A.) I went round to his house. (Q.) There you saw the document. Did you read it?—(A.) I did. (Q.) And signed it?—(A.) Yes, I signed it. (*Mr. Willis.*) I have nothing to ask you." My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.

My Lords, the same course was pursued with regard to Hoch. He says: "Ever since the year 1888 he has constantly annoyed and insulted me, but only when there were no witnesses by—when I have been walking quietly out. He has sneered, grunted, sputtered, and occasionally burst into a brutal guffaw. That has been going on until the time when he was bound over to keep the peace, when it ceased. But since that time he has tried to resume these performances, only for a whole year and more I have persistently avoided meeting him, and so I have not given him any opportunity of insulting me. (Q.) Did you give instructions to Mr. Dunn to act for you.—(A.) On that account. (Q.) That was before the month of August, 1891?—(A.) I forget the date. (*Mr. Willis.*) I have nothing to ask you, sir." Therefore, here are two witnesses, who may be taken as examples of others, as to both of whom it cannot be denied that, if their evidence is true, they went to Mr. Dunn and

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gave him instructions, and that the retainer was drawn up for the purpose of embodying the authority to Mr. Dunn to act. Under those circumstances what question of fact remains? What is there now for the jury after that? If *Mr. Willis* admits before the jury —as I say, by the absence of cross-examination, he does admit— that these statements are true, what is there for the jury? It is impossible, as it seems to me, therefore, to dispute for a moment that, in the manner in which this cause was conducted, that absolutely concluded the question. [His Lordship then expressed concurrence with the Lord Chancellor's view as to the signatories who had not been called.]

Now, with all the materials before us, what has been suggested as otherwise than proved by these facts? As I have already said, the conduct of the cause seems to me to amount practically to an admission that there was, I will not call it a retainer, but an employment, of Mr. Dunn; I will not use any technical phrase, because I think *Mr. Willis*, rightly enough, abandoned any argument derived from any particular force in the word "retainer," and used the word "employment." I think there was an employment, because these witnesses, if they speak truly, did employ Mr. Dunn to do the thing he did, and he did nothing but what he was employed to do, and if so, then, as *Mr. Willis* very candidly admitted yesterday, if he was really employed, there was an end of the case. That was the question on which the whole case turned at the trial, and if your Lordships were to send this case now to a new trial it would only be sending it to be tried again with the direction to the Judge that he must not, upon this evidence (for that is the test which we must apply, not upon any new evidence, but upon this evidence), leave the question of malice to the jury. I am of opinion that, if he did that, he would do wrong. That there was actual employment was admited at the trial, because the learned counsel for the plaintiff refused to cross-examine the witnesses, who proved that which, if proved and correctly stated, did amount to employment.

Therefore, my Lords, I entirely concur in the motion that this appeal be dismissed.

Lord Morris: My Lords, I entirely concur with the judgment of

the Lord Chancellor and of my noble and learned friend opposite. There are only one or two points upon which I should like to offer a few observations.

In the first place, it appears to me that the learned Judge put the real question to the jury as to whether this alleged employment of Mr. Dunn was a real and *bonâ fide* employment, or an unreal and sham employment in order to enable him maliciously to libel the plaintiff. That appears to me to have been the point which was put by the learned Judge, and it appears to me to have been the point upon which the whole trial went, and upon which the trial properly went, because, when one publication is proved that goes to the root of the entire controversy: the question was, was the employment a real one? If so, Mr. Dunn was privileged. If it was an unreal one, he had no privilege—the whole thing was a sham, and he was acting maliciously.

My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that those witnesses are not to be credited. But I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit.

Lord Bowen: [His Lordship agreed that the case made at the trial seemed to have been that there had been no genuine employment of the defendant, and that the document was a sham concocted for purposes of malice; that the verdict, if supported, could only be supported on that ground; but that, on the evidence of six of the

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signatories, taken in conjunction with the evidence of Mrs. Cooke, it was impossible to deny that there had been a real and genuine employment of the defendant; and that on the issue so presented to the jury judgment must be entered for the defendant. His Lordship added:] And I think, as the Lord Chancellor and my noble and learned friends who have preceded me have said, that it would be *pessimi exempli*, and contrary to all one's experience at Nisi Prius, and contrary to the best interests of justice, if a plaintiff, who had obtained a verdict from a jury upon one issue which he had presented to them, were allowed to sustain it by fishing out various causes of action, which he had not presented to the jury, and upon which their verdict was not asked for, and upon which damages unquestionably were not given. [His Lordship added that, although this was enough to end the case, he would consider the reasons which it was urged might sustain a verdict, though not the one given by the jury. He expressed concurrence with the Lord Chancellor as to the signatories who had not given evidence for the defendant, and continued:] I myself have no doubt at all, in the absence of authority, that if a solicitor has reason to believe that his services may be required by a possible client who does afterwards retain him, what passes between the solicitor and the client on the subject of the retainer, and relevant to the retainer, is covered by professional privilege.

Then it is said that there is some evidence of malice which would oust that privilege, if the privilege exists. With reference to that I have only two observations to make. The first is, that I entirely concur with what the noble and learned Lords who have preceded me have said. I can find no scintilla of evidence which would justify a jury in finding malice so as to oust that privilege.

My Lords, there is another and more serious point, a point of law, which I desire to keep open so far as my opinion is concerned. I very much doubt whether, when a professional relation is created between a solicitor and client, and communications pass between the solicitor and the client with reference to the prosecution of a third person, or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, pro-

vided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client. I very much doubt whether malice destroys that kind of privilege, unless it is shown that what passed was not germane to the occasion. But it is not necessary to decide that point, for it does not arise here. I only desire to keep it open in case it should arise in some other case.

Ordered, that the judgment appealed from be affirmed and the appeal dismissed with costs.

Solicitors: *White & De Buriatte*, for the Appellant.
Newson & Dunn, for the Respondent.

At para. 1

2008 ABQB 537
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2008 CarswellAlta 1163, 2008 ABQB 537, [2008] A.W.L.D. 3911, [2008] A.W.L.D. 3915, [2008] A.J. No. 965, 172 A.C.W.S. (3d) 589, 46 C.B.R. (5th) 243

In the Matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

B.E. Romaine J.

Judgment: August 28, 2008
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Q.C., Sean F. Collins, Fred Myers, Jay A. Carfagnini, Brian F. Empey for Applicants, CCAA
Patrick McCarthy, Q.C., Josef A. Kruger for Monitor
A. Robert Anderson, Q.C., Michael O'Brien for Independent Trustees of Calpine Commercial Trust, Directors of Calpine Power LP Ltd.
Peter T. Linder, Q.C., Emi R. Bossio for HCP Acquisition Inc.
Brian P. O'Leary, Q.C., Patricia Quinton-Campbell for Khanjee Holdings (U.S.) Inc., Khanjee Power Generations LLC, WASP ENERGY LLC. et al
Anthony L. Friend, Q.C., Scott D. Bower for Catalyst Capital Group Inc.

***B.E. Romaine J.*:**

1 Often in proceedings under the *Companies' Creditors Arrangement Act*, costs are not awarded against unsuccessful parties. There are policy reasons for this convention: generally, stakeholders in CCAA proceedings are involuntary parties in the process, compelled to participate by reason of the CCAA debtor seeking the protection of the Act. Creditors and other stakeholders often bring applications in order to protect the priority of their positions or to seek a lifting of the stay provisions in circumstances they believe warrant such relief. The applications brought by Khanjee Holdings (U.S.) Inc. and the Catalyst Capital Group Inc. that are the subject of this decision on costs are different from the usual type of CCAA application in that they were disappointed bidders or potential bidders on the purchase and sale of an asset of one of the Calpine applicants. Catalyst sought re-consideration of an existing order and Khanjee sought an amendment to an existing order that would allow it to bid on the asset despite its contractual obligation not to do so. The parties are sophisticated commercial entities that entered the fray voluntarily in an attempt to better their positions, with respect both to their ability to acquire the Class B Units and the Fund-related contracts of CLP and the take-over bid for the publicly-traded trust units of the Fund. The policy reasons that underlie the no-costs convention are thus not operative in this case, and there is no reason to depart from the general rule awarding costs to the successful parties, not as a punishment but as a recognition of the usual risks of litigation. Thus, there will be costs awarded, and the remaining issue is to whom and in what amount.

2 The successful parties submit that since the Court was able to dismiss the applications without calling on submissions from parties other than the applicants, and for reasons that made it clear that I found the applications lacking substantial merit, there should be a costs award compelling the applicants jointly or separately to pay costs on a full indemnity basis. Although the applications had little chance of success for the reasons I expressed in my decisions, given the context in which they were brought, I cannot find that they were so improper or vexatious as to warrant an exceptional award of complete indemnity costs. While there was an allegation at least in the case of Khanjee of impropriety in the mere fact that the application was brought in the face of the confidentiality agreement to which it had bound itself, that issue will be addressed more fully in terms of party and party costs.

3 As I noted in my reasons dated February 8, 2007, the process of marketing the Class B Units and Fund-related contracts of CLP was abbreviated and rapidly evolving, largely due to the complication and timing of the take-over bid proceedings for the Fund's A Units. Given the objective of obtaining the best price for the Fund-related assets for the benefit of stakeholders in the CCAA process, I could not afford interested parties the luxury of a lengthy auction process. The situation was further complicated by the Settlement Agreement application and the holiday season, which made it difficult for interested parties to respond to unfolding events. Despite the best efforts of interested parties and the extremely rapid response of the Monitor to competing offers, stakeholders were often put in a difficult position with respect to evaluating information. As I said previously, the process was not pretty, the financial stakes were very high and conduct that in other circumstances may have given rise to penal costs must be viewed with greater tolerance.

4 Khanjee applied to set aside the January 30, 2007 approval of the bid by HCP Acquisition Inc. with a direction that the party that successfully acquired the Fund's Class A Units be required to purchase the B Units at the price fixed by the Court on January 30, 2007. Alternatively, Khanjee submittted that there should be a new auction process, and that it be permitted in that process to submit an offer to purchase the Fund-related assets. I held that Khanjee's application was essentially a request that I allow it to circumvent a confidentiality and standstill agreement into which it had freely entered, that I did not have jurisdiction over an unknown purchaser of the Fund's A Units so as to compel it to purchase the Fund-related assets, and that Khanjee had failed to raise any new material evidence that would justify a reconsideration of my previous decision.

5 Khanjee was a participant in the Fund's search for a white-knight in response to Harbinger's take-over bid for the A Units. As a condition to being allowed access to confidential information in connection with the potential acquisition of the Fund, Khanjee executed a confidentiality agreement that restricted it from being able to submit an offer for the Fund-Related Assets. Khanjee submits that its participation in the take-over bid process was predicated on the understanding that the Fund was able to control the sale of both the Class A Units and the Fund-Related Assets and it is critical about the information made available to the Monitor and the Court relating to the marketing process and the disclosure made available by the Fund. Khanjee suggests that the combination of the take-over bid process and the CCAA process had become a "quagmire for any interested, serious" bidders, and that this justified its last minute application.

6 While the details of the confidentiality and standstill agreements may not have been fully-disclosed in the information before the Court on January 30, 2007, the gist of the contractual limitations and the negative effect they would have on the auction process was adequately described in the Monitor's reports. Khanjee's application added little by way of relevant information to the process. Participation in a public take-over bid for securities is indeed rife with strategic risk for an interested bidder, but that cannot justify the type of interference with contractual obligations unrelated to the Calpine applicants envisioned by the Khanjee application. These submissions do not justify relief from a costs award against Khanjee.

7 Catalyst's application requested that the January 30, 2007 approval of the bid by HCP Acquisition Inc. be set aside and that Catalyst be permitted to submit a written proposal for the acquisition of the Fund-Related Assets in a form that had been provided to the Monitor dated February 8, 2007. I held that the new proposal was not substantially different from that presented by counsel in oral submissions on January 30, 2007 and that it still suffered from serious contract termination risks. I also held that the application was an attempt to re-argue Catalyst's case. Catalyst submits in this

costs application that it had not been able to make adequate representations in the first application about its operational expertise, which, it says, relates to whether it would have been unreasonable for the Fund to refuse its consent to the transfer of the Fund-related contracts. This was always a minor factor, as it was not the Fund's ability to withhold consent but the time it may have taken to resolve the issue through litigation that was of greater relevance to consideration of the competing offers.

8 Catalyst also complains that my reasons of February 8, 2007 were "for some reason" not provided to Catalyst or its counsel. Counsel of record for Catalyst at the time of the January 30, 2007 hearing was advised of the availability of these reasons at the same time as all other counsel. It is unfortunate that Catalyst's change of counsel may have led to a delay in new counsel receiving a copy of the decision.

9 Catalyst also suggests that it brought its application only upon becoming aware that Khanjee was bringing an application in any event. That, unfortunately, did not relieve opposing parties from having to address Catalyst's application separately.

10 Catalyst also suggests that its February 8, 2007 offer was different from what had been presented on January 30, 2007. While there were some differences, I found the new offer not be substantially different, particularly in the key area of contract transfer and termination risks. In short, these submissions do not justify relief from a costs award against Catalyst.

11 Three parties seek costs from Khanjee and Catalyst. There are the Calpine parties (which seek costs, including the full-indemnity costs of any person entitled to indemnity from them with respect to the reconsideration applications), the Independent Trustees of Calpine Commercial Trust and the Directors of Calpine Power L.P. Ltd. (the general partner of Calpine Power L.P.) and HCP Acquisition Inc.

12 With respect to the party and party costs of each of these claimants, I am satisfied that, given the accelerated and intense process necessitated by the reconsideration motions and the nature of the litigation, Schedule C of the Rules of Court is inappropriate as a guide.

13 I also note that Khanjee and Catalyst did not act jointly, and that therefore joint and several cost awards are not appropriate in this case.

14 I have considered the estimated solicitor and client costs of each of the claimants, and have concluded that HCP Acquisition Inc. and the Trustees and Directors of the Fund and its general partner should receive the same level of reimbursement of costs, roughly commensurate with the principle that a costs award should aim at providing 40% to 50% indemnity: *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.) at para. 8. I therefore award each of these claimants costs in the amount of $6,300 against each of Khanjee and Catalyst, plus one half of their reasonable disbursements.

15 The indemnity costs claimed by the Calpine applicants are considerably higher than those claimed by the other two successful parties, and I note that they impliedly include the costs of other parties who have a right to seek indemnification from the Calpine applicants for the costs of appearing on this application. As pointed out by Catalyst, security instruments that may contain such types of indemnity provisions were not in evidence, but I take note that the costs of the Monitor and the Monitor's counsel are costs that must be borne by the creditors of the estates of the Calpine parties. I therefore award the Calpine applicants parties costs in the amount of $15,000 against each of Khanjee and Catalyst plus one half of their reasonable disbursements.

Order accordingly.

At para. 34

1993 CarswellOnt 226
Ontario Court of Justice (General Division)

Canadian Asbestos Services Ltd. v. Bank of Montreal

1993 CarswellOnt 226, [1993] O.J. No. 1487, [1995] G.S.T.C. 36, 21 C.B.R. (3d) 120, 41 A.C.W.S. (3d) 517

CANADIAN ASBESTOS SERVICES LIMITED and 163230 CANADA INC. and their creditors v. BANK OF MONTREAL, HALIFAX INSURANCE COMPANY, SGB 2000 INC., T. HARRIS PARTNERSHIP INCORPORATED, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, LOCAL UNION 1891, ONTARIO HYDRO, DOMINION OF CANADA GENERAL INSURANCE COMPANY, and R. IN RIGHT OF CANADA (in their personal capacities and on behalf of and for the benefit of all creditors of applicants) (No. 3); Application under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Personal Property Security Act, 1989, S.O. 1989, c. 16; Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 114; Rules 14.05(3)(d), (e), (g) and (h) and 12.01 of Rules of Civil Procedure

Chadwick J.

Judgment: June 28, 1993
Docket: Doc. 62972/92

Counsel: *Paul B. Kane* and *Jean-Marc Eddie* for the applicants.
Philip Reimer for Bank of Montreal.
Brian J. Saunders for Attorney General of Canada.
Julian Heller for S.G.B. 2000 Inc.
E. Peter Auvinen for Electrical Power Systems Sector Vacation Pay and Holiday Pay Trust Funds
P. Donald Rasmussen for John Westeinde.

***Chadwick J.*:**

1 The receiver-manager brings this application for approval of a proposed scheme of distribution.

History of proceedings

2 Deloitte & Touche were appointed as monitors of the applicant companies pursuant to the provisions of the *Companies' Creditors Arrangement Act*, on January 15th, 1992. Unfortunately, they were unable to put forward a plan or proposal which would satisfy the interests of the various creditors. On May 1st, 1992 I terminated Deloitte & Touche as monitors and appointed them receiver-managers pursuant to the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 114.

3 There was a dispute amongst the creditors as to priority. The priorities were determined by me with written reasons issued on October 26th, 1992 [reported at 16 C.B.R. (3d) 114] and March 24th, 1993 [reported at 13 O.R. (2d) 291].

4 As there is insufficient funds available to pay all of the creditors, there have been a number of challenges to their claims. In addition the claims of the monitor, receiver-manager and their solicitors' fees relating to these applications has been challenged.

Estimate of funds available

5 Funds held in Trust by Perley-Robertson

Torcom	$110,00.00
Halifax Insurance	81,000.00
Canderel (Royal Trust Job)	90,401.37

6 Accounts Receivable to be collected

Ontario Hydro-Bruce Nuclear Plant	44,493.48
Dominion of Canada-165 University	37,091.71
Cash on hand	37,593.72
	$400,580.28

Proposed distribution

7

Class	Total Claim	Recovery	Percentage
Fresh Funds Injected	$ 98,500	$ 98,500	100.00%
Wages & Vacation Pay	3,018	3,018	100.00%
Federal Crown Claims	46,407	46,407	100.00%
Monitor/Receiver & legal fees	403,000	209,731	52.04%
Halifax Insurance Claims	16,643	16,643	100.00%
Provincial Crown Claims	68,255	6,826	10.00%
Ontario Hydro	33,404	3,340	10.00%
Canderel (Royal Trust Job)	9,072	6,804	75.00%
Other Post January 15, 1992 Creditors	93,107	9,311	10.00%

Completion costs

8 Canadian Asbestos Services Ltd. (CAS) completed the work on the Bruce project and charged a sum of $44,493.48. At a previous hearing, the amount of the charge-back for completion was challenged, by SGB 2000 Inc. As a result, I directed the receiver-manager to hold in trust the sum of $20,000 and pay out the balance of $24,493.48 to CAS. The parties have now had an opportunity of investigating the total charge-back by CAS.

9 The problem arises from the fact that the original estimate for the completion of the work was in the range of $15,000 to $25,000. The cost incurred by CAS exceeds their estimate by four times. Mr. Heller, on behalf of SGB 2000 Inc. has carried out a careful analysis of the cost factor and has examined the payroll records of CAS. It appears that CAS was not as efficient in completing the work on the Hydro project as they had been prior to the monitor being put in place on January 15th, 1992. The workforce was reduced and they have paid some of the supervisory people more money for the completion of the work than they had in previous months.

10 Brian Loveday, a consultant with Deloitte & Touche, the person responsible for the overall supervision of both the monitor and receiver-manager functions was also examined about the background information relating to the completion of the project by CAS. In his affidavit material filed, he is satisfied that these costs were incurred. He admits CAS may not have been as efficient as they should have been. The monies were actually spent by CAS and there was nothing

improper in the way CAS paid their accounts, nor was there any money misappropriated. Under the circumstances, I would allow their claim in full.

Federal Crown claims

11 Pursuant to previous orders, the receiver was directed to remit to the Federal Government all source deductions based upon 100 cents on the dollar. In the proposed distribution scheme, it provides for the payment to the Federal Crown of $46,407 which represents source deductions which have not been remitted.

12 Mr. Saunders, on behalf of the Crown takes the position that there is $63,396.28 presently owing by Canadian Asbestos as source deductions since January 15th, 1992. These deductions are under the *Income Tax Act*, *Canada Pension Plan*, *Unemployment Insurance Act*. The breakdown of the Federal Government claims as $42,922.63 principal, $13,847.56 penalty and $6,626.09 interest.

13 Section 227(4) of the *Income Tax Act* provides that every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty. There are similar provisions in both the *Canada Pension Plan* and *Unemployment Insurance Act*.

14 There is no issue that the Crown is entitled to 100% of the moneys that have been deducted at source. The dispute arises as to whether they are entitled to rank in priority over other creditors for both the penalty and interest. The penalty and interest arises as a result of the failure of the monitor/receiver-manager to remit source deductions in the time-frames as prescribed in the various Acts and regulations.

15 The deemed trust provision in the various Acts relates to the principal sums only and does not apply to penalties and interest.

16 The Crown will have priority with reference to the principal amount of source deduction but will have no priority with reference to the claim for interest and penalty. They will rank with the other creditors for those claims.

EPSS funds

17 The Electrical Power Systems Sector Vacation Pay and Statutory Holiday Pay Trust Funds claim priority with reference to vacation pay moneys owed to employees of CAS. CAS is bound by a collective agreement with the Ontario Allied Construction Trades Council which provided for the deduction of vacation pay for employees working on the Bruce Nuclear Project. This covered the period from November, 1991 to February, 1992.

18 The breakdown of monies owing for the above period is as follows:

(a) November 1991 — $10,992.51

(b) December 1991 — 5,435.39

(c) January 1992 — 4,217.53

(d) February 1992 — 23.80

19 Section 15, *Employment Standards Act*, R.S.O. 1990, c. E.14 provides as follows:

> Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not.

20 A careful examination of the payroll records of CAS indicates that there was very little work done after January 17th, 1992 which would attract vacation pay. The majority of the claim for the month of January relates to $15,071 of payroll expense up to January 17th and $1,146.12 between January 17th and January 31st.

21 The EPSS fund would be in no better position than the Federal or Provincial Crown. In my reasons of October 26th, 1992 I found that the Federal and Provincial Crown were bound by the *Companies' Creditors Arrangement Act*. I followed my previous decision in *Fine's Flowers Ltd. v. Fine's Flowers Ltd. (Creditors of)* (sub nom. *Fine's Flowers Ltd. v. Creditors of Fine's Flowers Ltd.*) (1992), 7 O.R. (3d) 195.

22 As the vast majority of the applicants, EPSS funds claim relates to work prior to January 15th, 1992 the monitor-receiver is not responsible for these vacation monies. EPSS fund will have priority as it relates to the amounts incurred after January 15th, 1992 which I will fix at $300.

Westeinde claims

23 John Westeinde, the principal shareholder of Canadian Asbestos Services Ltd., submitted an invoice to the monitor-receiver for services rendered at the rate of $5,000 per month. At the time of the appointment of the monitor on January 15th, 1992 Mr. Westeinde and other shareholders agreed that he would be paid $5,000 a month to assist the monitor in the operation of the company. It is to be noted that there was a substantial benefit to be derived by Mr. Westeinde and other shareholders if a plan or arrangement could have been made under the provisions of the CCAA. There is no doubt that the services provided by Mr. Westeinde were of value to the monitor to carry on the day-to-day operation of the company. It is also to be noted that he was paid $10,000 previously for these services. After the appointment of the receiver on May 1st, 1992 there was no provision for Mr. Westeinde to provide services to the receiver-manager.

24 The issue is not with reference to the amount charged by Mr. Westeinde but whether he has priority over other creditors.

25 In view of the shortage of funds, I do not see why Mr. Westeinde should rank in priority to the other creditors who are only receiving 10% of their claim. Other people have provided services to the monitor and are suffering financial loss.

26 Application under the CCAA was for the benefit of Mr. Westeinde and other shareholders of Mr. Westeinde's company and as such he should not have any priority.

27 Westeinde Construction Limited, a company owned and operated by John Westeinde provided storage facilities for the files of CAS until the appointment of the monitor. For the same reasons I have indicated above, they should not have any priority over other creditors. Mr. Westeinde withdrew his other claims.

Monitor-receiver legal fees

28 The largest claim in the list of distribution is the monitor-receiver fees and legal fees. These fees can be broken down as follows:

Deloitte & Touche Inc. $237,000

Perley-Robertson, Panet, Hill & McDougall 166,000

29 The fees of the monitor/receiver and legal fees have not been assessed. I indicated to the parties that if there was a challenge to either group of fees, I would conduct an assessment of these accounts.

30 There is no question that the fees are substantial but there were numerous applications to the court in this matter. There were many challenges put forward which no doubt took a great deal of time both in and out of court. It is to be

noted that the percentage of recovery of fees for both groups is 52.4%. However there has been fees paid in advance which represent 100% of fees which would bring their percentage of recovery up to approximately 60%.

31 The reduction of fees by 40% is purely a voluntary reduction by the receiver and legal counsel. It is based primarily upon the limited resources available for distribution.

32 I dealt with the priority of the monitor-receiver and legal counsel in previous reasonings and have no reason to vary or change that priority. In my view they should have priority over other creditors as this is the only way these applications would succeed and they should be properly compensated.

Costs

33 SGB 2000 Inc. claim they should have their costs and the costs should be given priority over other creditors. Mr. Heller, on behalf of SGB 2000 points out that they have been successful in a number of the motions that they have brought in these proceedings. In addition, at the commencement of these proceedings, it was suggested that the monies on the Bruce project be segregated and made available to SGB 2000 Inc. and other contractors who performed services. If that had happened, then SGB 2000 no doubt would not have been involved in the various motions.

34 I have considered the question of costs, and whether any of the parties other than counsel for the monitor-receiver should receive legal costs. I appreciate SGB 2000 Inc. has incurred a large number of legal costs in disputing these various applications. However, it was apparent very early in these proceedings that there was going to be limited funds available for distribution. As such counsel should have considered the cost to the client, and the likelihood they would not recover costs.

35 I am prepared to fix costs of the various parties, however, I am not prepared to give them priority over other creditors.

Order accordingly.

2002 CarswellOnt 4507
Ontario Superior Court of Justice

Conte Estate v. Alessandro

2002 CarswellOnt 4507, [2002] O.J. No. 5080, 119 A.C.W.S. (3d) 951

Elisa Conte, Executrix and Trustee for Cesidio Conte and Elisa Conte, Plaintiffs and Joe Alessandro Also Known as Giuseppe Alessandro, a Bankrupt, Gregorina Alessandro, Alba Alessandro and A. Farber & Partners Inc., Trustee in Bankruptcy of the Estate of the Said Giuseppe (aka) Joe Alessandro, Defendants

Rouleau J.

Heard: September 17-23, 2002
Judgment: December 10, 2002
Docket: 96-CU-114234

Counsel: *Joseph J. Colangelo*, for Plaintiffs
William G. Dingwall, Q.C., for Defendants

***Rouleau J.*:**

I. Introduction

1 This action was brought by Cesidio and Elisa Conte ("Cesidio" and "Elisa" respectively) to set aside two non arm's length transactions and to declare them fraudulent and void. The first non arm's length transaction was a conveyance of 1629 James Street, Tiny, Ontario ("the property") from the defendant Giuseppe Alessandro ("Joe") to his wife, the defendant Gregorina Alessandro ("Gregorina"). The second non arm's length transaction was a $225,000 mortgage placed on the property by Gregorina in favour of her daughter, the defendant Alba Alessandro ("Alba"). The plaintiffs also sought other ancillary relief, and the defendants counterclaimed seeking declarations that the property is in fact beneficially owned by Gregorina and that Alba's mortgage is valid.

2 The issue in this action is whether the two transfers of property were fraudulent conveyances: the transfer of property from an insolvent husband to his wife and the subsequent mortgage of the property by the wife to their daughter. I have concluded that both transactions are fraudulent conveyances.

II. The Facts

3 The plaintiff Cesidio died before trial, and the action was continued by his estate. As his death was anticipated, the parties videotaped his testimony which was admitted at trial.

4 The defendant Joe declared bankruptcy in February 2002 and, by order of Wilson J., the plaintiffs were allowed to continue the present action. The trustee in bankruptcy decided not to continue to defend the action and consented to judgment against the bankrupt. For purposes of the trial, therefore, only the defendants Gregorina and Alba defended.

A) The Debt

5 Cesidio and Joe were former partners with two others in a lumber business. In the late 1980s, Joe bought out Cesidio for $400,000 made up of $50,000 cash and a $350,000 promissory note due February 1, 1993. When the note became due in February 1993, the plaintiffs demanded payment but the debt was not paid. Cesidio brought an action for recovery

of the $350,000 which resulted in the judgment of Cameron J. dated April 3, 1996. This judgment awarded Cesidio and Elisa Conte $413,768.33 and solicitor and client costs. The judgment bears interest at 10% annually.

6 Despite repeated attempts at collection including a judgment debtor examination, nothing has been paid on this debt. As at the 17th day of September 2002, I was advised that the value of the judgment, with interest, was $642,831.74.

B) The Property

7 In 1972, a numbered company purchased the property that was, at the time, a vacant cottage lot near Georgian Bay. Shortly thereafter the defendant Joe took title of the property in his name "to uses." Although there is conflicting evidence on the point, it appears that the property was purchased as part of an arrangement among several partners to acquire a series of properties, divide these into building lots and resell them at a profit. Because the partners were purchasing several adjoining lots, they purchased these in a sort of "checker board" arrangement putting properties in their names, in the names of their spouses or in joint ownership.

8 According to the testimony of one of the partners, Giuseppe Marchese, the property was one of five properties acquired by him and three other partners, the defendant Joe, Raffaele Morano and Domenic Scroll. Four of the properties (the "Block D properties") were adjoining, and these were registered in each of the names of the defendants, Gregorina and Joe, and in the names of Raffaele "to uses" and Mariaella Morano. The property which was not adjoining to the others was, as set out above, registered in the name of the defendant Joe "to uses." The sale of the Block D properties generated sufficient monies to cover the full purchase price of the five properties. Therefore the remaining property held by Joe for the four partners was the "profit" of the four partners.

9 According to Giuseppe Marchese, sometime later Joe bought out the interest in the property owned by the three other partners paying $3,000 to each of them. No transfer was necessary since the property was already in Joe's name.

10 In August 1994 the property was transferred from Joe "to uses" to Gregorina for nominal consideration. The land transfer tax affidavit stated that the consideration was $2.00 and that Gregorina "has been the sole beneficial owner during the entire period the lands had been registered in the name of Joe."

C) The Mortgage

11 In October 1996, Alba registered a mortgage in the amount of $225,000 against the property. Alba testified that the consideration for the mortgage was a series of payments made by her to Gregorina during the period December 1993 to April 3, 1995. This series of advances had been made under an agreement entered into among the three defendants in December 1993 (the "loan agreement"). According to Alba the advances were made because her mother needed the money.

12 There was a series of thirteen cheques totalling $258,500 entered into evidence. The defendants claimed the cheques were advances made pursuant to the loan agreement. Although the cheques were all drawn on Alba's account, Joe signed every cheque but one. The three payees of the cheques were Alessandro Holding Ltd., Joe Alessandro, and Joe and Gregorina Alessandro jointly. Little is known of the source and use of these funds as the bank statements were not entered into evidence. Alba testified that by the time she reached her early twenties, she had made hundreds of thousands of dollars trading in penny stocks. Again, no documentation was provided in support of this. It also appeared from Joe's testimony that he was a member of the Board or may have played some role in one or more of the companies, the stock of which Alba traded and profited from.

13 Pursuant to the terms of the loan agreement, the advances of $258,500 would have become due in April 1997. It appears that there was no repayment of these sums.

14 The mortgage was registered in October 1996, and full payment was due one year later. During the first year of the mortgage, Gregorina paid interest. However, on October 1, 1997, when the balance became due, payments stopped, and the mortgage went into default.

D) Chronology

15 The plaintiffs suggest that much can be inferred from the timing of various events. They have put forward a chronology setting out the dates of various key events. I agree that the timing is important and therefore will set out some of the key dates and events in this judgment. They are as follows:

September 26, 1972	Purchase of the subject property by Joe "to uses"
February 1, 1988	Joe purchases the lumber business from Cesidio and Elisa for $400,000; $50,000 payable in cash and the balance of $350,000 by promissory note
February 11, 1993	Demand for payment by the plaintiffs of the $350,000 note
December 3, 1993	Loan agreement among Alba, Joe and Gregorina pursuant to which Alba agrees to advance sums to Joe and Gregorina in the future. The agreement includes a recital that Joe holds the property in trust for Gregorina
December 6, 1993	First advance made under the loan agreement. It is a $5,000 cheque to Alessandro Holdings Ltd.
June 7, 1994	Statement of Claim issued by Cesidio and Elisa to obtain repayment of the $350,000 debt
August 30, 1994	Transfer of the property from Joe to Gregorina for $2
April 3, 1996	Judgment of Justice Cameron in the debt action granting judgment in the amount of $413,768.33, plus post-judgment interest at 10%. Included in the reasons for Justice Cameron is the statement that alleged oral agreements put forward by Joe did not occur and that Justice Cameron did not believe Joe.
July 3, 1996	Examination in aid of execution of Joe
October 4, 1996	Execution of charge on the property by Gregorina and Joe in favour of their daughter Alba
November 14, 1996	Statement of claim in the present action is issued.

III. Issues

16 The issues in this case are as follows:

(a) was the transfer from Joe to Gregorio a fraudulent conveyance?

(b) was the mortgage from Gregorina to Alba a fraudulent conveyance?

(c) Did the plaintiffs and defendants settle the claim before the trial?

IV. The Law

A) Statutory Framework

17 The plaintiffs rely principally on two statutes, the *Fraudulent Conveyances Act* R.S.O. 1990, c.F-29 and the *Assignments and Preferences Act*, R.S.O. 1990, c.A-33.

18 The relevant portions of the *Fraudulent Conveyances Act* are as follows:

> **2.** Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. R.S.O. 1990, c. F.29, s. 2.

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section. R.S.O. 1990, c. F.29, s. 3.

19 The relevant portions of the *Assignments and Preferences Act* are as follows:

Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors

4.-(1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the personal, debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced. R.S.O. 1990, c. A.33, s. 4(1).

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

Assignments for benefit of creditors and good faith sales, etc., protected.

5.(1) Nothing in section 4 applies to an assignment made to the sheriff for the area in which the debtor resides or carries on business or, with the consent of a majority of the creditors having claims of $100 and upwards computed according to section 24, to another assignee resident in Ontario, for the purpose of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts, nor to any sale or payment made in good faith in the ordinary course of trade or calling to an innocent purchaser or person, nor to any payment of money to a creditor, nor to any conveyance, assignment, transfer or delivery over of any goods or property of any kind, that is made in good faith in consideration of a present actual payment in money, or by way of security for a present actual advance of money, or that is made in consideration of a present actual sale or delivery of goods or other property where the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor. R.S.O. 1990, c. A.33, s. 5(1).

B) Presumption of Fraud

20 In this type of case it is unusual to find direct proof of intent to defeat, hinder or delay creditors. It is more common to find evidence of suspicious facts or circumstances from which the court infers a fraudulent intent.

21 These suspicious facts or circumstances are sometimes referred to as the "badges of fraud." These badges of fraud are evidentiary indicators of fraudulent intent and their presence can form the *prima facie* case needed to raise a presumption of fraud. These badges of fraud can be traced back to *Twyne's Case* (1601), 3 Co. Rep. 80b (Eng. K.B.) and are elaborated upon in *Prodigy Graphics Group Inc. v. Fitz-Andrews*, [2000] O.J. No. 1203 (Ont. S.C.J.).

22 The presence of one or more of the badges of fraud raises the presumption of fraud. Once there is a presumption, the burden of explaining the circumstantial evidence of fraudulent intent falls on the parties to the conveyance. The persuasive burden of proof stays with the plaintiff; it is only the evidentiary burden that shifts to the defendants.

23 In cases of non arm's length transactions, independent corroborative evidence is strongly recommended but not required if the defendants' evidence is found to be credible. In *Koop v. Smith* (1915), 51 S.C.R. 554 (S.C.C.), Duff J. discussed the need for corroborative evidence in a case involving a transaction between two near relatives for no consideration. Duff J., at p.559 stated as follows:

> I think the true rule is that suspicious circumstances coupled with relationship make a case of *res ipsa loquitur* which the tribunal of fact may and will generally treat as a sufficient *prima facie* case, but that it is not strictly in law bound to do so; and that the question of the necessity of corroboration is strictly a question of fact. Having examined the evidence carefully I am satisfied that the learned trial judge was entitled to take the course he did take and not only that the evidence, as I read it in the record, casts the burden of explanation upon the respondent, but that the testimony given by her brother ought not in the circumstances to be accepted as establishing either the actual existence of the debt or of the *bona fides* of the transaction.

24 Another useful case is *Petrone v. Jones* (1995), 33 C.B.R. (3d) 17 (Ont. Gen. Div.). That case supports the proposition that where, as in the present case, the transferor is transferring the only asset he has remaining with which to pay his debts, there is a presumption of an intent to defeat creditors. Wright J., at p.20, stated the proposition as follows:

> In the absence of any direct proof of intention, if a person owing a debt makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid then, since it is the necessary consequence of the settlement that some creditors must remain unpaid, it is the duty of the judge to direct a jury that they must infer the intent of the settlor to have been to defeat or delay his creditors. (*Sun Life Assurance Co. v. Elliott* (1900), 31 S.C.R. 91.)
>
> Even if we consider the direct evidence that the defendant had no intention of defeating, hindering, *et cetera* the claims of the plaintiff, can this evidence remain standing in the face of the undoubted evidence that for the past year the defendant has in fact acted in every way to defeat, hinder or delay the plaintiff's claim?
>
> Even if the defendant had no intention, at the time of the conveyance, of defeating, hindering or delaying the plaintiff's claim, surely his actions since that date, the defence of the claim on the promissory note, the defence of this action, prevent him from raising that lack of specific intent as a defence.
>
> Further: even if the plaintiff did not intend to defeat, hinder or delay this creditor but effected the transfer with a view to defeating, hindering or delaying potential future creditors his defence would still fail.

V. Analysis

25 The plaintiffs' position is that the many suspicious circumstances and badges of fraud surrounding the transfer of the property by Joe to Gregorina and the mortgage by Gregorina to Alba raise the presumption of fraud which has not been rebutted. This leads to the inevitable conclusion that the mortgage and the transfer of the property should both be set aside pursuant to the *Fraudulent Conveyances Act*.

A) Assignments and Preferences Act

26 The plaintiffs have also relied on the *Assignments and Preferences Act* as a basis to set aside the mortgage. For the Act to apply, the transferor (or mortgagor) must be insolvent. It may well be that Joe was insolvent at the time that the mortgage was placed on the property, but the mortgage was granted by Gregorina. No evidence was led suggesting that Gregorina was insolvent. Even though Joe, as spouse, consented to the transaction, I do not believe that this would bring the *Assignment and Preferences Act* into play.

B) Requirements to Prove Fraudulent Conveyance

27 The plaintiffs need to show that both the transfer to Gregorina and the subsequent mortgage to Alba were both part of a scheme to defeat, hinder, delay or defraud the plaintiffs contrary to the *Fraudulent Conveyances Act*.

28 If I find that the conveyances were made with intent to defeat, hinder, delay or defraud creditors it would still not be void if the defendants could establish that the transactions were made for good consideration, were *bona fide* and the transferee or mortgagee was a person not having, at the time of the transaction, notice or knowledge of the intent to defraud. The onus to show this, however, is on the defendants. (*Bank of Montreal v. Jory*, [1981] B.C.J. No. 1014 (B.C. S.C.)).

C) Taking Title "To Uses"

29 The taking of title "to uses" was the subject of much argument. The defendants maintain this has the same effect as taking title "in trust." The plaintiffs maintain that it is simply a form of title that was used at that time to avoid the obligations flowing from dower. While both positions may be sustainable, the real determinant is the intention of the parties. Therefore, I see no need to deal with the *Statute of Uses* R.S.O. 1897, c.331 and its application to the present case.

D) The Defendant's Case

30 The defendants admit that the transfer from Joe to Gregorina was not made for consideration. They take the position that the transfer was simply putting the property into Gregorina's name on the basis that, since the mid-70s, it had been held by Joe on behalf of Gregorina. They point to the fact that title had been taken by Joe "to uses" as evidence of this. If accepted, this is a complete answer to the plaintiffs' claim.

31 If the court sets aside the transfer to Gregorina as a fraudulent conveyance, the defendants take the position that the mortgage on the property is valid and enforceable. It would remain as a charge on the property and take priority over the plaintiffs' claims.

32 Finally, the defendants take the position that the action has been settled and that, as a result, the claim should be dismissed.

E) The Evidence

33 The events surrounding this action date back, in some cases thirty years. As a result, some allowance must be made for faulty memories and for the difficulty in proving certain facts. Similarly, the real estate transactions carried out in the 1970s, including the acquisition of the property by Joe "to uses," involved many different lots contributing to confusion in the testimony and recollection of the parties.

34 Even accounting for this, the evidence put forward by the defendants is far from satisfactory. I noted a number of significant inconsistencies. Some of the more significant inconsistencies surrounding key events were as follows:

1. Gregorina testified that the property had always been in her name. However, there was also evidence that:

    - according to land registry records the property was put into the name of Joe "to uses" in 1972 and not transferred to Gregorina till August 1994

    - Joe's discovery evidence was that the 1994 transfer of the property was made at Gregorina's request

    - Gregorina's discovery evidence was that the property was transferred to her because Joe had problems at the bank and did not want to lose the cottage.

2. Alba testified that she gave her mother a mortgage because her mother needed the money. However, there was also evidence to the effect that:

• the mortgage was placed on the property after all of the funds said to support the mortgage were advanced;

• the advances purportedly supporting the mortgage were not made to Gregorina, they were made principally to Alessandro Holdings Ltd., a company apparently controlled by Joe, and to a lesser degree to Joe and Gregorina jointly.

• Joe's discovery evidence was that some of the money was to pay his debts at the Royal Bank for which Gregorina was co-signer.

• all but one of the cheques drawn on Alba's account were signed and likely initiated by Joe.

• although Alba's testimony on this point is somewhat evasive, it is likely that Gregorina was giving Alba significant gifts, including cash gifts, in the same period that the alleged advances were made and remained outstanding;

• Alba testified that it was her mother that gave the necessary instructions to the lawyer regarding the mortgage, but Gregorina's discovery evidence was that all of the paper work regarding the property was prepared or arranged by Alba;

3. Joe testified that he was never a partner in the venture that acquired the property and the Block D properties. He also testified that there were four partners: Gregorina, Giuseppe Marchese, Domenic Sgro and Raffaele Morano. Other evidence on the point, however, was as follows:

• evidence of Gregorina that there were three partners: her, Morano and Marchese.

• the evidence of Giuseppe Marchese was that there were four partners and that one of those four was Joe and not Gregorina;

• Joe gave previous evidence that there were five partners and that he had never held any property in trust. At trial he changed his testimony and said that these prior sworn statements were made in error.

35 When I review the whole of the evidence and consider the reliability of the various witnesses I find Joe's testimony that he took the property in trust for four partners, including his wife, and that it was Gregorina who, as one of the four beneficiaries, paid out the other three partners thereby becoming the sole beneficial owner of the property to be self-serving and improbable. The evidence is more consistent with Joe being the partner who acquired the complete interest in the property sometime in the mid 70s, and I so find.

36 The 1994 transfer to Gregorina was a non arm's length transaction for no consideration at a time when Joe was insolvent. It was an attempt to put the property out of the reach of his creditors.

37 Support for this conclusion includes the following:

1. The clear and cogent evidence of Giuseppe Marchese. He testified that there were four partners, one of whom was Joe, and that after the Block D properties were sold, Joe bought out his partners by paying each of them $3,000. As a result, Joe became the sole owner of the property.

2. When one reviews all of the transactions shown in the various property registers for the area, it is clear that Joe and his partners bought and sold many properties. It does not seem reasonable that Joe would put this particular property into his name when he had no interest in it. Some properties were put in his name, in Gregorina's name

and in their joint names and there seems little logic in his name appearing on title of this particular property if he had no interest in it.

3. The way Joe acted and parts of his testimony suggest that he was directly and intimately involved in these transactions and are more consistent with Joe being a partner than not.

4. Gregorina's discovery evidence read in at trial was that Joe transferred the property into her name because he had problems with the bank and did not want to lose the cottage.

5. The evidence of Cesidio and Sylvio Conte, Cesidio's son, was that Joe had advised them both that the property was "his cottage," that is, Joe's cottage.

38 I turn now to Gregorina's evidence on the question of ownership. As set out previously, her testimony at trial was that the property had always been hers and in her name. She was visibly emotional about it, and it may well be that at the time of trial this was her honest belief. This belief, even if sincere, does not make it so. There were many transactions and payments made in the early 70s. From her testimony, it was clear that Gregorina did not know which specific property would have been put into her name nor which property was put into the name of her husband.

39 She testified repeatedly that the cottage lot she bought was on Ronald Avenue and, after being told that the property was located on James Street, said she must have forgotten that the lots she purchased were scattered on different streets. In fact she and Joe did buy a lot on Ronald Avenue as part of the many transactions in the area, and it is on this lot that they built their first cottage. The Ronald Avenue lot is not, however, the lot that is the subject of the present litigation. The Ronald Avenue cottage was later sold and a second cottage was built on the property located on James Street which, as stated earlier, was also acquired as part of these transactions but is in the name of Joe "to uses".

40 In my view, the property on which the current cottage is situated, the property that is the subject of this litigation, was not a property that Gregorina bought in the 1970s. Her testimony concerning her alleged purchase of the property is confused, inconsistent and changing. The evidence is more consistent with Joe having acquired that property.

41 I now turn to the transactions themselves — the transfer and subsequent mortgaging of the property.

F) Badges of Fraud

42 From the chronology and facts we can identify a series of "badges of fraud" for both the transfer and mortgaging of the property.

1. Transfer from Joe to Gregorina

43 Based on my earlier finding that Joe did not hold the property in trust and had in fact become the owner of the property in the 70s, the 1994 transaction should be viewed as a simple transfer rather than a transfer to the beneficiary under a trust arrangement. I will therefore turn to a review of some of the badges of fraud and how they relate to the transfer to Gregorina. They are as follows:

a) The transferor has few remaining assets after the transfer:

- the property transferred was the only asset owned by Joe and was done at a time when Joe was insolvent.

b) Transfer to a non arm's length person:

- the transfer was non arm's length from Joe to his wife.

c) There are actual or potential liabilities facing the transferor or he is about to enter upon a risky undertaking:

- the transfer was made very shortly after the plaintiffs issued the statement of claim to recover the $350,000 debt owed by Joe.

d) Grossly inadequate consideration:

- the consideration for the transfer from Joe to Gregorina was nominal.

e) The transferor remains in possession or occupation of the property for his own use after the transfer:

- Joe continued to use and benefit from the property after the transfer to Gregorina.

f) The deed contains a self-serving and unusual provision:

- the land transfer tax affidavit contained a self-serving statement being that the transferee had been the sole beneficial owner during the entire period the lands were registered in the name of Joe.

g) The transfer was effected with unusual haste:

- after holding for over 20 years the transfer is effected shortly after the plaintiffs issued the statement of claim.

44 The presence of one or more of these badges of fraud raises a presumption of fraud. As set out earlier, while the persuasive burden of proof remains with the plaintiffs, the burden of explaining the circumstantial evidence of fraudulent intent now shifts to the defendants.

45 In addition to these badges of fraud there is the evidence of Gregorina which was read in from the discovery transcript. Her evidence was that the transfer was done to take the property out of reach of the bank, one of Joe's creditors. Considering this evidence, not only was there little or no evidence to explain the circumstantial evidence of fraudulent intent and rebut the presumption of fraud, there was direct evidence supporting the fraudulent intent.

2. Mortgage Between Gregorina and Alba

46 When we look for badges of fraud in a mortgage transaction that is alleged to be the second part of a two part scheme to defeat or delay creditors we need to adapt the principles somewhat to take into account the unique circumstances. Some of the badges of fraud and how they relate to the mortgage of the property are as follows:

a) Transfer to a non arm's length person:

- the transaction was non-arm's length, being between Gregorina and her daughter Alba.

b) The effect of the transaction is to delay and defeat creditors:

- there was a risk that the transfer would be set aside and the property seized by creditors, therefore, the mortgage served to protect against that.

c) Payment to a person not a party to the disposition:

- the consideration for the mortgage and the making of the mortgage were not contemporary. The consideration did not go to Gregorina but rather went principally to a company apparently controlled by Joe, and to Joe and Gregorina jointly.

d) The transfer was effected with unusual haste:

- the timing of the loan agreement which underlies the mortgage was shortly after the plaintiffs demanded payment from Joe; and:

• Gregorina and/or Alba registered the mortgage on the property shortly after the date of the judgment debtor examination of Joe.

e) The absence of a sound business or tax reason for the transaction:

• Alba and Gregorina were mother and daughter. Alba had received numerous gifts of money and goods from her mother. There was no business or tax reason for the mortgage and no reason why the mortgage should be placed on the cottage lot rather than Gregorina's home in Toronto.

f) The deed contains a self-serving and unusual provision:

• The loan agreement which deals with the purported loan from Alba to Gregorina and Joe contains a recital describing Joe as the holder in trust of the property, and Gregorina is the beneficial owner.

47 The existence of one or more of these various badges of fraud serves to shift the burden of explaining the circumstantial evidence of fraudulent intent to the defendants.

48 The defendants allege that the mortgage flowed from the loan agreement and that the mortgage was placed on the property as consideration for the advances made pursuant to the loan agreement.

49 When one reviews the mortgage transaction in the context of all of the other facts and events surrounding the property it is, in my view, improbable that the mortgage was a regular financial arrangement between Alba and Gregorina. The mortgage and the loan agreement were part of the scheme to keep the property out of the reach of Joe's creditors.

50 The advances under the loan agreement were to or for the benefit of Joe, and Gregorina did not have much involvement in it. The loan agreement was likely triggered by the plaintiffs' demand for payment from Joe or other creditors' demands. The mortgage was intended to protect the cottage from being seized by creditors and sold to provide money to repay Joe's debts.

51 While Joe, Gregorina and Alba each tried to characterize these transactions as regular and proper, I found the evidence of each of them to be self-serving and unreliable. On the balance of probabilities, I am satisfied that the dominant purpose of both of the transactions was to prevent creditors from having access to the property for payment of Joe's debts. Gregorina and Alba were both well aware of Joe's financial situation. While Gregorina did not appear to me to be sophisticated enough to structure the various transactions, I find that she willingly cooperated with Alba and Joe who undertook to put the property out of the reach of Joe's creditors.

G) Was There Consideration for the Mortgage?

52 If the defendants can establish that either of the transactions was made for good consideration and was a *bona fide* transaction to a person not having notice or knowledge of the intent to defraud, then the grantee may keep the property free of the taint of fraud.

53 With respect to the transfer of the property from Joe to Gregorina, there was no valuable consideration, and I need go no further.

54 With respect to the mortgage, the defendants tried to show that the mortgage was given for good and valuable consideration. The burden was on the defendants to establish consideration. The evidence presented by the defendants is not sufficient to discharge the burden of proof in this case. The production of various cheques, most of which were payable to one of the companies controlled by Joe was unconvincing as it was clear on the whole of the evidence that Joe was controlling the flow of funds. In the absence of the various bank accounts showing the source of the monies and the ultimate disposition of the funds, I am not satisfied that the advances were *bona fide* payments made by Alba

to Gregorina in support of the mortgage. In addition, as stated earlier, I find that Alba was well aware of the reason for these various transactions, and it was no coincidence that she sought to place a mortgage on the property rather than on other assets in the name of Gregorina.

55 I find, on a balance of probabilities, that the transfer to Gregorina and the mortgage were done with an intent to defeat, hinder, delay or defraud the creditors. The transfer and the mortgage were not made for consideration nor was the mortgage made in good faith to a person who, at the time of the placing of the mortgage, had no notice or knowledge of the intent to defeat, hinder, delay or defraud the creditor.

H) Alleged Settlement

56 A full and final release, a consent and an agreement to settle the claim, all executed October 7, 1999, were entered into evidence.

57 The defendants allege that the action was settled and that, as a result, the claim ought to be dismissed.

58 In his videotaped evidence, Cesidio confirmed that he did in fact execute the documents but that this had been done on the understanding that the executed documents would be exchanged through intermediaries against payment in full of the debt. He testified that no payment was ever made. As a result, he never authorised the release of the settlement documents, and no settlement was effected.

59 Joe testified that the settlement negotiations were conducted through an intermediary and that he had paid the settlement funds.

60 It is not clear from Joe's evidence what amount was to be paid in settlement of the claim. Other than Joe's testimony, the only evidence of payment of any settlement funds was a certified cheque for $72,000 dated July 13, 1999, payable to J. Sansone, a friend of the families. There was no evidence provided regarding who cashed the cheque in October 1999 nor how the funds were used.

61 The burden is on the defendants to establish that a settlement has been concluded. Given the evidence of Cesidio denying any payment, the proof that the settlement funds were actually paid is essential. Mr. Sansone was never called to testify concerning what the $72,000 payment to him was for nor has any other document been tendered showing that this, or any other sum, was ever paid to the plaintiffs.

62 The defendants have not satisfied me on a balance of probabilities that a settlement was entered into which resolved all of the issues in this action. They offered no satisfactory explanation for the failure to call the payee of the cheque, J. Sansone. By reason of that failure I draw an inference adverse to the defendants that the testimony of that witness would not have assisted the defendants' case.

63 In any event, the amount paid to Mr. Sansone was less than the amount allegedly agreed upon, and other than Joe's testimony, there is no evidence that these sums were paid. The defendants have not satisfied me that any consideration was paid for the alleged settlement. I therefore conclude that this defence must fail.

VI. Conclusion

64 In the result, I grant judgment setting aside the transfer of the property described municipally as 1629 James Street, Tiny, Ontario, from Giuseppe Alessandro to Gregorina Alessandro, Instrument 01263935 dated August 31, 1994. I also grant judgment setting aside the charge granted on that same property by Gregorina Alessandro to Alba Alessandro, instrument 01325897 dated October 11, 1996.

65 In view of my conclusions in respect of the plaintiffs' claims, I dismiss the defendants' counterclaim.

66 If the parties are unable to agree on the issue of costs, the plaintiffs are to provide me with written submissions within 15 days of the release of these reasons, and the defendants are to respond in writing to these within 10 days thereafter.

Action allowed; counterclaim dismissed.

2004 CarswellOnt 3218
Ontario Court of Appeal

Conte Estate v. Alessandro

2004 CarswellOnt 3218, [2004] O.J. No. 3275, 132 A.C.W.S. (3d) 901

CESIDIO CONTE and ELISA CONTE (Plaintiffs / Respondents) v. JOE ALESSANDRO, also known as GIUSEPPE ALESSANDRO, GREGORINA ALESSANDRO and ALBA ALESSANDRO (Defendants / Appellants)

Armstrong J.A., Doherty J.A., and Lang J.A.

Heard: May 18, 2004
Judgment: May 18, 2004
Docket: CA C39320

Proceedings: affirming *Conte Estate v. Alessandro* (2002), 2002 CarswellOnt 4507 (Ont. S.C.J.)

Counsel: William G. Dingwall, Q.C. for Appellants
J. Colangelo for Respondent

Per Curiam:

1 The trial judge found as a fact that Joe Alessandro acquired a "complete interest" in the subject property in the 1970s.

2 That factual finding is buttressed by the language of the 1972 deed to uses which grants the fee simple to Joe Alessandro unless and until he chose to exercise the power of appointment.

3 The trial judge found that the purported exercise of the power of appointment in favour of the appellant in 1996 was a conveyance within the *Act*, and was on the facts fraudulent. Neither finding of fact is open to challenge in this court.

4 The appeal is dismissed. An order will go in the terms of para. 32(a)(b) and (c) of the respondent's factum.

5 Costs on a substantial indemnity basis fixed at $20,000.00 all in.

Appeal dismissed.

At para. 109

2017 ONCA 1014
Ontario Court of Appeal

Ernst & Young Inc. v. Essar Global Fund Limited

2017 CarswellOnt 20162, 2017 ONCA 1014, 139 O.R. (3d) 1, 286 A.C.W.S. (3d) 658, 420 D.L.R. (4th) 23, 54 C.B.R. (6th) 173, 76 B.L.R. (5th) 171

Ernst & Young Inc. in its capacity as Monitor of all of the following: Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (Plaintiff / Respondent) and Essar Global Fund Limited, Essar Power Canada Ltd., New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., Essar Steel Limited and Essar Steel Algoma Inc. (Defendants / Appellants / Respondent)

R.A. Blair, S.E. Pepall, K. van Rensburg JJ.A.

Heard: August 15-17, 2017
Judgment: December 21, 2017
Docket: CA C63581/C63588

Proceedings: affirming *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); and refusing leave to appeal *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); additional reasons to *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Patricia D.S. Jackson, Andrew D. Gray, Jeremy Opolsky, Alexandra Shelley, Davida Shiff, for Appellants, Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Essar Ports Canada Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited
Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Respondent, Ernst & Young Inc. in its capacity as Monitor of Essar Steel Algoma Inc. et al.
Eliot N. Kolers, Patrick Corney, for Respondent, Essar Steel Algoma Inc.
Peter H. Griffin, Monique Jilesen, Kim Nusbaum, for Appellants, GIP Primus, L.P. and Brightwood Loan Services LLC

***S.E. Pepall J.A.*:**

1 This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") restructuring proceedings of the respondent, Essar Steel Algoma Inc. ("Algoma") [1], one of Canada's largest integrated steel mills and the respondent, Ernst & Young Inc., the court-appointed Monitor.

2 The supervising *CCAA* judge authorized the Monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "Port") were conveyed to Portco.

3 Portco is a single purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie Port. Portco obtained control in November 2014 in a transaction between Algoma, Portco, and Essar Global (the "Port Transaction"). The Port Transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The interveners below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively "GIP"), are arm's length lenders who loaned Portco US$150 million to effect the transaction.

4 The trial judge found the Port Transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are first, that the Monitor lacked standing to bring an oppression claim and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

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

A. FACTS

(1) Algoma's Operations

6 The City of Sault Ste. Marie sits on the shore of St. Mary's River, a waterway that links Lake Superior to Lake Huron at the heart of the Great Lakes, close to the Canada/U.S. border. The steel production operations that are owned by Algoma have been the primary employer and economic engine of the City since construction of the steel mill in 1901. Not surprisingly, the City's Port, which is situated next to Algoma's buildings and facilities, is integral to the steel operations. Indeed, Algoma is the Port's primary customer and its employees have traditionally run the Port operations. Raw materials used to produce steel are shipped to the Port and the steel that is produced is shipped to market from the Port. The relationship is one of mutual dependence.

7 Unfortunately, Algoma was in and out of *CCAA* protection proceedings both in 1991 and in 2001. In late 2013, Algoma faced another liquidity crisis and restructured under the *CBCA* in 2014. The recent *CCAA* filing occurred on November 9, 2015.

(2) The Essar Group

8 Essar Global is a Cayman Islands limited liability company and the ultimate parent of the respondent Algoma, which it acquired through its subsidiaries in 2007. Essar Global is also the parent of the appellants Portco, Essar Power Canada Ltd., New Trinity Coal Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., and Essar Steel Limited. Its investments are managed by Essar Capital Limited ("Essar Capital"), which is based in London, England. These companies are part of the Essar Group, a multinational conglomerate that was founded in India by two brothers, Sashi and Ravi Ruia. Members of the Ruia family are the beneficial owners of the Essar Group.

(3) Algoma's Recapitalization

9 In late 2013, Algoma was facing a liquidity crisis. Algoma anticipated being unable to meet a coupon payment due to unsecured bondholders in June 2014, and its US$346 million term loan was to mature in September 2014. Although Essar Global had been injecting substantial funds into Algoma, it was hesitant to advance further cash to Algoma. Algoma decided to consider mechanisms to restructure and reduce its debt and therefore embarked on a recapitalization project.

10 At the time of the discussions relating to the recapitalization, Algoma's Board of Directors consisted of five appointees affiliated with the Ruia family or the Essar Group, and three independent directors. In early January 2014, the Board of Directors placed responsibility for Algoma's recapitalization efforts in the hands of Essar Global and Essar Capital employees. Algoma personnel had no day-to-day control over the recapitalization project.

11 Although the three independent directors had begun expressing concerns about their roles on the Board as early as the fall of 2013, in the face of Algoma's serious financial challenges, their concerns became more acute. Specifically, they were concerned that their requests for timely, full disclosure of information and full participation in the strategic decisions of the Board had not been properly taken into account by the other Board members. On January 19, 2014, the three sent a memo to the Board proposing the establishment of an independent committee to work with outside financial advisors to evaluate options and alternatives for Algoma's recapitalization. The Board held a meeting on February 11, 2014, and rejected this proposal by a vote of four to three, the three being the independent directors. In response, one of the three independent directors resigned. The other two initially remained on the Board.

12 On February 17, 2014, one of the remaining independent directors, Thomas Dodds, wrote to Prashant Ruia seeking a meeting. Prashant Ruia was then the vice-chair of Algoma's Board, the son of one of the founders of Essar Group, and a director of Essar Capital. Mr. Dodds wrote:

> If your expectation of [the Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
>
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at [Algoma].
>
> . . .
>
> In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
>
> We cannot discharge our responsibilities under such an environment.

13 The two remaining independent directors resigned on February 21 and May 5, 2014, respectively. In his resignation letter, Mr. Dodds explained his rationale, stating:

> I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company or its parent.

14 The trial judge found, at para. 15 of his reasons, that the four directors who voted against the independent committee were "Essar-affiliated directors", that it was clear that the Ruia family did not want an independent committee, and that the Essar-affiliated directors voted accordingly.

15 The trial judge also found that the recapitalization and the Port Transaction were run by Joe Seifert, Chief Investment Officer of Essar Capital. The trial judge rejected the contention that Mr. Seifert was merely an advisor to the Board that independently made all of the critical decisions. Rather, Essar Global and Essar Capital, led by Mr. Seifert, directed and made decisions relating to the recapitalization and the Port Transaction. As the trial judge noted at para. 49, the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

(4) Restructuring Support Agreement

16 Essar Global engaged Barclays Capital, an investment bank, to pursue alternative financing structures for Algoma on behalf of Essar Global. Barclays introduced GIP to Mr. Seifert of Essar Capital. In May 2014, representatives of Essar Global, GIP, and Barclays met to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a transaction in which Algoma might sell its Port assets to a new corporate entity to generate cash proceeds, but not for the purpose of recapitalizing Algoma. Rather, the proceeds would flow upstream to Essar Global. In light of Algoma's prior insolvencies, GIP thought it important that a separate corporate entity distinct from Algoma be established to hold the Port assets. By the end of June 2014, Algoma had an exclusivity agreement with GIP regarding GIP's loan to finance the Port Transaction.

17 Soon after entering into the exclusivity agreement with GIP, on July 24, 2014, Algoma entered into a Restructuring Support Agreement (the "RSA") with Essar Global and an *ad hoc* committee of Algoma's unsecured noteholders. The RSA set out the principal terms of a restructuring. It provided for a reduction of Algoma's debt through the exchange of the unsecured notes in return for the payment of a percentage of their original principal amount and the issuance of new notes. The note restructuring would be implemented through a court-approved *CBCA* Plan of Arrangement. As a condition of the RSA and pursuant to an Equity Commitment Letter dated July 23, 2014, Essar Global agreed to acquire equity in Algoma for cash in the minimum amount of US$250 million and subject to a maximum of US$300 million. The trial judge found that Essar Global never intended to honour this obligation.

18 The Equity Commitment Letter provided a remedy in the event of a breach. The Plan of Arrangement contained a release of any claim arising out of the Equity Commitment Letter in favour of Essar Global, the noteholders, and the other corporations participating in the Arrangement.

19 It was a condition of the proposed Plan of Arrangement that Essar Global would comply with its RSA obligation to provide the aforementioned cash equity infusion. However, as early as March 28, 2014, representatives of the Ruia family had made it clear that they did not have US$250 million for equity. Efforts were made to reduce Essar Global's contribution. In late July 2014, one of the Ruia representatives wrote that ideally the equity contribution would be kept to US$150 to US$160 million.

20 Nonetheless, an application for approval of the Plan of Arrangement was made to the court. The recapitalization contemplated by the RSA was approved as an arrangement under s. 192 of the *CBCA* on September 15, 2014.

21 Beginning in October 2014, roadshow presentations were made to market the securities being offered through the recapitalization. However the transaction marketed did not accord with the transaction contemplated by the RSA. First, the roadshow presentation described an Essar Global cash equity contribution in Algoma of less than US$100 million, not the US$250 to US$300 million described in the RSA. Second, the presentation provided for the cash to be generated from the sale of the Port by Algoma. The RSA did not allow for such a sale absent the noteholders' consent. No such consent had been obtained. In addition, the proceeds of any sale were to be used to reduce Algoma's debt.

22 The roadshow was unsuccessful and investors failed to subscribe for the securities marketed. The lead bookrunner attributed this failure to the perception among investors that the transaction described in the roadshow presentation contemplated an insufficient contribution of equity into Algoma by Essar Global.

23 And so it was that Algoma was left without the cash to repay or refinance its debt.

24 Ultimately, the RSA was amended on November 6, 2014, such that Essar Global contributed US$150 million rather than the cash contribution of between US$250 and US$300 million originally contemplated by the Equity Commitment Letter. The amended RSA went on to provide that upon fulfillment of this revised contribution, Essar Global was deemed to have satisfied all of its obligations under the Equity Commitment Letter. The releases contained in the original filing were repeated in the amended Plan of Arrangement.

25 As subsequently discussed, in light of the amended RSA, an amended Plan of Arrangement was approved on November 10, 2014.

(5) Port Transaction

26 The Port Transaction closed on November 14, 2014. In summary, Algoma sold to Portco the Port assets consisting of the Port buildings, the plant, and machinery, but not the land. Algoma leased the realty to Portco for a term of 50 years. Portco agreed to provide Port cargo handling services in return for a monthly payment from Algoma to Portco. Algoma agreed to provide to Portco the services necessary to operate the Port in return for a monthly payment from Portco that would be less than the monthly payment paid by Algoma to Portco for cargo handling services.

27 Turning to the details of the Port Transaction, Algoma and Portco entered into a Master Sale and Purchase Agreement ("MSPA"). Under the MSPA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port, and agreed to lease the realty to Portco;

(ii) Portco agreed to pay Algoma US$171.5 million to be satisfied by:

- a cash payment by Portco of US$151.66 million; and
- the issuance of an unsecured promissory note in the amount of US$19.84 million payable in full on November 13, 2015.

28 To fund these obligations, Portco obtained a US$150 million term loan from GIP. GIP Primus, L.P. lent US$125 million, while Brightwood Loan Services LLC lent US$25 million. This term loan was secured by all of Portco's current and future real and personal property and supported by two guarantees in favour of GIP: one from Essar Global, and another from Algoma Port Holding Company Inc., Portco's direct parent.

29 Pursuant to the MSPA, Algoma and Portco executed five additional documents: a promissory note, a lease, a Shared Services Agreement, an Assignment of Material Contracts Agreement, and a Cargo Handling Agreement.

(i) Promissory Note

30 The promissory note was for US$19.84 million payable by Portco to Algoma. Portco immediately assigned its obligations under the promissory note to Essar Global. Essar Global therefore became the obligor under the note and Algoma released Portco from its obligation. As of the date of the trial, the promissory note remained unpaid. At para. 27 of a subsequent decision released on June 26, 2017, the trial judge granted a declaration that any amounts owing to Algoma under the promissory note given by Portco to Algoma have been set-off against amounts owing by Algoma to Portco under the Cargo Handling Agreement: [*Essar Steel Algoma Inc. et al Re*] 2017 ONSC 3930, 53 C.B.R. (6th) 321 (Ont. S.C.J.). The decision allows for set-off against Portco, but preserves GIP's right to repayment.

(ii) Lease

31 Under the lease, Portco leased from Algoma the Port lands, roads, and outdoor storage space for a 50-year term. Portco prepaid Algoma the rent for the entire 50-year period. The present value of this leasehold interest was stated to be US$154.8 million. Algoma maintained responsibility for all maintenance, repairs, insurance, and property taxes.

(iii) Shared Services Agreement

32 Under the Shared Services Agreement, Algoma was to be responsible for providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. These services were to be provided by Algoma

employees, not Portco employees. Portco agreed to pay Algoma US$11 million annually subject to escalation at the rate of 3 percent per annum beginning in 2016.

(iv) Assignment of Material Contracts

33 Under the Assignment of Material Contracts Agreement, Algoma provided a covenant in favour of GIP, which precluded Algoma from selling or assigning any material contract relating to the Port, including the Cargo Handling Agreement except by way of security granted to its other third party lender.

(v) Cargo Handling Agreement

34 Under the Cargo Handling Agreement, Portco agreed to provide Algoma with cargo handling services for an initial 20-year term with automatic renewal for successive three-year periods unless either party gave written notice of termination to the other. Algoma agreed to pay Portco based on tonnage with a minimum monthly assured volume of US$3 million. In other words, Algoma was obliged to pay a minimum of US$36 million annually to Portco for 20 years subject to an escalation in price of 1 percent per annum commencing in 2016. Therefore, while Algoma was entitled to US$11 million annually under the Shared Services Agreement, it had to pay Portco at least US$36 million annually under the Cargo Handling Agreement, such that Portco would receive an annual revenue stream from Algoma of US$25 million. This amount was intended to service GIP's term loan at US$25 million a year. However, GIP's loan had a term of eight years, and therefore Portco would have the full benefit of the US$25 million for at least 12 years of the initial 20-year term of the Cargo Handling Agreement, and potentially for 42 years if the Agreement was not terminated.

35 Section 15.2 of the Cargo Handling Agreement also contained a change of control clause that stated that the "Agreement may not be assigned by either Party without the prior written consent of the other Party." This provision became particularly contentious because it effectively gave Portco — and therefore Portco's parent, Essar Global — a veto over any party acquiring Algoma in the *CCAA* proceedings.

36 Although inclusion of the change of control provision in the Cargo Handling Agreement was driven by GIP, the trial judge found that it was effectively for the benefit of Essar Global, as it gave Portco a veto. Furthermore, the trial judge noted at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit, by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

37 In discussing the financial ramifications of the Shared Services Agreement and the Cargo Handling Agreement, the trial judge observed at para. 26 of his reasons:

> When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan.

38 Duff & Phelps assessed the fair value of the Portco Transaction as ranging between US$150.9 million and US $174.2 million with a midpoint of US$161.7 million. However, this assessment failed to take into account the change of control provision in the Cargo Handling Agreement. Deloitte LLP reviewed Duff & Phelps' assessment and concluded it was reasonable. [2]

(6) Final Recapitalization

39 Ultimately the recapitalization of Algoma consisted of the following transactions:

(a) Algoma issued US$375 million in senior secured notes pursuant to an offering memorandum;

(b) Algoma entered into a new US$50 million senior secured asset-based revolving credit facility and a new US$375 million term loan;

(c) Algoma's unsecured noteholders were paid a portion of their principal and were issued new junior secured notes;

(d) Algoma completed the Port Transaction;

(e) Essar Global contributed US$150 million in cash in exchange for common equity, and also contributed US$150 million in debt forgiveness; and

(f) All other Algoma lenders were repaid in full.

40 In addition, GIP entered into a secured term loan for US$150 million with Portco, secured by a GSA over all of Portco's assets. It also received guarantees — one from Essar Global and one from Algoma Port Holding Company Inc. — guaranteeing Portco's liabilities. In November 2014, the transactions in furtherance of Algoma's recapitalization, including the Port Transaction, were approved unanimously by Algoma's Board of Directors after receiving advice and on the recommendation of Algoma's management. By this time, the Board consisted of four directors: Mr. Kishore Mirchandani, who became a director on June 23, 2014; Mr. Naresh Kothari, who became a director on August 24, 2014; the Board's chair, Mr. Jatinder Mehra of Essar Global; and Algoma's CEO, Mr. Kalyan Ghosh. Mr. Ghosh, and Mr. Rajat Marwah, Algoma's CFO, both testified that they supported the Port Transaction not because it was ideal, but because there was no other option given Essar Global's failure to capitalize Algoma as it had committed to do.

41 As mentioned, the approved Plan of Arrangement that included the original RSA had to be amended in light of the revised equity contribution. A *CBCA* Plan of Arrangement incorporating the recapitalization and authorizing the amendment of the September 2014 approval order was granted by Morawetz J. on November 10, 2014.

42 Based on the materials before this court, it would appear that the Port Transaction was not mentioned or brought to Morawetz J.'s attention. In this regard, the trial judge found that there was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement. The Port Transaction is not mentioned in that order or in any endorsement.

43 The outcome of the Port Transaction was that all Port assets were transferred from Algoma to Portco, the Port lands were leased to Portco for 50 years, and Portco obtained change of control rights. Portco paid Algoma US$151,660,501.50 in cash, provided the US$19,840,000 promissory note, and was obliged to pay Algoma US$11 million per annum under the Shared Services Agreement. In turn, Algoma was obliged to pay Portco US$36 million per annum for an initial term of 20 years under the Cargo Handling Agreement, subject to renewal, netting Portco US$25 million per annum as against the Shared Services Agreement payments. Meanwhile, under the revised RSA, Essar Global contributed cash of US$150 million to Algoma rather than the original cash commitment of US$250 to US$300 million.

(7) Insolvency Protection Proceedings

44 On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "*CCAA* Applicants") under *CCAA* protection. As mentioned, he appointed Ernst & Young Inc. as the Monitor. The order contained various paragraphs addressing the rights and obligations of the Monitor, including a direction to perform such duties as were required by the Court. On November 20, 2015, Morawetz J. granted an Amended and Restated Initial Order that, among other things, directed the Monitor to review and report to the Court on any related party transactions (expressly including the Port Transaction).

45 During the *CCAA* proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the Court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient

evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the *CCAA* Applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the *CCAA* process. The letter stated that any prospective bidder was to be told of the consent or veto right:

> Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].
>
> Again please confirm that this has been made clear to prospective bidders.

46 On June 20, 2016, the Monitor filed its Thirteenth Report, which described the Portco Transaction and indicated that there may be grounds for further review of that transaction. The Monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US$150 million in equity rather than US$250 to US$300 million, and that the Portco Transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents."

47 On September 26, 2016, Deutsche Bank AG, who led the Debtor-in-Possession ("DIP") Lenders of Algoma and also represented the interests of potential bidders in the *CCAA* process, applied for an order empowering the Monitor to commence certain proceedings and make certain investigations. [3] On September 26, 2016, Newbould J. granted an order authorizing the Monitor to commence and continue proceedings under s. 241 of the *CBCA* in relation to related party transactions, including but not limited to the Port Transaction.

48 The action proceeded on an accelerated timetable due to the progress of the *CCAA* restructuring. [4] On October 20, 2016, the Monitor commenced proceedings claiming oppression pursuant to s. 241 of the *CBCA* against Essar Global and others in the Essar Group including Portco. It pleaded that by reason of its role as a court officer directed to commence the oppression proceedings and to oversee the interests of all stakeholders of Algoma, it was a complainant within the meaning of ss. 238 and 241 of the *CBCA*.

49 It alleged that since June 2007, the Essar Group had exercised *de facto* control over Algoma and had engaged in a course of conduct that consistently preferred the interests of the Essar Group and in particular, Essar Global, to those of Algoma and its stakeholders. This included the transfer to the Essar Group of long-term control over, and a valuable equity interest in, Algoma's Port facilities, an irreplaceable and core strategic asset of Algoma. The value of control over the Port to Algoma and its stakeholders was immeasurable, since Algoma's business could not function without access to the Port.

50 The Monitor pointed out that the Essar Group obtained its control and equity interest in the Port through a cash contribution of less than US$4.7 million. It pleaded that the US$150 million raised as part of the Port Transaction came from third party lenders, namely GIP, and was money raised against the security and value of the Port facilities, an asset of Algoma, as well as a promissory note that remained unpaid, and a guarantee from Essar Global. The Monitor also stressed that the control obtained by the Essar Group was not only over the Port facilities, but extended to any sale of the Algoma business such that Essar Global had an indirect veto on transactions involving Algoma's enterprise. Essar Global also obtained a right to substantial payments under the Cargo Handling Agreement.

51 The oppression occasioned was exacerbated by the fact that the borrowed monies raised through the transaction were a substitution for monies Essar Global had promised to contribute as equity in Algoma.

52 The Monitor also argued that s. 15.2 of the Cargo Handling Agreement itself constituted oppression, because it was for the long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The Monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the *CCAA* process, thus negatively affecting the sales process. The Monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

53 In addition, the Monitor pleaded that the oppression and prejudice to creditors was continuing as Essar Global and other related companies had insisted that bidders for Algoma's business under the SISP, which was approved by the court on February 11, 2016, be advised of Portco's consent rights under the change of control clause in the Cargo Handling Agreement.

54 Essar Global and the remaining defendants filed their defence rejecting the Monitor's allegations, describing the action as "an improper and ill-conceived leverage tactic". They asserted that the litigation was an attempt to attack the Port Transaction for the benefit of other bidders under the sales process, including the DIP Lenders. They pleaded that the Monitor had no standing, the claim was improperly pleaded, an oppression remedy seeking to unwind or claim damages in respect of the Port Transaction was unavailable at law, and in any event there was no oppression, prejudice, or unfairness.

55 Portco's lenders, GIP, were granted intervener status as parties on December 22, 2016. They noted that they were *bona fide*, arm's length, and independent commercial parties and no cause of action or wrongful conduct was asserted by the Monitor against them. Nonetheless, the Monitor was seeking remedies that eviscerated the security held by them. They asserted that the Monitor did not have standing and could not establish any oppressive conduct in any event. Moreover, the structure of the Port Transaction was transparent to all of Algoma's stakeholders. Lastly, even if the court granted a remedy to the Monitor, it had no jurisdiction to prejudice the interests of GIP. The Monitor subsequently amended its statement of claim to modify the language on the relief claimed relating to the indebtedness and security interests in favour of GIP.

56 Various procedural motions were brought. Others who are not before this court intervened: Deutsche Bank AG; the Ad Hoc Committee of Algoma's Noteholders; Algoma Retirees; and two locals from the union United Steelworkers, Locals 2724 and 2251. The Essar Group and GIP brought motions to strike on the basis that the Monitor lacked standing and later also sought an order for particulars. On December 1, 2016, Newbould J. ordered that the standing motions be dealt with at the trial scheduled for January 30, 2017. On January 5, 2017, he urged the Monitor to give as many particulars as it could regarding the relief it might seek.

57 On January 30, 2017, Essar Capital served a motion for an order re-opening the SISP and to make information available to Essar Global to allow it to consider submitting a bid. Newbould J. dismissed the request. At para. 114 of his reasons, the trial judge found that Essar Global was still interested in purchasing the assets of Algoma.

58 The action proceeded to a five-day trial before Newbould J. commencing on January 31, 2017.

B. TRIAL JUDGMENT

59 The trial judge organized his reasons for decision under six principal headings: the Monitor's standing; who directed the recapitalization and the Port Transaction; reasonable expectations and were they violated; the business judgment rule; and the appropriate remedy. I will summarize his conclusions on each issue.

(1) Monitor's Standing

60 As mentioned, both Essar Global and GIP challenged the Monitor's standing as a complainant under the oppression provisions of the *CBCA*. They also argued that only persons directly damaged by the oppressive conduct could bring the action and that this action was in substance a derivative claim by Algoma. The trial judge rejected these arguments.

61 He found that the stakeholders harmed were Algoma's trade creditors, pensioners, retirees, and employees. At para. 32, he noted that Algoma owed CDN$911.9 million as of the date of the Port Transaction to a group of creditors including trade creditors, pensioners, retirees, and the City of St. Sault Marie.

62 The trial judge acknowledged at para. 34 that normally a monitor, who is a court officer, is to be neutral and not take sides. However, there are exceptions. Under s. 23(1)(k) of the *CCAA*, a monitor must carry out any function in relation to the debtor that the court may direct. At para. 35, the trial judge also pointed to the *CCAA* proceedings of Nortel Networks Corp. as a precedent: *Nortel Networks Corp., Re* (October 3, 2012), Doc. Toronto 09-CL-7950 (Ont. S.C.J. [Commercial List]). In those proceedings, a monitor was authorized to act as a litigant after all of Nortel's directors and senior executives had resigned.

63 Moreover, the trial judge observed that determining whether someone is a complainant under s. 238 of the *CBCA* is a discretionary decision. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.), this court confirmed that a trustee in bankruptcy acting on behalf of the creditors of a bankrupt estate could be a complainant within the meaning of s. 238. In so doing, the court noted the need for flexibility to ensure that the remedial purpose of the oppression provisions is achieved. The trial judge saw no reason why the principle of collective action — which posits that it is more efficient for creditors to pursue their claims in a bankruptcy collectively with a trustee acting as their representative rather than individually — should not be followed in the present *CCAA* proceeding. At para. 37, he concluded that the Monitor had taken the action as an adjunct to its role in facilitating a restructuring and was therefore a proper complainant.

64 To respond to Essar Global and GIP's arguments that the claim was properly a derivative action and that no person had been personally harmed beyond Algoma, at para. 40 the trial judge relied on *Rea v. Wildeboer*, 2015 ONCA 373, 126 O.R. (3d) 178 (Ont. C.A.), at para. 27. There, Blair J.A. commented that the derivative action and the oppression remedy are not mutually exclusive. Although on the facts of *Wildeboer*, Blair J.A. had struck out a statement of claim pleading the oppression remedy, the trial judge distinguished *Wildeboer* on the basis that the relief sought was for the benefit of the corporation and there was no allegation that individualized personal interests were affected by the alleged wrongful conduct.

(2) Essar Global Directed the Recapitalization and the Portco Transaction

65 The trial judge observed that in some respects, it did not matter who made the decisions regarding the recapitalization and the Port Transaction — if the conduct was oppressive, relief could be granted. Nonetheless, he found at para. 49, that the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots."

66 At para. 52, he accepted the evidence of Mr. Ghosh and Mr. Marwah that they did not negotiate the economic terms of the refinancing or the Port Transaction. Nor was either involved in the renegotiation of the RSA.

67 The trial judge relied on other evidence, including Algoma's annual Business Plan dated February 3, 2014, to support his factual findings. He also considered evidence of the witnesses. He found at paras. 56-57 that some of the witnesses had been evasive, including: Rewant Ruia, the Ruia family's lead in the Essar Group's North American operations; Mr. Seifert,; and Rajiv Saxena, the Executive Director of Essar Steel India Ltd.

68 After reviewing the evidence, the trial judge noted at para. 58 that he was satisfied that Mr. Seifert, who represented the Essar Group's interests, had primary responsibility for pursuing the recapitalization negotiations and Algoma's refinancing via the Port Transaction. He concluded at para. 60:

> I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Portco Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma

> management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

(3) Reasonable Expectations and their Violation

69 The trial judge identified the two-step process to determine whether a violation of reasonable expectations has occurred under s. 241 of the *CBCA*, which is described at para. 68 of *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.): (i) does the evidence support the reasonable expectation asserted by the complainant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct that is oppressive, unfairly prejudicial, or unfairly disregards a relevant interest?

70 He described the reasonable expectations asserted by the Monitor as relating to the loss by Algoma of a critical asset and the change of control clause in the Cargo Handling Agreement. He stated at para. 64:

> The Monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

71 At para. 67, the trial judge did not accept that the expectations of creditors such as the employees, pensioners, and retirees were governed only by their agreements with Algoma. Furthermore, the evidence, including the inferences drawn from the circumstances that existed at Algoma in 2014, supported the expectations relied upon by the Monitor. He noted at para. 73 that stakeholders have a reasonable expectation of fair treatment and this was particularly so in Sault Ste. Marie, where Algoma is of critical importance to the local economy and relied upon greatly by trade creditors and employees.

72 He concluded at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

73 The trial judge held that the reasonable expectations of the trade creditors, employees, pensioners, and retirees were violated in two principal ways: first, the Port Transaction itself; and second, the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

74 The Port Transaction was caused by Essar Global's breach of both the RSA and the Equity Commitment Letter. Because the lease of the land from Algoma to Portco was for 50 years and Essar Global was in a position to terminate the Cargo Handling Agreement after 20 years, Algoma would be at Essar Global's mercy for the duration of these agreements. The trial judge found at para. 78 that the transfer of the Port assets to Portco was driven by GIP's desire for a "bankruptcy remote" special purpose vehicle. GIP was aware of Algoma's previous insolvencies and would only lend to a new entity that held the Port assets and that was separate from Algoma.

75 The Port Transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the RSA and the Equity Commitment Letter under which Essar Global had pledged a cash investment of US$250 to US$300 million. The trial judge found at para. 82 that Essar Global had no intention of living up to its promises and had acted in bad faith in this regard. The content of the roadshow presentations reflected the discordance with the RSA. The alternative transaction in the roadshow presentations contemplated cash being contributed to the recapitalization through the sale of the Port. That these presentations failed was partially attributable, as the trial judge found at para. 82, to Essar Global's insufficient contribution of cash equity into Algoma.

76 The trial judge concluded that Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter made it necessary to carry out the Port Transaction. GIP's loan of US$150 million reduced the amount of cash equity Essar Global promised to advance to Algoma. Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the Port Transaction and the transfer of control. This was, as the trial judge concluded at para. 89, an exercise in bad faith. Had an independent committee of Algoma's Board of Directors been struck, Essar may have been held to its bargain rather than looking to third party financing from GIP under the Port Transaction structure. The Board's failure to examine alternatives to effect Algoma's recapitalization indicated a lack of regard for the interests of Algoma's stakeholders.

77 Additionally, the long-term value given to Essar Global by the Port Transaction was itself oppressive (although in stating this, the trial judge noted that the Monitor did not pursue its claim that the Port assets were transferred to Portco at an undervalue).

78 As for the release in the amended RSA, the trial judge observed that it was a release of any claim arising out of the Equity Commitment Letter. The trial judge found at para. 100 that the Monitor was not making a claim under that Letter, nor was it asking that Essar Global provide the equity it had promised in that commitment. Rather, Essar Global's failure to live up to its commitment was part of the factual circumstances to be taken into account in considering whether Algoma's stakeholders were treated fairly under the Port Transaction.

79 The trial judge also observed that when the court approved the amended Plan of Arrangement under the amended RSA, it did not have knowledge of the Port Transaction. There was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement; there was no finding relating to the release of Essar Global; the trade creditors, the employees, pensioners and retirees were not parties to the motion approving the amended RSA; and the order was obtained without opposition.

80 Ultimately he concluded that the Port Transaction was itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(4) Change of Control Provision

81 The trial judge determined at para. 104 that the change of control provision gave effective control to Portco (*i.e.* Essar Global) over who may acquire the Algoma business. Any buyer of Algoma or its business would need to be assigned the Cargo Handling Agreement so that it could operate the steel mill. Therefore the veto under this clause was effectively a veto over any change of control of the Algoma business.

82 Although the evidence indicated that the change of control provision was included for GIP's protection, the trial judge found that this end could have been achieved in other ways. For example, as the trial judge pointed out at para. 110, the parties could have included a provision in the Assignment of Material Contracts Agreement that prevented a change of control of Algoma without GIP's explicit consent. Such an alternative might have been considered had there been a committee of independent directors with advisors independent of Essar Global. But, as the trial judge concluded at para. 111, the reality was that there was no pushback on the change of control provision that was implemented, and which gave Portco/Essar Global a veto.

83 The trial judge concluded at para. 113 that the change of control provision was of considerable value to Essar Global. Furthermore, as mentioned, the trial judge stated at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

84 The May 10, 2016 letter from Portco's counsel, which sought confirmation from Algoma's counsel that prospective bidders would be advised of Portco's rights, exemplified this. In the letter, Essar Global effectively held out its consent to any change of control right to dissuade competing bidders for Algoma in the restructuring process while it continued

to express its own interest as a prospective bidder. The trial judge observed at para 115 that: "[I]t is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful".

85 The trial judge also observed that the evidence established that Portco's right to refuse assignment of the Cargo Handling Agreement was a material impediment to restructuring Algoma as Algoma could not survive without access to the Port. He concluded that the change of control provision in favour of Portco in the Cargo Handling Agreement was unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(5) The Business Judgment Rule

86 The trial judge also determined that the business judgment rule, which accords deference to a business decision of a Board of Directors so long as the decision lies within a range of reasonable alternatives, did not provide a defence to Essar Global. The Board had not followed advice that it insist Essar Global comply with its commitments under the RSA and the Equity Commitment Letter. As the trial judge stated at para. 123, the result of this was the Port Transaction, which was:

> [A]n exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefitted Essar Global at a time that a future insolvency was a possibility.

87 Moreover, there was no evidence that the Board even considered whether protection to GIP could be provided in the absence of the change of control provision in favour of Portco and hence Essar Global. This failure was unreasonable.

(6) Remedy

88 The trial judge stated at para. 136 that if there were no less obtrusive way to remedy the oppression, he would have ordered that Portco's shares be transferred to Algoma. However, mindful that a remedy for oppression should be approached with a scalpel, he instead relied on s. 241(3) of the *CBCA* to order a variation of the Port Transaction. He accordingly deleted s. 15.2 of the Cargo Handling Agreement and inserted a provision in the Assignment of Material Contracts Agreement, which provided that, if GIP becomes the equity owner of Portco, its consent would be required for a change of control of Algoma. He rejected the suggestion that either GIP or Essar Global were taken by surprise by this relief.

89 He also addressed the imbalance created by the 50-year term of the lease between Algoma and Portco as against the 20-year term of the Cargo Handling Agreement (with automatic renewal for successive three year periods, barring either party's termination). As the Port was critical to Algoma's operation and survival, Algoma's ability under the Cargo Handling Agreement to refuse an extension after 20 years was illusory and, in reality, the renewal provision was one-sided in favour of Essar Global.

90 He concluded at para. 144 that the payments under the Cargo Handling Agreement were an unreasonable benefit in favour of Essar Global. If the Agreement lasted only the initial 20-year term, Portco/Essar Global would receive US $300 million after GIP's loan was paid off. If the Agreement was not terminated before the end of its 50 year life, Portco/ Essar Global would receive an additional US$750 million for the last 30 years.

91 Accordingly, the trial judge ordered that the lease, the Cargo Handling Agreement, and the Shared Services Agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

92 The trial judge decided at para. 147 that the appropriate place for Portco to assert its claims for a declaration that the US$19.8 million promissory note had been paid as a result of set-off and for amounts owing under the Cargo Handling Agreement was in the ongoing *CCAA* proceedings.

(7) Costs

93 Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN$1.17 million to the Monitor. The trial judge then ordered Essar Global to pay Algoma CDN$1.5 million in costs and ordered that no costs be payable by the Monitor or by or to GIP.

C. ISSUES

94 There are eight issues to be addressed:

1. Did the Monitor lack standing to be a complainant under s. 238 of the *CBCA*?

2. Could the claim of the Monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

3. Did the trial judge err in his analysis of reasonable expectations?

4. Did the trial judge err in his analysis of wrongful conduct and harm?

5. Did the trial judge err in tailoring a remedy?

6. Was there procedural unfairness?

7. Should the fresh evidence be admitted?

8. Should leave to appeal costs be granted to GIP and the costs award varied?

D. ANALYSIS

(1) Standing of the Monitor

95 Essar Global submits that the Monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the Monitor could avoid conflicts.

96 GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the Monitor's oppression claim against it. Also, Algoma can be directed to make the Cargo Handling Agreement payments to GIP directly and therefore the Monitor owed a fiduciary duty to GIP.

97 In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the Monitor could have standing to bring an oppression action.

(a) The Purpose of CCAA Restructurings

98 As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

99 As outlined by Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], the *CCAA* fell into disuse after amendments in 1953 that limited its application to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 336-337; and *Century Services*, at para. 13.

100 The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially-distressed corporations without forcing them to first declare bankruptcy: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at p. 661.

101 The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-339. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

102 The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

103 To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

104 It is against this background that the role of a monitor must be considered.

(b) The Role of the Monitor

105 Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.). In that case, an interim receiver was appointed whose role was described at p. 277 as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan

was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq www.mondaq.com. The monitor was thus a court-appointed officer.

106 The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

107 Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008) 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor — taking on larger mandates, often times involving complex, cross-border restructurings.

108 Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd., Re* (1992), 67 B.C.L.R. (2d) 385 (B.C. C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd., Re* (1993), 77 B.C.L.R. (2d) 332 (B.C. S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy.

109 Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy, and as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed it is required by statute to do so. See for example s. 23 of the *CCAA* that describes certain duties of a monitor.

110 Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) A Monitor as Complainant in an Oppression Action

111 Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*.[5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate

law remedy that should be available in such proceedings.[6] I do not understand the appellants to be taking the former position; rather they simply argue that the Monitor has no standing.

112 Section 238 of the *CBCA* defines a complainant as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(d) is the relevant subsection.

113 Section 241***o****f* the *CBCA* describes the oppression remedy:

> (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,
> >
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

114 The question here is whether the trial judge erred in concluding that the Monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the Monitor have been a complainant in this case? I would answer both questions affirmatively.

115 As is clear from s. 238(d) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an oppression action involving an oppressive agreement between the debtor and a non-arm's length party. As this court said in that case at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

116 Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

117 Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(k) of the *CCAA* expressly provides that a monitor shall carry out any functions

in relation to the company that the court may direct. Moreover, s. 23(1)(c) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

118 Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order it considers appropriate in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 39 C.B.R. (6th) 173 (Ont. C.A.), at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

119 Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

120 However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

121 Here, in para. 37(c) of the Amended and Restated Initial *CCAA* Order dated November 20, 2015, the Monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the Monitor to commence proceedings under s. 241 of the *CBCA*. The Monitor proceeded with the oppression action in the interests of the restructuring consistent with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The Monitor took the action as an "adjunct to its role in facilitating a restructuring".

122 Moreover, it cannot be said that the Monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

123 It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether:

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

124 In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the Monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the

pensioners, retirees, employees, and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

125 Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the *CCAA* proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to supervise all parties including the Monitor to ensure that no unfairness or unwarranted impartiality occurred.

126 Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the Monitor to exercise any powers properly exercisable by a Board of Directors of Nortel or its subsidiaries. But this expansion was a response to the resignations of the Boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the Monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

127 In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the Monitor standing to pursue an action for oppression.

(2) Derivative or Oppression Action

128 In addition to attacking the standing of the Monitor to bring the action, the appellants also submit that the Monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that *Act*. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the Monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

129 In support of their submission, the appellants rely heavily on the decision of this Court in *Wildeboer*. This case is not *Wildeboer*, however.

130 In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]."

131 The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly re-affirmed the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

> I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata* [*Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee* [*Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (C.A.)] make it clear that there are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); *Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), aff'd [2001] O.J. No. 3918 (Ont. Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at para. 526, leave to appeal refused, (2005), [2004] S.C.C.A. No. 291 (S.C.C.).

132 Or, as Armstrong J.A. put it in *Malata Group (HK) Ltd. v. Jung* [2008 CarswellOnt 699 (Ont. C.A.)], at para. 30:

> [T]here is not a bright line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

133 In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion — unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation — this case falls into the overlapping category.

134 For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the Monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted at para. 31, the Monitor initially cast quite widely the net of stakeholders affected by the Port Transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners, and retirees.

135 In oppression remedy parlance, the nub of the exercise lies in determining whether the claimant has identified a "reasonable expectation" and shown that it has been violated by wrongful conduct that is "oppressive" (in the broad sense contemplated by the *Act*) *of the interests of the claimant*: see *BCE*. The Monitor asserted at the hearing, and the trial judge found at para. 75:

> [T]hat the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

136 It was alleged, and the trial judge found, that these reasonable expectations had been violated both by aspects of the Port Transaction itself, and by the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

137 The appellants argue that the reasonable expectations asserted relate only to harm done to Algoma. The trial judge disagreed, as do I. As he concluded at para. 37:

> Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process <u>and negatively impact creditors</u>. [Emphasis added]

138 On this basis, at para. 40, the trial judge distinguished *Wildeboer* because the Monitor was asserting "that the personal interests of the creditors ha[d] been affected."

139 The appellants place considerable emphasis on certain language contained in *Wildeboer* to the effect that, in circumstances where there may be overlapping derivative and oppression claims, the wrong must both harm the corporation and must also affect the claimant's "individualized personal interests". They interpret these comments as mandating not only that each claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in their same class.

140 For example, the appellants rely on certain aspects of the following comments by this court at paras. 29, 32-33 of *Wildeboer*:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants.
>
> . . .

> The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea — the only director plaintiff — does not plead that the Improper Transactions have impacted his interest *qua* director.
>
> Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

141 While pertinent to the *Wildeboer* context, some of the foregoing language, when read in isolation and out of context, may be misconceived when it comes to a more general application. However, I do not read *Wildeboer* as precluding an oppression remedy in respect of individuals forming a homogenous group of stakeholders — for example, trade creditors, employees, retirees, or pensioners — simply because each of them, separately, may have suffered the same type of individualized harm.

142 Instead, I read the reference at para. 29 to the complainant being directly affected "in a manner that was different from the indirect effect of the conduct on similarly placed complainants" to be another way of capturing the notion expressed in paras. 32-33 that the individualized harm is to be distinct from conduct harming only "the body corporate, *i.e.*, the collectivity of shareholders as a whole."

143 Were the appellants correct in their submissions, as counsel for the Monitor points out, this court would not have upheld an oppression remedy on behalf of *all* shareholders of a company that had suffered harm as a result of a non-market executive compensation contract: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), aff'd (2004), 42 B.L.R. (3d) 34 (Ont. C.A.), at para. 153. Nor would it have upheld an oppression remedy claim on behalf of *a class* of shareholders who were harmed as a result of the existence of a transfer pricing regime that was disadvantageous to the company, as it did in *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (Ont. C.A.). *Wildeboer* contains no suggestion that these authorities are no longer good law; nor would it have done.

144 The same may be said, in my view, about a group of creditors who have suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation. While the oppression remedy is not available as redress for a simple contractual breach (such as the failure to pay a debt), it has long been held to be available, in appropriate circumstances, to creditors whose interests "have been compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself": *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, 41 B.L.R. (4th) 51 (Ont. C.A.), at para. 66. See also: *Fedel v. Tan*, 2010 ONCA 473, 101 O.R. (3d) 481 (Ont. C.A.), at para. 56.

145 The question is whether the impugned conduct is "oppressive" (in the broad sense contemplated by the *CBCA*) and, if so, whether the stakeholder has suffered harm in its capacity as a stakeholder as a result of that conduct.

146 Moreover, the circumstances that presented themselves emphasize the need for flexibility in the availability of the oppression remedy. The court and the Monitor were faced with *prima facie* evidence of oppression including bad faith and self-dealing. There was *prima facie* evidence of personal harm to the pensioners, employees, retirees, and trade creditors. While leave of the court is required for a derivative action, in substance, in the context of a *CCAA* proceeding, court supervision is present, thereby neutralizing the need for the derivative action procedural safeguard of leave.

147 I would also note that GIP argues that the decision not to bring this action by way of derivative action may have been a strategic decision made because Algoma was contractually prohibited from seeking to set aside or vary the contracts arising from the Port Transaction, including the Cargo Handling Agreement and the lease. If anything, this argument supports the conclusion that it was appropriate for this action to be brought as an oppression claim.

148 In conclusion, at law, the Monitor was at liberty to bring an action for oppression. I will now turn to the issue of reasonable expectations.

(3) Reasonable Expectations

149 Essar Global and GIP submit that the trial judge erred in his analysis of reasonable expectations. They argue that there was no evidence of any subjectively held expectations, that the trial judge did not consider whether the expectations were objectively reasonable, and that he failed to consider factors identified in *BCE*.

150 The Monitor and Algoma respond by saying that the existence of reasonable expectations is a question of fact that can be proved by direct evidence or by the drawing of reasonable inferences. In this case, the trial judge properly considered the evidence that was before him to conclude that the pensioners, employees, retirees, and trade creditors held expectations that had been violated and that those expectations were objectively reasonable.

151 In his analysis, the trial judge correctly identified the two prongs of the oppression inquiry identified by the Supreme Court at para. 68 of *BCE*: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest?

152 In identifying these two prongs, at paras. 58-59, the Supreme Court made two preliminary observations:

> First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
>
> Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another. [Citations omitted.]

153 As also stated in *BCE* at para. 71:

> Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful." The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all the interests at play.

154 Evidence of an expectation "may take many forms depending on the facts of the case": *BCE*, at para. 70. The "actual expectation of a particular stakeholder is not conclusive": *BCE*, at para. 62. Furthermore, a stakeholder's reasonable expectation of fair treatment "may be readily inferred", because fundamentally all stakeholders are entitled to expect fair treatment: *BCE*, at paras. 64, 70. Once the expectation at issue is identified, the focus of the inquiry is on whether it has been established that the particular expectation was reasonably held: *BCE*, at para. 70.

155 The Monitor particularized the reasonable expectations in issue. It stated that the stakeholders had reasonable expectations that the Essar Group would not cause Algoma to engage in transactions for their benefit to the detriment of Algoma and its stakeholders, cause Algoma to transfer long-term control over an irreplaceable and core strategic asset of Algoma (*i.e.* the Port) to the Essar Group, and, among other things, provide the Essar Group with a veto. The source and content of the expectations were stated by the Monitor to include commercial practice, the nature of Algoma, and past practice. These particulars would all feed an expectation of fair treatment.

156 Based on the reasonable expectations particularized by the Monitor, as already noted, the trial judge found at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

157 There was evidence of subjective expectations before the trial judge. For example, at para. 65 of his reasons, the trial judge considered the evidence of subjective expectations of two trade creditors explaining that they were unaware of the Port Transaction and would not have expected an outcome in which Algoma no longer had full control over the Port facility.

158 The trial judge also drew reasonable inferences from the evidence and circumstances that existed at Algoma in 2014 in support of the expectations relied upon by the Monitor, as he was entitled to do: see *Ford Motor*, at para. 65. In that regard, he noted that Algoma had gone through a number of insolvencies and restructurings since the early 1990s. Given the cyclical nature of the steel business, it was reasonable for the stakeholders to expect a restructuring in the future. The reasonableness of this restructuring-related expectation was confirmed by GIP's insistence on a "bankruptcy remote" structure for its loan "given the fluctuating prices of steel and Algoma's history of insolvencies", as GIP said in its factum.

159 Based on the evidence of subjective expectations and the reasonable inferences the trial judge drew from the record, it cannot be said that there was no evidence supporting the trial judge's conclusion that a future restructuring was not reasonably foreseeable.

160 The trial judge also concluded that it was objectively reasonable for the stakeholders to expect, as he noted at para. 73, that Algoma would not lose its ability to restructure absent the consent of Essar Global — particularly in Sault Ste. Marie, where Algoma is the major industry on which trade creditors and employees rely. Put differently, it would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors, and employees. Contrary to the assertions of the appellants, the trial judge expressly considered those issues.

161 Similarly, Essar Global submits that the foreseeability of another insolvency was contradicted by Mr. Marwah's affidavit evidence on the application for approval of the Plan of Arrangement, where he deposed that he believed that Algoma would be solvent. I would not give effect to this argument, as the trial judge's conclusion on the foreseeability of the insolvency is a factual finding, based on his review of the record as a whole. Essar Global has not demonstrated that this finding is subject to any palpable and overriding error.

162 The appellants' complaint that the trial judge failed to consider any of the factors identified in *BCE* is also misplaced. In that decision, the Supreme Court stated at para. 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. . . . In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

163 Essar Global's argument that the trial judge did not turn his mind to the *BCE* factors ignores the trial judge's explicit reasons on this point. At para. 68 of his decision, the trial judge referred to the factors identified by the Supreme Court as "useful" in determining whether an expectation was reasonable. These factors include: i) general commercial practice; ii) the nature of the corporation; iii) the relationship between the parties; iv) past practice; v) steps the claimant could have taken to protect itself; vi) representations and agreements; and vii) the fair resolution of conflicting interests between corporate stakeholders.

164 The trial judge correctly noted that, due to the fact-specific nature of the inquiry into reasonable expectations, not all listed factors must be satisfied in any particular case. I agree with his conclusion. The *BCE* factors are "not hard and fast rules", but are merely intended to "guide the court in its contextual analysis": Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2017), at]§17.47.

165 Nonetheless, the trial judge did consider a number of the *BCE* factors based on the facts before him. For instance, at para. 68, he concluded that Algoma's prior sale of a non-critical asset, relating to factor iv), past practice, was not helpful in determining reasonable expectations. This was because the sale of a non-critical asset differs from the sale of a critical asset, as in the Port Transaction. Also under the rubric of past practices, he considered Algoma's prior insolvencies and restructuring proceedings. He concluded that while it was reasonable for stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, it was not reasonable for them to expect that Algoma would lose its ability to restructure without the prior agreement of its parent, Essar Global.

166 As the trial judge's reasons reveal, he specifically considered the *BCE* factors and made findings on the objective reasonableness of the expectations at issue. I endorse the comments of the Monitor found at para. 80 of its factum:

> In this case, Justice Newbould found that the employees, retirees, and trade creditors all had a reasonable expectation that Essar Group would not engineer a transaction that deprived Algoma of a key strategic asset, rendering it incapable of restructuring or engaging in significant transactions without the approval of Essar Global, for minimal cash consideration in circumstances where there had been no consideration of alternative transactions. This was entirely supported by the entirety of the record adduced at trial.

167 This was essentially a factual exercise. There was conflicting evidence before the triaI judge. However it was for the trial judge to weigh the evidence and make factual findings. That is what he did. Based on the record before him, those factual findings were available to him. He considered both subjective expectations and whether the expectations were objectively reasonable. I see no reason to interfere.

168 I therefore reject the appellants' submissions on reasonable expectations.

(4) Wrongful Conduct and Harm

169 Essar Global also takes issue with the trial judge's conclusion that Essar Global's conduct was wrongful and harmful.

170 First, Essar Global submits that the trial judge inappropriately relied on the Equity Commitment Letter. It argues that the court approved the amended Plan of Arrangement that released Essar Global from any claim relating to the Equity Commitment Letter, and that reliance on a released obligation in connection with the wrongful conduct requirement of oppression was an impermissible collateral attack on the approval order.

171 I disagree. I can state no more clearly than the trial judge did at para. 100 of his reasons:

> The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The Monitor contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

172 An amended Plan of Arrangement became necessary when Essar Global did not provide the promised equity contribution, the roadshow presentations were unsuccessful, and the Port Transaction was the only available means to generate sufficient cash for Algoma.

173 I also note that the trial judge recognized that the trade creditors, the employees, pensioners and retirees were not parties to nor did they play any role in the amended Plan of Arrangement proceedings. Although the release was in both the original RSA and the amended RSA, it would appear that there was no express reference to the Port Transaction being part of the Plan of Arrangement, nor was there any mention of it in any endorsement or the order approving the amended Plan of Arrangement.

174 In addition, the trial judge did not make his finding of wrongful conduct based on Essar Global's breach of the Equity Commitment Letter. Rather, he found that the totality of Essar Global's conduct regarding the Recapitalization and Port Transaction satisfied the wrongful conduct requirement.

175 Taken in context, the trial judge made no error in his treatment of the release in favour of Essar Global.

176 Second, Essar Global submits that the trial judge made factual errors relating to Essar Global's cash contributions. In particular, it submits that he erred in concluding that the cash Essar Global did advance in the recapitalization, namely US$150 million rather than the US$250 to US$300 million that was originally promised, was generated by the Port Transaction when it was not. They also complain that he erred in granting an oppression remedy when the Equity Commitment Letter provided for a limited remedy in the event of a breach.

177 The reasons of the trial judge on Essar Global's cash contribution are admittedly somewhat confusing. In para. 20 of his reasons, he states that Essar Global's revised cash contribution under the amended RSA was "to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million." Reading that paragraph in isolation might lend credence to the appellants' submission. That said, having regard to the record before him and reading the reasons as a whole, I am not persuaded that the trial judge misunderstood Essar Global's contribution to the recapitalization.

178 The relevant contributions made to Algoma in November 2014 consisted of:

• US$150 million in cash from Essar Global under the amended RSA;

• US$150 million in debt reduction in the form of loan forgiveness for certain loans owed by Algoma to members of the Essar Group under the amended RSA; and

• US$150 million in cash generated from the Port Transaction.

179 Essar Global only provided Algoma with US$150 million in cash equity, not the US$250 to 300 million in cash equity it had originally promised. The debt forgiveness would not assist Algoma in addressing its impending liquidity issues in the same way a cash injection would. Additionally, as the trial judge noted at para. 88, the US$150 million in debt reduction related to loans at the bottom of Algoma's capital structure, and therefore this reduction was of "questionable value" to Algoma at the time.

180 Algoma, the Monitor and Essar Global all provided the trial judge with written submissions describing the cash equity contribution as consisting of US$150 million in cash from Essar Global and US$150 million in cash from the Port Transaction. The contributions were also repeatedly referenced in the record. For example, the affidavit of Mr. Seifert — which the trial judge considered in great detail — clearly sets out Essar Global's cash contribution to Algoma and the US$150 million in cash paid by Portco to Algoma under the Port Transaction as separate transactions. Similarly, these contributions are described as separate transactions in the affidavits of Messrs. Marwah and Ghosh.

181 The trial judge's reasons establish that he understood that there were two separate cash payments made to Algoma — one made by Essar Global in satisfaction of its commitments under the amended RSA and one made by Portco under the Port Transaction. He also understood that these cash payments were made in addition to Essar Global's forgiveness of US$150 million debt owed to it by Algoma.

182 Specifically, at para. 85, the trial judge noted that in October 2014, after the original RSA had been executed, Essar Global contemplated reducing the amount of its cash contribution promised under the RSA and the Equity Commitment Letter. The roadshow presentation prepared regarding Algoma's capitalization showed that Essar Global proposed to contribute less than US$100 million of *cash* rather than the US$250-$300 million required. He obviously understood that there was to be a cash component to Essar Global's contribution separate and apart from the proceeds of the Port Transaction.

183 In addition, at para. 88, the trial judge noted that the Port Transaction "*reduced* the amount of cash equity previously promised by Essar Global to be advanced to Algoma" (emphasis added). This shows that the trial judge understood that the proceeds from the Port Transaction were not *replacing* Essar Global's promised cash contribution. The trial judge recognized that the cash equity contribution of US$150 million and the debt reduction of US$150 million were insufficient to successfully refinance Algoma, and using the Port Transaction proceeds was the only way to generate the additional US$150 million in cash necessary. The trial judge highlighted at para. 96 that Algoma's CEO, Mr. Ghosh, had indicated that "he had had to agree to the Port Transaction" as it was the "only way" to refinance Algoma, since Essar Global's contribution was only "bringing in $150 million".

184 Even if the appellants were correct in this regard, which I do not accept, on their analysis, they themselves admit that Essar Global's contribution was short by US$50 million.

185 No matter the correct figure, Essar Global's conduct created a situation where Algoma had no choice but to accept the Port Transaction. There was no palpable and overriding error in the trial judge's understanding of the recapitalization requirements.

186 In any event, the reduction in Essar Global's cash contribution was only one aspect of Essar Global's overall conduct considered by the trial judge. He did not conclude that the cash equity reduction was itself the oppressive act. Accordingly, again, any factual error regarding Essar Global's actual cash contribution was not a palpable and overriding error.

187 As mentioned, Essar Global also asserts that the remedy for breach contained in the Equity Commitment Letter precluded any oppression remedy. No one was suing for breach of the Equity Commitment Letter. Rather, it formed part of the context that included a failure to explore alternatives, the Port Transaction itself, control rights that were proffered as a disincentive to other bidders and that erased any possibility of a successful restructuring, all in disregard of the expectations of the pensioners, employees, retirees, and trade creditors.

188 Third, although not identified as a ground of appeal nor advanced as such in their factum, in oral argument, the appellants submitted that the alleged breach of the Equity Commitment Letter did not cause Algoma to enter the Port Transaction.

189 Essar Global contends that the trial judge made factual errors in finding a causal connection between Essar Global's equity commitment and the Port Transaction. It argues that the Port Transaction was a key component of the recapitalization before the execution of the Equity Commitment Letter.

190 At trial, the trial judge rejected Essar Global's argument, finding at para. 87 that the Port Transaction was contemplated as a possible transaction when first introduced in May 2014, but that the transaction was not a certainty. He accurately noted that the first Plan of Arrangement that was approved by the Court required Essar Global to comply with its cash funding commitment of US$250 to US$300 million pursuant to the Equity Commitment Letter and that the Port Transaction was not a part of that plan. He found that the Port Transaction had to be carried out because of Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter.

191 The causal connection between Essar Global's equity commitment and the Port Transaction is a factual matter and the trial judge's factual finding was supported by the evidence.

192 Furthermore, the Port Transaction that was floated in May 2014 was an entirely different transaction, in which the proceeds of sale would flow upstream to Essar Global and would not be used to recapitalize Algoma. Moreover, the RSA prohibited a related party transaction without noteholder consent, and the proceeds of any sale in excess of US$2 million had to be used to reduce Algoma's debt.

193 I am not persuaded that the trial judge made any palpable and overriding error in his finding.

194 Fourth, Essar Global submits that the trial judge erred in disregarding the business judgment rule, which should have applied to prevent judicial second-guessing of the Board's decisions.

195 The trial judge correctly described the business judgment rule relying on para. 40 of *BCE*:

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives . . . It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

196 Two additional points should be made with respect to the business judgment rule. First, the rule shields business decisions from court intervention only where they are made prudently and in good faith: *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div. [Commercial List]), at pp. 150-151.

197 Second, the rule's protection is available only to the extent that the Board of Directors' actions actually evidence their business judgment: *UPM-Kymmene*, at para. 153.

198 In deciding that the rule afforded no defence to Essar Global, the trial judge, at para. 123, relied on the fact that the Board did not follow "advice to go after Essar Global on its cash equity commitment". The trial judge went on to note that had Algoma's Board formed an independent committee in February 2014, events may have evolved differently, and the Board may have accepted the advice to hold Essar Global to its commitment.

199 Essar Global takes issue with this conclusion by asserting that the trial judge should not have characterized Algoma's Board as lacking independence because of its decision not to strike an independent committee. Essar Global points out that there was no evidence that Mr. Ghosh — who cast the deciding vote in that decision — was not free to vote as he chose.

200 Essar Global's argument ignores the trial judge's key finding that the four directors who voted against the independent committee in February 2014, including Mr. Ghosh, were not independent. The trial judge noted at para. 15 that he could "not overlook" that Mr. Ghosh had been with Essar Steel India, adding that Algoma's CFO, Mr. Marwah, had described these four directors as "Essar-affiliated directors". On this basis, it was open for the trial judge to find that the Essar-affiliated directors were not free from the influence of Essar Global and the Ruia family, particularly when considered alongside his extensive comments at paras. 43-60 finding that the critical decisions regarding Algoma's recapitalization and the Port Transaction were made not by Algoma's Board, but by Essar Global and Essar Capital as led by Mr. Seifert.

201 Specifically, the trial judge made findings of fact at paras. 51-53 regarding the limited role played by Algoma's Board and management. He accepted the evidence of Messrs. Ghosh and Marwah that they did not negotiate the economic terms of the debt refinancing or the Port Transaction. He also accepted the evidence of Mr. Ghosh that

the Transaction was approved because there was no realistic alternative to generate sufficient cash to complete the recapitalization. He rejected the contradictory evidence of Mr. Seifert because the evidence of Messrs. Ghosh and Marwah was consistent with the documentary evidence. In my view, the trial judge was entitled to weigh the evidence as he did and make these findings of fact that were not infected by any palpable and overriding error.

202 Essar Global maintained before the trial judge, as they do before this court, that the Algoma Board's decisions were nonetheless shielded from court intervention because the Board had the benefit of sophisticated advisors throughout the recapitalization process. And yet, the only evidence tendered of any such advice was advice that the Board elected not to follow.

203 At para. 122, the trial judge described this advice, which was provided at least in part by Ray Schrock, described by the appellants as Algoma's lawyer. Mr. Schrock told the Board that unsecured noteholders would not react well to the Port Transaction and were likely to seek a higher infusion of cash from Essar Global, as promised in the Equity Commitment Letter. Mr. Schrock said that the Board should insist that Algoma press Essar Global to fulfill its equity commitments. There was no evidence that steps were taken in this regard and the trial judge found that this advice was not followed.

204 Additionally, the circumstances surrounding the resignation of the independent directors from Algoma's Board lend support to the trial judge's conclusion that reliance on the business judgment rule was unavailable. Mr. Dodds' letter stated that his decision to resign was driven by his conclusion that as an independent director, he lacked confidence that he was "receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company and/or its parent". It was open to the trial judge to reach the conclusions he did. In these circumstances, the business judgment rule was of little assistance.

205 Essar Global also submits that the trial judge should not have gone on to censure the activities of the Board in November 2014 (when the Board approved the transactions) by relying on the Board's February 2014 decision regarding the independent committee.

206 The trial judge did not censure the decisions of the Algoma Board solely based on the February 2014 meeting. The February meeting, and the events surrounding it, are part of a larger context that included the November 2014 meeting, all of which the trial judge considered, and all of which demonstrated that the Board's decisions regarding the recapitalization were not made prudently or in good faith, as found by the trial judge, and thereby failed to attract the application of the business judgment rule.

207 Specifically, the trial judge found at para. 123 that, if the Board had acquiesced to forming an independent committee, or listened to the truly independent directors before they resigned in frustration, subsequent steps taken in pursuit of the recapitalization transaction "may have been taken differently". He then went on to say that:

> What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

208 Additionally, the trial judge found that the Board had accepted the inclusion of the contentious change of control provision in the Cargo Handling Agreement without considering alternatives. If the provision was truly for the benefit of GIP, it could have been accomplished in another way, without providing Essar Global with an effective veto over a change of control of Algoma.

209 All this evidence speaks to the Board's lack of business judgment and good faith, the failure to consider reasonable alternatives, and the Algoma Board's limited role in directing the recapitalization. There is no palpable and overriding error in the trial judge's conclusion that the Board was precluded from relying on the business judgment rule. His decision was amply supported by the record.

210 Essar Global makes an additional point relating to the business judgment rule: that, in any event, no independent committee was required under corporate law.

211 It is a contrivance for Essar Global to impugn the trial judge's conclusion regarding the business judgment rule on the basis that an independent committee was not required. Although it is true that an independent committee was not legally or technically required, the Board's decision not to strike one, in the circumstances surrounding the November 2014 restructuring transactions, speaks volumes. The decision not to strike an independent committee must be considered alongside the evidence I have already reviewed: the Board's lack of independence, the Board's failure to follow its advisors' advice, the Board's failure to consider alternatives, and the Board's acquiescence to recapitalization transactions that primarily benefited the interests of Essar Global over those of Algoma. Again, the totality of the evidence supports the Board's lack of good faith, and renders the business judgment rule inapplicable.

212 There is one final argument Essar Global raises in invoking the business judgment rule. It claims that it was procedurally offensive for the trial judge to criticize the directors for not following Mr. Schrock's advice because evidence of the advice was not before him. It adds that, had the directors relied on legal advice from Mr. Schrock in the legal proceedings, privilege had not been waived.

213 Here, the minutes of the Board meeting held in November 2014 describe Mr. Schrock as "informing the Board [that] the [unsecured noteholders] would not react well to the proposed changes and that they were likely to push [Essar Global] for a higher infusion of cash/equity into [Algoma] as set forth in the Commitment [L]etter". Mr. Schrock also commented that the proposed Port Transaction "was likely to cause concern by the [unsecured noteholders]". Accordingly, Mr. Schrock advised the Board to "insist that [Algoma] should press all parties to fully satisfy their . . . obligations regarding the equity contributions".

214 To the extent that Mr. Schrock's comments amounted to legal advice, I would first note that his advice was only one piece of the evidentiary puzzle in the broader factual context. Even if Mr. Schrock's advice, and the Board's failure to implement it, are disregarded, the record still amply supports the trial judge's conclusions on this issue.

215 I would also add that Essar Global's claim that the evidence of Mr. Schrock's advice was not before the trial judge is incorrect. The Board minutes were included in the record as an exhibit to an affidavit tendered by Essar Global. Finally, as for Essar Global's argument that privilege had not been waived, any privilege that may have attached to Mr. Schrock's advice belonged to Algoma and not Essar Global.

216 Fifth, Essar Global submits that the involvement of Algoma's management and Board in the Port Transaction sanitizes that transaction, because the trial judge concluded that Messrs. Ghosh and Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances. Essar Global also claims that the trial judge erred by holding otherwise because the Monitor failed to attack the Board's process in its pleading. I do not accept these arguments.

217 Despite Essar Global's argument, this court has established that good faith corporate conduct does not preclude a finding of oppression: *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.).

218 Moreover, Essar Global's argument on this point ignores the trial judge's findings that Algoma's Board and management played a limited role in the Port Transaction. It also ignores evidence that indicates that Messrs. Ghosh and Marwah's support was only given because there was no alternative to address Algoma's financial straits. This factual background demonstrates why it was open for the trial judge to conclude that the Port Transaction was oppressive, despite the good faith of Messrs. Ghosh and Marwah.

219 On the pleadings issue, I note that the Monitor pleaded that the Port Transaction was the result of Essar Global's "*de facto* control" of Algoma. In response, Essar Global pleaded that the Port Transaction was in the best interests of Algoma, based on the approval of the transaction by Algoma's Board and senior management, who were acting on an

informed basis and with the benefit of financial advice. Given the way in which Essar Global framed its defence in its pleadings, it cannot now say that issues related to the Board's process were not properly before the trial judge.

220 Turning to the appellants' last argument relating to wrongful conduct and harm, they submitted that the trial judge identified two potential harms caused by Essar Global, neither of which is actionable in the oppression action: the undervalue of the Port Transaction to Algoma and the impairment of Algoma's ongoing restructuring.

221 In my view, it is inaccurate to characterize the trial judge's findings and analysis as concluding that harm flowed to stakeholders because the Port Transaction did not provide sufficient value to Algoma.

222 Specifically, he did not find that the US$171.5 million in consideration paid by Portco to Algoma constituted undervalue. Indeed his remedy that GIP be repaid in full suggests the contrary. Rather, he found that Essar Global received an unreasonable benefit from the Port Transaction.

223 Moreover, it was an exercise in self-dealing. As the trial judge stated at para. 144:

> For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

224 The trial judge also concluded that the mismatched terms of the Cargo Handling Agreement (20 years renewable) and the 50-year lease offered Essar Global an additional benefit. In that regard, he was not bound to accept the evidence of the appellants' expert. He reasoned, at para. 142, that the Port was critical to Algoma's functioning, and therefore that Algoma would not be in a position to terminate the Cargo Handling Agreement for the duration of the lease:

> The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

225 The change of control provision or veto was also an exercise in "self-dealing". The consent provision unnecessarily tied Algoma's strategic options to Essar Global. The trial judge properly found that the insertion of control rights in the Cargo Handling Agreement served no practical purpose to GIP and the same rights could have been provided for in the Assignment of Material Contracts.

226 As the trial judge concluded at para. 138:

> In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP.

227 There was evidence from Messrs. Ghosh and Marwah that supported the trial judge's conclusion that harm had flowed from the presence of the change of control provision and the ensuing letter from counsel. They were not cross-examined and no competing evidence was tendered by the appellants. It was also open to the trial judge to interpret the letter sent by Portco's counsel to Algoma's counsel as a veto threat to potential bidders while Essar Global continued to be interested in being a bidder. I would not give effect to this argument.

228 On the issue of the impairment of Algoma's ongoing restructuring, the appellants argue that no harm could have flowed from this, as the restructuring was not, in fact, impaired. Specifically, they argue that the only evidence of impairment consisted of statements in the affidavits of Messrs. Ghosh and Marwah that potential bidders for Algoma were concerned about the change of control clause. I would reject this argument as well. Again, I note that the appellants chose not to cross-examine on these affidavits, nor did they object to their admission into evidence. They cannot now, after the fact, impugn the trial judge's reliance on these statements.

229 Additionally, the appellants argue that it was premature for the trial judge to conclude that the control clause impaired the restructuring, because Portco/Essar Global was never asked to consent to a new transaction or to new owners. However, at para. 117, the trial judge noted that the change of control rights had to be considered alongside Essar Global's holding itself out as a prospective buyer in any bidding process for Algoma. That Essar Global has never been asked to consent to a new transaction was immaterial, as it remained in Essar Global's "interest to dissuade other buyers in order for it to achieve the lowest possible purchase price". In coming to this conclusion the trial judge pointed to the letter from counsel for Portco/Essar Global on May 12, 2016, which "sp[oke] volumes" by "clearly invit[ing] any bidder to understand that Essar Global has control rights."

230 I see no error in the trial judge's conclusion.

(5) The Remedy

231 Turning then to the issue of the remedy. Essar Global submits that the trial judge erred in striking out the control clause in the Cargo Handling Agreement and in granting Algoma the option of terminating the Port agreements upon repayment of the GIP loan. They argue that he was only permitted to rectify the harm that was suffered. Deleting the provision was an overly broad remedy that was unconnected to the reasonable expectations of the stakeholders and instead, he should have considered a nominal damages award.

232 GIP supports the submissions of Essar Global. It argues that the remedy awarded was not sought by any party, no evidence had been called in respect of that remedy, and no submissions were made. The practical effect of granting Algoma a termination right is that GIP does not have the security for which it bargained and it was prejudiced, despite its lack of involvement in the oppression found against Essar Global. GIP also argues that the Monitor and Algoma are seeking to set-off amounts owed by Essar Capital to Algoma against amounts owed to GIP, which results in additional prejudice.

233 I would not give effect to these submissions. First, trial judges have a broad latitude to fashion oppression remedies based on the facts before them. Once a claim in oppression has been made out, a court may "grant any remedy it thinks fit": *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), at para. 4. The focus is on equitable relief, and deference is owed to the remedy granted: *Fedel*, at para. 100.

234 Second, the trial judge properly identified the need to avoid an overly broad remedy, stating at para. 136 that there were "less obtrusive ways" of remedying the oppression than ordering shares of Portco be transferred to Algoma

(the remedy the Monitor had originally requested). Varying the transaction as he did was one such way. The trial judge's remedy removes Portco's control rights (the main obstacle to a successful restructuring) and, after GIP is paid, restores the Port to the ownership of Algoma. If GIP becomes the equity owner of Portco, its consent will be required to any change of control. Unlike a damages award, the remedy was responsive to the oppressive conduct. It served to vindicate the expectations of the stakeholders that Algoma would retain long-term control of the Port and that Essar Global would not have a veto over its restructuring efforts.

235 Third, the remedy granted preserves the security GIP had bargained for and therefore GIP has not suffered any prejudice as a result of the remedy. The trial judge's remedy, as described at para. 145, ensures that GIP is to be paid in full. Until "payment in cash of all amounts owing to GIP" is made, the Port remains in Portco's hands and the contractual remedies held by GIP to enforce its security remain in place. Moreover, Essar Global guaranteed Portco's liabilities to GIP under GIP's loan in the Port Transaction, which further demonstrates GIP's lack of prejudice. As GIP's own affiant indicated, this guarantee provides GIP with "an extra layer of protection in the event the debtor is unable to repay the loan".

236 Finally, regarding the issue of set-off, I note that the arguments made by GIP in support of this ground were made prior to Newbould J.'s subsequent ruling dealing with this issue. In that decision, he held that Algoma had set-off amounts owed under the promissory note against Essar Global, but he preserved GIP's right to repayment. This decision is a full answer to GIP's arguments on this point, and ensures that GIP will not suffer any prejudice as a result of the remedy granted in response to Essar Global's oppressive conduct.

(6) Was There Procedural Unfairness?

237 Essar Global submits that the trial judge erred in basing his decision and relief on bases that were not pleaded. GIP supports the position of Essar Global, with particular focus on the remedy that was ultimately imposed.

238 As mentioned, the trial judge was the supervising *CCAA* judge and deeply acquainted with the facts of the restructuring. Of necessity, and on agreement of all parties to the oppression action, the timelines for pleadings, productions, and examinations were truncated. Additionally, no party objected at trial that the process had been procedurally unfair. Given the context and the complexity of the dispute, the pleadings were not as clear as they might have been in a less abbreviated schedule. That said, on a review of the record, I am not persuaded that there was any procedural unfairness with respect to the claims or that the appellants did not know the case they had to meet.

239 The focus of at least GIP's complaint lies in the remedy. The appellants are correct that the precise remedy awarded by the trial judge was not pleaded. A trial judge must fashion a remedy that best responds to the oppressive conduct and that is not overly broad. While it is desirable for a party seeking oppression relief to provide particulars of the remedy, a trial judge is not bound by those particulars. Because the discretionary powers under the oppression remedy must be exercised to *rectify* the oppressive conduct complained of (see: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), at para. 27), it follows that the remedy will, by necessity, be linked to the oppressive conduct that was pleaded. Therefore a party against whom a specifically-tailored oppression remedy is ordered cannot fairly complain that the remedy caught them by surprise. This conclusion is consistent with *Fedel*, where this court upheld oppression remedies imposed by the trial judge where the relief granted had not been specifically pleaded or sought in argument.

240 Moreover, absent error, a trial judge's decision on remedy is entitled to deference. As I have discussed, there is an absence of error. Furthermore, in this case, there is no prejudice to GIP. Its position is preserved by the remedy granted by the trial judge. At the same time, the remedy is responsive to Essar Global's oppressive conduct.

241 That said, the trial judge did consider whether Essar Global and GIP could fairly argue that they were taken by surprise by his remedy. At para. 141, he rejected this position, holding that the issue of the change of control clause was pleaded by the Monitor, and affidavit material filed by both Essar Global and GIP provided evidence on the provision's significance. At para. 146, he concluded that issues relating to the relief he ordered were "fully canvassed in the evidence

and argument", and that the remedy he ordered in fact was less intrusive than the remedy originally pled by the Monitor. And although he did not think an amendment was necessary, he nonetheless ordered that the Monitor would be granted leave to amend its claim to support the relief he granted.

242 I would not give effect to this ground of appeal.

(7) Fresh Evidence

243 Essar Global seeks to introduce fresh evidence on appeal that addresses the independence of Algoma's Board of Directors. It takes the position that the trial judge's rejection of the independence of two directors, Messrs. Kothari and Mirchandani, played a significant role in his decision. It adds that the lack of independent directors was not pleaded by the Monitor and so Essar Global had no reason to adduce this evidence earlier.

244 Messrs. Mirchandani and Kothari joined Algoma's Board in June and August 2014, respectively, after the three independent directors resigned. They were therefore on the Board when the Port Transaction was approved in November 2014.

245 Whether "a proper case" exists to allow fresh evidence is determined by applying the test outlined in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), or the slightly modified test from *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.).

246 As this court has noted, the two tests are quite similar: see *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 93 O.R. (3d) 483 (Ont. C.A.), at para. 77. Under the *Palmer* test, the party seeking to admit fresh evidence must demonstrate that the evidence could not, by due diligence, have been adduced at trial; that the evidence is relevant in that it bears on a decisive issue in the trial; that the evidence is credible; and that the evidence, if believed, could be expected to affect the result.

247 Under the *Sengmueller* test, the moving party must demonstrate that the evidence could not have been obtained by the exercise of reasonable diligence prior to trial; that the evidence is credible; and that the evidence, if admitted, would likely be conclusive of an issue on appeal.

248 Essar Global has failed to meet either the *Palmer* or the *Sengmueller* test for two main reasons.

249 In both its original and its amended statement of claim, the Monitor alleged that representatives of Essar Global were members of Algoma's Board and exercised *de facto* control over Algoma, such that they made decisions for the benefit of Essar Global while unfairly disregarding the interests of Algoma's stakeholders. Essar Global cannot claim to have been caught by surprise by the issue of the Board's independence being in play. The fresh evidence could have been obtained with reasonable diligence prior to trial.

250 In any event, the evidence would not have affected the result at trial, and is not conclusive of any issue on appeal. The fresh evidence Essar Global asks to proffer consists of the affidavit of Mr. Mirchandani, which states that he and Mr. Kothari were determined to be independent Board members as a result of a conflict of interest policy and by virtue of the questionnaires they each completed.

251 However, there was evidence before the trial judge essentially to this effect, including Algoma's October 2014 offering memorandum, which stated that the Board included two independent directors. Indeed, the trial judge commented on this evidence in footnote 7 of his reasons, and rejected it in concluding that Messrs. Mirchandani and Kothari were not truly independent of Essar Global.

252 Additionally, and as I have already discussed elsewhere in these reasons, the remainder of the record strongly supported the Board's lack of independence. Even if the trial judge had Mr. Mirchandani's affidavit before him, it would not have made a difference.

253 I would therefore dismiss the motion for fresh evidence.

(8) Costs

254 GIP claimed costs of CDN$750,156.18 against the Monitor payable on a partial indemnity scale. It claimed it was entirely successful because it successfully resisted relief sought by the Monitor that would have prejudiced GIP. The trial judge exercised his discretion and observed that success between the Monitor and GIP was divided. He also relied on GIP's appeal as a basis to conclude success was divided. He therefore did not order any costs in favour of or against GIP.

255 GIP seeks leave to appeal the trial judge's costs award. Before this court, GIP in essence renews the arguments made before the trial judge. The awarding of costs is highly discretionary and leave is granted sparingly. I see no error in principle in the trial judge's exercise of discretion nor was the award plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

256 At trial, GIP was unsuccessful in challenging both the Monitor's claim of standing and its claim that the Port Transaction was oppressive. It also seems incongruous for GIP to suggest that it was entirely successful in defeating the Monitor's claims, while it appeals the trial decision.

257 I see no basis on which to interfere with the costs award of the trial judge and would refuse leave to appeal costs.

E. DISPOSITION

258 For these reasons, I would dismiss the appeal, the motion for fresh evidence and the motion for leave to appeal costs.

259 As agreed, I would order that the Monitor and Algoma are entitled to costs of the appeal fixed in the amounts of CDN$100,000 and CDN$60,000 respectively, inclusive of disbursements and applicable taxes on a partial indemnity scale. At the oral hearing, the parties had not agreed on whether the award should be payable on a joint and several basis and requested more time to consider the matter. On September 15, 2017, counsel wrote advising that they had still not agreed on this issue. GIP requested the opportunity to make additional costs submissions on this issue at the appropriate time. Under the circumstances, I would permit GIP to make brief written submissions on this issue by January 10, 2018. Essar Global shall have until January 17, 2018 to file its submissions. The Monitor and Algoma shall have until January 24, 2018 to respond.

***R.A. Blair J.A.*:**

I agree.

***K. van Rensburg J.A.*:**

I agree.

Appeal dismissed; application dismissed.

Footnotes

1 Algoma was named in the proceeding below as a defendant, but supports the position taken by the respondent, Ernst & Young Inc. It is therefore a respondent on this appeal.

2 In early 2015, Essar Consulting obtained two additional valuations of the Port assets, one in February from Royal Bank of Canada and one in April from ICICI Securities. The RBC valuation, which was an exhibit to the affidavit of Joseph Seifert, was between US$165 and US$200 million. The ICICI valuation, which was an exhibit to the affidavit of Anshumali Dwivedi, was US$349 million.

3 Although Deutsche Bank intervened in the proceedings below, it was not involved in this appeal.

4 Before this court, no submissions on urgency were advanced.

5 Stephanie Ben-Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009) 429, at pp. 430-431 and 436.

6 Janis Sarra, "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010) 99, at p. 99.

At p. 540 & 541

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Voluntary Settlement—Stat. 13 *Eliz. c.* 5.

When a settlement is not founded upon valuable consideration, it may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that the settlement necessarily would have that effect; but, *semble*, the mere fact that it has, in the event, prevented a creditor, who was such when it was made, from obtaining payment of his debt, is not of itself sufficient to enable him to set it aside.

Spirett v. *Willows* (1) considered.

Decree of *James*, V.C., affirmed.

THIS was an appeal by the Defendant *Pope* from a decree of Vice-Chancellor *James*, setting aside a voluntary settlement, dated the 3rd of March, 1863, by which the Rev. *J. Custance* assigned to trustees for the benefit of *Julia Pope* (then *Julia Thrift*) a policy of insurance for £1000 (effected by him in 1845 on his own life), and covenanted to pay the premiums. It appeared that he had previously settled this policy upon her in 1853, reserving a power of revocation, which he exercised in 1861, in order that he might receive a bonus.

At the time when the settlement now impeached was made, the settlor held two livings producing a net income of £815, and he was entitled to a Government life-annuity of a little more than £180, and to a copyhold cottage which he on the same day covenanted to surrender to Mrs. *Walpole*, the mother of *Julia Pope*, for £50. He had no other property except his furniture, and he was being pressed by his creditors. Among other debts, he owed £489 to Messrs. *Gurney*, his bankers at *Norwich*, and £7 8*s*. 6*d*. to a postmaster. On the same 3rd of March, 1863, he borrowed from Mrs. *Walpole* £350, for which he gave her a bill of sale of his furniture. Mrs. *Walpole* was privy to, and one of the trustees of, the settlement. At the same time he made an arrangement with his bankers that his solicitor, Mr. *Copeman*, should receive certain income from the benefices, and pay out of it £50 each half-year towards discharge of the balance. The banking account at *Norwich* was to remain

(1) 3 D. J. & S. 293.

a dead account, and to be discharged, with interest, by the above instalments. A new account was to be opened with the *Aylsham* branch of the same bank, and *Copeman* was to pay the residue of the income (after deducting the £50) to this new account, which was to be an ordinary current banking account.

At the testator's death, in April, 1868, the balance of £489 due to the bankers had been reduced to £117 by means of the annual instalments of £50. The *Aylsham* account shewed no balance on either side. The postmaster's debt of £7 8*s.* 6*d.*, and Mrs. *Walpole's* £350, with an arrear of interest, remained unpaid. The other debts due at the date of the settlement had been paid. The settlor, however, owed many debts subsequently contracted, and there were no assets whatever to pay them; the furniture having been sold under a subsequent bill of sale, to which Mrs. *Walpole* had agreed to postpone her security.

The Plaintiff, a tradesman who had supplied goods to the settlor after the date of the settlement, filed his bill for administration of the settlor's estate, and to set aside the settlement, to the benefit of which the Defendant *Pope* had become entitled under an appointment by *Julia Pope.*

Vice-Chancellor *James* made a decree for setting aside the settlement (1), from which *Pope* appealed.

Mr. *Morgan,* Q.C., and Mr. *H. A. Giffard,* for the Appellant:—

The settlor here was solvent after making the settlement, and this creditor cannot set it aside. *Spirett* v. *Willows* (2) draws a distinction between the case which a creditor who was such at the date of the settlement must make, from that which a posterior creditor must make. The Lord Chancellor thought it enough for the former to shew that he has been delayed by the settlement—a view not necessary to the decision of the case, and which may well be questioned; but he never said that a subsequent creditor stood on that footing. He must shew either actual intention to defeat creditors, or that the settlor's remaining property was insufficient to pay the then creditors. *Holmes* v. *Penney* (3) puts the rule of the Court on this subject in a clear light. All the cases

(1) Law Rep. 9 Eq. 206.
(2) 3 D. J. & S. 293.
(3) 3 K. & J. 90, 99.

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are consistent with this: *Stevens* v. *Olive* (1); *Richardson* v. *Smallwood* (2); *Skarf* v. *Soulby* (3); *Thompson* v. *Webster* (4); *Townsend* v. *Westacott* (5). *Jenkyn* v. *Vaughan* (6) decides only this, that the existence of a prior debt enables a subsequent creditor to file a bill; it does not decide that he need only prove the same case as the prior creditor.

[They also referred to *Stokoe* v. *Cowan* (7).]

Mr. *Kay*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiff, were not called upon.

LORD HATHERLEY, L.C.:—

The principle on which the statute of 13 Eliz. c. 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made.

The difficulty the Vice-Chancellor seems to have felt in this case was, that if he, as a special juryman, had been asked whether there was actually any intention on the part of the settlor in this case to defeat, hinder, or delay his creditors, he should have come to the conclusion that he had no such intention. With great deference to the view of the Vice-Chancellor, and with all the respect which I most unfeignedly entertain for his judgment, it appears to me that this does not put the question exactly on the right ground; for it would never be left to a special jury to find, *simpliciter*, whether the settlor intended to defeat, hinder, or delay his creditors, without a direction from the Judge that if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so. A jury would undoubtedly be so directed, lest they should fall into the error of speculating as to what was actually passing in the mind of the settlor, which can hardly ever be satisfactorily ascertained, instead of judging of his intention by the necessary consequences of his act, which consequences can always be estimated from the facts of the case. Of course there may be cases—

(1) 2 Bro. C. C. 90.

(2) Jac. 552.

(3) 1 Mac. & G. 364, 375.

(4) 4 De G. & J. 600, affirmed in D. P. 7 Jur. (N. S.) 531; 9 W. R. 641.

(5) 2 Beav. 340, 344.

(6) 3 Drew. 419.

(7) 29 Beav. 637.

of which *Spirett* v. *Willows* (1) is an instance—in which there is direct and positive evidence of an intention to defraud, independently of the consequences which may have followed, or which might have been expected to follow, from the act. In *Spirett* v. *Willows* the settlor, being solvent at the time, but having contracted a considerable debt, which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.

The circumstances of the present case are these: The settlor was pressed by his creditors on the 3rd of March, 1863. He was a clergyman with a very good income, but a life income only. He had a life-annuity of between £180 and £190 a year, and besides that he had an income from his benefice—his income from the two sources amounting to about £1000 a year. But at the same time his creditors were pressing him, and he had to borrow from Mrs. *Walpole*, who lived with him as his housekeeper, a sum of £350 wherewith to pay the pressing creditors. That accordingly was done, and he handed over to her as security the only property he had in the world beyond his life income and the policy which is now in question, namely, his furniture, and a copyhold of trifling value. It is said, however, that the value of the furniture exceeded (and I will take it to be so) by about £200 the value of the debt which was secured to Mrs. *Walpole*. That debt may be

(1) 3 D. J. & S. 293.

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put out of consideration, not only on that account, but because Mrs. *Walpole*, being herself a trustee of the settlement which is impeached, cannot be heard to complain of that settlement. But he also owed at the time of this pressure a debt of £339 to his bankers at *Norwich*, and he required, for the purpose of clearing the pressing demands upon him, not only the sum which he borrowed from Mrs. *Walpole*, but an additional sum of £150, which sum the bankers agreed to furnish, making their debt altogether, at the date of the execution of this settlement, a debt of £489. They made with him an arrangement (which probably was intended, in a great measure, as a friendly act towards a gentleman who was seventy-three years of age, and the duration of whose life, therefore, could not be expected to be very long), that they would for the present (for it cannot be held to be more than a present arrangement) suspend the proceedings, which, it appears, they were contemplating, upon his allowing his solicitor to receive part of his income, pay £100 a year towards liquidating the £489 (which was to be carried to what is called a "dead account"), and pay the residue into their branch bank at *Aylsham*, to an account upon which the settlor might draw. That arrangement was made, but there was no bargain on the part of the bankers that they would not sue at any time they thought fit; and, on the other hand, they had nothing in the shape of security for the payment of their debt, for they had not taken out sequestration, and there could be nothing in the shape of a charge upon the living except through the medium of a sequestration. When the settlor had made the voluntary assignment of the policy, he stood in this position, that he had literally nothing wherewithal to pay or to give security for the debt of £489, except the surplus value of the furniture, which must be taken to be worth about £200, and he was clearly and completely insolvent the moment he had executed the settlement, even if we assume that some portion of his tithes and of the annuity was due to him. It appears that a payment of the tithes was made in January, and we cannot suppose that there was more owing to him than the £200 which was paid in May, two months after the date of the deed; and if we add to that £200 as the surplus value of the furniture, and add something for an apportioned part of the annuity, the whole put together would not meet the £489. He,

in truth, was at that time insolvent; and there I put it more favourably than I ought to put it, because he could not at once put his hands upon that sum, so as to apply it towards satisfying the debt, at any time between March and May. The case, therefore, is one of those where an intention to delay creditors is to be assumed from the act.

The Vice-Chancellor seems to have felt himself very much pressed by the case of *Spirett* v. *Willows* (1), and the *dicta* of Lord *Westbury* in that case. The first of those *dicta* is: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shewn that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." The Vice-Chancellor seems to have thought himself bound by this expression of opinion, and to have set aside the settlement upon that ground alone. It is clear, however, that this expression of opinion on the part of the Lord Chancellor was by no means necessary for the decision of the case before him, where the settlor was guilty of a plain and manifest fraud. It is expressed in very large terms, probably too large; but, at all events, it is unnecessary to resort to it in the present case. It seems to me that the difficulty felt by the Vice-Chancellor arose from his thinking that it was necessary to prove an actual intention to delay creditors, where the facts are such as to shew that the necessary consequence of what was done was to delay them. If we had to decide the question of actual intention, probably we might conclude that the settlor, when he made the settlement, was not thinking about his creditors at all, but was only thinking of the lady whom he wished to benefit; and that his whole mind being given up to considerations of generosity and kindness towards her, he forgot that his creditors had higher claims upon him, and he provided for her without providing for them. It makes no difference that Messrs. *Gurney*, the bankers, seem to have been willing to forego the immediate payment of their debt; the question is, whether they could not within a month or less after the execution of the settlement, if they had been so minded, have called in the debt and overturned the settlement? Beyond all

(1) 3 D. J. & S. 293, 302.

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doubt they could, on the ground that it did not leave sufficient property to pay their debt; and this being so, we are not to speculate about what was actually passing in his mind. I am quite willing to believe that he had no deliberate intention of depriving his creditors of a fund to which they were entitled, but he did an act which, in point of fact, withdrew that fund from them, and dealt with it by way of bounty. That being so, I come to the conclusion that the decree of the learned Vice-Chancellor is right.

Then as to the costs. I think that the expense of separating them would come to more than the mere costs of administration. It was urged that this is an administration suit, as well as a suit to set aside the deed, and that, therefore, the Respondent ought not to have all the costs; but the costs of an administration summons would be trifling, and the costs of the suit are in reality those which have been incurred by the question as to the validity of the deed. The appeal must, therefore, be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

In this case I quite agree with the Vice-Chancellor in thinking that if the propositions laid down in *Spirett* v. *Willows* (1) are taken as abstract propositions, they go too far and beyond what the law is; but if they are taken in connection with the facts of that case, then undoubtedly there is abundantly enough to support the decision, for there was a voluntary settlement by a man who, at its date, was solvent, but immediately afterwards realised the rest of his property and denuded himself of everything. Of course the irresistible conclusion from that was, that the voluntary settlement was intended to defeat the subsequent creditors. That being so, I do not think that the Vice-Chancellor need have felt any difficulty about the case of *Spirett* v. *Willows*, but he seems to have considered, that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved—that is, in such cases as *Holmes* v. *Penney* (2), and *Lloyd* v. *Attwood* (3), where the instruments sought to be set aside were founded on

(1) 3 D. J. & S. 293, 302. (2) 3 K. & J. 90.
(3) 3 De G. & J. 614.

valuable consideration; but where the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a Judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them.

Now in this case, at the date of the settlement, Mr. *Custance* was really insolvent; and if at the date of the settlement the bankers had insisted on payment, and had issued execution, they could not have got a present payment unless they had resorted to that particular policy. That being so, it seems to me that the facts of this case bring the matter entirely within all the decided cases, and it is enough to say that at the date of this settlement Mr. *Custance* was not in a position to make any voluntary settlement whatever.

That being so, the appeal must be dismissed, and dismissed with costs, as I can see no reason for saying that the decree was not right in giving the whole costs of the suit. There was, previously to this case, a decision by Vice-Chancellor *Kindersley* (*Jenkyns* v. *Vaughan* (1),) laying down the rule that where a subsequent creditor institutes a suit and proves the existence of a debt antecedent to the settlement, he can maintain a suit such as this, and therefore it is not a new case. There can be no reason for doubting the correctness of that decision, either in point of principle or justice.

Solicitors: Messrs. *Turner & Turner;* Messrs. *Paterson, Snow, & Burney.*

(1) 3 Drew. 419.

At paras. 95-99

2015 ONCA 570
Ontario Court of Appeal

Grant Forest Products Inc. v. Toronto-Dominion Bank

2015 CarswellOnt 11970, 2015 C.E.B. & P.G.R. 8139 (headnote only), 2015 ONCA 570, [2015] W.D.F.L. 4098, 20 C.C.P.B. (2nd) 161, 256 A.C.W.S. (3d) 269, 26 C.C.E.L. (4th) 176, 26 C.B.R. (6th) 218, 337 O.A.C. 237, 387 D.L.R. (4th) 426, 4 P.P.S.A.C. (4th) 358, 9 E.T.R. (4th) 205

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of a Plan of Compromise or Arrangement of Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings G.P.

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP, Applicants and The Toronto-Dominion Bank, in its capacity as agent for the secured lenders holding first lien security and the Bank of New York Mellon, in its capacity as agent for secured lenders holding second lien security, Respondents

Doherty, E.E. Gillese, P. Lauwers JJ.A.

Heard: February 3, 2015
Judgment: August 7, 2015
Docket: CA C58636

Proceedings: affirming *Grant Forest Products Inc. v. GE Canada Leasing Services Co.* (2013), 7 C.C.P.B. (2nd) 239, 93 E.T.R. (3d) 15, 6 C.B.R. (6th) 1, 2013 ONSC 5933, 2013 CarswellOnt 14057, C.L. Campbell J. (Ont. S.C.J. [Commercial List])

Counsel: Mark Bailey, Deborah McPhail for Appellant, Superintendent of Financial Services
Jane Dietrich for Respondents, Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP
John Marshall, Roger Jaipargas for Respondent, West Face Capital Inc.
Alex Cobb for Respondent, Mercer (Canada) Limited
David Byers, Dan Murdoch for Respondent, Ernst & Young Inc.
Andrew J. Hatnay, James Harnum, Adrian Scotchmer for Intervener, Court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings

***E.E. Gillese J.A.*:**

Overview

1 The debtor companies in this case obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") and entered into a liquidation process. After selling their assets and paying out the first lien lenders in full, there were insufficient funds to satisfy the claims of the second lien lenders and the claims asserted on behalf of two of the debtor companies' pension plans. A contest ensued between one of the secured creditors and the pension claimants.

2 The CCAA judge ordered the remaining debtor companies into bankruptcy, thereby resolving the contest in favour of the secured creditor.

3 Ontario's Superintendent of Financial Services (the "*Superintendent*") appeals.

4 During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on wind up of each plan (the "*wind up deemed trust*"). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies' accounts and inventory.

5 The basis for the Superintendent's position is a combination of ss. 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*").

6 Sections 57(3) and (4) of the PBA read as follows:

> 57 (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> 57 (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

7 The priority of the PBA deemed trusts is established by s. 30(7) of the PPSA. Section 30(7) reverses the first-in-time principle for certain assets and gives the beneficiaries of the deemed trusts priority over an account or inventory and its proceeds. Section 30(7) states:

> 30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

8 The Superintendent contends that the decision below is wrong because, among other things, he says that it is inconsistent with the Supreme Court of Canada's recent decision in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.).

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

The Cast of Characters

10 Grant Forest Products Inc. ("*GFPI*") and certain of its subsidiaries carried on an oriented strand board manufacturing business from facilities in Ontario, Alberta and the United States. At the beginning of these proceedings, GFPI and its subsidiaries were the third largest such manufacturer in North America.

11 GFPI and related companies (the "*Applicants*") brought an application for protection from creditors under the CCAA (the *CCAA Proceeding*"). Following the sale of certain assets, the CCAA Proceeding was terminated in relation to some of the Applicants. GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. are the "*Remaining Applicants*" in the CCAA Proceeding.

12 Mercer (Canada) Ltd. is the administrator of the two pension plans in question in the CCAA Proceeding (the "*Administrator*"). Mercer replaced PricewaterhouseCoopers Inc. as administrator in August 2013.

13 Stonecrest Capital Inc. was appointed the chief restructuring organization (the "*CRO*") by court order dated June 25, 2009.

14 Ernst & Young Inc. was appointed the monitor (the "*Monitor*") by court order dated June 25, 2009.

15 The "*First Lien Lenders*" are the first-ranking secured creditors in the CCAA Proceeding. Following the sale of assets during the CCAA Proceeding, distributions were made and the First Lien Lenders were paid in full.

16 The "*Second Lien Lenders*" are secured creditors ranking behind the First Lien Lenders, and are collectively owed approximately $150 million.

17 The Bank of New York Mellon served as agent for the Second Lien Lenders in these proceedings (the "*Second Lien Lenders' Agent*").

18 The Superintendent is the regulator of pension plans under the PBA and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. He is also the administrator of the pension benefits guarantee fund under the PBA, which partially insures pension benefits in certain circumstances.

19 West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P. (collectively, "*West Face*"), are parties to the *Second Lien Credit Agreement* with the Remaining Applicants. The Second Lien Lenders (including West Face) are currently the highest ranking secured creditors. West Face is owed approximately $31 million.

20 Shortly after the oral hearing of this appeal, the court-appointed representative counsel to non-union active and retired employees of United States Steel Canada Inc. ("*USSC*") in USSC's unrelated proceedings under the CCAA (the "*Intervener*") sought leave to intervene. The Intervener wished to have the opportunity to make submissions on the issues raised in this appeal from the perspective of retirees and pension beneficiaries. Approximately 6,000 affected employees and retirees of USSC are subject to the representation order.

21 By endorsement dated March 19, 2015, this court granted the Intervener leave to intervene as a friend of the court: *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 192 (Ont. C.A.). Under the terms of that endorsement, the Intervener was limited to addressing only those issues already raised on the appeal and to the existing record.

Background in Brief

Sale of the Applicants' Assets

22 On March 19, 2009, GE Canada Leasing Services Company applied for a bankruptcy order against GFPI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). In response, the Applicants sought protection under the CCAA through the CCAA Proceeding.

23 The court gave that protection by order dated June 25, 2009 (the "*Initial Order*"). The Initial Order also stayed the bankruptcy application against GFPI and approved a marketing process designed to locate potential investors to purchase, as a going concern, the Applicants' business and operations. Consequently, the CCAA Proceeding proceeded as a liquidation, rather than as a restructuring.

24 In the CCAA Proceeding, no order was made authorizing a debtor-in-possession financing or other "super priority" lending arrangement.

25 GFPI's assets were sold in a number of transactions that closed between May 26, 2010 and November 7, 2012.

26 GFPI and certain of its subsidiaries sold the large majority of their core operating assets to Georgia Pacific LLC and certain of its affiliates ("*Georgia Pacific*"). The sale to Georgia Pacific was court approved on March 30, 2010, and closed on May 26, 2010. On sale, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. - Englehart Plan, which was the pension plan associated with the assets it had purchased.

27 Other than the assets sold to Georgia Pacific, GFPI's only other significant operating asset was a 50% interest in a mill in Alberta. The sale of that interest was approved by court order on January 5, 2011, and closed on February 17, 2011. Additional assets were sold over the following two years, with the final sale closing on November 7, 2012.

28 Each sale was court approved and subject to the standard provision that all encumbrances and claims which applied to the assets prior to the sale applied to the sale proceeds with the same priority.

29 The court made distribution orders that resulted in the First Lien Lenders being paid in full in January of 2012.

30 A distribution of $6 million was made to the Second Lien Lenders. Approximately $150 million remains owing to those lenders under the Second Lien Credit Agreement. Of that amount, West Face is owed approximately $31 million.

31 As of February 1, 2013, GFPI held cash of approximately US$2.1 million and the Monitor held cash of approximately $6.6 million and US$0.3 million (the "*Remaining Funds*").

The Pension Plans

32 GFPI was the employer, sponsor and administrator of four pension plans. The two plans of significance in this appeal are (1) the Pension Plan for Salaried Employees of GFPI - Timmins Plant (the "*Salaried Plan*") and (2) the Pension Plan for Executive Employees of GFPI (the "*Executive Plan*") (together, the "*Plans*").

33 Both of the Plans are defined benefit pension plans under the PBA.

34 The Initial Order provided that the Applicants were "entitled but not required" to pay "all outstanding and future ... pension contributions ... incurred in the ordinary course of business".

35 On August 26, 2011, the "Timmins Pension Plan Order" was made. This order authorized GFPI to take steps to initiate the wind up of the Salaried Plan and to work with the Superintendent to appoint a replacement plan administrator for the Salaried Plan. This order also directed the Monitor to hold back approximately $191,000 from any distribution to creditors. The holdback was thought to be sufficient to satisfy the anticipated wind up deficit of the Salaried Plan. The Timmins Pension Plan Order expressly provided that nothing in it "affects or determines the priority or security of the claims" against the holdback.

36 A similar order was made in respect of the Executive Plan on September 21, 2011. However, the hold back amount in respect of the Executive Plan was $2,185,000.

37 The Administrator recommended that the Plans be wound up and on February 27, 2012, the Superintendent ordered the Plans wound up (the "*Superintendent's Wind Up Orders*"). Under those orders, the effective date of wind up for the Executive Plan is June 10, 2010, and for the Salaried Plan it is March 31, 2011.

38 As will become apparent, it is significant that the Plans were ordered to be wound up after the CCAA Proceeding commenced.

The Pension Motion

39 GFPI continued to make all required contributions to the Plans (both current service and special payments) until June 2012. However, on June 8, 2012, the Remaining Applicants brought a motion seeking an order declaring that none of GFPI, the CRO or the Monitor were required to make further contributions to the Plans (the "*Pension Motion*"). The grounds for the motion included that there was uncertainty relating to the priority of amounts owing in respect of the wind up deficits in the Plans and it was possible that *Indalex*, which was then before the Supreme Court, might have an impact on that matter.

40 When the wind up reports showed that the estimated deficits in the Plans had increased, by order dated June 25, 2012, the hold back for the Salaried Plan was increased from approximately $191,000 to $726,372 and for the Executive Plan from approximately $2.185 million to $2,384,688 (collectively, the "*Reserve Funds*").

41 The Pension Motion was originally returnable on June 25, 2012. However, it was adjourned several times.

42 On the first return date, acting on his own motion, the CCAA judge adjourned the Pension Motion and directed that further notice be given to the Second Lien Lenders. By endorsement dated June 25, 2012, a term of the adjournment was that no further payments were to be made to the Plans. [1]

43 It should be noted that several weeks prior, on March 19, 2012, counsel for the Second Lien Lenders' Agent sent an email to all those on the Service List saying that it no longer represented the Agent and asking to be removed from the Service List.

44 On August 8, 2012, the Remaining Applicants served a notice of return of the Pension Motion for August 27, 2012.

45 On August 27, 2012, again on his own motion and over the objections of the pension claimants, the CCAA judge adjourned the Pension Motion to a date to be determined at a comeback hearing to be held prior to the end of September 2012. He also directed the Monitor to provide additional communication to the Second Lien Lenders and to seek their positions on the Pension Motion.

46 By letter dated August 31, 2012, the Monitor advised the Second Lien Lenders' Agent that the Pension Motion had been adjourned at the hearing on August 27 and requested a conference call with, among others, the various Second Lien Lenders, to determine what positions they would take on the Pension Motion.

47 The conference call took place on September 5, 2012. West Face did not participate in it. The two Second Lien Lenders that did attend on the call indicated that they supported the Pension Motion.

48 On September 17, 2012, the Pension Motion was scheduled to be heard on October 22, 2012.

49 On September 21, 2012, the Monitor sent the Second Lien Lenders' Agent a letter advising that the Pension Motion would be heard on October 22, 2012. In the letter, the Monitor also indicated that any Second Lien Lender that wished to make its position on the Pension Motion known should contact the Monitor.

50 When West Face became aware that the Second Lien Lenders' Agent would not be able to obtain timely instructions in respect of the Pension Motion, it retained its own counsel to respond to the Pension Motion.

51 By letter dated October 12, 2012, West Face advised the Monitor that it would support the Pension Motion.

52 West Face served a notice of appearance in the CCAA Proceeding on October 19, 2012. It sought an adjournment of the October 22, 2012 hearing date but the Administrator opposed the adjournment request.

The Bankruptcy Motion

53 By notice of motion dated October 21, 2012, West Face then brought a motion returnable on October 22, 2012, seeking to be substituted for GE Canada Leasing Services Company in the outstanding bankruptcy application issued against GFPI. Alternatively, it sought to have the court lift the stay of proceedings in the CCAA Proceeding and permit it to petition the Remaining Applicants into bankruptcy (the "*Bankruptcy Motion*").

54 On October 22, 2012, it was submitted [2] that the Bankruptcy Motion should be adjourned but that the Pension Motion should be argued. The CCAA judge adjourned both motions (together, the "*Motions*"), however, citing the close

relationship between the two. The adjournment continued the terms of the adjournment of the Pension Motion on June 25, 2012.

The Motions are Heard

55 The first round of oral submissions on the Motions was heard on November 27, 2012. The CCAA judge reserved his decision.

56 The Supreme Court released its decision in *Indalex* on February 1, 2013.

57 On February 6, 2013, the CCAA judge identified certain additional issues to be dealt with on the Motions and directed the parties to make written submissions on them.

58 A further oral hearing on the Motions took place on July 23, 2013.

The Transition Order

59 The CCAA judge dealt with the Motions by order dated September 20, 2013 (the "*Transition Order*"). Among other things, in the Transition Order, the court ordered that:

> 1. none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to ss. 57(3) and (4) of the PBA;
>
> 2. none of GFPI, the CRO or the Monitor shall make any further payments to the Plans; and
>
> 3. GFPI and each of the other Remaining Applicants are adjudged bankrupt and ordered into bankruptcy.

60 In short, the Transition Order resolved the priority contest between the pensioners and West Face in favour of West Face.

The Appeal

61 The Superintendent then sought and obtained leave to appeal to this court.

The Decision Below

62 In his reasons for decision, the CCAA judge observed that through the CCAA Proceeding, the Applicants' assets had been sold in a way that provided the maximum benefit to the widest group of stakeholders. Moreover, some of the assets were sold on a going concern basis, which provided continued employment and benefits for many. The alternative to the CCAA Proceeding was a bankruptcy proceeding, which might well have resulted in a greater loss of employment and a lower level of recovery for secured creditors.

63 The CCAA judge then found that the Remaining Funds were not subject to wind up deemed trusts.

64 The Superintendent and the Administrator had submitted that, notwithstanding the Initial Order, the wind up deemed trusts should prevail over other creditors' claims.

65 In rejecting this submission, the CCAA judge stated that a wind up deemed trust will prevail when wind up occurs before insolvency but not when a wind up is ordered after the Initial Order is granted. He said that this approach provides predictability and certainty for the stakeholders of the insolvent company and enables secured creditors to decide whether they are willing to pursue a plan of compromise or immediately apply for a bankruptcy order.

66 The CCAA judge relied on the Supreme Court's decision in *Indalex* for the proposition that provincial statutory provisions in the pension area prevail prior to insolvency but once the federal statute is involved, the insolvency regime applies.

67 The CCAA judge also rejected the argument that the CCAA court, in authorizing the wind up of the Plans, had given the wind up deemed trusts priority in the insolvency regime. He noted that the orders authorizing the wind ups explicitly state that they do not affect or determine the priority or security of the claims against those funds, and the orders say nothing in respect of the deemed trust issue.

68 The CCAA judge opined that, on the basis of this analysis, a lifting of the stay was not necessary to defeat the wind up deemed trusts said to have arisen after the Initial Order.

69 The CCAA judge then observed that the issue of whether to terminate a CCAA proceeding and permit a petition in bankruptcy to proceed is a discretionary matter. In the absence of provisions in a plan of compromise under the CCAA or a specific court order, any creditor is at liberty to request that the CCAA proceedings be terminated if its position might better be advanced under the BIA. The question was whether it was fair and reasonable, bearing in mind the interests of all creditors, that the interests of the creditor seeking preference under the BIA should be allowed to proceed.

70 The CCAA judge found that there was no evidence of a lack of good faith on the part of West Face in seeking to lift the stay, beyond the allegations relating to delay. He went on to reject the argument based on West Face's alleged delay in bringing the Bankruptcy Motion, saying that no party had been prejudiced by the delay.

71 West Face argued that its interests should prevail because otherwise a wind up deemed trust that did not exist at the time of the Initial Order would *de facto* be given priority and that would be contrary to the priorities established under the BIA. The CCAA judge accepted this submission. He said that in *Indalex*, the Supreme Court limited the wind up deemed trust to obligations arising prior to insolvency and to deny West Face the relief it sought would be at odds with that reasoning.

72 Accordingly, the CCAA judge concluded, the monies held by the Monitor should not be applied to the Plans.

A Summary of the Parties' Positions On Appeal

The Superintendent

73 The Superintendent submits that the CCAA judge erred in concluding that no wind up deemed trusts arose during the CCAA Proceeding. He contends that where a pension plan is wound up after an initial order is made under the CCAA, but before distribution is complete, unpaid contributions to the pension plan constitute a wind up deemed trust under the PBA. In this case, he says, the wind up deemed trusts arose during the CCAA Proceeding and took priority over other creditors' claims. Those deemed trusts were not rendered inoperative by the doctrine of federal paramountcy because there was no debtor-in-possession loan or charge.

74 The Superintendent further submits that because of the procedural history of this matter, the CCAA judge should have required payment of the full wind up deficits prior to lifting the stay to permit the bankruptcy application. He says that the CCAA judge adjourned the Pension Motion to provide further notice to the Second Lien Lenders when additional notice was not required because the Second Lien Lenders had received sufficient notice. Further, he contends, the adjournments were prejudicial to the pension claimants because if the CCAA judge had considered the Pension Motion in a timely manner, there would have been no basis on which to relieve against pension plan contributions.

75 The Superintendent also submits that the CCAA judge erred in concluding that it was necessary for the pension claimants to have opposed the Initial Order and the sale and vesting orders made during the CCAA Proceeding in order to assert the wind up deemed trusts.

The Administrator

76 The Administrator supports the Superintendent and adopts his submissions. It offers the following additional reasons in support of the appeal.

77 First, the Administrator says that the CCAA judge erred by failing to answer the question posed by the Pension Motion, namely, whether GFPI should be relieved from making further payments into the Plans. It submits that the test GFPI had to meet to obtain such relief is: could GFPI make the required payments without jeopardizing the restructuring? Instead of answering that question, the Administrator says that the CCAA judge asked and answered this question: can a wind up deemed trust be created during the pendency of a stay of proceedings? The Administrator contends that the CCAA judge erred in recasting the Pension Motion in this way because the creation of a wind up deemed trust and the obligation to make special payments are two separate concepts. It submits that the existence of a deemed trust has no bearing on whether a CCAA court should grant a debtor relief from the obligation to make special pension payments.

78 Second, the Administrator submits, contrary to the CCAA judge's finding, where a wind up deemed trust arises before, and has an effective date before, the date of a court-approved distribution to creditors, the priority of that deemed trust must be considered before a distribution is approved.

79 Third, the Administrator submits that the wind up deemed trust is not rendered inoperative in a CCAA proceeding unless the operation of the wind up deemed trust conflicts with a specific provision in the CCAA or an order issued under the CCAA. The Administrator says that, in the present case, there is no CCAA provision or order that conflicts with the wind up deemed trust. Therefore, those trusts operate and have priority pursuant to s. 30(7) of the PPSA.

80 Fourth, the Administrator submits that because bankruptcy is not the inevitable result of a liquidating CCAA proceeding, the CCAA judge had to consider the totality of the circumstances, including West Face's lengthy delay in bringing the Bankruptcy Motion, when ordering GFPI into bankruptcy. It says that West Face did not satisfy its onus to have the stay lifted but, even if it did, the Bankruptcy Motion should have been granted on condition that the outstanding amounts owed to the Plans were paid prior to the bankruptcy taking effect.

81 Finally, the Administrator says that the CCAA judge erred by requiring the Superintendent and it to challenge all orders made in the CCAA Proceeding had they wished to assert the priority of the wind up deemed trusts.

The Remaining Applicants

82 The Remaining Applicants take no position on the issues raised by the Superintendent. However, if the appeal is successful, they ask that the court affirm that paras. 1-6 of the Transition Order remain operative. Those paragraphs can be found in Schedule A to these reasons.

West Face

83 West Face maintains that the core issue to be decided on this appeal is whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering GFPI into bankruptcy. It says that if this court accepts that the CCAA judge made no error in ordering GFPI into bankruptcy, without first requiring payment of the pension claims, the issues raised by the Superintendent are moot.

84 West Face further submits that the doctrine of federal paramountcy puts an end to the wind up deemed trust claims. Bankruptcy proceedings are the appropriate forum to resolve wind up deemed trust claims at the close of CCAA proceedings. It would have been improper for the CCAA judge to order payment of the wind up deemed trust deficits before putting GFPI into bankruptcy, as such an order would have usurped Parliament's bankruptcy regime.

The Monitor

85 Because the Bankruptcy Motion was primarily a priority dispute between two creditor groups, the Monitor took no position on that motion and it takes no position on that issue in this appeal.

86 However, the Monitor notes that in making the Transition Order, the CCAA judge addressed issues relating to the existence and potential priority of a wind up deemed trust in the CCAA context. Given the relevance of those issues to other insolvency proceedings, the Monitor made the following submissions:

1. the main question giving rise to the Transition Order was whether it was appropriate to lift the stay and order GFPI into bankruptcy;

2. wind up deemed trusts are not created during the pendency of a CCAA proceeding;

3. if wind up deemed trusts did arise during this CCAA Proceeding, because the Superintendent's Wind Up Orders were made after the Initial Order, the earliest date on which those deemed trusts could be effective was February 27, 2012, the date of the Superintendent's Wind Up Orders; and

4. the CCAA judge did not suggest that the pension claimants were obliged to take steps earlier in the CCAA Proceeding to assert the priority of their wind up deemed trust claims. While the CCAA judge did state that the pension claimants were required to obtain an order lifting the stay for a wind up deemed trust to be created, that was because the winding up of a pension plan is outside of the ordinary course of business and the Initial Order permitted payments of pension contributions only in "the ordinary course of business".

The Intervener

87 The Intervener's position is that:

1. a pension plan does not have to be wound up as of the CCAA filing date for the wind up deemed trust to be effective;

2. the beneficiaries of the wind up deemed trust have priority in CCAA proceedings ahead of all other secured creditors over certain assets;

3. an initial CCAA order does not operate to invalidate the wind up deemed trust regime; and

4. the CCAA judge erred in granting the Bankruptcy Motion, which was brought to defeat the wind up deemed trust priority regime.

The Issues

88 The parties do not agree on what issues are raised on this appeal. A comparison of the issues as articulated by each of the Superintendent and West Face demonstrates this.

89 The Superintendent says that the following three issues are to be determined in this appeal:

1. do unpaid contributions related to a pension plan that is wound up after the initial order in a CCAA proceeding constitute a deemed trust under the PBA?

2. if such unpaid contributions constitute a deemed trust under the PBA, what is the priority of the deemed trust where there is no debtor in possession loan?

3. what actions must pension creditors take to assert the deemed trust under the PBA in a CCAA proceeding, both before and after the deemed trust arises?

90 West Face, on the other hand, says that there is but one issue for determination: did the pension claims have to be paid as a precondition to an order to put GFPI into bankruptcy at the end of the CCAA Proceeding?

91 In these circumstances, it falls to the court to determine what issues must be addressed in order to resolve this appeal.

92 To do this, I begin by noting two things. First, in appeals of this sort, the role of this court is to correct errors. Put another way, its overriding task is to determine whether the result below is correct. It is not the role of this court to provide advisory opinions on abstract or hypothetical questions: *Kaska Dena Council v. British Columbia (Attorney General)*, 2008 BCCA 455, 85 B.C.L.R. (4th) 69 (B.C. C.A.), at para. 12. Second, an appeal lies from an order or judgment and not from the reasons for decision which underlie that order or judgment: *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (Ont. C.A.), at para. 10.

93 With these parameters in mind, it appears to me that the question which must be answered to decide this appeal and resolve the dispute between the parties is: did the CCAA judge err in lifting the stay and ordering the Remaining Applicants into bankruptcy without first requiring that the wind up deemed trusts deficits be paid in priority to the Second Lien Lenders?

94 To answer that question, I must address the following issues:

1. what standard of review applies to the CCAA judge's decision to lift the CCAA stay of proceedings and order the Remaining Applicants into bankruptcy?

2. did the CCAA judge make a procedural error in his treatment of the Pension Motion? and

3. did the CCAA judge err in principle, or act unreasonably, in lifting the stay and ordering the Remaining Applicants into bankruptcy?

The Standard of Review

95 The Superintendent submits that the standard of review of a decision made under the CCAA is correctness with respect to errors of law, and palpable and overriding error with respect to the exercise of discretion or findings of fact. As authority for this submission, the Superintendent relies on *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]), at para. 29.

96 I would not accept this submission for two reasons.

97 First, in articulating this standard of review, *Resurgence* purported to follow *Royal Bank v. Fracmaster Ltd.*, 244 A.R. 93, 1999 ABCA 178 (Alta. C.A.). However, *UTI* does not set out the standard of review in the terms expressed by *Resurgence*. At para. 3 of *UTI*, the Alberta Court of Appeal states that discretionary decisions made under the CCAA "are owed considerable deference" and appellate courts should intervene only if the CCAA judge "acted unreasonably, erred in principle, or made a manifest error".

98 Second, the applicable standard of review has been established by two decisions of this court: *Air Canada, Re* (2003), 66 O.R. (3d) 257 (Ont. C.A.) and *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.). In *Air Canada*, at para. 25, this court states that deference is owed to discretionary decisions of the CCAA judge. In *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at para. 71, this court reiterated that point and added that appellate intervention is justified only if the CCAA judge erred in principle or exercised his or her discretion unreasonably.

99 The decision to lift the stay and order the Remaining Applicants into bankruptcy was a discretionary decision: *Ivaco*, at para. 70. Therefore, the question becomes, did the CCAA judge err in principle or exercise his discretion unreasonably in so doing?

100 Before turning to this question, I will consider whether the CCAA judge made a procedural error in the process leading up to the making of the Transition Order.

Did the CCAA Judge Make a Procedural Error?

101 The procedural complaint levied against the CCAA judge is based on his having adjourned the Pension Motion on more than one occasion, on his own motion, so that additional notice could be given to the Second Lien Lenders. The Superintendent says that additional notice was not required because the Second Lien Lenders had been given sufficient notice and the resulting delay in having the Pension Motion heard caused prejudice to the pension claimants.

102 I would not accept this submission. Considered in context, I do not view the CCAA judge as having acted improperly in adjourning the Pension Motion on his own motion.

103 It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Ted Leroy Trucking Ltd., Re*, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The CCAA judge must "provide the conditions under which the debtor can attempt to reorganize" (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge "must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors" (para. 60).

104 *Century Services*, it can be seen, makes it clear that the CCAA judge in the present CCAA Proceeding had to "be cognizant" of the interests of the Second Lien Lenders, as well as those of the moving parties and the pension claimants.

105 It would have been apparent to the CCAA judge that the Pension Motion had the potential to adversely affect the interests of the Second Lien Lenders. At the time that the Pension Motion was brought, the Applicants' assets had been sold and only limited funds were left for distribution. Those funds were clearly insufficient to meet the claims of both the Second Lien Lenders and the pension claimants. It will be recalled that by means of the motion, GFPI, the CRO and the Monitor sought to be relieved of any obligation to continue making contributions into the Plans. The Pension Motion was vigorously opposed. Had the CCAA judge refused to grant the Pension Motion and contributions continued to be made to the Plans, the Second Lien Lenders would have been prejudiced because there would have been even fewer funds available to satisfy their claims.

106 The CCAA judge was also aware that in March 2012 — some three months before the Pension Motion was brought — counsel for the Second Lien Lenders' Agent had given notice that it was to be removed from the service list because it no longer represented the Second Lien Lenders' Agent.

107 Despite service of the Pension Motion on the Second Lien Lenders' Agent and on the Second Lien Lenders, in these circumstances, it is understandable that the CCAA judge had concerns about the adequacy of notice to the Second Lien Lenders.

108 That this concern drove the adjournments is apparent from the CCAA judge's direction to the Monitor on August 27, 2012, to provide additional communication to the Second Lien Lenders themselves, not the Agent. (The Monitor followed those directions, holding a conference call directly with the Second Lien Lenders themselves.)

109 In these circumstances, I do not accept that the adjournments of the Pension Motion amounted to procedural unfairness. Rather, the adjournments are consonant with the Supreme Court's dictates in *Century Services*, described above.

Did the CCAA Judge Err in Principle or Act Unreasonably in Lifting the Stay and Ordering the Remaining Applicants into Bankruptcy?

110 In general terms, I see no error in the CCAA judge's exercise of discretion to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

111 At the time the Motions were heard, GFPI had long since ceased operating, its assets had been sold, and the bulk of the sale proceeds had been distributed. It was a liquidating CCAA with nothing left to liquidate. Nor was there anything left to reorganise or restructure. All that was left was to distribute the Remaining Funds and it was clear that those funds were insufficient to meet the claims of both the Second Lien Lenders and the pension claimants.

112 In those circumstances, the breadth of the CCAA judge's discretion was sufficient to "construct a bridge" to the BIA — that is, he had the discretion to lift the stay and order the Remaining Applicants into bankruptcy. Although this was not a situation in which creditors had rejected a proposal, the reasoning of the Supreme Court at paras. 78 and 80 of *Century Services* applied:

> ... The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco*, at paras. 62-63). [Citation excluded.]
>
> . . .
>
> [T]he comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. <u>The CCAA is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the BIA. The court must do so in a manner that does not subvert the scheme of distribution under the BIA. Transition to liquidation requires partially lifting the CCAA stay to commence proceedings under the BIA</u>. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*. [Emphasis added.]

113 Consequently, the question for this court is whether the CCAA judge erred in principle, or exercised his discretion unreasonably, by lifting the stay and ordering the Remaining Applicants into bankruptcy.

114 The various complaints levied against the CCAA judge's exercise of discretion can be summarized as raising the following questions. Did the motion judge err in:

1. failing to properly take into consideration West Face's conduct in bringing the Bankruptcy Motion?

2. failing to recognize, and require payment of, the wind up deemed trusts that arose during the CCAA Proceeding before ordering GFPI into bankruptcy?

3. wrongly considering that the pension claimants had to take certain steps earlier in the CCAA Proceeding in order to successfully assert their claims? and

4. failing to consider the question posed by the Pension Motion, namely, whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans?

1. West Face's Conduct

115 Two complaints are levied about West Face's conduct. The first is that West Face delayed in bringing the Bankruptcy Motion and the second is that West Face brought that motion to defeat the wind up deemed trust regime.

116 Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

117 In the circumstances, I do not view West Face as having been dilatory in the bringing of the Bankruptcy Motion.

118 As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been West Face's motivation, it does not disentitle West Face from being granted the relief it sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour: see *Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de développement*, [1988] 1 S.C.R. 1061 (S.C.C.), at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C. C.A.), at pp. 627, 630-31; and *Ivaco*, at para. 76.

2. The Wind up Deemed Trusts

119 The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that *Indalex* requires that the wind up deemed trusts be given priority in this case.

120 I would not accept either submission.

Federal Paramountcy

121 In my view, the first submission misses a crucial point: federal paramountcy in this case is based on the BIA.

122 As I have explained, at the time that the Motions were heard, it was open to the CCAA judge to order the Remaining Applicants into bankruptcy. Once the CCAA judge exercised his discretion and made that order, the priorities established by the BIA applied to the Remaining Funds and rendered the wind up deemed trust claims inoperative.

123 Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when the Motions were heard because payment would have had the effect of frustrating the priorities established by the federal law of bankruptcy. A provincial statute cannot alter priorities within the federal scheme nor can it be used in a manner that subverts the scheme of distribution under the BIA: *Century Services*, at para. 80.

Indalex

124 As for the second submission, in my view, *Indalex* does not assist in the resolution of the priority dispute in this case.

125 In *Indalex*, the CCAA court authorized debtor-in-possession ("DIP") financing and granted the DIP charge priority over the claims of all creditors.

126 There were two pension plans in issue in *Indalex*: the executives' plan and the salaried employees' plan. When the CCAA proceedings began, the executives' plan had not been declared wound up. As s. 57(4) of the PBA provides that the wind up deemed trust comes into existence only when the pension plan is wound up, no wind up deemed trust existed in respect of the executives' plan.

127 The salaried employees' pension plan was in a different position, however. That plan had been declared wound up prior to the commencement of the CCAA proceeding and the wind up was in process.

128 A majority of the Supreme Court concluded that the PBA wind up deemed trust for the salaried employees' pension plan continued in the CCAA proceeding, subject to the doctrine of federal paramountcy. However, the CCAA court-ordered priority of the DIP lenders meant that federal and provincial laws gave rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.

129 Both the facts and the issues in *Indalex* differ from those of the present case.

130 There are two critical factual distinctions. First, the wind up deemed trust under consideration in *Indalex* arose before the CCAA proceeding commenced. In this case, neither of the Plans had been declared wound up at the time the Initial Order was made - the Superintendent's Wind Up Orders were made after the CCAA Proceeding commenced.

131 Second, the BIA played no part in *Indalex* In this case, however, the BIA was implicated from the beginning of the CCAA Proceeding. Prior to the issuance of the Initial Order, one of the debtor companies' creditors (GE Canada) had issued a bankruptcy application, which was stayed by the Initial Order. Further, and importantly, at the time the priority contest came to be decided in this case, both the Pension Motion and the Bankruptcy Motion were before the CCAA judge and he found that there was no point to continuing the CCAA proceeding. [3]

132 The issues for resolution in *Indalex* were whether: the deemed trust in s. 57(4) applied to wind up deficiencies; such a deemed trust superseded a DIP charge; the company had fiduciary obligations to the pension plan members when making decisions in the context of insolvency proceedings; and, a constructive trust was properly imposed as a remedy for breach of fiduciary duties.

133 As I already explained, because of the point in the proceedings at which the Motions were heard, the primary issue for the CCAA judge in this case was whether to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

134 Given the legal and factual differences between the two cases, I do not find *Indalex* to be of assistance in the resolution of this dispute.

3. Steps by the Pension Claimants

135 It was submitted that the CCAA judge wrongly required the pension claimants to have taken steps earlier in the CCAA Proceeding, had they wished to assert their wind up deemed trust claims.

136 I understand this submission to be based largely on paras. 94 and 95 of the CCAA judge's reasons. The relevant parts of those paragraphs read as follows:

> [94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an insolvent company GFPI was not obliged to make the payments ... .
>
> [95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA.* Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek

to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made.

137 I do not read the CCAA judge's reasons as saying that the pension claimants had to have taken certain steps earlier in the CCAA Proceeding in order to assert their claims. Rather, I understand the CCAA judge to be saying the following. A contribution towards a wind up deficit made by an insolvent company subject to a CCAA order is not a payment made in the ordinary course of business. The Initial Order only permitted payments in the ordinary course of business. Thus, if during the CCAA Proceeding the pension claimants wanted payments be made on the wind up deficits, they would have had to have taken steps to accomplish that. These steps include reaching an agreement with the Applicants and secured creditors or seeking to have the stay lifted and an order made compelling the making of the payments.

138 Understood in this way, I see no error in the CCAA judge's reasoning. I would add that the timing of the relevant events supports this reasoning. When the Initial Order was made, the Plans were on-going — the Superintendent's Wind Up Orders were not made until almost three years later. The Initial Order permitted, but did not require, GFPI to pay "all outstanding and future ... pension contributions ... incurred in the ordinary course of business". The nature and magnitude of contributions to ongoing pension plans is different from those made to pension plans in the process of being wound up. Thus, it does not seem to me that payments made on wind up deficits fall within the terms of the Initial Order which permitted the making of pension contributions "incurred in the ordinary course of business".

139 Accordingly, had the pension creditors sought to have payments made on the wind up deficits, they would have had to have taken steps — such as those suggested by the CCAA judge — to enable and/or compel such payments to be made.

4. The Question Posed by the Pension Motion

140 I do not accept that the CCAA judge erred by failing to answer the question posed by the Pension Motion. That question, it will be recalled, was whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans.

141 In ordering the Remaining Applicants into bankruptcy, the CCAA judge found that there was no point to continuing the CCAA Proceeding. It was plain and obvious that there were insufficient funds to meet the claims against the Remaining Funds. Accordingly, there was no need for the CCAA judge to address the question posed by the Pension Motion because distribution of the Remaining Funds had to be in accordance with the BIA priorities scheme.

A Concluding Comment

142 In my view, this case illustrates the value that a CCAA proceeding - rather than a bankruptcy proceeding - offers for pension plan beneficiaries. Three examples demonstrate this.

143 First, from the outset of the CCAA Proceeding until June 2012, all pension contributions (both ongoing and special payments) continued to be made into the Plans. Had GFPI gone into bankruptcy, those payments would not have been made to the Plans.

144 Second, on the sale to Georgia Pacific, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. - Englehart Plan. Had GFPI gone into bankruptcy, it is unlikely in the extreme that the Englehart Plan would have continued as an on-going plan.

145 Third, the CCAA Proceeding gave GFPI sufficient "breathing space" to enable it to take steps to ensure that the Plans continued to be properly administered. This is best seen from the orders dated August 26, 2011, and September 21, 2011. Through those orders, GFPI was authorized to initiate the Plans' windups and work with the Superintendent in appointing a replacement administrator, and the Monitor was authorized to hold back funds against which the pension claimants could assert their claims. Co-operation of this sort typically leads to reduced costs of administration with the result that more funds are available to plan beneficiaries.

146 I hasten to add that these remarks are not intended to suggest a lack of sympathy for the position of pension plan beneficiaries in insolvency proceedings. Rather, it is to recognize that while no panacea, at least there is some prospect of amelioration of that position in a CCAA proceeding.

Disposition

147 Accordingly, I would dismiss the appeal. Dismissal of the appeal would leave paras. 1-6 of the Transition Order operative, thus nothing more need be said in relation to the Remaining Applicants' submissions.

148 If the parties are unable to agree on costs, I would permit them to make written submissions to a maximum of three pages in length, within fourteen days of the date of release of these reasons.

***Doherty J.A.*:**

I agree

***P. Lauwers J.A.*:**

I agree

Schedule A

Paragraphs 1-6 of the Transition Order read as follows:

> **SERVICE**
>
> 1. THIS COURT ORDERS that the Motions are properly returnable and hereby dispenses with further service thereof.
>
> **CAPITALIZED TERMS**
>
> 2. THIS COURT ORDERS that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.
>
> **APPROVAL OF ACTIVITIES**
>
> 3. THIS COURT ORDERS that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty- Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.
>
> **EXTENSION OF STAY PERIOD**
>
> 4. THIS COURT ORDERS that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "Initial Order"), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor's Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.
>
> 5. THIS COURT ORDERS that none of GFPI, Stonecrest Capital Inc. ("SCI") in its capacity as Chief Restructuring Organization (the "CRO"), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan (collectively, the "Pension Plans") or their respective trustees or to the Pension Administrator.
>
> 6. THIS COURT ORDERS and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

Appeal dismissed.

Footnotes

1 Although the wording of the endorsement is somewhat unclear, it appears that all parties proceeded on that basis. The relevant part of the endorsement states: "I am satisfied that GFPI, CRO and the monitor hold funds that may otherwise be due under the pension plans pending notice to second lien creditors ..."

2 The record is unclear as to which party or parties made this submission.

3 See para. 62 of the reasons, where the CCAA judge states that the usefulness of the CCAA proceeding had come to an end.

At paras. 61-72

1994 CarswellOnt 230
Ontario Court of Justice (General Division)

Hall-Chem Inc. v. Vulcan Packaging Inc.

1994 CarswellOnt 230, [1994] O.J. No. 817, 12 B.L.R. (2d) 274, 46 A.C.W.S. (3d) 1053

HALL-CHEM INC. v. VULCAN PACKAGING INC., VULCAN, EMBALLAGES INC. carrying on business under the firm name and style of VULSAY INDUSTRIES

VULCAN PACKAGING INC., VULCAN, EMBALLAGES INC. carrying on business under the firm name and style of VULSAY INDUSTRIES v. HALL-CHEM INC., MICHEL BELEC, LAWRENCE DEAKINS, QUALILAB MARKETING INC. and QUALILAB INDUSTRIES INC.

Spence J.

Heard: August 26, 27, 30 and 31, September 1-3, 8-10, 20, 22 and 23, 1993

***Spence J.*:**

1 The claims and the counterclaims in this matter arise out of the dealings between the parties in connection with the sale of automotive chemicals during the period from late 1990 to early 1992.

2 The counterclaims against certain of the defendants by counterclaim were disposed of before trial and the remaining claims were revised in certain respects with the result that the remaining issues are the claim and a counterclaim between the plaintiff ("Hall-Chem") and the defendant ("Vulcan"), the counterclaim by Vulcan against Michel Belec ("Belec") and a crossclaim by Belec against Hall-Chem.

3 Hall-Chem's claim against Vulcan is for payment of unpaid invoices for automotive chemical products totalling $82,826.99. Vulcan asserts various defences including a right of set-off relating to its counterclaim against Hall-Chem. In that counterclaim, Vulcan asserts that Hall-Chem is responsible for certain costs and losses incurred by Vulcan in respect of a shipment of goods ordered by Qualilab Marketing Inc. ("Marketing"), a company at the time owned by Hall-Chem and Belec.

4 In its counterclaim against Belec, Vulcan seeks to recover in respect of the losses it has incurred as a result of its business dealings with Marketing and subsequently with the successor company to Marketing, Qualilab Industries Inc.

Background Facts

5 Hall-Chem is a duly incorporated company which carries on the business of packaging and selling automotive chemicals such as windshield washer fluid and radiator antifreeze in the province of Quebec. Vulcan is incorporated under the laws of Ontario and carries on in Ontario a business similar to that of Hall-Chem.

6 In early 1990, Hall-Chem agreed to assist Belec, who was experienced in the sales and marketing of automotive chemicals, in forming and operating a new business under the Qualilab name to sell products provided by Hall-Chem and others. Belec resides in Brampton, Ontario. The new company, Marketing, was incorporated under the laws of Canada. Belec and Hall-Chem each acquired and held 50% of the shares of the new company, Marketing, which was incorporated to carry on the business. Hall-Chem was to provide all administrative services for the business; Belec was responsible for sales and marketing. This arrangement lasted until the end of June, 1991 when the parties, out of mutual dissatisfaction with the business and its results, agreed to terminate their association as shareholders in Marketing. Hall-Chem withdrew by transferring its shares to Belec.

7 During the period prior to the Hall-Chem withdrawal, Marketing had arranged with Vulcan to have Vulcan supply goods to a customer of Marketing in Western Canada. This transaction, referred to below as the "Western Shipment", aborted and Vulcan incurred costs and losses as a result.

8 In the period leading up to the Hall-Chem withdrawal from Marketing, Belec negotiated an arrangement with Vulcan to facilitate the continuation of the business operations of Marketing. Under these arrangements, which took effect at the beginning of July, 1991, customer orders would be placed with Marketing which would then order the product from Vulcan which would in turn order the product from Hall-Chem and other suppliers. This arrangement placed Vulcan in the chain of liability to the suppliers of product ordered by Marketing. Vulcan was also to provide all administrative services for the business of Marketing; Belec was to be responsible for sales and marketing. This arrangement between Marketing, Vulcan and Belec lasted for three months, until the end of September, 1991 when, after discussions between Belec and a Vulcan representative, it was decided that the arrangement would be terminated. Belec advised Vulcan and others that Marketing would not carry on business subsequently and instead a new company, Qualilab Industries Inc. ("Industries") would carry on the sales business to service customers in the industry. Industries was incorporated under the laws of Ontario and was owned 50% by Belec and 50% by one Lawrence Deakins, originally a defendant by counterclaim.

9 During the three months of its association with Marketing in their sales arrangement, Vulcan regularly ordered product from Hall-Chem. Hall-Chem asserts that Vulcan is liable to pay to it the unpaid invoices from Hall-Chem for those sales. Vulcan defends, partly on the basis of a claim of set-off in respect of the Western Shipment and partly on the grounds of disputes as to the invoices and invoice amounts to be recognized. Vulcan asserts against Belec that actions taken by Belec with respect to the termination of the association between Marketing and Vulcan and the resumption of the business by Industries were improper and that Belec is personally liable to Vulcan for the damages it suffered as a result.

The Issues Between Hall-Chem and Vulcan

10

The Western Shipment

11 Vulcan states that it lost approximately $150,000 on account of the aborted Western Shipment, including warehousing charges for unsold inventory of which $5,081 was appropriately charged to Hall-Chem and deducted by Vulcan from its payments on Hall-Chem invoices. Vulcan asserts, in effect, that this loss was occasioned by Marketing and Belec, as a result of Belec's incorrect representation to Vulcan that a sale transaction was available for product to be supplied by Vulcan and the subsequent incurring of warehousing charges and losses on the resale of product at lower prices. Vulcan claims that the responsibility for this loss should be borne not only by Marketing but also by Hall-Chem, on the basis that Hall-Chem was a partner of Marketing and assurances of Hall-Chem's support were given on Hall-Chem's behalf.

12 As to the contention that Hall-Chem was a partner with Marketing in its business, there is really no supporting evidence. Hall-Chem owned 50% of the shares of Marketing. Hall-Chem provided financial support for Marketing by co-signing or guaranteeing a bank line of credit of $50,000 for Marketing and providing extended credit terms to Marketing on sales of product to it. The President of Hall-Chem, Jean-Claude Hetu, was a member of the board of Marketing, along with Belec, the President of Marketing. Nothing in these arrangements or in the manner of Marketing's dealings would indicate that Hall-Chem could properly be regarded as its partner.

13 Following the collapse of the prospective Western sale, Belec sent a letter from Marketing to Vulcan to the attention of Ross Quantz, the Vice-President, dated January 22, 1991, setting out a plan whereby Vulcan would acquire back the unsold inventory and Marketing would be committed to incur warehousing and selling costs until the inventories were sold. Vulcan subsequently advised Marketing it would proceed on this basis, by a letter dated February 5, 1991.

14 The letter of January 22 from Belec stated the following, before setting out the plan just mentioned:

> First of all, I wish to state that the unfortunate Western transaction has truly tested Qualilab's financial ability or inability to assume quick growth through inventory purchases. Nevertheless, in my meeting with Hall-Chem, I have their assurance of continued endorsement regarding support on receivables and so far no one has any doubts regarding that support.
>
> Conclusively, from my meetings with yourself and my Hall-Chem partners, Qualilab will refrain from purchasing any types of inventories not aligned fully with customer purchase orders unless Hall-Chem fully supports by means of back-to-back purchase orders.

15 The letter carries a notation that it is to be copied to Mr.Hetu and to Mr.Douglas Hall, a principal in Hall-Chem. Mr.Hetu denies receiving it. There was no evidence as to whether Mr.Hall received the letter.

16 The letter from Marketing to Vulcan was accompanied by a fax on Marketing letterhead from Belec to Vulcan, also to the attention of Ross Quantz. The fax message said in part that "Qualilab and Hall-Chem have agreed to spend more money in helping the sale of this inventory get off the ground". The fax was not marked with any indication of a copy going to Hall-Chem.

17 Mr. Hetu denied that Marketing or Belec had authority to make representations on behalf of Hall-Chem, that Hall-Chem had agreed to any support for Marketing beyond the letters of credit and the ex tended credit terms, and that Hall-Chem had agreed to the support arrangement ascribed to it in the fax. This evidence is uncontradicted and I accept it.

18 Accordingly, Hall-Chem cannot be held liable for any costs or losses incurred by Vulcan in respect of the Western Shipment.

19 I note also that even if Hall-Chem had approved the letter (excluding the accompanying fax) it would be hard to see how this could support a claim against Hall-Chem in respect of the Western Shipment. "Continuing endorsement regarding receivables", if it means anything, must mean support which Hall-Chem had been providing up to that time and there is no evidence to suggest Vulcan or anyone else had any reason to believe that Hall-Chem had been providing support to Marketing in the form of paying receivables owed by Marketing to its suppliers (which indeed would be more properly described as payables of Marketing). As for the second statement regarding Hall-Chem in the passage quoted from the letter, there was no evidence that Marketing subsequently made inventory purchases without having related customer purchase orders. In any event, the statement is a Marketing commitment, not an undertaking by Hall-Chem. It is also relevant to the plausibility of this claim that no notice of it was given until after Hall-Chem commenced its action against Vulcan on the basis of the unpaid invoices and Vulcan made its defence and counterclaim in July 1992, about a year and a half after the events complained of. It seems reasonable to conclude that Vulcan was prepared to live with the arrangement in its February 5, 1991 letter until it found itself in the position of a defendant to the Hall-Chem claim.

The Vulcan Invoices

(1) The Flexpac Invoices

20 In June 1991, while Hall-Chem was still providing the administrative services used in the business of Marketing, Marketing sent purchase orders to Flexpac Products Inc. for products having a total value of about $4,000. The purchase orders were signed for Marketing by a person who was employed by Hall-Chem, apparently in the ordinary course of his administrative responsibilities in respect of the Marketing business. On July 2, 1991 Marketing issued another purchase order to Flexpac for pallets and other products; the price and signature on the order form are not legible. On July 3, 1991, Flexpac issued a bill of lading to Hall-Chem for the products in these orders, except the pallets, plus 224 cases of brake fluid. That day, Flexpac also issued an invoice to (or in the name of) Marketing, above whose name there appears on the invoice in handwriting the name "Vulsay" meaning Vulcan, apparently for the goods listed in the bill of lading

plus 8 pallets, for a total price of $11,645.02. Vulcan issued a cheque to Flexpac dated July 15, 1991 in the same amount in payment of the Flexpac invoice.

21 Some months later in November 1991, Vulcan sent an invoice to Industries, apparently with respect to the Flexpac shipment for which Vulcan had paid on July 15, 1991. This invoice was returned to Vulcan with the anonymous handwritten annotation "send back to Vulsay, bill to Hall-Chem". Vulcan asserts the July 15, 1991 payment should be chargeable to Hall-Chem, apparently because the goods or some of them were ordered when Hall-Chem was doing the administration of Marketing. This position is not sound.

22 With respect to the portion of the goods presumably ordered after June 30, the invoicing by the supplier to Vulcan and the payment by Vulcan to the supplier were not inconsistent with the arrangement between Vulcan and Marketing. Vulcan would presumably have been entitled to invoice Marketing for the supplier's price plus Vulcan's markup, or whatever was the proper price in accordance with the arrangements between Marketing and Vulcan, and to look to Marketing to pay that amount. Whether such an invoice and payment occurred cannot be discerned from the evidence. With respect to the orders that pre-date June 30, it is not evident why Vulcan became involved in the chain of invoicing and payment. Vulcan having done so, it is reasonable to infer from the evidence about the arrangements between Marketing and Vulcan that Vulcan could have looked to Marketing for payment. Why the July 3 bill of lading was sent to Hall-Chem is not clear; the most likely explanation was that its offices had the same address as Marketing. There was evidence that the order was to go to a company named Uniselect and Hall-Chem did not bill for it. Nothing in this evidence and nothing else in the evidence about the Flexpac orders and the related invoices and payment indicates any reason to impose liability on Hall-Chem in respect of the matter. Hall-Chem was not a party to the transactions and had not assumed any responsibility for them.

(2) The Pricing Discrepancies

23 Vulcan asserts that certain of the Hall-Chem invoices to Vulcan during the July to September period of 1991 were excessive in their amounts, by a total of $10,706.32. Hall-Chem disputes that claim and says that, in any event, the total of the alleged excess invoice amounts that have been identified for it in debit memos from Vulcan is only $5,368.

24 With respect to the prices to be paid to suppliers, Vulcan's arrangement with Marketing was that Belec on behalf of Marketing was to negotiate with suppliers the price to be paid to them and was to advise Vulcan of those prices. The price approved by Belec was to be the price at which Vulcan would purchase from the supplier. Vulcan could then add its markup on the sale of that product to Marketing and Marketing could then complete the sale to the customer. That this was the arrangement was clear from the evidence of Mr. Quantz. When questions arose at Vulcan as to whether the pricing system was working correctly, Belec would be consulted. On a number of occasions Belec would meet with Mr. Hetu concerning apparent price discrepancies with respect to products supplied by Hall-Chem. Some of these, but not all, were resolved in favour of Vulcan and Hall-Chem would provide a credit to Vulcan.

25 Counsel for Vulcan suggested that Hall-Chem had not proved that the price of sales transactions between Vulcan and Hall-Chem was agreed upon with Vulcan and that this could not be proved, because Vulcan was never consulted on the prices to be charged, and accordingly these transactions were incomplete contracts, and the court should not imply a price equal to the Hall-Chem invoice price. This argument misses the point. Vulcan had authorized Belec and/or Marketing to set prices and the arrangements which Vulcan established and operated for the placing and filling of orders with Hall-Chem and other suppliers reflected this procedure. Hall-Chem has delivered goods on the basis of that procedure. Vulcan cannot now deny that it is bound by those arrangements. From the perspective of good business practice and reputation it is curious, to say the least, that Vulcan would advance such an argument. In any event, it does not succeed.

26 The question remains whether there are any further adjustments to be made in respect of the prices billed by Hall-Chem on its invoices to Vulcan. Mr. Hetu denies that there are. Hall-Chem tendered a reconciliation of its invoices to Vulcan and its payments from Vulcan which shows a final invoice entry on October 7, 1991 and the amount which Hall-

Chem claims is the total unpaid balance, $82,826.99. Of this amount, $10,706.32 is attributable to what Vulcan alleges are price discrepancies, that is, prices that are in excess of those properly chargeable under the arrangements between Vulcan and Marketing.

27 In November of 1991 the comptroller of Vulcan, Adriane Willetts, undertook a review of the Hall-Chem invoice prices, meeting from time to time with Belec and using what she understood to be Marketing and Hall-Chem price lists. The price lists were not produced at trial, and Mr. Hetu testified he was not aware of Belec having a price list for Hall-Chem's product to be sold to Vulcan. It appears that Belec indicated that certain price adjustments should be made, but whether these adjustments total the amount claimed by Vulcan to be attributable to price discrepancies or whether any of these were approved by Hall-Chem was not shown. In any event, this effort to make adjustments subsequent to the deliveries of product, indeed some months after the deliveries, does not seem to have yielded an answer to the relevant question, which must be: were the invoice prices, at the time Hall-Chem charged them, in excess of the prices which were properly chargeable in accordance with the arrangements between Hall-Chem and Belec (the latter acting under the authority he held from Vulcan to set the prices for Vulcan purchases)? Since there is no evidence on which to reach a positive answer to that question, there is no basis on which to recognize the alleged price discrepancies.

(3) The Post-September Invoices

28 Vulcan contends that seven invoices it received from Hall-Chem, totalling $50,765.10, are not payable by Vulcan because they were issued subsequent to September 30, 1991, the date that Marketing ceased operations and Vulcan ceased to have any relationship to the ongoing Qualilab business except as a supplier. Two of these invoices relate to purchase orders sent by Vulcan to Hall-Chem prior to the end of September, while the Vulcan/Marketing arrangement was still in place. It was proper for Hall-Chem to act on those orders and to bill Vulcan accordingly. Two of the invoices relate to transactions for which no purchase order was produced but a purchase order number was sent, prior to September 30, to Hall-Chem on Marketing letterhead by the staff person at Vulcan who was in charge of placing orders with suppliers under the Vulcan/Marketing arrangements. Two purchase order number communications were sent in early October on Marketing letterhead to Hall-Chem, from the Vulcan offices where the Marketing business had been administered. One invoice relates to a purchase order sent in the same manner, but on the letterhead of Industries, on October 4, 1991.

29 It appears that in late September Vulcan arranged to have a staff person hired for Marketing and on its payroll to handle the placing of orders and it seems probable that this person, Celine Jacques, sent the two early October orders on Marketing letterhead incorrectly, whether through oversight or otherwise is not known. Ms. Jacques had succeeded a Vulcan employee in these ordering responsibilities. The Hall-Chem staff employee, Ms. Champagne, who dealt with Ms. Jacques at the Vulcan offices assumed that she was the person who was to place orders for Vulcan. Neither Vulcan nor Marketing notified Vulcan in the period under consideration that Ms. Jacques was employed by Marketing or that Marketing ceased operations on September 30, 1991. Ms. Champagne testified she would not have noticed that the last of the orders was on Industries' letterhead, rather then that of Marketing. The "Qualilab" logo is the same in both letterheads and is the dominant feature of the overall company logo. Hall-Chem relies on the fact that it was not given any notice about the changes in the Vulcan/Marketing arrangements. It filled the orders it received in good faith and billed Vulcan for them accordingly. Vulcan says that it had no reason to anticipate these problems, but that is not an adequate response. Since the orders were placed in the usual way that the arrangements had operated in the past, and it was Vulcan that allowed that to happen, Hall-Chem is entitled to rely upon those orders and to look to Vulcan for payment in accordance with the arrangements.

30 It was suggested that to so hold would amount to a determination that failure to disown responsibility for invoices rendered is enough to bind a person who has had the benefit of goods or services so invoiced, a position which it was said was expressly rejected in the decision of the Supreme Court of Canada in *Saint John Tug Boat Co. v. Irving Refinery Ltd.*, [1964] S.C.R. 614 at p. 622. However, the court's rejection of that principle is clearly a very qualified one, if it is even to be considered a rejection. What Ritchie J. states at p. 622 is that such a failure to disown responsibility "is not of itself *always* enough" to bind the recipient of the services (emphasis added) and he goes on to say:

> The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied.

31 In the present case, the circumstances are such that Hall-Chem could reasonably infer that the disputed orders had been placed pursuant to the Vulcan/Marketing arrangement. Counsel for Vulcan also referred to the English case of *Fairline Shipping Corp. v. Adamson* (1973), [1974] 2 All E.R. 967 (Q.B.). In that case, the plaintiff contended unsuccessfully that the defendant offeror was estopped from denying the existence of a contract in circumstances where the plaintiff itself had never taken steps to accept the plaintiff's offer. I do not think that decision implies that, in the present case, Vulcan should be allowed to avoid the consequences of its own failure to notify Hall-Chem of the termination of the Vulcan/Marketing arrangements.

32 For the above reasons, the counterclaim and defences of Vulcan against Hall-Chem do not succeed and Hall-Chem is entitled to judgment against Vulcan for the unpaid invoices totalling $82,826.99.

The Issues between Vulcan and Belec

33 Vulcan claims damages in the amount of $150,000 for negligent representation by Belec in connection with the Western Shipment. The allegation by Vulcan is that Belec, as President of Marketing, told Ross Quantz of Vulcan that Belec had made a deal for the sale of $388,000 worth of product to a buyer in Western Canada in November of 1990, knowing this was not true, and that Vulcan relied on this representation and suffered damages as a result. The damages are calculated by comparing the cost to Vulcan of the goods it acquired to fill the order with the price it ultimately received for those goods.

34 In *Queen v. Cognos Inc.* (1993), 45 C.C.E.L. 153, the Supreme Court of Canada considered the elements that must be established to succeed in an action for negligent representation. Iacobucci J. stated at p. 171 that there are five general requirements:

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
>
> (2) the representation in question must be untrue, inaccurate, or misleading;
>
> (3) the representor must have acted negligently in making said misrepresentation;
>
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

35 Dealing first with the representation, Ross Quantz testified that in December of 1990, Belec told him that he, Belec, had lied when he had earlier told Vulcan that he had a contract in Western Canada. This testimony was not effectively contradicted. It appears that the statement was prompted by Belec's expectation that he would be able to conclude a deal but the expectation was converted in the telling into a representation. Various reasons were given as to why the prospective deal did not materialize and why Vulcan was not advised in a timely way but nothing was said which countered the evidence that Belec had misrepresented to Vulcan that there was a deal which Vulcan was invited to fill. The misrepresentation was clearly made knowingly. Moreover, Belec allowed the misrepresentation to remain uncorrected after he learned that the prospective deal was off, in hopes that he would find another buyer, which he did not succeed in doing.

36 It is equally clear that Vulcan relied upon the misrepresentation by shipping product to Western Canada to fill the order. This was exactly the reliance that was to be foreseen.

37 A second misrepresentation occurred when on January 22, 1991 Belec sent the fax referred to earlier to Vulcan which stated that "Qualilab and Hall-Chem have agreed to spend more money in helping the sale of this inventory get

off the ground". This fax accompanied the letter of January 22 from Belec to Vulcan, also referred to earlier, in which Belec referred to Hall-Chem's "assurance of continued endorsement regarding support on receivables".

38 There was no evidence that Hall-Chem had made any commitment to Marketing beyond its original letter of credit and extended credit terms or that Belec had any reason to believe it had done so.

39 This second misrepresentation is significant when viewed in the context of the letter which Vulcan subsequently sent to Marketing dated February 5, 1991 in which Vulcan stated that it would, as proposed in the January 22, 1991 letter, acquire back the unsold inventory and look to Marketing to pay the warehousing and selling costs until the inventories were sold. Ross Quantz stated that if it were not for the assurances in the communication of January 22, 1991 he would not have had any further dealings with Marketing or Belec. He acknowledged that adopting the reacquisition plan was also advantageous to Vulcan in one respect, in that it would remove a doubtful transaction from the accounts of Vulcan.

40 Vulcan made its own arrangements to dispose of the reacquired inventory, through another agent whom it retained for the purpose. For Belec, it was argued that by undertaking to reacquire the unsold inventory and then to sell it through other channels, Vulcan had effectively terminated any reliance it had earlier placed on the representations made by Belec. Against this view it was pointed out that the letter of February 5 is only a letter, not a contract, and it says nothing about waiver, and waiver is not pleaded. In effect, it is contended that the adoption of the reacquisition plan is nothing more than a form of mitigation on the part of the injured party, and not a termination of reliance. I think this distinction is correct. It is important to keep in mind that the relevant test in respect of the tort of negligent misrepresentation is whether there was reliance by the claimant. Once it is established that the claimant has relied on the misrepresentation, it should be able to claim for the damages suffered without being prejudiced by its efforts to minimize those damages, unless it is negligent in those efforts. In the present case, the evidence was that Vulcan acted responsibly in its efforts to minimize its losses.

41 The first misrepresentation made by Belec elicited the reliance of Vulcan which acquired inventory for delivery to supply the purported order in Western Canada. Having relied on that misrepresentation, Vulcan then received a second misrepresentation from Belec and relied on it by continuing to deal with Marketing, including relying on it with respect to the warehousing and selling costs for the reacquired inventory while seeking responsibly to dispose of that inventory.

42 The remaining question is whether Belec stood in a special relationship to Vulcan of a type that should give rise to liability under the test in *Queen v. Cognos*. Belec was acting as the President of Marketing. There was no suggestion that he stood to gain personally from the Western Shipment otherwise than through his position as a shareholder and the President of Marketing. It was argued that Belec had a special relationship with Vulcan because Belec was inducing Vulcan to do business, and to continue to do business, with Marketing. Belec's evidence was that, in not advising promptly of the collapse of the prospective Western deal, he was trying to serve the best interests of Marketing which he considered it his duty to do.

43 Whether the requirement for a special relationship between the maker and the recipient of the misrepresentation is an entirely separate and additional requirement from those already considered is open to some question in the light of the cases, especially the discussion in the judgment of Iacobucci J. in *Queen v. Cognos* at p. 176. The following statements from the judgment of Iacobucci J. indicate how closely related the test of "special relationship" is to the requirement of foreseeable reliance:

> It was foreseeable that the appellant would be relying on the information given during the hiring interview in order to make his career decision. It was reasonable for the appellant to rely on said representations. There is nothing before this court that suggests that the respondent was not, at the time of the interview or shortly thereafter, assuming responsibility for what was being represented to the appellant by Mr. Johnston ... It was foreseeable to the respondent and its representative that the appellant would sustain damages should the representations relied on prove to be false and negligently made. There was, undoubtedly, a relationship of proximity between the parties at all material times. Finally, it is not unreasonable to impose a duty of care in all the circumstances of this case; quite the

> contrary, it would be unreasonable *not* to impose such a duty. In short, therefore, there existed between the parties a "special relationship" at the time of the interview ... In my opinion, confining this duty of care to "professionals" who are in the business of providing information and advice such as doctors, lawyers, bankers, architects, and engineers, reflects an overly simplistic view of the analysis required in cases such as the present one. The question of whether a duty of care with respect to representations exists depends on a number of considerations including, but not limited to, the representor's profession.

44 In the present case, it was reasonably foreseeable that Vulcan would be induced by the misrepresentation to acquire and supply product for the Western Shipment and would subsequently continue its dealings with Marketing and Belec as contemplated in the February 5 letter, and this foreseeability, brought about by the actions of Belec, places him in such proximity to Vulcan that a special relationship can be said to exist.

45 The fact that Belec was an officer and employer of Marketing might be thought to imply that only Marketing, but not Belec, was in that special relationship with Vulcan. Any contention to that effect would be sufficiently answered by reference to the decision in *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1991), 40 C.C.E.L. 262 (Ont. Div. Ct.). At p. 290, Rosenberg J., in the course of dealing with the liability of employers for negligent misrepresentations, cited 16 *Halsbury* (4th ed., 1976) at p. 518 for the general rule that:

> ... an employee who commits a tort is liable in damages to the person injured, and his liability is not affected by the existence of a contract of employment or, where he commits the tort in the course of his employment and within the scope of his authority, by the existence of the corresponding liability of his employer for the same tort, since he is the actual tortfeasor.

46 On this basis, I would find in favour of Vulcan in respect of its claim for damages against Belec for negligent representation. With respect to damages, the evidence of Ross Quantz was that Vulcan lost $1.46 per bottle of product sold plus 15¢ commission per bottle plus $27,000 in warehouse charges. This does not include the cost of money incurred to service Vulcan's operating line with its bank. Vulcan sold through its agent all of the 86,800 bottles in the shipment remaining after sales of 1,200 bottles made through Belec's efforts. Vulcan amended its statement of counterclaim to claim $150,000 in respect of this head of damages and I therefore would accept that amount for purposes of determining the damages in this regard subject to any request that may be made to have the precise amount determined.

The Vulcan Invoices

47 In its counterclaim against Belec, Vulcan claimed contribution and indemnity with respect to any amount for which Vulcan might be held liable to Hall-Chem. Counsel for Vulcan repeated this claim in his closing argument. However, little was said in argument in support of that claim and on the evidence it is not apparent what claim could be developed persuasively. While there was existence of some confusion in the pricing as between Vulcan and Hall-Chem which may have involved discrepancies in the price information given to each of them by Belec, there was no evidence from which I would have concluded that any contribution that Belec made to the pricing problems was deliberate or in excess of his authority as an officer of Marketing. I would accordingly dismiss this counterclaim against Belec.

The Transition to Industries

48 Vulcan asserts that Belec caused the transition of business operations from Marketing to Industries at the end of September, 1991 to be carried out in a way that constituted a fraudulent conveyance, a conspiracy and a breach of trust on his part, causing damage to Vulcan for which he is liable.

49 As part of the plan developed by Belec and Lawrence Deakins to have Flexpac take a 50% interest in the Qualilab sales and marketing business, Industries was incorporated on September 18, 1991 with Belec and Flexpac each holding 50% of its shares. Belec was the President of Industries and Deakins was its Secretary-Treasurer. Flexpac provided the capital for the new corporation to start business and Belec was responsible for the day-to-day operations. Industries operated for a short time subsequent to September 30, 1991 during which time it carried on the business previously carried

on by Marketing, having many of the same customers in the industry, including Vulcan. Industries ceased operations in March of 1992.

50 A principal reason which Belec and Deakins had for the creation of Industries was their awareness that Marketing had unpaid accounts owing to Vulcan which, if not dealt with, would be a burden on the future operations of the Qualilab business. Ross Quantz was made aware in late September that it was proposed that the business of Marketing would cease to be carried on by Marketing and would instead be carried on by Industries.

51 On October 3, 1991, Marketing gave notice to Vulcan of the plan to have the business continue in Industries. The letter stated as follows:

> Unfortunately, for financial reasons, Qualilab Marketing Inc. has ceased it's [sic] operation effective Sept. 30, 1991. Qualilab Marketing Inc. has suffered intensive losses in it's [sic] first year of operation and under its present format and management was unsuccessful in obtaining the proper financing to continue its operation. The company has no intentions of defaulting on its obligation short and longterm and has already shown its desire by assigning rights to its receivables and payables prior to June 30, 1991 to Hall Chem and also given access with signing rights to receivable dated after July 1st and ending Sept. 30 to Vulsay Industries on the understanding that all its payable obligation were handled to both party satisfaction. As to the method of transition it will be done with the interest of insuring continuation of business with Qualilab Marketing Inc.'s customer base through the newly formed Qualilab Industries Inc.

52 The results of the arrangements in which Belec participated with respect to Marketing and Industries were that:

(i) Marketing ceased carrying on business, at a time when it had uncollected receivables and outstanding accounts payable.

(ii) Industries commenced carrying on the business formerly carried on by Marketing, dealing with many of the same customers, employing Belec in the same capacity as had Marketing and using the Qualilab name and logo. No consideration was paid to Marketing with respect to any goodwill value that might be attributable to Marketing having effectively put Industries in a position to carry on what had previously been the business of Marketing.

(iii) Industries started in business with a balance sheet that was free of the liabilities which were still outstanding in Marketing. Industries advised Vulcan by letter that Industries would assume responsibility for purchase orders placed with Vulcan for Industries but on Marketing letterhead during the first few start-up days.

53 According to Ross Quantz he understood the letter of October 3 to mean that Vulcan was to have an assignment of the receivables of Marketing for the period from July 1 to September 30, 1991, the period covered by the Vulcan/ Marketing relationship. Ross Quantz anticipated that, because Marketing's mail had been going to Vulcan's offices, Vulcan would have little difficulty in collecting the receivables.

54 However, the matter did not develop that way. Business premises for Industries were obtained and a new business address was established in Oshawa and communications were sent to customers including former Marketing customers advising them to make payments to Industries at the new address.

55 Vulcan alleged that as a result of these communications to customers, Belec knew that the customers were likely to be confused as to the manner in which they were to pay outstanding accounts owed to Marketing and that some payments of such accounts were likely to go to Industries, and that this is what in fact happened. In particular, Vulcan claims that a cheque for approximately $152,000 from Uniselect Inc. was sent to Industries on account of a Uniselect debt to Marketing and that Industries improperly appropriated these funds for itself. The cheque from Uniselect was in the amount of $152,078.47, was drawn on the Banque Nationale in Canada and was made payable to "Qualilab Inc." at its address in Oshawa.

56 This cheque was received by Industries and was deposited to its bank account.

57 Belec acknowledged in his Examination for Discovery that this amount was properly owing to Marketing. He stated that Industries had applied these moneys for the benefit of Marketing by paying off Marketing obligations that had been paid by Industries or were still outstanding.

58 On an inter-company account reconciliation for the period up to January 23, 1992 which Industries provided to Vulcan in mid-1992, two items entitled "invoicing credits" were entered against Marketing and in favour of Industries with respect to Uniselect Inc. in the amounts of $61,000.48 and $65,394.20 respectively. The first of these "credits" resulted from Uniselect having reduced a payment it made to Industries on account of Industries invoices by amounts it considered it was owed by Marketing by reason of deficiencies in product delivered for which it had already paid Marketing. In effect, Industries satisfied the alleged debt of Marketing to Uniselect and therefore Industries, by applying the "credit", reimbursed itself for the amount of that debt.

59 The second "invoicing credit", for $65,394.20, also related to alleged Marketing obligations which Industries effectively satisfied. Most of this amount was accounted for by credit notes issued by Industries or Uniselect with respect to stock of Zeroflow product which Marketing had sold to Uniselect and Marketing had allegedly agreed to buy back from Uniselect for amounts equal to the amounts in the credit notes. What happened to the stock which was supposed to be repurchased was not clear. In any event, the two credits given by Industries totalling about $126,000 constituted a satisfaction by Industries of actual or alleged Marketing obligations and the application of the $152,000 received from Uniselect against those credits represented a reimbursement to Industries of those credits it had given to Uniselect. Industries had never assumed the debts and liabilities of Marketing. Industries was continuing to do business with Uniselect; it had an understandable interest in seeing that Uniselect's expectations about its previous dealings with Marketing were satisfied.

60 The reconciliation provided by Industries to Vulcan showed a total of $219,562.75 as having been paid or satisfied on behalf of Marketing (including the approximately $126,000 applied to the Uniselect invoicing credits and a further $17,153 to Belec for salary and $9,000 to him for expenses) against a total credit on behalf of Marketing for $186,934, leaving, according to the reconciliation, an outstanding debit against Marketing in Industries' favour of $32,628. None of the payments said to have been made on behalf of Marketing out of the $219,561.75 was made to Vulcan. Earlier, in October 1991, a cheque from Uniselect for $73,085.30 payable to Qualilab Inc. at a Montreal address was endorsed over to Vulcan and deposited by it.

Fraudulent Conveyance

61 Section 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 provides as follows:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

62 In its Statement of Defence and Counterclaim, Vulcan seeks, as against the named defendants, including Belec, Marketing and Industries, a declaration that "the conveyances from Marketing to Industries" are void by virtue of the Act and certain other relief consequential upon such a declaration. My understanding is that Marketing and Industries did not appear in this matter and this action has not proceeded against them, the issues relating to them having been disposed otherwise. Under the Act, the result that follows from a determination that a conveyance by a debtor is fraudulent for purposes of s. 2 is that it is void as against creditors and certain others. Since the debtor, Marketing, is not before the court in this proceedings, I think it would be inappropriate for the court to make a determination and order pursuant to the Act. Nevertheless, the question whether there is a fraudulent conveyance is germane to the issue of conspiracy and it will accordingly be addressed for that purpose.

63 Vulcan also seeks similar relief under the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33. Similar considerations to those mentioned above apply with respect to this request for relief, so it will be dealt with the same way.

64 The issues that are largely common to both Acts are:

(i) was there a "conveyance" of "real or personal property" and, if so,

(ii) was the conveyance of property made with "intent to defeat ... creditors"?

65 The *Assignment and Preferences Act* raises a further issue, whether the debtor was insolvent or knew itself to be on the eve of insolvency. It will not be necessary to deal with this issue for the purpose of the determination which is relevant to the question of conspiracy.

66 As to whether there was a conveyance of personal property, there are two complicating factors. First, there was no instrument or other act of conveyance or transfer. This by itself should not be deter minative. The cases are clear that this legislation is to be given a broad reading consistent with its remedial purpose. The effect of the arrangements was to put Industries into a position to carry on the business of Marketing by making available to Industries the services, know-how and information of Belec and the business name of Qualilab, which were the key business assets of Marketing, with Belec probably considerably more important than the Qualilab name. There was some issue as to whether a customers list was transferred and whether it would be personal property, but no positive finding as to such a transfer is possible. No submissions were made as to whether the interests which Marketing held under its employment arrangements with Belec (which probably constituted a contract for indefinite hiring) and its interest in the Qualilab name (which might or might not be the subject of legal protection without contractual support) amounted to "personal property" within the meaning of each of the two Acts. In the absence of evidence of customer lists, the relationship of Marketing with its customers, while no doubt of value, might well fall short of the status of personal property. The arrangements made between Marketing and Industries clearly had the effect of enabling Industries, instead of Marketing, to carry on the Qualilab Marketing business but this may not have involved a conveyance of personal property contrary to the statutory prohibition.

67 The arrangements by which the receivables of Marketing came under the direction and control of Industries should not be overlooked in this analysis. The definition of "conveyance" in the Act appears, by including such acts as "encumbrance" and "limitation of use", to be broad enough that such a transfer of control and direction should be treated as a "conveyance", particularly where as here the transfer was not done on a basis that recognizes and implements a trust relationship in respect of the transferred assets. Taking all of these considerations together, it is reasonable to conclude that there was a conveyance of personal property within the meaning of the Act.

68 The intention of Marketing in facilitating these arrangements was clearly to defeat creditors. If the transition to Industries had not occurred, the creditors would have been able to look to an operating business for the satisfaction of their claims. As a result of the transition, the business was to continue to operate, but its pre-transition creditors would be able to look only to the existing receivables for payment of their claims and not to any new value created subsequently in this business. Nor did Marketing receive any considerations for allowing Industries to take over its business. There was no indication that any thought was given to compensating Marketing for the goodwill which was effectively transferred to Industries.

69 The elimination of the claims of creditors against the continuing Qualilab operations was manifestly what was intended by Belec who knew that such an arrangement was essential to obtain the proposed investment from Deakins in the new company.

70 In *Nuove Ceramiche Richetti S.p.A. v. Mastrogiovanni* (unreported November 23, 1988, H.C.) [reported (1988), 76 C.B.R. (N.S.) 310], Trainor J. referred to the law on fraudulent conveyance as set out in the decision of Anderson J. in *Re Fancy* (1984), 51 C.B.R. (N.S.) 29 and commented as follows:

In *Re Fancy* (supra) Anderson J. said:

> The plaintiff must prove that the conveyance was made with the intent defined in that section. Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional 'badges of fraud' may give rise to an inference or intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on *bona fides* be corroborated by reliable independent evidence.

The "badges of fraud" referred to by Mr. Justice Anderson are those set out in *Re Dougmor Realty Holdings Ltd.* (1966), 59 D.L.R. (2d) 432:

> (1) Secrecy
>
> (2) Generality of Conveyance
>
> (3) Continuance in possession by debtor.
>
> (4) Some benefit retained under the settlement to the settlor.

71 In the present case, there was a significant element of secrecy. Vulcan knew that Industries would be created but did not know that the arrangements for the payment of the receivables of Marketing, to which Vulcan was assured it would have access, would be changed so that its access would no longer be automatic but would depend on action by Industries which would not be open to its scrutiny. The transfer of business to the new company was general in its scope, leaving its receivables within the ownership of Marketing but transferring their management to Industries. No other assets remained in Marketing, while all its liabilities remained for its own account. Belec through his participation in Industries as a shareholder, director and officer continued to have the direction and control of the business and to be in a position to enjoy whatever benefits that business might produce to the extent of his interest in the new company.

72 Accordingly, given the presence of these badges of fraud and the failure of Belec to show an absence of fraudulent intent, I would conclude that Belec had the intention to defeat creditors which is a required element for a fraudulent conveyance.

Conspiracy

73 In *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* (1983), 145 D.L.R. (3d) 385 (S.C.C.), Estey J. made the following statement about the law of torts in respect of conspiracy [at p. 398]:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> > (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
> >
> > (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

74 Belec was at all relevant times the directing and controlling mind of Marketing and Industries insofar as the transitional arrangements were concerned. He had an interest in the outcome of the arrangements as a shareholder in each company. This interest was separate from and in addition to his role as the president and a director of both companies and he should be regarded as acting in his separate personal capacity in the arrangements which were made with Marketing and Industries. The existence of an agreement among the three of them is to be inferred from the fact that the transfer of the business from Marketing to Industries could have been carried out only by the deliberate and concerted actions of all three parties, and it was carried out.

75 With respect to the first test in Estey J.'s decision, the actions of Belec appear to me to have had as their predominant purpose the causing of injury to Vulcan. While Belec did not know the amount that was owing by Marketing to Vulcan he knew that there was a debt owing; he acknowledged this in his Examination for Discovery, and, knowing the role of Vulcan as intermediary between the suppliers and Marketing, he had reason to know that the debt was likely a significant amount. He knew also that there was a significant debt owing to Hall-Chem. He knew that Deakins would proceed with the proposed investment in Industries only if it was clear of the accumulated liabilities of Marketing. He knew that the transfer arrangements would leave Marketing solely dependent upon its accumulated receivables to pay off its liabilities. His evidence was that he believed that Marketing was in a break-even position but he indicated no basis for such a view. It would take more than a vague supposition about the adequacy of the receivables to justify the action that was taken, especially when the transfer was accompanied by arrangements made by Belec with customers which resulted in those receivables being applied to meet the claims of only certain creditors, not including Vulcan.

76 Alternatively, if his knowledge and belief were not such as to justify the conclusion I have reached above about the predominant purpose of his conduct, it is clear that his conduct was directed against Vulcan, as a major creditor of Marketing, in circumstances where he should have known that injury to Vulcan would ensue. Since the conduct in which Belec was engaged with Marketing and Industries amounted to a fraudulent conveyance, the requirements of the second test set out by Estey J. are satisfied.

77 With respect to damages, a party to a conspiracy is liable for damage which was the foreseeable consequence of the conspiracy: *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 59 D.L.R. (4th) 533 (Ont. C.A.) at p. 548.

78 Adrianna Willetts, the controller of Vulcan, provided computer print-outs showing that as at September 1, 1993, Vulcan was owed approximately $188,000 by Marketing and $88,000 by Industries. She described the process involved in producing these reports, including the review of invoices. Ms. Willetts testified that she had developed the information used in the reports in consultation with Belec and that he agreed with them. Belec said he could not agree with the Marketing report without having the backup documentation to review, and that he did not agree with the Industries report. Vulcan did not produce the invoices at trial which would support the reports.

79 Counsel for Belec submitted that Vulcan had failed to provide evidence of efforts on its part to send invoices to Marketing's customers and to collect from them. Certainly it did not seem that any such efforts were undertaken by Vulcan. But no basis was suggested on which Vulcan could properly have relied to take direct action against Marketing's customers. These outstanding accounts were payable to Marketing and were never formally assigned to Marketing so Vulcan was not in a position to pursue those accounts on its own behalf and it had no authorization from Marketing to do so.

80 Accordingly, it is necessary to conclude, on the evidence available that Vulcan's damages from the conspiracy are in the amount of $188,000 on account of outstanding amounts owing to it by Marketing.

81 Vulcan also claimed damages against Belec by reason of the conspiracy in the amount of $88,000 with respect to outstanding accounts owing by Industries to Vulcan. The total amount owing was determined in the same way as the outstanding accounts owed by Marketing. I see no reason not to accept Vulcan's determination of the amount. No reason was put forward, however, for viewing the losses Vulcan incurred from its dealings with Industries as a result of the conspiracy. The conspiracy and its consequences relate to a worsening of the position of Marketing but not that of Industries, which effectively obtained a better business position than would have been the case without the conspiracy. Presumably Industries itself is liable for its outstanding accounts owing to Vulcan. But those accounts and the fact that they are not paid and presumably cannot be paid do not arise from the conspiracy and therefore do not give rise to any liability on the part of Belec in that regard.

Breach of Trust

82 Vulcan contends that Belec is liable to it for a breach of the trust relationship which was created between Marketing and Vulcan by the assurance in the October 3, 1991 letter that Vulcan would have access to Marketing's receivables. The specific claim is that by depositing the Uniselect cheque to Qualilab Inc. for $152,078.47 dated November 29, 1991 to the bank account of Industries and then making payments out of that account to persons other than Vulcan, Belec and Industries failed to assure, as required by the trust relationship, that funds representing a Marketing receivable were accessible to Vulcan.

83 Authority for holding a director and officer personally liable for breach of trust in circumstances which are similar in certain respects to the present case may be found in *Canadian Imperial Bank of Commerce v. Graat* (1991), 5 B.L.R. (2d) 271 (Ont. Gen. Div.) and *Air Canada v. M & L Travel Ltd.* (1991), 2 O.R. (3d) 184 (C.A.), affirmed S.C.C., Oct. 21, 1993 [reported [1993] 3 S.C.R. 787].

84 The cheque for $152,078.47 from Uniselect represented payment on accounts owing to Marketing and was treated accordingly in the inter-company reconciliation prepared by Industries referred to earlier. When the cheque came into the possession of Industries it was dealt with in the same manner as Industries' own receipts. While Belec may not have turned his mind to the specific cheque and what receivables it represented, he must have been aware that cheques such as this one, relating to Marketing receivables, would come to Industries and he was in a position to determine how they were dealt with. Under the system he authorized, the cheque was deposited to the Industries bank account. Belec was in a position to exercise discretion and power in a way that could affect the interests of Vulcan. This by itself would not place Belec in a trust relationship with Vulcan but the letter of October 3, 1991, followed by the notice to customers advising them to pay to Industries, were sufficient to bring about that result. This conclusion does not require or imply a conclusion that the assurance in the letter of October 3 amounted to an assignment of accounts receivable. On the basis of the letter, Vulcan was entitled to expect that if a cheque for Marketing receivables came within the disposition of Belec and Industries, steps would be taken to honour the commitment made in the October 3 letter. It is possible that the extent to which the moneys could be paid over to Vulcan would have been constrained by operation of law if, for example, the payment would have constituted an improper preference to one creditor over others. But no attention was paid to such considerations. Indeed, on the contrary, Belec seemed to feel that it was quite in order to apply the cheque to meet claims of certain selected creditors, including himself, without any regard for Vulcan and the assurance given to it in the October 3 letter.

85 These factors indicate that a trust relationship should be inferred to exist: see *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161 (B.C. C.A.). Counsel for Vulcan submitted that on the basis of that case a constructive trust should be inferred as a basis for a remedy to avoid unjust enrichment. There was certainly a deprivation of Vulcan: money that would have gone to it (subject to any legal constraints) did not.

86 As to whether there was an unjust enrichment of Belec and Industries, the inter-corporate account reconciliation referred to earlier showed that, at the time it was prepared, Industries had paid out almost $33,000 more on account of Marketing than it had received. This might suggest that the moneys received on account of Marketing were paid out on

account of Marketing liabilities and that, although there was a contravention of the assurance given to Vulcan, there was no unjust enrichment to Belec and Industries. It is probable that most of the Marketing liabilities which Industries paid, such as Uniselect, were those whose payment would contribute most to the prospects of continuing supplier support for Industries, but that by itself does not amount to unjust enrichment to Belec and Industries in the absence of evidence that the suppliers made such payments a condition of these continued business dealings.

87 It is clear however that Belec did derive a direct benefit from the manner in which Industries dealt with moneys it received on account of Marketing receivables. Belec received payment of salary and travel expenses said to be owing to him by Marketing. The fact these amounts were owed to him, assuming that to be so, does not alter the character of the payment of those amounts to him in the circumstances of the case as a form of unjust enrichment.

88 Marketing, by the letter of October 3, 1991 must be regarded as having entered into a trust relationship with Vulcan in respect of the receivables. Belec and Industries are, as third parties, strangers to the trust. The reasons of Iacobucci J. in the Supreme Court of Canada decision in *Air Canada v. M & L Travel Ltd.*, cited above, are instructive for this case. Employing the analysis which commences at p. 22 of Iacobucci J.'s reasons, I would make the following determinations.

89 First, Industries was in receipt of trust property. Because of its relationship to Belec, in this regard Industries may be regarded as an alter ego and accordingly is chargeable with the trust in respect of the property. As such, Industries could be liable as a participant in the breach of the trust, if it were before the court.

90 Second, Belec would be personally liable if he was in knowing receipt of trust property. His receipt of payments from Industries on account of salary and expenses might be sufficient to satisfy this requirement, even though there was no direct diversion of the Uniselect funds but rather a payment out of a fund in which they were pooled. Alternatively, a clearer basis of personal liability is to be found in the head of liability which Iacobucci J. refers to as "knowing assistance". For liability to exist on this basis Iacobucci J. states that it must be established that the defendant "knowingly assisted in a dishonest and fraudulent design" on the part of the trustee. In the circumstances of this case, I think that test should be taken to mean that Belec must have knowingly assisted in a dishonest and fraudulent design on the part of Industries, the person in receipt of and charged with the trust property.

91 For the assistance to be knowing it must be "actual knowledge". Iacobucci J. says at p. 25 that if the stranger to the trust received a benefit as a result of the breach of the trust, this may ground an inference that the stranger knew of the breach. Given the role of Belec in the affairs of Industries and the way Industries treated the Uniselect cheque as a Marketing credit and his knowledge that it was deposited to Industries' account the conclusion that Belec knew or must be taken to have known about the breach of trust is unavoidable. If that knowledge was not subjective, he was wilfully blind or reckless given the facts of which he did have knowledge, and he derived a personal benefit, so his participation can be regarded as knowing (cf. Iacobucci J. at p. 43).

92 For the breach to be considered as dishonest and fraudulent, Iacobucci J. adopts (at p. 41 [p. 826 S.C.R.]) as the relevant description "the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take". Those words aptly characterize the manner in which the Uniselect cheque was dealt with in this case.

93 Accordingly Belec is personally liable for the breach of trust in respect of the Uniselect cheque.

94 Although this is a separate ground of liability it appears that the amount for which Belec is liable or potentially liable on this basis, which is the amount of the Uniselect cheque, is part of the amount for which Belec is liable in damages for conspiracy.

95 For the reasons given above, Belec is liable to Vulcan for damages for negligent representations which I have fixed at $150,000, the amount claimed by Vulcan (subject to any further determination of that amount) and also for damages for conspiracy in the amount of $188,000 and for breach of trust in the amount of $152,078.47, which amount is included in the amount of $188,000.

Issues between Belec and Hall-Chem

96 Belec cross-claimed against Hall-Chem for contribution and indemnity in respect of any damages and costs that may be awarded against him. No evidence was led that would support such a determination. The cross-claim is dismissed. Counsel may make submissions as to costs.

Order accordingly.

At paras. 55-56

H.L. *Appellant*

v.

Attorney General of Canada *Respondent*

and

Attorney General for Saskatchewan *Intervener*

Indexed as: H.L. *v.* Canada (Attorney General)

Neutral citation: 2005 SCC 25.

File No.: 29949.

Hearing: May 13, 2004.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

Rehearing: December 13, 2004.

Judgment: April 29, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeals — Saskatchewan Court of Appeal — Questions of fact — Applicable standard of appellate review on questions of fact in Saskatchewan — Whether Court of Appeal correct in setting aside trial judge's pecuniary damages award for loss of past and future earnings — Whether Court of Appeal applied proper standard — The Court of Appeal Act, 2000, S.S. 2000, c. C-42.1, s. 14.

L brought an action for sexual battery against S and the federal government for acts that had occurred 20 years earlier when L was about 14 years old. S, who worked on a reserve for the federal government, sexually abused L on two occasions. L left school when he was about 17 years old, without completing the eighth grade. He was unable to retain meaningful employment between 1978-1987. During that time, he drank heavily, was incarcerated frequently and relied on social assistance to meet his needs. Between 1988-2000, he worked sporadically. The evidence given by L and two expert witnesses satisfied the trial judge that L's poor

H.L. *Appelant*

c.

Procureur général du Canada *Intimé*

et

Procureur général de la Saskatchewan *Intervenant*

Répertorié : H.L. *c.* Canada (Procureur général)

Référence neutre : 2005 CSC 25.

N° du greffe : 29949.

Audition : 13 mai 2004.

Présents : Les juges Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

Nouvelle audition : 13 décembre 2004.

Jugement : 29 avril 2005.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Appels — Cour d'appel de la Saskatchewan — Questions de fait — Norme de révision en appel applicable à une question de fait en Saskatchewan — La Cour d'appel a-t-elle eu raison d'annuler les dommages-intérêts pécuniaires accordés par le juge de première instance pour les pertes de revenus antérieure et ultérieure? — A-t-elle appliqué la norme appropriée? — Loi de 2000 sur la Cour d'appel, L.S. 2000, ch. C-42,1, art. 14.

L a intenté une action contre S et le gouvernement du Canada relativement à des voies de fait de nature sexuelle dont il avait été victime 20 ans plus tôt vers l'âge de 14 ans. S, qui travaillait alors pour le gouvernement fédéral dans une réserve, l'a agressé sexuellement deux fois. L a quitté l'école à l'âge de 17 ans environ sans avoir terminé sa huitième année. Entre 1978 et 1987, il n'a pu conserver un emploi convenable. Il buvait beaucoup, se retrouvait souvent derrière les barreaux et avait recours à l'aide sociale pour subvenir à ses besoins. De 1988 à 2000, il a travaillé sporadiquement. Les témoignages de L et des deux experts ont convaincu le juge

employment record between 1978-1987 was attributable to his alcoholism, emotional difficulties, and criminality, which were in turn attributable to the sexual abuse perpetrated by S. He found as well that L's sporadic work record between 1988-2000 was consistent with the emotional difficulties described by the experts in their assessments of the psychological effects of sexual abuse. The trial judge maintained L's action against S and the federal government, since he found that the criteria for the imposition of vicarious liability on the government had been met. He awarded L non-pecuniary damages, pecuniary damages for loss of past and future earnings and pre-judgment interest. With respect to L's claim for loss of future earnings, in the absence of specific evidence in this regard, the trial judge relied inferentially on the evidence relating to L's past earning capacity. The Court of Appeal dismissed the federal government's appeal as it related to vicarious liability and to the award for non-pecuniary damages, but allowed the appeal in relation to pecuniary damages and pre-judgment interest. The Court of Appeal set aside the award for pecuniary damages for loss of past and future earnings on the ground that, on its assessment of the evidence, the evidence fell short of proving the loss. Leave to this Court was granted by the Court of Appeal, pursuant to s. 37 of the *Supreme Court Act*, to clarify the correct standard of review applicable to the Saskatchewan Court of Appeal.

de première instance que L avait peu travaillé de 1978 à 1987 à cause de son alcoolisme, de ses difficultés émotionnelles et de sa criminalité, qui eux étaient attribuables aux abus sexuels commis par S. Le juge a également conclu que les emplois occupés sporadiquement de 1988 à 2000 s'inscrivaient dans la suite logique des difficultés émotionnelles décrites par les experts dans leur évaluation des effets psychologiques de l'abus sexuel. Il a accueilli l'action de L contre S et le gouvernement du Canada, estimant réunies les conditions auxquelles l'État pouvait être tenu responsable du fait d'autrui. Il a accordé à L des dommages-intérêts non pécuniaires, des dommages-intérêts pécuniaires pour les pertes de revenus antérieure et ultérieure et de l'intérêt avant jugement. En ce qui concerne la perte de revenus ultérieure alléguée, faute d'éléments de preuve précis à l'appui, le juge de première instance s'est fondé, par inférence, sur la preuve relative à la capacité de gain antérieure de L. La Cour d'appel a rejeté l'appel du gouvernement du Canada quant à la responsabilité du fait d'autrui et aux dommages-intérêts non pécuniaires, mais elle l'a accueilli relativement aux dommages-intérêts pécuniaires et à l'intérêt avant jugement. Elle a annulé les dommages-intérêts pécuniaires accordés pour les pertes de revenus antérieure et ultérieure au motif que, suivant son appréciation de la preuve, l'existence de ces pertes n'était pas établie. Elle a accordé l'autorisation de se pourvoir devant notre Cour en application de l'art. 37 de la *Loi sur la Cour suprême* afin que soit déterminée la norme de révision que devait appliquer la Cour d'appel de la Saskatchewan.

Held (Bastarache, LeBel, Deschamps and Charron JJ. dissenting in part): The appeal should be allowed in part. The trial judge's award of pecuniary damages for loss of past earnings is restored, but the award must be reduced to reflect the time L spent in prison and the social assistance he received during the period covered by the award.

Per McLachlin C.J. and Major, Binnie, Fish and Abella JJ.: In Saskatchewan, as elsewhere in Canada, a trial judge's primary findings of fact and inferences of fact are only reviewable on appeal on a standard of palpable and overriding error. *The Court of Appeal Act, 2000*, in particular s. 14, did not create for Saskatchewan an appellate court radically different, in powers and purpose, from its counterparts in the other provinces. To the contrary, an examination of both the 2000 Act and its predecessors, their legislative history, and their judicial interpretation in this Court and by the Saskatchewan Court of Appeal itself all lead to the conclusion that the 2000 Act did not change the standard of review applicable in Saskatchewan to appellate review on questions of fact: the appeal is a review for error, and not a review by rehearing. Courts of appeal in Canada, absent an express

Arrêt (les juges Bastarache, LeBel, Deschamps et Charron sont dissidents en partie) : Le pourvoi est accueilli en partie. Les dommages-intérêts pécuniaires accordés pour la perte de revenus antérieure sont rétablis, mais leur montant est abaissé pour tenir compte du temps que L a passé en prison et des prestations d'aide sociale qu'il a touchées pendant la période considérée.

La juge en chef McLachlin et les juges Major, Binnie, Fish et Abella : En Saskatchewan, comme ailleurs au Canada, les conclusions du juge de première instance relatives à des faits prouvés directement et ses inférences factuelles ne sont susceptibles de révision en appel que selon la norme de l'erreur manifeste et dominante. La *Loi de 2000 sur la Cour d'appel* — son art. 14 en particulier — n'a pas créé en Saskatchewan une cour d'appel radicalement différente de celles des autres provinces sur le plan des pouvoirs ou de l'objet. Au contraire, le libellé de la Loi de 2000 et des lois qui l'ont précédée, l'historique législatif de chacune d'elles et leur interprétation par notre Cour et par la Cour d'appel de la Saskatchewan mènent à la conclusion que la Loi de 2000 n'a pas changé la norme de révision en appel applicable dans la province à l'égard d'une question de fait : l'appel est instruit par

legislative instruction to the contrary, cannot disregard the governing principle of appellate intervention on questions of fact. They may make their own findings and draw their own inferences, but only where the trial judge is shown to have committed a palpable and overriding error or made findings of fact, including inferences of fact, that are clearly wrong, unreasonable, or unsupported by the evidence. A court of appeal cannot substitute for the reasonable inference preferred by the trial judge, an equally, or even more, persuasive inference of its own. These principles are consistent with this Court's recent decision in *Housen*. [3-6] [13-16] [74] [80] [89] [110]

In this case, the Saskatchewan Court of Appeal reversed the trial judge on six points: (1) qualification of the experts, (2) causation, (3) mitigation, (4) incarceration, (5) collateral benefits, and (6) loss of future earnings. The Court of Appeal erred in interfering with the trial judge's findings on the first three issues because it applied the wrong standard and improperly substituted its own opinion of the facts for that of the trial judge. The trial judge, however, made "palpable and overriding errors" on the last three issues. His finding that S's sexual abuse of L caused his loss of income due to imprisonment is both contrary to judicial policy and unsupported by the evidence. L's lack of gainful employment caused by his imprisonment resulted from his criminal conduct, not from his abuse by S or from the alcoholism. The award for loss of past earnings should thus be reduced to reflect the time L spent in prison. The trial judge also erred in not deducting from the same award the social assistance payments L had received during the relevant period. The trial judge's failure to make such deduction constitutes a severable error of principle. Finally, the trial judge's award for loss of future earnings must be set aside. The finding that a person has had emotional and substance abuse problems which in the past have impacted on his earning capacity is not in itself a sufficient basis for concluding on the balance of probabilities that this state of affairs will endure indefinitely. [111] [137] [142-143] [145] [148] [152]

Per Bastarache, LeBel and Deschamps JJ. (dissenting in part): In Saskatchewan, the nature of appellate review is by way of rehearing and not review for error. The grammatical and ordinary sense of the words used in ss. 13 and 14 of *The Court of Appeal Act, 2000*, as well as the object of the Act, the object of the specific legislative provisions that form the statutory framework for appeals, and the Act's historical foundations, clearly lead

voie de contrôle d'erreur (« *review for error* »), et non par voie de nouvelle audition. Au Canada, à défaut d'une prescription expresse contraire de la loi, une cour d'appel ne peut faire fi du principe régissant l'appel d'une conclusion de fait. Elle peut tirer ses propres conclusions et inférences, mais seulement s'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou qu'il a tiré des conclusions de fait, y compris des inférences de fait, manifestement erronées, déraisonnables ou non étayées par la preuve. Une cour d'appel ne peut substituer à l'inférence raisonnable retenue par le juge de première instance sa propre inférence tout aussi convaincante, sinon plus. Ces principes sont conformes au récent arrêt *Housen* de notre Cour. [3-6] [13-16] [74] [80] [89] [110]

En l'espèce, la Cour d'appel de la Saskatchewan a infirmé la décision de première instance au regard de six points : (1) la compétence des experts, (2) la causalité, (3) la limitation du préjudice, (4) l'incarcération, (5) les prestations parallèles et (6) la perte de revenus ultérieure. Elle a eu tort de modifier les conclusions du juge de première instance quant aux trois premiers, car elle n'a pas appliqué la norme appropriée et a irrégulièrement substitué sa propre interprétation des faits à la sienne. Cependant, le juge de première instance a commis des erreurs « manifestes et dominantes » quant aux trois derniers points. Sa conclusion que les abus sexuels ont causé la perte de revenus due à l'incarcération n'est ni conforme aux principes judiciaires ni étayée par la preuve. L'absence d'emploi rémunérateur imputable à l'emprisonnement résultait du comportement criminel de L, et non de son alcoolisme ou des actes de S. Le montant des dommages-intérêts accordés pour la perte de revenus antérieure doit donc être abaissé en fonction du temps que L a passé en prison. Le juge de première instance a également eu tort de ne pas en déduire les prestations d'aide sociale touchées par L pendant la période considérée. L'omission de le faire constitue une erreur de principe dissociable. Enfin, les dommages-intérêts accordés pour la perte de revenus ultérieure doivent être annulés. Le fait qu'une personne a connu des problèmes émotionnels et de toxicomanie qui ont nui à sa capacité de gain ne permet pas à lui seul de conclure, selon la prépondérance des probabilités, qu'il en sera toujours ainsi. [111] [137] [142-143] [145] [148] [152]

Les juges Bastarache, LeBel et Deschamps (dissidents en partie) : En Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non de contrôle d'erreur (« *review for error* »). Le sens grammatical et ordinaire des mots employés aux art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*, l'objet de la Loi et des dispositions établissant le cadre législatif de l'appel, de même que les fondements historiques de la Loi permettent clairement

to that conclusion. *The Court of Appeal Act, 2000* is the only one among all of the statutes governing the powers of appellate courts in Canada that relieves the Court of Appeal of any obligation to adopt the view of the evidence taken by the trial judge and directs it to act on its own view of what, in its judgment, the evidence proves. [157] [243] [296]

A number of Saskatchewan Court of Appeal cases also support the conclusion that the nature of appellate review in Saskatchewan is by way of rehearing. To the extent that there are cases from this Court and the Saskatchewan Court of Appeal that appear to conflict with this conclusion, they can be reconciled. In particular, in *Housen*, the mere fact that this Court did not, on an appeal from the Saskatchewan Court of Appeal, refer to *The Court of Appeal Act* but instead used a statement from a different province's Court of Appeal that is in conflict with the clear language of that Act to define the role of the appellate court in Saskatchewan, demonstrates that *Housen* should not be used to understand the nature of appellate review in that province. Rather, the application of *Housen* as an authority should be limited to general standards of appellate review only. [259] [294-298]

Appellate review by way of rehearing is not a retrial or a *de novo* hearing. On an appeal by way of rehearing, the Court of Appeal is not limited to a review of the lower court's decision and can form its own judgment on the issues and direct its attention to the merits of the case. This does not mean, however, that the Court of Appeal can ignore the trial judge's findings. The special advantage of the trial judge calls for a measure of deference on the part of the Saskatchewan Court of Appeal when, pursuant to the direction in s. 14 of the Act, it is considering what the evidence proves. Factual findings that engage the special advantage of the trial judge will be accorded some deference and the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding. Factual findings that do not engage the special advantage of the trial judge are not entitled to the same level of deference. The Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a simple error in his or her fact finding. In the case of inferences of fact, since a trial judge is in no better position than the Court of Appeal to draw inferences of fact from a base of fact properly established, the threshold that the Court of Appeal must pass before substituting its own inference of fact is reasonableness. Nevertheless, given the respect that is to be accorded to the office of the trial judge, in the cases of inferences of fact or of findings of fact that do not engage the special advantage of the trial judge, the

de tirer cette conclusion. Parmi les lois qui régissent les pouvoirs des cours d'appel au Canada, la *Loi de 2000 sur la Cour d'appel* est la seule à soustraire la Cour d'appel à l'obligation d'accepter les conclusions que le juge de première instance a tirées de la preuve et à lui enjoindre de décider en se fondant sur sa propre appréciation de la preuve. [157] [243] [296]

Un certain nombre de décisions de la Cour d'appel de la Saskatchewan appuient la conclusion que, dans la province, l'appel est instruit par voie de nouvelle audition. Les arrêts de notre Cour et de la Cour d'appel de la Saskatchewan qui semblent contredire cette conclusion peuvent être conciliés avec elle. Dans *Housen*, en particulier, le simple fait que, dans le cadre d'un appel de la décision de la Cour d'appel de la Saskatchewan, notre Cour a passé sous silence la *Court of Appeal Act*, mais a cité un passage d'une décision d'une autre cour d'appel contredisant le libellé clair de cette loi pour définir le rôle de la cour d'appel en Saskatchewan montre que l'arrêt *Housen* ne saurait servir à déterminer la nature de la révision en appel dans cette province. L'arrêt *Housen* ne devrait valoir que pour les normes générales de révision en appel. [259] [294-298]

L'appel par voie de nouvelle audition n'équivaut ni à la reprise du procès ni à une audition *de novo*. Dans le cadre d'un tel appel, la Cour d'appel n'est pas confinée à l'examen de la décision du tribunal inférieur. Elle doit former sa propre opinion sur les questions en litige et se pencher sur le fond de l'affaire. Il ne s'ensuit cependant pas qu'elle peut faire abstraction des conclusions du juge de première instance. L'avantage particulier dont bénéficie ce dernier exige de la Cour d'appel de la Saskatchewan qu'elle fasse preuve d'une certaine déférence lorsqu'elle apprécie la preuve conformément à la prescription de l'art. 14 de la Loi. La Cour d'appel doit faire preuve de déférence vis-à-vis des conclusions factuelles qui font jouer cet avantage particulier; elle n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits. La conclusion factuelle qui ne fait pas jouer l'avantage particulier du juge de première instance ne commande pas la même déférence. La Cour d'appel n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si une simple erreur a été commise dans l'appréciation des faits. Le juge de première instance n'étant pas mieux placé que la Cour d'appel pour tirer une inférence de fait d'un ensemble de faits dûment établis, le critère auquel la Cour d'appel doit satisfaire pour substituer sa propre inférence de fait à la sienne est celui de la raisonnabilité. Vu le respect que commande la charge de juge de première instance, lorsque l'avantage particulier du juge ne

Court of Appeal will presuppose that the trial judge has drawn reasonable inferences of fact or made factual findings free of error. [178] [245] [253-256]

The Court of Appeal correctly applied the appropriate standard when it set aside the trial judge's pecuniary damages award for both past and future loss of earnings, because the factual inferences on which the award was based were not reasonably supported by the evidence and were therefore not reasonable. Even if the more stringent standard set out in *Housen* applied here, the Court of Appeal's decision would still be upheld. The trial judge's findings were so unreasonable that they amounted to palpable error in the appreciation of the evidence and the inferences drawn. With respect to past loss of earnings, the trial judge's first inference that S's sexual abuse caused L's alcoholism was based primarily on the general expert evidence. However, the expert witnesses in this case transcended their respective fields of expertise when they testified as to the etiology of alcoholism and the cause of L's alcoholism in particular. Since the expert witnesses were not properly qualified to express opinions on this subject, their evidence in this regard is entitled to no weight, and L's testimony as to the effect of S's sexual abuse on his alcoholism could not, on its own, provide a sufficient evidentiary basis for the trial judge's inference that S's sexual abuse caused L's alcoholism. The trial judge's second inference that S's sexual abuse caused L's emotional problems which resulted in L losing employment income also lacks a sufficient evidentiary foundation. The evidence adduced at trial only demonstrated that L did not work between 1978-1987 and worked only sporadically between 1988-2000. It does not prove that L was wholly or largely unable to work because of his emotional problems. L's sporadic work record, in itself, is as consistent with choosing not to work as with being unable to work. With respect to future loss of earnings, since it was not reasonable for the trial judge to conclude that L suffered a loss of employment income because of S's sexual abuse, given the evidentiary gaps in the trial judge's causal chain, it was likewise not reasonable for him to conclude that L will continue to suffer such a loss in the future. [306] [313-317] [323-325] [329]

Per Charron J. (dissenting in part): There is agreement with the majority's analysis on the governing standard of review for appeals in Saskatchewan and the Court of Appeal thus erred in finding that the standard was other than that adopted by this Court in *Housen*. However, on application of the appropriate standard of review, the Court of Appeal was correct in setting aside the entire award for pecuniary damages. There is agreement with

joue pas, la Cour d'appel présupposera néanmoins que l'inférence de fait est raisonnable ou que la conclusion factuelle est exempte d'erreur. [178] [245] [253-256]

La Cour d'appel a bien appliqué la norme appropriée en annulant les dommages-intérêts pécuniaires accordés pour les pertes de revenus antérieure et ultérieure, car les inférences factuelles sur lesquelles se fondait cet octroi n'étaient pas raisonnablement étayées par la preuve et n'étaient donc pas raisonnables. Même au regard de la norme plus stricte établie dans l'arrêt *Housen*, la décision de la Cour d'appel serait quand même confirmée en l'espèce. Les conclusions du juge de première instance étaient si déraisonnables qu'elles entachaient d'une erreur manifeste l'appréciation de la preuve et les inférences tirées. En ce qui concerne la perte de revenus antérieure, la première inférence du juge — les abus sexuels de S ont causé l'alcoolisme de L — se fondait principalement sur la preuve d'expert générale. Or, en l'espèce, les témoins experts ont outrepassé leurs domaines d'expertise respectifs en témoignant sur l'étiologie de l'alcoolisme en général et sur la cause de l'alcoolisme de L en particulier. Comme ils n'étaient pas dûment qualifiés pour se prononcer sur ces sujets, leurs témoignages n'ont aucune valeur à cet égard. Le témoignage de L concernant l'incidence des abus sexuels sur son alcoolisme ne pouvait à lui seul étayer suffisamment l'inférence du juge de première instance selon laquelle les abus sexuels de S avaient causé l'alcoolisme de L. La deuxième inférence du juge — les abus sexuels étaient à l'origine des problèmes émotionnels qui avaient fait perdre des revenus d'emploi à L — ne s'appuie pas non plus sur une preuve suffisante. La preuve offerte au procès établissait seulement que L n'avait pas travaillé de 1978 à 1987 et qu'il n'avait travaillé que sporadiquement de 1988 à 2000. Cette preuve n'établit pas que L était totalement ou en grande partie incapable de travailler à cause de ses problèmes émotionnels. Le fait qu'il a travaillé sporadiquement peut aussi bien résulter d'un choix que d'une incapacité. Pour ce qui est de la perte de revenus ultérieure, comme il n'était pas raisonnable de conclure que L avait subi une perte de revenus d'emploi à cause des abus sexuels de S, étant donné les lacunes, sur le plan de la preuve, de la chaîne causale établie par le juge de première instance, il n'était pas non plus raisonnable de conclure que L continuerait de subir une telle perte. [306] [313-317] [323-325] [329]

La juge Charron (dissidente en partie) : L'analyse des juges majoritaires concernant la norme de révision en appel applicable dans la province de la Saskatchewan est juste, et la Cour d'appel a donc eu tort de conclure que la norme applicable n'était pas celle établie par notre Cour dans *Housen*. Toutefois, compte tenu de l'application de la norme de révision appropriée, la Cour d'appel a annulé à bon droit la totalité des dommages-intérêts pécuniaires

the minority that the same error informed the trial judge's decision to award pecuniary damages in respect of both past and future loss of earnings. The trial judge found that there was a causal connection between the acts of sexual abuse and a lifelong inability to earn income. The evidence did not support this finding and, consequently, the award for loss of income, past and future, is unreasonable. [347-348]

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By Fish J.

Applied: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53; **referred to:** *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Tanel v. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Markling v. Ewaniuk*, [1968] S.C.R. 776; *Kosinski v. Snaith* (1983), 25 Sask. R. 73; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Assicurazioni Generali SpA v. Arab Insurance Group*, [2003] 1 W.L.R. 577; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Harrington v. Harrington* (1981), 33 O.R. (2d) 150; *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz* (1986), 49 Sask. R. 244; *Sisson v. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Knight v. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68; *Bogdanoff v. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35; *Brown v. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

By Bastarache J. (dissenting in part)

Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33; *Fox v. Percy* (2003), 214 C.L.R. 118, [2003] HCA 22; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd.* (2002), 223 Sask. R. 236, 2002 SKCA 100; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Hallberg v. Canadian National Railway Co.* (1955), 16 W.W.R. 538; *Taylor v. University of Saskatchewan* (1955), 15 W.W.R. 459; *Audergon v. La Baguette Ltd.*, [2002] E.W.J. No. 78 (QL), [2002] EWCA Civ 10; *Gray v. Turnbull* (1870), L.R. 2 Sc. & Div. 53;

accordés. Comme le concluent les juges minoritaires, la même erreur entachait la décision du juge de première instance d'accorder des dommages-intérêts pécuniaires pour les pertes de revenus passée et future. Le juge a en effet conclu à l'existence d'un lien de causalité entre les abus sexuels et l'incapacité permanente de gagner un revenu. La preuve n'étayait pas cette conclusion, de sorte que l'indemnisation pour les pertes de revenus passée et future est déraisonnable. [347-348]

Jurisprudence

Citée par le juge Fish

Arrêts appliqués : *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33; *M.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 477, 2003 CSC 53; **arrêts mentionnés :** *Lensen c. Lensen*, [1987] 2 R.C.S. 672; *Tanel c. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214; *Athey c. Leonati*, [1996] 3 R.C.S. 458; *Markling c. Ewaniuk*, [1968] R.C.S. 776; *Kosinski c. Snaith* (1983), 25 Sask. R. 73; *R. c. W. (R.)*, [1992] 2 R.C.S. 122; *Assicurazioni Generali SpA c. Arab Insurance Group*, [2003] 1 W.L.R. 577; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Harrington c. Harrington* (1981), 33 O.R. (2d) 150; *Pelech c. Pelech*, [1987] 1 R.C.S. 801; *Board of Education of the Long Lake School Division No. 30 of Saskatchewan c. Schatz* (1986), 49 Sask. R. 244; *Sisson c. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Knight c. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68; *Bogdanoff c. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35; *Brown c. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18; *Janiak c. Ippolito*, [1985] 1 R.C.S. 146; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748.

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C.C.L.T. (3d) 186, [2001] S.J. No. 298 (QL), 2001 SKQB 233, and supplementary reasons (2001), 210 Sask. R. 114, [2001] 11 W.W.R. 727, [2001] S.J. No. 478 (QL), 2001 SKQB 233. Appeal allowed in part, Bastarache, LeBel, Deschamps and Charron JJ. dissenting in part.

E. F. Anthony Merchant, Q.C., *Eugene Meehan, Q.C.*, and *Graham Neill*, for the appellant.

Roslyn J. Levine, Q.C., and *Mark Kindrachuk*, for the respondent.

Barry J. Hornsberger, Q.C., for the intervener.

The judgment of McLachlin C.J. and Major, Binnie, Fish and Abella JJ. was delivered by

722, 5 C.C.L.T. (3d) 186, [2001] S.J. No. 298 (QL), 2001 SKQB 233, et motifs supplémentaires (2001), 210 Sask. R. 114, [2001] 11 W.W.R. 727, [2001] S.J. No. 478 (QL), 2001 SKQB 233. Pourvoi accueilli en partie, les juges Bastarache, LeBel, Deschamps et Charron sont dissidents en partie.

E. F. Anthony Merchant, c.r., *Eugene Meehan, c.r.*, et *Graham Neill*, pour l'appelant.

Roslyn J. Levine, c.r., et *Mark Kindrachuk*, pour l'intimé.

Barry J. Hornsberger, c.r., pour l'intervenant.

Version française du jugement de la juge en chef McLachlin et des juges Major, Binnie, Fish et Abella rendu par

FISH J. —

I. Introduction

This appeal turns on the applicable standard of appellate review on questions of fact in Saskatchewan, and on the application of that standard by the Court of Appeal in this case. Our concern is with all of the facts, and nothing but the facts: with facts proved directly and with facts inferred, but not with questions of law or questions of mixed law and fact.

LE JUGE FISH —

I. Introduction

1 Le présent pourvoi porte sur la norme de révision applicable en appel à l'égard d'une question de fait en Saskatchewan et sur l'application de cette norme en l'espèce par la Cour d'appel. Il a pour objet tous les faits et seulement eux, qu'ils soient prouvés directement ou inférés, et non des questions de droit ou mixtes de fait et de droit.

Legislatures may fix by statute the powers of the appellate courts they are constitutionally authorized to create. The Legislative Assembly of Saskatchewan has done so, most recently in *The Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1 ("*2000 Act*").

2 Une législature peut définir dans une loi les pouvoirs de la cour d'appel que la Constitution l'autorise à créer. L'assemblée législative de la Saskatchewan l'a fait pour la dernière fois dans la *Loi de 2000 sur la Cour d'appel*, L.S. 2000, ch. C-42,1 (« *Loi de 2000* »).

The *2000 Act* did not enlarge materially the powers previously vested in the Saskatchewan Court of Appeal. Nor did it purport to modify at all the manner in which those powers have been exercised for nearly half a century.

3 Cette loi n'a pas accru sensiblement les pouvoirs de la Cour d'appel de la Saskatchewan. Elle ne visait pas non plus à modifier la manière dont ces pouvoirs étaient exercés depuis près d'un demi-siècle.

More particularly, the *2000 Act* did not change the standard of review applicable in Saskatchewan to appellate intervention with respect to findings of fact. The criteria that govern <u>the exercise</u> by the Court of Appeal of its statutory powers in this regard remain unchanged. Like other appellate courts across the country, it may substitute its own

4 Plus particulièrement, la *Loi de 2000* n'a pas changé la norme de révision applicable en appel à l'égard d'une conclusion de fait. Les critères régissant <u>l'exercice</u> des pouvoirs légaux de la Cour d'appel à ce chapitre demeurent les mêmes. À l'instar des autres cours d'appel du pays, la Cour d'appel de la Saskatchewan peut substituer sa propre

view of the evidence and draw its own inferences of fact where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence.

appréciation de la preuve et tirer ses propres inférences de fait lorsqu'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve.

5 This standard of appellate review is subject, of course, to statutory exceptions. It does not apply where the legislature has expressly provided otherwise. Nothing in the *2000 Act* reflects any such intention or has any such effect. It sets out the powers of the Court of Appeal in considerable detail; in other Canadian jurisdictions, equivalent powers are conferred in more general terms. As we shall see, however, the *2000 Act* neither bestows on the Court of Appeal for Saskatchewan unique powers of appellate intervention on questions of fact nor ordains their exercise in a manner that, within Canada, is exclusive to Saskatchewan.

Évidemment, cette norme de révision s'applique en appel sous réserve des exceptions prévues par la loi. Le législateur peut l'écarter expressément. Aucune disposition de la *Loi de 2000* ne traduit pareille intention ni n'a cet effet. Les pouvoirs de la Cour d'appel y sont énoncés de manière très détaillée; dans les autres provinces ou territoires canadiens, les pouvoirs équivalents sont formulés de façon plus générale. Or, nous le verrons, la *Loi de 2000* ne confère pas à la Cour d'appel de la Saskatchewan un pouvoir d'intervention unique à l'égard d'une question de fait ni ne prescrit l'exercice de ce pouvoir selon des modalités qui, au Canada, sont propres à la Saskatchewan.

6 In my respectful view, the Court of Appeal departed from the applicable standard in this case.

En toute déférence, la Cour d'appel n'a pas respecté la norme de révision applicable en l'espèce.

7 I would therefore allow the appeal in part, with costs, as explained in the reasons that follow.

Je suis donc d'avis d'accueillir le pourvoi en partie, avec dépens, pour les motifs qui suivent.

II. Overview

II. Vue d'ensemble

8 This matter reaches us, exceptionally, with leave granted by the Court of Appeal itself, pursuant to s. 37 of the *Supreme Court Act*, R.S.C. 1985, c. S-26. In reversing the trial judge, the Court of Appeal felt empowered by its governing statute to "rehear" the case. Speaking for the Court of Appeal on the leave application, Bayda C.J.S. acknowledged that a very different standard — "review for error" — had been held applicable in "the recent majority decision of the Supreme Court of Canada in *Housen v. Nikolaisen et al.*, [2002] 2 S.C.R. 235". "Both conclusions", said the Chief Justice, "cannot be right" ((2003), 238 Sask. R. 167, 2003 SKCA 78, at para. 11). I agree, of course, and, in my respectful view, it is the standard applied by the Court of Appeal — the "rehearing" standard — that is wrong.

Exceptionnellement, la question nous est soumise avec l'autorisation de la Cour d'appel elle-même, en application de l'art. 37 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26. La Cour d'appel a infirmé la décision de première instance après avoir estimé que sa loi constitutive l'investissait du pouvoir de « réentendre » l'affaire. Saisie de la demande d'autorisation, elle a reconnu, par la voix du juge en chef Bayda, qu'une norme très différente — celle du [TRADUCTION] « contrôle d'erreur » (« *review for error* ») — avait été jugée applicable par [TRADUCTION] « les juges majoritaires de la Cour suprême du Canada dans le récent arrêt *Housen c. Nikolaisen et al.*, [2002] 2 R.C.S. 235 ». Le Juge en chef a opiné que [TRADUCTION] « les deux points de vue ne pouvaient être valables » ((2003), 238 Sask. R. 167, 2003 SKCA 78, par. 11). Je suis évidemment d'accord avec lui et, à mon humble avis, c'est la norme fondée sur le pouvoir de la Cour d'appel de « réentendre » l'affaire qui doit céder le pas.

I shall deal later with the difference between the majority and minority reasons in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. For present purposes, it will suffice to mention that this Court in *Housen* was unanimous on the issue that concerns us here: All nine Justices agreed that the standard of appellate review on questions of fact in Saskatchewan is review for error and not review by rehearing. They agreed as well that findings of fact by the trial judge will be disturbed on appeal only for errors that can properly be characterized as palpable and overriding.

It was not contended in *Housen*, either in the Saskatchewan Court of Appeal or in this Court, that the standard of appellate review in Saskatchewan differed significantly from the prevailing standard elsewhere in Canada. And none of the parties found it necessary or useful to refer in their written or oral submissions in this Court to the *2000 Act* or its predecessors. This should not be thought surprising. On second reading, the Minister of Justice assured the Legislative Assembly of Saskatchewan that Bill 80 which, upon its adoption, became the *2000 Act*

> doesn't change the jurisdiction of the Court of Appeal in any way, it simply restates the historical jurisdiction of the court in a way that can be understood by users of the Act.

(*Saskatchewan Hansard*, June 7, 2000, at p. 1626)

Moreover, the Saskatchewan Court of Appeal, both before and after the coming into force of the *2000 Act*, had consistently held that a trial judge's findings of fact can be set aside only where palpable and overriding error is shown. It affirmed and reiterated that principle well before this Court's judgment in *Housen*, and even before *Lensen v. Lensen*, [1987] 2 S.C.R. 672. Thus, for example, in *Tanel v. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214 (C.A.), Bayda C.J.S. stated that the palpable and overriding standard had been followed by the Saskatchewan Court of Appeal "for a long time and most certainly since [1960]" (p. 218).

Lensen, also an appeal from Saskatchewan, was decided under the predecessor to the *2000 Act*. This

9 Je ferai état plus loin de ce qui a opposé les juges majoritaires aux juges minoritaires dans *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33. Il suffit pour l'instant de mentionner que les neuf juges de notre Cour étaient unanimes quant à la question qui nous intéresse en l'espèce : en Saskatchewan, l'appel interjeté à l'égard d'une conclusion de fait est instruit par voie de contrôle d'erreur, et non de nouvelle audition. Ils ont également convenu que les conclusions de fait du juge de première instance ne pouvaient être modifiées en appel qu'en cas d'erreur pouvant à juste titre être qualifiée de manifeste et de dominante.

10 Dans *Housen*, nul n'a prétendu en Cour d'appel de la Saskatchewan ni devant notre Cour que la norme de révision en appel applicable dans cette province différait sensiblement de celle s'appliquant ailleurs au Canada. Et aucune des parties n'a jugé nécessaire ou utile de faire mention de la *Loi de 2000* ou des lois qui l'ont précédée dans ses plaidoiries orales ou écrites devant notre Cour. Cela n'est pas étonnant. En deuxième lecture, le ministre de la Justice a assuré à l'Assemblée législative de la Saskatchewan que le projet de loi 80 (devenu la *Loi de 2000* après son adoption) :

> [TRADUCTION] ne modifie en rien la compétence de la Cour d'appel. Il ne fait que reformuler sa compétence historique afin que la Loi puisse être comprise par ses « utilisateurs ».

(*Saskatchewan Hansard*, 7 juin 2000, p. 1626)

11 En outre, la Cour d'appel de la Saskatchewan, tant avant qu'après l'entrée en vigueur de la *Loi de 2000*, avait toujours statué que les conclusions de fait d'un juge de première instance ne pouvaient être écartées que si l'existence d'une erreur manifeste et dominante était établie. Elle a affirmé et réaffirmé ce principe bien avant *Housen*, et même avant l'arrêt *Lensen c. Lensen*, [1987] 2 R.C.S. 672. Dans *Tanel c. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214 (C.A.), par exemple, le juge en chef Bayda a dit que la Cour d'appel de la Saskatchewan appliquait la norme de l'erreur manifeste et dominante [TRADUCTION] « depuis longtemps, et très certainement depuis [1960] » (p. 218).

12 Dans *Lensen*, notre Cour était également saisie d'un pourvoi contre un arrêt de la Cour d'appel de

Court dealt specifically in that case with the governing provision of the Saskatchewan statute, but laid down a uniform norm for appellate courts across the country.

la Saskatchewan rendu en fonction de la loi qu'a remplacée la *Loi de 2000*. Elle a dûment analysé la disposition pertinente de la loi de la Saskatchewan, mais elle a énoncé une seule et même norme applicable à toutes les cours d'appel du pays.

13 As we shall see, the decisive provisions of the *2000 Act* are identical in substance to the corresponding provisions of the Act it replaced. This underlines the present relevance of the Court of Appeal's decisions prior to November 1, 2000, when the current Act came into effect. And it reflects the legislative intention, mentioned earlier, not to "change the jurisdiction of the Court of Appeal in any way" (*Saskatchewan Hansard*, at p. 1626).

Comme nous le verrons, les dispositions en cause de la *Loi de 2000* sont identiques, sur le fond, à celles qu'elles ont remplacées, d'où la pertinence, dans la présente affaire, des décisions rendues par la Cour d'appel avant le 1er novembre 2000, date d'entrée en vigueur de la loi actuelle. Cela traduit également l'intention du législateur, signalée précédemment, de ne [TRADUCTION] « modifie[r] en rien la compétence de la Cour d'appel » (*Saskatchewan Hansard*, p. 1626).

14 Finally, I agree that the powers of the Saskatchewan Court of Appeal are set out in its constituent statute in greater detail than is the case in most other provinces. Greater detail in an empowering statute, however, does not invariably signal a legislative intent to confer broader powers. Often, the opposite is true. In any event, the *2000 Act* must be read in the light of this Court's jurisprudence — and appellate decisions in Saskatchewan itself — immediately prior to its adoption. Neither the text of the Act nor its legislative history indicates a departure from the principles set out in those cases.

Enfin, je conviens qu'en Saskatchewan, la loi pertinente énonce les pouvoirs de la cour d'appel de façon plus détaillée que dans la plupart des autres provinces. Cependant, le fait qu'une loi constitutive soit plus exhaustive ne traduit pas invariablement la volonté du législateur de conférer des pouvoirs plus étendus. C'est souvent l'inverse. Quoi qu'il en soit, la *Loi de 2000* doit être interprétée à la lumière des décisions de notre Cour — et des décisions de la Cour d'appel de la Saskatchewan elle-même — rendues juste avant son adoption. Ni le libellé de la Loi ni son historique législatif n'indiquent une dérogation aux principes issus de ces arrêts.

15 In short, I am not at all persuaded that the *2000 Act* was intended to create for Saskatchewan an appellate court radically different, in powers and purpose, from its counterparts in the other provinces. Nothing in the record before us, in the relevant provisions of the Act, or in the Court of Appeal's own earlier appreciation of its proper role suggests to me that it has now been invested with a general jurisdiction to "rehear" trials — that is, to apply a "rehearing" standard when it reviews judgments at trial.

En résumé, je ne suis pas du tout convaincu que la *Loi de 2000* visait à établir en Saskatchewan une cour d'appel radicalement différente de celles des autres provinces sur le plan des pouvoirs ou de l'objet. Ni le dossier qui nous a été présenté ni les dispositions pertinentes de la Loi ni l'appréciation de son rôle par la Cour d'appel elle-même ne me permettent de conclure que cette dernière est désormais investie du pouvoir général de « réentendre » une affaire, c'est-à-dire de se prononcer sur un jugement de première instance à l'issue d'une « nouvelle audition ».

16 To a significant extent, that is what it did here. In my respectful view, it improperly substituted its own opinion of the facts for that of the trial judge. The court evidently viewed with skepticism the trial judge's conclusions regarding the damages suffered by H.L. as a direct result of Mr. Starr's proven

Or, dans une large mesure, elle a agi en l'espèce comme si tel était le cas. À mon humble avis, elle a irrégulièrement substitué sa propre interprétation des faits à celle du juge de première instance. Elle a manifestement mis en doute les conclusions du juge de première instance sur le préjudice infligé

misconduct. Doubt as to the soundness of the trial judge's findings of fact, however, is not a recognized ground of appellate intervention.

directement à H.L. par les actes répréhensibles prouvés de M. Starr. Cependant, douter de la justesse des conclusions de fait du juge de première instance ne constitue pas un motif reconnu d'intervention en appel.

I would therefore allow the appeal in part and restore the trial judge's award for past loss of earnings, except where the errors imputed to him are indeed "palpable and overriding".

17 Par conséquent, je suis d'avis d'accueillir le pourvoi en partie et de rétablir la décision du juge de première instance quant à la somme accordée pour la perte de revenus antérieure, sauf erreur véritablement « manifeste et dominante » de sa part.

III. The Facts and Judgment at Trial

III. Les faits et le jugement de première instance

H.L., a former resident of Gordon First Nation Reserve, brought an action for sexual battery against William Starr and the Government of Canada for acts that had occurred some twenty years earlier: (2001), 208 Sask. R. 183, 2001 SKQB 233. Mr. Starr was employed at that time by the federal Department of Indian and Northern Affairs ("Department") as Residence Administrator of the Gordon Student Residence on Gordon First Nation Reserve.

18 H.L., un ancien résidant de la réserve de la Première nation de Gordon, a intenté une action contre William Starr et le gouvernement du Canada relativement à des voies de fait de nature sexuelle commises quelque vingt ans plus tôt : (2001), 208 Sask. R. 183, 2001 SKQB 233. M. Starr travaillait alors pour le ministère fédéral des Affaires indiennes et du Nord Canada (« ministère ») et administrait le pensionnat situé dans la réserve.

With the approval of the Department, Mr. Starr had organized various extracurricular activities for the students and other children living on the Reserve. It was through one of these activities, an after-school boxing club, that Mr. Starr came into contact with H.L. H.L. was then about 14 years old. Mr. Starr sexually abused H.L. on two occasions by subjecting him to acts of masturbation and to requests for sexual favours.

19 Avec l'aval du ministère, M. Starr avait mis sur pied divers programmes d'activités parascolaires destinés aux élèves du pensionnat et aux autres enfants de la réserve. C'est dans le cadre de l'une de ces activités — un club de boxe — que M. Starr avait rencontré H.L. L'appelant avait alors 14 ans. M. Starr l'a agressé sexuellement deux fois en le soumettant à des actes de masturbation et en sollicitant ses faveurs sexuelles.

H.L. testified that Mr. Starr's assaults had a profound and enduring impact. He felt "ashamed" and "dirty", and was afraid to tell anyone what had happened, because he thought no one would believe him. He "tried to find a way to get out of going to school because [he] didn't want to be around anybody", and "had a hard time concentrating because it was on [his] mind".

20 H.L. a témoigné que les actes de M. Starr l'avaient marqué profondément et pour longtemps. Il s'était senti « honteux » et « souillé » et avait craint de se confier à quiconque, pensant que personne ne le croirait. Il avait [TRADUCTION] « cherché un moyen de quitter l'école, car [il] ne voulait avoir affaire à personne », et « avait du mal à se concentrer à cause de ce qui s'était passé ».

H.L. testified that he had never even "touched" alcohol before the assaults occurred, but began consuming excessive amounts shortly thereafter, when he was 15 or 16 years old. Alcohol provided an "escape" from his recurring thoughts about the sexual assaults. "[M]y way of dealing with it", he

21 H.L. a témoigné qu'il n'avait jamais « touché » à l'alcool auparavant, mais qu'il avait commencé à en faire une consommation excessive peu de temps après; il était alors âgé de 15 ou 16 ans. L'alcool lui permettait de « fuir », de ne plus penser sans cesse aux agressions sexuelles. Il a dit : [TRADUCTION]

said, "was to go out and get drunk." That is why he "started drinking at a young age and got addicted to alcohol".

« [M]a façon de réagir à la situation était de sortir et de me soûler. » C'est ainsi qu'il [TRADUCTION] « a commencé à boire à un jeune âge et est devenu alcoolique ».

22 Because he had difficulty concentrating and was by then "already into alcohol pretty bad", H.L. left school when he was about 17 years old, without completing the eighth grade. H.L. characterized the sexual abuse perpetrated by Mr. Starr as the most traumatic event of his life.

Comme il avait de la difficulté à se concentrer et était alors [TRADUCTION] « déjà très dépendant à l'alcool », H.L. a quitté l'école à l'âge de 17 ans environ sans avoir terminé sa huitième année. H.L. a dit des abus sexuels commis par M. Starr qu'ils avaient été l'événement le plus traumatisant de sa vie.

23 Both H.L. and Canada called witnesses who were qualified as experts in assessing the psychological effects of sexual abuse. Both experts had tested H.L. and interviewed him extensively. Canada's expert, Dr. Arnold, adverted to factors other than H.L.'s sexual abuse by Mr. Starr that had, in his view, contributed to H.L.'s addiction to alcohol. He noted, in particular, that H.L. had grown up in a home that modelled alcohol abuse and violence. Dr. Arnold concluded, however, that Mr. Starr's sexual abuse of H.L. was a "specific triggering event" that led to H.L.'s abuse of alcohol.

H.L. et le procureur général du Canada ont chacun fait entendre un expert de l'évaluation des effets psychologiques de l'abus sexuel. Les deux experts avaient soumis H.L. à des tests et l'avaient interrogé longuement. Selon l'expert du procureur général du Canada, le Dr Arnold, d'autres facteurs que les abus sexuels avaient contribué à la dépendance de H.L. à l'alcool, notamment le fait d'avoir grandi dans une famille où sévissaient l'abus d'alcool et la violence. Le Dr Arnold a toutefois conclu que les abus sexuels avaient été un [TRADUCTION] « événement déclencheur » à l'origine de l'alcoolisme de H.L.

24 Asked whether H.L. would have become an alcoholic in any event, Dr. Arnold stated: "He may have had vulnerability, but except for the exposure to the sexual abuse, may not have developed a substance abuse problem. So I have to be careful when I say that, the risk is there, but except for that triggering event it may not have occurred. We don't know." Invited to elaborate, Dr. Arnold added:

> What we have [here] is an individual who has a risk because of his upbringing, so he's — he has a risk and a vulnerability. If specific stressful life events come along and he's exposed to them, such as sexual abuse, he is at more risk than someone who doesn't have that history of vulnerability.

Lorsqu'on lui a demandé si H.L. serait devenu alcoolique de toute façon, le Dr Arnold a répondu : [TRADUCTION] « Il aurait pu être vulnérable, mais n'eût été les abus sexuels, il aurait pu ne jamais abuser de substances intoxicantes. Je dois donc être prudent lorsque j'affirme que le risque existe, mais que sans cet événement déclencheur, il aurait pu ne pas se réaliser. Nous ne le savons pas. » Invité à préciser sa pensée, le Dr Arnold a ajouté :

> [TRADUCTION] Nous avons affaire à un individu prédisposé par son éducation, il est donc — il est prédisposé et vulnérable. Si un événement stressant se produit, s'il est victime d'abus sexuel par exemple, il est plus prédisposé qu'un autre ne présentant aucune vulnérabilité.

25 H.L.'s expert, Mr. Stewart, testified that H.L. was primarily traumatized by the sexual abuse perpetrated by Mr. Starr, which could be linked to his withdrawal and drinking problems:

> [T]hey certainly coincide with his abuse, and again research would indicate that substance abuse . . . is a direct result of being abused, so with other interviews and assessments and people that I've seen in therapy that

L'expert de H.L., M. Stewart, a témoigné que l'appelant avait avant tout été traumatisé par les abus sexuels, que l'on pouvait rattacher à son repli sur soi et à son problème d'alcool :

> [TRADUCTION] [I]ls coïncident certainement avec les abus sexuels et, là encore, les recherches indiquent que la toxicomanie [. . .] est une conséquence directe de l'abus, alors si je me fie à d'autres entrevues et évaluations et

have undergone sexual abuse, they find it extremely difficult to concentrate . . . .

Mr. Stewart explained that some "resilient" children are able to "shrug off" sexual abuse, with the benefit of a strong home and family life and the opportunity to disclose the abuse in a safe manner. Children who have been abused by a trusted authority figure, on the other hand, are more adversely affected.

The trial judge, Klebuc J., accepted the evidence of H.L. and the experts. He found that the sexual assaults committed by Mr. Starr caused H.L. to suffer enormous humiliation, self-blame and loss of self-worth, to lose interest in his education, in part due to his inability to concentrate, and to develop alcoholism.

Klebuc J. recognized that H.L. had a dysfunctional home life. He found, however, that no divisible injury could be attributed to it; nor was it a "necessary cause" of H.L.'s injuries. There was no evidence that H.L. suffered from a "crumbling skull", or pre-existing condition that would have led to his losses regardless of the sexual battery (see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 34-36). Rather, if H.L. was particularly vulnerable, this amounted to a "thin skull", within the meaning of *Athey*, exonerating neither Canada nor Mr. Starr from their liability for the consequences.

H.L. was unable to retain meaningful employment between 1978 and 1987 (the "first period"). During that time, he drank heavily and was incarcerated frequently. He relied on social assistance to meet his needs. Between 1988 and 2000 (the "second period"), he worked sporadically.

H.L. testified that his inability to maintain steady employment was attributable to his abuse of alcohol, manifested by extensive and recurring periods of indulgence.

The impact of the sexual assaults on H.L.'s ability to maintain steady employment was addressed as well by the experts. Dr. Arnold, for example,

aux personnes que j'ai vues en thérapie, la victime d'abus sexuels a énormément de difficulté à se concentrer . . .

26

M. Stewart a expliqué que certains enfants « résilients » bénéficiant de liens familiaux étroits et ayant la possibilité de dévoiler l'abus en toute confiance peuvent se « délester » de l'abus sexuel. Par contre, l'enfant abusé sexuellement par une personne en situation d'autorité en qui il avait confiance est plus gravement atteint.

27

En première instance, le juge Klebuc a ajouté foi aux témoignages de H.L. et des experts. Il a conclu que les agressions sexuelles commises par M. Starr avaient amené H.L. à ressentir une grande humiliation, à s'en prendre à lui-même, à perdre son estime de soi, à se désintéresser de ses études, en partie à cause de son incapacité à se concentrer, et à sombrer dans l'alcool.

28

Le juge Klebuc a reconnu que H.L. avait grandi au sein d'une famille dysfonctionnelle. Il a cependant conclu qu'aucune partie du préjudice ne pouvait être imputée séparément à ce fait, qui ne constituait pas non plus une « cause nécessaire » du préjudice subi. Rien ne prouvait que H.L. souffrait d'une vulnérabilité déjà « active » ou d'un état préexistant qui aurait causé le préjudice indépendamment de l'agression sexuelle (voir *Athey c. Leonati*, [1996] 3 R.C.S. 458, par. 34-36). En fait, si H.L. était particulièrement vulnérable, il s'agissait d'une vulnérabilité « latente », au sens de l'arrêt *Athey*, ne soustrayant ni l'État ni M. Starr à leur responsabilité pour les conséquences subies.

29

Entre 1978 et 1987 (la « première période »), H.L. n'a pu conserver un emploi convenable. Il buvait beaucoup et se retrouvait souvent derrière les barreaux. Il avait recours à l'aide sociale pour subvenir à ses besoins. De 1988 à 2000 (la « seconde période »), il a travaillé sporadiquement.

30

H.L. a témoigné qu'il n'avait pu conserver un emploi à cause de sa consommation excessive d'alcool, qui se manifestait par de longues et nombreuses cuites.

31

Les experts se sont aussi prononcés sur l'incidence des abus sexuels sur la capacité de H.L. de conserver un emploi. Le Dr Arnold, par exemple,

testified to the "chain of events" set into motion by the sexual abuse perpetrated by Mr. Starr. He stated that this "triggering event" led to alcohol and school problems, a loss of confidence in the school system, and a diminished "work ethic", which Dr. Arnold defined as H.L.'s "ability to hold work and be able to regularly show up and those kinds of things". Dr. Arnold explained that sexual abuse by an authority figure, both generally and in H.L.'s specific circumstances, could lead to distrust of authority figures, including teachers, police, employers, judges, doctors, and medical care workers.

a fait état de la « suite d'événements » qui avait suivi l'agression. Il a déclaré que cet « événement déclencheur » avait mené à l'alcool et aux problèmes à l'école, à la perte de confiance dans le système scolaire et à l'affaiblissement de la « morale du travail », qu'il a définie comme la [TRADUCTION] « capacité à conserver un emploi et à se présenter régulièrement au travail, et ce genre de chose ». Le Dr Arnold a expliqué que l'abus sexuel perpétré par une personne en situation d'autorité, tant en général que dans la situation particulière de H.L., pouvait entraîner une perte de confiance dans les figures d'autorité, notamment les professeurs, les policiers, les employeurs, les juges, les médecins et le personnel soignant.

32 Similarly, Mr. Stewart testified that the sexual abuse would cause H.L. to have negative self-esteem, a poor self-image and a lack of confidence. These personality traits, he added, detrimentally affect one's ability to secure and maintain employment.

Dans la même veine, M. Stewart a témoigné que l'abus sexuel entraîne une perte d'estime de soi, une image de soi négative et un manque de confiance en soi qui nuisent à la capacité de trouver et de conserver un emploi.

33 The evidence given by H.L. and the experts satisfied Klebuc J. that H.L.'s poor employment record during the "first period" was attributable to his alcoholism, emotional difficulties, and criminality, which were in turn attributable to the sexual abuse perpetrated by Mr. Starr. He found as well that H.L.'s sporadic work record during the "second period" was consistent with the emotional difficulties described by the experts in their psychological assessments.

Les témoignages de H.L. et des experts ont convaincu le juge Klebuc que si H.L. avait peu travaillé pendant la « première période » c'était à cause de son alcoolisme, de ses difficultés émotionnelles et de sa criminalité, qui eux étaient attribuables aux abus sexuels commis par M. Starr. Il a également conclu que les emplois occupés sporadiquement par H.L. pendant la « seconde période » s'inscrivaient dans la suite logique des difficultés émotionnelles décrites par les experts dans leurs évaluations psychologiques.

34 In the result, Klebuc J. maintained H.L.'s action against Mr. Starr and the Government of Canada. He found that the criteria for the imposition of vicarious liability on Canada had been met, and awarded H.L. a total of $80,000 in non-pecuniary damages, $296,527.09 in pecuniary damages and $30,665 in estimated pre-judgment interest.

Le juge Klebuc a donc accueilli l'action de H.L. contre M. Starr et le gouvernement du Canada. Il a jugé réunies les conditions auxquelles l'État pouvait être tenu responsable du fait d'autrui. Il a accordé 80 000 $ au total à titre de dommages-intérêts non pécuniaires, 296 527,09 $ à titre de dommages-intérêts pécuniaires et 30 665 $ à titre d'intérêt avant jugement.

35 The non-pecuniary damages included $60,000 for the losses and injuries, including emotional distress, that H.L. had suffered — and would continue to suffer — as a consequence of Mr. Starr's abuse, and aggravated damages of $20,000.

Les dommages-intérêts non pécuniaires se composaient de 60 000 $ pour les pertes et le préjudice, y compris la détresse émotionnelle, que H.L. avait subis — et qu'il continuerait de subir — à cause des actes répréhensibles de M. Starr, ainsi que de dommages-intérêts majorés de 20 000 $.

The pecuniary damages were determined as follows. Klebuc J. was satisfied that the appellant would have been able and willing to work, but for his emotional difficulties and resulting dependence on alcohol. Relying on Statistics Canada data submitted on consent, Klebuc J. estimated that H.L. would have worked as a construction or agricultural labourer 25 weeks annually, during the "first period" (1978-87), earning a total of $27,150.

36 Voici comment le montant des dommages-intérêts pécuniaires a été arrêté. Le juge Klebuc s'est dit convaincu que l'appelant aurait été en mesure et désireux de travailler n'eût été ses difficultés émotionnelles et la dépendance à l'alcool qui en résultait. Se fondant sur des données de Statistique Canada produites sur consentement, il a supposé que H.L. aurait été ouvrier de ferme ou du bâtiment 25 semaines par année et aurait gagné au total 27 150 $ au cours de la « première période » (1978 à 1987).

Klebuc J. found that H.L. would have maintained full-time employment in automotive repair during the "second period" (1988-2000). Relying here again on Statistics Canada data, he applied the median rate of $330 per week for all persons engaged in the repair and overhaul of motor vehicles. He discounted this amount by a 20 percent contingency factor to reflect H.L.'s vulnerability to job loss due to his limited education and cut off this branch of the award at the date of a back injury suffered by H.L. After deducting the income actually earned by H.L., Klebuc J. estimated a residual loss in earnings of $90,187.09 for the period.

37 Le juge Klebuc a conclu que, pendant la deuxième période (1988 à 2000), H.L. aurait occupé un emploi à temps plein dans le domaine de la réparation d'automobiles. Dans les données de Statistique Canada, le salaire hebdomadaire moyen d'une personne travaillant dans le domaine de la réparation et de la révision de véhicules moteur était de 330 $. Il a retranché 20 p. 100 pour tenir compte du risque de perte d'emploi imputable au faible niveau d'instruction de H.L. et il a arrêté le calcul le jour où ce dernier s'était blessé au dos. Après avoir soustrait le revenu effectivement gagné par H.L., il a estimé à 90 187,09 $ la perte de revenus pendant la période.

Klebuc J. then considered H.L.'s claim for loss of future earnings and, in the absence of specific evidence in this regard, relied inferentially on the evidence relating to H.L.'s past earning capacity. He estimated H.L.'s future income, but for Mr. Starr's misconduct, at no less than $17,160 annually, and deducted H.L.'s average earnings in the past to arrive at an annual income loss of $12,533 for the remainder of H.L.'s projected working life.

38 Le juge Klebuc s'est ensuite penché sur la perte de revenus ultérieure alléguée et, vu l'absence d'éléments de preuve précis à cet égard, il s'est fondé, par inférence, sur la preuve relative à la capacité de gain antérieure de H.L. Il a estimé que n'eût été les actes répréhensibles de M. Starr, H.L. aurait gagné pas moins de 17 160 $ par année. Après avoir soustrait le revenu moyen antérieur de H.L., il est arrivé à une perte de revenus annuelle de 12 533 $ pour le reste de la vie active projetée.

IV. The Court of Appeal

IV. La Cour d'appel

The Court of Appeal dismissed Canada's appeal as it related to vicarious liability and to the $80,000 award for non-pecuniary damages, but allowed the appeal in relation to the pecuniary damages and pre-judgment interest. H.L.'s cross-appeal was dismissed except as it related to $6,500 in damages for future care: (2002), 227 Sask. R. 165, 2002 SKCA 131.

39 La Cour d'appel a rejeté l'appel du procureur général du Canada quant à la responsabilité du fait d'autrui et aux dommages-intérêts non pécuniaires de 80 000 $, mais elle l'a accueilli relativement aux dommages-intérêts pécuniaires et à l'intérêt avant jugement. Elle a rejeté l'appel incident de H.L., sauf quant à l'indemnité de 6 500 $ pour soins futurs : (2002), 227 Sask. R. 165, 2002 SKCA 131.

Writing for the court, Cameron J.A. noted that the appeal and cross-appeal were based on s. 7(2)(a)

40 Se prononçant au nom de la Cour d'appel, le juge Cameron a signalé que l'appel et l'appel incident

and s. 13 of the *2000 Act*. In his view, these provisions embody a legislative choice for an unlimited right of appeal, embracing every component of the decision at trial that engages s. 13 of the *2000 Act*.

étaient fondés sur l'al. 7(2)a) et l'art. 13 de la *Loi de 2000*. Selon lui, ces dispositions traduisaient la volonté du législateur d'accorder un droit d'appel non restreint à l'égard de chacun des éléments de la décision de première instance faisant jouer l'art. 13 de la *Loi de 2000*.

41 Cameron J.A. accepted the binding authority of *Lensen*, which was based on s. 8 of *The Court of Appeal Act*, R.S.S. 1978, c. C-42 ("*1978 Act*"). Cameron J.A. acknowledged that s. 14 of the *2000 Act*, which replaced s. 8, differed in syntax but not in substance from its predecessor. He noted that *Lensen* had been applied by the Saskatchewan Court of Appeal on innumerable occasions to limit the broad power of appellate review under s. 14 and its predecessor on issues of credibility. A trial judge's assessment of credibility, he said, cannot be interfered with on appeal in the absence of palpable and overriding error.

Le juge Cameron a reconnu être lié par l'arrêt *Lensen* rendu sur le fondement de l'art. 8 de la *Court of Appeal Act*, R.S.S. 1978, ch. C-42 (« *Loi de 1978* »). Il a convenu que l'art. 14 de la *Loi de 2000*, qui a remplacé l'art. 8, était différent sur le plan de la syntaxe, mais non sur le fond. Il a signalé que la Cour d'appel de la Saskatchewan avait appliqué l'arrêt *Lensen* à d'innombrables occasions pour limiter, en matière de crédibilité, le vaste pouvoir de révision en appel que conféraient l'art. 14 et la disposition qu'il avait remplacée. Il a ajouté que l'appréciation de la crédibilité par un juge de première instance ne pouvait être modifiée en appel à défaut d'une erreur manifeste et dominante.

42 Cameron J.A. was of the opinion, however, that no such limit governs inferences of fact and questions of mixed fact and law. This, he said, was the traditional view adopted by the Saskatchewan Court of Appeal, as evidenced by *Markling v. Ewaniuk*, [1968] S.C.R. 776, applied in *Kosinski v. Snaith* (1983), 25 Sask. R. 73 (C.A.).

Le juge Cameron a cependant estimé que pareille restriction ne s'appliquait ni aux inférences de fait ni aux questions mixtes de fait et de droit. Tel était le point de vue adopté jusqu'alors par la Cour d'appel de la Saskatchewan, comme l'atteste l'application de l'arrêt *Markling c. Ewaniuk*, [1968] R.C.S. 776, dans *Kosinski c. Snaith* (1983), 25 Sask. R. 73 (C.A.).

43 Cameron J.A. acknowledged that a set of uniform national standards governing appellate review has evolved in Canada for inferences of fact and questions of mixed fact and law, but considered that *Housen* had extended the measure of appellate deference traditionally associated with findings of credibility to other components of the decision at trial. In his view, this trend toward increased deference required reconsideration, especially for Saskatchewan, where the right of appeal and the powers of the court to act on that right are set out in the *2000 Act*.

Le juge Cameron a reconnu qu'un ensemble de normes nationales uniformes s'était constitué au Canada à l'égard de la révision en appel des inférences de fait et des questions mixtes de fait et de droit. Il a toutefois estimé que l'arrêt *Housen* avait étendu la déférence dont faisaient traditionnellement l'objet en appel les conclusions relatives à la crédibilité aux autres éléments de la décision de première instance. Selon lui, il y avait lieu de reconsidérer cette tendance à une déférence accrue, surtout en Saskatchewan où la *Loi de 2000* définissait le droit d'appel et les pouvoirs de la Cour d'appel.

44 Cameron J.A. regretted that the general standard of appellate review had shifted from appeal by way of rehearing, which he viewed as traditional in Saskatchewan, to the more deferential standard of review for error.

Le juge Cameron a dit regretter que l'on soit passé de l'appel par voie de nouvelle audition, qu'il jugeait traditionnel en Saskatchewan, à l'appel par voie de contrôle d'erreur, qui commande une plus grande déférence.

Cameron J.A. suggested that *Housen* underscores the divide between the current standards of judicially limited appellate review and the broad appellate power granted by the Saskatchewan legislature.

On the merits of the appeal, Cameron J.A. concluded that the award for pecuniary damages lacked an evidentiary foundation and therefore could not stand. He found the following errors in the trial judge's awards of $117,337.09 for loss of past earning capacity and $179,190 for loss of future earning capacity:

1. The trial judge erred in failing to consider the plaintiff's duty to mitigate.

2. The trial judge did not take into account the extent to which the defendant Mr. Starr's wrongful acts contributed to the loss of earnings. He ought to have had regard for the possibility that H.L. would have been unable to cope with his alcohol-related problems irrespective of the sexual assault by Mr. Starr.

3. The trial judge awarded H.L. damages for loss of earning capacity while H.L. was incarcerated. In this regard, Cameron J.A. found that the trial judge had erred in attributing the plaintiff's criminal behaviour to the wrongdoing of Mr. Starr.

4. The trial judge did not address the issue of whether the social assistance benefits received by H.L. constituted offsetting collateral benefits.

Acting on its own view of the evidence, the Court of Appeal held that H.L. had not established that he was wholly or largely unable to work because of the sexual abuse by Mr. Starr. In its view, the evidence simply proved that H.L. did not work during the first period (1978 to 1987) and worked only sporadically during the second period (1988 to 2000). An inference that Mr. Starr's abuse caused H.L.'s reduced earning capacity would require more convincing evidence than was adduced in this case. The court

45 Il a fait observer que l'arrêt *Housen* mettait en évidence l'écart entre les normes de révision actuellement applicables en appel donnant lieu à un pouvoir de contrôle judiciairement limité et le vaste pouvoir conféré par la législature de la Saskatchewan.

46 Sur le fond, le juge Cameron a conclu que l'octroi de dommages-intérêts pécuniaires n'était fondé sur aucun élément de preuve et ne pouvait donc pas être maintenu. Voici les erreurs qu'il a relevées dans la décision du juge de première instance d'accorder la somme de 117 337,09 $ pour la perte de capacité de gain antérieure et de 179 190 $ pour la perte de capacité de gain ultérieure :

1. Le juge de première instance a omis à tort de prendre en considération l'obligation du demandeur de limiter le préjudice.

2. Il n'a pas tenu compte de la mesure dans laquelle les actes fautifs du défendeur, M. Starr, avaient contribué à la perte de revenus. Il aurait dû considérer la possibilité que H.L. n'ait pas réussi à surmonter ses problèmes d'alcool indépendamment de l'agression sexuelle perpétrée par M. Starr.

3. Il a accordé des dommages-intérêts pour la perte de capacité de gain pendant l'incarcération de H.L. À cet égard, le juge Cameron a conclu qu'il avait eu tort d'attribuer le comportement criminel du demandeur aux actes répréhensibles de M. Starr.

4. Il ne s'est pas demandé si les prestations d'aide sociale touchées par H.L. constituaient des prestations parallèles déductibles.

47 S'appuyant sur sa propre appréciation de la preuve, la Cour d'appel a conclu que H.L. n'avait pas établi que les abus sexuels l'avaient rendu totalement ou en grande partie incapable de travailler. À son avis, la preuve établissait simplement que H.L. n'avait pas travaillé pendant la première période (1978 à 1987) et n'avait travaillé que sporadiquement pendant la seconde (1988 à 2000). Une inférence selon laquelle la capacité de gain réduite était imputable à l'agression devait, selon elle, s'appuyer sur une preuve plus

found that H.L.'s sporadic work record was, in itself, as consistent with choice as with disability.

convaincante que celle offerte en l'espèce. Elle a conclu que si H.L. avait travaillé sporadiquement, ce pouvait être tant par choix qu'à cause d'une incapacité.

48 Finally, the court recalled that expert witnesses can provide opinion evidence only on matters within their recognized field of expertise. Beyond that, their opinion evidence is inadmissible and, if admitted, entitled to no weight. According to the Court of Appeal, the two expert witnesses in this case were allowed to "roam at large" and to express opinions that they were not qualified to give.

Enfin, la Cour d'appel a rappelé qu'un témoin expert ne pouvait donner son opinion que sur des sujets relevant de son domaine d'expertise. Son opinion était par ailleurs inadmissible et, si elle était admise, elle n'a aucune valeur. Dans la présente affaire, les deux témoins experts avaient pu [TRADUCTION] « s'écarter du sujet » et exprimer des opinions qui outrepassaient leur compétence.

49 The Court of Appeal thus set aside the award of pecuniary damages on the ground that, on its assessment, the evidence fell short of proving the loss.

La Cour d'appel a donc annulé les dommages-intérêts pécuniaires au motif que, suivant son évaluation, la perte n'était pas étayée par la preuve.

50 H.L. now appeals to this Court from the decision of the Court of Appeal.

H.L. en appelle aujourd'hui devant notre Cour de la décision de la Cour d'appel.

V. Discussion

V. Analyse

51 The appeal raises two main issues:

1. What is the correct standard of review by provincial appellate courts on questions of fact, and is that standard different for the Court of Appeal for Saskatchewan?
2. Did the Saskatchewan Court of Appeal misapply the governing standard to the trial judge's findings of fact in this case?

Le pourvoi soulève deux questions principales :

1. Quelle norme de révision une cour d'appel provinciale doit-elle appliquer à l'égard d'une question de fait, et cette norme est-elle différente pour la Cour d'appel de la Saskatchewan?
2. La Cour d'appel de la Saskatchewan a-t-elle mal appliqué la norme appropriée aux conclusions de fait tirées en l'espèce par le juge de première instance?

A. *The Applicable Standard of Review: Introduction*

A. *La norme de révision applicable : Introduction*

52 Fact finding in the litigation context involves a series of cerebral operations, some simple, others complex, some sequential, others simultaneous. The entire process is generally reserved in Canada to courts of first instance. In the absence of a clear statutory mandate to the contrary, appellate courts do not "rehear" or "retry" cases. They review for error.

L'appréciation des faits dans le contexte d'un litige suppose une série d'opérations mentales qui peuvent être simples ou complexes, successives ou simultanées. Au Canada, elle est généralement du seul ressort des tribunaux de première instance. À moins que le législateur ne lui confère clairement le pouvoir de le faire, une cour d'appel ne « réentend » pas une affaire ni ne l'« instruit à nouveau ». Elle vérifie si la décision est exempte d'erreur.

53 The standard of review for error has been variously described. In recent years, the phrase "palpable and overriding error" resonates throughout the

Le contrôle d'erreur a été décrit de différentes façons. Ces dernières années, l'expression « erreur manifeste et dominante » trouve un écho dans toute

cases. Its application to all findings of fact — findings as to "what happened" — has been universally recognized; its applicability has not been made to depend on whether the trial judge's disputed determination relates to credibility, to "primary" facts, to "inferred" facts or to global assessments of the evidence.

la jurisprudence. L'application de cette norme à toutes les conclusions de fait — celles portant sur « ce qui s'est passé » — est universellement reconnue; elle n'est pas subordonnée à ce que la décision contestée du juge de première instance touche à la crédibilité, à des faits prouvés directement, à des faits « inférés » ou à l'appréciation globale de la preuve.

54

Nor has the standard been said to vary according to whether we are concerned with what Hohfeld long ago described as "evidential" or "constitutive" facts (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923), at p. 32). Nor, put differently, has the standard been said to vary according to whether our concern is with direct proof of a fact in issue, or indirect proof of facts from which a fact in issue has been inferred.

Nul n'a prétendu non plus que la norme variait selon que l'on se trouve ou non en présence de faits que Hohfeld a qualifiés, il y a longtemps, de « probatoires » ou de « constitutifs » (voir W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923), p. 32). L'on n'a pas dit non plus, en d'autres termes, que la norme variait selon que l'on avait affaire ou non à la preuve directe d'un fait en litige ou à la preuve indirecte de faits à partir desquels un fait en litige a été inféré.

55

"Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.

L'expression « erreur manifeste et dominante » décrit de manière à la fois élégante et colorée la norme bien établie et généralement applicable en appel à l'égard d'une conclusion de fait tirée lors du procès. Elle ne supplante cependant pas les autres formulations de la norme applicable. Par exemple, dans l'arrêt *Housen*, les juges majoritaires (au par. 22) et les juges minoritaires (au par. 103) ont convenu que les inférences de fait « manifestement erronée[s] » tirées au procès pouvaient être annulées en appel. Les deux expressions consacrent le même principe : une cour d'appel modifiera les conclusions de fait du juge de première instance seulement si elle peut relever clairement l'erreur alléguée et s'il est établi que cette erreur a joué dans la décision.

56

In my respectful view, the test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence". In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, McLachlin J. (as she then was) explained why courts of appeal must show particular deference to trial courts on issues of credibility. At the same time, however, she noted (at pp. 131-32) that

À mon humble avis, le critère est également rempli lorsque les conclusions de fait du juge de première instance peuvent véritablement être qualifiées de « déraisonnables » ou de « non étayées par la preuve ». Dans l'arrêt *R. c. W. (R.)*, [1992] 2 R.C.S. 122, la juge McLachlin (maintenant Juge en chef) a expliqué pourquoi, en matière de crédibilité, une cour d'appel doit faire preuve d'une déférence particulière envers un tribunal de première instance. Elle a toutefois fait observer (aux p. 131-132) que

it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

The statutory framework in criminal matters is, of course, different in certain respects. But as a matter of principle, it seems to me that unreasonable findings of fact — relating to credibility, to primary or inferred "evidential" facts, or to facts in issue — are reviewable on appeal because they are "palpably" or "clearly" wrong. The same is true of findings that are unsupported by the evidence. I need hardly repeat, however, that appellate intervention will only be warranted where the court can explain why or in what respect the impugned finding is unreasonable or unsupported by the evidence. And the reviewing court must of course be persuaded that the impugned factual finding is likely to have affected the result.

la cour d'appel conserve le pouvoir d'écarter un verdict fondé sur des conclusions relatives à la crédibilité dans les cas où, après avoir étudié l'ensemble de la preuve et tenu compte des avantages du juge de première instance, elle conclut que le verdict est déraisonnable.

Évidemment, en matière criminelle, le cadre législatif diffère à certains égards. Mais, en principe, il semble que les conclusions de fait déraisonnables — touchant à la crédibilité, à des faits « probatoires » prouvés directement ou inférés ou à des faits en litige — peuvent être modifiées en appel parce qu'elles sont « manifestement » ou « clairement » erronées. Il en va de même des conclusions non étayées par la preuve. Toutefois, faut-il le répéter, l'intervention en appel ne sera justifiée que si la cour d'appel peut préciser pour quel motif ou en quoi la conclusion de fait contestée est déraisonnable ou non étayée par la preuve. Et le tribunal de révision doit évidemment être convaincu que cette conclusion a vraisemblablement joué dans la décision.

57 I find it helpful, in concluding on this point, to reproduce Professor Zuckerman's summary of the governing principles in England:

> As a general principle, an appeal court must not interfere with findings of fact made by the lower court for the simple reason that the judge who saw and heard the witnesses is better placed to assess their reliability and draw inferences from their testimony. An appeal court will interfere only if it concludes that no reasonable court could have reached such conclusions, or if the lower court failed to take crucial factors into consideration. . . .
>
> . . .
>
> . . . It follows that, if the appeal court cannot conclude that the lower court's inference from the primary facts was wrong, in the sense that it fell outside the range of inferences that a reasonable court could make, the appeal court should allow the lower court's decision to stand. The nature of the appellate evaluation of the lower court's decision will vary in accordance with the type of judgment that the lower court was called upon to make. But whatever the nature of the issues and however wide or narrow is the room for disagreement, the test remains the same: was the lower court's decision wrong. . . .
>
> A decision will be wrong if it was founded on an incorrect interpretation of statute, or if it wrongly applied

Pour conclure sur le sujet, voici comment le professeur Zuckerman résume les principes applicables en Angleterre :

> [TRADUCTION] En principe, une cour d'appel ne doit pas modifier les conclusions de fait du tribunal inférieur pour la simple raison que le juge qui a vu et entendu les témoins est mieux placé pour apprécier la fiabilité de leur témoignage et en tirer des inférences. Une cour d'appel n'interviendra que si elle estime qu'aucun tribunal raisonnable n'aurait pu arriver à de telles conclusions, ou que le tribunal inférieur n'a pas tenu compte de facteurs cruciaux. . .
>
> . . .
>
> . . . Partant, si la cour d'appel n'est pas en mesure de conclure que l'inférence tirée par le tribunal inférieur à partir des faits prouvés directement était erronée, en ce sens qu'elle ne figurait pas parmi les inférences qu'un tribunal raisonnable pouvait tirer, la décision du tribunal inférieur doit être maintenue. La nature de l'appréciation de la décision du tribunal inférieur varie selon le type de jugement que celui-ci était appelé à rendre. Mais quelle que soit la nature des questions en litige, et peu importe qu'il y ait peu ou amplement matière à désaccord, le critère demeure le même : la décision du tribunal inférieur était-elle erronée? . . .
>
> Une décision est erronée si elle est fondée sur une interprétation incorrecte d'une loi, sur l'application

a legal principle, or if it was based on a plainly erroneous factual conclusion. . . . Put another way, as long as the lower court's conclusions represent a reasonable inference from the facts, the appeal court must not interfere with its decision.

(A. A. S. Zuckerman, *Civil Procedure* (2003), at pp. 765-68)

Moreover, procedural changes governing civil appeals in England that took effect in May of 2000 do not appear from subsequent decisions of the Court of Appeal to have altered substantially the previous approach to appellate review:

When the Court of Appeal heard appeals on questions of fact [under the old procedure] the court was essentially conducting a review of the findings made by the judge below . . . . Our task [under the new regime] is essentially no different from what it was — we consider the judgment testing it against the evidence available to the judge and we ask, as we used to ask, whether it was wrong.

(*Assicurazioni Generali SpA v. Arab Insurance Group*, [2003] 1 W.L.R. 577 (C.A.), *per* Ward L.J., at para. 195)

In determining whether or not the judgment appealed from was so "wrong", whether under the new or the old regime,

the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she been called upon to make it in the court below. Something more is required than personal unease and something less than perversity has to be established. The best formulation for the ground in between where a range of adverbs may be used — "clearly", "plainly", "blatantly", "palpably" wrong, is . . . whether that finding by the trial judge exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible.

(*Assicurazioni*, *per* Ward L.J., at para. 197)

For present purposes, I find it unnecessary to consider in detail how the standard of appellate review has been applied in England either before or since the reforms that took effect in May of 2000. I am content with two observations.

erronée d'un principe juridique ou sur une conclusion factuelle clairement erronée. [. . .] Autrement dit, tant que les conclusions du tribunal inférieur constituent une inférence raisonnable tirée des faits, la cour d'appel ne doit pas modifier la décision.

(A. A. S. Zuckerman, *Civil Procedure* (2003), p. 765-768)

58 De plus, entrées en vigueur en mai 2000, les modifications apportées à la procédure applicable à l'appel civil en Angleterre ne semblent pas, au vu des décisions rendues depuis par la Cour d'appel, avoir modifié sensiblement la conception antérieure de l'appel :

[TRADUCTION] Lorsque [suivant l'ancienne procédure] la Cour d'appel entendait un appel portant sur une question de fait, elle se livrait essentiellement au contrôle des conclusions du juge de première instance [. . .] Notre rôle [sous le nouveau régime] demeure essentiellement le même — nous examinons le jugement au regard de la preuve présentée au juge et nous nous demandons, tout comme avant, s'il était erroné.

(*Assicurazioni Generali SpA c. Arab Insurance Group*, [2003] 1 W.L.R. 577 (C.A.), le lord juge Ward, par. 195)

Pour déterminer si le jugement porté en appel était « erroné », tant sous le nouveau régime que sous l'ancien,

[TRADUCTION] la cour d'appel ne doit pas conclure que le jugement de première instance est erroné simplement parce qu'il diffère de celui qu'elle aurait rendu. Il faut davantage qu'une réticence personnelle et moins qu'une iniquité. Situé entre les deux, le critère applicable est celui de la conclusion « clairement », « simplement », « nettement » ou « manifestement » erronée. Il faut donc se demander si la conclusion tirée de la preuve par le juge de première instance s'inscrit ou non dans le cadre, très large, à l'intérieur duquel elle peut raisonnablement faire l'objet d'un désaccord.

(*Assicurazioni*, le lord juge Ward, par. 197)

59 Pour les besoins du présent pourvoi, je juge inutile d'examiner en détail la manière dont la norme de révision en appel a été appliquée en Angleterre avant ou depuis les modifications entrées en vigueur en mai 2000. Je ne formulerai que deux remarques.

60 First, the passages I have quoted describe the standard of appellate review in England in terms that are fully compatible with both the majority and the minority reasons in *Housen*.

Premièrement, les extraits précités décrivent la norme anglaise en des termes parfaitement compatibles avec les motifs des juges majoritaires et ceux des juges minoritaires dans *Housen*.

61 Second, on any view of the matter, English precedent provides no support for reading into Saskatchewan legislation, past or present, an appellate jurisdiction to "rehear" — in any sense of that term — determinations of fact made at trial. The English *Rules of the Supreme Court, 1883* expressly provided that "[a]ll appeals to the Court of Appeal shall be by way of rehearing." The governing statutes in Saskatchewan have never included equivalent or similar language.

Deuxièmement, quel que soit l'angle sous lequel on l'aborde, la jurisprudence anglaise ne permet aucunement d'interpréter les dispositions pertinentes de la Saskatchewan, actuellement ou anciennement en vigueur, comme conférant à la Cour d'appel le pouvoir de « réentendre » — quel que soit le sens donné à ce terme — une décision rendue en première instance relativement aux faits. Les *Rules of the Supreme Court, 1883* d'Angleterre disposaient expressément que [TRADUCTION] « [t]out appel interjeté devant la Cour d'appel était instruit par voie de nouvelle audition. » Les dispositions législatives pertinentes de la province n'ont jamais eu un libellé équivalent ou semblable.

B. *Housen v. Nikolaisen*

B. *Housen c. Nikolaisen*

62 The rules governing appellate intervention in Canada on matters of fact have been set out and reaffirmed in an unbroken line of cases over nearly three decades: *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Lensen*; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; and *Housen*.

Les règles régissant au Canada la modification en appel d'une conclusion de fait font l'objet d'une jurisprudence constante depuis près de trois décennies : *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2; *Lensen*; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Housen*.

63 *Housen*, like the present case, was an appeal from Saskatchewan where the Court of Appeal had reversed the trial judge. At issue was the trial judge's finding that a regional municipality was liable for a portion of the damages caused to the plaintiff in a traffic accident on a rural road. The Court was divided as to the standard of review applicable to the trial judge's findings of negligence (a finding of mixed law and fact) and causation (a finding of fact). In this case, we are concerned only with the standard of review on findings of fact.

Dans *Housen*, comme en l'espèce, le pourvoi provenait de la Saskatchewan, et la Cour d'appel avait infirmé la décision de première instance. Le litige portait sur la conclusion du juge de première instance selon laquelle la municipalité régionale était en partie responsable du préjudice subi par le demandeur lors d'un accident automobile sur une route rurale. Notre Cour était divisée quant à la norme de révision applicable aux conclusions relatives à la négligence (question mixte de fait et de droit) et à la causalité (question de fait). En l'espèce, seule nous intéresse la norme de révision applicable à une question de fait.

All nine justices agreed in *Housen* that an appellate court ought never to retry a case. They agreed as well that deference is owed to all findings of fact made by the trial judge, whether those findings are based on direct evidence or on inferences drawn from facts proved directly.

64 Les neuf juges ont convenu qu'une cour d'appel ne doit jamais instruire l'affaire à nouveau. Ils ont également reconnu que la déférence s'impose à l'égard de toutes les conclusions de fait du juge de première instance, qu'elles s'appuient sur une preuve directe ou sur des inférences tirées de faits établis directement.

Speaking for the majority, Iacobucci and Major JJ. stated, for example, that "to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact" (para. 19). Likewise, speaking for the minority, Bastarache J. agreed that "the standard of review is identical for both findings of fact and inferences of fact" (para. 103 (emphasis added)).

65 Au nom des juges majoritaires, les juges Iacobucci et Major ont affirmé, par exemple, que « l'application d'une [. . .] norme [moins exigeante] romprait avec la jurisprudence établie de notre Cour en la matière et serait contraire aux principes justifiant le respect d'une attitude empreinte de retenue à l'égard des constatations de fait » (par. 19). De même, s'exprimant au nom des juges minoritaires, le juge Bastarache a reconnu que « la norme de contrôle [était] la même et pour les conclusions de fait et pour les inférences de fait » (par. 103 (je souligne)).

It was in the application of this shared view as to the governing principle that the Court divided.

66 C'est la mise en pratique de ce consensus quant au principe applicable qui a divisé notre Cour.

Speaking for the majority, Iacobucci and Major JJ. held that all findings of fact, whether based on direct or circumstantial evidence, are only reviewable on a standard of palpable and overriding error. In their view, a panoply of policy reasons command appellate deference. These include the need to limit the cost of litigation and to promote the autonomy of trial proceedings, two reasons that are unrelated to the superior vantage point of the trial judge in hearing *viva voce* evidence.

67 Au nom des juges majoritaires, les juges Iacobucci et Major ont conclu que toutes les conclusions de fait, qu'elles s'appuient sur une preuve directe ou circonstancielle, n'étaient susceptibles de révision que selon la norme de l'erreur manifeste et dominante. À leur avis, un ensemble de raisons de principe commandaient la déférence en appel, dont la nécessité de réduire le coût de l'instance et de favoriser l'autonomie du procès, sans compter l'avantage dont bénéficie le juge de première instance du fait qu'il entend les témoignages de vive voix.

Bastarache J. did not dilute, still less abandon, the principle of deference with respect to findings of fact based on inferences. In his view, however, an inference was reviewable if it was not "reasonably . . . supported by the findings of fact that the trial judge reached":

> While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is

68 Le juge Bastarache n'a pas édulcoré, et encore moins abandonné, le principe de la déférence à l'égard des conclusions de fait fondées sur des inférences. À son avis, cependant, une inférence pouvait être écartée si elle n'était pas « raisonnablement [. . .] étayée par les conclusions de fait tirées par le juge de première instance » :

> Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve

entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added; para. 103.]

69 As I have already mentioned, there is no meaningful difference between a standard of "clearly wrong" and a standard of "palpable and overriding error". As Iacobucci and Major JJ. noted in *Housen*, at para. 5, the *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337 (emphasis added)). Moreover, no error could lead to a reversal unless it was "overriding" in the sense that it discredits the result.

70 The "palpable and overriding error" standard, apart from its resonance, nevertheless helps to emphasize that one must be able to "put one's finger on" the crucial flaw, fallacy or mistake. In the words of Vancise J.A., "[t]he appellate court must be certain that the trial judge erred and must be able to identify with certainty the critical error" (*Tanel*, at p. 223, dissenting, though not on this issue).

71 And yet, again as indicated earlier, I agree with Bastarache J. that there is no meaningful difference between

> concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts.

(*Housen*, at para. 104)

72 I have not overlooked that, according to the majority in *Housen*, the test to be applied in reviewing inferences of fact is "not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts" which, in its view, implied a stricter standard (para. 21 (emphasis in original)). The apparent concern of the majority was that, in drawing an analytical

étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait. [Je souligne; par. 103.]

Je le répète, il n'y a pas de différence marquée entre la norme du « manifestement erroné » et celle de l'« erreur manifeste et dominante ». Dans *Housen*, les juges Iacobucci et Major ont fait observer au par. 5 de leurs motifs que le *Trésor de la langue française* (1985), t. 11, définissait comme suit le mot « manifeste » : « . . . Qui est tout à fait évident, qui ne peut être contesté dans sa nature ou son existence. [. . .] *erreur manifeste* » (p. 317 (je souligne)). En outre, seule une erreur « dominante » — qui discrédite la décision rendue — pouvait mener à une infirmation.

Cependant, en plus de sa résonance, l'expression « erreur manifeste et dominante » contribue à faire ressortir la nécessité de pouvoir « montrer du doigt » la faille ou l'erreur fondamentale. Pour reprendre les termes employés par le juge Vancise, [TRADUCTION] « [l]a cour d'appel doit être certaine que le juge de première instance a commis une erreur et elle doit être en mesure de déterminer avec certitude l'erreur fatale » (*Tanel*, p. 223, motifs dissidents, mais pas sur ce point).

Pourtant, je l'ai signalé précédemment, je conviens avec le juge Bastarache qu'il n'y a aucune différence notable entre

> le fait de conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a constatés, et le fait de conclure que cette inférence n'était pas raisonnablement étayée par ces faits.

(*Housen*, par. 104)

Je n'oublie pas que, de l'avis des juges majoritaires dans *Housen*, la révision d'une inférence de fait « ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis », ce qui, selon eux, suppose l'application d'une norme plus stricte (par. 21 (souligné dans l'original)). Ils craignaient apparemment que, en

distinction between factual findings and factual inferences, the minority position might lead appellate courts to involve themselves in reweighing the evidence (para. 22). As well, the majority stated:

> If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. [Emphasis in original; para. 23.]

These passages from the majority reasons in *Housen* should not be taken to have decided that inferences of fact drawn by a trial judge are impervious to review though unsupported by the evidence. Nor should they be taken to have restricted appellate scrutiny of the judge's inferences to an examination of the primary findings upon which they are founded and the process of reasoning by which they were reached.

I would explain the matter this way. Not infrequently, different inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own. This fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen*.

In short, appellate courts not only may — but must — set aside all palpable and overriding errors of fact shown to have been made at trial. This applies no less to inferences than to findings of "primary" facts, or facts proved by direct evidence.

Courts of appeal across Canada, despite their understandable concern over these passages, have well understood the central message of three decades of jurisprudence in this Court, culminating in *Housen*. They have generally applied the palpable and overriding error standard to all findings of fact made at trial — albeit with varying degrees of enthusiasm.

faisant une distinction analytique entre les conclusions de fait et les inférences factuelles, les juges minoritaires n'incitent les cours d'appel à soupeser à nouveau la preuve (par. 22). Ils ont ajouté :

> Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle. [Souligné dans l'original; par. 23.]

73 Il ne faut pas conclure de ces passages des motifs majoritaires dans *Housen* que les inférences de fait tirées par le premier juge échappent à la révision même lorsqu'elles ne sont pas étayées par la preuve. Il ne faut pas non plus en déduire que leur révision en appel se limite à un examen des conclusions relatives à des faits prouvés directement sur lesquelles elles sont fondées et du raisonnement à l'issue duquel elles ont été tirées.

74 Je m'explique. Il n'est pas rare que des inférences différentes puissent raisonnablement être tirées des faits que le juge de première instance a tenus pour directement établis. L'examen en appel consiste à déterminer si les inférences du juge sont « raisonnablement étayées par la preuve ». Si elles le sont, le tribunal de révision ne peut soupeser la preuve à nouveau en substituant à l'inférence raisonnable retenue par le juge sa propre inférence tout aussi convaincante, sinon plus. Là encore, cette règle fondamentale est parfaitement compatible avec les motifs majoritaires et ceux de la minorité dans *Housen*.

75 En résumé, non seulement une cour d'appel peut écarter toute erreur de fait manifeste et dominante commise au procès, mais elle doit le faire. Cela vaut pour les inférences comme pour les conclusions relatives à des faits établis par preuve directe.

76 Malgré l'inquiétude compréhensible qu'ont suscité chez elles les passages précités, les cours d'appel du Canada ont bien saisi le principal message qui se dégageait de trois décennies d'arrêts de notre Cour, le dernier en date étant l'arrêt *Housen*. Elles ont généralement appliqué — quoique avec un enthousiasme variable — la norme de l'erreur manifeste et dominante à toutes les conclusions de fait tirées au procès.

C. *The Applicability of Housen in Saskatchewan*

C. *L'applicabilité de l'arrêt Housen en Saskatchewan*

77 We are urged to find on this appeal that the rule governing appellate intervention on matters of fact differs in Saskatchewan from the rest of Canada.

On nous exhorte à conclure en l'espèce que l'appel d'une conclusion de fait n'est pas soumis à la même règle en Saskatchewan et ailleurs au Canada.

78 *Housen* was an appeal from the Court of Appeal for Saskatchewan, but did not refer to the *2000 Act* or its predecessors. On the strength of this "omission", it is now argued that the Court in *Housen* misapprehended the scope of appellate review in Saskatchewan.

Dans *Housen*, le pourvoi visait une décision de la Cour d'appel de la Saskatchewan, mais ne renvoyait ni à la *Loi de 2000* ni aux lois qui l'ont précédée. Faisant fond sur cette « omission », l'on soutient aujourd'hui que notre Cour s'est méprise sur l'étendue du pouvoir de la Cour d'appel dans cette province.

79 This contention rests on three propositions. First, it is suggested that the *2000 Act*, like its predecessors, vests in the Court of Appeal for Saskatchewan a broader jurisdiction than is conferred by corresponding legislation on appellate courts elsewhere in Canada. Second, it is argued that the Court of Appeal for Saskatchewan, at least prior to *Housen*, had consistently interpreted its governing statute as granting a larger scope of review than *Housen* permits. Finally, it is contended that it was the intention of the Saskatchewan legislature in 2000, when it amended *The Court of Appeal Act*, to clarify that appellate review in that province was to proceed by way of rehearing.

Cette prétention repose sur trois affirmations. Premièrement, la *Loi de 2000*, comme les lois qui l'ont précédée, conférerait à la Cour d'appel de la Saskatchewan un pouvoir plus grand que celui accordé aux autres cours d'appel du Canada par leurs lois constitutives. Deuxièmement, la Cour d'appel de la Saskatchewan, du moins avant l'arrêt *Housen*, aurait toujours considéré que sa loi constitutive lui conférait un pouvoir de révision plus grand que celui défini dans cet arrêt. Enfin, en modifiant la *Court of Appeal Act* en 2000, la législature de la Saskatchewan aurait voulu préciser que, dans cette province, l'appel était instruit par voie de nouvelle audition.

80 None of these propositions is firmly rooted in fact or in law. An examination of both the former and present Acts, their legislative history, and their judicial interpretation in this Court and by the Saskatchewan Court of Appeal itself all lead to the same conclusion: appellate review in Saskatchewan has for a long time proceeded, and continues to proceed, on essentially the same basis as appellate review elsewhere in Canada. The appeal is a review for error, and not a review by rehearing.

Aucune de ces affirmations n'a d'assise factuelle ou juridique solide. Le libellé de l'ancienne loi et celui de la loi actuelle, l'historique législatif de chacune d'elles et leur interprétation par notre Cour et par la Cour d'appel de la Saskatchewan mènent à la même conclusion : en Saskatchewan, l'appel est instruit depuis longtemps et encore de nos jours suivant les mêmes critères, essentiellement, qu'ailleurs au Canada. Il s'agit donc d'un contrôle d'erreur, et non d'un appel instruit par voie de nouvelle audition.

D. *The Saskatchewan Court of Appeal Act*

D. *La Loi sur la Cour d'appel de la Saskatchewan*

81 These are the provisions of the *2000 Act* that set out the powers of the Court of Appeal for Saskatchewan:

Les dispositions suivantes de la *Loi de 2000* établissent les pouvoirs de la Cour d'appel de la Saskatchewan :

12(1) On an appeal, the court may:

12(1) Sur appel, la Cour peut :

(a) allow the appeal in whole or in part;

(b) dismiss the appeal;

(c) order a new trial;

(d) make any decision that could have been made by the court or tribunal appealed from;

(e) impose reasonable terms and conditions in a decision; and

(f) make any additional decision that it considers just.

(2) Where the court sets aside damages assessed by a jury, the court may assess any damages that the jury could have assessed.

13 Where issues of fact have been tried, or damages have been assessed, by a trial judge without a jury, any party is entitled to move against the decision of the trial judge, by motion for a new trial or otherwise:

. . .

(b) on the same grounds, including objections against the sufficiency of the evidence, or the view of the evidence taken by the trial judge, that are allowed in cases of trial or assessment of damages by a jury.

14 On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

Section 14 is of particular interest on this appeal. Cameron J.A. was of the view that it frees the Court of Appeal from the view of the evidence taken by the trial judge, and entitles it to draw its own inferences of fact.

82 While s. 14 refers to a "rehearing", it is clear from the context of the Act that this does not confer on the Court of Appeal the power to "rehear" trials. It simply provides that the powers available to the court on an appeal are available on the rehearing of an appeal. The term "rehearing" is

a) accueillir l'appel en tout ou en partie;

b) rejeter l'appel;

c) ordonner la tenue d'un nouveau procès;

d) rendre toute décision qui aurait pu être rendue par la Cour ou le tribunal qui a prononcé la décision frappée d'appel;

e) assortir une décision de modalités et de conditions raisonnables;

f) rendre toute autre décision qu'elle estime juste.

(2) Lorsqu'elle annule des dommages-intérêts adjugés par un jury, la Cour peut évaluer tous dommages-intérêts que le jury aurait pu évaluer.

13 Lorsqu'un juge du procès siégeant sans jury a rendu sa décision sur une question de fait ou évalué les dommages-intérêts, une partie peut attaquer la décision, notamment par voie de motion visant la tenue d'un nouveau procès :

. . .

b) pour les mêmes moyens, y compris pour insuffisance de preuve ou en raison des conclusions qu'en a tirées le juge, que ceux qui sont autorisés dans les cas où le procès a été tenu devant jury ou que les dommages-intérêts ont été évalués par un jury.

14 Lorsque la décision d'un juge du procès est portée en appel ou qu'une motion est présentée à cet égard, ou lors d'une nouvelle audience, la Cour n'est pas tenue d'ordonner la tenue d'un nouveau procès ou d'accepter les conclusions que le juge du procès a tirées de la preuve. La Cour se détermine en se fondant sur sa propre appréciation de la preuve et peut tirer les inférences factuelles et rendre la décision qu'aurait dû rendre, à son avis, le juge du procès.

L'article 14 revêt une importance particulière en l'espèce. Le juge Cameron a estimé qu'il soustrayait la Cour d'appel à l'obligation d'accepter les conclusions tirées de la preuve par le juge de première instance et l'autorisait à tirer ses propres inférences de fait.

Il ressort de la *Loi de 2000* dans son ensemble que même s'il fait mention d'une « nouvelle audience », l'art. 14 n'investit pas la Cour d'appel du pouvoir de « réentendre » une affaire. Il dit simplement que ses pouvoirs en appel peuvent être exercés lors de la nouvelle audition d'un appel.

used in the *2000 Act* in s. 16, which states that the court shall rehear an appeal in certain circumstances, for example, where this is made necessary by the death or resignation of two or more of the judges who heard the initial appeal. As the then Minister of Justice of Saskatchewan explained on second reading, the *2000 Act* (then Bill 80) "clarifies the procedure respecting rehearings", which are to take place if a rehearing of the appeal is required for reasons mentioned below (*Saskatchewan Hansard*, at p. 1626).

L'expression « nouvelle audience » est employée à l'art. 16, qui dispose que la Cour d'appel réentend un appel dans certaines circonstances, notamment lorsque l'exigent le décès ou la démission d'au moins deux des juges ayant entendu l'appel initial. Comme l'a expliqué en deuxième lecture le ministre de la Justice de la Saskatchewan de l'époque, la *Loi de 2000* (le projet de loi 80) [TRADUCTION] « clarifie la procédure relative à la tenue d'une nouvelle audience », qui aura lieu si la nouvelle audition d'un appel s'impose pour les motifs prévus expressément (*Saskatchewan Hansard*, p. 1626).

83 Though the statute uses more specific language, it is similar in effect to the corresponding statutes in other provinces and territories as regards the issue that concerns us here — authority to review primary findings of fact and inferences.

Même si elle est rédigée de façon plus précise, la *Loi de 2000* ressemble dans ses effets aux lois équivalentes des autres provinces et des territoires pour ce qui est de la question qui nous intéresse en l'espèce : le pouvoir de réviser les conclusions relatives à des faits prouvés directement et les inférences.

84 Thus, for example, a review of other provincial statutes reveals that British Columbia, Alberta, Manitoba, Ontario, and Prince Edward Island all explicitly allow their courts of appeal to "draw inferences of fact": *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 9(2); *Alberta Rules of Court*, Alta. Reg. 390/68, r. 518(c); *The Court of Appeal Act*, R.S.M. 1987, c. C240, s. 26(2); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(4)(a); *Supreme Court Act*, R.S.P.E.I. 1987, c. 66, s. 56(4)(a).

Par exemple, la Colombie-Britannique, l'Alberta, le Manitoba, l'Ontario et l'Île-du-Prince-Édouard autorisent tous expressément leurs cours d'appel à « tirer des inférences de fait » ou à « faire des déductions factuelles » : *Court of Appeal Act*, R.S.B.C. 1996, ch. 77, par. 9(2); *Alberta Rules of Court*, Alta. Reg. 390/68, règle 518c); *Loi sur la Cour d'appel*, L.R.M. 1987, ch. C240, par. 26(2); *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, al. 134(4)a); *Supreme Court Act*, R.S.P.E.I. 1987, ch. 66, al. 56(4)a).

85 Alberta, Manitoba, Prince Edward Island and Ontario also grant their respective courts of appeal the power to arrive at the decision the trial judge "ought" to have made: *Alberta Rules of Court*, r. 518(e); *The Court of Appeal Act* (Man.), s. 26(1); *Supreme Court Act* (P.E.I.), s. 56(1)(a); *Courts of Justice Act* (Ont.), s. 134(1)(a).

L'Alberta, le Manitoba, l'Île-du-Prince-Édouard et l'Ontario accordent également à leurs cours d'appel respectives le pouvoir de rendre la décision que le juge de première instance « aurait dû » rendre : *Alberta Rules of Court*, règle 518e); *Loi sur la Cour d'appel* (Man.), par. 26(1); *Supreme Court Act* (Î.-P.-É.), al. 56(1)a); *Loi sur les tribunaux judiciaires* (Ont.), al. 134(1)a).

86 Quebec confers on its Court of Appeal "all powers necessary" to the exercise of its jurisdiction (*Courts of Justice Act*, R.S.Q., c. T-16, s. 10) — a general power that could hardly have been expressed in broader terms — while the Atlantic provinces, the Northwest Territories, and Nunavut grant jurisdiction consistent with

Le Québec confère à sa cour d'appel « tous les pouvoirs nécessaires » pour donner effet à sa compétence (*Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16, art. 10) — un pouvoir général qu'il aurait été difficile de formuler plus largement —, alors que les provinces de l'Atlantique, les Territoires du Nord-Ouest et le Nunavut accordent à leurs cours

dates prior to the passing of their respective Acts.

87 In this light, I think it evident that the jurisdiction of the Saskatchewan Court of Appeal to review inferences of fact drawn by the trial judge is hardly exceptional, let alone unique. Other provincial or territorial courts of appeal are granted similar powers, expressly or implicitly, by their governing statutes. The *2000 Act* simply sets out those powers in more detail than some. A detailed enunciation of the powers conferred does not signify a legislative intent that they be more expansively exercised.

88 The Saskatchewan Court of Appeal is explicitly empowered to take its own view of what the evidence proves, to draw inferences of fact and to pronounce any decision that the trial judge ought to have pronounced. I do not think it open to question that other provincial appellate courts are endowed with these very same powers. But the scope of the powers conferred must not be confused with the manner in which they are to be exercised. In *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, Morden J.A., speaking for the court in a different context but on this very point, stated:

> The purpose of s. 17(2)(*b*)(i) of the *Divorce Act*, which enables us to "pronounce the judgment that ought to have been pronounced" is to prescribe the general kind of disposition open to us, on allowing an appeal, as an alternative to ordering a new trial . . . and is not intended, in my view, to provide the rule governing *when* we will interfere with the challenged judgment, *i.e.*, it does not set forth the standard for determining whether or not the challenged judgment should be set aside. [Emphasis in original; pp. 154-55.]

Harrington was expressly endorsed by this Court in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 824.

89 Neither in Saskatchewan nor elsewhere in Canada may courts of appeal, absent an express legislative instruction to the contrary, disregard the governing principle of appellate intervention

d'appel une compétence compatible avec celle qu'elles exerçaient à une date antérieure à l'adoption de leurs lois respectives.

Il me paraît donc évident que le pouvoir de la Cour d'appel de la Saskatchewan de réviser les inférences de fait tirées par le juge de première instance est loin d'être exceptionnel, encore moins unique. D'autres cours d'appel provinciales ou territoriales sont expressément ou implicitement investies de pouvoirs similaires par leurs lois constitutives. La *Loi de 2000* énonce simplement ces pouvoirs plus en détail, ce qui ne signifie pas que le législateur a voulu qu'ils soient exercés de manière plus expansive.

La Cour d'appel de la Saskatchewan est expressément autorisée à apprécier la preuve, à tirer des inférences de fait et à rendre la décision qu'aurait dû rendre le juge de première instance. Je ne crois pas que l'on puisse mettre en doute le fait que d'autres cours d'appel provinciales ont les mêmes pouvoirs. Or, l'étendue des pouvoirs accordés ne doit pas être confondue avec la manière dont il convient de les exercer. Dans *Harrington c. Harrington* (1981), 33 O.R. (2d) 150, s'exprimant au nom de la Cour d'appel dans un contexte différent, mais sur le même sujet, le juge Morden a dit ce qui suit :

> [TRADUCTION] L'alinéa 17(2)*b*)(i) de la *Loi sur le divorce*, qui nous permet de « rendre le jugement qui aurait dû être rendu » a pour objet de prescrire le type général de décision que nous pouvons rendre quand nous accueillons l'appel, au lieu d'ordonner un nouveau procès [. . .]; il n'a pas pour but, à mon avis, d'énoncer une règle régissant les cas *où* nous pouvons modifier le jugement attaqué, c.-à-d., il n'établit pas la norme applicable pour déterminer si le jugement attaqué doit ou non être annulé. [En italique dans l'original; p. 154-155.]

Notre Cour a expressément approuvé cet arrêt dans *Pelech c. Pelech*, [1987] 1 R.C.S. 801, p. 824.

À défaut d'une prescription expresse contraire de la loi, une cour d'appel ne peut, ni en Saskatchewan ni ailleurs au Canada, faire fi du principe régissant l'appel d'une conclusion de fait. Elle peut

on questions of fact. They may indeed make their own findings and draw their own inferences, but only where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable, or unsupported by the evidence.

effectivement tirer ses propres conclusions et inférences, mais seulement s'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou qu'il a tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve.

90 As I stated at the outset, the *2000 Act* neither bestows on the Court of Appeal for Saskatchewan unique powers of appellate intervention on questions of fact nor ordains their exercise in a manner that, within Canada, is exclusive to Saskatchewan.

Comme je l'ai dit au début des présents motifs, la *Loi de 2000* ne confère pas à la Cour d'appel de la Saskatchewan un pouvoir d'intervention unique à l'égard d'une question de fait ni ne prescrit l'exercice de ce pouvoir selon des modalités qui, au Canada, sont propres à la Saskatchewan.

E. *The Judicial Treatment of* The Court of Appeal Act *in Saskatchewan*

E. *L'interprétation de sa loi constitutive par la Cour d'appel de la Saskatchewan*

91 Prior to any intervention by this Court as to the appropriate standard of appellate review on questions of fact in Saskatchewan, the Court of Appeal's own case law under the *1978 Act*, the predecessor to the *2000 Act* that concerns us here, was entirely consistent with the principles elaborated in *Lensen* and *Housen*.

Avant même que notre Cour ne se prononce sur la norme de révision en appel applicable à l'égard d'une conclusion de fait en Saskatchewan, la Cour d'appel a elle-même appliqué la *Loi de 1978*, remplacée par la *Loi de 2000* visée en l'espèce, d'une manière en tous points conforme aux principes issus de *Lensen* et *Housen*.

92 The leading case in the province was *Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz* (1986), 49 Sask. R. 244, where the Court of Appeal found that a standard of palpable and overriding error applied to a trial judge's findings of fact. Sherstobitoff J.A., for himself and for Tallis J.A., provided an extensive, detailed and definitive analysis of the Court of Appeal's decisions concerning its jurisdiction to review findings of fact. Dealing specifically with s. 8 of the *1978 Act*, Sherstobitoff J.A. stated, at p. 248:

> While, on its face, s. 8 appears to confer not only the power, but a duty to "rehear" or "retry" a case, simple fairness and justice require a court of appeal to recognize that a trial judge has an immense advantage in assessing evidence and arriving at findings of fact as opposed to a court of appeal which is confined to an examination of a cold black and white record of a trial proceeding, completely devoid of the tension, emotion, colour, and atmosphere of a trial, all of which factors are immeasureably important in assisting a trial judge in arriving at his conclusions. It is for these reasons that a court of appeal must extend very substantial deference to the finding of facts of a trial judge. The issue has been considered on many occasions by the Supreme

L'arrêt de principe dans la province est *Board of Education of the Long Lake School Division No. 30 of Saskatchewan c. Schatz* (1986), 49 Sask. R. 244, où la Cour d'appel a conclu que la norme de l'erreur manifeste et dominante s'appliquait aux conclusions de fait du juge de première instance. S'exprimant également au nom du juge Tallis, le juge Sherstobitoff a procédé à l'analyse complète, détaillée et définitive des décisions de la Cour d'appel relatives à son pouvoir de réviser une conclusion de fait. Voici ce qu'il a dit au sujet de l'art. 8 de la *Loi de 1978*, à la p. 248 :

> [TRADUCTION] Si, à première vue, l'art. 8 paraît conférer non seulement le pouvoir, mais aussi l'obligation de « réentendre » une affaire ou de l'« instruire à nouveau », la simple équité et la justice la plus élémentaire requièrent d'un tribunal d'appel qu'il reconnaisse que le juge de première instance a l'immense avantage de pouvoir apprécier les témoignages et de constater les faits, par opposition à un tribunal d'appel, confiné à l'étude froide, sans nuance, du dossier de première instance, dénué de la tension, de l'émotion, du pittoresque et de l'atmosphère qui ont imprégné le procès et qui sont tous des facteurs incommensurablement importants et si utiles au juge de première instance pour arriver à ses conclusions. C'est pour ces raisons qu'un

Court of Canada and its decisions bear these principles out. [Emphasis added.]

The Court of Appeal in *Long Lake School Division* expressly adopted the jurisprudence of this Court setting out general standards of appellate review applicable to questions of fact, in particular citing *Stein v. The Ship "Kathy K"*, a classic enunciation of the principle of appellate deference to the findings of fact at trial.

93 Nor can it be contended, as Cameron J.A. suggested in the present case, that the Court of Appeal had traditionally distinguished, in considering its powers of review, between primary findings and inferences. On the contrary, in *Long Lake School Division*, Sherstobitoff J.A. did not restrict his guidelines for appellate deference to matters of credibility or to the review of primary findings. He set out instead a general guideline: "[w]here there is evidence to support a finding of fact a court of appeal should not interfere in the absence of palpable or demonstrable error" (p. 251).

94 Similarly, in *Tanel*, Bayda C.J.S. set out the test for appellate review of findings of fact in these terms: "first, is there evidence to support the trial judge's findings of fact; and second, is there an absence of palpable or demonstrable error?" (p. 218). Later, Bayda C.J.S. referred to the "'task of great and almost insuperable difficulty' (*per* Lord Sumner [in *S.S. Hontestroom v. S.S. Sagaporack*, [1927] A.C. 37 (H.L.)]) that any appellant faces in trying to convince an appellate court to overturn a trial judge's finding of fact" (p. 220). In the same case, Vancise J.A. summarized the standard of review aptly, at p. 223:

For an appellate court to intervene in respect to findings of fact by a trial judge and to modify or substitute those findings of fact there must be palpable and overriding error. The appellate court must be certain that

tribunal d'appel doit traiter avec une grande déférence les conclusions de fait du juge de première instance. La Cour suprême du Canada a examiné la question à de nombreuses occasions et ces principes ressortent de ses arrêts. [Je souligne.]

Citant plus particulièrement l'arrêt *Stein c. Le navire « Kathy K »*, un énoncé classique du principe de la déférence manifestée en appel à l'égard des conclusions de fait tirées en première instance, la Cour d'appel s'est expressément conformée à la jurisprudence de notre Cour établissant les normes générales de révision en appel applicables à l'égard d'une conclusion de fait.

L'on ne saurait prétendre non plus, comme le juge Cameron l'a laissé entendre dans la présente affaire, que dans l'examen de son pouvoir de révision, la Cour d'appel a traditionnellement distingué la conclusion relative à un fait prouvé directement de l'inférence. Au contraire, dans l'arrêt *Long Lake School Division*, le juge Sherstobitoff n'a pas limité la déférence en appel aux seules conclusions relatives à la crédibilité ou à des faits prouvés directement. Il a plutôt énoncé la règle générale suivante : [TRADUCTION] « [l]orsqu'un élément de preuve étaye une conclusion de fait, la cour d'appel s'abstient de la modifier, sauf erreur manifeste ou apparente » (p. 251).

De même, dans *Tanel*, le juge en chef Bayda a énoncé comme suit le critère applicable à l'appel d'une conclusion de fait : [TRADUCTION] « premièrement, un élément de preuve étaye-t-il la conclusion de fait du juge de première instance; deuxièmement, y a-t-il absence d'erreur manifeste ou apparente? » (p. 218). Plus loin, il a fait état de la [TRADUCTION] « "tâche difficile, voire insurmontable" (lord Sumner [dans *S.S. Hontestroom c. S.S. Sagaporack*, [1927] A.C. 37 (H.L.)]) de tout appelant qui tente d'amener une cour d'appel à infirmer une conclusion de fait tirée par un juge de première instance » (p. 220). Dans la même affaire, le juge Vancise a bien résumé la norme de révision applicable, à la p. 223 :

[TRADUCTION] Pour qu'une cour d'appel modifie les conclusions de fait d'un juge de première instance, une erreur manifeste et dominante doit les entacher. La cour d'appel doit être certaine que le juge de

the trial judge erred and must be able to identify with certainty the critical error.

95 Yet again, and still prior to this Court's decision in *Lensen*, Cameron J.A., for the court, applied a palpable and overriding error standard to the trial judge's conclusion that the plaintiffs had not relied on the defendant's misrepresentation, as it was "open to him on the evidence": see *Sisson v. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232, at p. 235.

96 Speaking for the Court in *Lensen*, Dickson C.J. thus adopted the Court of Appeal's own synthesis of its jurisprudence in *Long Lake School Division*, when he stated (at pp. 683-84):

> It is a well-established principle that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it can be established that the trial judge made some "palpable and overriding error which affected his assessment of the facts".... While section 8 of the Saskatchewan *Court of Appeal Act* authorizes the Court of Appeal to "draw inferences of fact", this task must be performed in relation to facts as found by the trial judge. Unless the trial judge has made some "palpable and overriding error" in this regard, s. 8 should not be construed so as to modify the traditional role of the Court of Appeal with respect to those findings.

97 In short, far from proceeding by way of rehearing, the Court of Appeal for Saskatchewan appears to have for many decades prior to both *Lensen* and *Housen* understood its legislative mandate as a power of review for error. The court consistently and repeatedly held that it was authorized to intervene in a trial judge's findings of fact only where palpable and overriding error was shown.

98 No decision has been drawn to our attention where the court has asserted a power of review by rehearing.

première instance a commis une erreur et être en mesure de déterminer avec certitude l'erreur fatale.

Toujours avant l'arrêt *Lensen* de notre Cour, le juge Cameron a une fois de plus appliqué, au nom de la Cour d'appel, la norme de l'erreur manifeste et dominante à la conclusion du juge de première instance selon laquelle les demandeurs ne s'étaient pas fiés à la déclaration trompeuse de la défenderesse, [TRADUCTION] « la preuve lui permettant de tirer pareille conclusion » : voir *Sisson c. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232, p. 235.

Dans *Lensen*, s'exprimant au nom de notre Cour, le juge en chef Dickson a donc fait sienne la synthèse de sa propre jurisprudence à laquelle s'était livrée la Cour d'appel dans *Long Lake School Division*, aux p. 683-684 :

> C'est un principe bien établi que les constatations de fait d'un juge de première instance, fondées sur la crédibilité des témoins, ne doivent pas être infirmées en appel à moins qu'il ne puisse être établi que le juge de première instance « a commis une erreur manifeste et dominante qui a faussé son appréciation des faits » [. . .] Certes, l'art. 8 de la *Court of Appeal Act* de la Saskatchewan autorise la Cour d'appel à [TRADUCTION] « faire des déductions de fait », mais cela doit être accompli en fonction des faits constatés par le juge de première instance. À moins que le juge de première instance n'ait commis quelque « erreur manifeste et dominante » à cet égard, l'art. 8 ne doit pas être interprété de manière à modifier le rôle joué traditionnellement par la Cour d'appel en ce qui concerne ces constatations.

En somme, loin d'avoir privilégié la nouvelle audition, la Cour d'appel de la Saskatchewan semble avoir vu dans son mandat légal le pouvoir de vérifier si la décision est exempte d'erreur, et ce, bien des décennies avant les arrêts *Lensen* et *Housen*. Elle a conclu à maintes reprises et avec constance qu'elle n'était autorisée à modifier les conclusions de fait du juge de première instance que si l'existence d'une erreur manifeste et dominante était établie.

Nulle décision où la Cour d'appel a revendiqué le pouvoir d'instruire l'appel par voie de nouvelle audition n'a été portée à notre attention.

F. *The Effect of the 2000 Amendments to The Court of Appeal Act*

It was argued by the Attorney General for Saskatchewan that amendments made to *The Court of Appeal Act* in 2000 call for a reconsideration of the principles of appellate review applicable in Saskatchewan.

Prior to those amendments, as we have just seen, a standard of palpable and overriding error had been applied with relative consistency to appellate review of findings of fact made at trial. Neither a plain reading of the *2000 Act*, nor the legislative history of the amendments, indicate a legislative intention to change that standard.

As we shall see, moreover, the Court of Appeal itself did not view the *2000 Act*, after its adoption, as warranting a departure from *Lensen*, or from its own case law prior to the decision of our Court in that case.

Section 14 of the current *2000 Act* is the successor to s. 8 of the *1978 Act*. The two provisions are best viewed together:

14 [Powers of court re evidence] On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

8. [Court not bound by view of evidence taken by trial judge] Upon appeal from, or motion against, the order, decision, verdict or decree of a trial judge, or on the rehearing of any cause, application or matter, it shall not be obligatory on the court to grant a new trial, or to adopt the view of the evidence taken by the trial judge, but the court shall act upon its own view of what the evidence in its judgment proves, and the court may draw inferences of fact and pronounce the verdict, decision or order that, in its judgment, the judge who tried the case ought to have pronounced.

F. *L'effet des modifications apportées en 2000 à la loi sur la Cour d'appel*

99 Le procureur général de la Saskatchewan a fait valoir que les modifications apportées à la loi sur la Cour d'appel en 2000 rendaient nécessaire le réexamen des principes régissant l'appel dans la province.

100 Avant ces modifications, nous venons de le voir, la norme de l'erreur manifeste et dominante avait été appliquée assez uniformément à l'appel d'une conclusion de fait tirée au procès. Ni la simple lecture de la *Loi de 2000* ni l'historique législatif des modifications n'indiquent l'intention du législateur d'établir une nouvelle norme.

101 De plus, nous le verrons, la Cour d'appel elle-même n'a pas jugé que la *Loi de 2000*, une fois adoptée, la justifiait de déroger à l'arrêt *Lensen* ou à sa propre jurisprudence antérieure à cet arrêt.

102 L'article 14 de la *Loi de 2000*, actuellement en vigueur, a remplacé l'art. 8 de la *Loi de 1978*. Pour les besoins de la présente analyse, les deux dispositions sont reproduites l'une à la suite de l'autre :

14 [La Cour n'est pas liée par les conclusions du juge du procès] Lorsque la décision d'un juge du procès est portée en appel ou qu'une motion est présentée à cet égard, ou lors d'une nouvelle audience, la Cour n'est pas tenue d'ordonner la tenue d'un nouveau procès ou d'accepter les conclusions que le juge du procès a tirées de la preuve. La Cour se détermine en se fondant sur sa propre appréciation de la preuve et peut tirer les inférences factuelles et rendre la décision qu'aurait dû rendre, à son avis, le juge du procès.

[TRADUCTION]

8. [La Cour n'est pas liée par les conclusions que le juge du procès a tirées de la preuve] Lorsque la décision, l'ordonnance ou la conclusion d'un juge du procès est portée en appel ou qu'une motion est présentée à son égard, ou lors de la nouvelle audition d'une affaire ou d'une demande, la Cour n'a pas à ordonner la tenue d'un nouveau procès ni à accepter les conclusions que le juge du procès a tirées de la preuve. La Cour se détermine en se fondant sur son interprétation de la preuve et elle peut tirer les inférences factuelles et rendre la décision, l'ordonnance ou la conclusion qu'aurait dû rendre, à son avis, le juge qui a instruit le procès.

103 Section 14, which came into effect on November 1, 2000, is identical in substance to the former s. 8, though the drafting of the provision has been modernized. While s. 14 refers only to a "decision" (rather than to an "order, decision, verdict or decree"), "decision" is defined in the *2000 Act* to include an order, verdict or decree. Even in this regard, s. 14 thus corresponds in substance to the former provision.

Entré en vigueur le 1er novembre 2000, l'art. 14 est identique sur le fond à l'ancien art. 8, même si son libellé a été modernisé. Il ne renvoie plus qu'à la « décision », mais ce terme est défini dans la *Loi de 2000* comme s'entendant également d'une ordonnance ou d'une conclusion. Même sous ce rapport, sa teneur correspond donc à celle de l'ancienne disposition.

104 In other respects, the two provisions are indistinguishable. Section 14 of the *2000 Act* merely rephrases its predecessor in plainer English. This should cause no surprise, given the legislative history of the amendments.

Les deux dispositions ne peuvent par ailleurs être distinguées l'une de l'autre. L'article 14 ne fait que reformuler plus simplement l'art. 8, ce qui n'est pas étonnant au vu de l'historique législatif des modifications.

105 On second reading of the *2000 Act*, Mr. Axworthy emphasized that the amendments were primarily intended to restate the historical jurisdiction of the court in modern language, and to facilitate its translation into French:

> **Hon. Mr. Axworthy**: — Thank you, Mr. Speaker. I rise today to move second reading of The Court of Appeal Act, 2000. Mr. Speaker, The Court of Appeal Act was first passed when the court was created in 1915, and a number of provisions in the Act have remained unchanged since that time. Therefore, Mr. Speaker, there's a need to update and clarify some of these provisions.
>
> The present section of the Act relating to jurisdiction is incomprehensible to anyone other than a legal historian. The Bill before the House doesn't change the jurisdiction of the Court of Appeal in any way, it simply restates the historical jurisdiction of the court in a way that can be understood by users of the Act.
>
> The legislature will be asked to approve the re-enactment of The Court of Appeal Act in both French and English . . . .
>
> Mr. Speaker, the English version of this Bill required revision for clarification purposes before the French translation could go forward. As well as adopting gender-neutral language, this update of The Court of Appeal Act substantially improves the law by making it clear and more understandable, even to my own colleagues, Mr. Speaker.

Lors de la deuxième lecture de la *Loi de 2000*, M. Axworthy a insisté sur le fait que les modifications visaient surtout à réaffirmer la compétence historique de la Cour d'appel dans une langue moderne, et à en faciliter la traduction en français :

> [TRADUCTION] **L'hon. M. Axworthy** : — Merci, Monsieur le Président. Je prends la parole aujourd'hui pour proposer l'adoption en deuxième lecture de la Loi de 2000 sur la Cour d'appel. Monsieur le Président, la Loi sur la Cour d'appel a initialement été adoptée lors de la création de la Cour en 1915, et un certain nombre de ses dispositions sont demeurées inchangées depuis. Par conséquent, Monsieur le Président, il est nécessaire d'actualiser et de clarifier certaines de ces dispositions.
>
> La disposition actuelle sur la compétence est incompréhensible pour quiconque n'est pas un historien du droit. Le projet de loi dont la Chambre est saisie ne modifie en rien la compétence de la Cour d'appel. Il ne fait que reformuler sa compétence historique afin que la Loi puisse être comprise par ses « utilisateurs ».
>
> L'Assemblée sera appelée à approuver la réadoption de la Loi sur la Cour d'appel en français et en anglais . . .
>
> Monsieur le Président, la version anglaise de ce projet de loi devait être révisée à des fins de clarification avant que la traduction en français ne puisse être entreprise. En plus de supprimer toute distinction fondée sur le sexe, cette actualisation de la Loi sur la Cour d'appel améliore sensiblement la loi en la rendant plus claire et plus compréhensible, même pour mes propres collègues, Monsieur le Président.

And finally:

Et enfin :

. . . the Bill clarifies the procedure respecting rehearings. It states that the court shall rehear an appeal if due to death or resignation, only one judge who heard the appeal remains. As well, if the number of judges is reduced to an even number that is deeply divided on a matter, a party to the appeal may apply for a rehearing.

(*Saskatchewan Hansard*, at pp. 1625-26 (emphasis added))

Though of limited weight, *Hansard* evidence can assist in determining the background and purpose of legislation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35. In this case, it is particularly apposite, since it was contended by the Attorney General for Saskatchewan, an intervener in this Court, that the legislature's purpose in revising *The Court of Appeal Act* was to "clarify" that the Court of Appeal was to be placed "in a position of conducting an appeal by rehearing".

Here, too, I find instructive the Saskatchewan Court of Appeal's own interpretation of its constituent statute. It does not appear, even prior to this Court's judgment in *Housen*, to have understood the *2000 Act* as an enlargement of its powers of review on questions of fact under the previous Act, as interpreted by the court itself. In *Knight v. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68, at para. 28, Sherstobitoff J.A., speaking for the court, applied the palpable and overriding error standard to findings of credibility made and inferences of fact drawn by the trial judge:

In this case, much of the trial judge's finding of fact depended primarily upon assessments of the relative credibility of the witnesses. To that extent, his findings cannot be interfered with unless the appellants can show that there was a palpable and overriding error. Further, to the extent that his findings depended upon drawing inferences of fact, the appellants must show that there was no evidence from which those conclusions could reasonably be drawn. [Emphasis added.]

Knight was heard by the Saskatchewan Court of Appeal in May of 2001, some six months after the

. . . le projet de loi clarifie la procédure relative à la tenue d'une nouvelle audience. Il prévoit que la cour réentend un appel si, en raison d'un décès ou d'une démission, il ne reste plus qu'un seul des juges l'ayant entendu. Aussi, lorsque le nombre de juges est réduit à un nombre pair et qu'il y a partage égal entre eux, une partie peut demander une nouvelle audience.

(*Saskatchewan Hansard*, p. 1625-1626 (je souligne))

106 Bien que sa valeur probante soit restreinte, la transcription des débats parlementaires peut servir à déterminer le contexte et l'objet d'un texte législatif : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 35. Cet élément est particulièrement pertinent en l'espèce, car le procureur général de la Saskatchewan, partie intervenante au présent pourvoi, a fait valoir que l'intention du législateur, en révisant la loi sur la Cour d'appel, était de « préciser » que la Cour d'appel était mise [TRADUCTION] « en position d'instruire un appel par voie de nouvelle audition ».

107 L'interprétation de sa propre loi constitutive par la Cour d'appel de la Saskatchewan me paraît aussi digne d'intérêt. Même avant l'arrêt *Housen*, la Cour d'appel ne semble pas avoir vu dans la *Loi de 2000* un élargissement de son pouvoir d'intervention à l'égard d'une question de fait, compte tenu de sa propre interprétation de l'ancienne loi. Dans *Knight c. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68, par. 28, s'exprimant au nom de la Cour d'appel, le juge Sherstobitoff a appliqué la norme de l'erreur manifeste et dominante aux conclusions sur la crédibilité et aux inférences de fait tirées par le juge de première instance :

[TRADUCTION] En l'espèce, une bonne partie des conclusions de fait du juge de première instance tenait essentiellement à l'appréciation de la crédibilité relative des témoins. Par conséquent, ses conclusions ne peuvent être modifiées que si les appelants établissent qu'une erreur manifeste et dominante a été commise. De plus, dans la mesure où ses conclusions tenaient à des inférences de fait, les appelants doivent démontrer qu'aucun élément de preuve ne permettait raisonnablement de tirer ces conclusions. [Je souligne.]

La Cour d'appel de la Saskatchewan a instruit cette affaire en mai 2001, soit environ six mois après

2000 Act had come into force. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), states the "common law presumption that procedural legislation applies immediately and generally to both pending and future facts" (p. 582). This common law rule has been codified by Saskatchewan's *Interpretation Act, 1995*, S.S. 1995, c. I-11.2, s. 35 (am. S.S. 1998, c. 47, s. 6).

l'entrée en vigueur de la *Loi de 2000*. Dans *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), R. Sullivan fait état de la [TRADUCTION] « présomption de common law voulant que les dispositions relatives à la procédure s'appliquent immédiatement et généralement aux affaires en instance et aux affaires à venir » (p. 582). Cette règle de common law a été codifiée dans la *Loi d'interprétation de 1995* de la Saskatchewan, L.S. 1995, ch. I-11,2, art. 35 (mod. L.S. 1998, ch. 47, art. 6).

108 Similarly, in *Bogdanoff v. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35, Gerwing J.A., in oral reasons for the court, applied a palpable and overriding error standard to a finding of causation made by the trial judge. The appeal was heard more than three months after the *2000 Act* came into effect. In *Brown v. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18, decided almost a year later, Tallis J.A. applied the same standard, again for a unanimous court.

De même, dans l'affaire *Bogdanoff c. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35, la juge Gerwing, s'exprimant de vive voix au nom de la Cour d'appel, a appliqué la norme de l'erreur manifeste et dominante à une conclusion sur la causalité tirée par le juge de première instance, et ce, plus de trois mois après l'entrée en vigueur de la *Loi de 2000*. Dans l'arrêt *Brown c. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18, rendu presque un an plus tard, le juge Tallis a appliqué la même norme, toujours avec l'assentiment de ses collègues.

109 In none of these decisions was there any suggestion that the *2000 Act* had enlarged the scope of appellate review of findings of fact in Saskatchewan. Nor was the *2000 Act* mentioned at all.

Dans aucune de ces décisions la Cour d'appel de la Saskatchewan n'a laissé entendre que la *Loi de 2000* avait accru la portée de son pouvoir de réviser en appel une conclusion de fait. Elle n'a même pas fait mention de cette loi.

G. *The Standard of Appellate Review: Conclusion*

G. *La norme de révision applicable : Conclusion*

110 With respect, I do not find persuasive any of the arguments advanced in support of the contention that the rules governing appellate intervention in Saskatchewan differ from those set out in *Housen*. On the contrary, I am satisfied for the reasons given that the standard of review for inferences of fact, in Saskatchewan as elsewhere in Canada, is that of palpable and overriding error and its functional equivalents, including "clearly wrong", "unreasonable" and "not reasonably supported by the evidence".

En toute déférence, je ne trouve pas convaincants les arguments avancés à l'appui de la thèse selon laquelle, en Saskatchewan, les règles régissant l'appel diffèrent de celles énoncées dans *Housen*. Je crois plutôt, pour les motifs exposés, que la norme de révision applicable aux inférences de fait, en Saskatchewan comme ailleurs au Canada, est celle de l'erreur manifeste et dominante et ses équivalents fonctionnels — « manifestement erroné », « déraisonnable » et « non étayé par la preuve ».

H. *Application of the Standard of Review*

H. *L'application de la norme de révision*

111 The Court of Appeal reversed the trial judge on six points that are at issue in this appeal: (1) qualification of the experts, (2) causation, (3) mitigation,

La Cour d'appel a infirmé la décision de première instance au regard de six points qui sont en litige dans le présent pourvoi : (1) la compétence des

(4) incarceration, (5) collateral benefits, and (6) loss of future earnings. In my respectful view, the Court of Appeal erred in interfering with the trial judge's findings on the first three issues. I agree, however, that the trial judge erred in awarding H.L. damages for lost earnings for the time he spent in prison, in failing to deduct the social assistance received by H.L. from the award for loss of past earnings, and in granting an award for loss of future earnings.

experts, (2) la causalité, (3) la limitation du préjudice, (4) l'incarcération, (5) les prestations parallèles et (6) la perte de revenus ultérieure. À mon humble avis, elle a eu tort de modifier les conclusions du juge de première instance quant aux trois premiers. Je conviens cependant que ce dernier a eu tort d'accorder des dommages-intérêts pour la perte de revenus pendant l'incarcération, de ne pas déduire les prestations d'aide sociale de l'indemnité accordée pour la perte de revenus antérieure et d'accorder des dommages-intérêts pour la perte de revenus ultérieure.

(1) The Expert Evidence

(1) La preuve d'expert

112

The trial judge based his conclusion that Mr. Starr's sexual abuse of H.L. caused H.L.'s alcoholism on the evidence adduced before him, including that of the experts called by the parties. The Court of Appeal, in my view, erred in substituting its own opinion of that evidence for that of the trial judge and in interfering with the judge's conclusion on this issue.

Le juge de première instance a fondé sur les témoignages entendus, dont ceux des experts des parties, sa conclusion que les abus sexuels de M. Starr avaient causé l'alcoolisme de H.L. Selon moi, la Cour d'appel a eu tort de substituer sa propre appréciation de ces éléments de preuve à celle du juge de première instance et de modifier la conclusion que ce dernier en avait tirée.

113

Cameron J.A. found that "the two witnesses [the experts] were pretty much allowed to roam at large, expressing all manner of opinion in relation to which they were not formally qualified" (para. 255). Specifically, Cameron J.A. felt that the experts should not have been allowed to speak to the cause of H.L.'s alcoholism (para. 256). He then concluded that, in the absence of this expert evidence, there was no basis for an inference that Mr. Starr's abuse had caused H.L.'s alcoholism and consequent loss (para. 258).

Le juge Cameron a conclu que [TRADUCTION] « les deux témoins [experts] avaient pu en quelque sorte s'écarter du sujet et exprimer leur opinion sur toutes sortes de questions qui ne relevaient pas de leur compétence » (par. 255). Plus particulièrement, il a estimé que les experts n'auraient pas dû être admis à se prononcer sur la cause de l'alcoolisme de H.L. (par. 256). Il a ensuite conclu que, en l'absence d'une preuve d'expert à l'appui, rien ne permettait d'inférer que les abus commis par M. Starr avaient causé l'alcoolisme de H.L. et le préjudice qui en avait résulté (par. 258).

114

I am unable to share this view. Both experts testified that H.L.'s sexual abuse by Mr. Starr had caused his alcoholism. Both were qualified to speak to the long-term psychological effects of that sexual abuse. Both had extensive clinical and professional experience in that area, and both had tested H.L. and interviewed him extensively. Characterizing the testimony of the experts as evidence concerning the etiology of alcoholism in general ignores its real content and true import: rather than appreciating the experts' testimony for its relevance, purpose and significance as evidence of the effects of Mr. Starr's

Je ne puis être d'accord. Les deux experts ont témoigné que les abus sexuels dont H.L. avait été victime étaient à l'origine de son alcoolisme. Tous deux étaient qualifiés pour se prononcer sur les effets psychologiques à long terme de ces abus. Tous deux avaient une vaste expérience clinique et professionnelle dans le domaine; ils avaient soumis H.L. à des tests et l'avaient interrogé longuement. Considérer ces témoignages comme une preuve relative à l'étiologie de l'alcoolisme en général fait abstraction de leur véritable teneur et de leur portée réelle : au lieu de les apprécier en fonction de leur pertinence, de

tortious conduct on H.L. himself, Cameron J.A. misapprehended it as testimony about the *causes of alcoholism generally*.

leur objet et de leur importance comme une preuve des *effets du comportement répréhensible de M. Starr à l'endroit de H.L.*, le juge Cameron y voit à tort une preuve relative aux *causes de l'alcoolisme en général*.

115 Both experts were psychologists with extensive knowledge and experience concerning sexual abuse. They were qualified to speak to the effects of such abuse, including substance abuse. *Both* testified that Mr. Starr's abuse bore a causal relationship to H.L.'s substance abuse; the difference in their respective opinions related only to the *extent* of that causal relationship in the circumstances of this case.

Les deux experts étaient psychologues et avaient une connaissance approfondie de l'abus sexuel et une vaste expérience en la matière. Ils avaient la compétence voulue pour se prononcer sur les effets de l'abus sexuel, dont la consommation excessive de substances intoxicantes. *Tous deux* ont vu un lien de causalité entre les actes de M. Starr et la consommation excessive de substances intoxicantes par H.L.; seule les a opposés l'*importance* de ce lien dans les circonstances de l'espèce.

116 Moreover, the difference in their opinions had no bearing on the liability of Mr. Starr or Canada for the damages found by the trial judge to have been suffered by H.L.: Dr. Arnold stated that H.L.'s family life enhanced his vulnerability to alcoholism, but nonetheless described the *abuse* as the "specific triggering event", without which H.L.'s pre-existing *vulnerability* may not have caused him harm. In Dr. Arnold's opinion, we just "don't know" what would have happened to H.L. had he not suffered abuse at the hands of Mr. Starr, because, in fact, he did.

De plus, la divergence d'opinion ne portait aucunement sur la responsabilité de M. Starr ou de l'État pour le préjudice que H.L. avait subi selon le juge de première instance : le Dr Arnold a affirmé que les antécédents familiaux de H.L. l'avaient rendu plus vulnérable à l'alcoolisme, mais il a néanmoins considéré l'*abus* comme l'« événement déclencheur » sans lequel la *vulnérabilité* préexistante de H.L. aurait pu ne lui être aucunement préjudiciable. À son avis, nul ne pouvait dire ce qu'il serait advenu de H.L. s'il n'avait pas été victime d'abus de la part de M. Starr parce que, justement, il l'avait été.

117 With respect, it is neither accurate nor helpful to say that the trial judge allowed the experts to "roam at large". On the contrary, they were "reigned in" by the trial judge upon proper objections by counsel, for example on the issue of H.L.'s "earning capacity".

En toute déférence, il n'est ni exact ni utile de dire que le juge de première instance a laissé les experts « s'écarter du sujet ». Au contraire, il les a rappelés à l'ordre à la suite d'objections justifiées, notamment au sujet de la « capacité de gain » de H.L.

118 To sum up, then, both experts testified on direct examination that the abuse H.L. experienced bore a causal relationship to his substance abuse. The respondent's position on that issue is therefore unacceptable: In effect, the respondent seeks to disavow in this Court the evidence he himself adduced at trial on the ground that his own witness, Dr. Arnold, was not qualified to answer the questions he himself put to the witness without objection by opposing counsel.

Les deux experts ont donc conclu, en interrogatoire principal, à l'existence d'un lien de causalité entre les abus sexuels subis par H.L. et sa consommation excessive de substances intoxicantes. La thèse contraire défendue devant notre Cour est donc inacceptable. L'intimé cherche en effet à récuser le témoignage qu'il a lui-même présenté en première instance, alléguant que son témoin, le Dr Arnold, n'était pas qualifié pour répondre aux questions qu'il lui a lui-même posées sans que l'avocat de la partie adverse ne formule d'objection.

Dr. Arnold's answers were indeed detrimental to the respondent's case. But it is too late in the day to contend that Dr. Arnold was not qualified to speak to the relationship between the sexual abuse inflicted on H.L. and his ensuing problems — the very issue upon which he was examined deliberately by counsel who called him.

I would therefore allow the appeal on this branch of the matter, since the trial judge did not err in qualifying the witnesses, in making findings on their relative credibility or in relying on their expert opinions.

(2) Causation

In my respectful view, the Court of Appeal erred in setting aside the trial judge's findings on causation.

Causation is a factual inference: *Housen*, at paras. 70 and 75 of the majority reasons and paras. 111 and 159 of the minority reasons.

This Court explained the test for causation in *Athey*, at paras. 13-19:

> Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.
>
> The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury.
>
> . . .
>
> The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm . . . . It is

119 Les réponses du Dr Arnold ont certes nui à la thèse défendue par l'intimé, mais il est maintenant trop tard pour prétendre que le témoin n'était pas qualifié pour se prononcer sur l'existence d'un lien entre les abus sexuels et les problèmes subséquents de H.L., ce sur quoi l'avocat qui l'avait appelé à la barre l'a délibérément interrogé.

120 J'accueillerais donc ce volet du pourvoi, le juge de première instance n'ayant commis aucune erreur en tenant les témoins pour compétents, en tirant des conclusions sur leur crédibilité relative ou en se fondant sur leurs avis d'experts.

(2) La causalité

121 En toute déférence, la Cour d'appel a eu tort d'écarter les conclusions du juge de première instance sur le lien de causalité.

122 Conclure à l'existence d'un lien de causalité est une inférence factuelle : *Housen*, par. 70 et 75 (motifs majoritaires), par. 111 et 159 (motifs minoritaires).

123 Dans *Athey*, notre Cour a exposé le critère applicable en la matière, aux par. 13-19 :

> La causalité est établie si le demandeur prouve, selon la norme applicable en matière civile, c'est-à-dire suivant la prépondérance des probabilités, que le défendeur a causé le préjudice ou y a contribué : *Snell c. Farrell*, [1990] 2 R.C.S. 311; *McGhee c. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> Le critère général, quoique non décisif, en matière de causalité est celui du « facteur déterminant » (« *but for test* »), selon lequel le demandeur est tenu de prouver que le préjudice ne serait pas survenu sans la négligence du défendeur : *Horsley c. MacLaren*, [1972] R.C.S. 441.
>
> Comme le critère du facteur déterminant n'est pas applicable dans certaines circonstances, les tribunaux ont reconnu que la causalité était établie si la négligence du défendeur avait « contribué de façon appréciable » au préjudice.
>
> . . .
>
> En droit, la responsabilité du défendeur n'est pas écartée du seul fait que d'autres facteurs qui ne lui sont pas imputables ont contribué au préjudice [. . .] Il suffit que

sufficient if the defendant's negligence was a cause of the harm. . . . [Emphasis in original.]

124 The causal question at issue here is whether Mr. Starr's sexual abuse of H.L. reduced H.L.'s employment income during the first and second periods. The trial judge answered that question in the affirmative (para. 65). He drew this inference from both experts' opinions that H.L.'s alcoholism was caused by the sexual abuse; from their opinions that sexual abuse results in a loss of self-esteem and self-confidence which, in turn, affect employability or "work ethic"; and from the evidence of H.L. himself.

125 The trial judge based his assessment of damages on the finding that the sexual abuse by Mr. Starr caused H.L.'s emotional difficulties and alcoholism, which in turn caused his inability to secure and maintain full-time employment. Ultimately, then, the question is whether this was a reasonable inference on the facts as found by the trial judge.

126 The experts in this case gave their evidence regarding (1) the link between H.L.'s sexual abuse and his emotional problems and alcoholism, and (2) the link between H.L.'s low self-esteem and self-confidence and his reduced employability. The opinion of an expert was not necessary to make the link between H.L.'s alcoholism and his reduced ability to sustain remunerative employment. That link, which might appear to be a matter of common experience to many, was nonetheless provided by H.L. himself.

127 The first inference drawn by the trial judge was that the sexual abuse caused H.L.'s emotional problems and alcoholism. Both experts testified that sexual abuse would cause a victim to have a negative self-image and a lack of self-confidence. As we saw earlier, H.L. also testified that the abuse made him feel humiliated and ashamed, caused him to lose concentration, and led to his withdrawal from schooling at an early stage.

la négligence du défendeur ait été une cause du préjudice. . . [Souligné dans l'original.]

Dans la présente affaire, la question en litige au chapitre de la causalité est la suivante : les abus sexuels ont-ils eu pour effet de diminuer le revenu d'emploi de H.L. pendant la première période et la seconde? Le juge de première instance a répondu par l'affirmative (par. 65). Il a tiré cette inférence des avis des deux experts selon lesquels les abus sexuels étaient à l'origine de l'alcoolisme de H.L. et avaient causé une perte d'estime de soi et de confiance en soi qui, elle, avait influé sur l'aptitude au travail ou sur la « morale du travail », ainsi que du témoignage de H.L. lui-même.

Le juge de première instance a fondé son évaluation du préjudice sur la conclusion que les abus sexuels étaient à l'origine des difficultés émotionnelles et de l'alcoolisme de H.L. qui, eux, avaient empêché l'appelant d'obtenir et de conserver un emploi à temps plein. Il faut donc se demander, en fin de compte, s'il s'agissait d'une inférence raisonnable compte tenu des faits constatés par le juge de première instance.

Les experts ont donné leur avis sur (1) le lien entre les abus sexuels, d'une part, et les difficultés émotionnelles et l'alcoolisme de H.L., d'autre part, ainsi que sur (2) le lien entre le manque d'estime de soi et de confiance en soi de H.L. et son aptitude réduite au travail. L'opinion d'un expert n'était pas nécessaire pour établir un lien entre l'alcoolisme de H.L. et sa capacité réduite de conserver un emploi rémunérateur. Ce lien a été établi par le témoignage de H.L. même s'il pouvait paraître évident à bon nombre de personnes.

Suivant la première inférence tirée par le juge de première instance, les abus sexuels avaient causé les difficultés émotionnelles et l'alcoolisme de H.L. Les deux experts ont témoigné que la victime d'abus sexuel a une image négative d'elle-même et manque de confiance en elle. Rappelons que H.L. a dit s'être senti humilié et honteux et avoir eu du mal à se concentrer par suite des agressions, ce qui l'avait amené à quitter l'école précocement.

Both experts also identified the abuse as having triggered H.L.'s excessive drinking and addiction to alcohol. As I have already suggested, on either expert's testimony, the test in *Athey* was met.

128 Les deux experts ont également opiné que les abus sexuels avaient déclenché la consommation excessive d'alcool et la dépendance à cette substance intoxicante. Comme je l'ai déjà laissé entendre, sur la foi du témoignage de l'un ou l'autre des experts, le critère de l'arrêt *Athey* était respecté.

The second inference drawn by the trial judge was that H.L.'s emotional problems and alcohol abuse reduced his capacity to secure and retain employment. On this point, Dr. Arnold, the defendant Canada's expert, testified on cross-examination by counsel for H.L. that sexual abuse would affect a victim's "work ethic":

> Q: Would you think it likely that [sexual abuse by someone associated with the school system] would have affected [a victim's] work ethic?
>
> A: Work ethic as in — perhaps to define that, I think what you're saying is his ability to hold work and be able to regularly show up and those kinds of things?
>
> Q: Yes.
>
> A: Yes, and I would refer to the chain of events I just referred to. You have an event, then — sorry, an event — I better be clear here — event of abuse, you have alcohol and, yes, indeed that chain of events would logically go there and —

No objection was taken to this testimony.

129 Suivant la deuxième inférence du juge de première instance, les difficultés émotionnelles de H.L. et sa consommation excessive d'alcool avaient réduit son aptitude au travail. Contre-interrogé à ce sujet par l'avocat de H.L., l'expert du procureur général du Canada, le Dr Arnold, a témoigné que l'abus sexuel nuisait à la « morale du travail » de la victime :

> [TRADUCTION]
>
> Q: Estimez-vous probable que [l'abus sexuel par une personne associé au système scolaire] nuise à la morale du travail [de la victime]?
>
> R: La morale du travail, comme dans — peut-être pour la définir, je pense que vous parlez de sa capacité à conserver un emploi et à se présenter régulièrement au travail, et ce genre de chose?
>
> Q: Oui.
>
> R: Oui, et je me reporte à la suite des événements dont je viens de parler. Un événement se produit, puis — désolé, un événement — il vaut mieux préciser — un abus, il y a l'alcool et, oui, effectivement, la suite des événements aboutirait logiquement à cela et —

Ce témoignage n'a suscité aucune objection.

Mr. Stewart was asked on direct examination by counsel for H.L. whether self-esteem and self-confidence affected employability, and answered that he was "sure it would, yes". This testimony was allowed by the court, despite the objection taken by counsel for Canada, on the basis that it was within the realm of Mr. Stewart's (and Dr. Arnold's) expertise.

130 En interrogatoire principal, l'avocat de H.L. a demandé à M. Stewart si l'estime de soi et la confiance en soi avaient une incidence sur l'aptitude au travail. Sa réponse a été : [TRADUCTION] « bien sûr que oui ». Malgré l'objection formulée par l'avocat du procureur général du Canada, ce témoignage a été admis en preuve au motif qu'il relevait du domaine d'expertise de M. Stewart (et du Dr Arnold).

Canada's earlier objection to questions put in chief to Mr. Stewart regarding H.L.'s earning capacity had been sustained on the basis that Mr. Stewart was not a vocational expert. Without endorsing that finding, I find it sufficient to mention that both experts were allowed to express their opinions whether the emotional problems caused by Mr. Starr's abuse affected H.L.'s ability to find and keep a job, but not

131 L'objection soulevée auparavant par le procureur général du Canada à l'égard des questions posées à M. Stewart en interrogatoire principal au sujet de la capacité de gain de H.L. avait été maintenue au motif que le témoin n'était pas un expert du domaine de l'emploi. Sans approuver cette conclusion, je me contente de faire remarquer que les deux experts ont pu exprimer leur opinion quant à savoir si les

whether they reduced his earning capacity when he did secure employment.

problèmes émotionnels causés par les actes de M. Starr avaient nui à la capacité de H.L. de trouver et de conserver un emploi, et non s'ils avaient réduit sa capacité de gain lorsqu'il obtenait un emploi.

132 In addition, as already mentioned, there was an evidentiary basis for the trial judge's finding that alcoholism had affected H.L.'s earning capacity. H.L. himself testified that he was unable to sustain employment for more than five or six months due to his drinking problem, and that his lack of education, criminal record and alcoholism deterred employers from hiring him. This was, of course, a matter within H.L.'s personal experience, and the trial judge was entitled to give it appropriate weight.

De plus, je le répète, la preuve étayait la conclusion du juge de première instance que l'alcoolisme de H.L. avait nui à sa capacité de gain. L'appelant a lui-même témoigné que son problème d'alcool l'empêchait de conserver un emploi plus de cinq ou six mois et que sa faible scolarité, son casier judiciaire et son alcoolisme rebutaient les employeurs. Ce témoignage relevait évidemment de l'expérience personnelle de H.L., et le juge de première instance pouvait à bon droit lui accorder l'importance voulue.

133 There was thus sufficient evidence on the record to support the trial judge's findings that the sexual abuse of H.L. by Mr. Starr caused emotional problems and alcoholism, which in turn hindered H.L.'s efforts to hold down a job. On this evidence, a reasonable trier of fact could draw a causal inference. The trial judge therefore committed no reviewable error in awarding damages for loss of past earnings, and the Court of Appeal erred in setting aside that award.

Le dossier renfermait suffisamment d'éléments de preuve pour étayer la conclusion que les abus sexuels étaient à l'origine des problèmes émotionnels et de l'alcoolisme de H.L., lesquels avaient nui à ses efforts pour garder un emploi. Un juge des faits raisonnable pouvait, en se fondant sur ces éléments de preuve, tirer une inférence de causalité. Le juge de première instance n'a donc pas commis d'erreur susceptible de révision en accordant des dommages-intérêts pour la perte de revenus antérieure, et la Cour d'appel a eu tort d'annuler cet octroi.

(3) Loss of Past Earnings: Mitigation

(3) La perte de revenus antérieure : Limitation du préjudice

134 The onus rests on the defendant to prove that the plaintiff failed to mitigate his loss: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at p. 163. Here, the trial judge concluded that the Crown led no evidence on the issue of mitigation. The Court of Appeal pointed to H.L.'s failure to upgrade his education and training as well as his failure to enter rehabilitation as evidence that he failed to mitigate his loss (para. 232).

Il incombe au défendeur de prouver que le demandeur a omis de limiter le préjudice : *Janiak c. Ippolito*, [1985] 1 R.C.S. 146, p. 163. Dans la présente affaire, le juge de première instance a conclu que le procureur général du Canada n'avait présenté aucune preuve à cet égard. La Cour d'appel a opiné que l'omission de H.L. de parfaire son éducation et sa formation et de participer à un programme de réadaptation établissait l'absence de limitation du préjudice (par. 232).

135 H.L. testified that he failed to upgrade his education because he had a poor memory and dropped out of an auto mechanics course after two months. This is consistent with the trial judge's finding that H.L.'s alcoholism, poor self-image and lack of confidence affected his ability to learn a trade and his ability to find and keep a job. This does not point to

H.L. a témoigné qu'il n'avait pas élevé son niveau d'instruction à cause de son peu de mémoire et qu'il avait abandonné un cours de mécanique automobile après deux mois. Cela concorde avec la conclusion du juge de première instance que l'alcoolisme, l'image négative de soi et le manque de confiance avaient empêché H.L. d'apprendre un métier, de

a failure to mitigate. And though the record is essentially silent regarding H.L.'s efforts at rehabilitation, it appears from his evidence at trial that he was at least then making an effort to abstain from any further consumption of alcohol.

trouver un emploi et de le garder. On ne saurait y voir une omission de limiter le préjudice. Même si le dossier ne révèle essentiellement rien au sujet de ses efforts de réadaptation, le témoignage de H.L. au procès permettait de conclure qu'il avait tenté à tout le moins de mettre fin à sa consommation d'alcool.

136

Since the evidence as to H.L.'s mitigation of his damages was inconclusive at best, Canada's burden had not been discharged. The Court of Appeal therefore erred in reversing the trial judge's finding on this issue.

La preuve s'étant révélée au mieux équivoque concernant la limitation du préjudice, le procureur général du Canada ne s'est pas acquitté de son fardeau de preuve. La Cour d'appel a donc eu tort d'écarter la conclusion qu'en avait tirée le juge de première instance.

(4) Loss of Past Earnings: Incarceration

(4) La perte de revenus antérieure : Incarcération

137

In calculating H.L.'s loss of past earnings, the trial judge did not reduce the damages awarded to reflect the time H.L. spent in prison. The Court of Appeal intervened in this respect — quite properly, in my view. As Cameron J.A. noted, to compensate an individual for loss of earnings arising from criminal conduct undermines the very purpose of our criminal justice system (paras. 240-41); an award of this type, if available in any circumstances, must be justified by exceptional considerations of a compelling nature and supported by clear and cogent evidence of causation.

Dans son calcul de la perte de revenus antérieure, le juge de première instance n'a pas retranché de la période considérée le temps où H.L. avait été incarcéré. La Cour d'appel a eu tout à fait raison, à mon avis, d'intervenir à cet égard. Comme l'a fait remarquer le juge Cameron, indemniser une personne de la perte de revenus résultant d'un comportement criminel va à l'encontre de l'objet même de notre système de justice pénale (par. 240-241). Une telle indemnisation, lorsqu'elle peut être accordée, doit se fonder sur des motifs exceptionnels pressants et s'appuyer sur une preuve de causalité claire et convaincante.

138

The trial judge inferred that H.L.'s alcohol abuse, which was caused by the sexual abuse, "led to [his] numerous convictions on alcohol and theft related offences" (para. 29). As already noted, the inference that sexual abuse caused H.L.'s alcoholism is supported by the evidence. It is the relationship between H.L.'s alcoholism and his loss of earnings due to imprisonment that is the focus of my concern here: The question before the trial judge was not whether H.L. had committed certain crimes while drunk, but whether his ensuing incarceration was caused by his addiction to alcohol.

Le juge de première instance a inféré que la consommation excessive d'alcool, imputable aux abus sexuels, [TRADUCTION] « avait amené » H.L. à commettre « de nombreuses infractions liées à l'alcool et au vol » (par. 29). Comme je l'ai déjà dit, l'inférence que les abus sexuels ont causé l'alcoolisme de H.L. est étayée par la preuve. C'est le lien entre l'alcoolisme de H.L. et la perte de revenus due à son incarcération qui m'intéresse en l'occurrence. Le juge de première instance n'avait pas à décider si H.L. avait commis certains crimes en état d'ébriété, mais bien si l'incarcération subséquente avait été causée par sa dépendance à l'alcool.

139

In examination-in-chief by H.L.'s counsel, Mr. Stewart testified that there is a relationship between sexual abuse and criminal conduct, in "that a number of individuals — in fact a wide number of

Lors de son interrogatoire principal par l'avocat de H.L., M. Stewart a témoigné qu'il y avait un lien entre l'abus sexuel et le comportement criminel, c'est-à-dire [TRADUCTION] « qu'un certain nombre

individuals, I don't have the exact number, who have been either physically or sexually abused in childhood, a great proportion of those end up being abusers themselves once they reach adulthood".

de personnes — en fait, un grand nombre de personnes, je n'ai pas les chiffres exacts, qui ont été victimes d'agressions physiques ou sexuelles dans leur enfance, une grande proportion de ces personnes deviennent elles-mêmes des agresseurs lorsqu'elles atteignent l'âge adulte ».

140 In cross-examination, Mr. Stewart explained that his statement concerned the likelihood that a child who is sexually abused will become an abuser as an adult. None of H.L.'s periods of incarceration related to charges of sexual abuse.

En contre-interrogatoire, M. Stewart a expliqué qu'il avait voulu parler de la probabilité qu'un enfant victime d'agression sexuelle devienne agresseur à l'âge adulte. Aucune des périodes d'incarcération de H.L. ne faisait suite à une accusation d'agression sexuelle.

141 The expert evidence did not disclose a more general link between sexual abuse and criminality. Nor did the materials before the trial judge entitle him to conclude that those suffering from alcoholism were more inclined to commit crimes.

La preuve d'expert ne révélait aucun lien plus général entre l'abus sexuel et la criminalité. Les éléments présentés au juge de première instance ne lui permettaient pas non plus de conclure qu'une personne alcoolique était plus encline à la criminalité.

142 In any event, the chain of causation linking H.L.'s sexual abuse to his loss of income while incarcerated was interrupted by his intervening criminal conduct. During these periods, his lack of gainful employment was caused by his imprisonment, not by his alcoholism; and his imprisonment resulted from his criminal conduct, not from his abuse by Mr. Starr nor from the alcoholism which it was found to have induced.

Quoi qu'il en soit, le lien de causalité entre les abus sexuels et la perte de revenus pendant l'incarcération a été rompu par le comportement criminel de H.L. Durant les périodes en cause, l'absence d'emploi rémunérateur était due à l'emprisonnement, et non à l'alcoolisme, et cet emprisonnement résultait du comportement criminel de H.L., et non des actes de M. Starr ni de l'alcoolisme de H.L. qui avait découlé de ces actes selon la preuve.

143 Thus, on any view of the matter, the trial judge's finding that Mr. Starr's sexual abuse of H.L. caused his loss of income due to imprisonment is both contrary to judicial policy and unsupported by the evidence.

Par conséquent, quel que soit le point de vue adopté, la conclusion du juge de première instance que les abus sexuels ont causé la perte de revenus due à l'incarcération n'est ni conforme aux principes judiciaires ni étayée par la preuve.

144 I would therefore dismiss H.L.'s appeal under this head.

Je rejetterais donc ce volet du pourvoi.

(5) Loss of Past Earnings: Social Assistance

(5) La perte de revenus antérieure : Aide sociale

145 The Court of Appeal found, again correctly in my view, that the trial judge had erred in not deducting from H.L.'s award for loss of past earnings the social assistance payments he had received during the relevant period.

Encore une fois, j'estime que la Cour d'appel a eu raison de conclure que le juge de première instance avait commis une erreur en ne déduisant pas des dommages-intérêts accordés pour la perte de revenus antérieure les prestations d'aide sociale touchées par H.L. pendant la période considérée.

146 Klebuc J. found that H.L. "generally relied on social assistance to meet his needs" during the first

Le juge Klebuc a conclu que, pendant la première période, H.L. [TRADUCTION] « avait

period for which he assessed damages for lost earnings, but did not account for those or any other social assistance payments in fixing his award (para. 64). With respect to the second period for which Klebuc J. assessed damages for lost earnings, he did, however, deduct the income earned by H.L.

généralement compté sur l'aide sociale pour subvenir à ses besoins »; il l'a indemnisé pour la perte de revenus sans déduire de la somme accordée le montant de ces prestations ou de toute autre aide obtenue (par. 64). En ce qui concerne la seconde période, il a déduit de l'indemnité accordée à ce chapitre le revenu gagné par H.L.

147 This Court recently had occasion to consider whether social assistance payments are to be deducted from damage awards for lost earnings in *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53. In that case, McLachlin C.J. affirmed the "common sense proposition that social assistance benefits are a form of wage replacement" and deductible at common law to avoid double recovery (para. 28).

Récemment, dans *M.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 477, 2003 CSC 53, notre Cour a eu l'occasion d'examiner la question de savoir si les prestations d'aide sociale devaient être déduites de dommages-intérêts accordés pour la perte de revenus. La juge en chef McLachlin a fait sienne « la proposition sensée selon laquelle les prestations d'aide sociale constituent une forme de remplacement du revenu » et sont déductibles en common law pour qu'il n'y ait pas double indemnisation (par. 28).

148 Klebuc J. did not have the benefit of this Court's decision in *M.B.* His understandable — but nonetheless erroneous — failure to deduct social assistance benefits constitutes a severable error of principle: see *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, and *Housen.*

Cet arrêt n'avait pas encore été rendu lorsque le juge Klebuc s'est prononcé en première instance. Compréhensible, mais néanmoins fautive, l'omission de déduire les prestations d'aide sociale constitue une erreur de principe dissociable : voir *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, et *Housen.*

149 Unfortunately, the amount of social assistance received by H.L. during the first and second periods is not available on the record. In the absence of agreement between the parties, this calculation must therefore be left to the trial court for proof and determination.

Malheureusement, le montant de l'aide sociale touchée par H.L. au cours de la première période et de la seconde ne figure pas au dossier. Faute d'entente entre les parties, il appartiendra donc au tribunal de première instance d'examiner la preuve et de déterminer ce montant.

(6) Loss of Future Earnings

(6) La perte de revenus ultérieure

150 Finally, the trial judge awarded H.L. $179,190 for loss of future earnings. The Court of Appeal set this award aside on the basis of what it found to be factual errors by the trial judge. With respect, I do not share the Court of Appeal's findings of factual error, but I do agree that the trial judge's disposition on this branch of the award lacked an evidentiary basis — quite unlike his award for loss of past earnings, which was supported by the evidence of H.L. and the expert witnesses called by H.L. and Canada.

Enfin, le juge de première instance a accordé à H.L. des dommages-intérêts de 179 190 $ pour la perte de revenus ultérieure. La Cour d'appel a annulé sa décision sur le fondement d'erreurs qualifiées de factuelles. En toute déférence, je ne partage pas cet avis concernant l'existence d'erreurs factuelles, mais je conviens que ce volet de la décision n'était pas étayé par la preuve, contrairement à l'indemnité accordée pour la perte de revenus antérieure appuyée, elle, par le témoignage de H.L. et des experts des deux parties.

151 In quantifying the damages for loss of future earnings, the trial judge acknowledged explicitly that the parties had presented no evidence regarding H.L.'s future earning capacity (para. 70).

En évaluant le préjudice subi à ce chapitre, le juge de première instance a reconnu expressément que les parties n'avaient présenté aucun élément de preuve concernant la capacité de gain ultérieure de H.L. (par. 70).

152 The finding that a person has had emotional and substance abuse problems which in the past have impacted on his earning capacity is not in itself a sufficient basis for concluding on the balance of probabilities that this state of affairs will endure indefinitely. To assume, without additional evidence, that H.L. will continue to suffer from substance abuse and emotional problems, will not upgrade his education or enter into rehabilitation, and will continue to have a reduced earning capacity, would be to do him an unnecessary and unwarranted disservice — particularly in the light of his own evidence that he had already at the time of trial taken steps to end his addiction to alcohol.

Le fait qu'une personne a connu des problèmes émotionnels et de toxicomanie qui ont nui à sa capacité de gain ne permet pas à lui seul de conclure, selon la prépondérance des probabilités, qu'il en sera toujours ainsi. Tenir pour acquis, sans autre élément de preuve, que H.L. continuera de souffrir de toxicomanie et de difficultés émotionnelles, qu'il ne parfera pas son éducation ni ne surmontera son alcoolisme, et que sa capacité de gain demeurera réduite, lui rendrait inutilement et injustement un bien mauvais service, surtout à la lumière de son témoignage selon lequel, au moment du procès, il avait déjà pris des mesures pour venir à bout de sa dépendance à l'alcool.

VI. Disposition

VI. Dispositif

153 For all of these reasons, I would allow the appeal in part, with costs.

Pour tous ces motifs, je suis d'avis d'accueillir en partie le pourvoi, avec dépens.

154 I would confirm the trial judge's award of pecuniary damages for loss of past earnings, but order that they be reduced to reflect the time the appellant spent in prison and the social assistance he received during the period covered by the award. In the absence of an agreement between the parties as to the amounts involved, they are to be fixed on an application by either party to the trial court.

Je confirmerais donc les dommages-intérêts pécuniaires accordés par le juge de première instance pour la perte de revenus antérieure, mais j'ordonnerais leur réduction pour tenir compte du temps que l'appelant a passé en prison et des prestations d'aide sociale qu'il a touchées au cours de la période considérée. À défaut d'une entente entre les parties, les montants en cause devront être fixés sur demande présentée au tribunal de première instance par l'une ou l'autre des parties.

155 Finally, I would dismiss the appeal with respect to the trial judge's award of damages for loss of future earnings.

Enfin, je rejetterais le pourvoi en ce qui concerne les dommages-intérêts accordés par le juge de première instance pour la perte de revenus ultérieure.

The reasons of Bastarache, LeBel and Deschamps JJ. were delivered by

Version française des motifs des juges Bastarache, LeBel et Deschamps rendus par

BASTARACHE J. (dissenting in part) —

LE JUGE BASTARACHE (dissident en partie) —

I. Overview

I. Vue d'ensemble

156 Appeals are creatures of statute; therefore, legislative — not judicial — policy choice must be

L'appel est une création de la loi; le choix de politique législative, et non judiciaire, doit donc

considered paramount. Moreover, because appeals in civil cases are founded on provincial legislation which may vary from one province to another, the rights of appeal and the powers of an appellate court to act on those rights will not necessarily be uniform across the country.

primer. En outre, étant donné que l'appel civil a ses assises dans les lois provinciales et que celles-ci peuvent varier d'une province à l'autre, le droit d'appel et le pouvoir de la cour d'appel de donner suite à l'exercice de ce droit ne seront pas nécessairement les mêmes dans tout le pays.

157

Among all of the statutes governing the powers of appellate courts in Canada, Saskatchewan's *Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1, is the only one that relieves the Court of Appeal of any obligation to adopt the view of the evidence taken by the trial judge and directs it to act on its own view of what, in its judgment, the evidence proves. This must "mean something". In my view, it means that in Saskatchewan, the nature of appellate review is by way of rehearing and not review for error.

Parmi toutes les lois régissant les pouvoirs des cours d'appel au Canada, la *Loi de 2000 sur la Cour d'appel* de la Saskatchewan, L.S. 2000, ch. C-42,1, est la seule à soustraire la Cour d'appel à l'obligation d'accepter les conclusions que le juge de première instance a tirées de la preuve et à lui enjoindre de se déterminer en se fondant sur sa propre appréciation de la preuve. Cela doit « signifier quelque chose ». À mon avis, cela signifie que, en Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non de contrôle d'erreur (« *review for error* »).

158

In this appeal, we are particularly concerned with the conditions under which, in the context of an appeal by way of rehearing, the Court of Appeal will overrule a trial judge's factual inference. I contend that the court will overrule such an inference when it is not reasonable. While it can therefore be said that the standard of review in Saskatchewan for factual inferences is reasonableness, as I will demonstrate more fully in these reasons, it is awkward to speak in terms of a "standard of review" in that regard, given the fact that, in Saskatchewan, the Court of Appeal is not limited to a "review" of the lower court's decision but is, instead, directed to take its own view of the evidence. Nevertheless, for the purposes of my analysis in this context and to promote clarity, I will accept the use of "standard of review" language and agree that the standard applicable to factual inferences is indeed reasonableness.

Dans le présent pourvoi, nous nous intéressons particulièrement aux conditions auxquelles, dans le contexte d'un appel par voie de nouvelle audition, la Cour d'appel infirmera une inférence factuelle du juge de première instance. Je soutiens qu'elle le fera si l'inférence n'est pas raisonnable. Bien que l'on puisse donc affirmer que la norme de contrôle qui s'applique aux inférences factuelles en Saskatchewan est celle de la raisonnabilité, comme je l'explique plus en détail dans les présents motifs, il est incongru d'employer l'expression « norme de contrôle », car en Saskatchewan, la Cour d'appel n'a pas à s'en tenir au « contrôle » de la décision du tribunal inférieur, mais doit plutôt se livrer à sa propre appréciation de la preuve. Néanmoins, pour les besoins de mon analyse dans ce contexte et par souci de clarté, je consens à l'emploi de la terminologie des « normes de contrôle » et conviens que la norme applicable à l'inférence factuelle est bien celle de la raisonnabilité.

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On the facts of this case, I am of the view that the Court of Appeal did not misapply this standard when it set aside the trial judge's award of pecuniary damages. On the contrary, it correctly interfered in this regard because the factual inferences on which the damages award was based were unreasonable, as they were unsupported by the evidence. As will be further demonstrated, even if the more stringent standard adopted in *Housen v. Nikolaisen*, [2002] 2

Vu les faits de l'espèce, j'estime que la Cour d'appel n'a pas mal appliqué cette norme en annulant les dommages-intérêts pécuniaires accordés par le juge de première instance. Au contraire, elle a eu raison de le faire, car les inférences factuelles qui soustendaient leur octroi étaient déraisonnables parce que non étayées par la preuve. Comme nous le verrons, même au regard de la norme plus stricte établie dans l'arrêt *Housen c. Nikolaisen*, [2002] 2

S.C.R. 235, 2002 SCC 33, applied here, I would still uphold the decision of the Court of Appeal.

R.C.S. 235, 2002 CSC 33, appliquée en l'espèce, je serais quand même d'avis de confirmer la décision de la Cour d'appel.

II. Facts

II. Faits

160 The following facts, as found by the trial judge, are not in dispute.

Constatés par le juge de première instance, les faits suivants ne sont pas contestés.

161 H.L. is a status Indian within the meaning of the *Indian Act*, S.C. 1951, c. 29, and is a member of the Gordon First Nation Reserve. When he was six months old, his father died, leaving his mother as the sole caregiver for 10 children of whom he was the youngest. His mother subsequently entered into a relationship with S.W. This relationship was punctuated with frequent physical abuse of H.L.'s mother by S.W. and excessive use of alcohol by both of them. During the first 12 years of his life, H.L.'s mother frequently moved her family between the Gordon First Nation Reserve and the Moscowegan First Nation Reserve of which S.W. was a member. These relocations were often precipitated by acts of violence on the part of S.W.

Indien inscrit au sens de la *Loi sur les Indiens*, S.C. 1951, ch. 29, H.L. est membre de la Première nation de Gordon. Il était âgé de six mois lorsque son père est décédé et que sa mère a dû s'occuper seule de dix enfants dont il était le cadet. Sa mère s'est par la suite engagée avec S.W. dans une relation marquée d'abus physiques fréquents à son endroit et de consommation excessive d'alcool par eux deux. Les douze premières années de la vie de H.L. ont été ponctuées de fréquents allers-retours de la famille entre la réserve de la Première nation de Gordon et celle de la Première nation de Moscowegan, dont S.W. était membre. Décidés par la mère de H.L., ces déplacements faisaient souvent suite à des actes de violence de la part de S.W.

162 When H.L. resided at the Gordon First Nation Reserve, he attended a public school in Punnichy. At no time did he attend Gordon's Day School or reside at the Gordon Student Residence (formerly known as the Gordon Indian Residential School). However, in 1974 or 1975, he joined a boxing club on the Reserve that was operated by the Department of Indian and Northern Affairs and administered by William Starr. Starr was also the administrator of the Student Residence. During this period of time, Starr sexually assaulted the appellant by subjecting him to two acts of masturbation.

Lorsqu'il habitait la réserve de la Première nation de Gordon, H.L. allait à l'école publique de Punnichy. Il n'a jamais fréquenté l'école de jour de Gordon ni habité la résidence d'élèves de Gordon (l'ancien pensionnat indien). Cependant, en 1974 ou en 1975, il s'est inscrit à un club de boxe de la réserve dont le fonctionnement était assuré par le ministère des Affaires indiennes et du Nord Canada, et la gestion par William Starr. Ce dernier était également l'administrateur de la résidence d'élèves. C'est à l'occasion de la participation de H.L. aux activités du club que M. Starr l'a agressé sexuellement en le soumettant à deux actes de masturbation.

163 H.L. brought an action against Starr and the Government of Canada for damages suffered as a consequence of the abuse.

H.L. a intenté contre M. Starr et le gouvernement du Canada une action en indemnisation du préjudice subi par suite des abus sexuels.

III. Judicial History

III. Historique des procédures judiciaires

A. *Saskatchewan Court of Queen's Bench*

A. *Cour du Banc de la Reine de la Saskatchewan*

164 The trial judge, Klebuc J., found that the injuries and losses complained of by H.L. were attributable to Starr's assaults. Specifically, he stated that:

En première instance, le juge Klebuc a conclu que le préjudice allégué par H.L. était attribuable aux agressions commises par M. Starr. Plus précisément, il a affirmé :

[H.]L. unquestionably suffered enormous humiliation, self-blame and loss of self-worth as a consequence of Starr's sexual abuse and such emotional problems in turn caused him to lose interest in pursuing an education, due in part to his inability to concentrate. Immediately after the second assault, he commenced excessive alcohol consumption which in turn led to numerous convictions on alcohol and theft related offences, including convictions between 1978 and 2000 for driving while disqualified and driving while impaired. These difficulties, as well as his difficulty with being "emotionally close" with women, in my view are attributable to Starr's sexual abuse of him. To the extent his dysfunctional family or [S.]W.'s misconduct may be viewed as a cause, I am of the opinion that Starr's abuse is such an extraordinary occurrence that it constitutes a novus actus interveniens which severed any chain of causation that may have existed between the aforementioned causes and the damages ultimately experienced by [H.]L.

(*H.L. v. Canada (Attorney General)* (2001), 208 Sask. R. 183, 2001 SKQB 233, at para. 29)

Consequently, Klebuc J. granted the appellant judgment against Starr, as well as the Government of Canada, since he found that the criteria for the imposition of vicarious liability on the Government of Canada had been met.

165 As for H.L.'s entitlement to damages, the trial judge concluded that H.L. was entitled to non-pecuniary damages of $60,000 for the emotional distress he suffered and will continue to suffer as a consequence of Starr's abuse and aggravated damages of $20,000 for the humiliation and indignation he suffered as a result of Starr's conduct. Klebuc J. also concluded that H.L. was willing and able to work but for his emotional and alcohol-related problems, which were attributable to Starr's sexual abuse. Therefore, the trial judge awarded the appellant $117,337.09 for the past loss of income earning capacity and $179,190 for future loss. This latter amount was based solely on the evidence relating to H.L.'s past earning capacity. Finally, Klebuc J. awarded H.L. punitive damages against Starr in the amount of $20,000.

166 In supplemental reasons, Klebuc J. held that H.L. was entitled to claim pre-judgment interest against

[TRADUCTION] Il ne fait aucun doute que [H.]L. a ressenti une grande humiliation, s'en est pris à lui-même et a perdu son estime de soi par suite des abus sexuels commis par M. Starr, et ces difficultés émotionnelles l'ont amené à se désintéresser de ses études, en partie à cause de son incapacité à se concentrer. Dès après la deuxième agression, il s'est mis à consommer de l'alcool de façon abusive, ce qui l'a amené à commettre de nombreuses infractions liées à l'alcool et au vol. Entre 1978 et 2000, par exemple, il a été reconnu coupable de conduite sans permis et de conduite avec facultés affaiblies. Ces ennuis, ainsi que sa difficulté à « établir des liens affectifs » avec une femme, sont attribuables, selon moi, aux abus sexuels. Dans la mesure où sa famille dysfonctionnelle ou le comportement répréhensible de [S.]W. peuvent être considérés comme une cause du préjudice, j'estime que les actes de M. Starr ont été un événement si extraordinaire qu'ils constituent un novus actus interveniens rompant tout lien de causalité entre cette cause et le préjudice ultime de [H.]L.

(*H.L. c. Canada (Attorney General)* (2001), 208 Sask. R. 183, 2001 SKQB 233, par. 29)

Estimant remplies les conditions auxquelles une personne peut être tenue responsable du fait d'autrui au Canada, le juge Klebuc a donc donné gain de cause à l'appelant contre M. Starr et le gouvernement du Canada.

Pour ce qui est de l'indemnité, le juge de première instance a conclu que H.L. avait droit à des dommages-intérêts non pécuniaires de 60 000 $ pour la détresse émotionnelle dont il avait souffert, et dont il continuerait de souffrir, à cause des abus sexuels, ainsi qu'à des dommages-intérêts majorés de 20 000 $ pour l'humiliation et l'indignation causées par ces actes. Le juge Klebuc a également conclu que H.L. aurait été désireux et en mesure de travailler n'eût été ses difficultés émotionnelles et ses problèmes liés à l'alcool depuis les abus sexuels. Il a donc accordé à l'appelant 117 337,09 $ pour la perte de capacité de gain antérieure et de 179 190 $ pour la perte de capacité de gain ultérieure. Ce dernier octroi reposait uniquement sur la preuve relative à la capacité de gain antérieure de H.L. Enfin, il a condamné M. Starr à des dommages-intérêts punitifs de 20 000 $.

Dans des motifs complémentaires, le juge Klebuc a statué que H.L. pouvait exiger de chacun des

each defendant from the date he served his statement of claim: see *H.L. v. Canada (Attorney General)* (2001), 210 Sask. R. 114, 2001 SKQB 233.

B. *Saskatchewan Court of Appeal*

167 The Attorney General of Canada appealed to the Court of Appeal on the ground that the trial judge erred in holding the Government of Canada vicariously liable for Starr's acts. The Attorney General of Canada also made the following alternative submissions: (i) the award of damages for emotional distress was excessive; (ii) the award of damages for loss of earning capacity, past and future, was ill-founded; and (iii) the award of pre-judgment interest was contrary to law. H.L. cross-appealed, taking issue with the trial judge's assessment of damages and claiming that, together with pre-judgment interest, he was entitled to damages in the amount of $527,000.

168 Cameron J.A., writing for the Court of Appeal, began his reasons for judgment with a review of the statutory framework for appeals and their adjudication in the province of Saskatchewan, and he came to the following conclusion:

> On appeal from a decision of a judge of the Court of Queen's Bench sitting without a jury, taken pursuant to sections 7(2)(a) and 13 of the *Court of Appeal Act, 2000*, it is the duty of the court acting under section 14 of the *Act* to rehear the case in the context of the grounds of appeal and make up its own mind, not disregarding the judgment appealed from, and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly . . . .

(*H.L. v. Canada (Attorney General)* (2002), 227 Sask. R. 165, 2002 SKCA 131, at para. 77) ("*H.L.* (C.A.)")

In coming to this conclusion, Cameron J.A. was cognizant of the divide that is setting in between the adjudicative framework suggested by the general standards of appellate review and that provided by *The Court of Appeal Act, 2000*; however, he

défendeurs de l'intérêt avant jugement à compter de la signification de sa déclaration : voir *H.L. c. Canada (Attorney General)* (2001), 210 Sask. R. 114, 2001 SKQB 233.

B. *Cour d'appel de la Saskatchewan*

Le procureur général du Canada a interjeté appel devant la Cour d'appel au motif que le juge de première instance avait eu tort de conclure à la responsabilité du gouvernement du Canada pour les actes de M. Starr. Il a également présenté les arguments subsidiaires suivants : (i) les dommages-intérêts accordés pour la détresse émotionnelle étaient exorbitants; (ii) l'indemnisation des pertes de capacité de gain antérieure et ultérieure était sans fondement; (iii) l'octroi de l'intérêt avant jugement était contraire à la loi. Contestant l'évaluation du préjudice par le juge de première instance et alléguant que, avec l'intérêt avant jugement, il avait droit à des dommages-intérêts de 527 000 $, H.L. a formé un pourvoi incident.

Dans ses motifs rendus au nom de la Cour d'appel, après un examen des dispositions applicables aux appels et à leur règlement dans la province de la Saskatchewan, le juge Cameron est arrivé à la conclusion suivante :

> [TRADUCTION] Lorsque la décision d'un juge de la Cour du Banc de la Reine siégeant sans jury est portée en appel sur le fondement de l'al. 7(2)a) et de l'art. 13 de la *Loi de 2000 sur la Cour d'appel*, la Cour d'appel doit, suivant l'art. 14 de cette loi, réentendre l'affaire en fonction des motifs d'appel et se former sa propre opinion en tenant compte du jugement porté en appel et en lui accordant une importance particulière lorsque la crédibilité d'un témoin est en cause, tout en jouissant de l'entière liberté de tirer ses propres inférences des faits prouvés ou reconnus, et rendre une décision en conséquence . . .

(*H.L. c. Canada (Attorney General)* (2002), 227 Sask. R. 165, 2002 SKCA 131, par. 77) (« *H.L.* (C.A.) »)

En tirant cette conclusion, le juge Cameron était conscient du fossé qui se creusait entre les paramètres découlant des normes générales de révision en appel et ceux prévus par la *Loi de 2000 sur la Cour d'appel* pour le règlement d'un appel. Il a néanmoins

maintained that while, in other provinces, appeal may be by way of review for error, in Saskatchewan, appeals have traditionally been and today still are by way of rehearing.

opiné que même si, dans les autres provinces, il peut donner lieu à un contrôle d'erreur, en Saskatchewan, le règlement d'un appel s'effectue encore et toujours par voie de nouvelle audition.

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Turning to the grounds of appeal advanced by the parties, Cameron J.A. dismissed the Attorney General of Canada's appeal as it related to the trial judge's conclusion that the Government of Canada was vicariously liable, entitling H.L. to $80,000 in non-pecuniary damages. However, Cameron J.A. allowed the Attorney General of Canada's appeal in relation to the trial judge's awards of pecuniary damages for past and future loss of earning capacity and pre-judgment interest. As to the pecuniary damages award, Cameron J.A., taking his own view of the evidence, concluded that the basic evidentiary foundation for the award was lacking. In addition to this fundamental error, Cameron J.A. also found that the trial judge erred in four respects in his calculation of the award: (i) the trial judge failed to consider the plaintiff's duty to mitigate; (ii) he unreasonably concluded that the plaintiff did not have a "crumbling skull" and therefore attributed too much to Starr's wrongful acts in his assessment of pecuniary damages; (iii) he did not reduce the damages award to reflect the time H.L. was incarcerated; and (iv) he failed to account for the social assistance payments H.L. received during the relevant period.

Le juge Cameron a ensuite examiné les motifs d'appel invoqués par les parties. Il a rejeté l'appel du procureur général du Canada visant la conclusion du juge de première instance selon laquelle le gouvernement du Canada était responsable des actes de M. Starr et H.L. avait droit à des dommages-intérêts non pécuniaires de 80 000 $. Il a cependant accueilli l'appel quant aux dommages-intérêts pécuniaires accordés pour les pertes de capacité de gain antérieure et ultérieure, et à l'intérêt avant jugement. En ce qui concerne les dommages-intérêts pécuniaires, le juge Cameron, se fondant sur sa propre appréciation de la preuve, a conclu que leur montant ne s'appuyait sur aucun élément de preuve. Outre cette erreur fondamentale, il a estimé que le juge de première instance avait commis quatre erreurs dans le calcul de la somme accordée : (i) il n'avait pas pris en considération l'obligation du demandeur de limiter le préjudice; (ii) il avait conclu, de manière déraisonnable, que la vulnérabilité du demandeur n'était pas déjà active, de sorte qu'il avait accordé trop d'importance aux actes répréhensibles de M. Starr en établissant les dommages-intérêts pécuniaires; (iii) il n'avait pas retranché de la période considérée le temps que H.L. avait passé en prison; (iv) il n'avait pas tenu compte des prestations d'aide sociale touchées par H.L. pendant cette période.

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As for H.L.'s cross-appeal, Cameron J.A. dismissed it except as it related to H.L.'s claim of damages for the cost of future care. The court allowed H.L.'s appeal in this regard, and awarded him $6,500.

Quant à l'appel incident de H.L., le juge Cameron l'a rejeté sauf en ce qui concerne les soins futurs, pour lesquels il lui a accordé 6 500 $ à titre de dommages-intérêts.

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H.L. applied to the Court of Appeal pursuant to s. 37 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, for leave to appeal to this Court on the following grounds:

(1) What is the correct standard of review of the appellate court of a province, and is that standard different for the appellate court of Saskatchewan?

Sur le fondement de l'art. 37 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26, H.L. a demandé à la Cour d'appel l'autorisation de se pourvoir devant notre Cour relativement aux questions suivantes :

(1) Quelle norme de révision la cour d'appel d'une province doit-elle appliquer, et cette norme est-elle différente pour la Cour d'appel de la Saskatchewan?

(2) Did the Saskatchewan Court of Appeal misapply that standard regarding:

a) expert witnesses;

b) pecuniary damages?

(2) La Cour d'appel de la Saskatchewan a-t-elle mal appliqué cette norme à l'égard :

a) des témoins experts;

b) des dommages-intérêts pécuniaires?

172 In his reasons for judgment on the application, Bayda C.J.S. noted that the scope of the Court of Appeal's powers was uncertain at present and that this controversy must be resolved: (2003), 238 Sask. R. 167, 2003 SKCA 78. Therefore, he granted H.L. leave to appeal to this Court on the grounds stipulated. He also granted the Attorney General of Canada leave to cross-appeal on the ground that the court erred in its determination that the Government of Canada was vicariously liable for Starr's acts; however, the Attorney General of Canada discontinued the cross-appeal, and it was not argued before us.

Dans ses motifs afférents à la demande d'autorisation, le juge en chef Bayda a fait observer que l'étendue des pouvoirs de la Cour d'appel était alors incertaine et que la question devait être résolue : (2003), 238 Sask. R. 167, 2003 SKCA 78. Il a donc accueilli la demande d'autorisation de pourvoi de H.L. pour les motifs indiqués. Il a également autorisé le procureur général du Canada à former un pourvoi incident au motif que la Cour d'appel aurait eu tort de conclure à la responsabilité du gouvernement du Canada pour les actes de M. Starr; abandonné, l'appel incident n'a toutefois pas été plaidé devant nous.

IV. Analysis

A. *The Nature and Standard of Appellate Review in Saskatchewan for Questions of Fact*

(1) Introduction

IV. Analyse

A. *La nature de la révision en appel et la norme de révision en appel applicable à l'égard d'une question de fait en Saskatchewan*

(1) Introduction

173 Before beginning my analysis regarding my view of the applicable standard of appellate review in Saskatchewan for questions of fact, it is necessary to clarify what I respectfully perceive to be some confusion unfortunately apparent regarding the meaning of the term "appeal by way of rehearing".

Avant d'entreprendre l'analyse de la norme de révision en appel applicable à l'égard d'une question de fait en Saskatchewan, quelques éclaircissements s'imposent pour dissiper la confusion que semble malheureusement créer l'expression « appel par voie de nouvelle audition ».

174 Because the word "rehearing" can be used in a number of different senses, to avoid confusion three situations need to be identified and explained: (1) appeal by way of review (for error); (2) appeal by way of rehearing; and (3) a rehearing which is a new trial or occasionally a new appeal, also known as a *de novo* hearing: see A. A. S. Zuckerman, *Civil Procedure* (2003), at pp. 761-62. On an appeal by way of review, the appeal court's duty is limited to a review of the lower court's decision, and it may only interfere in limited circumstances identified by reference to the standard of review applicable to the particular type of question before the court (i.e., questions of fact, law or mixed fact and law):

Étant donné que l'expression « nouvelle audition » ou « nouvelle audience » (« *rehearing* ») peut être employée dans plusieurs sens différents, afin d'éviter toute confusion, des précisions s'imposent sur les trois procédures d'appel : (1) le contrôle d'erreur; (2) la nouvelle audition; (3) la nouvelle audition consistant à instruire l'affaire à nouveau ou, à l'occasion, à reprendre l'appel, également appelée audition *de novo* : voir A. A. S. Zuckerman, *Civil Procedure* (2003), p. 761-762. Dans le cadre d'un appel par voie de contrôle, la cour d'appel doit s'en tenir à l'examen de la décision du tribunal inférieur et ne peut intervenir qu'à certaines conditions, selon la norme de contrôle applicable au type de question dont elle

Zuckerman, at p. 762. In general, in Canada appeals are conducted by way of review: see, e.g., *Housen*.

In contrast, on an appeal by way of rehearing, the court is not limited to a scrutiny of the lower court's decision but is expected to form its own judgment on the issues: Zuckerman, at p. 769. In the case at bar, the Saskatchewan Court of Appeal held that this is the type of appeal that is available for civil matters tried by a judge alone in that province. In its reasons for judgment, the Court of Appeal described the difference between an appeal by way of rehearing and an appeal by way of review for error as follows:

> Rehearing is oriented to the decision upon the merits of the case. Review for error is oriented to the process by which the decision is made.

(*H.L.* (C.A.), at para. 86)

Finally, an appeal by way of rehearing must be distinguished from the last category of appeal types — an appeal by way of a hearing *de novo*. As recently noted by the Australian High Court, an appeal by way of rehearing does not involve a completely fresh hearing by the appellate court of all the evidence: see *Fox v. Percy* (2003), 214 C.L.R. 118, [2003] HCA 22, at para. 22. Instead, the court "proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits".

It is especially important not to conflate the concept of an appeal by way of rehearing with an actual rehearing or a "retrial" (a.k.a. an appeal by way of a hearing *de novo*); however, with respect, it appears to me that in certain passages in his reasons for judgment in this case, my colleague Fish J. may have done so. For instance, at para. 15 of his reasons, Fish J. states that "[n]othing in the record before us, in the relevant provisions of the Act, nor in the Court of Appeal's own earlier appreciation of its proper role suggests to me that it has now been invested with a general jurisdiction to 'rehear' trials — that is, to apply a 'rehearing' standard when it reviews judgments at trial." As explained above, it is my view that there is a significant difference between "rehearing" trials (i.e., conducting a *de novo* hearing) and

est saisie (question de fait, de droit ou mixte de fait et de droit) : Zuckerman, p. 762. Au Canada, l'appel est généralement instruit par voie de contrôle : voir p. ex. l'arrêt *Housen*.

175 Par contre, lorsqu'elle procède par voie de nouvelle audition, la cour d'appel n'est pas confinée à l'examen de la décision du tribunal inférieur, mais doit se former sa propre opinion sur les questions en litige : Zuckerman, p. 769. En l'espèce, la Cour d'appel de la Saskatchewan a statué que telle était la procédure d'appel applicable à une affaire civile instruite par un juge seul dans cette province. Dans ses motifs, la Cour d'appel a distingué l'appel par voie de nouvelle audition de l'appel par voie de contrôle d'erreur :

> [TRADUCTION] La nouvelle audition vise la décision au fond. Le contrôle d'erreur vise la procédure à l'issue de laquelle la décision est rendue.

(*H.L.* (C.A.), par. 86)

176 Enfin, l'appel par voie de nouvelle audition doit être distingué d'avec l'appel par voie d'audition *de novo*. Comme l'a récemment indiqué la Haute Cour d'Australie, l'appel par voie de nouvelle audition ne suppose pas que l'on réentende l'ensemble de la preuve : voir *Fox c. Percy* (2003), 214 C.L.R. 118, [2003] HCA 22, par. 22. En fait, la cour d'appel [TRADUCTION] « se fonde sur le dossier et sur tout nouvel élément qu'il lui arrive, exceptionnellement, d'admettre en preuve ».

177 Il est particulièrement important de ne pas confondre l'appel par voie de nouvelle audition avec le fait de réentendre l'affaire ou de l'instruire à nouveau (appel par voie d'audition *de novo*); cependant, en toute déférence, il me semble que mon collègue le juge Fish a pu le faire dans certains passages de ses motifs. Au paragraphe 15, par exemple, il dit que « [n]i le dossier qui nous a été présenté ni les dispositions pertinentes de la Loi ni l'appréciation de son rôle par la Cour d'appel elle-même ne me permettent de conclure que cette dernière est désormais investie du pouvoir général de "réentendre" une affaire, c'est-à-dire de se prononcer sur un jugement de première instance à l'issue d'une "nouvelle audition". » Comme je l'explique précédemment, je crois qu'il existe une grande différence entre « réentendre »

applying a "rehearing" standard when reviewing judgments at trial (i.e., conducting an appeal by way of "rehearing").

178 Similarly, at para. 52 of his reasons, Fish J. notes that "[i]n the absence of a clear statutory mandate to the contrary, appellate courts do not 'rehear' or 'retry' cases." As briefly noted above, in the case at bar, the Court of Appeal concluded that, in Saskatchewan, on an appeal from a decision of a trial judge without a jury, the appeal is by way of rehearing, the Court of Appeal being directed to "make up its own mind, not disregarding the judgment appealed from, and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly": *H.L.* (C.A.), at para. 77 (emphasis added). In my opinion, in *H.L.* (C.A.), it is clear that when the Court of Appeal asserted that appeals in Saskatchewan are heard by way of rehearing, it was not claiming it has the power to conduct retrials or *de novo* hearings; rather, it was saying that it was not limited to a review of the lower court's decision but could instead direct its attention to the merits of the case (para. 86). I would immediately note that this language can be somewhat confusing because, as I shall explain later, a Court of Appeal will only interfere where it finds that the trial judge committed some error. There is always a degree of deference to trial judges in an appeal by way of rehearing.

179 With this semantic issue hopefully clarified, I will proceed with my analysis of the applicable standard of appellate review in Saskatchewan for questions of fact. I will begin with a review of the provisions of *The Court of Appeal Act, 2000* at issue in this appeal — namely ss. 7(2)(a) and 13, which pertain to the right of appeal, and ss. 12 and 14, which pertain to the powers of the Court of Appeal to act on that right — and I will apply the modern interpretation rule set out by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87, to ss. 13 and 14

une affaire (tenue d'une audition *de novo*) et réviser un jugement de première instance au regard de la norme de la « nouvelle audition » (instruction d'un appel par voie de « nouvelle audition »).

De même, au par. 52 de ses motifs, le juge Fish signale que, « [à] moins que le législateur ne lui confère clairement le pouvoir de le faire, une cour d'appel ne "réentend" pas une affaire ni ne l'"instruit à nouveau". » Comme je l'ai déjà expliqué brièvement, la Cour d'appel a conclu en l'espèce que, en Saskatchewan, l'appel de la décision d'un juge de première instance siégeant sans jury était instruit par voie de nouvelle audition. Il lui incombait alors de [TRADUCTION] « se former sa propre opinion en tenant compte du jugement porté en appel et en lui accordant une importance particulière lorsque la crédibilité d'un témoin est en cause, tout en jouissant de l'entière liberté de tirer ses propres inférences des faits prouvés ou reconnus, et [de] rendre une décision en conséquence » : *H.L.* (C.A.), par. 77 (je souligne). Il me paraît clair qu'en affirmant ainsi que l'appel était instruit par voie de nouvelle audition en Saskatchewan, la Cour d'appel ne prétendait pas pouvoir reprendre le procès ou procéder à une audition *de novo*. Elle disait plutôt que son rôle n'était pas limité au contrôle de la décision du tribunal inférieur, mais qu'elle pouvait au contraire se pencher sur le fond de l'affaire (par. 86). Je signale d'emblée que ces propos peuvent quelque peu prêter à confusion parce que, comme je l'explique plus loin, une cour d'appel n'intervient que si elle estime que le juge de première instance a commis une erreur. Un certain degré de déférence envers le juge de première instance s'impose toujours dans un appel par voie de nouvelle audition.

Ce problème de sémantique étant, je l'espère, résolu, je me penche maintenant sur la norme de révision en appel applicable à une question de fait dans la province en cause. J'examinerai tout d'abord les dispositions de la *Loi de 2000 sur la Cour d'appel* visées en l'espèce — soit l'al. 7(2)a) et l'art. 13, relatifs au droit d'appel, et les art. 12 et 14, portant sur le pouvoir de la Cour d'appel de donner suite à l'exercice de ce droit —, puis j'appliquerai aux art. 13 et 14 la règle d'interprétation moderne énoncée par E. A. Driedger dans *Construction of Statutes*

in particular in order to determine if they vest the Saskatchewan Court of Appeal with the jurisdiction to conduct appeals by way of rehearing or by way of review for error. After identifying the nature of appellate review in Saskatchewan, I will consider the effect of judicial policy concerns in relation to the court's exercise of its review powers in certain circumstances. I will then offer my conclusion regarding the standard of appellate review in Saskatchewan for questions of fact, and I will endeavour to reconcile past jurisprudence with this conclusion.

(2) Statutory Framework

(a) *Background*

Before commencing my analysis of the appropriate interpretation of the statutory provisions at issue in this appeal, it is necessary to make note of two background points that will influence my reasoning in this regard.

First, as noted by La Forest J. in *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at pp. 69-70:

> Appeals are solely creatures of statute; see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.

(See also *Fox v. Percy*, at para. 20.)

Because appeals are creatures of statute, legislative — not judicial — policy choice must be considered paramount: see, e.g., *Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd.* (2002), 223 Sask. R. 236, 2002 SKCA 100, at para. 34. Moreover, because appeals in civil cases are founded on provincial legislation, which may vary from one province to another, it must be accepted that the rights of appeal and the powers of the court to act on those rights will not necessarily be uniform across

(2e éd. 1983), p. 87, afin de déterminer s'ils confèrent à la Cour d'appel de la Saskatchewan le pouvoir d'instruire un appel par voie de nouvelle audition ou par voie de contrôle d'erreur. Une fois déterminée la nature de la révision en appel en Saskatchewan, j'examinerai l'incidence des considérations de politique judiciaire sur l'exercice du pouvoir de révision de la Cour d'appel dans certaines circonstances. J'exposerai ensuite ma conclusion sur la norme de révision en appel applicable à une question de fait en Saskatchewan, puis je m'efforcerai de la concilier avec la jurisprudence existante.

(2) Cadre législatif

a) *Contexte*

180 Avant de me pencher sur la juste interprétation des dispositions législatives en cause, deux éléments de contexte qui influenceront mon raisonnement doivent être signalés.

181 Premièrement, comme l'a fait observer le juge La Forest dans l'arrêt *Kourtessis c. M.R.N.*, [1993] 2 R.C.S. 53, p. 69-70 :

> Les appels ne sont qu'une création de la loi écrite; voir l'arrêt *R. c. Meltzer*, [1989] 1 R.C.S. 1764, à la p. 1773. Une cour d'appel ne possède pas de compétence inhérente. De nos jours toutefois, on a parfois tendance à oublier ce principe fondamental. Les appels devant les cours d'appel et la Cour suprême du Canada sont devenus si courants que l'on s'attend généralement à ce qu'il existe un moyen quelconque d'en appeler de la décision d'un tribunal de première instance. Toutefois, il demeure qu'il n'existe pas de droit d'appel sur une question sauf si le législateur compétent l'a prévu.

(Voir également *Fox c. Percy*, par. 20.)

L'appel étant une création de la loi, le choix de politique législative, et non judiciaire, doit primer : voir, p. ex., *Farm Credit Corp. c. Valley Beef Producers Co-operative Ltd.* (2002), 223 Sask. R. 236, 2002 SKCA 100, par. 34. En outre, étant donné que l'appel civil a ses assises dans les lois provinciales et que celles-ci peuvent varier d'une province à l'autre, il faut accepter que le droit d'appel et le pouvoir de la cour d'appel de donner suite à l'exercice de ce droit ne seront pas nécessairement les mêmes dans tout

the country. Thus, when considering the appropriate interpretation of statutory appeal provisions, such as those at issue in this case, it is necessary to have regard for such statutory variations and differences in appeal traditions as may exist between provinces: *Valley Beef Producers Co-operative*, at para. 36.

182 Second, s. 10 of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, reads as follows:

> Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.

As noted by the Court of Appeal in *Valley Beef Producers Co-operative*, s. 10 of *The Interpretation Act* tells us that the provisions of *The Court of Appeal Act, 2000*, including those pertaining to both the right of appeal and the powers of the court, must be "construed and interpreted liberally to the end of fulfilling their legislative objectives or, to put it another way, to the ultimate end of implementing the legislative policy they reflect": *Valley Beef Producers Co-operative*, at para. 43; see also *H.L.* (C.A.), at para. 14.

(b) *Statutory Provisions at Issue*

183 The following provisions of *The Court of Appeal Act, 2000* are at issue in this appeal:

> **7**. . .
>
> (2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:
>
> (a) of the Court of Queen's Bench or a judge of that court;
>
> **12**(1) On an appeal, the court may:
>
> (a) allow the appeal in whole or in part;
>
> (b) dismiss the appeal;
>
> (c) order a new trial;
>
> (d) make any decision that could have been made by the court or tribunal appealed from;

le pays. Ainsi, pour dégager la juste interprétation de dispositions législatives en la matière, comme celles visées en l'espèce, il faut tenir compte des variations et des différences existant d'une province à l'autre au chapitre des dispositions et des usages en matière d'appel : *Valley Beef Producers Co-operative*, par. 36.

Deuxièmement, l'art. 10 de la *Loi d'interprétation de 1995*, L.S. 1995, ch. I-11,2, est libellé comme suit :

> Chaque texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large et libérale qui soit compatible avec la réalisation de son objet.

Comme l'a fait remarquer la Cour d'appel dans *Valley Beef Producers Co-operative*, suivant l'art. 10 de la *Loi d'interprétation*, les dispositions de la *Loi de 2000 sur la Cour d'appel*, notamment celles se rapportant au droit d'appel et aux pouvoirs de la Cour d'appel, doivent être [TRADUCTION] « interprétées largement afin de favoriser la réalisation de l'objectif législatif, c'est-à-dire la mise en œuvre ultime de la politique législative qui les sous-tend » : *Valley Beef Producers Co-operative*, par. 43; voir aussi *H.L.* (C.A.), par. 14.

b) *Dispositions législatives en cause*

Les dispositions suivantes de la *Loi de 2000 sur la Cour d'appel* sont en cause dans le présent pourvoi :

> **7**. . .
>
> (2) Sous réserve du paragraphe (3) et de l'article 8, appel peut être interjeté à la Cour d'une décision :
>
> a) de la Cour du Banc de la Reine ou d'un juge de cette cour;
>
> **12**(1) Sur appel, la Cour peut :
>
> a) accueillir l'appel en tout ou en partie;
>
> b) rejeter l'appel;
>
> c) ordonner la tenue d'un nouveau procès;
>
> d) rendre toute décision qui aurait pu être rendue par la Cour ou le tribunal qui a prononcé la décision frappée d'appel;

(e) impose reasonable terms and conditions in a decision; and

(f) make any additional decision that it considers just.

(2) Where the court sets aside damages assessed by a jury, the court may assess any damages that the jury could have assessed.

13 Where issues of fact have been tried, or damages have been assessed, by a trial judge without a jury, any party is entitled to move against the decision of the trial judge, by motion for a new trial or otherwise:

(a) within the same time that is allowed in cases of trial or assessment of damages by a jury; and

(b) on the same grounds, including objections against the sufficiency of the evidence, or the view of the evidence taken by the trial judge, that are allowed in cases of trial or assessment of damages by a jury.

14 On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

e) assortir une décision de modalités et de conditions raisonnables;

f) rendre toute autre décision qu'elle estime juste.

(2) Lorsqu'elle annule des dommages-intérêts adjugés par un jury, la Cour peut évaluer tous dommages-intérêts que le jury aurait pu évaluer.

13 Lorsqu'un juge du procès siégeant sans jury a rendu sa décision sur une question de fait ou évalué les dommages-intérêts, une partie peut attaquer la décision, notamment par voie de motion visant la tenue d'un nouveau procès :

a) dans le même délai que celui qui est prévu dans les cas où le procès a été tenu devant jury ou que les dommages-intérêts ont été évalués par un jury;

b) pour les mêmes moyens, y compris pour insuffisance de preuve ou en raison des conclusions qu'en a tirées le juge, que ceux qui sont autorisés dans les cas où le procès a été tenu devant jury ou que les dommages-intérêts ont été évalués par un jury.

14 Lorsque la décision d'un juge du procès est portée en appel ou qu'une motion est présentée à cet égard, ou lors d'une nouvelle audience, la Cour n'est pas tenue d'ordonner la tenue d'un nouveau procès ou d'accepter les conclusions que le juge du procès a tirées de la preuve. La Cour se détermine en se fondant sur sa propre appréciation de la preuve et peut tirer les inférences factuelles et rendre la décision qu'aurait dû rendre, à son avis, le juge du procès.

184

Sections 7(2)(a) and 13 pertain to the right of appeal and ss. 12 and 14 pertain to the powers of the court. In the course of my analysis of the statutory provisions at issue, I will focus on s. 13 of the Act, given that it specifically pertains to the right of appeal when issues of fact have been tried by a judge alone and that the particular issue in this appeal is the standard of appellate review for questions of fact, and s. 14, given that it provides the remedy associated with the right conferred by s. 13.

L'alinéa 7(2)a) et l'art. 13 touchent au droit d'appel, et les art. 12 et 14, aux pouvoirs de la Cour d'appel. Je mettrai l'accent sur l'art. 13, étant donné qu'il établit précisément le droit d'appel conféré lorsqu'un juge seul s'est prononcé sur une question de fait et que le litige porte en l'espèce sur la norme de révision en appel applicable à une question de fait, ainsi que sur l'art. 14, qui prévoit les mesures à prendre relativement au droit conféré à l'art. 13.

(c) *Did the Province Act Within Its Authority When It Enacted The Court of Appeal Act, 2000?*

c) *La province avait-elle compétence pour adopter la Loi de 2000 sur la Cour d'appel?*

185

Before commencing the substantive portion of my analysis of the appropriate interpretation of the statutory provisions at issue in this appeal, as a preliminary point, it is important to note that the Saskatchewan legislature acted within its authority

Avant d'aborder la question substantielle de la juste interprétation des dispositions législatives en cause dans le présent pourvoi, il importe de préciser que le législateur de la Saskatchewan avait le pouvoir d'adopter la *Loi de 2000 sur la Cour*

when it enacted *The Court of Appeal Act, 2000*. Specifically, the constitutional authority for this Act is founded on the exclusive provincial jurisdiction over property and civil rights and the administration of justice: see *Constitution Act, 1867*, ss. 92(13) and 92(14). Although I made note of this point earlier, in my view it is also important to reiterate here that, because appeal rights and powers for civil matters are generally a matter of provincial jurisdiction, the different common law jurisdictions across Canada need not have the same nature or standards of appellate review. As noted by the Attorney General of Canada in his written submissions, just as it is with all of the heads of provincial power under s. 92 of the *Constitution Act, 1867*, the exercise of the power over property and civil rights and the administration of justice is destined to result in different approaches to similar issues. One need only look to the various provincial statutes pertaining to limitation of actions, contributory negligence, juries and no-fault accident insurance schemes as examples of this. Therefore, in my view it is clear that interprovincial variation in the nature and standards of appellate review is both possible and acceptable in our federal system.

d'appel. En fait, son fondement constitutionnel résidait dans la compétence exclusive des provinces en matière de propriété et de droits civils et d'administration de la justice : voir la *Loi constitutionnelle de 1867*, par. 92(13) et (14). Il m'apparaît aussi important de rappeler, dans la mesure où les droits et les pouvoirs en matière civile relèvent généralement de la compétence provinciale, que ni la nature de la révision en appel ni les normes de révision en appel n'ont à être les mêmes dans les différents ressorts de common law du Canada. Le procureur général du Canada l'a également signalé dans son mémoire, l'exercice des pouvoirs en matière de propriété et de droits civils et d'administration de la justice, comme de tous ceux qui sont énumérés à l'art. 92 de la *Loi constitutionnelle de 1867*, apporte nécessairement des solutions différentes à des problèmes semblables. Il suffit pour s'en convaincre de consulter les lois provinciales sur la prescription, la négligence contributive, les jurys et l'assurance-accidents sans égard à la responsabilité. À mon avis, il est donc clair que la variation, d'une province à l'autre, de la nature de la révision en appel et des normes de révision en appel est possible et acceptable dans notre système fédéral.

(d) *Statutory Interpretation*

186 A determination of the standard of appellate review in Saskatchewan for questions of fact turns on the interpretation given to the provisions of *The Court of Appeal Act, 2000* quoted above. On numerous occasions, this Court has confirmed that the preferred approach to statutory interpretation is that set out by Driedger, at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

187 Despite this Court's adherence to this approach to statutory interpretation, as noted by this Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 28, the interpretive factors enumerated by

d) *Interprétation législative*

La norme de révision applicable en appel à l'égard d'une question de fait en Saskatchewan dépend de la manière dont on interprète les dispositions précitées de la *Loi de 2000 sur la Cour d'appel*. Notre Cour a dit maintes fois que la méthode d'interprétation à privilégier est celle qu'énonce Driedger, à la p. 87 :

> [TRADUCTION] Aujourd'hui, il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Notre Cour adhère certes à cette méthode, mais point n'est besoin d'appliquer à la lettre les facteurs d'interprétation énumérés par Driedger, d'autant qu'ils sont étroitement liés et interdépendants : *Chieu c. Canada (Ministre de la*

Driedger need not be applied in a formulaic fashion, particularly because they are closely related and interdependent.

As explained earlier, in the course of my analysis of the appropriate interpretation of the statutory provisions at issue in this appeal, I will focus on ss. 13 and 14 the Act. I will first consider the grammatical and ordinary sense of the words used in these two sections. I will then proceed to read these sections in their broader context. This inquiry will include an examination of (i) the object of the Act, (ii) the object of the specific legislative provisions that form the statutory framework for the business of appeal, and (iii) the historical foundations of the Act.

(i) Grammatical and Ordinary Sense

1. *Section 13*

Section 13 augments the right of appeal conferred by s. 7(2)(a), "[w]here issues of fact have been tried, or damages have been assessed, by a trial judge without a jury." In particular, s. 13(b) sets out the grounds upon which a party can object to the decision of the trial judge. On an ordinary and grammatical reading of this paragraph, it is clear that it sets out two distinct grounds. First, s. 13(b) incorporates by reference the same grounds of objection that are allowed in cases of trial or assessment of damages by a jury, including the sufficiency of the evidence. Second, para. (b) expands the scope of an appeal from a decision of a judge alone beyond the scope of an application for a new trial following a trial by jury by entitling a party to object to the view of the evidence taken by the trial judge. The fact that s. 13(b) provides a party with two discrete grounds for objection is supported by the legislature's use of the word "or" between "the sufficiency of the evidence" and "the view of the evidence taken by the trial judge". As noted by the Court of Appeal, because the two grounds for objection are expressed in the alternative, given the presumption against tautology, they are presumed not to be saying the same thing: *H.L.* (C.A.), at para. 22; see also R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 158-62.

Citoyenneté et de l'Immigration), [2002] 1 R.C.S. 84, 2002 CSC 3, par. 28.

188 Je l'ai déjà dit, mon analyse de la juste interprétation des dispositions législatives en cause porte essentiellement sur les art. 13 et 14 de la Loi. J'examinerai d'abord le sens grammatical et ordinaire des mots qui y sont employés, puis j'interpréterai ces dispositions dans leur contexte général. L'examen portera sur (i) l'objet de la Loi, (ii) l'objet des dispositions établissant le cadre législatif de l'appel et (iii) les fondements historiques de la Loi.

(i) Sens grammatical et ordinaire

1. *Article 13*

189 L'article 13 ajoute au droit d'appel que confère l'al. 7(2)a) « [l]orsqu'un juge du procès siégeant sans jury a rendu sa décision sur une question de fait ou évalué les dommages-intérêts. » Plus particulièrement, l'al. 13b) précise les moyens pour lesquels une partie peut attaquer la décision du juge de première instance. Selon le sens ordinaire et grammatical des mots qui y sont employés, deux moyens se dessinent clairement. Premièrement, l'al. 13b) intègre par renvoi les moyens de contestation autorisés lorsque le procès a eu lieu devant un jury ou que les dommages-intérêts ont été évalués par un jury, y compris l'insuffisance de la preuve. Deuxièmement, il confère à l'appel formé contre la décision d'un juge seul une portée plus grande que celle de la demande d'un nouveau procès après le verdict d'un jury en permettant à une partie de contester les conclusions que le juge de première instance a tirées de la preuve. La conclusion que l'al. 13b) confère deux moyens distincts s'appuie sur l'emploi de la conjonction « ou » entre « pour insuffisance de preuve » et « en raison des conclusions qu'en a tirées le juge ». Comme l'a signalé la Cour d'appel, les deux moyens étant énoncés dans une alternative et l'absence de tautologie étant présumée, les deux motifs ne sont pas censés être synonymes : *H.L.* (C.A.), par. 22; voir aussi R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 158-162.

2. *Section 14*

190 On an ordinary reading of s. 14, it is clear that it relieves the court of any obligation "to adopt the view of the evidence taken by the trial judge" and directs the court in imperative terms to "act on its own view of what, in its judgment, the evidence proves". The section then goes on to empower the court in permissive terms to "draw inferences of fact" and to "pronounce the decision that, in its judgment, the trial judge ought to have pronounced": see also *H.L.* (C.A.), at paras. 28 and 63.

191 For reasons that will be more fully explained below, I agree with the Court of Appeal that the nature of powers conferred on the court by s. 14, in light of the right of appeal established by s. 13, are associated with appeal by way of rehearing and not retrial or review for error as generally understood. Not only do I agree with the Court of Appeal's understanding of the nature of the powers conferred on the court by s. 14, I also respectfully disagree with Fish J.'s reading of this section in two respects.

192 First, at para. 82 of his reasons, Fish J. focuses on the use of the word "rehearing" in s. 14 and concludes that, given the context of the Act and especially s. 16(1), it is clear that this does not confer on the Court of Appeal the power to "rehear" trials; it simply provides that the powers available to the court on an appeal are available on the rehearing of an appeal, which would occur in the event of the resignation of two or more judges who heard the initial appeal, for example.

193 As a preliminary point, and with respect, I wish to re-emphasize that, contrary to Fish J.'s assertion in para. 82 and elsewhere, the Court of Appeal did not claim it had the power to "rehear" trials; it claimed it had the power to conduct an appeal by way of rehearing rather than review for error. Semantic issues aside, I agree with Fish J. that s. 14 does provide that the powers available to the court on an appeal are available on the rehearing of an appeal. However, I do not agree that the use of the word "rehearing" in s. 14 assists in determining the nature of appellate review in Saskatchewan. In my

2. *Article 14*

Selon le sens ordinaire des mots qui y sont employés, l'art. 14 soustrait manifestement la Cour d'appel à l'obligation « d'accepter les conclusions que le juge du procès a tirées de la preuve » et lui enjoint impérativement de « se détermine[r] en se fondant sur sa propre appréciation de la preuve ». L'article prévoit ensuite que la Cour d'appel peut « tirer [d]es inférences factuelles » et « rendre la décision qu'aurait dû rendre, à son avis, le juge du procès » : voir aussi *H.L.* (C.A.), par. 28 et 63.

Pour les plus amples motifs exposés ci-après, je conviens avec la Cour d'appel que les pouvoirs qui lui sont conférés à l'art. 14, compte tenu du droit d'appel prévu à l'art. 13, sont propres à l'appel par voie de nouvelle audition, et non à la reprise de l'instruction ni au contrôle d'erreur au sens où on l'entend généralement. Non seulement je partage l'avis de la Cour d'appel sur la nature des pouvoirs que lui accorde l'art. 14, mais, en toute déférence, je ne peux souscrire à l'interprétation de cette disposition que préconise le juge Fish, et ce, pour deux raisons.

Premièrement, au par. 82 de ses motifs, le juge Fish relève l'emploi de l'expression « nouvelle audience » à l'art. 14 et conclut, au vu de l'ensemble de la Loi et du par. 16(1) en particulier, que la Cour d'appel n'a manifestement pas le pouvoir de « réentendre » une affaire. Selon lui, l'art. 14 dit simplement que les pouvoirs dont elle dispose en appel peuvent être exercés lors de la nouvelle audition d'un appel devenue nécessaire, par exemple, après la démission d'au moins deux des juges qui ont entendu l'appel initial.

À titre préliminaire et malgré tout le respect que je dois au juge Fish, je rappelle que, contrairement à ce qu'il dit dans ses motifs, au par. 82 notamment, la Cour d'appel n'a pas prétendu avoir le pouvoir de « réentendre » une affaire; elle a dit pouvoir instruire un appel par voie de nouvelle audition plutôt que par voie de contrôle d'erreur. Abstraction faite des questions de sémantique, je partage l'opinion du juge Fish selon laquelle l'art. 14 prévoit effectivement que les pouvoirs dont dispose la Cour d'appel lors d'un appel peuvent être exercés lors de la nouvelle audition d'un appel. Cependant, je ne pense pas que

respectful view, the use of the word "rehearing" in s. 14 is a "red herring", so to speak, in that it is not relevant to an inquiry into the nature of appellate review in Saskatchewan. In order to determine the nature of appellate review in Saskatchewan (i.e., whether appeals are conducted by way of rehearing or review for error), one must examine the powers conferred on the court by s. 14 from a functional perspective. As I will explain later, when viewed functionally, it is clear that the powers conferred by s. 14 vest the court with the power to conduct an appeal by way of rehearing.

I also respectfully take issue with Fish J.'s use of other provincial statutes to read down *The Court of Appeal Act, 2000*. For instance, at para. 87, Fish J. states:

> ... I think it evident that the jurisdiction of the Saskatchewan Court of Appeal to review inferences of fact drawn by the trial judge is hardly exceptional, let alone unique. Other provincial or territorial courts of appeal are granted similar powers, expressly or implicitly, by their governing statutes. The *2000 Act* simply sets out those powers in more detail than some.

As noted previously, interprovincial variation in the nature and standards of appellate review is acceptable in our federal system, and I agree with the Court of Appeal's reasoning in this regard:

> The provinces, of course, constitute discrete jurisdictions for the purpose at hand. Hence, the nature of appeal may differ from one jurisdiction to the next. So, too, may the right of appeal, which may be more or less limited, and the powers of the appeal courts, which may be more or less extensive. It is well to bear this in mind so as not to inadvertently import something from another jurisdiction which, however apt in that jurisdiction, may be inapt in this one.

(*H.L.* (C.A.), at para. 31)

On an ordinary reading of s. 14 of the Act, this section frees the Court of Appeal from the view of the evidence taken by the trial judge and empowers it to draw its own inferences of fact. In my view, the powers conferred on the court by s. 14 are associated with an appeal by way of rehearing, and this makes the Saskatchewan Act unique. In

l'emploi de l'expression « nouvelle audience » à l'art. 14 doive être pris en considération pour déterminer la nature de la révision en appel en Saskatchewan. À mon humble avis, il s'agit en quelque sorte d'un leurre, cette expression n'étant pas pertinente à cet égard. Pour déterminer si les appels sont réglés par voie de nouvelle audition ou de contrôle d'erreur, il faut examiner d'un point de vue fonctionnel les pouvoirs conférés à l'art. 14. Comme je l'explique plus loin, de ce point de vue, il ne fait aucun doute que l'art. 14 confère à la Cour d'appel le pouvoir d'instruire un appel par voie de nouvelle audition.

194 En toute déférence, je ne suis pas d'accord non plus avec l'utilisation, par le juge Fish, des lois d'autres provinces pour interpréter la *Loi de 2000 sur la Cour d'appel*. Il dit par exemple au par. 87 :

> Il me paraît donc évident que le pouvoir de la Cour d'appel de la Saskatchewan de réviser les inférences de fait tirées par le juge de première instance est loin d'être exceptionnel, encore moins unique. D'autres cours d'appel provinciales ou territoriales sont expressément ou implicitement investies de pouvoirs similaires par leurs lois constitutives. La *Loi de 2000* énonce simplement ces pouvoirs plus en détail ...

195 Comme je l'ai déjà mentionné, notre système fédéral admet que la nature de la révision en appel et les normes de révision en appel diffèrent d'une province à l'autre, et je fais mien le raisonnement de la Cour d'appel à cet égard :

> [TRADUCTION] Il va de soi que les provinces constituent des ressorts distincts quant à la question qui nous intéresse. La nature de la révision en appel peut ainsi varier de l'une à l'autre. Il en va de même du droit d'appel, qui peut être plus ou moins limité, et des pouvoirs des cours d'appel, qui peuvent être plus ou moins étendus. Il faut se le rappeler afin de ne pas importer par inadvertance un élément qui n'est approprié que dans un autre ressort.

(*H.L.* (C.A.), par. 31)

196 Suivant le sens ordinaire de l'art. 14 de la Loi, la Cour d'appel n'a pas à faire siennes les conclusions tirées de la preuve par le juge de première instance et peut tirer ses propres inférences de fait. Selon moi, les pouvoirs que cet article confère à la Cour d'appel participent de la nature d'un appel par voie de nouvelle audition, ce qui rend unique le régime de

fact, these powers were once described by Gordon J.A. in *Hallberg v. Canadian National Railway Co.* (1955), 16 W.W.R. 538 (Sask. C.A.), at p. 544, as "the widest powers given an appellate court in Canada". Moreover, I agree with the intervener Attorney General for Saskatchewan that a review of the statutes governing the powers of other appellate courts in Canada today confirms that no other jurisdiction in Canada has a provision equivalent to s. 14. For instance, while British Columbia, Alberta, Manitoba, Ontario and Prince Edward Island do allow their courts of appeal to draw inferences of fact, except for the British Columbia and Alberta courts of appeal, the circumstances in which they are permitted to do so are limited, and, more importantly, only the Saskatchewan legislation relieves the Court of Appeal of any obligation to adopt the view of the evidence taken by the trial judge and directs it to act on its own view of what, in its judgment, the evidence proves: see *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 9(2); *Alberta Rules of Court*, Alta. Reg. 390/68, r. 518(c); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(4)(a); *The Court of Appeal Act*, R.S.M. 1987, c. C240, s. 26(2); *Supreme Court Act*, R.S.P.E.I. 1987, c. 66, s. 56(4)(a). This does not mean that the Court of Appeal can ignore the findings of the trial judge; I will deal with this issue later.

la Saskatchewan. En fait, ces pouvoirs ont déjà été qualifiés des [TRADUCTION] « plus étendus jamais accordés à une juridiction d'appel au Canada » : *Hallberg c. Canadian National Railway Co.* (1955), 16 W.W.R. 538 (C.A. Sask.), p. 544, le juge Gordon. De plus, je conviens avec le procureur général de la Saskatchewan que l'examen des lois régissant à l'heure actuelle les pouvoirs des autres cours d'appel confirme qu'il n'existe au pays aucune disposition équivalente à l'art. 14. Par exemple, la Colombie-Britannique, l'Alberta, le Manitoba, l'Ontario et l'Île-du-Prince-Édouard autorisent bien leurs cours d'appel à tirer des inférences de fait, mais à l'exception des cours d'appel de la Colombie-Britannique et de l'Alberta, les circonstances dans lesquelles elles peuvent le faire sont limitées et, ce qui importe davantage, seule la loi de la Saskatchewan soustrait la Cour d'appel à l'obligation d'accepter les conclusions tirées de la preuve par le juge de première instance et lui enjoint de se déterminer en se fondant sur sa propre appréciation de la preuve : voir *Court of Appeal Act*, R.S.B.C. 1996, ch. 77, par. 9(2); *Alberta Rules of Court*, Alta. Reg. 390/68, règle 518c); *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, al. 134(4)a); *Loi sur la Cour d'appel*, L.R.M. 1987, ch. C240, par. 26(2); *Supreme Court Act*, R.S.P.E.I. 1987, ch. 66, al. 56(4)a). La Cour d'appel ne peut cependant pas faire fi des conclusions du juge de première instance. J'y reviendrai.

197 Because the unique nature of appellate review in Saskatchewan is apparent on an ordinary reading of s. 14, and interprovincial variation in the nature and standards of appellate review is acceptable in our federal system, it is inappropriate to rely upon other provincial statutes to read down *The Court of Appeal Act, 2000*.

Le sens ordinaire des mots employés à l'art. 14 faisant ressortir la singularité de l'appel en Saskatchewan et notre système fédéral admettant les différences entre les provinces en ce qui concerne la nature de la révision en appel et les normes de révision en appel, on ne peut se fonder sur les lois des autres provinces pour interpréter restrictivement la *Loi de 2000 sur la Cour d'appel*.

(ii) Broader Context

(ii) Contexte général

198 I will now proceed to examine ss. 13 and 14 of *The Court of Appeal Act, 2000* in their broader context. In order to do so, I will explore the following contextual factors: (i) the object of the Act, (ii) the object of the specific legislative provisions that form the statutory framework for appeals, and (iii) the historical foundations of the Act and ss. 13 and 14

Je passe maintenant à l'examen des art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel* dans leur contexte général. Pour ce faire, j'analyserai les facteurs contextuels suivants : (i) l'objet de la Loi, (ii) l'objet des dispositions établissant le cadre législatif de l'appel et (iii) les fondements historiques de la Loi et des art. 13 et 14 en particulier. J'en conclurai que, en

in particular. I will conclude that this contextual examination confirms that the nature of appellate review in Saskatchewan is by way of rehearing and not review for error.

Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non par voie de contrôle d'erreur.

1. *The Object of The Court of Appeal Act, 2000*

1. *L'objet de la Loi de 2000 sur la Cour d'appel*

I agree with the Court of Appeal that the principal object of *The Court of Appeal Act, 2000*, "aside from continuing the Court of Appeal for Saskatchewan, is to confer rights of appeal, as in sections 7 and 13, and to empower the court to act on those rights, as in sections 12 and 14": *H.L.* (C.A.), at para. 11. I also agree that rights of appeal are substantive rights of major importance to persons who find themselves before the courts and tribunals, and that the fullness of a right to appeal depends on the fullness of the powers of the court to act on it (para. 13). Thus, in this context, in determining the scope of powers conferred on the Court of Appeal by the Act, it is necessary to keep in mind the object of the right of the appeal: *Valley Beef Producers Co-operative*, at para. 45.

199 Je conviens avec la Cour d'appel que le principal objet de la *Loi de 2000 sur la Cour d'appel*, [TRADUCTION] « outre le maintien de la Cour d'appel de la Saskatchewan, est de conférer des droits d'appel (p. ex. aux art. 7 et 13) et d'investir la Cour d'appel du pouvoir de donner suite à leur exercice (p. ex. aux art. 12 et 14) » : *H.L.* (C.A.), par. 11. Je suis aussi d'avis que le droit d'appel est un droit substantiel de grande importance pour la personne qui se retrouve devant une cour de justice ou un tribunal et que son étendue dépend de celle du pouvoir de la cour d'appel d'y donner suite (par. 13). Dans ce contexte, pour déterminer la portée du pouvoir que la Loi confère à la Cour d'appel, il faut donc se rappeler l'objet du droit d'appel : *Valley Beef Producers Co-operative*, par. 45.

With this in mind, I will now turn to an examination of the object of the specific legislative provisions that form the statutory framework for appeals in Saskatchewan.

200 Cela dit, je passe à l'objet des dispositions établissant le cadre législatif de l'appel en Saskatchewan.

2. *The Object of the Specific Legislative Provisions That Form the Statutory Framework for Appeals in Saskatchewan*

2. *L'objet des dispositions établissant le cadre législatif de l'appel en Saskatchewan*

a. Section 7(2)(a)

a. Alinéa 7(2)a)

As noted by the Court of Appeal in this case, the right of appeal conferred by s. 7(2)(a) is expressed to be subject to ss. 7(3) and 8; however, in this instance, because neither of these sections apply, s. 7(2)(a) confers an unlimited right of appeal upon a party proceeding in the Court of Queen's Bench: *H.L.* (C.A.), at para. 15; *Valley Beef Producers Co-operative*, at para. 49.

201 Comme l'a signalé la Cour d'appel dans la présente affaire, le libellé de l'al. 7(2)a) prévoit que le droit d'appel conféré est assujetti au par. 7(3) et à l'art. 8. En l'espèce, toutefois, aucune de ces deux dispositions ne s'applique, de sorte que l'al. 7(2)a) confère un droit d'appel illimité à la personne qui est partie à une instance devant la Cour du Banc de la Reine : *H.L.* (C.A.), par. 15; *Valley Beef Producers Co-operative*, par. 49.

In *Valley Beef Producers Co-operative*, the Court of Appeal noted that although they are highly trained and competent, judges of the Court of Queen's Bench may on occasion fail in relation to one or more

202 Dans *Valley Beef Producers Co-operative*, la Cour d'appel a fait remarquer que, même s'ils sont chevronnés et compétents, les juges de la Cour du Banc de la Reine peuvent parfois commettre une

components of judicial decision making, or fail on the whole to pronounce such judgment or make such order as the dispute requires: *Valley Beef Producers Co-operative*, at para. 50. In this context, the legislature created the right of appeal found in s. 7(2)(a), the object of which is "[t]o provide parties to proceedings in the Court of Queen's Bench with the most comprehensive and effective means of redress possible in relation to such failures."

b. Section 13

203 As explained previously, s. 13 augments the right of appeal conferred by s. 7(2)(a), "[w]here issues of fact have been tried, or damages have been assessed, by a trial judge without a jury." In particular, s. 13(b) sets out two distinct grounds upon which a party can object to the decision of the trial judge: (1) the same grounds of objection that are allowed in cases of trial or assessment of damages by a jury, including the sufficiency of evidence; and (2) the view of the evidence taken by the trial judge.

204 I agree with the Court of Appeal in *Valley Beef Producers Co-operative*, at para. 63, that "the object of [this] section may be seen to lie in expanding the scope of the grounds upon which a party is entitled to object in relation to issues of fact tried by judge alone". This strongly suggests that decisions of judges are not to be treated as the equivalent of jury verdicts in terms of the nature and standard of appellate review.

205 In sum, I agree with the Court of Appeal that in cases such as the one at bar, ss. 7(2)(a) and 13 provide parties with a facially unlimited right of appeal, which has first and foremost to do with relief from error: *Valley Beef Producers Co-operative*, at para. 65.

c. Section 12(1)

206 As noted by the Court of Appeal in *Valley Beef Producers Co-operative*, "[t]he legislature, in empowering the Court of Appeal for Saskatchewan

erreur à l'une ou à plusieurs des étapes du processus décisionnel judiciaire ou, globalement, ne pas rendre le jugement ou l'ordonnance qu'exige le règlement du litige : *Valley Beef Producers Co-operative*, par. 50. C'est dans ce contexte que le législateur a établi le droit d'appel prévu à l'al. 7(2)a), dont l'objet est [TRADUCTION] « [d]'offrir aux parties à une instance devant la Cour du Banc de la Reine les voies de recours les plus complètes et les plus efficaces possible à l'égard de telles erreurs. »

b. Article 13

Comme je l'ai expliqué précédemment, l'art. 13 ajoute au droit d'appel conféré à l'al. 7(2)a), « [l]orsqu'un juge du procès siégeant sans jury a rendu sa décision sur une question de fait ou évalué les dommages-intérêts. » Plus particulièrement, l'al. 13b) dispose qu'une partie peut attaquer la décision du juge de première instance : (1) pour les moyens de contestation autorisés lorsque le procès a eu lieu devant un jury ou que les dommages-intérêts ont été évalués par un jury, y compris l'insuffisance de preuve, et (2) en raison des conclusions que le juge de première instance a tirées de la preuve.

Je partage l'opinion de la Cour d'appel dans *Valley Beef Producers Co-operative* : [TRADUCTION] « l'on peut conclure que [cet] article vise à accroître la portée des moyens pour lesquels une partie peut contester la décision d'un juge seul portant sur une question de fait » (par. 63). Ce qui laisse clairement entendre que la décision d'un juge ne doit pas être tenue pour équivalente au verdict d'un jury en ce qui concerne la nature de la révision en appel et la norme de révision en appel.

Je conviens donc avec la Cour d'appel que dans un cas comme celui considéré en l'espèce, l'al. 7(2)a) et l'art. 13 accordent aux parties un droit d'appel à première vue illimité visant avant tout la réparation d'une erreur : *Valley Beef Producers Co-operative*, par. 65.

c. Paragraphe 12(1)

Comme l'a fait observer la Cour d'appel dans *Valley Beef Producers Co-operative*, [TRADUCTION] « [e]n investissant la Cour d'appel de la Saskatchewan

as it did in s. 12(1) could hardly have expressed itself in broader terms": para. 70. In the case at bar, the Court of Appeal noted in particular the scope of clauses (d) and (f), which empower the court, in turn, to "make any decision that could have been made by the court . . . appealed from" and "make any additional decision that it considers just". Given the nature of all judicial decision making, the Court of Appeal concluded, and I agree, that the exercise of these particular powers "entails ascertaining the material facts by one method or another, identifying the governing law, and applying the law to the facts as in the judgment of the court seems right": *H.L.* (C.A.), at para. 27. Besides their breadth, the powers conferred on the court by s. 12(1) are also generally remedial in nature, in that their object is to empower the court "to redress error or deficiency in relation to the resolution of the controversy in the first instance with a view to setting matters right": *Valley Beef Producers Co-operative*, at para. 70.

des pouvoirs prévus au par. 12(1), le législateur aurait pu difficilement s'exprimer de manière plus générale » : par. 70. En l'espèce, la Cour d'appel a insisté tout particulièrement sur la portée des al. d) et f) qui, pour leur part, lui permettent de « rendre toute décision qui aurait pu être rendue par la Cour [. . .] qui a prononcé la décision frappée d'appel » et de « rendre toute autre décision qu'elle estime juste ». Vu la nature de tout processus décisionnel judiciaire, la Cour d'appel a conclu, et je suis d'accord avec elle, que l'exercice de ces pouvoirs particuliers [TRADUCTION] « comprend l'établissement des faits pertinents à l'aide d'une méthode ou d'une autre, la détermination du droit applicable et l'application du droit aux faits de la manière qu'elle estime juste » : *H.L.* (C.A.), par. 27. Outre leur étendue, les pouvoirs conférés au par. 12(1) ont généralement une vocation réparatrice, leur objet étant d'habiliter la Cour d'appel [TRADUCTION] « à réparer une erreur ou une lacune entachant le règlement du litige en première instance, et ce, en vue de rétablir les choses » : *Valley Beef Producers Co-operative*, par. 70.

d. Section 14

207 As I have mentioned previously, s. 14 frees the Court of Appeal from the view of the evidence taken by the trial judge and directs it to act on its own view of what the evidence proves. In the course of so doing, the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced. In light of the clear conferral of these broad powers, I am of the view that the object of s. 14 is to relieve the Court of Appeal from the strictures pertaining to a motion for a new trial following a jury verdict: *Valley Beef Producers Co-operative*, at para. 78. As noted by the Court of Appeal in the case at bar, a party can object to a jury verdict on the grounds of misdirection, the improper reception or rejection of evidence, unfairness in the proceedings and insufficiency of the evidence relative to the verdict: *H.L.* (C.A.), at para. 19. However, it may not object to the view of the evidence taken by the jury. As explained by Culliton J.A. (as he then was) in *Taylor v. University of Saskatchewan* (1955), 15 W.W.R. 459 (Sask. C.A.), at p. 463, when objecting to a jury verdict, "[t]he issue . . . is not whether

d. Article 14

Je le répète, l'art. 14 soustrait la Cour d'appel à l'obligation d'accepter les conclusions que le juge de première instance a tirées de la preuve et lui enjoint de se déterminer en se fondant sur sa propre appréciation de la preuve. Ce faisant, la Cour d'appel peut tirer des inférences de fait et rendre la décision qu'aurait dû rendre, à son avis, le juge de première instance. Étant donné l'attribution non équivoque de ces larges pouvoirs, j'estime que l'art. 14 vise à libérer la Cour d'appel des contraintes applicables à la demande d'un nouveau procès après le verdict d'un jury : *Valley Beef Producers Co-operative*, par. 78. Comme l'a signalé la Cour d'appel en l'espèce, une partie peut contester le verdict d'un jury en alléguant le caractère erroné des directives, l'irrégularité de l'acceptation ou du refus d'un élément de preuve, l'iniquité de la procédure ou l'insuffisance de la preuve appuyant le verdict : *H.L.* (C.A.), par. 19. Elle ne peut toutefois pas contester les conclusions que le jury a tirées de la preuve. Comme l'a expliqué le juge Culliton (plus tard Juge en chef) dans *Taylor c. University of Saskatchewan* (1955),

the court agrees with the finding of the jury, but whether the jury, if acting judicially, might properly reach the decision which it did."

e. Conclusion

208 After examining the object of the specific legislative provisions that form the statutory framework for appeals in Saskatchewan, in my view it is clear that the legislature intended to provide parties to proceedings in the Court of Queen's Bench with the most comprehensive and effective means to address error in any component of a trial decision, including the view of the evidence taken by the trial judge. As will become clearer after an examination of the historical foundations of the Act, this particular type of appellate review is consistent with an appeal by way of rehearing — not merely by way of review for error. For instance, in the context of a case involving a trial judge's exercise of discretion, Jonathan Parker L.J. noted that "a decision by the appeal court to proceed by way of rehearing frees it from such constraints [involved in an appeal by way of review] and allows it to exercise the discretion afresh in circumstances where it would have been unable to do so had the appeal proceeded in the normal way, by way of review": *Audergon v. La Baguette Ltd.*, [2002] E.W.J. No. 78 (QL), [2002] EWCA Civ 10, at para. 85. Nevertheless, the powers granted must be exercised in a manner consistent with applicable and proper judicial policy. This is addressed later.

3. *Historical Foundations*

209 In my opinion, an examination of the historical foundations of *The Court of Appeal Act, 2000* and ss. 13 and 14 in particular confirms that the nature of appellate review in Saskatchewan is by way of rehearing, not review for error.

a. Historical Foundations of the Act

210 In *Valley Beef Producers Co-operative*, the Court of Appeal had occasion to describe the

15 W.W.R. 459 (C.A. Sask.), p. 463, lorsqu'une partie conteste le verdict d'un jury, [TRADUCTION] « [l]a question [. . .] n'est pas de savoir si la cour est d'accord avec la conclusion du jury, mais bien si le jury, agissant judiciairement, pouvait à bon droit arriver à une telle conclusion. »

e. Conclusion

Après avoir examiné l'objet des dispositions établissant le cadre législatif de l'appel en Saskatchewan, il me paraît clair que le législateur a voulu offrir aux parties à une instance devant la Cour du Banc de la Reine les voies de recours les plus complètes et les plus efficaces possible pour réparer toute erreur entachant un élément ou un autre de la décision de première instance, y compris les conclusions tirées de la preuve. Comme le montrera l'examen des fondements historiques de la Loi, ce type particulier d'appel est compatible avec l'instruction par voie de nouvelle audition, et non le simple contrôle d'erreur. Dans une affaire portant sur l'exercice du pouvoir discrétionnaire du juge de première instance, le lord juge Jonathan Parker a d'ailleurs affirmé que [TRADUCTION] « la décision de la cour d'appel de procéder par voie de nouvelle audition la libère de telles contraintes [celles d'un appel par voie de contrôle] et lui permet d'exercer le pouvoir discrétionnaire à nouveau dans des circonstances où elle n'aurait pu le faire si l'appel avait été instruit de la manière habituelle, soit par voie de contrôle » : *Audergon c. La Baguette Ltd.*, [2002] E.W.J. No. 78 (QL), [2002] EWCA Civ 10, par. 85. Les pouvoirs conférés doivent toutefois être exercés conformément aux principes judiciaires applicables et appropriés. J'y reviendrai.

3. *Fondements historiques*

À mon avis, l'examen des fondements historiques de la *Loi de 2000 sur la Cour d'appel*, et de ses art. 13 et 14 en particulier, confirme qu'en Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non par voie de contrôle d'erreur.

a. Fondements historiques de la Loi

Dans *Valley Beef Producers Co-operative*, la Cour d'appel a eu l'occasion de préciser les

historical foundations of *The Court of Appeal Act, 2000*:

The *Court of Appeal Act, 2000* is the latest in a series of such enactments, the original of which was enacted in 1915, when the Court of Appeal for Saskatchewan was created [see *The Court of Appeal Act*, S.S. 1915, c. 9].

. . .

The original was founded in turn and in significant part on the *Judicature Act*, S.S. 1909, c. 52 (ss. 24 to 29); The *Supreme Court of Judicature Act, 1873* (36 and 37 Vict., c. 66, ss. 4, 18 and 19) as amended from time to time to January 1, 1889; and the *Rules* of The Supreme Court, 1883, Order 58. The *Supreme Court of Judicature Act, 1873* created the Court of Appeal in England and provided generally for its jurisdiction and powers. Order 58 of the Rules of the Supreme Court, which had the force of law, clothed the court with more specific powers in relation to appeal. The Saskatchewan Court of Appeal was created and empowered along these lines, and the *Court of Appeal Act, 2000* still reflects these historical foundations, as did its predecessors. Indeed, these foundations constitute an important part of the external context in which the *Act* was passed and serve as guiding lights, as it were, when it comes to understanding several of its provisions, especially those concerning the right of appeal and the powers of the court. [paras. 37-38]

b. Historical Foundations of Sections 13 and 14

211 Order 58 of the English *Rules of the Supreme Court, 1883* contained two rules of particular significance, namely, rr. 1 and 4. Rule 1 stated that "[a]ll appeals to the Court of Appeal shall be by way of rehearing", and r. 4 provided that, among other things, the court "shall have the power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require". Order 58 applied only to appeals, which, as noted previously, are creatures of statute; applications for a new trial following a trial by jury were governed by different rules, including the rules found in Order 39: see *Valley Beef Producers Co-operative*, at para. 40.

fondements historiques de la *Loi de 2000 sur la Cour d'appel* :

[TRADUCTION] La *Loi de 2000 sur la Cour d'appel* est le texte législatif le plus récent en la matière, le premier ayant été adopté en 1915 lors de la création de la Cour d'appel de la Saskatchewan [voir *The Court of Appeal Act*, S.S. 1915, ch. 9].

. . .

Pour sa part, la loi initiale était fondée en grande partie sur la *Judicature Act*, S.S. 1909, ch. 52 (art. 24 à 29), la *Supreme Court of Judicature Act, 1873* (36 & 37 Vict., ch. 66, art. 4, 18 et 19), et ses modifications en date du 1er janvier 1889, et l'ordonnance 58 des Rules of the Supreme Court, 1883. La *Supreme Court of Judicature Act, 1873* a institué la Cour d'appel d'Angleterre et établi, de façon générale, sa compétence et ses pouvoirs. L'ordonnance 58 des Rules of the Supreme Court, qui avait force de loi, a investi la Cour d'appel de pouvoirs plus précis pour le règlement d'un appel. La Cour d'appel de la Saskatchewan a été créée et investie de pouvoirs suivant ce modèle, et la *Loi de 2000 sur la Cour d'appel*, à l'instar des lois qu'elle a remplacées, reflète encore ces fondements historiques. Ces fondements constituent en effet un élément important du contexte externe dans lequel la *Loi* a été adoptée et tiennent encore lieu de repères lorsqu'il s'agit de comprendre certaines de ses dispositions, notamment celles relatives au droit d'appel et aux pouvoirs de la Cour d'appel. [par. 37-38]

b. Fondements historiques des art. 13 et 14

Les règles 1 et 4 de l'ordonnance 58 des *Rules of the Supreme Court, 1883* (R.-U.) étaient particulièrement importantes. La première prévoyait que [TRADUCTION] « [t]out appel interjeté devant la Cour d'appel est instruit par voie de nouvelle audition », et la règle 4 précisait entre autres que la Cour d'appel [TRADUCTION] « peut tirer des inférences de fait et rendre le jugement ou l'ordonnance qui aurait dû être rendu, et rendre toute autre ordonnance qui s'impose ». L'ordonnance 58 s'appliquait seulement à l'appel, qui, faut-il le rappeler, est une création de la loi; la demande d'un nouveau procès après le verdict d'un jury était régie par d'autres règles, dont celles figurant dans l'ordonnance 39 : voir *Valley Beef Producers Co-operative*, par. 40.

212 As noted by the Court of Appeal in the case at bar, the powers conferred on the court by r. 4 were picked up, first, by the Supreme Court of Saskatchewan *en banc* and then, later, by s. 9 of *The Court of Appeal Act*, S.S. 1915, c. 9. In fact, s. 9 was made even more explicit than r. 4 of Order 58, in that, in addition to empowering the Court of Appeal to draw inferences of fact and pronounce the decision that, in its judgment, ought to have been pronounced, it also stated that "it shall not be obligatory on the court to grant a new trial, or to adopt the view of the evidence taken by the trial judge, but the court shall act upon its own view of what the evidence in its judgment proves . . . ."

Comme l'a dit la Cour d'appel dans la présente affaire, les pouvoirs conférés par la règle 4 ont d'abord été repris par la Cour suprême de la Saskatchewan *in banco*, puis à l'art. 9 de la *Court of Appeal Act*, S.S. 1915, ch. 9. En fait, l'art. 9 était encore plus explicite que la règle 4 de l'ordonnance 58. En plus d'habiliter la Cour d'appel à tirer des inférences de fait et à rendre la décision qui, à son avis, aurait dû être rendue, il prévoyait que [TRADUCTION] « la Cour d'appel n'est pas tenue d'ordonner un nouveau procès ni d'accepter les conclusions tirées de la preuve par le juge de première instance; elle se fonde sur sa propre appréciation de la preuve . . . »

213 As noted by the Court of Appeal in the case at bar, rr. 1 and 4 of Order 58 and s. 9 of *The Court of Appeal Act* of 1915 were enacted in the midst of controversy regarding the right of appeal as it pertained to issues of fact tried by a judge alone and the extent of the powers of the Court of Appeal to act on that right. The court explained that "[a]t the heart of the matter lay the question of whether a decision of a judge without a jury should be treated as the equivalent of a jury verdict, especially for the purpose of an appeal engaging issues of fact" (para. 36). Specifically, some appellate judges, most notably Lord Chelmsford in *Gray v. Turnbull* (1870), L.R. 2 Sc. & Div. 53 (H.L.), so regretted that trial judges' findings of fact seemed subject to appeal, especially when made in the face of conflicting evidence, that they placed a heavy burden of persuasion on an appellant, which virtually foreclosed appeal on the ground of the view of the evidence taken by the trial judge. Others, such as James L.J. in *Bigsby v. Dickinson* (1876), 4 Ch. D. 24 (C.A.), leaned against this and adopted a more generous approach: see *H.L.* (C.A.), at para. 37.

Comme la Cour d'appel l'a signalé en l'espèce, les règles 1 et 4 de l'ordonnance 58 et l'art. 9 de la *Court of Appeal Act* de 1915 ont été adoptées au beau milieu d'une controverse concernant le droit d'en appeler d'une question de fait tranchée par un juge seul et l'étendue du pouvoir de la Cour d'appel de donner suite à l'exercice de ce droit. Elle a expliqué que [TRADUCTION] « [l]a question de savoir si la décision d'un juge seul devait être tenue pour équivalente au verdict d'un jury, surtout lorsque l'appel porte sur une question de fait, était au cœur du débat » (par. 36). Plus particulièrement, certains juges d'appel, en particulier lord Chelmsford dans *Gray c. Turnbull* (1870), L.R. 2 Sc. & Div. 53 (H.L.), ont trouvé si regrettable que les conclusions de fait du juge de première instance semblent susceptibles d'appel, surtout celles tirées à partir d'éléments de preuve contradictoires, qu'ils ont imposé un lourd fardeau de persuasion à l'appelant, ce qui a pour ainsi dire exclu la possibilité d'en appeler des conclusions tirées de la preuve par le juge de première instance. D'autres juges, comme le lord juge James dans *Bigsby c. Dickinson* (1876), 4 Ch. D. 24 (C.A.), ont opté pour une approche plus généreuse : voir *H.L.* (C.A.), par. 37.

214 In the two sections that follow, I will briefly review how this controversy was resolved first in England, and second in Saskatchewan, in order to better place what are now ss. 13 and 14 of *The Court of Appeal Act, 2000* in their proper historical context.

Je ferai brièvement état du règlement de la controverse en Angleterre, puis en Saskatchewan, afin de mieux situer dans leur juste contexte historique les actuels art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*.

c. Resolution of Controversy in England

In England, this controversy was largely laid to rest by the adoption of Order 58, which provided for appeal by way of rehearing and expressly empowered the Court of Appeal to draw inferences of fact and give any judgment which ought to have been given, and by the subsequent decision of the Court of Appeal in *Coghlan v. Cumberland*, [1898] 1 Ch. 704, which proved to be a seminal case in both England and Saskatchewan.

In *Coghlan v. Cumberland*, Lindley M.R. discussed the nature of appellate review of a decision of a judge alone as follows:

> The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. [pp. 704-5]

Although a court is under a duty to make up its own mind, Lindley M.R. noted that it must nevertheless be cognizant of the inherent difficulty of doing so in respect of findings of fact that rest on the trial judge's assessments of credibility:

> When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the

c. Règlement de la controverse en Angleterre

215 En Angleterre, l'adoption de l'ordonnance 58 établissant l'appel par voie de nouvelle audition et habilitant expressément la Cour d'appel à tirer des inférences de fait et à rendre tout jugement qui aurait dû l'être, et l'arrêt *Coghlan c. Cumberland*, [1898] 1 Ch. 704, rendu subséquemment par la Cour d'appel et qui a fait école tant en Angleterre qu'en Saskatchewan, ont en grande partie mis fin au débat.

216 Dans *Coghlan c. Cumberland*, le maître des rôles Lindley s'est penché sur la nature de la révision en appel de la décision d'un juge seul :

> [TRADUCTION] L'instance n'a pas été instruite devant jury, et l'appel interjeté contre la décision du juge n'est pas régi par les règles applicables à la tenue d'un nouveau procès après le verdict d'un jury. Même dans les cas où, comme en l'espèce, l'appel porte sur une question de fait, la Cour d'appel doit se rappeler qu'elle a le devoir de réentendre l'affaire, et elle doit réexaminer les documents présentés au juge de pair avec ceux qu'elle décide d'admettre en preuve. Elle doit ensuite former sa propre opinion, non pas en faisant abstraction du jugement porté en appel, mais en le soupesant et en l'examinant soigneusement; elle ne doit pas s'abstenir d'infirmer le jugement si, après un examen minutieux, elle arrive à la conclusion qu'il est erroné. [p. 704-705]

Le maître des rôles Lindley a précisé que, même si la Cour d'appel a l'obligation de se faire sa propre opinion, elle doit néanmoins être consciente de la difficulté de le faire à l'égard des conclusions de fait fondées sur l'appréciation de la crédibilité des témoins par le juge de première instance :

> [TRADUCTION] Lorsque l'issue dépend en grande partie de la crédibilité relative des témoins qui ont été interrogés et contre-interrogés devant le juge — et c'est souvent le cas —, la Cour d'appel a conscience de l'énorme avantage découlant du fait d'avoir vu et entendu les témoins. Il est souvent très difficile d'apprécier correctement la crédibilité relative des témoins à partir de déclarations écrites, et lorsqu'il s'agit d'ajouter foi à un témoignage plutôt qu'à un autre, et que la décision tient à l'attitude et au comportement des témoins, la Cour d'appel doit se fier et se fie toujours aux impressions du juge de première instance. D'autres facteurs n'ayant rien à voir avec l'attitude et le comportement peuvent évidemment permettre de déterminer si une déclaration est digne de foi ou non. Ces facteurs peuvent justifier la Cour d'appel de différer

credibility of witnesses whom the Court has not seen. [p. 705]

217 Similarly, in *Montgomerie & Co. v. Wallace-James*, [1904] A.C. 73 (H.L.), Earl of Halsbury L.C. stated that, if called upon to take up an issue of fact on appeal, an appellate tribunal must do so to the best of its ability, including its ability to draw inferences:

> My Lords, I think this appeal should be allowed. It is simply a question of fact, and doubtless, where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court. [Emphasis added; p. 75.]

218 Despite the clear language of Order 58 that an appeal of a decision of a judge alone shall be by way of rehearing, some appellate judges continued to espouse the view that, for the purposes of appeal, such a decision was to be treated as the equivalent of a jury verdict. This prompted the House of Lords to revisit this issue in both *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, and *Benmax v. Austin Motor Co.*, [1955] A.C. 370.

219 In *Mersey Docks and Harbour Board v. Procter*, Viscount Cave L.C. adopted the principles articulated by Lindley M.R. in *Coghlan v. Cumberland* and by Earl of Halsbury L.C. in *Montgomerie & Co. v. Wallace-James* in his discussion of the duty of a court hearing an appeal from the decision of a judge alone:

> My Lords, it was contended on behalf of the appellants that the finding of Branson J., being a finding of a trial judge on a question of fact, should not have been disturbed by the Court of Appeal. In my opinion there is no ground for such a contention. The duty of a Court hearing an appeal from the decision of a judge without a jury was clearly defined by Sir Nathaniel Lindley M.R. in *Coghlan v. Cumberland*, and by Lord Halsbury in *Montgomerie & Co. v. Wallace-James*, and is no longer in doubt. The procedure on an appeal from a judge sitting without a jury is not governed by

d'opinion, même à l'égard d'une question de fait touchant à la crédibilité de témoins qu'elle n'a pas vus. [p. 705]

De même, dans *Montgomerie & Co. c. Wallace-James*, [1904] A.C. 73 (H.L.), le comte Halsbury, lord chancelier, a dit que le tribunal appelé à examiner une question de fait en appel doit le faire au mieux de sa capacité, y compris celle de tirer des inférences :

> [TRADUCTION] Vos Seigneuries, je suis d'avis d'accueillir l'appel. Il ne s'agit que d'une question de fait, et il ne fait aucun doute que lorsqu'une question de fait a été tranchée par un tribunal qui a vu et entendu les témoins, il faut accorder la plus grande importance à la conclusion tirée par ce tribunal. Celui-ci a pu observer le comportement des témoins et juger de la véracité et de l'exactitude de leurs témoignages mieux que n'importe quel tribunal d'appel. Mais lorsque la question de la sincérité ne se pose pas, et qu'il s'agit de savoir quelles déductions doivent être tirées de témoignages sincères, alors le premier tribunal n'est pas en meilleure position pour décider que les juges de la cour d'appel. [Je souligne; p. 75.]

Même si l'ordonnance 58 disposait clairement que l'appel de la décision d'un juge seul était instruit par voie de nouvelle audition, certains juges d'appel ont continué de penser que cette décision devait, pour les besoins de l'appel, être tenue pour équivalente au verdict d'un jury. La Chambre des lords a donc réexaminé la question dans *Mersey Docks and Harbour Board c. Procter*, [1923] A.C. 253, et *Benmax c. Austin Motor Co.*, [1955] A.C. 370.

Dans *Mersey Docks and Harbour Board c. Procter*, le vicomte Cave, lord chancelier, a adopté les principes énoncés par le maître des rôles Lindley dans *Coghlan c. Cumberland* et par le comte Halsbury, lord chancelier, dans *Montgomerie & Co. c. Wallace-James*, où il analyse l'obligation de la cour saisie de l'appel de la décision d'un juge seul :

> [TRADUCTION] Vos Seigneuries, on a prétendu au nom des appelants que la conclusion du juge Branson, une conclusion tirée par un juge de première instance à l'égard d'une question de fait, n'aurait pas dû être modifiée par la Cour d'appel. À mon avis, cette prétention est sans fondement. L'obligation de la cour saisie de l'appel de la décision d'un juge siégeant sans jury a été clairement définie par sir Nathaniel Lindley, maître des rôles, dans *Coghlan c. Cumberland*, et par lord Halsbury dans *Montgomerie & Co. c. Wallace-James*, et plus aucun doute ne subsiste. L'appel de la décision

the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly. . . . The material facts, so far as they are known, are undisputed; and the Court of Appeal was at liberty, and indeed was bound, to draw its own inference from them. [Footnotes omitted; pp. 258-59.]

Likewise, in *Benmax v. Austin Motor Co.*, the House of Lords upheld the decision of the Court of Appeal on the ground that, while the ability of the Court of Appeal to overrule a trial judge's decision that is based on assessments of credibility may be limited, its ability to address the trial judge's inference from the evidence as a whole is not. Specifically, Lord Morton, who delivered the judgment of the House, stated that

in the present case it would appear that the learned judge did not doubt the credibility of any witness, and formed his views by inference from the evidence as a whole. The Court of Appeal formed the opposite view by the same method and I agree with that court. [p. 374]

Viscount Simonds, who delivered concurring but more extensive reasons in *Benmax v. Austin Motor Co.*, addressed what he perceived to be a source of confusion: the distinction between "the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts" (p. 373). As for inferences from facts, Viscount Simonds stated that "an appellate court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge" (p. 374).

These decisions effectively settled the controversy regarding the nature of appellate review in England for questions of fact; that is, until May 2, 2000, when Parliament introduced a new system of civil appeals: *H.L.* (C.A.), at para. 48. As will be discussed below, this new appeal regime appears

d'un juge siégeant sans jury n'est pas régi par les règles applicables à la demande d'un nouveau procès après le verdict d'un jury. Il incombe à la Cour d'appel de se former sa propre opinion en tenant compte du jugement porté en appel et en lui accordant une importance particulière lorsque la crédibilité d'un témoin est en cause, tout en jouissant de l'entière liberté de tirer ses propres inférences des faits prouvés ou reconnus, et de rendre une décision en conséquence. [. . .] Les faits pertinents connus ne sont pas contestés; la Cour d'appel pouvait, et même devait, en tirer ses propres inférences. [Citations omises; p. 258-259.]

220 Aussi, dans *Benmax c. Austin Motor Co.*, la Chambre des lords a confirmé la décision de la Cour d'appel au motif que, même si la capacité de la Cour d'appel d'infirmer une décision fondée sur l'appréciation de la crédibilité des témoins par le juge de première instance est limitée, sa capacité de juger de l'inférence que le juge de première instance a tirée de la preuve dans son ensemble ne l'est pas. Lord Morton, qui a rendu le jugement au nom de la Chambre, a précisé :

[TRADUCTION] Dans la présente affaire, le juge semble n'avoir mis en doute la crédibilité d'aucun témoin et s'être formé sa propre opinion en tirant l'inférence de la preuve dans son ensemble. La Cour d'appel s'est formé l'opinion contraire en suivant la même méthode, et je partage cette opinion. [p. 374]

221 Dans la même affaire, le vicomte Simonds, qui a rendu des motifs concourants mais plus détaillés, s'est penché sur ce qui lui paraissait être une source de confusion, soit la distinction entre [TRADUCTION] « une conclusion relative à un fait précis et une conclusion relative à un fait qui est en réalité une inférence tirée à partir de faits établis ou, comme on l'a dit parfois, entre la perception des faits et leur appréciation » (p. 373). Au sujet des inférences tirées de faits, il a dit : [TRADUCTION] « la cour d'appel doit se former une opinion indépendante, mais elle accordera naturellement de l'importance au jugement de première instance » (p. 374).

222 Ces décisions ont effectivement mis fin à la controverse sur la nature de la révision en appel d'une conclusion de fait en Angleterre, et ce, jusqu'à l'adoption par le Parlement, le 2 mai 2000, d'un nouveau régime d'appel civil : *H.L.* (C.A.), par. 48. Comme nous le verrons, ce nouveau régime semble

to have changed the nature of appellate review in England.

avoir modifié la nature de la révision en appel dans ce pays.

d. Resolution of Controversy in Saskatchewan

d. Règlement de la controverse en Saskatchewan

223 In order to explain how the controversy was laid to rest in Saskatchewan, it is necessary to begin with the years preceding the enactment of *The Court of Appeal Act* of 1915.

Pour expliquer comment la controverse a pris fin en Saskatchewan, il faut remonter aux années ayant précédé l'adoption de la *Court of Appeal Act* de 1915.

224 In *Coventry v. Annable* (1911), 19 W.L.R. 400, the Supreme Court of Saskatchewan *en banc* heard an appeal from a decision of a judge alone on the question, among others, of whether the judge was wrong in finding no fraud on the part of the defendant. Wetmore C.J. adopted and applied Lindley M.R.'s statement of principle in *Coghlan v. Cumberland*, finding fraud and deciding the case accordingly. The appeal to the Supreme Court of Canada was dismissed, with three of the six judges filing individual reasons. Anglin J., in particular, agreed with Wetmore C.J. and adopted the essence of the principle put forward by Lindley M.R. in *Coghlan v. Cumberland* that is quoted above: see *Annable v. Coventry* (1912), 46 S.C.R. 573, at p. 587.

Dans *Coventry c. Annable* (1911), 19 W.L.R. 400, la Cour suprême de la Saskatchewan a entendu *in banco* l'appel de la décision d'un juge seul et s'est entre autres demandé si ce dernier avait eu tort de conclure à l'absence de fraude de la part du défendeur. Le juge en chef Wetmore a appliqué le principe énoncé par le maître des rôles Lindley dans *Coghlan c. Cumberland*, a conclu à la fraude et a tranché en conséquence. La Cour suprême du Canada a rejeté le pourvoi formé contre ce dernier arrêt, trois des six juges rédigeant des motifs individuels. Le juge Anglin, en particulier, s'est dit d'accord avec le juge en chef Wetmore et a repris pour l'essentiel le principe énoncé par le maître des rôles Lindley dans *Coghlan c. Cumberland* et cité précédemment : voir *Annable c. Coventry* (1912), 46 R.C.S. 573, p. 587.

225 Anglin J. also referred to the decision in *Coghlan v. Cumberland* in *Greene, Swift & Co. v. Lawrence* (1912), 2 W.W.R. 932 (S.C.C.), at p. 944, adding:

> However loath we may be to reverse the decision of a trial judge on the question of fact, "it is our duty to do so if the evidence coerces our judgment so to do." The Gairloch, 1899, 2 Ir. 1, 13; *Coghlan v. Cumberland*, 1898, 1 Ch. 704, 67 L.J. Ch. 402.

Le juge Anglin a également cité la décision *Coghlan c. Cumberland* dans l'arrêt *Greene, Swift & Co. c. Lawrence* (1912), 2 W.W.R. 932 (C.S.C.), p. 944, en ajoutant :

> [TRADUCTION] Quelle que soit notre réticence à infirmer la décision du juge de première instance à l'égard d'une question de fait, « il nous incombe de le faire lorsque nous estimons y être contraints par la preuve ». The Gairloch, 1899, 2 Ir. 1, 13; *Coghlan c. Cumberland*, 1898, 1 Ch. 704, 67 L.J. Ch. 402.

226 In 1918, *The Court of Appeal Act* of 1915 was proclaimed and thereafter appeals went to the Court of Appeal for Saskatchewan where they were governed by ss. 8 and 9 (now ss. 13 and 14), "the purpose of which lay in putting to rest the controversy in Saskatchewan along the lines it had been put to rest in England, though along even more explicit and decisive lines": *H.L.* (C.A.), at para. 56. In paragraphs 57 to 59 of its reasons in the case at bar, the Court of Appeal succinctly sets out how, since

Après la promulgation de la *Court of Appeal Act* de 1915 en 1918, les appels ont été soumis à la Cour d'appel de la Saskatchewan et régis dès lors par les art. 8 et 9 (devenus les art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*), [TRADUCTION] « qui avaient pour but de mettre fin à la controverse en Saskatchewan, mais de façon encore plus explicite et décisive que ce n'avait été le cas en Angleterre » : *H.L.* (C.A.), par. 56. Dans la présente affaire, la Cour d'appel explique brièvement aux par. 57 à 59 de ses

The Court of Appeal Act of 1915 was enacted, it has adopted the "rehearing" approach to appellate review that was first laid out in *Coghlan v. Cumberland* and approved by Anglin J. in *Annable v. Coventry* and *Greene, Swift & Co. v. Lawrence*: see, e.g., *Miller v. Foley & Sons* (1921), 59 D.L.R. 664; *Messer v. Messer* (1922), 66 D.L.R. 833; *Monaghan v. Monaghan*, [1931] 2 W.W.R. 1; *Kowalski v. Sharpe* (1953), 10 W.W.R. (N.S.) 604; *Tarasoff v. Zielinsky*, [1921] 2 W.W.R. 135; *Matthewson v. Thompson*, [1925] 2 D.L.R. 1211; *French v. French*, [1939] 2 W.W.R. 435, at p. 443; and *Wilson v. Erbach* (1966), 56 W.W.R. 659, at p. 666.

In conclusion, the court notes that "the controversy that had prevailed in Saskatchewan prior to the enactment of the *Court of Appeal Act* of 1915 was laid to rest here following the enactment of sections 8 and 9 of that *Act*": *H.L.* (C.A.), at para. 60. In my view, this brief discussion of the historical foundations of *The Court of Appeal Act, 2000* and ss. 13 and 14 in particular confirms that in Saskatchewan, for the purpose of appeal, a decision of a judge alone is not to be taken as the equivalent of a jury verdict, and that the nature of appellate review of such a decision is by way of rehearing.

e. Legislative History

Although the section numbering may have changed and the language may have been modernized over time, the Acts' historical foundations remain relevant today because the Saskatchewan legislature has faithfully adhered to the content of what are now ss. 13 and 14 throughout the years: *H.L.* (C.A.), at para. 61. Therefore, I share the view of the Court of Appeal that the 2000 legislative amendments to *The Court of Appeal Act* did not have any substantive effect on the nature of appellate review in Saskatchewan and the scope of the powers of the Court of Appeal; rather, these amendments to *The Court of Appeal Act*

> served to maintain and augment at least 85 years of appellate practice in Saskatchewan, where appeal in relation to an unlimited right of appeal from a decision of a trial judge without a jury has traditionally been by way of "rehearing", with the Court of Appeal being directed to

motifs comment, depuis l'adoption de la *Court of Appeal Act* de 1915, elle a opté pour l'instruction de l'appel par voie de « nouvelle audition » préconisée initialement dans *Coghlan c. Cumberland*, puis approuvée par le juge Anglin dans *Annable c. Coventry* et *Greene, Swift & Co. c. Lawrence* : voir, p. ex., *Miller c. Foley & Sons* (1921), 59 D.L.R. 664; *Messer c. Messer* (1922), 66 D.L.R. 833; *Monaghan c. Monaghan*, [1931] 2 W.W.R. 1; *Kowalski c. Sharpe* (1953), 10 W.W.R. (N.S.) 604; *Tarasoff c. Zielinsky*, [1921] 2 W.W.R. 135; *Matthewson c. Thompson*, [1925] 2 D.L.R. 1211; *French c. French*, [1939] 2 W.W.R. 435, p. 443; *Wilson c. Erbach* (1966), 56 W.W.R. 659, p. 666.

227 En conclusion, la Cour d'appel a fait observer que [TRADUCTION] « les art. 8 et 9 de la *Court of Appeal Act* de 1915 ont mis fin à la controverse qui existait jusqu'alors en Saskatchewan » : *H.L.* (C.A.), par. 60. Selon moi, ce bref examen des fondements historiques de la *Loi de 2000 sur la Cour d'appel*, et des art. 13 et 14 en particulier, confirme que, en Saskatchewan, la décision d'un juge seul ne doit pas être assimilée, en appel, au verdict d'un jury et que l'appel d'une telle décision est instruit par voie de nouvelle audition.

e. Historique législatif

228 La numérotation des articles a changé et le libellé a bien été modernisé avec le temps, mais les fondements historiques de ces lois sont toujours pertinents, le législateur de la Saskatchewan étant resté fidèle au fil des ans à la teneur des actuels art. 13 et 14 : *H.L.* (C.A.), par. 61. Je conviens donc avec la Cour d'appel que les modifications apportées à la *Court of Appeal Act* en 2000 n'ont pas modifié sensiblement la nature de la révision en appel en Saskatchewan ni l'étendue des pouvoirs de la Cour d'appel, mais qu'elles ont plutôt

> [TRADUCTION] consacré et développé une procédure d'appel datant d'au moins 85 ans en Saskatchewan, où l'exercice d'un droit d'appel illimité à l'encontre de la décision d'un juge de première instance siégeant sans jury a toujours été instruit par voie de « nouvelle

take its own view of the evidence and being empowered to draw inferences of fact and pronounce the decision that ought to have been pronounced by the trial judge. [para. 62]

229 In contrast, a major English legislative initiative in 2000 appears to have had a much more marked effect on the nature of appellate review in that country. On May 2, 2000, a new system of civil appeals took effect in England, and the new rules appear mostly in Part 52 of the *Civil Procedure Rules 1998*, S.I. 1998 No. 3132: see Great Britain, *Civil Procedure* (2002), vol. 1, at pp. 1182ff. These new rules seek to restrict resort to the appeal process to cases that really justify its use and to ensure that appeals, when they are warranted, are conducted in an efficient and effective manner: Zuckerman, at p. 719. In *Tanfern Ltd. v. Cameron-MacDonald*, [2000] 1 W.L.R. 1311 (C.A.), at para. 50, Brooke L.J. described the changes imposed by this new appeal regime as "the most significant changes in the arrangements for appeals in civil proceedings in this country for over 125 years". These changes were welcomed by N. H. Andrews in "A New System of Civil Appeals and a New Set of Problems", [2000] *Cambridge L.J.* 464, at p. 465, since they would "reduce the delay, expense, and uncertainty of civil proceedings" and "increase the incentive for litigants to 'get it right first time round'". Nevertheless, Andrews also noted that "the same changes will reduce the chances of rectifying defective decisions", and that "[t]his is the price paid for achieving the impressive benefits of the new system of appeals."

230 It is of particular relevance to the issues that arise in this case that under this new appeal regime in England, as a general rule, appeals to the Court of Appeal are no longer by way of rehearing but, rather, are limited to a review of the lower court's decision: see *Civil Procedure Rules*, r. 52.11(1). This obvious change in terminology from "rehearing" to "review" would suggest, at first blush at least, that the English Parliament intended that the nature of appellate review in that country be changed, specifically from a more robust appeal by way of rehearing to a more limited review of the lower court's decision. However, it appears that there is currently some controversy in England regarding the

audition », la Cour d'appel étant tenue de se fonder sur sa propre appréciation de la preuve et habilitée à tirer des inférences de fait et à rendre la décision qu'aurait dû rendre le juge de première instance. [par. 62]

En Angleterre, par contre, une importante mesure législative adoptée en 2000 semble avoir eu une incidence beaucoup plus marquée sur la nature de la révision en appel dans ce pays. Le 2 mai 2000, un nouveau régime d'appel civil y est entré en vigueur, et la partie 52 des *Civil Procedure Rules 1998*, S.I. 1998 No. 3132, renferme la plupart des nouvelles règles : voir Grande-Bretagne, *Civil Procedure* (2002), vol. 1, p. 1182 et suiv. Ces nouvelles règles visent à faire en sorte qu'il ne soit interjeté appel que dans les cas qui le justifient vraiment et que, lorsqu'il est justifié, l'appel soit instruit avec efficacité et efficience : Zuckerman, p. 719. Dans *Tanfern Ltd. c. Cameron-MacDonald*, [2000] 1 W.L.R. 1311 (C.A.), par. 50, le lord juge Brooke a dit qu'il s'agissait [TRADUCTION] « des modifications les plus importantes apportées au régime d'appel civil dans ce pays depuis plus de 125 ans ». La réforme a été bien accueillie par N. H. Andrews dans « A New System of Civil Appeals and a New Set of Problems », [2000] *Cambridge L.J.* 464, p. 465, puisqu'elle allait [TRADUCTION] « réduire l'attente, le coût et l'incertitude associés à une instance civile » et « inciter davantage les parties à "bien faire les choses du premier coup" ». Andrews a néanmoins signalé que [TRADUCTION] « ces mêmes modifications allaient réduire la possibilité de corriger une décision irrégulière [. . .] [m]ais que c'était le prix à payer pour bénéficier des énormes avantages du nouveau régime d'appel. »

Le fait que, suivant le nouveau régime d'appel en Angleterre, les appels interjetés devant la Cour d'appel ne sont plus instruits, en règle générale, par voie de nouvelle audition, mais donnent plutôt lieu à un contrôle de la décision du tribunal inférieur revêt une importance particulière pour le règlement des questions soulevées en l'espèce : voir *Civil Procedure Rules*, règle 52.11(1). Ce changement patent de terminologie — « contrôle » au lieu de « nouvelle audition » — donne à penser, du moins de prime abord, que le législateur britannique a voulu modifier la nature de la révision en appel, c'est-à-dire passer d'un appel relativement musclé par voie de nouvelle audition à un examen plus limité de la décision du

difference between appeal by way of rehearing and appeal by way of review, and what effect the terminology change in the new rules had on the nature of appellate review in that country.

For instance, in *Assicurazioni Generali SpA v. Arab Insurance Group*, [2003] 1 W.L.R. 577 (C.A.), Ward L.J., in a separate opinion, stated that prior to the reform of civil appeals in 2000, "interlocutory appeals in the Court of Appeal were treated as reviews of the lower court's decision", even though they were "nominally by way of rehearing" (para. 194). Therefore, despite the change in language from "rehearing" to "review", Ward L.J. concluded that an appellate court's task is essentially no different from what it was before the new rules came into effect; that is, "[t]he Court of Appeal can only interfere if the decision of the lower court was wrong and in deciding whether or not findings of fact were wrong, we take a retrospective look at the case and do not decide it afresh untrammelled by the judge's conclusion" (para. 195). Similarly, in his reasons for judgment on behalf of the court in *Assicurazioni*, Clarke L.J. acknowledged that there is plainly force in the submission that the nature of appellate review changed with the change in language, but he nonetheless concluded that although the previous rule expressly referred to a rehearing, "the exercise upon which the court was engaged was essentially one of review" (para. 13).

Conversely, Jolowicz argues that under the former *Rules of the Supreme Court* appeals to the Court of Appeal were by way of rehearing, and this "meant that appellate judges were most unlikely to interfere with the trial judge's findings of fact in so far as they depended on his assessment of the credibility of witnesses, but it did not mean that they were judges only of law": J. A. Jolowicz, "The New Appeal: rehearing or revision or what?" (2001), 20 *C.J.Q.* 7, at p. 7. Specifically, Jolowicz argues that the provisions in the former *Rules of the Supreme Court* were enough to ensure that the English Court of Appeal was indeed a "court of appeal", before which issues

tribunal inférieur. Cependant, il appert que la différence entre ces deux types d'appel et l'effet du changement de terminologie dans les nouvelles règles sur la nature de la révision en appel dans ce pays suscitent actuellement une certaine polémique dans ce pays.

231 Par exemple, dans l'arrêt *Assicurazioni Generali SpA c. Arab Insurance Group*, [2003] 1 W.L.R. 577 (C.A.), le lord juge Ward a dit dans des motifs distincts qu'avant la réforme du régime d'appel civil en 2000, [TRADUCTION] « l'appel interlocutoire interjeté devant la Cour d'appel était instruit par voie de contrôle de la décision du tribunal inférieur », même s'il l'était « théoriquement par voie de nouvelle audition » (par. 194). Par conséquent, même si les nouvelles règles ne parlaient plus de « nouvelle audition », mais de « contrôle », le lord juge Ward a conclu que le rôle d'une cour d'appel était demeuré essentiellement le même : [TRADUCTION] « [e]lle ne peut intervenir que si la décision du tribunal inférieur était erronée et, pour déterminer si une conclusion de fait était erronée ou non, nous examinons l'affaire rétrospectivement et nous nous abstenons de statuer à nouveau sans égard à l'opinion du juge » (par. 195). De même, le lord juge Clarke, s'exprimant au nom de la Cour d'appel dans cette affaire, a reconnu la valeur manifeste de la prétention selon laquelle la nouvelle terminologie avait modifié la nature de la révision en appel. Il a néanmoins conclu que malgré le renvoi exprès des règles antérieures à une nouvelle audition [TRADUCTION] « le rôle de la cour d'appel en était essentiellement un de contrôle » (par. 13).

232 À l'opposé, Jolowicz soutient que l'appel interjeté devant la Cour d'appel en application des anciennes *Rules of the Supreme Court* était instruit par voie de nouvelle audition et qu'[TRADUCTION] « il arrivait rarement que les juges d'appel modifient une conclusion de fait du juge de première instance lorsqu'elle s'appuyait sur son appréciation de la crédibilité d'un témoin, mais cela ne veut pas dire qu'ils n'étaient que les juges du droit » : J. A. Jolowicz, « The New Appeal : re-hearing or revision or what? » (2001), 20 *C.J.Q.* 7, p. 7. Plus précisément, Jolowicz fait valoir que les dispositions des anciennes *Rules of the Supreme Court* suffisaient pour que la Cour

are to be decided afresh in fact and in law, and not what is called elsewhere a "[c]ourt of cassation", before which only the conformity of the lower court judgment to the rules of law is argued (pp. 7-8).

233 Similarly, Lord Sumner stated in *S.S. Hontestroom v. S.S. Sagaporack*, [1927] A.C. 37 (H.L.), at p. 47, that "[o]f course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute": see also J. A. Jolowicz, "Court of Appeal or Court of Error?", [1991] *Cambridge L.J.* 54. Nonetheless, like Jolowicz, Lord Sumner also noted that "not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge"; therefore, he opined that "[i]f [the trial judge's] estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone" (p. 47).

234 Not only does Jolowicz argue that, under the former rules, appeals to the Court of Appeal were by way of rehearing, in the sense that the Court of Appeal was empowered to "retry the case on the shorthand note", he is also of the view that because an appeal court conducting a "review" of the decision of the lower court under the new rules may take account of the evidence given at trial and may exercise all the powers conferred on it by the rules (including the power to draw inferences of fact), the new "review" provided for by Part 52 of the *Civil Procedure Rules* "differs little, if at all, from the procedure formerly used in the Court of Appeal": see Jolowicz, "The New Appeal: re-hearing or revision or what?", p. 11.

235 Of course, it is not this Court's place to resolve this controversy in English law. Whatever the change in language in the new English appeal rules may mean, as noted above, it is clear that over the years Saskatchewan has not substantively changed

d'appel d'Angleterre soit une véritable « cour d'appel » appelée à réexaminer des questions de fait et de droit, et non ce qu'on appelle ailleurs une « [c]our de cassation » où l'argumentation ne porte que sur l'observation des règles de droit par le tribunal inférieur (p. 7-8).

Aussi, dans l'arrêt *S.S. Hontestroom c. S.S. Sagaporack*, [1927] A.C. 37 (H.L.), p. 47, lord Sumner a affirmé : [TRADUCTION] « [b]ien sûr, nous avons compétence pour instruire l'affaire de nouveau à partir des notes sténographiques, ce qui comprend l'appréciation de la crédibilité relative des témoins, puisque des règles ayant force de loi assimilent l'appel à une nouvelle audition ». Voir aussi J. A. Jolowicz, « Court of Appeal or Court of Error? », [1991] *Cambridge L.J.* 54. Toutefois, à l'instar de Jolowicz, lord Sumner a signalé que [TRADUCTION] « le fait de ne pas avoir vu les témoins place les juges d'appel dans une situation toujours désavantageuse par rapport au juge de première instance », de sorte que « [l]orsque son appréciation de l'homme forme une partie substantielle de ses motifs de jugement, le juge de première instance a droit, si j'interprète bien les décisions, au respect de ses conclusions de fait » (p. 47).

Jolowicz soutient non seulement que, suivant les anciennes règles, l'appel interjeté devant la Cour d'appel était instruit par voie de nouvelle audition, en ce sens que la Cour d'appel était habilitée à « instruire l'affaire de nouveau à partir des notes sténographiques », mais aussi que le nouveau « contrôle » prévu à la partie 52 des *Civil Procedure Rules* [TRADUCTION] « diffère peu, ou ne diffère pas du tout, de la procédure antérieure » en ce que la Cour d'appel, lorsqu'elle « contrôle » la décision du tribunal inférieur en application des nouvelles règles, peut tenir compte de la preuve présentée au procès et exercer tous les pouvoirs que lui confèrent les règles (notamment celui de tirer des inférences de fait) : voir Jolowicz, « The New Appeal : re-hearing or revision or what? », p. 11.

Il n'appartient évidemment pas à notre Cour de trancher. Quel que soit l'effet du nouveau libellé des règles régissant l'appel en Angleterre, en Saskatchewan, le texte de la loi sur la Cour d'appel n'a manifestement pas beaucoup changé au fil des

the language in its *Court of Appeal Act*. Therefore, this supports the argument that the nature of appellate review in Saskatchewan has not deviated from its historical roots. In other words, in Saskatchewan, appeals were and continue to be by way of rehearing.

Moreover, if one accepts that an appeal by way of rehearing is different from a review of the lower court decision and that the change in language in the new English appeal rules from "rehearing" to "review" signified a shift to a more restricted form of appellate review in that country (as a plain reading of the new rule would seem to suggest at least), then it can be argued that the Saskatchewan legislature was not willing to pay the price to which Andrews refers — i.e., unlike the English Parliament, the Saskatchewan legislature was not willing to reduce the chances of rectifying defective decisions in order to reduce the delay, expense and uncertainty of civil proceedings. It saw no need for it. Moreover, because an appeal is a statutory creature, legislative policy choices in this area must be seen to be paramount. It appears that, in enacting *The Court of Appeal Act, 2000*, the Saskatchewan legislature re-affirmed its policy choice to have its Court of Appeal proceed with appeals by way of rehearing. If the legislature is now concerned or becomes concerned in the future about the nature of appellate review in Saskatchewan, it is open to the legislature to amend *The Court of Appeal Act, 2000*: see *Chieu v. Canada (Minister of Citizenship and Immigration)*, at para. 66. For now, the statute is clear: in Saskatchewan, the nature of appellate review is by way of rehearing.

However, even if one subscribes to the view professed by the Lord Justices in *Assicurazioni* that appellate review in England was and still is by way of review, unlike my colleague Fish J., I contend that the English understanding of appeal by way of "review" is different from the Canadian understanding of this concept, which was recently articulated by this Court in *Housen*. Moreover, the English understanding of appeal by way of review is actually more closely in line with the nature of appellate review in Saskatchewan, which, as I understand it, is by way of rehearing.

ans, en sorte que la révision en appel y serait demeurée fidèle à ses racines historiques. Autrement dit, dans cette province, l'appel était et est toujours instruit par voie de nouvelle audition.

236 De plus, si l'on accepte qu'un appel par voie de nouvelle audition diffère d'un contrôle de la décision du tribunal inférieur et que le nouveau libellé des règles régissant l'appel en Angleterre, où la « nouvelle audition » est remplacée par le « contrôle », traduit une évolution vers un appel plus restreint dans ce pays (comme semble l'indiquer du moins leur simple lecture), on peut soutenir que, contrairement au Parlement britannique, le législateur de la Saskatchewan n'était pas disposé à payer le prix dont fait mention Andrews, c'est-à-dire réduire la possibilité de corriger une décision irrégulière afin de diminuer l'attente, le coût et l'incertitude associés à une instance civile. Il n'en voyait pas la nécessité. De plus, l'appel étant une création de la loi, les choix de politique législative en la matière doivent primer. Il semble que par l'adoption de la *Loi de 2000 sur la Cour d'appel*, le législateur de la Saskatchewan a réaffirmé son choix politique de faire en sorte que la Cour d'appel instruise les appels par voie de nouvelle audition. Si la nature de la révision en appel en Saskatchewan le préoccupe ou venait à le préoccuper, il lui serait loisible de modifier la *Loi de 2000 sur la Cour d'appel* : voir *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, par. 66. Pour le moment, la loi est claire : en Saskatchewan, l'appel est instruit par voie de nouvelle audition.

237 Cependant, même si l'on convient avec les lords juges dans *Assicurazioni* que, en Angleterre, l'appel s'entendait et s'entend toujours d'un contrôle, contrairement à mon collègue le juge Fish, j'estime que la notion anglaise d'appel par voie de « contrôle » diffère de la canadienne, que notre Cour a récemment circonscrite dans *Housen*. Qui plus est, la notion anglaise d'appel par voie de contrôle se rapproche davantage de l'appel prévu en Saskatchewan qui, selon moi, est instruit par voie de nouvelle audition.

238 For example, Zuckerman notes that one of the general principles underlying an appeal by way of review in England is that an appeal court should not interfere with findings of fact made by the lower court because the judge who saw and heard the witnesses is better placed to assess their reliability and draw inferences from their testimony. Zuckerman states that this principle led to a distinction in the English case law "between conclusions concerning primary facts which followed entirely from the assessment of the reliability of witnesses, and conclusions based on a combination of testimonial assessment and analysis of documents and surrounding circumstances, with which the appeal court would more readily interfere" (p. 766). Zuckerman explains that the reason for this distinction is that "an appeal court is just as well placed as the trial judge to determine the proper inferences to be drawn from circumstantial or documentary evidence": see also *Whitehouse v. Jordan*, [1981] 1 All E.R. 267 (H.L.), *per* Lord Fraser.

239 Similarly, in *Assicurazioni*, although Clarke and Ward L.JJ. both stated that, despite the change in language from "rehearing" to "review", the Court of Appeal's task has always been and still is to review the lower court's judgment for error, it is clear from their judgments that they accept that, in the course of such a review, the greater the advantage the trial judge has over the appellate court (e.g., with respect to credibility assessments), the more reluctant the appellate court should be to interfere. However, when the relative advantage of the trial judge is not engaged, such as when the issue is with respect to the drawing of inferences, then the appellate court may more readily interfere. This proposition was specifically recognized by Ward L.J. as follows:

> Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts. [para. 197]

240 From my perspective, it appears that the type of "review" to which Zuckerman and the Lord Justices

À titre d'exemple, Zuckerman fait observer que l'un des principes généraux sous-jacents à un appel par voie de contrôle en Angleterre est qu'une cour d'appel ne doit pas modifier les conclusions de fait du tribunal inférieur parce que le juge qui a vu et entendu les témoins était mieux placé pour apprécier leur fiabilité et tirer des inférences de leurs témoignages. Il ajoute que ce principe est à l'origine d'une distinction dans la jurisprudence anglaise [TRADUCTION] « entre les conclusions sur des faits essentiels qui découlent entièrement de l'appréciation de la fiabilité des témoins et celles qui sont fondées à la fois sur l'appréciation des témoignages et sur l'analyse des documents et des circonstances, que la cour d'appel serait plus encline à modifier » (p. 766). Zuckerman explique cette distinction par le fait qu'[TRADUCTION] « une cour d'appel est aussi bien placée que le juge de première instance pour décider des inférences que commandent les éléments de preuve circonstancielle ou documentaire » : voir aussi *Whitehouse c. Jordan*, [1981] 1 All E.R. 267 (H.L.), lord Fraser.

De même, dans l'arrêt *Assicurazioni*, les lords juges Clarke et Ward ont tous deux affirmé que, malgré le remplacement du terme « nouvelle audition » par celui de « contrôle », le rôle de la Cour d'appel avait toujours été et était toujours de contrôler le jugement du tribunal inférieur pour déterminer si une erreur a été commise, mais ils ont clairement reconnu que, dans le cadre d'un tel contrôle, plus le juge du procès bénéficie d'un avantage par rapport à elle (p. ex. en ce qui concerne l'appréciation de la crédibilité), moins la cour d'appel doit être encline à intervenir. Cependant, lorsque le juge de première instance ne jouit pas d'un avantage relatif, notamment pour tirer des inférences, la cour d'appel interviendra plus volontiers. Le lord juge Ward l'a reconnu expressément :

> [TRADUCTION] Lorsque les faits essentiels ne sont pas contestés et que le jugement a été rendu sur le fondement des inférences que le juge a tirées de la preuve présentée, la Cour d'appel, qui a le pouvoir de tirer toute inférence de fait qu'elle estime justifiée, interviendra volontiers relativement à l'appréciation de ces faits. [par. 197]

De mon point de vue, le type de « contrôle » auquel renvoient Zuckerman et les lords juges dans

in *Assicurazioni* are referring is not the same as the general "review for error" concept subscribed to in Canada. In *Housen*, all nine justices agreed in principle that, in the course of a review for error, the standard of review should be identical for both findings of fact and inferences of fact, although, as will be explained below, the majority and minority disagreed on the articulation of the standard of review for the latter. In his reasons in this case, Fish J. confirms that the same standard of review should apply to findings of fact as well as to inferences of fact: see, e.g., at paras. 52-55. In contrast, as explained above, in England there is authority for the proposition that, in the course of an appeal by way of review in that country, there is a distinction to be made between findings of fact that engage the special advantage of the trial judge (e.g., those that involve assessments of credibility) and inferences of fact that do not. The appellate court will more readily interfere in the latter case, and, in my view, this implies that, contrary to the Canadian position, the same standard of review cannot be applied to both circumstances.

l'arrêt *Assicurazioni* ne paraît pas correspondre à la notion générale de « contrôle d'erreur » que l'on connaît au Canada. Dans *Housen*, les neuf juges ont convenu en principe que, dans le cadre d'un contrôle d'erreur, la norme applicable devait être la même pour les conclusions de fait et les inférences de fait, même si, comme je l'explique plus loin, les juges majoritaires et les juges minoritaires ne s'entendaient pas sur la mise en pratique de la norme dans le cas des secondes. Dans ses motifs, le juge Fish confirme que la même norme doit s'appliquer aux conclusions de fait comme aux inférences de fait : voir, p. ex., les par. 52-55. Comme nous l'avons vu, la jurisprudence anglaise dit au contraire que lors d'un tel appel par voie de contrôle, il faut distinguer entre les conclusions de fait, pour lesquelles le juge de première instance bénéficie d'un avantage particulier (p. ex. pour l'appréciation de la crédibilité), et les inférences de fait, pour lesquelles il ne jouit d'aucun avantage. La cour d'appel interviendra plus volontiers dans ce dernier cas, et il s'ensuit selon moi, contrairement au point de vue canadien, que la même norme de révision ne saurait s'appliquer dans les deux cas.

241

Not only is the type of appeal by way of "review" described by Zuckerman and the Lord Justices in *Assicurazioni* different from the Canadian understanding of this concept, I also suggest that in some respects it is actually more in line with the nature of appellate review in Saskatchewan. In these reasons, I will go on to explain that in Saskatchewan, where the nature of appellate review is by way of rehearing, when the trial judge's factual findings engage the special advantage he or she has over an appellate tribunal, the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding. In contrast, because the trial judge is in no better position than the Court of Appeal to draw inferences of fact from a base of fact properly established, I will contend that the Court of Appeal will more readily interfere when inferences are at issue. Specifically, it is my view that the Saskatchewan Court of Appeal will overrule a trial judge's inference of fact and draw its own when it concludes that the inference is not reasonable. It is apparent that this approach to factual findings and

Non seulement l'appel par voie de « contrôle » dont font état Zuckerman et les lords juges dans l'arrêt *Assicurazioni* diffère de ce qu'on entend par ce type d'appel au Canada, mais à certains égards, il s'apparente en fait davantage à l'appel propre à la Saskatchewan. Comme je l'explique dans les présents motifs, en Saskatchewan, où l'appel est instruit par voie de nouvelle audition, lorsque le juge de première instance bénéficie d'un avantage particulier par rapport au tribunal d'appel relativement aux conclusions de fait, la Cour d'appel n'interviendra et ne substituera sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits. Par contre, le juge de première instance n'étant pas mieux placé que la Cour d'appel pour tirer des inférences de fait à partir de faits dûment établis, je soutiens que la Cour d'appel interviendra plus volontiers lorsqu'une inférence sera en cause. Plus précisément, je suis d'avis que la Cour d'appel de la Saskatchewan écartera une inférence de fait déraisonnable pour y substituer la sienne. Cette démarche à l'égard des conclusions et des

inferences of fact, which I will explain more fully below, is quite similar to that followed in England (where appeals are now by way of "review"), in that both approaches differentiate between the two and grant more deference to the trial judge in the former case, when his or her special advantage is engaged.

inférences de fait, sur laquelle je reviendrai plus en détail, semble être sensiblement la même que celle adoptée en Angleterre (où l'appel s'entend désormais d'un « contrôle »), en ce sens qu'elle fait également une distinction entre conclusions et inférences de fait et préconise une plus grande déférence à l'égard des premières lorsque le juge bénéficie d'un avantage particulier.

242 All of this merely demonstrates that terminology (i.e., "rehearing" versus "review") can be misleading. Therefore, in these circumstances, and particularly because appeals are statutory creations, it is best to focus upon the statute that sets out the appellate court's jurisdiction and powers, in order to determine the nature of appellate review. As I have explained in these reasons, the statute in this case is clear: in Saskatchewan, the nature of appellate review is by way of rehearing.

Il s'ensuit donc que les termes employés (« nouvelle audition » ou « contrôle ») peuvent être trompeurs. Dans ces circonstances, et en particulier parce que l'appel est une création législative, il est préférable d'axer l'analyse sur la loi qui confère à la cour d'appel sa compétence et ses pouvoirs pour déterminer la nature de la révision en appel. Je le répète, la loi est claire en l'espèce : en Saskatchewan, l'appel est instruit par voie de nouvelle audition.

(iii) Conclusion Regarding the Nature of Appellate Review in Saskatchewan

(iii) Conclusion sur la nature de la révision en appel en Saskatchewan

243 After examining the grammatical and ordinary sense of the words used in ss. 13 and 14 of *The Court of Appeal Act, 2000*, as well as the object of the Act, the object of the specific legislative provisions that form the statutory framework for appeals, and the Act's historical foundations, to me it is clear that the nature of appellate review in Saskatchewan is by way of rehearing, with the Court of Appeal being directed to take its own view of the evidence and being empowered to draw inferences of fact and pronounce the decision that ought to have been pronounced by the trial judge. In light of this conclusion, one question remains: although the Court of Appeal is not constrained by the view of the evidence taken by the trial judge, in what circumstances will the Court of Appeal apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced? In particular, in this appeal, we are concerned with when the Court of Appeal will do so in relation to questions of fact. The issue then is to determine what judicial policy mandates in the particular context of *The Court of Appeal Act, 2000.*

Après avoir examiné le sens grammatical et ordinaire des mots employés aux art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*, ainsi que l'objet de la Loi, l'objet des dispositions établissant le cadre législatif de l'appel et les fondements historiques de la Loi, il me semble clair que, en Saskatchewan, l'appel est instruit par voie de nouvelle audition, la Cour d'appel étant tenue de se fonder sur sa propre appréciation de la preuve et habilitée à tirer des inférences de fait et à rendre la décision qu'aurait dû rendre le juge de première instance. Vu cette conclusion, et même si la Cour d'appel n'est pas liée par les conclusions tirées de la preuve en première instance, une question demeure : dans quelles circonstances la Cour d'appel se fondera-t-elle sur sa propre appréciation de la preuve et rendra-t-elle, au besoin, la décision qui aurait dû l'être? Dans le présent pourvoi, la question qui nous intéresse particulièrement est celle de savoir dans quels cas la Cour d'appel pourra le faire à l'égard d'une question de fait. Il nous faut donc déterminer ce que commande la politique judiciaire dans le contexte particulier de la *Loi de 2000 sur la Cour d'appel.*

(3) Judicial Policy Concerns

Contrary to the Saskatchewan Court of Appeal, I believe that the direction contained in s. 14 of the Act to the Court of Appeal to take its own view of what the evidence proves is subject to the judicial policy concern that trial judges enjoy a special advantage over an appellate court, in that they hear the testimony of witnesses *viva voce* and are exposed to the case as a whole. This is also the view of most authors, for instance J.-C. Royer, *La preuve civile* (3rd ed. 2003), at p. 324. The trial judge's special advantage has been recognized by this Court on a number of occasions: see, e.g., *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 794, *per* L'Heureux-Dubé J.; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at para. 36. Of particular relevance to this appeal, the trial judge's special advantage was recently described by the High Court of Australia in the context of an appeal by way of rehearing as follows:

> On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.

(*Fox v. Percy*, at para. 23 (footnotes omitted))

The special advantage of the trial judge calls for a measure of deference on the part of the Saskatchewan Court of Appeal when, pursuant to the direction in s. 14 of the Act, it is considering what the evidence proves: see *Valley Beef Producers Co-operative*, at para. 87. Specifically, when the trial

(3) Considérations de politique judiciaire

244 Contrairement à la Cour d'appel de la Saskatchewan, j'estime que l'obligation que lui fait l'art. 14 de la Loi de se fonder sur sa propre appréciation de la preuve est subordonnée au principe judiciaire voulant que le juge de première instance ait un avantage particulier sur elle du fait qu'il entend les témoignages de vive voix et assiste à toute l'instruction. C'est aussi l'opinion de la plupart des auteurs, dont J.-C. Royer, *La preuve civile* (3e éd. 2003), p. 324. Notre Cour a reconnu à maintes reprises la situation privilégiée du juge de première instance : voir, p. ex., *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 R.C.S. 705, p. 794, la juge L'Heureux-Dubé; *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, par. 36. Voici comment, dans le contexte d'un appel par voie de nouvelle audition, la Haute Cour d'Australie a récemment décrit l'avantage dont jouit le juge de première instance, une description particulièrement pertinente en l'espèce :

> [TRADUCTION] D'une part, la cour d'appel est tenue de « rendre le jugement qui, à son avis, aurait dû être rendu en première instance ». D'autre part, elle doit nécessairement respecter les « limites normales » auxquelles se heurte toute cour d'appel agissant entièrement ou dans une large mesure sur la foi du dossier. Au nombre de ces limites, mentionnons sa situation désavantageuse par rapport au juge de première instance en ce qui touche à la crédibilité des témoins et à l'« impression » qui se dégage de l'affaire et qu'une cour d'appel, à la lecture de la transcription, n'est pas toujours en mesure de partager pleinement. En outre, généralement, la cour d'appel n'est pas saisie de tous les éléments de preuve présentés au procès, ou n'en prend pas connaissance. Dans la plupart des cas, le juge de première instance jouit donc d'avantages découlant de l'obligation de recevoir et d'examiner tous les éléments de preuve et de la possibilité, sur une plus longue période en général, de soupeser la preuve dans son ensemble et d'en tirer des conclusions.

(*Fox c. Percy*, par. 23 (citations omises))

245 L'avantage particulier du juge de première instance exige de la Cour d'appel de la Saskatchewan qu'elle fasse preuve d'une certaine déférence lorsqu'elle apprécie la preuve conformément à la prescription de l'art. 14 de la Loi : voir *Valley Beef Producers Co-operative*, par. 87. Plus précisément,

judge's decision is based upon issues that engage this special advantage (most notably, factual findings based on credibility assessments), the Court of Appeal should make due allowance in this respect: see *Fox v. Percy*, at para. 25. Nevertheless, it must be kept in mind that the Court of Appeal is charged with the statutory mandate to conduct appeals by way of rehearing, and, as noted by the High Court of Australia:

> [T]he mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings. [para. 28]

246 Furthermore, although it is my view that the Court of Appeal should accord some deference to decisions that are based upon issues that engage the special advantage of the trial judge, the same deferential stance does not extend to drawing inferences of fact or to evaluating a body of fact against a legal standard: see *H.L.* (C.A.), at para. 68. As noted by the Court of Appeal in the case at bar and confirmed in several other cases, the Court of Appeal "is in as good a position as the trial judge to draw inferences of fact from a base of fact proven or admitted": see *Montgomerie & Co. v. Wallace-James*, at p. 75; *Mersey Docks and Harbour Board v. Procter*, at pp. 258-59; *Warren v. Coombes* (1979), 142 C.L.R. 531 (H.C. Austl.), at p. 551, cited with approval in *Fox v. Percy*, at para. 25. This point was, in fact, confirmed <u>by this Court</u> in *Workmen's Compensation Board v. Greer*, [1975] 1 S.C.R. 347, at pp. 357-58, where, after quoting from the aforementioned House of Lords' decision in *Montgomerie & Co. v. Wallace-James*, it stated that

> the practice of this Court, which reflects a reluctance to interfere with concurrent findings of fact in two provincial courts, does not apply with the same force to inferences drawn from conflicting professional opinions as it does to findings based on direct factual evidence.

lorsque la décision de première instance se fonde sur un élément faisant jouer cet avantage particulier (au premier chef, la conclusion de fait fondée sur une appréciation de la crédibilité), la Cour d'appel doit en tenir dûment compte : voir *Fox c. Percy*, par. 25. Il ne faut néanmoins pas perdre de vue que la Cour d'appel a l'obligation légale d'instruire l'appel par voie de nouvelle audition, et comme l'a fait remarquer la Haute Cour d'Australie :

> [TRADUCTION] [L]e simple fait que le juge de première instance a tiré une conclusion favorable aux témoins d'une partie et défavorable à ceux d'une autre n'empêche pas et ne doit pas empêcher la cour d'appel de s'acquitter des fonctions que lui confère la loi. Il arrive parfois que des faits irréfutables ou un témoignage non contredit démontrent que les conclusions du juge de première instance sont erronées même si elles paraissent fondées sur une appréciation de la crédibilité ou sont présentées comme telles. [par. 28]

En outre, bien que je sois d'avis que la Cour d'appel doit faire preuve de déférence à l'égard d'une décision fondée sur un élément faisant jouer l'avantage particulier du juge de première instance, la même obligation de déférence ne s'applique pas à l'inférence de fait ni à l'appréciation d'un ensemble de faits en fonction d'une norme juridique : voir *H.L.* (C.A.), par. 68. Comme la Cour d'appel l'a signalé en l'espèce et confirmé dans plusieurs autres affaires, elle [TRADUCTION] « est aussi bien placée que le juge de première instance pour tirer des inférences de fait d'un ensemble de faits prouvés ou reconnus » : voir *Montgomerie & Co. c. Wallace-James*, p. 75; *Mersey Docks and Harbour Board c. Procter*, p. 258-259; *Warren c. Coombes* (1979), 142 C.L.R. 531 (H.C. Austr.), p. 551, cité avec approbation dans *Fox c. Percy*, par. 25. <u>Notre Cour</u> l'a en fait également confirmé dans l'arrêt *Workmen's Compensation Board c. Greer*, [1975] 1 R.C.S. 347, p. 357-358, où elle a dit ce qui suit après avoir cité l'arrêt *Montgomerie & Co. c. Wallace-James* de la Chambre des lords :

> . . . la pratique de cette Cour, qui témoigne d'une répugnance à modifier des conclusions de fait concordantes de deux cours provinciales, ne s'applique pas avec la même vigueur à des déductions tirées d'opinions contradictoires de spécialistes qu'à des conclusions fondées sur la preuve directe de certains faits.

In *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, at p. 122, McLachlin J. (as she then was) agreed with this Court's decision in *Greer*, but also elaborated on it as follows:

> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge.

My conclusion that the same appellate deference does not extend to the drawing of inferences is strengthened by the fact that s. 14 of the Act expressly empowers the Court of Appeal to draw inferences of fact and pronounce the decision that, in its judgment, ought to have been pronounced, a power that necessarily entails drawing evaluative inferences: *H.L.* (C.A.), at para. 68.

(4) When Faced With a Question of Fact, in What Circumstances Will the Court of Appeal Apply Its Own View of the Evidence and, if Necessary, Pronounce the Decision that Ought to Have Been Pronounced?

In light of my consideration of the impact of judicial policy concerns regarding the special advantage of the trial judge, especially with regard to factual findings based on assessments of credibility, I will now address the question: when faced with a question of fact, in what circumstances will the Court of Appeal apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced?

In general, I agree with the Court of Appeal's statement:

> On appeal from a decision of a judge of the Court of Queen's Bench sitting without a jury, taken pursuant to sections 7(2)(a) and 13 of the *Court of Appeal Act, 2000*, it is the duty of the court acting under section 14 of the *Act* to rehear the case in the context of the grounds of appeal and make up its own mind, not disregarding

Dans l'arrêt *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114, p. 122, la juge McLachlin (maintenant Juge en chef) a souscrit à l'arrêt *Greer* de notre Cour, mais a développé sa pensée comme suit :

> Je reconnais que le principe de non-intervention d'une cour d'appel dans les conclusions de fait d'un juge de première instance ne s'applique pas avec la même vigueur aux conclusions tirées de témoignages d'expert contradictoires lorsque la crédibilité de ces derniers n'est pas en cause. Il n'en demeure pas moins que, selon notre système de procès, il appartient essentiellement au juge des faits, en l'espèce le juge de première instance, d'attribuer un poids aux différents éléments de preuve.

247 Ma conclusion selon laquelle l'inférence ne commande pas la même déférence en appel est étayée par le fait que l'art. 14 de la Loi confère expressément à la Cour d'appel le pouvoir de tirer des inférences de fait et de rendre la décision qui aurait dû l'être à son avis, un pouvoir qui comporte nécessairement celui de tirer des inférences appréciatives : *H.L.* (C.A.), par. 68.

(4) Lorsqu'elle doit se prononcer sur une question de fait, dans quelles circonstances la Cour d'appel peut-elle se fonder sur sa propre appréciation de la preuve et, au besoin, rendre la décision qui aurait dû l'être?

248 Après l'examen de l'incidence des considérations de politique judiciaire concernant l'avantage particulier dont jouit le juge de première instance à l'égard, notamment, d'une conclusion de fait fondée sur une appréciation de la crédibilité, je me penche maintenant sur la question suivante. Lorsqu'elle doit se prononcer sur une question de fait, dans quelles circonstances la Cour d'appel peut-elle se fonder sur sa propre appréciation de la preuve et, au besoin, rendre la décision qui aurait dû l'être?

249 Dans l'ensemble, je suis d'accord avec la conclusion de la Cour d'appel :

> [TRADUCTION] Lorsque la décision d'un juge de la Cour du Banc de la Reine siégeant sans jury est portée en appel sur le fondement de l'al. 7(2)a) et de l'art. 13 de la *Loi de 2000 sur la Cour d'appel*, la Cour d'appel doit, suivant l'art. 14 de cette loi, réentendre l'affaire en fonction des motifs d'appel et se former sa propre opinion

the judgment appealed from, and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly . . . .

(*H.L.* (C.A.), at para. 77)

250 To this general statement, I would add the following two points. First, I would note that deference should not only be accorded to trial decisions where the credibility of witnesses comes into question, but also to all such decisions where the special advantage of the trial judge is engaged. This would include cases where the trial judge's conclusion on an issue is dependent on his or her holistic assessment of the evidence presented at trial (all of which may not be available to the Court of Appeal), also described as his or her "feeling" of the case: see *Fox v. Percy*, at para. 23. Second, as I mentioned above, an appropriate interpretation of *The Court of Appeal Act, 2000* indicates that the primary function of the Court of Appeal is to correct error or deficiency in the particular case. In light of its role as a "court of error", I would emphasize that "[i]f, making proper allowance for the advantages of the trial judge, [the Court of Appeal concludes] that an error has been shown, [it is] authorised, and obliged, to discharge [its] appellate duties in accordance with the statute": *Fox v. Percy*, at para. 27. Here again I must note that the language used is awkward because of the word "error". But in the context I have discussed, one will understand that even though the palpable error threshold is not applicable, the Court of Appeal will only substitute its view of the facts if it finds some error in the reasoning of the trial judge.

251 In my view, contrary to the submissions of the Attorney General for Saskatchewan, this general statement of when the Saskatchewan Court of Appeal will interfere with the decision of a trial judge does <u>not</u> imply that factual findings that do not engage the special advantage of the trial judge and inferences of fact are to be reviewed on the basis of the correctness standard. As a preliminary point, in Saskatchewan, the nature of appellate review is, as earlier demonstrated, by way of rehearing, not

en tenant compte du jugement porté en appel et en lui accordant une importance particulière lorsque la crédibilité d'un témoin est en cause, tout en jouissant de l'entière liberté de tirer ses propres inférences des faits prouvés ou reconnus, et rendre une décision en conséquence . . .

(*H.L.* (C.A.), par. 77)

Je me permets d'apporter deux précisions. Premièrement, la déférence s'impose à l'égard non seulement d'une décision de première instance où la crédibilité des témoins est en jeu, mais aussi de toute décision faisant jouer l'avantage particulier du juge de première instance, notamment lorsqu'une conclusion de ce dernier repose sur son appréciation globale des éléments de preuve présentés au procès (lesquels ne sont pas nécessairement tous mis à la disposition de la Cour d'appel), également qualifiée d'« impression » se dégageant de l'affaire : voir *Fox c. Percy*, par. 23. Deuxièmement, comme je l'ai déjà mentionné, selon la juste interprétation de la *Loi de 2000 sur la Cour d'appel*, la principale fonction de la Cour d'appel consiste à réparer l'erreur ou la lacune qui entache une décision. Vu ce rôle confié à la « cour de révision », je souligne que [TRADUCTION] « [s]i, après avoir dûment tenu compte de la situation privilégiée du juge de première instance, elle conclut qu'une erreur a été commise, la Cour d'appel peut et doit s'acquitter de ses obligations en appel conformément à la loi » : *Fox c. Percy*, par. 27. Là encore, je dois faire observer que la formulation est boiteuse à cause de l'emploi du mot « erreur ». Mais dans le contexte considéré, l'on comprendra que même si le critère de l'erreur manifeste ne s'applique pas, la Cour d'appel ne substituera sa propre appréciation des faits à celle du juge de première instance que si elle découvre une faille dans le raisonnement de ce dernier.

Selon moi, contrairement aux prétentions du procureur général de la Saskatchewan, cet énoncé général des circonstances dans lesquelles la Cour d'appel de la Saskatchewan peut modifier la décision de première instance <u>ne</u> signifie <u>pas</u> que la conclusion factuelle ne faisant pas jouer l'avantage particulier du juge de première instance et l'inférence de fait doivent être révisées selon la norme de la décision correcte. D'abord, en Saskatchewan l'appel est instruit, je le répète, par voie de nouvelle audition, et

review for error; therefore, the notion of "reviewing" a decision on any standard, let alone the correctness standard, is not applicable in these circumstances. Moreover, the correctness standard implies that the reviewing court will accord no deference to the decision of the lower court, but it is clear from the general statement of the Court of Appeal in *H.L.* (C.A.) that I quoted above that even though it is the duty of the court acting under s. 14 of the Act to rehear the case in the context of the grounds of appeal and make up its own mind, it will not disregard the judgment appealed from. The office of a trial judge is deserving of respect, and the decisions of such judges will be presupposed (and not presumed) to be free from error: see *Valley Beef Producers Co-operative*, at paras. 117 and 120.

Turning now to specifically address the circumstances in which the Court of Appeal, when faced with questions of fact, will apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced, I will distinguish between three types of questions of fact: (i) factual findings that engage the special advantage of the trial judge; (ii) factual findings that do not; and (iii) inferences based on findings of fact. I distinguish between factual findings that engage the special advantage of the trial judge and factual findings that do not because, as noted above, more deference is called for with regard to the former. I distinguish between factual findings generally and inferences of fact because there is an analytical difference between the two: see *Housen*, at para. 103 (for the minority). Inferences involve logical deductions that rely upon findings of fact in order to come to either legal or factual conclusions. In this case, we are only concerned with factual inferences.

(a) *Factual Findings That Engage the Special Advantage of the Trial Judge*

As noted previously, factual findings that engage the special advantage of the trial judge will be accorded some deference by the Court of Appeal. To the extent that "standards of review" language is

non de contrôle d'erreur. Par conséquent, la notion de « contrôle » de la décision en fonction de quelque norme, à plus forte raison celle de la décision correcte, ne saurait s'appliquer dans les circonstances de l'espèce. Ensuite, la norme de la décision correcte implique que le tribunal de révision ne fait preuve d'aucune déférence à l'égard de la décision du tribunal inférieur, alors qu'il ressort de l'affirmation générale de la Cour d'appel dans *H.L.* (C.A.), citée précédemment, que même si l'art. 14 de la Loi lui fait obligation de réentendre l'affaire en fonction des motifs d'appel et de se former sa propre opinion, elle doit tenir compte du jugement porté en appel. La charge d'un juge de première instance commande le respect, et l'on présupposera (et non présumera) que la décision d'un tel juge est exempte d'erreur : voir *Valley Beef Producers Co-operative*, par. 117 et 120.

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En ce qui concerne maintenant les circonstances dans lesquelles, lorsqu'il lui faut se prononcer sur une question de fait, la Cour d'appel peut se fonder sur sa propre appréciation de la preuve et, au besoin, rendre la décision qui aurait dû l'être, je distingue entre trois types de questions de fait : (i) la conclusion factuelle qui fait jouer l'avantage particulier du juge de première instance; (ii) celle qui ne le fait pas; (iii) l'inférence fondée sur une conclusion de fait. Je distingue entre la conclusion factuelle qui fait jouer l'avantage particulier du juge de première instance et celle qui ne le fait pas parce que, comme je l'ai dit, la première commande une plus grande déférence. Je fais une distinction entre la conclusion factuelle en général et l'inférence de fait, les deux étant différentes sur le plan analytique : voir *Housen*, par. 103 (opinion de la minorité). L'inférence suppose une déduction logique fondée sur une conclusion de fait en vue d'arriver à une conclusion sur le plan du droit ou des faits. En l'espèce, nous nous intéressons uniquement à l'inférence factuelle.

a) *Conclusion factuelle faisant jouer l'avantage particulier du juge de première instance*

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Je le répète, la Cour d'appel doit faire preuve d'une certaine déférence vis-à-vis des conclusions factuelles qui font jouer l'avantage particulier du juge de première instance. Dans la mesure où la

useful in the context of appellate review by way of rehearing, if only for clarity's sake, it can be argued that, although the Court of Appeal is not constrained by the view of the evidence taken by the trial judge, when the trial judge's factual findings engage the special advantage he or she has over an appellate tribunal, the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding: *H.L.* (C.A.), at para. 77. That being said, it must be borne in mind that the primary function of the Saskatchewan Court of Appeal is to correct "error or deficiency" in the particular case, and it is not relieved of this function "by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses": *Fox v. Percy*, at para. 29. In such a case, "making all due allowances for the advantages available to the trial judge", the Court of Appeal must not shrink from applying its own view of the evidence if it concludes that the trial judge's view is tainted by a palpable and overriding error.

terminologie propre aux « normes de contrôle » est utile dans le contexte d'un appel par voie de nouvelle audition, ne serait-ce que par souci de clarté, on peut soutenir que, même si elle n'est pas liée par les conclusions que le juge de première instance a tirées de la preuve, lorsque ces conclusions font jouer l'avantage particulier du juge de première instance, la Cour d'appel n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits : *H.L.* (C.A.), par. 77. Cela dit, il faut se rappeler que la principale fonction de la Cour d'appel de la Saskatchewan est de réparer l'erreur ou la lacune qui entache la décision et qu'elle doit s'en acquitter même lorsque [TRADUCTION] « le juge de première instance est expressément ou implicitement arrivé à une conclusion influencée par son opinion sur la crédibilité des témoins » : *Fox c. Percy*, par. 29. En pareil cas, [TRADUCTION] « après avoir dûment tenu compte des avantages dont bénéficie le juge de première instance », la Cour d'appel ne doit pas craindre de se fonder sur sa propre appréciation de la preuve si elle estime que celle du juge de première instance est entachée d'une erreur manifeste et dominante.

(b) *Factual Findings That Do Not Engage the Special Advantage of the Trial Judge*

b) *Conclusion factuelle ne faisant pas jouer l'avantage particulier du juge de première instance*

254 Factual findings that do not engage the special advantage of the trial judge are not entitled to the same level of deference as those that do. Therefore, while the Court of Appeal will presuppose that such factual findings are free from error, given the respect that is to be accorded to the office of a trial judge, if the Court of Appeal concludes that some error has indeed been made, it will apply its own view of the evidence: see *Valley Beef Producers Co-operative*, at para. 117. As above, to the extent that "standards of review" language is helpful, it can be argued that, although the Court of Appeal is not constrained by the view of the evidence taken by the trial judge, it will only interfere and apply its own view of the evidence if the trial judge has committed a simple error in his or her fact finding.

La conclusion factuelle qui ne fait pas jouer l'avantage particulier du juge de première instance ne commande pas la même déférence. Aussi, même si elle présupposera qu'une conclusion factuelle est exempte d'erreur, étant donné le respect dû à la charge d'un juge de première instance, lorsqu'elle estimera qu'une erreur a bel et bien été commise, la Cour d'appel se fondera sur sa propre appréciation de la preuve : voir *Valley Beef Producers Co-operative*, par. 117. Par analogie avec ce qui précède, dans la mesure où la terminologie propre aux « normes de contrôle » est utile, l'on peut soutenir que, même si elle n'est pas liée par les conclusions que le juge de première instance a tirées de la preuve, la Cour d'appel n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si le juge de première instance a commis une simple erreur en appréciant les faits.

The distinction between simple error and palpable and overriding error should be noted. Because the trial judge is typically in no better position than the Court of Appeal to make factual findings that are not dependent on hearing the testimony of witnesses *viva voce* or being exposed to the case as a whole, no greater measure of deference is called for than presupposing (though not presuming) that the trial judge's fact finding is free from error: see *Valley Beef Producers Co-operative*, at para. 117; *H.L.* (C.A.), at para. 73. If a simple error in this type of fact finding is detected — it need not be palpable and overriding —, the Court of Appeal must interfere and apply its own view of the evidence. This approach is supported by my position that an appropriate interpretation of *The Court of Appeal Act, 2000* indicates that the primary function of the Court of Appeal is to correct error or deficiency in the particular case.

255 La simple erreur doit être distinguée de l'erreur manifeste et dominante. Le juge de première instance n'étant généralement pas mieux placé que la Cour d'appel pour tirer des conclusions factuelles n'exigeant pas d'avoir entendu les témoignages de vive voix ni d'avoir assisté à toute l'instruction, la seule déférence qui s'impose consiste à présupposer (et non à présumer) que l'appréciation des faits par le juge de première instance n'est entachée d'aucune erreur : voir *Valley Beef Producers Co-operative*, par. 117; *H.L.* (C.A.), par. 73. Lorsqu'elle y décèle une simple erreur — point n'est besoin qu'il s'agisse d'une erreur manifeste et dominante —, la Cour d'appel doit intervenir et se fonder sur sa propre appréciation de la preuve. J'ajoute que, suivant la juste interprétation de la *Loi de 2000 sur la Cour d'appel*, la principale fonction de la Cour d'appel est de réparer l'erreur ou la lacune qui entache la décision.

(c) *Inferences of Fact*

In the case at bar, we are particularly concerned with conditions under which, in the context of an appeal by way of rehearing, the Court of Appeal will overrule a trial judge's inference of fact and instead draw its own. Once again, I reiterate that a trial judge is in no better position than the Court of Appeal to draw inferences of fact from a base of fact properly established, either in the first instance or on appeal: see *Valley Beef Producers Co-operative*, at para. 86; *H.L.* (C.A.), at para. 68. Furthermore, it must be remembered that the primary function of the Court of Appeal is to correct error or deficiency in the particular case. Because inferences are matters of logic and their accuracy can never be conclusively established, it is awkward to speak in terms of "error" with respect to these inferences; instead, I favour the use of the concept of reasonableness. Because s. 14 of the Act states in part that "the court shall act on its own view of what, in its judgment, the evidence proves, and the court <u>may</u> draw inferences of fact . . . .", it can be argued that the Court of Appeal "may" draw its own inference of fact when, after considering what, in its own view, the evidence proves and, comparing that with the inference of fact made by the trial judge, it concludes that the trial judge's inference of fact was not

c) *Inférence de fait*

256 En l'espèce, nous nous attachons particulièrement aux conditions auxquelles, dans le contexte d'un appel par voie de nouvelle audition, la Cour d'appel infirmera une inférence de fait du juge de première instance et lui substituera la sienne. Encore une fois, je le répète, le juge de première instance n'est pas mieux placé que la Cour d'appel pour tirer une inférence de fait d'un ensemble de faits dûment établis, que ce soit en première instance ou en appel : voir *Valley Beef Producers Co-operative*, par. 86; *H.L.* (C.A.), par. 68. De plus, il faut se rappeler que la fonction première de la Cour d'appel est de réparer l'erreur ou la lacune qui entache la décision. L'inférence étant affaire de logique et sa justesse ne pouvant jamais être établie avec certitude, l'emploi du mot « erreur » est inopportun à son égard; je privilégie la notion de « raisonnabilité ». Comme l'art. 14 de la Loi dit entre autres que « [l]a Cour se détermine en se fondant sur sa propre appréciation de la preuve et <u>peut</u> tirer les inférences factuelles . . . », on peut faire valoir que la Cour d'appel « peut » tirer sa propre inférence de fait lorsque, après avoir apprécié elle-même la preuve et comparé cette appréciation avec l'inférence de fait tirée par le juge de première instance, elle arrive à la conclusion que celle-ci n'était pas raisonnable. En d'autres termes, dans le

reasonable. In other words, in the context of an appeal by way of rehearing, the threshold that the Court of Appeal must pass before substituting its own inference of fact is reasonableness. Nevertheless, as was the case with findings of fact that do not engage the special advantage of the trial judge, out of respect for the office of the trial judge, the Court of Appeal will presuppose that he or she has drawn reasonable inferences of fact: see *Valley Beef Producers Co-operative*, at para. 120. The Court of Appeal in *Valley Beef Producers Co-operative* aptly summarized this concept as follows:

> Should the court, having determined what inferences may properly be drawn, conclude that those of the chambers judge were reasonable, as presupposed, it will not interfere. Should it reach the opposite conclusion, or be left in serious doubt, it will take its own view of what the evidence warrants in the way of inference and establish the secondary facts as it sees fit in the exercise of its faculty of judgment. [para. 120]

(5) Previous Jurisprudence Regarding Standards of Appellate Review

257 In light of my conclusion regarding the nature of appellate review in Saskatchewan and the circumstances in which the Court of Appeal will apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced, in this final section, I will endeavour to reconcile past jurisprudence on this topic with my conclusion.

258 Earlier, I explained why the nature of appellate review in Saskatchewan is by way of rehearing and not review for error, such that the Court of Appeal is relieved of any obligation to adopt the view of the evidence taken by the trial judge and is directed instead to act on its own view of what, in its judgment, the evidence proves. Moreover, I noted that the Saskatchewan Act, which gives the Court of Appeal its mandate to conduct appeals in this manner, is unique. In this context, I contend that when examining previous jurisprudence on appellate review with a view to reconciling it with my conclusion about the nature and (so-called) standards of appellate review in Saskatchewan, the focus should be on Saskatchewan-specific cases, and in particular

contexte d'un appel par voie de nouvelle audition, le critère auquel la Cour d'appel doit satisfaire pour substituer sa propre inférence de fait à celle du juge de première instance est celui de la raisonnabilité. Néanmoins, vu le respect que commande la charge de juge de première instance, la Cour d'appel doit, comme dans le cas d'une conclusion de fait qui ne fait pas jouer l'avantage particulier du juge de première instance, présupposer que ce dernier a tiré une inférence de fait raisonnable : voir *Valley Beef Producers Co-operative*, par. 120. Dans cet arrêt, la Cour d'appel a bien résumé cette notion :

> [TRADUCTION] Lorsque, après avoir déterminé quelles inférences pouvaient être tirées à juste titre, la Cour d'appel conclut que celles du juge en chambre étaient raisonnables, comme on le présuppose, elle ne doit pas intervenir. Lorsqu'elle arrive à la conclusion contraire, ou qu'elle a un doute sérieux, elle doit se fonder sur sa propre appréciation de ce que la preuve permet d'inférer et établir les faits secondaires comme elle le juge indiqué dans l'exercice de sa faculté de discernement. [par. 120]

(5) Jurisprudence relative aux normes de révision en appel

En dernier lieu, je m'appliquerai à concilier avec la jurisprudence pertinente ma conclusion sur la nature de la révision en appel en Saskatchewan et sur les circonstances dans lesquelles la Cour d'appel se fondera sur sa propre appréciation de la preuve et, au besoin, rendra la décision qui aurait dû l'être.

J'ai expliqué précédemment pourquoi, en Saskatchewan, l'appel est instruit par voie de nouvelle audition, et non de contrôle d'erreur, de sorte que la Cour d'appel n'a pas à accepter les conclusions que le juge de première instance a tirées de la preuve, mais doit plutôt se déterminer en fonction de sa propre appréciation de la preuve. De plus, j'ai souligné le caractère unique de la Loi de la Saskatchewan, qui habilite la Cour d'appel à procéder ainsi. Dans ce contexte, j'estime que l'examen de la jurisprudence sur la révision en appel en vue de la concilier avec ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel applicables dans la province doit mettre l'accent sur les décisions relatives à la Saskatchewan et,

those from this Court and the Saskatchewan Court of Appeal. This is particularly so when the general standards of appellate review seem to be drifting away from appeal by way of rehearing and toward appeal by way of review for error: *H.L.* (C.A.), at para. 86. Additionally, as noted by the Court of Appeal, these general standards "have evolved not so much on the basis of statutory provision as on the basis of judicial policy concerns — concerns having to do with finality in litigation, with cost and delay occasioned by appeal, with taxing scarce judicial resources, and so on" (para. 81). However, because appeals are creatures of statute, these judicial policy concerns must be assessed in light of the statutory mandate conferred on the Court of Appeal. In this case, the Saskatchewan legislature, through *The Court of Appeal Act, 2000*, has instructed its Court of Appeal to conduct appeals by way of rehearing rather than review for error, with the overall aim of redressing error and setting matters right: *Valley Beef Producers Co-operative*, at para. 70. In this light, the judicial policy concerns noted above lose their relevance and should not be used to limit the facially unlimited right of appeal and the broad powers of the appellate court to act on that right that are provided by statute in the province of Saskatchewan. Instead, other policies apply.

plus particulièrement, sur celles de notre Cour et de la Cour d'appel de la Saskatchewan. D'autant plus que les normes générales applicables en appel semblent s'éloigner de l'appel par voie de nouvelle audition et se rapprocher de l'appel par voie de contrôle d'erreur : *H.L.* (C.A.), par. 86. En outre, comme l'a signalé la Cour d'appel, ces normes générales [TRADUCTION] « n'ont pas tant évolué en fonction de dispositions législatives que de considérations de politique judiciaire — irrévocabilité des jugements, coût et attente associés à l'appel, affectation de ressources judiciaires limitées, etc. » (par. 81). Cependant, l'appel étant une création législative, ces considérations de politique judiciaire doivent être appréciées à la lumière de la mission dont la Cour d'appel est légalement investie. En l'espèce, l'assemblée législative de la Saskatchewan, en adoptant la *Loi de 2000 sur la Cour d'appel*, a enjoint à sa cour d'appel de statuer à l'issue d'une nouvelle audition, et non d'un contrôle d'erreur, avec l'objectif général de réparer une erreur et de rétablir les choses : *Valley Beef Producers Co-operative*, par. 70. Les considérations de politique judiciaire susmentionnées perdent donc leur pertinence et ne doivent pas être invoquées pour limiter le droit d'appel à première vue illimité et les vastes pouvoirs de la cour d'appel — prévus par la loi dans la province de la Saskatchewan — de donner suite à l'exercice de ce droit. Ce sont plutôt d'autres politiques qui s'appliquent.

Examining the judicial interpretation by this Court and the Saskatchewan Court of Appeal of the nature and (so-called) standards of appellate review in Saskatchewan, in contrast with Fish J.'s assertion at para. 98 that "[n]o decision has been drawn to our attention where the [Saskatchewan Court of Appeal] has asserted a power of review by rehearing", I have found that there are a number of Saskatchewan Court of Appeal cases that support my conclusion that the nature of appellate review in Saskatchewan is by way of rehearing and not review for error. Moreover, to the extent that there are cases from this Court and the Saskatchewan Court of Appeal that appear to conflict with my conclusion, in my view, they can be reconciled in one of three ways. First, a number of these cases hold that findings of fact made at trial based on the credibility of

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En me penchant sur l'interprétation, par notre Cour et la Cour d'appel de la Saskatchewan, de la nature de la révision en appel et des « normes de contrôle » en appel applicables en Saskatchewan, malgré l'affirmation du juge Fish au par. 98 de ses motifs selon laquelle « [n]ulle décision où la Cour d'appel a revendiqué le pouvoir d'instruire l'appel par voie de nouvelle audition n'a été portée à notre attention », j'ai constaté qu'un certain nombre de décisions de la Cour d'appel de la Saskatchewan appuient ma conclusion que, dans cette province, l'appel est instruit par voie de nouvelle audition, et non de contrôle d'erreur. De plus, si des arrêts de notre Cour et de la Cour d'appel de la Saskatchewan semblent contredire ma conclusion, ils peuvent, à mon avis, être conciliés avec elle de trois façons. Premièrement, un certain nombre de ces

witnesses are not to be reversed on appeal unless the trial judge made some palpable and overriding error which affected his or her assessment of the facts. This specific holding is not at odds with my conclusion regarding the nature of appellate review in Saskatchewan and the circumstances in which the Saskatchewan Court of Appeal, when faced with factual findings that engage the special advantage of the trial judge, will interfere and apply its own view of the evidence. Therefore, these cases can be reconciled by restricting their impact to their specific *rationes decidendi*. Second, some of these cases do not refer to the Saskatchewan Act at all, despite the fact that it is the only statute in Canada that frees the Court of Appeal from the view of the evidence taken by the trial judge and directs it to take its own view of the evidence. Therefore, I contend that these cases are better understood as applying to appellate review in general, the nature of which has drifted toward appeal by way of review, rather than appellate review in Saskatchewan under *The Court of Appeal Act, 2000*, which continues to be by way of rehearing. Finally, some cases, or at least aspects of them, may simply require reconsideration in light of the above analysis regarding the nature of appellate review in Saskatchewan. This Court is not bound by the particular decisions of lower courts, particularly when there is conflict within the case law.

arrêts établissent que la conclusion de fait tirée au procès sur le fondement de la crédibilité d'un témoin ne doit être infirmée en appel que si le juge de première instance a commis une erreur manifeste et dominante ayant entaché son appréciation des faits. Cela ne va pas à l'encontre de ma conclusion sur la nature de la révision en appel en Saskatchewan et les circonstances dans lesquelles la Cour d'appel, lorsqu'elle doit se prononcer sur une conclusion factuelle faisant jouer l'avantage particulier du juge de première instance, peut intervenir et se fonder sur sa propre appréciation de la preuve. Il est donc possible de concilier ces arrêts avec ma conclusion en ne retenant que leur *ratio decidendi*. Deuxièmement, certains de ces arrêts ne font aucune mention de la Loi de la Saskatchewan, même si elle est la seule au Canada à soustraire la Cour d'appel à l'obligation d'accepter les conclusions tirées de la preuve par le juge de première instance et à lui enjoindre de se fonder sur sa propre appréciation de la preuve. Par conséquent, j'estime préférable de considérer qu'ils s'appliquent à l'appel en général, qui se rapproche désormais davantage du contrôle judiciaire que de l'appel instruit en Saskatchewan à l'issue d'une nouvelle audition sous le régime de la *Loi de 2000 sur la Cour d'appel*. Enfin, certains arrêts ou, du moins, certains de leurs aspects, pourraient simplement nécessiter un réexamen à la lumière de l'analyse qui précède concernant la nature de la révision en appel en Saskatchewan. Notre Cour n'est pas liée par les décisions des tribunaux inférieurs, surtout lorsque la jurisprudence est contradictoire.

(a) *Saskatchewan Court of Appeal Cases in Support of My Conclusion That the Nature of Appellate Review in Saskatchewan Is by Way of Rehearing*

a) *Arrêts de la Cour d'appel de la Saskatchewan étayant ma conclusion selon laquelle, en Saskatchewan, l'appel est instruit par voie de nouvelle audition*

260 At para. 97 of his reasons, Fish J. states that "the Court of Appeal for Saskatchewan appears to have for many decades prior to both *Lensen* and *Housen* understood its legislative mandate as a power of review for error". With respect, I must disagree with this statement because, as noted previously, since *The Court of Appeal Act* of 1915 was enacted, the Saskatchewan Court of Appeal has adopted the rehearing approach to appellate review that was first laid out in *Coghlan v.*

Le juge Fish affirme, au par. 97 de ses motifs, que « la Cour d'appel de la Saskatchewan semble avoir vu dans son mandat légal le pouvoir de vérifier si la décision est exempte d'erreur, et ce, bien des décennies avant les arrêts *Lensen* et *Housen* ». En toute déférence, je ne peux être d'accord, car, je le répète, depuis l'adoption de la *Court of Appeal Act* de 1915, la Cour d'appel de la Saskatchewan a opté pour l'appel par voie de nouvelle audition préconisé initialement dans *Coghlan c. Cumberland*,

Cumberland and approved by Anglin J. in *Annable v. Coventry* and *Greene, Swift & Co. v. Lawrence*: see, e.g., *Miller v. Foley & Sons*; *Messer v. Messer*; *Monaghan v. Monaghan*; *Kowalski v. Sharpe*; *Tarasoff v. Zielinsky*; *Matthewson v. Thompson*; *French v. French*, at p. 443; and *Wilson v. Erbach*, at p. 666.

For example, in *Miller v. Foley & Sons*, the appeal turned entirely upon a finding of fact by the trial judge, and the Court of Appeal held that "[t]he rule no doubt is that, in cases of this kind, it is the duty of this Court to re-hear the case and to overrule it when on full consideration the Court is convinced that the judgment appealed from is wrong" (p. 665). Similarly, in *Monaghan v. Monaghan*, the Court of Appeal confirmed that, pursuant to (then) s. 8 of *The Court of Appeal Act*, R.S.S. 1930, c. 48, it was duty-bound to reconsider the evidence:

> We are dealing with an appeal from a decision of a Judge sitting without a jury, and it is therefore our duty to reconsider the evidence. This is especially true in this Court, where we are bound to give due effect to sec. 8 of *The Court of Appeal Act*, R.S.S., 1930, ch. 48. This case does not turn upon the relative credibility of witnesses, and the question of which witness is to be believed rather than another does not arise; if it did, different considerations would, of course, apply. [p. 5]

Moreover, in *Tarasoff v. Zielinsky*, at p. 138, the Court of Appeal confirmed that it was in as good a position as the trial judge to draw inferences of fact, which, in this case, was that the deceased was killed by the defendant's bull. Likewise, in *French v. French*, at p. 443, the Court of Appeal noted that it is required to act on its own view of what the evidence proves when it cannot agree with the inferences the trial judge drew from the facts:

> In the result, I can only say, with great deference, that I cannot agree with the inferences which [the trial judge] draws from the facts and, such being the case, it is my duty to act upon my own view of what the evidence proves: *The Court of Appeal Act*, R.S.S. 1930, ch. 48, sec. 8; *Lysnar v. National Bank of N.Z.*, [1935] 1 W.W.R. 625.

(See also *Wilson v. Erbach*, at p. 666.)

puis approuvé par le juge Anglin dans *Annable c. Coventry* et *Greene, Swift & Co. c. Lawrence* : voir, p. ex., *Miller c. Foley & Sons*; *Messer c. Messer*; *Monaghan c. Monaghan*; *Kowalski c. Sharpe*; *Tarasoff c. Zielinsky*; *Matthewson c. Thompson*; *French c. French*, p. 443; *Wilson c. Erbach*, p. 666.

261 Par exemple, dans l'affaire *Miller c. Foley & Sons*, où l'appel visait uniquement une conclusion de fait tirée par le juge de première instance, la Cour d'appel a conclu que, [TRADUCTION] « [d]ans une affaire de ce genre, la règle veut sans aucun doute que la Cour réentende l'affaire et infirme la décision lorsque, après un examen minutieux, elle est convaincue de son caractère erroné » (p. 665). De même, dans *Monaghan c. Monaghan*, la Cour d'appel a confirmé que, suivant l'art. 8 de la *Court of Appeal Act*, R.S.S. 1930, ch. 48, elle avait l'obligation de réexaminer la preuve :

> [TRADUCTION] Nous sommes saisis de l'appel de la décision d'un juge siégeant sans jury, et il est donc de notre devoir de réexaminer la preuve, d'autant plus qu'il nous incombe d'assurer l'application de l'art. 8 de la *Court of Appeal Act*, R.S.S. 1930, ch. 48. Le règlement du litige ne tient pas à la crédibilité relative des témoins, et il ne s'agit pas d'ajouter foi à un témoin plutôt qu'à un autre; évidemment, si tel était le cas, des considérations différentes s'appliqueraient. [p. 5]

262 En outre, dans l'affaire *Tarasoff c. Zielinsky*, la Cour d'appel a confirmé à la p. 138 qu'elle était aussi bien placée que le juge de première instance pour tirer une inférence de fait et conclure, en l'espèce, que le défunt avait été tué par le taureau du défendeur. Aussi, dans *French c. French*, p. 443, elle a indiqué qu'elle devait statuer en fonction de sa propre appréciation de la preuve lorsqu'elle ne pouvait faire siennes les inférences que le juge de première instance avait tirées des faits :

> [TRADUCTION] Par conséquent, je peux seulement dire, en toute déférence, que je ne peux être d'accord avec les inférences que [le juge de première instance] tire des faits. Je dois donc statuer en me fondant sur ma propre appréciation de la preuve : *The Court of Appeal Act*, R.S.S. 1930, ch. 48, art. 8; *Lysnar c. National Bank of N.Z.*, [1935] 1 W.W.R. 625.

(Voir également *Wilson c. Erbach*, p. 666.)

263 Not only did the Saskatchewan Court of Appeal adopt the rehearing approach to appellate review in cases decided long before the decisions of this Court in *Lensen v. Lensen*, [1987] 2 S.C.R. 672, and *Housen* (discussed below), following these two decisions, the Court of Appeal also appears to have maintained its adherence to this form of appellate review.

264 For instance, in *Valley Beef Producers Co-operative*, the Court of Appeal took occasion to examine in detail the provisions of *The Court of Appeal Act, 2000*, given its newness at the time and the concern among members of the bar of the Province that the role of the court is on the wane, in that it will not or cannot address appeals as robustly as it once did. The court explained this concern in the following manner:

> The concern, which seems to have been mounting over the last several years, stems from what are nowadays referred to in increasingly comprehensive terms as the "standards of appellate review", a continually evolving set of uniform, national standards governing the determination of issues of fact and questions of law raised before the court on appeal. It behoves us to recognize this concern and to address it. [para. 32]

265 In its interpretation of *The Court of Appeal Act, 2000*, the court noted that the right of appeal conferred by s. 7(2)(a), and augmented by s. 13 when unlimited, is "a right of the person which has first and foremost to do with relief from error or deficiency, if such be found, in the decision affecting that person" (para. 65). With regard to s. 12(1), the court stated that the legislature "could hardly have expressed itself in broader terms, evincing an intention to fully empower the court to take such steps in respect of the decision under appeal as occasion requires" (para. 70). Although full consideration of ss. 13 and 14 was not needed to decide the case, which essentially involved the trial judge's identification and application of the governing law, the court nevertheless went on to state that "[s]ection 14 is concerned with issues of fact, as is s. 13, but it extends beyond this, inasmuch as it goes on to empower the court to pronounce judgment, which entails the application of law to fact once properly established" (para. 73). The court concluded that

Non seulement la Cour d'appel de la Saskatchewan a adopté l'appel par voie de nouvelle audition bien avant les arrêts *Lensen c. Lensen*, [1987] 2 R.C.S. 672, et *Housen* de notre Cour (sur lesquels je reviendrai), mais elle semble avoir continué depuis de privilégier cette forme de révision en appel.

À titre d'exemple, dans l'arrêt *Valley Beef Producers Co-operative*, la Cour d'appel a saisi l'occasion d'examiner en détail la *Loi de 2000 sur la Cour d'appel*, étant donné sa nouveauté à l'époque et la crainte des avocats de la province que la Cour d'appel ne connaisse un déclin du fait qu'elle ne voudrait ou ne pourrait plus instruire les appels avec la vigueur d'autrefois. Voici comment la Cour d'appel a expliqué cette appréhension :

> [TRADUCTION] La crainte, qui semble s'être accrue ces dernières années, est due aux « normes de révision en appel » — expression de plus en plus générale aujourd'hui consacrée —, un ensemble de normes nationales uniformes en constante évolution régissant le règlement des questions de fait et de droit soulevées devant la Cour d'appel. Il nous faut reconnaître cette crainte et en tenir compte. [par. 32]

Dans son analyse de la *Loi de 2000 sur la Cour d'appel*, la Cour d'appel a signalé que le droit d'appel conféré par l'al. 7(2)a), et accru par l'art. 13 lorsque aucune restriction ne s'applique, est [TRADUCTION] « un droit permettant d'abord et avant tout à son titulaire d'obtenir la réparation de toute erreur ou lacune décelée dans la décision qui le touche » (par. 65). En ce qui concerne le par. 12(1), elle a affirmé que le législateur [TRADUCTION] « aurait pu difficilement s'exprimer de manière plus générale, ce qui traduit l'intention d'investir véritablement la Cour d'appel du pouvoir de prendre les mesures qui s'imposent à l'égard de la décision portée en appel » (par. 70). Même s'il n'était pas nécessaire d'analyser les art. 13 et 14 pour statuer dans cette affaire, qui portait essentiellement sur la définition et l'application du droit applicable par le juge de première instance, la Cour d'appel a néanmoins ajouté que [TRADUCTION] « [l]'art. 14, à l'instar de l'art. 13, vise les questions de fait, mais va plus loin et habilite la Cour d'appel à rendre jugement, ce qui suppose l'application du

"[a]ll of this, of course, dovetails with the notion of appeal by way of re-hearing."

As for the central issue in the appeal — in what circumstances will the Court of Appeal exercise its remedial powers conferred on it by s. 12(1) and take issue with a chambers judge's decision on the grounds of (i) the judge's identification of the governing law and (ii) the judge's application of that law to the facts of the case — the court held that the court will exercise these powers "if satisfied of material error of law or material deficiency in respect of the decision under appeal" (para. 92). Moreover, although the court was of the view that appeal by way of rehearing remains the case in Saskatchewan, to the extent the basis for the exercise of the powers conferred on the court is expressed in terms of "standards of review", it went on to offer its opinion as to the standards in Saskatchewan (paras. 95-96).

First, with regard to questions of law, which, in the court's view, include both the judge's identification of the law as well as the judge's application of the law to the facts, the court stated that the standard in Saskatchewan was correctness (paras. 96 and 111). On this point, the court acknowledged that its decision was in contrast with the majority opinion in *Housen*; it attempted to justify this conflict in a number of ways, including by noting that the decision in *Housen* did not address the Saskatchewan Act (para. 108). Second, with regard to questions of fact, the court held that, for so-called primary and secondary facts (i.e., what I term "factual findings" and "inferences of fact") that are not dependent on hearing *viva voce* evidence or assessments of credibility, "no greater measure of deference is called for than that pertaining to the office of the judge, who being a superior court judge may be presupposed to have made reasonable findings of fact" (para. 117). In contrast, for findings of fact that do arise out of *viva voce* evidence and assessments of credibility, the court held that "again the court will address the issue on the standard of 'reasonableness', determined on the same basis and to the same extent as otherwise, but accompanied by an

droit aux faits dûment établis » (par. 73). La Cour d'appel a conclu que [TRADUCTION] « [t]out cela, évidemment, cadre bien avec la notion d'appel par voie de nouvelle audition. »

266 En ce qui a trait à la principale question en litige dans le présent pourvoi — dans quelles circonstances la Cour d'appel exercera les pouvoirs de réparation que lui confère le par. 12(1) et marquera son désaccord avec la décision du juge en chambre quant (i) à la définition du droit applicable et (ii) à l'application de ce droit aux faits de l'espèce —, la Cour d'appel a conclu qu'elle exercera ces pouvoirs [TRADUCTION] « si elle est convaincue qu'une erreur de droit ou une lacune importantes entache la décision portée en appel » (par. 92). De plus, même si elle était d'avis que l'appel par voie de nouvelle audition s'appliquait toujours en Saskatchewan, dans la mesure où le fondement de l'exercice de ses pouvoirs reprenait la terminologie des « normes de contrôle », la Cour d'appel s'est aussi prononcée sur les normes applicables en Saskatchewan (par. 95-96).

267 Premièrement, en ce qui concerne les questions de droit, qui, selon elle, comprennent tant la définition du droit que son application aux faits, la Cour d'appel a dit que la norme applicable en Saskatchewan était celle de la décision correcte (par. 96 et 111). Sur ce point, elle a reconnu que sa décision allait à l'encontre de l'opinion majoritaire dans l'arrêt *Housen*; elle a tenté de justifier cette contradiction de nombreuses façons, notamment en signalant que l'arrêt *Housen* ne faisait pas mention de la loi sur la Cour d'appel de la Saskatchewan (par. 108). Deuxièmement, au chapitre des questions de fait, elle a conclu que les conclusions relatives à des faits dits essentiels et secondaires (que j'appelle « conclusions factuelles » et « inférences de fait ») qui ne tiennent pas à l'audition des témoignages de vive voix ni à l'appréciation de la crédibilité, [TRADUCTION] « ne commandent pas une plus grande déférence que la charge du juge, dont on peut présupposer, s'agissant d'un juge d'une cour supérieure, qu'il a tiré des conclusions de fait raisonnables » (par. 117). À l'opposé, dans le cas des conclusions de fait découlant de témoignages entendus de vive voix et de l'appréciation de la crédibilité, la Cour d'appel a statué que, [TRADUCTION] « encore

appreciably higher measure of deference by reason of the judge's advantage, denied this court, of having seen and heard the witnesses" (para. 119).

une fois, elle appliquera la norme de la "raisonnabilité", de la même manière et dans la même mesure, mais en faisant preuve d'une déférence sensiblement plus grande en raison de l'avantage que confère au juge, à l'exclusion de la Cour d'appel, le fait d'avoir vu et entendu les témoins » (par. 119).

268 While it is apparent that there is some divergence between my conclusion and that of the Court of Appeal in *Valley Beef Producers Co-operative* regarding the circumstances in which the Court of Appeal will interfere with the trial judge's decision and instead apply its own view of the evidence, this is of secondary importance. If necessary, the conflict can be reconciled by this Court. What is of primary importance is the fact that in *Valley Beef Producers Co-operative*, a decision that was rendered after *The Court of Appeal Act, 2000* was enacted and post-*Housen*, the Court of Appeal confirmed that in Saskatchewan, at least, "appeal by way of rehearing remains the case" (para. 95).

Il semble y avoir une certaine divergence entre ma conclusion et celle de la Cour d'appel dans *Valley Beef Producers Co-operative* quant aux circonstances dans lesquelles la Cour d'appel peut modifier la décision du juge de première instance en se fondant plutôt sur sa propre appréciation de la preuve, mais elle a peu d'importance. Notre Cour peut au besoin concilier les deux points de vue. Il importe surtout que, dans *Valley Beef Producers Co-operative*, une décision rendue après l'adoption de la *Loi de 2000 sur la Cour d'appel* et après l'arrêt *Housen*, la Cour d'appel a confirmé que [TRADUCTION] « l'appel par voie de nouvelle audition s'applique toujours », du moins en Saskatchewan (par. 95).

269 This understanding of the nature of appellate review in Saskatchewan was repeated by the Court of Appeal in the case at bar: see *H.L.* (C.A.), at para. 77.

Dans la présente affaire, la Cour d'appel a de nouveau adopté cette position sur la nature de la révision en appel dans la province : voir *H.L.* (C.A.), par. 77.

(b) *Reconciliation of Cases That Appear to Conflict With Conclusion That the Nature of Appellate Review in Saskatchewan Is by Way of Rehearing*

b) *Conciliation avec les arrêts qui semblent contredire ma conclusion selon laquelle, en Saskatchewan, l'appel est instruit par voie de nouvelle audition*

270 To the extent that there are cases from this Court and the Saskatchewan Court of Appeal that appear to conflict with my conclusion regarding the nature and (so-called) standards of review in Saskatchewan, in my view, they can be reconciled in one of three ways: (i) they can be limited to their specific *rationes decidendi*; (ii) they can be distinguished because they do not refer to *The Court of Appeal Act, 2000* or its predecessors or (iii) they may simply require reconsideration in light of the above analysis regarding the nature of appellate review in Saskatchewan. In this section, I will discuss in turn each of the cases cited by Fish J. that appear to conflict with my understanding that the nature of appellate review in Saskatchewan is by way of rehearing.

Les arrêts de notre Cour et de la Cour d'appel de la Saskatchewan qui semblent contredire ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel applicables dans la province peuvent, à mon avis, être conciliés avec elle de trois façons : (i) en ne retenant que leur *ratio decidendi*, (ii) en les distinguant parce qu'ils ne font mention ni de la *Loi de 2000 sur la Cour d'appel* ni des lois qu'elle a remplacées, ou (iii) en les réexaminant simplement à la lumière de l'analyse qui précède concernant la nature de la révision en appel en Saskatchewan. J'examinerai ci-après chacun des arrêts cités par le juge Fish qui semblent aller à l'encontre de ma conclusion selon laquelle l'appel est instruit par voie de nouvelle audition en Saskatchewan.

(i) *Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz*

Prior to *Lensen* (discussed below), the leading case in Saskatchewan regarding appellate review was *Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz* (1986), 49 Sask. R. 244. In this case, Sherstobitoff J.A., for himself and for Tallis J.A., held that "palpable and overriding error" is the proper standard to apply to intervention by a Court of Appeal in respect of findings of fact by a trial judge. Although Sherstobitoff J.A. acknowledged that a "rehearing" is similar to what s. 8 (now s. 14) of *The Court of Appeal Act* requires of the court, he also stated:

While, on its face, s. 8 appears to confer not only the power, but a duty to "rehear" or "retry" a case, simple fairness and justice require a court of appeal to recognize that a trial judge has an immense advantage in assessing evidence and arriving at findings of fact as opposed to a court of appeal which is confined to an examination of a cold black and white record of a trial proceeding, completely devoid of the tension, emotion, colour, and atmosphere of a trial, all of which factors are immeasurably important in assisting a trial judge in arriving at his conclusions. It is for these reasons that a court of appeal must extend very substantial deference to the finding of facts of a trial judge. The issue has been considered on many occasions by the Supreme Court of Canada and its decisions bear these principles out. [p. 248]

After canvassing the case law to date regarding an appellate court's jurisdiction to review findings of fact, Sherstobitoff J.A. summarized the generally accepted principles that emerged from the authorities as follows:

1. This court is obliged under s. 8 of the *Court of Appeal Act* to review the impugned findings of fact of a trial judge and if it finds error, to make its own findings of

(i) L'arrêt *Board of Education of the Long Lake School Division No. 30 of Saskatchewan c. Schatz*

271 Avant l'arrêt *Lensen* (que j'examine plus loin), en Saskatchewan, l'arrêt de principe en matière de révision en appel était *Board of Education of the Long Lake School Division No. 30 of Saskatchewan c. Schatz* (1986), 49 Sask. R. 244. Dans cet arrêt, s'exprimant également au nom du juge Tallis, le juge Sherstobitoff a conclu que la norme applicable à l'intervention de la Cour d'appel à l'égard d'une conclusion de fait du juge de première instance était celle de « l'erreur manifeste et dominante ». Même s'il a reconnu que ce que l'art. 8 de la *Court of Appeal Act* (devenu l'art. 14 de la *Loi de 2000 sur la Cour d'appel*) exigeait de la Cour d'appel s'apparentait à une « nouvelle audition », le juge Sherstobitoff a dit par ailleurs :

[TRADUCTION] Si, à première vue, l'art. 8 paraît conférer non seulement le pouvoir, mais aussi l'obligation de « réentendre » l'affaire ou de l'« instruire à nouveau », la simple équité et la justice la plus élémentaire requièrent d'un tribunal d'appel qu'il reconnaisse que le juge de première instance a l'immense avantage de pouvoir apprécier les témoignages et de constater les faits, par opposition à un tribunal d'appel, confiné à l'étude froide, sans nuance, du dossier de première instance, dénué de la tension, de l'émotion, du pittoresque et de l'atmosphère qui ont imprégné le procès et qui sont tous des facteurs incommensurablement importants et si utiles au juge de première instance pour arriver à ses conclusions. C'est pour ces raisons qu'un tribunal d'appel doit traiter avec une grande déférence les constatations de fait du juge de première instance. La Cour suprême du Canada a examiné la question à de nombreuses occasions et ces principes ressortent de ses arrêts. [p. 248]

272 Après un examen approfondi de la jurisprudence relative au pouvoir d'une cour d'appel de réviser une conclusion de fait, le juge Sherstobitoff a résumé ainsi les principes généralement reconnus qui s'en dégageaient :

[TRADUCTION]

1. La Cour d'appel doit, suivant l'art. 8 de la *Court of Appeal Act*, examiner les conclusions de fait contestées du juge de première instance et, si elle décèle une erreur,

fact where possible in substitution for those of the trial judge.

2. In a review of the findings of fact of a trial judge, the proper starting point is deference to a trial judge's findings in recognition of the great advantage which a trial judge has in assessing the evidence.

3. With respect to determinations of credibility and findings of fact based thereon, a court of appeal should not intervene unless it is certain that the trial judge erred and can identify the critical error.

4. Where the issue is the trial judge's view of the evidence as a whole, a court of appeal should not interfere unless there has been a palpable or overriding error. It must be shown that the trial judge has failed to use or has palpably misused his advantage.

5. Where there is evidence to support a finding of fact a court of appeal should not interfere in the absence of palpable or demonstrable error. [Emphasis in original; p. 251.]

273 Although this does not dispose of all the points of conflict between the decision in *Long Lake School Division* and my conclusion in these reasons, it must be noted that in his reasons Sherstobitoff J.A. accepted that a "rehearing" is similar to what s. 8 of *The Court of Appeal Act* requires of the Court of Appeal, and he acknowledged that "[t]his court is obliged under s. 8 of the *Court of Appeal Act* to review the impugned findings of fact of a trial judge and if it finds error, to make its own findings of fact where possible in substitution for those of the trial judge" (p. 251). These comments regarding the court's power to conduct an appeal by way of (or at least similar to) rehearing are in contrast with Fish J.'s assertion at para. 98 of his reasons that "[n]o decision has been drawn to our attention where the court has asserted a power of review by rehearing."

274 Furthermore, and contrary to Fish J.'s assertion in his reasons at para. 93, it is arguable that Sherstobitoff J.A.'s comments regarding the need for appellate deference to factual findings ought to be

tirer ses propres conclusions de fait et les substituer, dans la mesure du possible, à celles du juge de première instance.

2. Lors de leur examen, les conclusions de fait du juge de première instance commandent de prime abord une grande déférence étant donné l'énorme avantage dont jouit le juge du procès pour apprécier la preuve.

3. En ce qui concerne l'appréciation de la crédibilité et les conclusions de fait fondées sur celle-ci, une cour d'appel ne doit intervenir que si elle est convaincue que le juge de première instance a commis une erreur et que si l'erreur fatale peut être déterminée.

4. Lorsque le litige porte sur des conclusions que le juge de première instance a tirées de la preuve dans son ensemble, une cour d'appel ne doit intervenir qu'en cas d'erreur manifeste ou dominante. Il doit être démontré que le juge de première instance n'a pas mis son avantage à profit ou que, de toute évidence, il l'a fait à mauvais escient.

5. Lorsqu'une conclusion de fait est étayée par un élément de preuve, une cour d'appel ne doit pas intervenir en l'absence d'une erreur manifeste ou démontrable. [Souligné dans l'original; p. 251.]

Même si cela ne règle pas tous les points de divergence entre l'arrêt *Long Lake School Division* et ma conclusion en l'espèce, il faut noter que, dans ses motifs, le juge Sherstobitoff a reconnu que la « nouvelle audition » s'apparente à ce que l'art. 8 de la *Court of Appeal Act* exige de la Cour d'appel et que celle-ci [TRADUCTION] « [d]oit, suivant l'art. 8 de la *Court of Appeal Act*, examiner les conclusions de fait contestées du juge de première instance et, si elle décèle une erreur, tirer ses propres conclusions de fait et les substituer, dans la mesure du possible, à celles du juge de première instance » (p. 251). Ces propos concernant le pouvoir de la Cour d'appel d'instruire l'appel par voie de nouvelle audition (ou, à tout le moins, d'une manière qui s'y apparente) vont à l'encontre de ceux du juge Fish, au par. 98 de ses motifs, selon lesquels « [n]ulle décision où la Cour d'appel a revendiqué le pouvoir d'instruire l'appel par voie de nouvelle audition n'a été portée à notre attention. »

En outre, et contrairement à ce qu'affirme le juge Fish au par. 93 de ses motifs, on peut soutenir que les propos du juge Sherstobitoff sur la nécessité de faire preuve de déférence en appel à l'égard des

restricted to matters that engage the special advantage of the trial judge, which include but are not limited to assessments of credibility. For instance, although Sherstobitoff J.A. refers simply to a "finding of fact" when he states in his fifth numbered point quoted above that "[w]here there is evidence to support a finding of fact a court of appeal should not interfere in the absence of palpable or demonstrable error", in the three previous points, he makes reference to the special advantage of the trial judge and circumstances that engage it, namely, determinations of credibility and viewing the evidence as a whole. Thus, it can be argued that, in light of his discussion of the special advantage of the trial judge immediately preceding it, Sherstobitoff J.A.'s reference to a "finding of fact" in his fifth point (and the appellate deference it is owed) ought to be read as pertaining to only those findings that engage the special advantage of the trial judge. This argument is strengthened by Sherstobitoff J.A.'s conclusion on this point in the appeal that "[t]he matter reduces itself to whether the trial judge erred in accepting the evidence of Schatz as to intent. This is a matter of credibility where an appeal court should not interfere" (p. 252). Reading down Sherstobitoff J.A.'s comments regarding the need for appellate deference to factual findings in this manner would accord with my conclusion that the powers conferred by s. 14 (then s. 8) of the Act are subject to the judicial policy concern that trial judges enjoy a special advantage over an appellate court, such that when the trial judge's factual findings engage this special advantage, the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding.

conclusions factuelles ne s'appliquent qu'aux questions qui font jouer l'avantage particulier du juge de première instance, dont l'appréciation de la crédibilité. Par exemple, alors qu'il ne renvoie qu'à une « conclusion de fait » en affirmant au point 5 que, [TRADUCTION] « [l]orsqu'une conclusion de fait est étayée par un élément de preuve, une cour d'appel ne doit pas intervenir en l'absence d'une erreur manifeste ou démontrable », le juge Sherstobitoff renvoie, aux trois points précédents, à l'avantage particulier du juge de première instance et aux circonstances dans lesquelles joue cet avantage, soit dans l'appréciation de la crédibilité et de la preuve dans son ensemble. Compte tenu de son analyse précédente de l'avantage dont jouit le juge de première instance, il faut donc conclure que lorsqu'il renvoie à une « conclusion de fait » au cinquième point (et à la déférence qu'elle commande en appel), le juge Sherstobitoff ne vise que la conclusion faisant jouer l'avantage particulier du juge de première instance. Cette prétention est étayée par sa conclusion selon laquelle [TRADUCTION] « [l]a question fondamentale dans cette affaire est de savoir si le juge de première instance a commis une erreur en admettant le témoignage de M. Schatz relatif à l'intention. Il s'agit d'une question de crédibilité à l'égard de laquelle une cour d'appel ne devrait pas intervenir » (p. 252). Cette interprétation atténuée des propos du juge Sherstobitoff concernant la déférence que commande en appel une conclusion factuelle se concilie avec ma conclusion que l'exercice des pouvoirs conférés par l'art. 14 de la Loi (qui a remplacé l'art. 8 de la *Court of Appeal Act*) est subordonné à la considération de politique judiciaire selon laquelle le juge de première instance a un avantage particulier sur la cour d'appel, de sorte que lorsque les conclusions factuelles du juge de première instance feront jouer cet avantage particulier, la Cour d'appel n'interviendra et ne se fondera sur sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits.

275

To the extent that it remains unclear whether Sherstobitoff J.A.'s comments regarding the need for appellate deference to factual findings can be restricted to matters that engage the special advantage of the trial judge or whether they are to apply to

Dans la mesure où l'on ne peut affirmer avec certitude que les propos du juge Sherstobitoff sur la déférence que commandent en appel les conclusions factuelles ne s'appliquent qu'aux questions faisant jouer l'avantage particulier du juge de première

all factual findings and inferences, I would simply say that the reasoning in this case may be in need of reconsideration in light of my analysis regarding the nature and (so-called) standards of appellate review in Saskatchewan. In *H.L.* (C.A.), the Court of Appeal acknowledged that this might be the case and stated that:

> In *Board of Education of Long Lake School Division No. 30 v. Schatz et al.*, we made some effort to reconcile the general standards of review as they were then emerging with what was then section 8, and is now section 14, of the *Act*. However, we did not then appreciate where the continuing evolution of these standards would ultimately lead. The appeal in that case centred on a finding of fact based on the trial judge's assessment of the credibility and reliability of the testimony of one of the parties, whose intention was in issue. That, of course, made it unnecessary, strictly speaking, to do more than accommodate the test of "palpable and overriding error" to what is now section 14. In any event, given the way all of this has played out, we may have to reconsider some of what we had to say in *Schatz* in light of what a closer examination of sections 13 and 14 reveals. [para. 91]

276 Moreover, it must be noted that Wakeling J.A. dissented in *Long Lake School Division*. His comments support my position that the court's decision in this case may be in need of reconsideration. In particular, Wakeling J.A. noted that the appellate process is based upon the generally accepted view that three or more heads are better than one and that this was probably the reason for the broad language employed in s. 8 of *The Court of Appeal Act* (1978): *Long Lake School Division*, at p. 254. In this regard, Wakeling J.A. stated:

> There can be little doubt as to the extent of the legal mandate that has been given this court, and if review on appeal is to be as meaningful as the legislators clearly intended, I see no reason for limiting this right of appellate review to the point where the conclusion reached by the trial judge is completely unsupportable, or misses the mark so widely as to call into question whether the mark was ever a point of aim. I make this point for I am of the opinion that it is possible to so focus on the restrictions on appellate review that one useful aspect of the appeal process relating to factual considerations becomes largely emasculated. The party suffering from a judicial error of

instance, et non à toutes les conclusions et inférences factuelles, je me contenterai de dire qu'il pourrait être nécessaire de réexaminer le raisonnement suivi dans cet arrêt à la lumière de mon analyse de la nature de la révision en appel et des « normes de contrôle » en appel applicables en Saskatchewan. Dans *H.L.* (C.A.), la Cour d'appel en a convenu et a affirmé :

> [TRADUCTION] Dans *Board of Education of Long Lake School Division No. 30 c. Schatz et al.*, nous avons tenté de concilier les normes générales de révision qui se dessinaient à l'époque avec l'ancien art. 8, devenu l'art. 14, de la *Loi*. Cependant, nous ne nous rendions pas compte alors des répercussions qu'aurait ultimement la constante évolution de ces normes. Dans cette affaire, l'appel visait une conclusion de fait fondée sur l'appréciation, par le juge de première instance, de la crédibilité et de la fiabilité du témoignage de l'une des parties, dont l'intention était en cause. Ce qui a pour ainsi dire rendu inutile, à proprement parler, de faire plus qu'adapter le critère de l'« erreur manifeste et dominante » à l'actuel art. 14. Quoi qu'il en soit, étant donné la façon dont les choses ont évolué, nous devrons peut-être réexaminer certaines de nos affirmations dans *Schatz* à la lumière de ce que révélera un examen plus approfondi des art. 13 et 14. [par. 91]

Signalons en outre la dissidence du juge Wakeling, qui étaye ma thèse qu'il pourrait être nécessaire de réexaminer l'arrêt *Long Lake School Division* de la Cour d'appel. Plus particulièrement, le juge Wakeling a dit que le processus d'appel reposait sur le principe bien connu que trois têtes ou plus valent mieux qu'une, et que cela expliquait probablement l'emploi de termes généraux à l'art. 8 de la *Court of Appeal Act* (1978) : *Long Lake School Division*, p. 254. Il a ajouté :

> [TRADUCTION] L'étendue du mandat légal de notre Cour ne fait aucun doute, et si la révision en appel doit avoir toute l'importance que le législateur a clairement voulu lui donner, je ne vois aucune raison de limiter l'application de ce droit d'appel aux seuls cas où la conclusion tirée par le juge de première instance est totalement insoutenable ou rate tellement la cible qu'on peut se demander si elle a jamais été visée. J'insiste sur ce point car, à mon avis, il est possible de mettre l'accent sur les limitations de la révision en appel au point d'affaiblir considérablement un aspect utile du processus d'appel ayant trait aux considérations factuelles. La victime d'une opinion

opinion has only the slightest opportunity for correction, even though such party suffers an injustice which in my view must be as hard to accept as that arising from an error of law. [pp. 254-55]

Wakeling J.A. concluded his reasons in this case by stating that it would be a strange anomaly if

in a province which apparently grants this court the broadest powers of review of any appellate court in Canada (*Hallberg v. Canadian National Railway Company* (1955), 16 W.W.R. (N.S.) 539, at 544), we are nonetheless as restrictive as any such court in our ability to review evidence given at trial (where such evidence is not subject to degrees of credibility) and to differ from a trial judge's conclusions of fact drawn from such evidence. [p. 259]

(ii) *Tanel v. Rose Beverages (1964) Ltd.* and *Sisson v. Pak Enterprises Ltd.*

In *Tanel v. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214 (C.A.), both Bayda C.J.S., for himself and Wakeling J.A., and Vancise J.A. in dissent followed and applied the principles regarding the review of a trial judge's findings of fact that were set out by Sherstobitoff J.A. in *Long Lake School Division.* Cameron J.A., for himself, Gerwing and Sherstobitoff JJ.A., in *Sisson v. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232 (C.A.), did likewise. Therefore, I do not consider it necessary to analyse these cases separately. To the extent that the decision in *Long Lake School Division* can be reconciled with my conclusion regarding the nature and (so-called) standards of appellate review in Saskatchewan, so too then can the decisions in these two cases. If it needs to be reconsidered, so do these other cases.

(iii) *Lensen*

In *Lensen,* this Court addressed whether it is proper for the Court of Appeal to reverse a finding of fact made by a judge at first instance. In his reasons for the Court, Dickson C.J. made explicit reference to s. 8 of *The Court of Appeal Act* (1978), and noted that "[d]espite its apparently broad language, s. 8 has been given a relatively narrow interpretation": p. 682, citing the Court of Appeal's decision

judiciaire erronée n'a qu'une infime possibilité d'obtenir réparation, et ce, même si elle subit une injustice qui, à mon sens, doit être aussi difficile à accepter que celle résultant d'une erreur de droit. [p. 254-255]

277 Le juge Wakeling a conclu en affirmant qu'il serait vraiment illogique que :

[TRADUCTION] dans une province qui accorde apparemment à la Cour d'appel les pouvoirs de révision les plus larges jamais conférés à une cour d'appel au Canada (*Hallberg c. Canadian National Railway Company* (1955), 16 W.W.R. (N.S.) 539, p. 544), nous restreignions néanmoins comme les autres cours d'appel notre capacité d'examiner la preuve présentée au procès (lorsque le degré de vraisemblance de cette preuve ne varie pas) et de nous dissocier des conclusions de fait que le juge de première instance a tirées de cette preuve. [p. 259]

(ii) Les arrêts *Tanel c. Rose Beverages (1964) Ltd.* et *Sisson c. Pak Enterprises Ltd.*

278 Dans l'arrêt *Tanel c. Rose Beverages (1964) Ltd.* (1987), 57 Sask. R. 214 (C.A.), tant le juge en chef Bayda, s'exprimant également au nom du juge Wakeling, que le juge Vancise, dissident, ont suivi et appliqué les principes énoncés par le juge Sherstobitoff dans *Long Lake School Division* pour la révision des conclusions de fait du juge de première instance. Dans l'arrêt *Sisson c. Pak Enterprises Ltd.* (1987), 64 Sask. R. 232 (C.A.), le juge Cameron a fait de même, les juges Gerwing et Sherstobitoff souscrivant à ses motifs. Il n'est donc pas nécessaire d'analyser séparément ces décisions. Si l'arrêt *Long Lake School Division* peut être concilié avec ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel applicables en Saskatchewan, ces deux arrêts peuvent l'être aussi. Si l'arrêt *Long Lake School Division* doit être réexaminé, ces deux-là aussi.

(iii) L'arrêt *Lensen*

279 Dans l'arrêt *Lensen,* notre Cour s'est demandé si la Cour d'appel pouvait à bon droit infirmer une conclusion de fait du juge de première instance. Dans les motifs qu'il a rédigés au nom de notre Cour, le juge en chef Dickson a renvoyé expressément à l'art. 8 de la *Court of Appeal Act* (1978) et a affirmé que « [m]algré sa formulation apparemment générale, l'art. 8 a reçu une interprétation

in *Long Lake School Division* in support. In this regard, Dickson C.J. stated:

> It is a well-established principle that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it can be established that the trial judge made some "palpable and overriding error which affected his assessment of the facts": . . . While section 8 of the Saskatchewan *Court of Appeal Act* authorizes the Court of Appeal to "draw inferences of fact", this task must be performed in relation to facts as found by the trial judge. Unless the trial judge has made some "palpable and overriding error" in this regard, s. 8 should not be construed so as to modify the traditional role of the Court of Appeal with respect to those findings. [Emphasis added; pp. 683-84.]

280 In terms of reconciling the decision of this Court in *Lensen* with my conclusion regarding the nature and (so-called) standards of appellate review in Saskatchewan, two points must be made. First, to the extent that the decision in *Lensen* relies upon the Court of Appeal's decision in *Long Lake School Division*, I simply refer to my earlier comments regarding that case. Second, the specific issue in *Lensen* was "whether the trial judge found as a fact that no oral agreement existed between the parties and, if so, whether the Court of Appeal erred by substituting its version of the facts" (p. 679). Dickson C.J. held that it was clear that the trial judge had made a finding that there was no agreement as alleged between the parties. Moreover, he held that "the trial judge was entitled to believe the defendant father's evidence and the evidence of his witnesses and reject the son's testimony and the testimony of his witnesses as to the existence of an oral contract between the parties": p. 684. Thus, Dickson C.J. concluded that because the trial judge did not make any palpable and overriding error in his assessment of the facts, the Court of Appeal exceeded its role as set out in s. 8 of the Act when it substituted its version of the facts for that given by the trial judge.

relativement étroite » : p. 682, citant à l'appui l'arrêt *Long Lake School Division* de la Cour d'appel. Il a ajouté :

> C'est un principe bien établi que les constatations de fait d'un juge de première instance, fondées sur la crédibilité des témoins, ne doivent pas être infirmées en appel à moins qu'il ne puisse être établi que le juge de première instance « a commis une erreur manifeste et dominante qui a faussé son appréciation des faits » : [. . .] Certes, l'art. 8 de la *Court of Appeal Act* de la Saskatchewan autorise la Cour d'appel à [TRADUCTION] « faire des déductions de fait », mais cela doit être accompli en fonction des faits constatés par le juge de première instance. À moins que le juge de première instance n'ait commis quelque « erreur manifeste et dominante » à cet égard, l'art. 8 ne doit pas être interprété de manière à modifier le rôle joué traditionnellement par la Cour d'appel en ce qui concerne ces constatations. [Je souligne; p. 683-684.]

Pour ce qui est de concilier l'arrêt *Lensen* de notre Cour avec ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel applicables en Saskatchewan, deux remarques s'imposent. Premièrement, dans la mesure où cet arrêt se fonde sur l'arrêt *Long Lake School Division* de la Cour d'appel, je renvoie tout simplement à mes observations précédentes sur celui-ci. Deuxièmement, dans *Lensen*, la question en litige était de « savoir si le juge de première instance a effectivement constaté qu'il n'existait aucun contrat verbal entre les parties et, dans l'affirmative, si la Cour d'appel a commis une erreur en substituant sa propre version des faits » (p. 679). Pour le juge en chef Dickson, il était clair que le juge de première instance avait conclu, contrairement à ce qui était allégué, qu'aucune convention n'était intervenue entre les parties. Il a ajouté : « le juge de première instance était en droit d'ajouter foi aux dépositions du père défendeur et de ses témoins, et de rejeter celles du fils et des siens, concernant l'existence d'un contrat verbal entre les parties » (p. 684). Le juge de première instance n'ayant commis aucune erreur manifeste et dominante dans son appréciation des faits, le juge en chef Dickson a donc conclu que la Cour d'appel avait outrepassé le pouvoir conféré à l'art. 8 de la *Court of Appeal Act* en substituant sa version des faits à celle du juge de première instance.

From this brief review, it is clear that the factual finding at issue in *Lensen* (i.e., whether an oral contract existed between the parties) was dependent on the trial judge's assessments of credibility; therefore, I conclude that this Court's decision in *Lensen* must be limited to its specific *ratio decidendi*, which, in my view, is the following: findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it can be established that the trial judge made some "palpable and overriding error which affected his assessment of the facts" (p. 684). If this Court's decision in *Lensen* is limited in this way, it accords with my conclusion that the powers conferred by s. 14 (then s. 8) of the Act are subject to the judicial policy concern that trial judges enjoy a special advantage over an appellate court, such that when the trial judge's factual findings engage this special advantage (e.g., when based on credibility), the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding.

281 Il ressort de ce bref examen que la conclusion factuelle contestée dans l'affaire *Lensen* (celle relative à l'existence d'un contrat verbal entre les parties) tenait à l'appréciation de la crédibilité par le juge de première instance. J'arrive donc à la conclusion que seule la *ratio decidendi* de cet arrêt vaut en l'espèce et, selon moi, cette *ratio decidendi* est la suivante : les conclusions de fait tirées en première instance sur le fondement de la crédibilité des témoins ne peuvent être infirmées en appel que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante qui a faussé son appréciation des faits » (p. 684). Sa portée ainsi limitée, l'arrêt *Lensen* se concilie avec ma conclusion que l'exercice des pouvoirs conférés par l'art. 14 de la Loi (qui a remplacé l'art. 8 de la *Court of Appeal Act*) est subordonné à la considération de politique judiciaire selon laquelle le juge de première instance a un avantage particulier sur la cour d'appel, de sorte que lorsque la conclusion factuelle du juge fait jouer cet avantage particulier (c'est-à-dire lorsqu'elle se fonde sur la crédibilité), la Cour d'appel n'intervient et ne substitue sa propre appréciation de la preuve à celle du juge de première instance que si ce dernier a commis une erreur manifeste et dominante d'appréciation des faits.

Nevertheless, I do acknowledge that in the excerpt from *Lensen* quoted above, Dickson C.J. states that while s. 8 of the Act authorizes the Court of Appeal to draw inferences of fact, this task (inference drawing) must be performed in relation to facts as found by the trial judge, and, unless the trial judge has made some palpable and overriding error in this regard, s. 8 should not be construed so as to modify the traditional role of the Court of Appeal with respect to those findings. I also acknowledge that, at first blush, this statement may appear to suggest that a palpable and overriding error standard should also apply to inferences. However, a closer reading of this statement reveals that Dickson C.J. is merely restating the principle he articulated immediately prior to this statement. In other words, he is stating that while the Act permits the Court of Appeal to draw inferences and inferences are logical conclusions based on established facts, this inference-drawing power does not change the fact that the

282 Je conviens néanmoins que dans l'extrait précité de l'arrêt *Lensen*, le juge en chef Dickson affirme que l'art. 8 de la *Court of Appeal Act* autorise la Cour d'appel à tirer des inférences de fait, mais que cette tâche (tirer des inférences) doit être accomplie en fonction des faits constatés par le juge de première instance. Il ajoute que, sauf erreur manifeste et dominante commise par ce dernier à cet égard, l'art. 8 ne doit pas être interprété de manière à modifier le rôle traditionnel de la Cour d'appel en ce qui concerne ces constatations. Je conviens également que, de prime abord, cette affirmation peut donner à penser que la norme de l'erreur manifeste et dominante devrait également s'appliquer aux inférences. Or, une lecture plus attentive de l'extrait révèle que le juge en chef Dickson réaffirme seulement le principe énoncé juste auparavant. Autrement dit, selon lui, même si la loi autorise la Cour d'appel à tirer des inférences et que les inférences constituent des conclusions logiques tirées à partir de faits établis, ce pouvoir de tirer

court may only intervene and reverse factual findings based on the credibility of witnesses when the trial judge has made some palpable and overriding error which affected his assessment of the facts. As noted above, when the decision in *Lensen* is limited to this specific *ratio decidendi*, it is consistent with my conclusion that the powers conferred by s. 14 (then s. 8) of the Act are subject to the judicial policy concern that trial judges enjoy a special advantage over an appellate court, such that when the trial judge's factual findings engage this special advantage (e.g., when based on credibility), the Court of Appeal will only interfere and apply its own view of the evidence if the trial judge has committed a palpable and overriding error in his or her fact finding.

des inférences ne change rien au fait que la Cour d'appel ne peut intervenir et infirmer des conclusions factuelles tirées sur le fondement de la crédibilité des témoins que lorsque le juge de première instance a commis une erreur manifeste et dominante ayant faussé son appréciation des faits. Comme je l'ai déjà dit, si l'on ne considère que sa *ratio decidendi*, l'arrêt *Lensen* est compatible avec ma conclusion que l'exercice des pouvoirs conférés par l'art. 14 de la Loi (qui a remplacé l'art. 8 de la *Court of Appeal Act*) est subordonné à la considération de politique judiciaire selon laquelle le juge de première instance a un avantage particulier sur la cour d'appel. Ainsi, lorsque les conclusions factuelles du juge de première instance font jouer cet avantage particulier (parce qu'elles sont fondées sur l'appréciation de la crédibilité), la Cour d'appel n'intervient et ne se fonde sur sa propre appréciation de la preuve que si le juge de première instance a commis une erreur manifeste et dominante en appréciant les faits.

(iv) *Bogdanoff v. Saskatchewan Government Insurance*; *Knight v. Huntington*; and *Brown v. Zaitsoff Estate*

(iv) Les arrêts *Bogdanoff c. Saskatchewan Government Insurance*, *Knight c. Huntington* et *Brown c. Zaitsoff Estate*

283 The Court of Appeal's recent decisions in *Knight v. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68, *Bogdanoff v. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35, and *Brown v. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18, all deal with the issue of the conditions under which the Court of Appeal can interfere with a trial judge's decision on a question of fact. Because all of these cases explicitly rely upon this Court's decision in *Lensen*, comments regarding that case, as well as my comments regarding *Long Lake School Division*, the decision upon which *Lensen* relies, should be kept in mind when reviewing them.

Les récents arrêts *Knight c. Huntington* (2001), 14 B.L.R. (3d) 202, 2001 SKCA 68, *Bogdanoff c. Saskatchewan Government Insurance* (2001), 203 Sask. R. 161, 2001 SKCA 35, et *Brown c. Zaitsoff Estate* (2002), 217 Sask. R. 130, 2002 SKCA 18, de la Cour d'appel, portent tous sur les conditions auxquelles elle peut modifier la décision du juge de première instance relative à une question de fait. Comme ils s'appuient tous clairement sur l'arrêt *Lensen* de notre Cour, il faut les considérer en tenant compte de mes observations sur ce dernier arrêt, ainsi que sur l'arrêt *Long Lake School Division*, dont *Lensen* s'inspire.

284 Moreover, in none of these cases was there any mention of *The Court of Appeal Act, 2000.* As I will more fully explain with regard to this Court's decision in *Housen*, this omission is indicative of a need to reconsider the precedential value of these three cases, given the uniqueness of the Saskatchewan Act.

En outre, aucun de ces arrêts ne fait mention de la *Loi de 2000 sur la Cour d'appel*. Comme je l'expliquerai plus en détail en examinant l'arrêt *Housen* de notre Cour, cette omission met en évidence la nécessité de reconsidérer la valeur jurisprudentielle de ces trois arrêts, étant donné la singularité de la Loi de la Saskatchewan.

Finally, to the extent that the Court of Appeal in these three cases applied the palpable and overriding error standard to findings of fact in which the special advantage of the trial judge is not engaged or to inferences of fact, the court's reasoning in this regard may be in need of reconsideration in light of my analysis regarding the nature and (so-called) standards of appellate review in Saskatchewan. For example (and as noted by Fish J. at para. 108 of his reasons), in *Bogdanoff v. Saskatchewan Government Insurance*, Gerwing J.A., in oral reasons for the court, applied a palpable and overriding error standard to a finding of causation. In *Brown v. Zaitsoff Estate*, Tallis J.A. applied the same standard to a finding that the respondent had not exerted undue influence on his mother. Similarly, in *Knight v. Huntington*, Sherstobitoff J.A. stated that "to the extent that [the trial judge's] findings depended upon drawing inferences of fact, the appellants must show that there was no evidence from which those conclusions could reasonably be drawn" (para. 28). In contrast, as I mentioned earlier, in Saskatchewan, where the nature of appellate review is by way of rehearing, the Court of Appeal will interfere with findings of fact that do not engage the special advantage of the trial judge when there is a simple error, and for inferences of fact, the threshold for appellate intervention is reasonableness.

285 Enfin, dans la mesure où, dans ces trois arrêts, la Cour d'appel a appliqué la norme de l'erreur manifeste et dominante à des conclusions de fait ne faisant pas jouer l'avantage particulier du juge de première instance ou à des inférences de fait, il pourrait être nécessaire de reconsidérer le raisonnement de la Cour d'appel à la lumière de mon analyse concernant la nature de la révision en appel et les « normes de contrôle » en appel applicables en Saskatchewan. Ainsi, et le juge Fish le signale au par. 108 de ses motifs, dans *Bodganoff c. Saskatchewan Government Insurance*, le juge Gerwing, s'exprimant de vive voix au nom de la Cour d'appel, a appliqué la norme de l'erreur manifeste et dominante à une conclusion sur la causalité. Dans *Brown c. Zaitsoff Estate*, le juge Tallis a appliqué la même norme à la conclusion que l'intimé n'avait exercé aucune influence indue sur sa mère. De même, dans *Knight c. Huntington*, le juge Sherstobitoff a affirmé que, [TRADUCTION] « dans la mesure où les conclusions [du juge de première instance] tenaient à des inférences de fait, les appelants doivent démontrer qu'aucun élément de preuve ne permettait raisonnablement de les tirer » (par. 28). Par contre, je le répète, en Saskatchewan, où l'appel est instruit par voie de nouvelle audition, la Cour d'appel peut infirmer une conclusion factuelle qui ne fait pas jouer l'avantage particulier du juge de première instance si elle est entachée d'une simple erreur; quant aux inférences de fait, la norme applicable est celle de la raisonnabilité.

(v) <u>*Housen v. Nikolaisen*</u>

The appeal in *Housen* arose out of a motor vehicle accident which occurred on a rural road in the Municipality of Shellbrook, Saskatchewan. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling the rural road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the municipality was negligent. At issue in the appeal to this

(v) <u>L'arrêt *Housen c. Nikolaisen*</u>

286 Dans l'affaire *Housen*, le pourvoi découlait d'un accident automobile survenu sur une route rurale dans la municipalité de Shellbrook, en Saskatchewan. Au procès, la juge a conclu que le conducteur du véhicule, Douglas Nikolaisen, avait fait preuve de négligence en roulant à une vitesse excessive sur une route rurale et en conduisant son véhicule en état d'ébriété. La juge de première instance a également estimé que l'intimée, la municipalité de Shellbrook, avait commis une faute en manquant à l'obligation que lui faisait l'art. 192 de la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1, de tenir le chemin dans un état raisonnable d'entretien. La Cour d'appel a infirmé sa

Court was whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. In *Housen*, the Court was divided as to the proper standard of review for questions of mixed law and fact, as well as for inferences drawn from findings of fact. In the case at bar, we are concerned only with the latter issue; that is, when the Saskatchewan Court of Appeal will interfere with a trial judge's decision regarding inferences drawn from findings of fact.

conclusion selon laquelle il y avait eu négligence de la part de la municipalité intimée. La question en litige que devait trancher notre Cour était de savoir si la Cour d'appel avait eu des motifs suffisants de modifier la décision du tribunal inférieur. La question de la norme de contrôle applicable à une question mixte de droit et de fait, ainsi qu'à une inférence tirée d'une conclusion de fait, a divisé notre Cour. Dans la présente espèce, seul ce dernier cas nous intéresse : dans quelles circonstances la Cour d'appel de la Saskatchewan peut-elle modifier la décision du juge de première instance concernant une inférence tirée d'une conclusion de fait?

287 In his reasons, Fish J. states that the majority and the minority in *Housen* shared the same view as to the standard of review for questions of fact, which include findings of fact and inferences of fact. In his opinion, "[i]t was in the application of this shared view as to the governing principle that the Court divided": para. 66 (emphasis in original). In this regard, Fish J. states that, "according to the majority in *Housen*, the test to be applied in reviewing inferences of fact is 'not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts' which, in its view, implied a stricter standard" (para. 72, citing *Housen*, at para. 21 (emphasis in *Housen*)). Fish J. notes that the majority was concerned that drawing an analytical distinction between factual findings and factual inferences, as advocated by the minority, might lead appellate courts to involve themselves in unjustified reweighing of evidence. He also notes that the majority stated that "[i]f there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion" (para. 72, citing *Housen*, at para. 23 (emphasis in *Housen*)).

Dans ses motifs, le juge Fish dit que, dans *Housen*, les juges majoritaires et les juges minoritaires partageaient le même avis sur la norme de contrôle applicable à une question de fait, ce qui comprend la conclusion de fait et l'inférence de fait. À son avis, « [c]'est la mise en pratique de ce consensus quant au principe applicable qui a divisé notre Cour » : par. 66 (souligné dans l'original). Il ajoute que « de l'avis des juges majoritaires dans *Housen*, la révision d'une inférence de fait "ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis", ce qui, selon eux, suppose l'application d'une norme plus stricte » (par. 72, citant l'arrêt *Housen*, par. 21 (souligné dans *Housen*)). Selon le juge Fish, la majorité craignait que l'établissement d'une distinction analytique entre les conclusions factuelles et les inférences factuelles, comme le proposait la minorité, n'incite les cours d'appel à soupeser la preuve à nouveau et sans raison. Il fait également remarquer que, pour les juges majoritaires, « [s]i aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle » (par. 72, citant l'arrêt *Housen*, par. 23 (souligné dans *Housen*)).

Fish J. then goes on to clarify these passages from the majority reasons in *Housen*. Specifically, he states that they cannot be taken to have restricted appellate scrutiny of the judge's inferences to an examination of the primary findings upon which they are founded and the process of reasoning by which they were reached. Instead, Fish J. asserts that "[a]ppellate scrutiny determines whether inferences drawn by the [trial] judge are 'reasonably supported by the evidence'" (para. 74). This statement is in direct conflict with the majority's statement in *Housen* that "the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge" (para. 21 (emphasis in original)). Moreover, to the extent that Fish J.'s clarification of the majority reasons in *Housen* can be understood to mean that the views of the majority and minority as to the standard of review for inferences of fact can be reconciled, I respectfully disagree. In my view, there was a major rift between the views of the majority and the minority on this issue.

288 Le juge Fish apporte ensuite des précisions sur ces passages des motifs majoritaires dans *Housen*. Il dit qu'on ne peut en déduire que l'examen en appel des inférences du juge de première instance se limite à l'examen des conclusions relatives à des faits prouvés directement sur lesquelles elles sont fondées et du raisonnement à l'issue duquel elles ont été tirées. Il affirme plutôt que « [l]'examen en appel consiste à déterminer si les inférences du juge [de première instance] sont "raisonnablement étayées par la preuve" » (par. 74). Cette affirmation va directement à l'encontre des propos des juges majoritaires dans *Housen* selon lesquels « la norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance » (par. 21 (souligné dans l'original)). De plus, dans la mesure où l'on peut conclure des précisions qu'apporte le juge Fish aux motifs des juges majoritaires dans *Housen* qu'il est possible de concilier les points de vue de la majorité et de la minorité quant à la norme de contrôle qui s'applique à l'inférence de fait, je ne peux les faire miennes. J'estime que cette question divisait profondément les juges majoritaires et les juges minoritaires.

For instance, although I agreed in my reasons for the minority in *Housen* that the standard of review is identical for both findings of fact and inferences of fact, I stated that "it is nonetheless important to draw an analytical distinction between the two" (para. 103). I was concerned that "[i]f the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings." Thus, it was my view that, "this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact". Thus, when reviewing the making of an inference, I stated that "the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles". The fact that the trial judge referred to some evidence to support his or her finding on

289 Par exemple, après avoir reconnu, dans les motifs que j'ai rédigés pour la minorité dans *Housen*, que la norme de contrôle était la même pour les conclusions de fait et les inférences de fait, j'ai indiqué qu'« il import[ait] néanmoins de faire une distinction analytique entre les deux » (par. 103). Je craignais que « [s]i le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. » J'estimais donc que « notre Cour a[vait] le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait ». J'ai opiné que « [l]a cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés ». Le

an issue will not insulate the finding from review (para. 169).

fait que le juge de première instance mentionne un élément de preuve à l'appui de sa conclusion n'a pas pour effet de la soustraire au contrôle (par. 169).

290 Iacobucci and Major JJ. for the majority in *Housen* disagreed with my articulation of the standard of review for inferences of fact in two respects. First, they stated that "the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard" (para. 21 (emphasis in original)). With respect, I still do not understand how an appellate court can reasonably make such a distinction, or how it can be said that the legislature would have wanted that a court clearly mandated to correct errors be so limited. I cannot see on what basis such a judicial policy can be justified. Second, in their view, drawing an analytical distinction between factual findings and factual inferences could lead appellate courts to engage in unjustified reweighing of the evidence. Iacobucci and Major JJ. stated that although they agreed that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, they added the caution that "where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error" (para. 22). This caution was based on the idea that "where evidence exists which supports [a factual conclusion], interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence". Because the majority felt that it is not the role of appellate courts to second-guess the weight assigned to various items of evidence, given what it perceived to be the advantageous position of the trial judge in this respect, it stated that "[i]f there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can

Au nom des juges majoritaires dans *Housen*, les juges Iacobucci et Major ont exprimé leur désaccord avec ma formulation de la norme de contrôle applicable aux inférences de fait pour deux raisons. Premièrement, selon eux, « la norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte » (par. 21 (souligné dans l'original)). En toute déférence, je ne vois toujours pas comment un tribunal d'appel peut raisonnablement établir une telle distinction ni comment on peut prétendre que le législateur a voulu limiter ainsi les pouvoirs d'une cour à laquelle il a clairement enjoint de réparer toute erreur commise. Je ne vois pas comment un tel principe judiciaire pourrait être justifié. Deuxièmement, pour les juges Iacobucci et Major, établir une distinction analytique entre les conclusions factuelles et les inférences factuelles pouvait inciter les cours d'appel à soupeser la preuve à nouveau et sans raison. Ils ont convenu qu'une cour d'appel pouvait conclure qu'une inférence de fait tirée par le juge de première instance était manifestement erronée, mais ils ont ajouté : « lorsque des éléments de preuve étayent cette inférence, il sera difficile à une cour d'appel de conclure à l'existence d'une erreur manifeste et dominante » (par. 22). Cette mise en garde reposait sur l'idée que « lorsqu'[une conclusion factuelle] est étayée par des éléments de preuve, modifier cette conclusion équivaut à modifier le poids accordé à ces éléments par le juge de première instance ». Comme, à leur avis, il n'appartenait pas à une cour d'appel de remettre en question le poids accordé aux différents éléments de preuve, compte tenu de leur perception de la situation privilégiée du juge de première instance à cet égard, les juges majoritaires ont dit que « [s]i

interfere with the factual conclusion" (para. 23 (emphasis in original)).

In response to the majority's criticism of my approach to the standard of review for inferences of fact, I would now say that we all agree that an appellate court must verify whether the making of an inference can be reasonably supported by the trial judge's findings of fact. It is the question of the standard of review that has to be addressed in more clear terms. In my view, there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her, and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic. To transport the analysis to the inference-drawing process is, in my view, of no assistance.

In light of the above discussion and in contrast with Fish J.'s assertion that it was in the application of a shared view as to the standard of review that the Court divided, I contend that the majority and the minority in *Housen* articulated different standards of review for inferences of fact. The majority was of the view that where evidence exists to support the trial judge's inference of fact, an appellate court will be hard pressed to find a palpable and overriding error. The error would have to be in the process. In contrast, the minority argued that it is not enough for an appellate court to verify that some evidence "exists" to support the trial judge's inference; rather, the appellate court must verify whether the inference can be reasonably supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. The standard articulated by the minority "entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion" (*Housen*, at para. 169).

aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle » (par. 23 (souligné dans l'original)).

291 Je répondrai maintenant à leur critique de mon point de vue sur la norme de contrôle applicable aux inférences de fait. Nous convenons tous qu'une cour d'appel doit vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance. C'est la question de la norme de contrôle applicable qui demeure nébuleuse. À mon avis, il n'y a aucune différence entre conclure qu'il était « déraisonnable » ou « manifestement erroné » de tirer une inférence des faits établis et de conclure que cette inférence n'était pas raisonnablement étayée par ces faits. La distinction est d'ordre purement sémantique. Faire porter l'analyse sur le processus inférentiel n'est, selon moi, d'aucune utilité.

292 À la lumière de l'analyse qui précède, et contrairement à l'affirmation du juge Fish selon laquelle c'est la mise en pratique d'un consensus sur la norme de contrôle qui a divisé notre Cour, j'estime que, dans *Housen*, la majorité et la minorité ont préconisé l'application de normes de contrôle différentes aux inférences de fait. Selon les juges majoritaires, lorsque des éléments de preuve étayent l'inférence de fait du juge de première instance, une cour d'appel pourra difficilement conclure à l'existence d'une erreur manifeste et dominante. Il faudrait que l'erreur entache le processus lui-même. À l'opposé, les juges minoritaires ont estimé qu'il ne suffisait pas que la cour d'appel vérifie s'il « existe » quelque élément de preuve étayant l'inférence du juge de première instance; la cour d'appel devait plutôt se demander si l'inférence pouvait raisonnablement être étayée par les conclusions de fait du juge de première instance et si ce dernier avait appliqué les bons principes de droit. La norme proposée par la minorité « permet au tribunal d'appel de se demander si le juge de première instance a

P. M. Perell, in his article entitled "The Standard of Appellate Review and the Ironies of Housen v. Nikolaisen" (2004), 28 *Advocates' Q.* 40, at p. 52, notes that "this is a fundamental principle of Aristotelian logic, the law of contradiction that a proposition and its negation cannot both be true at the same time and in the same respect".

clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse » (*Housen*, par. 169). Dans son article intitulé « The Standard of Appellate Review and the Ironies of Housen v. Nikolaisen » (2004), 28 *Advocates' Q.* 40, p. 52, P. M. Perell signale que [TRADUCTION] « suivant un principe fondamental de la logique aristotélicienne, le principe de contradiction, deux propositions, dont l'une est la négation de l'autre, ne peuvent être vraies ensemble ».

293 My contention that the majority and the minority in *Housen* articulated different standards of review for factual inferences is supported by the fact that, on the issue of causation, the majority and minority came to opposite conclusions. For instance, the majority held that the trial judge's finding of fact that a hidden hazard existed at the curve where the accident occurred should not be interfered with, and this finding formed part of the basis of her findings concerning causation. Thus, because her finding regarding the existence of a hidden hazard had a basis in the evidence, the majority held that "her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence" and should not have been interfered with by the Court of Appeal (paras. 73 and 75). In contrast, the minority held that in coming to her conclusion on causation, the trial judge erred by: (a) misapprehending the evidence; (b) ignoring relevant evidence; and (c) drawing erroneous conclusions: see paras. 158-69; see also Perell, at p. 48. The minority emphasized that even though the trial judge referred to some evidence to support her findings on causation, this did not insulate her findings from review.

Mon opinion selon laquelle, dans *Housen*, la majorité et la minorité ont préconisé l'application de normes de contrôle différentes aux inférences factuelles est étayée par le fait que, en ce qui concerne la causalité, elles sont arrivées à des conclusions opposées. Par exemple, les juges majoritaires ont conclu qu'il n'y avait pas lieu de modifier la conclusion de fait de la juge de première instance selon laquelle le virage où s'était produit l'accident présentait un danger caché, et les conclusions de cette dernière sur le lien de causalité reposaient en partie sur cette conclusion. Étant donné que la conclusion relative à l'existence d'un danger caché était étayée par la preuve, la majorité a estimé que « celles touchant le lien de causalité — fondées en partie sur le danger caché — avaient elles aussi des assises dans la preuve » et que la Cour d'appel n'aurait pas dû les modifier (par. 73 et 75). La minorité a pour sa part estimé qu'en tirant sa conclusion sur le lien de causalité, la juge de première instance avait commis une erreur en ce qu'elle : a) avait mal interprété la preuve, b) n'avait pas tenu compte de la preuve pertinente et c) avait tiré des conclusions erronées (par. 158-169); voir aussi Perell, p. 48. Les juges minoritaires ont précisé que même si la juge de première instance avait invoqué certains éléments de preuve à l'appui de ses conclusions sur le lien de causalité, celles-ci n'échappaient pas au contrôle.

294 The differences between the majority and minority opinions in *Housen* aside, in my opinion this case can be reconciled with my conclusion regarding the nature and (so-called) standards of appellate review in Saskatchewan by limiting its

Abstraction faite des divergences d'opinions entre les juges majoritaires et les juges minoritaires, je pense que l'arrêt *Housen* peut être concilié avec ma conclusion sur la nature de la révision en appel et les « normes de contrôle » en appel

application as an authority to general standards of appellate review only.

Housen was an appeal from the Court of Appeal for Saskatchewan, but it did not refer to Saskatchewan's unique *Court of Appeal Act* (the modernized version of this Act, *The Court of Appeal Act, 2000*, came into force after the Court of Appeal's decision in *Housen* was released and while the appeal to this Court was pending). The Court of Appeal in *H.L.* (C.A.) surmised that this Court's failure to refer to the former Act, and especially s. 8 (now s. 14), may have been due to the fact that s. 8 "had ceased over time to attract much attention, with the exception of the limited attention given to it by this court in *Board of Education of Long Lake School Division No. 30 v. Schatz et al.* . . ., and by the Supreme Court of Canada in *Lensen v. Lensen*": para. 90. In addition to this, the court stated that "the general standards of review have tended to evolve outside the statutory framework regarding appeal".

Regardless of the reason why, in my view the mere fact that this Court did not refer to *The Court of Appeal Act* is indicative of a need to limit its precedential value to general standards of review only. As I noted earlier, Saskatchewan's legislative scheme for appeals is, as far as I am aware, the only one among all of the statutes governing the powers of appellate courts in Canada that frees the Court of Appeal from the view of the evidence taken by the trial judge and directs it to take its own view of the evidence. I conclude that this makes the nature of appellate review in Saskatchewan unique.

With respect, one would reasonably think that such a unique legislative mandate is deserving of mention. However, because this mandate was not brought to the Court's attention by the parties, the majority in *Housen* states that the role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199, at p. 204, a British Columbia Court of Appeal decision in which the court stated:

applicables en Saskatchewan si on limite sa portée jurisprudentielle aux seules normes générales de révision en appel.

295 Dans l'affaire *Housen*, le pourvoi visait un arrêt de la Cour d'appel de la Saskatchewan, mais nulle mention n'était faite de la loi unique applicable en Saskatchewan, la *Court of Appeal Act* (la version modernisée de cette loi, la *Loi de 2000 sur la Cour d'appel*, est entrée en vigueur après l'arrêt de la Cour d'appel et avant que notre Cour ne se prononce à son tour). Dans *H.L.* (C.A.), la Cour d'appel a émis l'hypothèse que cette omission de notre Cour de renvoyer à l'ancienne loi et, en particulier, à l'art. 8 (devenu l'art. 14), pouvait être due au fait que l'art. 8 [TRADUCTION] « avait cessé à la longue de retenir l'attention, sauf dans *Long Lake School Division No. 30 c. Schatz et al.* [. . .] et *Lensen c. Lensen*, où la Cour d'appel et la Cour suprême du Canada s'y étaient attardées quelque peu » (par. 90). La Cour d'appel a ajouté que [TRADUCTION] « les normes générales de contrôle ont eu tendance à évoluer indépendamment du cadre législatif de l'appel ».

296 Quelle qu'en soit la raison, le simple fait que notre Cour n'a pas renvoyé à la *Court of Appeal Act* justifie selon moi que l'arrêt *Housen* n'ait valeur jurisprudentielle qu'à l'égard des normes générales de révision en appel. Je le répète, en Saskatchewan, le cadre législatif de l'appel, autant que je sache, est le seul parmi ceux qui régissent les pouvoirs des cours d'appel au Canada à soustraire la Cour d'appel à l'obligation d'accepter les conclusions que le juge de première instance a tirées de la preuve et à lui enjoindre de se déterminer en se fondant sur sa propre appréciation de la preuve. J'en conclus que la nature de la révision en appel en Saskatchewan est unique.

297 En toute déférence, il est raisonnable de penser qu'un mandat législatif aussi unique est digne de mention. Or, dans *Housen*, les parties n'ayant pas porté l'existence de ce mandat à l'attention de notre Cour, les juges majoritaires ont estimé que, dans l'arrêt *Underwood c. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199, p. 204, la Cour d'appel de la Colombie-Britannique avait bien défini le rôle d'un tribunal d'appel :

The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

This statement from the British Columbia Court of Appeal is in direct contrast with the legislative direction to the court in s. 8 of *The Court of Appeal Act* (now s. 14 of *The Court of Appeal Act, 2000*) to "act upon its own view of what the evidence in its judgment proves".

298 In my respectful view, the Court's failure to mention *The Court of Appeal Act* at all and its use of a statement from a different province's Court of Appeal that is in conflict with the clear language of the Act demonstrates that the decision in *Housen* should not be used to understand the nature and (so-called) standards of review in Saskatchewan. Rather, this decision if left untouched should be limited in its application to <u>general</u> standards of appellate review. Thus, I agree with the Court of Appeal that "the majority judgment in *Housen v. Nikolaisen* represents the culmination of the evolution of the general standards of appellate review and serves to supply an adjudicative framework that differs in material respects from that laid down by the *Court of Appeal Act, 2000* and, in particular, section 14 of the Act": *H.L.* (C.A.), at para. 92.

299 Before leaving my discussion of *Housen*, there is one further point to consider. I said earlier that a trial judge is in no better position than the Court of Appeal to draw inferences of fact from a base of facts properly established. I concluded that, in Saskatchewan, where the nature of appellate review is by way of rehearing, the threshold that the Court of Appeal must pass before substituting its own inference of fact is reasonableness. I used the term reasonableness because it is awkward to speak of a "correct" inference.

300 In contrast, I acknowledged that factual findings that engage the special advantage of the trial judge should be accorded some deference by the Court of Appeal. Therefore, I concluded that the Court of Appeal will only interfere with this type of factual

[TRADUCTION] La cour d'appel ne doit pas juger l'affaire de nouveau, ni substituer son opinion à celle du juge de première instance en fonction de ce qu'elle pense que la preuve démontre, selon son opinion de la prépondérance des probabilités.

Cette affirmation va directement à l'encontre de la volonté du législateur, exprimée à l'art. 8 de la *Court of Appeal Act* (devenu l'art. 14 de la *Loi de 2000 sur la Cour d'appel*), que la Cour d'appel [TRADUCTION] « se détermine en se fondant sur son interprétation de la preuve ».

À mon humble avis, le fait que notre Cour a passé sous silence la *Court of Appeal Act* et cité l'arrêt d'une autre cour d'appel contredisant le libellé clair de la loi montre que l'arrêt *Housen* ne devrait pas servir à déterminer la nature de la révision en appel ni les « normes de contrôle » en appel applicables en Saskatchewan. En soi, cet arrêt ne devrait valoir que pour les normes <u>générales</u> de révision en appel. Je conviens donc avec la Cour d'appel que [TRADUCTION] « le jugement majoritaire dans *Housen c. Nikolaisen* constitue le point culminant de l'évolution des normes générales de révision en appel et offre un cadre décisionnel qui diffère à bien des égards importants de celui qu'établit la *Loi de 2000 sur la Cour d'appel* et, plus précisément, l'art. 14 de cette loi » : *H.L.* (C.A.), par. 92.

Je poursuis mon analyse de l'arrêt *Housen* en abordant un autre point. J'ai dit précédemment que le juge de première instance n'est pas mieux placé que la Cour d'appel pour tirer des inférences de fait d'une base de faits dûment établis. J'ai conclu qu'en Saskatchewan, où l'appel est instruit par voie de nouvelle audition, le critère auquel la Cour d'appel doit satisfaire pour substituer sa propre inférence de fait à celle du juge de première instance est celui de la raisonnabilité. J'ai employé le terme « raisonnabilité » parce qu'il serait incongru de parler d'une inférence « correcte ».

En revanche, j'ai reconnu que la Cour d'appel devait faire preuve d'une certaine déférence à l'égard d'une conclusion factuelle qui fait jouer l'avantage particulier du juge de première instance. J'ai donc conclu qu'elle ne devait intervenir à l'égard

finding and apply its own view of the evidence if the trial judge has committed a palpable and overriding error.

de ce type de conclusion factuelle et se fonder sur sa propre appréciation de la preuve que si le juge de première instance avait commis une erreur manifeste et dominante.

Implicit in my analysis is the idea that, in the context of an appeal by way of rehearing, a palpable and overriding error standard, as it applies to factual findings engaging the special advantage of the trial judge, is more deferential than the reasonableness standard, as it applies to inferences drawn from those facts. It has not escaped me that some might find this reasoning to be potentially inconsistent with my reasons in *Housen*.

301 L'idée qui sous-tend mon raisonnement est que, dans le contexte d'un appel par voie de nouvelle audition, le critère de l'erreur manifeste et dominante, appliqué à une conclusion factuelle faisant jouer l'avantage particulier du juge de première instance, commande une plus grande déférence que le critère de la raisonnabilité, appliqué à une inférence tirée des faits en cause. Je me rends bien compte qu'aux yeux de certains ce raisonnement peut sembler incompatible avec mes motifs dans *Housen*.

As discussed above, in *Housen*, I stated that "[t]he Court [of Appeal] will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong": para. 102. I also stated that "[i]n reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles": para. 103. I then concluded that "the standard of review is identical for both findings of fact and inferences of fact", noting that "there is no difference between concluding that it was 'unreasonable' or 'palpably wrong' for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts" (paras. 103-4).

302 Dans cet arrêt, j'ai affirmé que « [l]a Cour [d'appel] ne modifie les conclusions de fait du juge de première instance que si celui-ci a commis une erreur manifeste ou dominante ou si la conclusion est manifestement erronée » (par. 102). J'ai ajouté que « [l]a cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés » (par. 103). J'ai ensuite conclu que « la norme de contrôle [est] la même et pour les conclusions de fait et pour les inférences de fait », faisant remarquer qu'« il n'y a aucune différence entre le fait de conclure qu'il était "déraisonnable" ou "manifestement erroné" pour un juge de tirer une inférence des faits qu'il a constatés, et le fait de conclure que cette inférence n'était pas raisonnablement étayée par ces faits » (par. 103-104).

Because I conclude that there is no difference between a palpably wrong inference and an inference that is not reasonably supported by the facts, my attempt to distinguish the so-called standard of review in Saskatchewan for factual findings engaging the special advantage of the trial judge (i.e., palpable and overriding error) from that for factual inferences (i.e., reasonableness) may be seen to conflict with my conclusion.

303 La distinction que j'ai tenté de faire entre la norme de révision qui s'appliquerait en Saskatchewan à l'égard d'une conclusion factuelle faisant jouer l'avantage particulier du juge de première instance (la norme de l'erreur manifeste et dominante) et celle qui s'applique à une inférence factuelle (la norme de la raisonnabilité) peut sembler contredire ma conclusion qu'il n'existe aucune différence entre une inférence manifestement erronée et une inférence qui n'est pas raisonnablement étayée par les faits.

304 The conflict is only apparent. Specifically, in my opinion, it is necessary to consider foremost that the nature of appellate review in Saskatchewan is very different than the general nature of appellate review in the rest of Canada; that is, in Saskatchewan, appeal is conducted by way of rehearing, while in the rest of Canada, it appears that an appellate court reviews for error. Thus, in Saskatchewan, the Court of Appeal is not actually reviewing the inferences drawn by the trial judge to see if they are reasonably supported by the facts; rather, pursuant to the legislative direction in s. 14 of *The Court of Appeal Act, 2000*, the court is making its own inferences and comparing them with those drawn by the trial judge. The Court of Appeal will only interfere and substitute its own inferences if, on the basis of this comparison, it concludes that those inferences drawn by the trial judge were not reasonable. Therefore, in this light, it would be inappropriate to compare my comments in *Housen* about the general standard of review for factual findings and inferences of fact with those I made in the context of appellate review under *The Court of Appeal Act, 2000* in Saskatchewan. Although this may be a fine distinction, I would add that the appearance of this conflict is, in my view, indicative of the problem with using "standards of review" language in the context of appellate review by way of rehearing. While expressing the circumstances in which the Saskatchewan Court of Appeal will apply its own view of the evidence and, if necessary, pronounce the decision that ought to have been pronounced in language that does not connote the concept of appeal by way of review for error would most likely avoid conflicts such as the one discussed in this section, for purposes of clarity, it may still be necessary (for the purposes of this appeal, at least) to use "standards of review" language, subject, perhaps, to the proviso that such language is not meant to invite comparison to actual standards of review employed in appeals by way of review for error.

La contradiction n'est qu'apparente. Plus particulièrement, j'estime qu'il faut avant tout tenir compte du fait que la révision effectuée en appel en Saskatchewan est très différente de la révision générale qui a lieu en appel ailleurs au Canada. En Saskatchewan, l'appel est instruit par voie de nouvelle audition, alors que, ailleurs au Canada, la cour d'appel semble se livrer à un contrôle d'erreur. En fait, la Cour d'appel de la Saskatchewan ne vérifie pas si les inférences tirées par le juge de première instance sont raisonnablement étayées par les faits; conformément à ce que prescrit l'art. 14 de la *Loi de 2000 sur la Cour d'appel*, elle tire plutôt ses propres inférences et les compare à celles du juge de première instance. La Cour d'appel n'intervient et ne substitue ses propres inférences à celles du juge de première instance que si, à l'issue de la comparaison, elle arrive à la conclusion que celles tirées en première instance n'étaient pas raisonnables. Il serait donc inopportun de confronter mes observations dans *Housen* sur la norme générale de révision applicable aux conclusions factuelles et aux inférences de fait avec mes remarques actuelles sur la révision en appel sous le régime de la *Loi de 2000 sur la Cour d'appel* en Saskatchewan. Bien que la distinction puisse être subtile, j'ajouterais que cette contradiction apparente fait ressortir, à mon avis, le problème que pose l'emploi de la terminologie propre aux « normes de contrôle » dans le cas d'un appel instruit par voie de nouvelle audition. Cette contradiction disparaîtrait vraisemblablement si l'on définissait les circonstances dans lesquelles la Cour d'appel de la Saskatchewan peut se fonder sur sa propre appréciation de la preuve et, au besoin, rendre la décision qui aurait dû l'être sans utiliser de termes qui renvoient à la notion d'appel par voie de contrôle d'erreur. Cependant, il peut demeurer nécessaire (du moins pour les besoins du présent pourvoi), par souci de clarté, d'employer la terminologie propre aux « normes de contrôle », mais en précisant, peut-être, que cet emploi n'invite nullement à la comparaison avec les normes de contrôle qui s'appliquent effectivement dans les appels instruits par voie de contrôle d'erreur.

(6) Conclusion

The Court of Appeal Act, 2000 is unique in Canada, and its provisions must "mean something". However, in his reasons in this case, Fish J. concludes that he is "not at all persuaded that the *2000 Act* was intended to create for Saskatchewan an appellate court radically different, in powers and purpose, from its counterparts in the other provinces": para. 15. Based on my examination of the grammatical and ordinary sense of the words used in ss. 13 and 14 of *The Court of Appeal Act, 2000*, as well as the object of the Act, the object of the specific legislative provisions that form the statutory framework for the business of appeal, and the Act's historical foundations, I respectfully disagree. In my view, *The Court of Appeal Act, 2000* mandates that the nature of appellate review in Saskatchewan is by way of rehearing, with the Court of Appeal being directed to take its own view of the evidence and being empowered to draw inferences of fact and pronounce the decision that ought to have been pronounced by the trial judge.

B. *Application of the Standard of Review*

As will be explained more fully below, the trial judge's determination of H.L.'s entitlement to pecuniary damages was based on a series of factual inferences. In Saskatchewan, the (so-called) standard of review for such inferences is reasonableness. In my view, the Court of Appeal correctly applied this standard when it set aside the trial judge's pecuniary damages award, because the factual inferences on which the award was based were not reasonably supported by the evidence and were therefore not reasonable. As mentioned earlier, I would find the reasons of the trial judge reviewable on the general standard set out in *Housen* as well. The findings were so unreasonable that they amounted to palpable error in the appreciation of the evidence and the inferences drawn.

While this conclusion is sufficient to dispose of this appeal, in my view, it is also necessary to comment upon the trial judge's assessment of damages for past loss of earning capacity, since I agree

(6) Conclusion

305 La *Loi de 2000 sur la Cour d'appel* est unique au Canada, et ses dispositions doivent « signifier quelque chose ». Pourtant, dans ses motifs, le juge Fish dit qu'il n'est « pas du tout convaincu que la *Loi de 2000* visait à établir en Saskatchewan une cour d'appel radicalement différente de celles des autres provinces sur le plan des pouvoirs et de l'objet » (par. 15). Compte tenu de mon examen du sens grammatical et ordinaire des mots employés aux art. 13 et 14 de la *Loi de 2000 sur la Cour d'appel*, ainsi que de l'objet de la Loi, de l'objet des dispositions établissant le cadre législatif de l'appel et des fondements historiques de la Loi, je ne peux, en toute déférence, être d'accord. À mon avis, la *Loi de 2000 sur la Cour d'appel* prescrit que, en Saskatchewan, l'appel est instruit par voie de nouvelle audition, la Cour d'appel devant se fonder sur sa propre appréciation de la preuve et pouvant tirer des inférences de fait et rendre la décision qu'aurait dû rendre le juge de première instance.

B. *Application de la norme de contrôle*

306 Comme je l'expliquerai davantage plus loin, la décision du juge de première instance d'accorder des dommages-intérêts pécuniaires à H.L. était fondée sur un ensemble d'inférences factuelles. En Saskatchewan, la « norme de contrôle » applicable à ces inférences est celle de la raisonnabilité. À mon sens, la Cour d'appel a appliqué cette norme correctement en annulant les dommages-intérêts pécuniaires accordés par le juge de première instance, car les inférences factuelles sur lesquelles se fondait cet octroi n'étaient pas raisonnablement étayées par la preuve et n'étaient donc pas raisonnables. Comme je l'ai déjà mentionné, les motifs du juge de première instance me paraissent également susceptibles de révision selon la norme générale énoncée dans l'arrêt *Housen*. Les conclusions étaient si déraisonnables qu'elles entachaient d'une erreur manifeste l'appréciation de la preuve et les inférences tirées.

307 Bien que cela suffise pour statuer sur le présent pourvoi, j'estime également nécessaire de faire quelques observations sur l'évaluation de la perte de capacité de gain antérieure, étant donné que je

with the Court of Appeal that the trial judge erred in his assessment in four respects. First, he failed to consider the plaintiff's duty to mitigate. Second, he unreasonably concluded that the plaintiff did not have a "crumbling skull" and therefore attributed too much to Starr's wrongful acts in his assessment of pecuniary damages. Third, he did not reduce the damages award to reflect the time H.L. was incarcerated. Fourth, he erred in not accounting for the social assistance payments H.L. received during the relevant period.

conviens avec la Cour d'appel que le juge de première instance a commis quatre erreurs à cet égard. Premièrement, il n'a pas pris en considération l'obligation du demandeur de limiter le préjudice. Deuxièmement, il a conclu, de manière déraisonnable, que la vulnérabilité du demandeur n'était pas déjà active, de sorte qu'il a accordé trop d'importance aux actes répréhensibles de M. Starr en établissant les dommages-intérêts pécuniaires. Troisièmement, il n'a pas retranché de la période considérée le temps que H.L. avait passé en prison. Quatrièmement, il a eu tort de ne pas tenir compte des prestations d'aide sociale touchées par H.L. pendant cette période.

308 As it is the more fundamental error, I will commence my reasons in this section with a discussion of why the basic evidentiary foundation for the pecuniary damages award for past and future loss of earnings is lacking.

S'agissant de l'erreur la plus fondamentale, j'expliquerai tout d'abord pourquoi les dommages-intérêts pécuniaires accordés pour les pertes de revenus antérieure et ultérieure ne s'appuient sur aucune preuve.

(1) No Evidentiary Foundation for Award of Pecuniary Damages for Past and Future Loss of Earnings

(1) Absence de preuve étayant l'octroi de dommages-intérêts pécuniaires pour les pertes de revenus antérieure et ultérieure

309 In order to find that the Government of Canada is liable to H.L. for pecuniary damages for past and future loss of earnings, one must determine whether H.L. suffered and will suffer a loss of employment income because of the two acts of sexual abuse to which he was subjected by Starr. At trial, Klebuc J. came to an affirmative conclusion on this issue. In support of this conclusion, he drew two factual inferences: (i) Starr's sexual abuse of H.L. caused H.L.'s emotional and alcohol-related problems; and (ii) these problems caused H.L.'s past loss of earnings and will cause H.L. to lose earnings in the future. In particular, with regard to the second inference, the trial judge stated:

> In my view, [H.]L.'s sporadic work record is consistent with the emotional difficulties described by Arnold and Stewart in their psychological assessments. However, his limited work history demonstrated to my satisfaction his willingness and ability to work as a construction worker and farm labourer but for his problem with alcohol.
>
> . . .

Avant de condamner le gouvernement du Canada à verser à H.L. des dommages-intérêts pécuniaires pour les pertes de revenus antérieure et ultérieure, il faut se demander si H.L. a subi et subira une perte de revenus d'emploi à cause des deux épisodes d'abus sexuel perpétrés par M. Starr. Au procès, le juge Klebuc a répondu par l'affirmative. À l'appui de sa conclusion, il a tiré deux inférences factuelles : (i) les abus sexuels étaient à l'origine des problèmes émotionnels et de consommation excessive d'alcool de H.L.; (ii) ces problèmes avaient infligé à H.L. une perte de revenus dans le passé et lui en infligeraient une dans l'avenir. Plus particulièrement, en ce qui a trait à la deuxième inférence, le juge de première instance a dit :

> [TRADUCTION] Selon moi, les emplois occupés sporadiquement par [H.]L. s'inscrivent dans la suite logique des difficultés émotionnelles décrites par MM. Arnold et Stewart dans leurs évaluations psychologiques. Ses antécédents professionnels limités m'ont néanmoins convaincu de sa volonté et de sa capacité d'occuper un emploi dans le secteur de la construction ou celui de l'agriculture, n'eût été son problème d'alcool.
>
> . . .

[H.]L.'s continuous participation in the repair of motor vehicles for reward satisfied me that he had the aptitude and interest necessary to secure and maintain full-time employment as a mechanic but for his emotional difficulties and consequential difficulty with alcohol. [paras. 65-66]

Le fait que [H.]L. a continué de réparer des automobiles contre rémunération m'a convaincu qu'il avait les aptitudes et l'intérêt nécessaires pour obtenir et conserver un emploi de mécanicien à temps plein, n'eût été ses difficultés émotionnelles et l'alcoolisme en découlant. [par. 65-66]

The Court of Appeal took its own view of what the evidence, in its judgment, proves, and, on this basis, it concluded that not only does the evidence fail to prove that the plaintiff was wholly or largely unable to work <u>because of</u> Starr's sexual abuse, it even fails to prove the basic premise that the plaintiff was wholly or largely unable to work. Although the court noted that the drawing of such an inference was not inconceivable, in its view, this inference was not readily drawn and would require more and better evidence than was adduced in this case.

310 La Cour d'appel a procédé à sa propre appréciation de la preuve et en a conclu que non seulement la preuve n'établissait pas que le demandeur était totalement ou en grande partie incapable de travailler <u>à cause</u> des abus sexuels, mais elle n'établissait même pas l'allégation fondamentale, savoir que le demandeur était totalement ou en grande partie incapable de travailler. Même si, à son avis, une telle inférence n'était pas inconcevable, la Cour d'appel a jugé qu'elle n'allait pas de soi et qu'elle nécessitait une preuve plus abondante et plus convaincante que celle offerte en l'espèce.

In my view, the Court of Appeal correctly followed the statutory direction in s. 14 of the Act when it took its own view of what the evidence proves. Moreover, for the reasons that follow, I contend that the Court of Appeal was correct to interfere and overturn the trial judge's inference that H.L. suffered and will suffer loss of employment income because of Starr's two acts of sexual abuse, since this inference was not reasonably supported by the evidence and, therefore, not reasonable.

311 Selon moi, la Cour d'appel s'est conformée à la prescription de l'art. 14 de la Loi en se livrant à sa propre appréciation de la preuve. En outre, pour les motifs qui suivent, j'estime que la Cour d'appel a eu raison d'intervenir et d'infirmer l'inférence du juge de première instance selon laquelle H.L. avait subi et subirait une perte de revenus d'emploi à cause des deux abus sexuels, cette inférence n'étant pas raisonnablement étayée par la preuve et n'étant donc pas raisonnable.

I will begin with a discussion of why the trial judge's conclusion regarding the liability of the Government of Canada and Starr for <u>past</u> loss of earnings was not reasonable.

312 J'examine tout d'abord la conclusion du juge de première instance concernant la responsabilité du gouvernement du Canada et de M. Starr pour la perte de revenus <u>antérieure</u> et les motifs pour lesquels elle n'était pas raisonnable.

(a) *Liability for Past Loss of Earnings*

a) *Responsabilité pour la perte de revenus antérieure*

As noted above, at trial, Klebuc J. drew two factual inferences in support of his conclusion that the Government of Canada and Starr were liable to H.L. for his past loss of earnings: (i) Starr's sexual abuse of H.L. caused H.L.'s emotional and alcohol-related problems; and (ii) these problems caused H.L.'s past loss of earnings. In my view, this causal chain must fail. First, the inference that Starr's sexual abuse caused H.L.'s alcoholism lacks a sufficient evidentiary basis. That being so, there is no need

313 Au procès, le juge Klebuc a tiré deux inférences factuelles à l'appui de sa conclusion selon laquelle le gouvernement du Canada et M. Starr étaient responsables de la perte de revenus antérieure de H.L. : (i) les abus sexuels commis par M. Starr étaient à l'origine des problèmes émotionnels et de la consommation excessive d'alcool de H.L.; (ii) ces problèmes avaient infligé à H.L. une perte de revenus dans le passé. Or, cette chaîne causale ne tient pas la route. Premièrement, l'inférence que les abus

to consider whether H.L.'s alcoholism caused him to lose employment income. Second, the evidence adduced at trial cannot reasonably support the inference that H.L.'s emotional problems caused him to lose employment income. Therefore, it is not necessary to comment upon whether Starr's sexual abuse caused H.L.'s emotional problems. Given these evidentiary gaps in the trial judge's chain of reasoning, it was not reasonable for him to conclude that H.L. suffered a loss of employment income because of the two acts of sexual abuse to which he was subjected by Starr, and the Court of Appeal was correct to interfere and set aside the award of pecuniary damages for past loss of earnings.

(i) The Inference That Starr's Sexual Abuse Caused H.L.'s Alcoholism

314 The trial judge's inference that Starr's sexual abuse caused H.L.'s alcoholism primarily derives from the opinions of Dr. Arnold and, especially, Mr. Stewart (paras. 26-27 and 29). Both of these witnesses expressed a variety of opinions, including those on alcoholism and the cause of H.L.'s alcoholism in particular. I recognize, like the Court of Appeal, that alcoholism is now increasingly being recognized as a disease, the etiology of which is likely to be outside the experience and knowledge of a judge or jury. Therefore, expert opinion evidence was necessary to enable the trial judge to appreciate this issue: see *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 23. However, while expert opinions on the etiology of alcoholism and the cause of H.L.'s alcoholism were necessary, Dr. Arnold and Mr. Stewart were not qualified to express opinions on this subject. Relying on improperly qualified expert opinions led to error.

315 As noted in *Mohan*, in order to be admissible, expert evidence must be provided by a

sexuels ont causé l'alcoolisme de H.L. ne s'appuie pas sur une preuve suffisante. Il n'est donc pas nécessaire de se demander si l'alcoolisme de H.L. lui a fait perdre des revenus d'emploi. Deuxièmement, la preuve présentée au procès ne peut raisonnablement étayer l'inférence que les problèmes émotionnels de H.L. lui ont infligé une perte de revenus d'emploi. En conséquence, il est inutile de déterminer si les abus sexuels commis par M. Starr sont à l'origine des problèmes émotionnels de H.L. Son raisonnement étant insuffisamment étayé par la preuve, le juge de première instance ne pouvait pas raisonnablement conclure que H.L. avait subi une perte de revenus d'emploi à cause des deux actes de masturbation auxquels M. Starr l'avait soumis, et la Cour d'appel a eu raison d'intervenir et d'annuler les dommages-intérêts pécuniaires accordés pour la perte de revenus antérieure.

(i) L'inférence selon laquelle les abus sexuels commis par M. Starr étaient à l'origine de l'alcoolisme de H.L.

L'inférence du juge de première instance selon laquelle les abus sexuels commis par M. Starr étaient à l'origine de l'alcoolisme de H.L. découle principalement de l'avis du Dr Arnold et, en particulier, de celui de M. Stewart (par. 26-27 et 29). Ces deux témoins ont exprimé diverses opinions, notamment sur l'alcoolisme de H.L. et sur sa cause. À l'instar de la Cour d'appel, je conviens que l'alcoolisme est de plus en plus considéré comme une maladie, la recherche de ses causes échappant vraisemblablement à la compétence d'un juge ou d'un jury. Une preuve d'expert était donc nécessaire pour permettre au juge de première instance de se former une opinion sur la question : voir *R. c. Mohan*, [1994] 2 R.C.S. 9, p. 23. Une preuve d'expert sur l'étiologie de l'alcoolisme et sur l'origine de l'alcoolisme de H.L. était certes nécessaire, mais ni le Dr Arnold ni M. Stewart n'étaient qualifiés pour se prononcer à ce sujet. En se fiant à l'avis d'experts dont les compétences étaient insuffisantes, le juge de première instance a commis une erreur.

Notre Cour l'a dit dans l'arrêt *Mohan*, pour être admissible, la preuve d'expert doit être présentée

properly qualified expert, that is, "a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify" (pp. 20 and 25). Dr. Arnold, a psychologist with a doctorate in psychology who had taught at the University of Saskatchewan, worked with persons subjected to sexual abuse and then went into private practice. He was formally qualified by the trial judge "as an expert in . . . the assessment, testing and treatment of victims of sexual abuse". Mr. Stewart, a family consultant and therapist with a masters degree in psychology, who was experienced in working with sexually abused children, was formally qualified by the trial judge "as a clinical therapist qualified to provide expert testimony in relation to the assessment . . . and treatment of adult and child victims of sexual abuse and assault with expertise in providing therapy and conducting personality assessments in general and in particular in relation to First Nations individuals". I agree with the Court of Appeal that "[t]hese are such open-ended designations as to invite all manner of opinion, including opinion that may be unreliable and that transcends the witnesses' field of expertise" (para. 255). Moreover, I agree that Dr. Arnold and Mr. Stewart in fact transcended their respective fields of expertise when they testified as to the etiology of alcoholism and the cause of H.L.'s alcoholism in particular. Opinion evidence on these issues ought to have come from a witness who has acquired special knowledge relating to alcoholism.

par un expert dont la qualification est suffisante, c'est-à-dire par « un témoin dont on démontre qu'il ou elle a acquis des connaissances spéciales ou particulières grâce à des études ou à une expérience relatives aux questions visées dans son témoignage » (p. 20 et 25). Titulaire d'un doctorat en psychologie, le Dr Arnold avait enseigné à l'Université de Saskatchewan, travaillé auprès de victimes d'abus sexuels, puis exercé en pratique privée. Le juge de première instance a formellement reconnu sa compétence [TRADUCTION] « à titre d'expert de l'évaluation, du testage et du traitement des victimes d'abus sexuels ». Thérapeute familial titulaire d'une maîtrise en psychologie et spécialisé dans l'intervention auprès d'enfants victimes d'abus sexuels, M. Stewart a vu sa compétence formellement reconnue par le juge de première instance [TRADUCTION] « à titre de thérapeute clinicien spécialiste de l'évaluation [. . .] et du traitement d'adultes et d'enfants victimes d'abus et d'agressions de nature sexuelle et offrant des services de thérapie et d'analyse de la personnalité, notamment aux membres des Premières nations ». Je conviens avec la Cour d'appel que [TRADUCTION] « [c]es descriptions sont si larges qu'elles ouvrent la porte à toutes sortes d'opinions dont certaines peuvent ne pas être dignes de foi et échapper au domaine d'expertise du témoin » (par. 255). De plus, j'estime aussi que le Dr Arnold et M. Stewart ont effectivement outrepassé leurs domaines d'expertise respectifs en témoignant sur l'étiologie de l'alcoolisme en général et sur la cause de l'alcoolisme de H.L. en particulier. Un témoin ayant des connaissances spéciales sur l'alcoolisme aurait dû témoigner sur ces questions.

316

Since Dr. Arnold and Mr. Stewart were not properly qualified to express opinions on the etiology of alcoholism and the cause of H.L.'s alcoholism in particular, their evidence in this regard is entitled to no weight. Accordingly, because the trial judge based his conclusion that Starr's sexual abuse caused H.L.'s alcoholism primarily on this general expert evidence, it lacks a sufficient evidentiary foundation and was properly overturned by the Court of Appeal. Since there is not a sufficient evidentiary basis for the inference that Starr's sexual abuse caused H.L.'s alcoholism, there is no

Le Dr Arnold et M. Stewart n'étant pas dûment qualifiés pour se prononcer sur l'étiologie de l'alcoolisme en général et la cause de l'alcoolisme de H.L. en particulier, il ne faut donc accorder aucune valeur aux opinions qu'ils ont exprimées sur ces sujets. Fondée principalement sur ces témoignages de non-spécialistes, la conclusion du juge de première instance selon laquelle les abus sexuels avaient causé l'alcoolisme de H.L. ne s'appuyait pas sur une preuve suffisante et a été à juste titre infirmée par la Cour d'appel. L'inférence voulant que les abus sexuels soient à l'origine de

need to consider whether H.L.'s alcoholism caused him to lose employment income.

317 I do note that, in addition to Dr. Arnold and Mr. Stewart, H.L. himself testified as to the effect of Starr's sexual abuse on his alcoholism. Nevertheless, I maintain that since the etiology of alcoholism is not understood by the average person, expert opinion evidence was necessary to enable the trial judge to appreciate this issue. Therefore, H.L.'s testimony in this regard could not, on its own, provide a sufficient evidentiary basis for the trial judge's inference that Starr's sexual abuse caused H.L.'s alcoholism.

318 Before examining the trial judge's factual inference that H.L.'s emotional problems caused his past loss of earnings, it is necessary to make two further points. First, I echo the Court of Appeal's call for rigour and discipline at the qualification stage, so that an expert witness can be formally qualified, if so qualified at all, relative to the opinion or opinions that he or she is expected to express. As this Court stated in *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 243, "[t]he proper practice is for counsel presenting an expert witness to qualify the expert in all the areas in which the expert is to give opinion evidence." The need to carefully qualify expert witnesses before they testify was also aptly noted by the Saskatchewan Court of Appeal in *Parker v. Saskatchewan Hospital Assn.*, [2001] 7 W.W.R. 230, 2001 SKCA 60, at para. 112, as follows:

> A rigorous approach at this stage can avoid difficulty, especially the difficulty posed by the potential reception of opinion evidence that transcends the scope of expertise of the witness. Strictly speaking such evidence is not admissible, and its admission can be troublesome.

319 Second, I do note that it is for opposing counsel to object if an expert witness goes beyond the proper limits of his or her expertise, and, in this case, not only did the Attorney General of Canada fail to object to the expert testimony on the etiology of alcoholism and the cause of H.L.'s

l'alcoolisme de la victime n'étant pas suffisamment étayée par la preuve, il n'est pas nécessaire de déterminer si l'alcoolisme a infligé à H.L. une perte de revenus d'emploi.

Outre le Dr Arnold et M. Stewart, H.L. a lui-même témoigné au sujet de l'incidence des abus sexuels sur son alcoolisme. Je maintiens néanmoins que, l'étiologie de l'alcoolisme échappant au commun des mortels, une preuve d'expert était nécessaire pour permettre au juge de première instance de se faire une opinion. Le témoignage de H.L. sur la question ne pouvait donc pas à lui seul étayer suffisamment l'inférence du juge de première instance selon laquelle les abus sexuels de M. Starr avaient causé l'alcoolisme de H.L.

Avant d'examiner l'inférence factuelle du juge de première instance voulant que ce soient les problèmes émotionnels de H.L. qui aient causé sa perte de revenus antérieure, je dois aborder deux autres points. Premièrement, je me fais l'écho de la Cour d'appel lorsqu'elle préconise rigueur et discipline dans l'évaluation de la qualification d'un expert en vue de sa reconnaissance formelle, le cas échéant, relativement à l'objet du témoignage. Comme l'a dit notre Cour dans *R. c. Marquard*, [1993] 4 R.C.S. 223, p. 243, « [e]n pratique, l'avocat qui présente un témoin expert doit le faire reconnaître à ce titre pour tous les domaines dans lesquels il doit exprimer un témoignage d'opinion. » Dans *Parker c. Saskatchewan Hospital Assn.*, [2001] 7 W.W.R. 230, 2001 SKCA 60, p. 112, la Cour d'appel de la Saskatchewan a aussi relevé avec justesse la nécessité de bien s'assurer de la qualification d'un témoin expert avant qu'il ne témoigne :

> [TRADUCTION] Adopter une démarche rigoureuse à cette étape peut éviter des problèmes, notamment en écartant toute opinion qui échappe au domaine d'expertise du témoin. À strictement parler, une telle preuve est inadmissible, mais si elle est néanmoins admise en preuve, de grandes difficultés peuvent en résulter.

Deuxièmement, il appartient à l'avocat de la partie adverse de formuler une objection lorsqu'un témoin expert ne s'en tient pas à son domaine d'expertise et, en l'espèce, non seulement le procureur général du Canada a omis de s'opposer au témoignage d'expert sur l'étiologie de l'alcoolisme et la cause

alcoholism, but his own witness, Dr. Arnold, was one of the experts who testified with regard to these issues. Nevertheless, in *Marquard*, this Court stated that

> [i]n the absence of objection, a technical failure to qualify a witness who clearly has expertise in the area will not mean that the witness's evidence should be struck. However, if the witness is not shown to have possessed expertise to testify in the area, his or her evidence must be disregarded and the jury so instructed. [p. 244]

Unlike the situation in *Marquard*, in this case, the expert witnesses did not possess expertise sufficient to permit them to testify in relation to an area in which they were not formally qualified to give expert opinion. Therefore, the fact that counsel for the Attorney General of Canada failed to object to Mr. Stewart's testimony in relation to the etiology of alcoholism and the cause of H.L.'s alcoholism and failed to steer his own witness, Dr. Arnold, away from this area does not change the fact that this evidence is entitled to no weight, since it was beyond the experts' expertise, both in fact and as it was formally recognized by the trial judge.

(ii) The Inference That H.L.'s Emotional Problems Caused His Past Loss of Earnings

Since there is no evidentiary basis for the inference that Starr's sexual abuse caused H.L.'s alcoholism, the conclusions relating to H.L.'s alcoholism that make up the trial judge's causal chain are no longer a consideration. All that remains in support of the trial judge's overall conclusion that H.L. suffered a loss of employment income because of Starr's sexual abuse is the following chain of reasoning: Starr's sexual abuse caused H.L.'s emotional problems, and these problems caused H.L. to lose employment income.

At trial, among other emotional problems, Klebuc J. found that H.L. suffered from self-blame and a

de l'alcoolisme de H.L., mais son propre témoin, le Dr Arnold, a lui-même témoigné relativement à ces questions. Cependant, dans l'arrêt *Marquard*, notre Cour a dit :

> En l'absence d'objection, l'omission technique de qualifier un témoin qui possède manifestement l'expertise dans le domaine en question ne signifie pas automatiquement que son témoignage doit être écarté. Toutefois, s'il n'est pas démontré que le témoin possède une expertise lui permettant de témoigner dans le domaine en cause, il ne faut pas tenir compte de son témoignage et le jury doit recevoir des directives à cet effet. [p. 244]

320 Dans la présente affaire, contrairement à la situation dans *Marquard*, les témoins experts ne possédaient pas l'expertise nécessaire pour témoigner relativement à certaines questions et n'avaient pas été formellement reconnus à titre d'experts dans ce domaine. Ainsi, l'omission de l'avocat du procureur général du Canada de s'opposer au témoignage de M. Stewart sur l'étiologie de l'alcoolisme et sur la cause de l'alcoolisme de H.L. et de faire en sorte que son propre témoin, le Dr Arnold, ne se prononce pas sur ces questions ne change rien au fait que ces témoignages n'avaient aucune valeur puisqu'ils ne relevaient pas du domaine d'expertise des témoins dans les faits et selon la reconnaissance formelle de leur domaine d'expertise par le juge de première instance.

(ii) L'inférence selon laquelle les problèmes émotionnels de H.L. sont à l'origine de sa perte de revenus antérieure

321 Comme l'inférence selon laquelle les abus sexuels de M. Starr ont causé l'alcoolisme de H.L. n'est pas étayée par la preuve, les conclusions sur l'alcoolisme de H.L. constituant la chaîne causale établie par le juge de première instance ne sont plus à prendre en considération. La conclusion générale du juge de première instance selon laquelle H.L. a subi une perte de revenus d'emploi à cause des abus sexuels ne s'appuie plus que sur le raisonnement suivant : les abus sexuels ont causé les problèmes émotionnels de H.L., et ces problèmes ont fait perdre des revenus d'emploi à H.L.

322 Au procès, le juge Klebuc a conclu que, au nombre des problèmes émotionnels de H.L., il y avait la

loss of self-worth (para. 29), and both experts testified that, in general, self-confidence and self-esteem affect work ethic and employability. In particular, Dr. Arnold testified on cross-examination that if a child is sexually abused by an individual from a school, the abuse would more likely cause the child to lose confidence in the school system:

Q: Would — if the sexual perpetrator was from a school and just not speaking about [H.L.], but generally, if a sexual perpetrator were from a school, would it be more likely to cause the student to lose confidence in the school system, the school leaders?

A: That would be my opinion.

Dr. Arnold also opined that such an act of abuse, followed by alcohol problems, would logically impact upon the individual's ability to hold work:

Q: Would you think it likely that this would have affected his work ethic?

A: Work ethic as in — perhaps to define that, I think what you're saying is his ability to hold work and be able to regularly show up and those kinds of things?

Q: Yes.

A: Yes, and I would refer to the chain of events I just referred to. You have an event, then — sorry, an event — I better be clear here — event of abuse, you have alcohol and, yes, indeed that chain of events would logically go there and —

Similarly, Mr. Stewart was asked on direct examination whether self-esteem and self-confidence affected employability, and he responded in the affirmative.

323 In my view, the testimony of the experts in this regard is of a general nature and not probative of whether H.L., in particular, was wholly or largely unable to work because of his emotional problems. Moreover, I agree with the Court of Appeal that the evidence adduced at trial only demonstrated

culpabilité et la perte d'estime de soi (par. 29), et les deux experts ont témoigné que, en règle générale, la confiance en soi et l'estime de soi avaient une incidence sur la morale du travail et l'aptitude au travail. Plus particulièrement, le Dr Arnold a déclaré en contre-interrogatoire qu'un enfant victime d'abus sexuel à l'école risquait davantage de perdre confiance dans le système scolaire :

[TRADUCTION]

Q : Est-ce que — si les abus sexuels ont été perpétrés par quelqu'un à l'école, et je ne parle pas seulement de [H.L.], mais en général, si les abus sexuels étaient le fait de quelqu'un à l'école, l'élève risquerait-il davantage de perdre confiance dans le système scolaire, dans la direction de l'école?

R : Je pense que oui.

Le Dr Arnold s'est également dit d'avis que de tels abus, suivis de problèmes d'alcool, pouvaient logiquement avoir des répercussions sur la capacité de conserver un emploi :

[TRADUCTION]

Q : Estimez-vous probable que cela nuise à sa morale du travail?

R : La morale du travail, comme dans — peut-être pour la définir, je pense que vous parlez de sa capacité à conserver un emploi et à se présenter régulièrement au travail, et ce genre de chose?

Q : Oui.

R : Oui, et je me reporte à la suite des événements dont je viens de parler. Un événement se produit, puis — désolé, un événement — il vaut mieux préciser — un abus, il y a l'alcool et, oui, effectivement, la suite des événements aboutirait logiquement à cela et —

De même, on a demandé à M. Stewart lors de son interrogatoire principal, si l'estime de soi et la confiance en soi avaient une incidence sur l'aptitude au travail, et il a répondu par l'affirmative.

Selon moi, le témoignage des experts à cet égard est de nature générale et n'a aucune valeur probante quant à savoir si H.L. était totalement ou en grande partie incapable de travailler à cause de ses problèmes émotionnels. En outre, je conviens avec la Cour d'appel que la preuve offerte au procès établit

that H.L. did not work during the first period and worked only sporadically during the second. It does not prove that H.L. was wholly or largely unable to work because of his emotional problems.

For instance, H.L.'s sporadic work record, in itself, is as consistent with choosing not to work as with being unable to work. In fact, certain pieces of evidence militate in favour of the former rather than the latter. For example, H.L. quit the only permanent job he ever had, working on a poultry farm outside Regina, in order to move to his then spouse's reserve, where she could pursue her career as a home care worker. H.L. was also enrolled in an auto mechanics course that was being held on the Muskowekwan Reserve where he was then living; however, he quit the course because he was not being paid to attend.

Therefore, because the evidence adduced at trial does not prove that H.L. was wholly or largely unable to work because of his emotional problems, the trial judge's inference that H.L.'s emotional problems caused him to lose employment income lacks a sufficient evidentiary foundation and was properly overturned by the Court of Appeal. Since there is not a sufficient evidentiary basis for the inference that H.L.'s emotional problems caused him to lose employment income, it is not necessary to comment upon whether Starr's sexual abuse caused H.L.'s emotional problems. The causal chain is already broken. Furthermore, because this was the only remaining chain of reasoning that could support the trial judge's overall conclusion that H.L. suffered a loss of employment income because of Starr's sexual abuse, it is clear that the trial judge's conclusion on this issue cannot stand and was indeed correctly overturned by the Court of Appeal.

In sum, the Court of Appeal did not err when it set aside the trial judge's award of pecuniary damages for past loss of earnings. As discussed above, the (so-called) standard of review in Saskatchewan for factual inferences is reasonableness. Since the damages award was based on an unreasonable chain of reasoning (i.e., one that was not supported by the

seulement que H.L. n'a pas travaillé durant la première période et n'a travaillé que sporadiquement pendant la seconde. Cette preuve n'établit pas que H.L. était totalement ou en grande partie incapable de travailler à cause de ses problèmes émotionnels.

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Par exemple, le fait que H.L. a travaillé sporadiquement peut aussi bien résulter d'un choix que d'une incapacité. D'ailleurs, certains éléments de preuve militent davantage en faveur de la première possibilité que de la seconde. Ainsi, H.L. a quitté le seul emploi permanent qu'il ait jamais eu — sur une ferme avicole à l'extérieur de Regina — pour s'établir dans la réserve de son épouse d'alors, qui pouvait y poursuivre sa carrière dans le domaine des soins à domicile. H.L. s'est également inscrit à un cours de mécanique automobile offert dans la réserve de Muskowekwan, où il vivait à l'époque, mais il l'a abandonné parce qu'il n'était pas payé pour y assister.

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La preuve présentée au procès n'établissant pas que H.L. était totalement ou en grande partie incapable de travailler à cause de ses problèmes émotionnels, l'inférence du juge de première instance selon laquelle ceux-ci lui avaient fait perdre des revenus d'emploi ne s'appuie donc pas sur une preuve suffisante et a été à juste titre infirmée par la Cour d'appel. Cette inférence n'étant pas suffisamment étayée, il n'est pas nécessaire de déterminer si les abus sexuels étaient à l'origine des problèmes émotionnels de H.L. La chaîne causale est déjà rompue. En outre, puisqu'il s'agissait là de l'argumentation ultime susceptible d'appuyer la conclusion générale du juge de première instance selon laquelle H.L. a subi une perte de revenus d'emploi à cause des abus sexuels commis par M. Starr, il est clair que cette conclusion du juge de première instance ne peut être maintenue et que la Cour d'appel a effectivement eu raison de l'infirmer.

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En somme, la Cour d'appel n'a pas eu tort d'annuler les dommages-intérêts pécuniaires accordés pour la perte de revenus antérieure. Je le répète, la « norme de contrôle » applicable en Saskatchewan à une inférence factuelle est celle de la raisonnabilité. Les dommages-intérêts étant fondés sur une argumentation déraisonnable (c'est-à-dire non étayée par

evidence), the Court of Appeal was correct to intervene and overrule it.

la preuve), la Cour d'appel a eu raison d'intervenir et de les annuler.

(b) *Liability for Future Loss of Earnings*

b) *Responsabilité pour la perte de revenus ultérieure*

327 Turning now to the Government of Canada's liability for future loss of earnings, it must be noted that the trial judge acknowledged that the parties presented no evidence regarding H.L.'s future earning capacity and that this necessitated a determination based solely on the data applied in assessing his loss of past earning capacity (para. 70). The trial judge ultimately calculated the discounted present lump sum required to fund H.L.'s loss of future earning capacity to be $179,190.

En ce qui concerne maintenant la responsabilité du gouvernement du Canada pour la perte de revenus ultérieure, il convient de signaler que le juge de première instance a reconnu que les parties n'avaient présenté aucune preuve relativement à la capacité de gain ultérieure de H.L. et que cette omission appelait une évaluation fondée uniquement sur les données prises en compte pour évaluer la perte de capacité de gain antérieure (par. 70). Le juge de première instance a finalement fixé à 179 190 $ la somme forfaitaire actualisée nécessaire pour indemniser H.L. de sa perte de capacité de gain ultérieure.

328 The Court of Appeal set aside this damages award, because it was of the view that the evidence fell short of proving the loss, and that the award suffered from the same errors as the award for past loss of earnings (para. 258).

La Cour d'appel a annulé ces dommages-intérêts au motif que la preuve n'établissait pas l'existence d'une perte, et que leur calcul était entaché des mêmes erreurs que celui des dommages-intérêts accordés pour la perte de revenus antérieure (par. 258).

329 I agree that the award for future loss of earnings must be set aside, because, like the award for past loss of earnings, it lacks a sufficient evidentiary foundation. In other words, since it was not reasonable for the trial judge to conclude that H.L. suffered a loss of employment income because of Starr's sexual abuse, given the evidentiary gaps in the trial judge's causal chain, it was likewise not reasonable for him to conclude that H.L. will continue to suffer such a loss in the future.

Je conviens que l'indemnité accordée pour la perte de revenus ultérieure doit être annulée. À l'instar de celle accordée pour la perte de revenus antérieure, elle ne s'appuie pas sur une preuve suffisante. En d'autres termes, comme il n'était pas raisonnable de conclure que H.L. avait subi une perte de revenus d'emploi à cause des abus sexuels commis par M. Starr, étant donné les lacunes, sur le plan de la preuve, de la chaîne causale établie par le juge de première instance, il n'était pas non plus raisonnable de conclure que H.L. continuerait de subir une telle perte.

(2) Trial Judge's Assessment of Damages for Past Loss of Earnings

(2) Évaluation de la perte de revenus antérieure

330 Given my conclusion that the pecuniary damages award for past and future loss of earnings lacks an evidentiary foundation, it is not necessary to review the trial judge's assessment of damages. However, in order to provide further guidance in this area of the law, I will briefly comment upon his assessment, especially because I agree with the Court of Appeal

Vu ma conclusion selon laquelle les dommages-intérêts pécuniaires accordés pour les pertes de revenus antérieure et ultérieure ne sont pas étayés par la preuve, point n'est besoin d'examiner l'évaluation du préjudice par le juge de première instance. Cependant, afin de clarifier davantage le droit applicable en la matière, je commenterai brièvement cette

that the trial judge erred in four respects. First, he failed to consider the plaintiff's duty to mitigate. Second, he unreasonably concluded that the plaintiff did not have a "crumbling skull" and therefore attributed too much to Starr's wrongful acts in his assessment of pecuniary damages. Third, he did not reduce the damages award to reflect the time H.L. was incarcerated. Fourth, he erred in not accounting for the social assistance payments H.L. received during the relevant period.

évaluation, d'autant plus que je conviens avec la Cour d'appel que le juge de première instance a commis quatre erreurs à cet égard. Premièrement, il n'a pas pris en considération l'obligation du demandeur de limiter le préjudice. Deuxièmement, il a conclu, de manière déraisonnable, que la vulnérabilité du demandeur n'était pas déjà active, de sorte qu'il a accordé trop d'importance aux actes répréhensibles de M. Starr en établissant les dommages-intérêts pécuniaires. Troisièmement, il n'a pas retranché de la période considérée le temps que H.L. avait passé en prison. Quatrièmement, il a eu tort de ne pas tenir compte des prestations d'aide sociale touchées par H.L. pendant cette période.

(a) *Duty to Mitigate*

a) *Obligation de limiter le préjudice*

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I agree with the Court of Appeal that the trial judge erred in failing to consider the plaintiff's duty to mitigate. As noted by the court, the Attorney General of Canada, who bore the onus of proof in respect of this issue, adduced evidence that the plaintiff had been offered opportunities to upgrade his education and training and to enter into rehabilitative treatment in relation to his excessive consumption of alcohol; yet, he declined or failed to pursue these offers (para. 232). Therefore, to the extent that the trial judge associated the plaintiff's loss of earnings with his lack of education or training or alcohol problems, I agree with the Court of Appeal that the trial judge ought to have turned his mind to the plaintiff's duty to mitigate, and he erred in not taking up this issue.

Je conviens avec la Cour d'appel que le juge de première instance a commis une erreur en ne tenant pas compte de l'obligation du demandeur de limiter le préjudice. Comme elle l'a fait remarquer, le procureur général du Canada, à qui incombait la charge de la preuve à cet égard, a présenté des éléments selon lesquels le demandeur s'était vu offrir la possibilité de parfaire son éducation et sa formation et de suivre un traitement pour sa consommation excessive d'alcool, mais avait décliné l'offre ou omis de saisir l'occasion (par. 232). Par conséquent, dans la mesure où le juge de première instance a associé la perte de revenus du demandeur à son manque d'éducation ou de formation ou à ses problèmes d'alcool, je conviens avec la Cour d'appel qu'il aurait dû tenir compte de l'obligation du demandeur de limiter le préjudice et qu'il a commis une erreur en omettant de le faire.

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I must also respectfully take issue with Fish J.'s reasons on this issue. At para. 134 of his reasons, Fish J. states that "the trial judge concluded that the Crown led no evidence on the issue of mitigation"; however, from my reading of the trial judge's reasons for judgment, it is clear that, rather than come to any such conclusion, the trial judge simply did not consider this issue at all and therein lies the error.

En toute déférence, je suis également en désaccord avec le juge Fish sur ce point. Au paragraphe 134 de ses motifs, il affirme que « le juge de première instance a conclu que le procureur général du Canada n'avait présenté aucune preuve à cet égard ». Or, suivant mon interprétation des motifs du jugement de première instance, il est clair que le juge n'a tiré aucune conclusion à ce sujet, omettant plutôt de considérer la question, d'où l'erreur.

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Furthermore, at para. 135, Fish J. notes that H.L. testified that he failed to upgrade his education because he had a poor memory. Instead of pointing

En outre, au par. 135 de ses motifs, le juge Fish fait observer que, suivant son témoignage, H.L. n'avait pas parfait son éducation à cause de son peu

to a failure to mitigate, in my colleague's view, this testimony is consistent with the trial judge's finding that H.L.'s alcoholism, poor self-image and lack of confidence affected his ability to learn a trade and his ability to find and keep a job. I have already discussed the evidentiary gaps in the trial judge's reasoning in this respect.

de mémoire. Au lieu d'y voir l'omission de limiter le préjudice, mon collègue estime que ce témoignage concorde avec la conclusion du juge de première instance selon laquelle l'alcoolisme de H.L., son image négative de lui-même et son manque de confiance avaient nui à sa capacité d'apprendre un métier et à celle de trouver et de conserver un emploi. J'ai déjà fait état de la faiblesse de la preuve sous-tendant le raisonnement du juge de première instance à cet égard.

334 Fish J. is also of the view that while "the record is essentially silent regarding H.L.'s efforts at rehabilitation, it appears from his evidence at trial that he was at least then making an effort to abstain from any further consumption of alcohol" (para. 135). With respect I do not agree that the record is essentially silent regarding H.L.'s efforts at rehabilitation. For example, at trial, the Attorney General of Canada filed as an exhibit H.L.'s admission reports from the Regina Provincial Correctional Centre ("P.C.C."). H.L. was incarcerated at the Regina P.C.C. for a number of alcohol and theft-related offences. These reports indicate that upon his various admissions to the P.C.C., H.L. expressed no interest in counselling, education or treatment programs relating to alcoholism. Therefore, while H.L. may have been making an effort to abstain from any further consumption of alcohol at the time of the trial, this does not change the fact that the trial judge ought to have considered the evidence regarding H.L.'s efforts at rehabilitation in the past, especially since H.L. was claiming damages for past loss of earnings. He erred in not doing so.

Le juge Fish ajoute que « [m]ême si le dossier ne révèle essentiellement rien au sujet de ses efforts de réadaptation, le témoignage de H.L. au procès permettait de conclure qu'il avait tenté à tout le moins de mettre fin à sa consommation d'alcool » (par. 135). À mon humble avis, je ne crois pas que le dossier ne révèle essentiellement rien au sujet des efforts de réadaptation de H.L. Par exemple, au procès, le procureur général du Canada a déposé en preuve les registres d'admission du centre correctionnel provincial de Regina où H.L. avait été incarcéré pour un certain nombre d'infractions liées à l'alcool et au vol. Selon ces registres, lors des différentes périodes d'incarcération, H.L. n'avait manifesté aucun intérêt pour les programmes d'aide, de formation ou de traitement destinés aux alcooliques. Par conséquent, même si, au moment du procès, H.L. faisait des efforts pour mettre fin à sa consommation d'alcool, il demeure que le juge de première instance aurait dû tenir compte de la preuve relative aux efforts de réadaptation antérieurs de H.L., d'autant plus que ce dernier demandait une indemnité pour la perte de revenus dans le passé. Il a eu tort de ne pas le faire.

(b) *Crumbling Skull*

b) *Vulnérabilité déjà active (« crumbling skull »)*

335 Assuming for the purposes of my analysis at this juncture that Starr's sexual abuse was at least a cause of H.L.'s loss of earnings (although it is my contention that there is no evidentiary basis for such a conclusion), I find that the trial judge also erred in his assessment of pecuniary damages by attributing too much to Starr's two acts of sexual abuse. This error came as a result of the trial judge's unreasonable inference that H.L. did not have a "crumbling skull".

À supposer, pour les besoins de la présente analyse, que les abus sexuels de M. Starr aient au moins contribué à la perte de revenus de H.L. (bien que, selon moi, la preuve ne permette pas de le conclure), j'estime que le juge de première instance a également commis une erreur en leur accordant trop d'importance dans l'établissement des dommages-intérêts pécuniaires. Cette erreur résulte de son inférence déraisonnable selon laquelle H.L. n'avait pas une vulnérabilité déjà active.

The "crumbling skull" rule was described by Major J. in *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 35, as follows:

> The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage . . . . Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award . . . . This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position. [Emphasis in original; citations omitted.]

The trial judge in the case at bar concluded that there was no evidence that H.L. then had a crumbling skull. In his view, if H.L. was predisposed to emotional injury as a consequence of S.W.'s abuse or the dysfunctional family environment he grew up in, H.L. had a "thin skull", meaning that the Government of Canada would remain responsible for the injuries triggered by Starr's abuse (para. 28).

I agree with the Attorney General of Canada that the evidence regarding H.L.'s upbringing in a home where there was alcohol abuse and family violence suggests it is quite likely that H.L.'s earning capacity would have been substantially the same even if the sexual assaults had not occurred. Contained in his family history are a number of disturbing events that undergird this conclusion. For instance, at trial, evidence was adduced to show that on one occasion, S.W. assaulted H.L.'s mother, brandished a rifle and threatened to kill her, which prompted H.L. and his older brother to crawl out of their bedroom window in mortal fear of being shot. They hid under the front steps while their mother fled. In my view, this startling event, combined with H.L.'s troubled home life

336 La règle de la vulnérabilité de la victime a été définie comme suit par le juge Major dans l'arrêt *Athey c. Leonati*, [1996] 3 R.C.S. 458, par. 35 :

> La règle de la vulnérabilité de la victime reconnaît simplement que l'état préexistant du demandeur était inhérent à sa « situation originale ». Le défendeur n'a pas à rétablir le demandeur dans une meilleure situation que sa situation originale. Le défendeur est responsable du préjudice causé, même s'il est très grave, mais il n'a pas à indemniser le demandeur des effets débilitants qui sont imputables à l'état préexistant et que ce dernier aurait subis de toute façon. Le défendeur est responsable des dommages supplémentaires mais non des dommages préexistants [. . .] De même, s'il y a un risque mesurable que l'état préexistant aurait entraîné des conséquences nuisibles pour le demandeur dans l'avenir, indépendamment de la négligence du défendeur, il peut alors en être tenu compte pour réduire le montant de l'indemnité globale [. . .] Ce résultat est conforme à la règle générale suivant laquelle il faut rétablir le demandeur dans la situation où il aurait été, avec ses risques et ses inconvénients, et non dans une meilleure situation. [Souligné dans l'original; citations omises.]

En l'espèce, le juge de première instance a conclu qu'aucune preuve n'établissait que, au moment considéré, la vulnérabilité de H.L. était déjà active. Selon lui, si H.L. avait une prédisposition aux troubles émotionnels en raison des actes de violence de S.W. ou du fait qu'il avait grandi dans une famille dysfonctionnelle, il s'agissait d'une vulnérabilité latente, de sorte que le gouvernement du Canada demeurait responsable du préjudice causé par les actes de M. Starr (par. 28).

337 Je conviens avec l'intimé le procureur général du Canada que la preuve selon laquelle H.L. a grandi au sein d'une famille où sévissaient l'abus d'alcool et la violence donne à penser que la capacité de gain de H.L. aurait probablement été la même si les abus sexuels n'avaient pas eu lieu. L'histoire familiale de H.L. fait état d'un certain nombre d'événements troublants qui appuient cette thèse. Par exemple, au procès, des éléments ont été présentés pour établir que S.W. avait une fois agressé la mère de H.L., brandi une arme et menacé de la tuer, ce qui avait obligé H.L. et son frère aîné à sortir par la fenêtre de leur chambre, en proie à une peur mortelle de se faire tirer dessus. Ils s'étaient cachés sous les marches de l'entrée alors que leur mère avait pris la fuite.

in general, likely would have detrimentally affected H.L. in the future, regardless of Starr's abuse.

Selon moi, il est probable que cet épisode saisissant, jumelé à une vie de famille généralement difficile, ait hypothéqué l'avenir de H.L., indépendamment des abus de M. Starr.

338 Moreover, both expert witnesses offered testimony that gives support to this conclusion. Dr. Arnold's opinion was that H.L.'s alcoholism was largely attributable to causes other than Starr's sexual abuse, such as H.L.'s exposure to alcohol abuse and family violence. Similarly, on cross-examination, Mr. Stewart admitted that H.L.'s early home life and S.W.'s abuse contributed in some way to his current problems. I agree with the Court of Appeal that since the trial judge relied on the evidence of these experts for the purpose of connecting the plaintiff's problem with alcohol to Starr's wrongful acts, albeit incorrectly in my view, he also should have had regard to it for the purpose of assessing the extent of H.L.'s loss of earnings that was attributable to these acts, in order to ensure that H.L. was not placed in a better position, through an award of damages, than he would have been had it not been for Starr's sexual abuse.

De plus, les deux témoins experts ont abondé en ce sens. Selon le Dr Arnold, l'alcoolisme de H.L. était en grande partie attribuable à d'autres causes que les abus sexuels, comme le fait d'avoir été confronté à l'abus d'alcool et à la violence familiale. De même, en contre-interrogatoire, M. Stewart a reconnu que sa vie de famille lorsqu'il était enfant et la violence de S.W. avaient en quelque sorte contribué à ses problèmes actuels. Je conviens avec la Cour d'appel que, le juge de première instance s'étant fondé, à tort selon moi, sur le témoignage de ces experts pour établir un lien entre l'alcoolisme du demandeur et les actes répréhensibles de M. Starr, il aurait dû également en tenir compte pour déterminer dans quelle proportion la perte de revenus de H.L. était attribuable à ces actes, et ce, afin que les dommages-intérêts ne mettent pas H.L. dans une situation meilleure que celle dans laquelle il se serait trouvé si les abus sexuels n'avaient pas eu lieu.

339 Therefore, in light of the evidence regarding H.L.'s upbringing in a home where there was alcohol abuse and family violence, as well as the experts' acknowledgement that H.L.'s formative life experience contributed at least in some way to his current problems, it was unreasonable for the trial judge to infer that H.L. did not have a crumbling skull, and that this error led him to attribute too much of H.L.'s loss of earning capacity to Starr's two acts of sexual abuse. Instead, as recommended by the Court of Appeal, the trial judge ought to have engaged in a retrospective contingency assessment, in order to consider potential deductions to the pecuniary damages award in light of possible contributing factors other than Starr's sexual abuse (para. 237).

Aussi, vu la preuve selon laquelle H.L. avait grandi dans un foyer où régnaient l'abus d'alcool et la violence familiale, ainsi que le témoignage des experts selon lequel les premières années d'apprentissage de la vie de H.L. avaient contribué jusqu'à un certain point à ses problèmes actuels, il était déraisonnable d'inférer que H.L. n'avait pas une vulnérabilité déjà active, et cette erreur a amené le juge de première instance à accorder trop d'importance aux deux épisodes d'abus sexuel en évaluant la perte de capacité de gain de H.L. Comme l'a recommandé la Cour d'appel, le juge aurait dû examiner les faits passés en vue de déterminer s'il fallait réduire le montant des dommages-intérêts accordés en fonction d'éventuels facteurs contributifs autres que les abus sexuels de M. Starr (par. 237).

(c) *Time Incarcerated*

c) *Incarcération*

340 At trial, Klebuc J. inferred that H.L.'s numerous convictions on alcohol and theft-related offences were attributable to Starr's sexual abuse (para. 29). Accordingly, in assessing H.L.'s loss of earnings, the trial judge included periods of time in which he

Au procès, le juge Klebuc a inféré que les nombreuses infractions liées à l'alcool et au vol commises par H.L. étaient attribuables aux abus sexuels de M. Starr (par. 29). Il a donc inclus dans la période considérée pour l'évaluation de la perte de revenus

was incarcerated. I agree with the Court of Appeal that the trial judge erred in attributing H.L.'s criminal behaviour and its earning-capacity consequence to Starr's wrongful acts, because there was no evidence to support this causal inference.

le temps que H.L. avait passé en prison. Je conviens avec la Cour d'appel qu'il a eu tort d'attribuer aux actes répréhensibles de M. Starr le comportement criminel de H.L. et les conséquences de ce comportement sur sa capacité de gain, car aucune preuve n'étayait cette inférence de causalité.

The evidence adduced at trial regarding the relationship between sexual abuse and criminality focused on the risk that child abuse victims may go on to become abusers themselves. For instance, during direct examination, Mr. Stewart offered the following testimony on this issue:

> Q: Would the sexual abuse have impacted upon — you mentioned substance abuse. What about criminality?
>
> A: It certainly could. Criminality in the sense that a number of individuals — in fact a wide number of individuals, I don't have the exact number, who have been either physically or sexually abused in childhood, a great proportion of those end up being abusers themselves once they reach adulthood. So in that sense, yes, it's possible.

On cross-examination, Mr. Stewart was asked to clarify his opinion regarding the relationship between sexual abuse and criminal behaviour. In response, he stated:

> The only criminal behaviour that's really I think associated with that [sexual abuse], strongly associated, is the tendency to possibly abuse other people, other kids maybe, but not between robbing a bank and being sexually abused. I don't think that there is that strong of a relationship, no.

341 La preuve présentée au procès relativement à l'existence d'un lien entre les abus sexuels et la criminalité portait surtout sur le risque qu'un enfant victime d'agression ne devienne lui-même agresseur. Par exemple, en interrogatoire principal, M. Stewart a dit ce qui suit à ce sujet :

> [TRADUCTION]
>
> Q : Concernant les effets de l'abus sexuel — vous avez mentionné l'abus de substances intoxicantes. La criminalité peut-elle être l'un d'eux?
>
> R : Certainement. La criminalité, en ce sens qu'un certain nombre de personnes — en fait, un grand nombre de personnes, je n'ai pas les chiffres exacts, qui ont été victimes d'agressions physiques ou sexuelles dans leur enfance, une grande proportion de ces personnes deviennent elles-mêmes des agresseurs lorsqu'elles atteignent l'âge adulte. Donc, en ce sens, oui, c'est possible.

En contre-interrogatoire, M. Stewart a été appelé à clarifier son opinion sur le lien entre l'abus sexuel et le comportement criminel :

> [TRADUCTION] Le seul comportement criminel qui soit vraiment associé à [l'abus sexuel], grandement associé, est la tendance à s'en prendre éventuellement à d'autres personnes, à d'autres enfants peut-être, mais non à dévaliser une banque, après avoir été abusé sexuellement. Je ne crois pas qu'il existe un lien aussi marqué, non.

In contrast, H.L.'s criminal record demonstrates that none of the crimes for which he was incarcerated related to the abuse of other people. Instead, as noted above, they were, for the most part, alcohol and theft related.

342 Par contre, le casier judiciaire de H.L. révèle qu'aucun des crimes pour lesquels il a été incarcéré n'avait trait à l'agression d'autrui. Au contraire, il s'agissait surtout, je le répète, d'infractions liées à l'alcool et au vol.

Because the expert evidence adduced at trial only described the risk that child abuse victims may go on to become abusers themselves, I find no evidence to support the trial judge's inference that H.L.'s numerous convictions on alcohol and theft-related offences were attributable to Starr's sexual abuse.

343 Étant donné que la preuve d'expert offerte au procès ne portait que sur le risque qu'un enfant agressé ne devienne lui-même agresseur, aucun élément de preuve n'appuie l'inférence du juge de première instance selon laquelle les nombreuses infractions liées à l'alcool et au vol commises par H.L.

Therefore, the trial judge erred in not reducing the damages award to reflect the time H.L. was incarcerated.

étaient attribuables aux abus sexuels de M. Starr. Le juge de première instance a donc eu tort de ne pas abaisser le montant des dommages-intérêts en fonction du temps que H.L. avait passé en prison.

344 Moreover, I agree with the Court of Appeal that to award a plaintiff damages for loss of earning capacity while incarcerated would undermine the principles of our criminal justice system (paras. 240-41). As noted by the Court of Appeal, the risk was well described by Samuels J.A. in *State Rail Authority of New South Wales v. Wiegold* (1991), 25 N.S.W.L.R. 500 (C.A.), at p. 514, as follows:

> If the plaintiff has been convicted and sentenced for a crime, it means that the criminal law has taken him to be responsible for his actions, and has imposed an appropriate penalty. He or she should therefore bear the consequences of the punishment, both direct and indirect. If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at nought. It would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.

En outre, je conviens avec la Cour d'appel qu'accorder à un demandeur des dommages-intérêts pour la perte de capacité de gain pendant son incarcération va à l'encontre des principes de notre système de justice pénale (par. 240-241). Comme elle l'a signalé, le juge Samuels avait bien décrit le dilemme dans *State Rail Authority of New South Wales c. Wiegold* (1991), 25 N.S.W.L.R. 500 (C.A.), p. 514 :

> [TRADUCTION] Si le demandeur a été déclaré coupable d'un crime et condamné à une peine, c'est parce que, au regard du droit criminel, il a été jugé responsable de ses actes et une peine appropriée lui a été infligée. Il doit donc subir les conséquences de la peine, directes et indirectes. Si, au regard de la responsabilité civile délictuelle, le contrevenant n'était pas tenu responsable de ses actes et devait être indemnisé par l'auteur du délit, la décision du tribunal pénal serait mise en échec. Il en résulterait entre le droit civil et le droit pénal une sorte de conflit susceptible de déconsidérer la justice.

(d) *Receipt of Social Assistance*

345 The trial judge noted that from January 1, 1980 to December 31, 1987, H.L. generally relied on social assistance to meet his needs; however, in calculating the award for past loss of earning capacity for this period, he did not account for H.L.'s receipt of social assistance payments (para. 64). The Court of Appeal found that Klebuc J. erred in not addressing the issue of whether the social assistance benefits received by H.L. should be deducted from the damages award for loss of past earnings, but it refrained from commenting any more upon the matter, since a recent decision from the British Columbia Court of Appeal directly on point was currently under appeal to this Court. That decision, *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53, has now been rendered. In *M.B.*, this Court held that social assistance is a form of income replacement and is therefore deductible at common law. In light of this decision, it is clear that the trial judge committed a mixed error of law and fact when he failed to account for the social

d) *Prestations d'aide sociale*

Le juge de première instance a fait observer que du 1er janvier 1980 au 31 décembre 1987, H.L. avait généralement compté sur les prestations d'aide sociale pour subvenir à ses besoins. Cependant, dans l'établissement des dommages-intérêts pour la perte de capacité de gain pendant cette période, il n'a pas tenu compte de l'obtention de prestations d'aide sociale par H.L. (par. 64). La Cour d'appel a conclu que le juge Klebuc avait eu tort de ne pas se demander si ces prestations devaient être déduites des dommages-intérêts accordés pour la perte de revenus antérieure. Elle s'est cependant abstenue de développer la question, une décision récente de la Cour d'appel de la Colombie-Britannique portant précisément sur le sujet faisant alors l'objet d'un pourvoi devant notre Cour. L'arrêt a depuis été rendu : *M.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 477, 2003 CSC 53. Dans cet arrêt, notre Cour a statué que les prestations d'aide sociale constituent une forme de remplacement du revenu et que, par conséquent, elles sont déductibles en common law.

assistance payments H.L. received during the relevant period.

À la lumière de cette décision, il est clair que le juge de première instance a commis une erreur mixte de fait et de droit lorsqu'il a omis de tenir compte des prestations d'aide sociale touchées par H.L. pendant la période considérée.

V. Disposition

For all these reasons, I would dismiss the appeal.

V. Dispositif

346 Pour tous ces motifs, je suis d'avis de rejeter le pourvoi.

The following are the reasons delivered by

CHARRON J. (dissenting in part) — I have had the benefit of reading the reasons of my colleagues Justice Fish and Justice Bastarache. I agree with the analysis of Fish J. on the governing standard of review for appeals in the province of Saskatchewan and conclude that the Court of Appeal erred in finding that the standard was other than that adopted by this Court in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. As Fish J., I would nonetheless conclude that the Court of Appeal was correct in setting aside the trial judge's award of pecuniary damages for future loss of earnings. I also agree with Fish J. that the trial judge erred in awarding pecuniary damages during the period of time that the appellant was incarcerated and that he further erred in failing to account for H.L.'s receipt of social assistance payments. However, I respectfully depart from Fish J.'s reasoning in the following respect.

Version française des motifs rendus par

347 LA JUGE CHARRON (dissidente en partie) — J'ai pris connaissance des motifs de mes collègues les juges Fish et Bastarache. Je souscris à l'analyse du juge Fish en ce qui concerne la norme de révision applicable en appel dans la province de la Saskatchewan et j'estime que la Cour d'appel a eu tort de conclure que la norme applicable n'était pas celle établie par notre Cour dans *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33. Tout comme le juge Fish, je suis néanmoins d'avis que la Cour d'appel a eu raison d'annuler les dommages-intérêts pécuniaires accordés en première instance pour la perte de revenus ultérieure. Je conviens également avec lui que le juge de première instance a eu tort d'accorder des dommages-intérêts pécuniaires pour la période pendant laquelle l'appelant avait été incarcéré et de ne pas tenir compte des prestations d'aide sociale qu'il avait touchées. En toute déférence, je me dissocie toutefois de son raisonnement à l'égard de ce qui suit.

I would conclude, on application of the appropriate standard of review, that the Court of Appeal was correct in setting aside the entire award for pecuniary damages. In my view, the same error informed the trial judge's decision to award pecuniary damages in respect of both past and future loss of earnings. In effect, the trial judge found that there was a causal connection between the acts of sexual abuse and a lifelong inability to earn income. In my respectful view, the evidence did not support this finding and, consequently, the award for loss of income, past and future, is unreasonable. On this point, I am essentially in agreement with the reasons of my colleague Bastarache J. Consequently, I would dismiss the appeal.

348 Compte tenu de l'application de la norme de révision appropriée, je crois que la Cour d'appel a annulé à bon droit la totalité des dommages-intérêts pécuniaires accordés. Selon moi, la même erreur entachait la décision du juge de première instance d'accorder des dommages-intérêts pécuniaires pour les pertes de revenus passée et future. Il a en effet conclu à l'existence d'un lien de causalité entre les abus sexuels et l'incapacité permanente de gagner un revenu. À mon humble avis, la preuve n'étayait pas cette conclusion, de sorte que l'indemnisation pour les pertes de revenus passée et future est déraisonnable. Sur ce point, je suis essentiellement d'accord avec mon collègue le juge Bastarache. Je suis donc d'avis de rejeter le pourvoi.

Appeal allowed in part, with costs, BASTARACHE, LEBEL, DESCHAMPS *and* CHARRON JJ. *dissenting in part.*

Solicitors for the appellant: Merchant Law Group, Regina.

Solicitor for the respondent: Attorney General of Canada, Toronto.

Solicitor for the intervener: Attorney General for Saskatchewan, Regina.

Pourvoi accueilli en partie, avec dépens, les juges BASTARACHE, LEBEL, DESCHAMPS *et* CHARRON *sont dissidents en partie.*

Procureurs de l'appelant : Merchant Law Group, Regina.

Procureur de l'intimé : Procureur général du Canada, Toronto.

Procureur de l'intervenant : Procureur général de la Saskatchewan, Regina.

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., et al.

Court of Appeal File No. C65891

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF THE APPELLANT
KSV KOFMAN INC., IN ITS CAPACITY AS MONITOR

VOLUME I OF III

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