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

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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 ONSC 1475
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National Telecommunications Inc., Re

2017 CarswellOnt 3184, 2017 ONSC 1475, 277 A.C.W.S. (3d) 247, 45 C.B.R. (6th) 181

IN THE MATTER OF THE BANKRUPTCY OF NATIONAL TELECOMMUNICATIONS INC. OF THE TOWN OF VAUGHAN, IN THE PROVINCE OF ONTARIO

F.L. Myers J.

Heard: February 21, 2017
Judgment: March 3, 2017
Docket: 31-2014067

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Bryan C. McPhadden, for 1219172 Ontario Inc. and Brian Coones

***F.L. Myers J.*:**

The Motion

1 The trustee in bankruptcy of the estate of National Telecommunications Inc. moves for an order requiring Brian Coones and his company, 1219172 Ontario Inc., to pay $159,330 to the estate under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. The trustee alleges that while insolvent, the bankrupt paid this amount to Mr. Coones' company and received no value in return.

2 For the reasons set out below, the order sought is granted.

Transfer at Undervalue

3 The phrase "transfer at undervalue" is defined in s. 2 of the *BIA* as follows:

> *transfer at undervalue* means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

4 It is apparent from this definition that the topic concerns transactions prior to bankruptcy in which a bankrupt depleted its assets to the prejudice of its creditors. Parliament has determined that in such cases, the trustee, on behalf of the creditors, may move to declare the transfers void so as to make the transferred assets and/or the value differential between the assets transferred and consideration received exigible by the trustee. There is a very broad range of pre-bankruptcy transfers of assets that may later be said to have depleted an estate. Some definitional meat is required to narrow the range so as to determine which transactions will be actionable by a trustee on behalf of an estate. Section 96 of the *BIA* provides the required definitions.

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph

(i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

(3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

5 Section 96 identifies three different sets of transactions for which a trustee can seek a remedy. First, if the bankrupt and the recipient of its assets were dealing at arm's length, then the trustee can seek a remedy if the transfer at undervalue occurred up to one year prior to the initial bankruptcy event, the bankrupt was insolvent or rendered insolvent at the time, and in making the transfer at undervalue, the bankrupt intended to defraud, defeat, or delay a creditor.

6 Where the bankrupt and the recipient of its assets were not dealing at arm's length then the rules differ depending on when the transaction occurred. The second set of transactions that a trustee can attack under s. 96 involves cases where the parties to the transfer at undervalue were not dealing at arm's length and the transfer occurred within one year of the initial bankruptcy event. In that case, the transfer can be impugned without any further proof. In my view, it is Parliament's intention that relief should be available nearly automatically on proof of those facts. *Lee, Re*, 2017 ONSC 388 (Ont. S.C.J.) (CanLII) at para. 16.

7 The third situation that a trustee can be attack under s. 96 involves cases where the parties to the transfer at undervalue were not dealing at arm's length but the transfer at undervalue occurred more than one year before the initial bankruptcy event but no more than five years before that event. In this third situation, Parliament has re-asserted the same requirements that apply to a transfer at undervalue to an arm's length party. That is, to obtain relief in the third case, a trustee needs to prove that the bankrupt was insolvent or rendered insolvent at the time of the transfer at undervalue and that in making the transfer at undervalue, the bankrupt intended to defraud, defeat, or delay a creditor.

8 The court is asked to determine therefore, first, whether the bankrupt transferred property to Mr. Coones and his company for no consideration or for conspicuously less consideration than the fair market value of the transferred property. If a transfer at undervalue occurred, then the next issue is whether the bankrupt and Mr. Coones and his company were dealing at arm's length. If they were not at arm's length, then the timing of the transaction(s) will dictate whether any further proof is required by the trustee in order to succeed. If the parties were operating at arm's length or, if they were not at arm's length and the transaction occurred more than one year but less than five years prior to the initial bankruptcy event, then the trustee must prove two further facts (insolvency and intention) in order to be entitled to relief under s. 96.

Mr. Coones was Privy to the Transfers to his Corporation

9 It is not disputed that Mr. Coones is the sole owner of 1219172 Ontario Inc. It is his corporate vehicle through which he ran a consulting business. Mr. Coones and his corporation fall squarely within the definition of privity in s. 96 (3) set out above. That is, they do not deal with each other at arm's length and Mr. Coones conceded on his s. 163 examination that he received personally the benefit of the funds paid by the bankrupt to his corporation. While this may be quite ordinary tax planning and, without more, would not likely invite piercing of the corporate veil at common law, s. 96 (1) provides that those who are privy to a transfer at undervalue are as liable as the recipient. Subsection. 96 (3) provides a statutory piercing of the corporate veil to recover transfers at undervalue from the real party in interest who received the value that ought to be available to the bankrupt's estate and creditors.

The Facts

10 On April 9, 2015, the court appointed Deloitte Restructuring Inc. to be the receiver and manager of the bankrupt. The receivership application was brought by HSBC Bank Canada as the principal lender and secured creditor of the bankrupt. The Receiver assigned the bankrupt into bankruptcy on July 10, 2015. Under s. 2 of the *BIA*, the date of the initial bankruptcy event is the date on which the application for the receivership was brought by HSBC. [1] Counsel for the trustee advises that the date of issuance of the notice of application in the receivership proceeding was March 26, 2015.

11 The bankrupt was a re-seller of telephone equipment. The owner of the bankrupt is Nelson Guyatt. He too is now bankrupt.

12 Mr. Coones and Mr. Guyatt became friends while working together for a different company around the turn of the century. They socialized with their families about once a year. Mr. Coones became employed by the bankrupt in 2008. He was paid a salary plus bonus. By 2011 Mr. Coones' total remuneration from the bankrupt was over $100,000. In 2012, Mr. Coones and Mr. Guyatt agreed to switch Mr. Coones from an employee to a consultant through his corporation. Thereafter, the bankrupt paid Mr. Coones' corporation $10,000 per month. There is nothing remarkable in the change of Mr. Coones' employment status from a bankruptcy perspective.

13 Mr. Coones had background in telephone system architecture and sales engineering. He testified that during his time with the bankrupt, he performed technical design, installation, and programming services before and after becoming a consultant. He conceded that his services decreased after he became a consultant as he wanted to branch out into other business ventures.

14 Mr. Coones was not represented by counsel when he was first examined under s. 163 of the *BIA* in October, 2015. His counsel submits that Mr. Coones' initial testimony should be discounted because he did not have the opportunity to prepare with counsel. I decline to find that fundamental changes in Mr. Coones' testimony can be attributed to counsel becoming available to him.

15 In his s. 163 examination, Mr. Coones testified that in his position with the bankrupt, he had no contact with its customers. He could not name any of the major customers or suppliers of the bankrupt. In fact, he could not name any customers for whom he performed design, installation, or programming. He undertook to provide copies of his emails to substantiate his activities for the bankrupt. However he failed to produce any emails. If he was programming and installing telephone systems for fees of $120,000 per year, it is not credible that he does not recall which supplier's telephones he was programming and installing. It is not credible that he never went to see clients. It is not credible that he could not remember any of the major clients whose systems he programmed.

16 Mr. Guyatt was equally elusive in describing Mr. Coones' services. He said that Mr. Coones helped him start and grow the business. When pressed he said (at q. 531 of his examination):

> Q. You mentioned that when you started the business —
>
> A. Yeah. So, it is only fair, if the company is making money and doing well, it is only fair to cut him in. Whenever I needed him to come in and do some networking stuff, he did. He was on call for me. And the customers were making money, so I was taking care of him, right?

17 Mr. Guyatt could give no greater specificity as to what Mr. Coones did for the business. Mr. Coones came in to the bankrupt's office as needed which was once a month or so. Yet at $10,000 per month, Mr. Guyatt confirmed that Mr. Coones was making more than Mr. Guyatt was making from his own business.

18 Mr. Coones and the bankrupt formalized Mr. Coones' consulting relationship with a written agreement dated April 1, 2012. It is apparent on the face of the document that it was a pre-printed form agreement that was obtained by the parties in 2013. The back-dating itself is not of particular relevancy as it was explained by Mr. Coones in a later cross-examination. However, in his initial testimony under s. 163 of the *BIA*, he was expressly asked and swore that he signed the agreement on the date of the agreement at a meeting with Mr. Guyatt at the bankrupt's office. That testimony was plainly untrue.

19 Late in his s. 163 examination, Mr. Coones testified that he was being paid commissions on clients for whom he had provided leads to the bankrupt. He said that he gave the bankrupt lists of leads. In response to an undertaking he produced a meaningless list of more than 225 businesses including American Express, Rogers Cable, The Bank of Nova Scotia, and Coca Cola that he had apparently provided to the bankrupt. Mr. Coones testified that his commissions were not based on sales made to his leads. Instead, he says that the bankrupt paid him $10,000 a month for a list of leads like those.

20 After cross-examining the trustee's representative on his affidavit, Mr. Coones delivered several further affidavits without seeking or obtaining leave of the court under Rule 39.02 (2) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 and Rule 3 of the *Bankruptcy and Insolvency General Rules*, CRC, c 368. In his further testimony, Mr. Coones swore that he provided web development for customers of the bankrupt. Moreover, he named several customers whom he said he introduced to the bankrupt and whose sales he helped increase substantially.

21 Mr. Coone's evidence changed substantially with each new affidavit. At first, he could not remember any customers. This evidence evolved to remembering that he brought in millions of dollars in sales from several customers whom he introduced to the bankrupt due to his personal connections. In the case of each customer whom Mr. Coone's swore he introduced to the bankrupt, the trustee was able to show from the bankrupt's records that it made sales to the customers *before* Mr. Coones was employed by the bankrupt. In response, Mr. Coones' story evolved again as he swore that he

informally helped the bankrupt before even becoming employed by it and he grew the bankrupt's business with those customers. In doing so, he implicitly accepted that his initial affidavit of September 7, 2016, stating that he "rarely had direct contact with customers or potential customers" must have been untrue. Comparing Mr. Coones' inability to name any customers in his s. 163 examination, to the sentence just quoted from his September 7, 2016 affidavit, to his testimony in his affidavit sworn November 10, 2016 that, "I played a decidedly direct role in attracting Telquest and Norstar as customers to [the bankrupt]," to his having just helped increase the sales to existing customers rather than actually introducing the customers as previously sworn (see paras. 12 and 13 of his January 5, 2017 affidavit) leaves no room to treat Mr. Coones' testimony as credible.

22 It is true that the bankrupt's sales revenues greatly increased after Mr. Coones became employed in 2008. However, there is no tangible evidence that Mr. Coones did anything at all to contribute to those results.

23 The trustee was able to locate one email from Mr. Coones to Mr. Guyatt dated April 20, 2015. In it, Mr. Coones wrote:

> Let me know when I can see Anthony this week for 10. Would like to do one this week and the first week of May if possible. I can talk to him to see if he can do more ongoing but that would give me some time to prepare.

24 On its plain words, Mr. Coones was asking Mr. Guyatt to arrange an appointment with someone named Anthony to arrange to "do one" this week and another in ten days. This sounds like Mr. Coones was moving some goods for Anthony to whom Mr. Guyatt controlled access. On cross-examination, Mr. Coones could not explain the email. He denied selling any goods and claimed that his desire to "see Anthony this week for 10" had to do with his $10,000 salary from the bankrupt rather than having a 10 minute appointment with Anthony or obtaining a quantity of 10 items from him.

25 Just prior to the hearing of the motion, Mr. Coones delivered an affidavit of Bruno Bressi sworn February 16, 2017. Mr. Bressi says that he is the principal of a customer of the bankrupt. Mr. Bressi says that Mr. Coones introduced him to Mr. Guyatt in 2001 or 2002 and coordinated efforts directed at developing business between the customer and the bankrupt. Once again the evidence as to what Mr. Coones actually did is conclusory and entirely bald. There is no explanation as to how this arrangement worked from 2001 to 2008 before Mr. Coones was even an employee of the bankrupt. Mr. Bressi simply recites information from Mr. Coones that he was paid for "supplier advice and technical assistance in addition to his sales knowledge."

26 When asked specifically about Mr. Bressi in his s. 163 examination (after already being unable to remember the names of any customers of the bankrupt), Mr. Coones testified that he knew Mr. Bressi's because he worked at the same location as the bankrupt. He made no mention of introducing him to the bankrupt or knowing him prior to his employment with the bankrupt. Moreover, when the trustee's counsel asked Mr. Coones if he knew what Mr. Bressi's job was, Mr. Coones said he was not sure. When asked if it had something to do with the bankrupt, Mr. Coones said he thought so. I would have expected different answers if Mr. Coones had introduced Mr. Bressi to the bankrupt and had been singularly responsible for a massive growth in multi-million dollar sales by the bankrupt to Mr. Bressi's business. He might have remembered that Mr. Bressi was a customer and had some idea what he did for a living for example.

27 The trustee's unchallenged evidence is that the bankrupt was insolvent by November 18, 2013. At that time it started receiving loans from a new lender that it booked falsely as revenue. It appears that the bankrupt embarked on a scheme of hiding its insolvency from its lender HSBC by reporting fictitious sales and revenues. There is no suggestion that Mr. Coones was party to any of this. The trustee simply marked the date of the bankrupt's insolvency in case it is required to prove that fact under s. 96 of the *BIA* as discussed above.

28 At para. 30 of his affidavit, the trustee's representative swears:

> In the Trustee's opinion, [the bankrupt] received no value for payments made to [Mr. Coone's corporation]. Both Coones and Guyatt have been examined and no concrete evidence of [the corporation] or Coones providing any services to [the bankrupt] has been shown, and nothing that can be quantified. Additionally, Coones left the

> employment of [the bankrupt] as he wanted to pursue other things. Guyatt felt "So it is only fair, if the company is making money and doing well, it is only fair to cut him in." The reason provided by Guyatt for why Coones via [his corporation] was receiving payments is because Guyatt felt it was only fair to pay Coones for helping [the bankrupt] get started. The value of the services provided to [the bankrupt], in respect of the payments since May 2012 [when Coones became a consultant through his corporation], in the opinion of the Trustee, is nil.

29 The bankrupt paid Mr. Coones' corporation $338,830 after May, 2012. It paid $159,330 from the date of its insolvency November 18, 2013.

Analysis

(a) Transfer at Undervalue

30 As set out at the outset, the first question for resolution is whether the bankrupt disposed of property for no consideration or for conspicuously less than the fair market value of the property. This process for assessing this question is guided by s. 96 (2). It requires the trustee to provide its opinion of the fair market value of the property transferred by the bankrupt and as to the actual consideration given to or received by the bankrupt. Here, the value of the property that the bankrupt gave to Mr. Coones' corporation is simply the amount of money paid over the time period that is determined to be relevant. The trustee has opined that the value of the services provided by Mr. Coones over that same time period is zero.

31 Subsection 96 (2) provides further that "the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee."

32 I am dubious that the evidence provided by Mr. Coones, as bald, contradictory, and incredible as it was, amounts to any evidence to the contrary. As such, the statutory presumption could apply. However, without deciding the degree to which evidence must be believed to amount to some evidence to the contrary, I am prepared to view Mr. Coones' and Mr. Bressi's evidence as meeting that standard. As such, the statutory presumption falls away. In that case, in my view, the burden is on the trustee to prove the values that it propounds under s. 96 (1). The trustee's counsel accepted this burden as he noted that it is open to the court to find a value for Mr. Coone's services that differs from the trustee's opinion.

33 In light of the credibility issues in this application, I raised with counsel the question of whether a trial of an issue is required. While the trustee's counsel was prepared to go to trial if necessary, neither counsel argued that a trial is required. Rule 11 of the *Bankruptcy and Insolvency General Rules* provides, "[s]ubject to these Rules, every application to the court must be made by motion unless the court orders otherwise". It is trite law that the *BIA* is a businessperson's statute. Its aim is particularly focused on efficiency and affordability.

34 Were this a motion for summary judgment in a civil case, I likely would find that I could not decide the case on the written record alone. However, I would feel very comfortable weighing the evidence and drawing inferences under Rule 20.04 (2.1) of the *Rules of Civil Procedure*.

35 In para 66 of *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), the Supreme Court of Canada discussed when a judge should make use of the powers to weigh evidence and draw inferences on a summary judgment motion as follows:

> If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

36 At para. 59 of the *Hryniak* decision, the Court gave further guidance as to the nature of the inquiry to be undertaken by a judge to decide if she or he might resolve a matter summarily as follows:

> It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

37 I am not to be taken as finding that *Hryniak* applies to a decision by the court under s. 96 of the *BIA*. Rather, I am cognizant that Rule 11 of the *Bankruptcy and Insolvency General Rules* provides that while the general rule is that applications are to be brought as motions, the judge has discretion to order a trial where appropriate. In my view, *Hryniak* provides an analogous circumstance where the court is directed to consider whether the use of a summary process will yield a fair result that serves the goals of timeliness, affordability, and proportionality and is therefore in the interest of justice. The goals identified in *Hryniak* are equally the goals of the bankruptcy process.

38 In my view a trial is not required to determine the issues in this application. The parties' complete evidence is before the court. There is no indication that there is any further evidence to be presented by any of the parties were a trial to be held. I have not excluded any evidence despite the procedural issues raised by the timing of the delivery of affidavits by both sides. There have been thorough cross-examinations of the protagonists. The credibility issues for Mr. Coones are patent on the faces of his own affidavits and the transcripts in light of the clear changes in his testimony and the inability of any witness to provide evidence of what Mr. Coones actually did for the bankrupt.

39 In my view, in light of the narrow definition of the issue, the breadth and clarity of the evidence on credibility, and especially, proportionality given the relatively small amount of money in issue, I should decline to exercise the jurisdiction under Rule 11 to order a trial of an issue. A trial is not needed to illuminate the issues or to assess the credibility and reliability of Mr. Coones' testimony.

40 Mr. Coones argues that his services were worth enough to the bankrupt for it to agree to pay him and to continue to pay him until it ran out of money in January, 2015. However, the subjective view of the debtor is not the issue. Once a debtor is insolvent, in particular, the issue requires an objective comparison of value given for value received. It is significant that s. 96 (2) directs the court to consider the "actual consideration" given or received. The question is not hypothetical or theoretical. The test is what was paid and what was actually given or done in return. In my view, through the testimony of Mr. Guyatt and Mr. Coones, the trustee proved its case on the balance of probabilities. Mr. Coones' had every opportunity in his multiple affidavits and cross-examinations to put forward a coherent set of facts to show what he actually did to provide value to the bankrupt, supported by documentation (as he undertook). It is clear that he did nothing of value for the bankrupt after becoming a consultant in May, 2012. If the consulting fees were intended as ongoing payments for prior services rendered, once again, apart from providing a meaningless list of business names, there is no credible basis to find that Mr. Coones provided services of enduring value to the bankrupt. Instead, Mr. Coones put forward a mass of conflicting evidence that changed each time the trustee answered his last version and yet always remained conclusory and essentially bald. There was no legal or persuasive burden on Mr. Coones or his corporation. However, in the absence of any credible evidence to the contrary, I find that the trustee has proven that Mr. Coones and his corporation provided no services of any actual value to the bankrupt from May, 2012. As such all payments to him from that date satisfy the definition of payments at an undervalue.

(b) Were the Bankrupt and Mr. Coones (and his Corporation) Dealing at Arm's Length

41 Mr. Coones looks to income tax law to define an "arm's length" relationship. He points out that under s. 4 (4) of the BIA, the question of whether persons who are not related to each other were operating at arm's length is a question of fact for the court. It is agreed that Messrs. Guyatt and Coones are not relatives.

42 In *McLarty v. R.*, 2008 SCC 26 (S.C.C.) (CanLII) the Supreme Court of Canada determined that all relevant factors must be considered to determine if parties operate at arm's length. While there is no one factor that predominates, the Court accepted that one should consider whether the parties were operating with a common mind. Did one control the

other for example? Were they propounding or representing separate legal or economic interests? Again, the answers to these questions should take into account the entirety of the relationship.

43 In *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781 (Ont. S.C.J.) (CanLII) Wilton-Siegel J. refined the issue for s. 96 of the *BIA* in particular. At para. 41 of the decision, Wilton-Siegel J. encapsulated the analysis as follows:

> Section 96 is directed at transfers by insolvent persons for a consideration that is materially or significantly less than the fair market value of the property. In this context, the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It addresses situations in which the economic self-interest of the transferor is, or is likely to be, displaced by other non-economic considerations that result in the consideration for the transfer failing to reflect the fair market value of the transferred property.

44 I wholly agree with and adopt Mr. Justice Wilton-Siegel's approach.

45 I cannot find that the bankrupt controlled Mr. Coones or *vice versa*. Neither can I find that they operated with a common mind. Mr. Guyatt's explanation of the reason for paying Mr. Coones confirmed that the bankrupt did not approach the relationship with Mr. Coones to advance the bankrupt's self-interest in maximizing its value. The best he was willing to say was that he was operating on some notion of fairness that led him to pay Mr. Coones more than he was making himself. Mr. Coones' counsel submitted that this is not uncommon when a business is failing. Employees get paid before equity holders. That is generally true but only if the employees are necessary to generate revenue. If a business is failing, one expects it to cut costs that do not contribute to its ability to produce new revenue to survive. This is all hypothetical as there was no evidence on this point.

46 I do not know if Mr. Guyatt or Mr. Coones did a deal because they were friends or if something else was afoot. I do not believe that either Mr. Guyatt or Mr. Coones chose to favour the court with the details of their actual relationship. Apart from reliance on their friendship, the trustee's arguments to support the finding of a non-arm's length relationship essentially turn on the same facts that underlie the finding that the agreement between the parties was a transfer at undervalue. Among other things, the trustee relies on the lack of evidence that Mr. Coones actually did anything of value; that he was paid more than Mr. Guyatt; and that payments continued while the bankrupt was already insolvent, to support a finding that they dealt on a non-arm's length basis.

47 The *BIA* allows for the possibility that transfers at undervalue can occur between parties who deal at arm's length. If a finding that parties are not at arm's length is be made based upon the same facts that supported the finding of a transfer at undervalue, there is a risk of depriving the concept of arm's length dealings of any independent content. The finding of a transfer at undervalue would answer both questions.

48 However, in this case, the finding of a transfer at undervalue is essentially an inference drawn from the surrounding facts. There was no valuation exercise as one might normally expect. Many of the same facts that led me to infer that there was no value provided by Mr. Coones or his corporation prevent me from concluding that the bankrupt entered into its agreement with the corporation while acting under normal commercial incentives. I do not think that I am creating a circularity by finding that some of the same facts can lead to two different inferences. Nor am I depriving the arm's length relationship issue of content. I am not finding that there was a non-arm's length relationship because the parties entered into a transfer at undervalue. Rather, with full focus on each question independently, looking at the totality of the evidence concerning the relationship, I cannot find that a company that agrees to pay someone more than it pays its owner, for doing nothing, and keeps paying that person until it is in the very last throes of a fatal insolvency was dealing with that person at arm's length. While the court does not know the full facts of the relationship between the bankrupt and Mr. Coones and never will, it is clear that there were other incentives at play that deprived their relationship of normal commercial imperatives like maximizing one's own value and even preserving one's own going concern. As such, I find that they were not dealing at arm's length.

49 On these findings alone, all payments made by the bankrupt to Mr. Coones' company for the one year prior to the date of the initial bankruptcy event, that is, from and after March 27, 2014, fall within s. 96 (1)(b)(i) of the *BIA*.

(c) Payments Made from November 18, 2013 to March 26, 2014.

50 As discussed at the outset, the trustee can look back for up to five years prior to the date of the initial bankruptcy event if it proves that the bankrupt was or became insolvent at the time that the transfers at undervalue were made and that the transfers were made with the intention to defraud, defeat, or delay a creditor.

51 The trustee does not seek to go back beyond November 18, 2013 as the earliest date that it asserts the bankrupt was insolvent as I have accepted above. That leaves the issue of the bankrupt's intention. In *Juhasz*, at para. 54 of his decision, Wilton-Siegel J. found that the section requires the trustee to prove that the prohibited intention was among the bankrupt's intentions. Section 96 does not require the trustee to prove that the bankrupt's only or even that its primary intention was to defraud, defeat, or delay its creditors. To that I would add that the section speaks to the intent to defraud, defeat, or delay "a creditor." It is not necessary for the trustee to prove that the bankrupt was engaged in a scheme to defeat its creditors generally or as a group.

52 Here it is clear and undisputed that after November 18, 2013, the bankrupt was engaged in an effort to defraud and delay HSBC from learning that the bankrupt was insolvent and borrowing from a different lender. The question then is whether the payments to Mr. Coones' corporation that were made while the bankrupt was actively trying to defraud and delay HSBC, can be said to have been made with the same intention.

53 The law recognizes that it is nearly impossible to prove another person's actual subjective intention. The trustee therefore relies on an analysis of the traditional "badges of fraud" that, at common law, can be accessed to establish a presumption of intention.

54 In *Purcaru v. Seliverstova*, 2016 ONCA 610 (Ont. C.A.) (CanLII), at para. 5, Miller J.A. wrote for the Court of Appeal:

> If a challenger raises evidence of one or more 'badges of fraud' that can give rise to an inference of an intent to defraud, the evidential burden then falls on those defending the transaction to adduce evidence showing the absence of fraudulent intent.

55 In *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635 (Ont. S.C.J. [Commercial List]), Brown J.A. listed the following as among the badges of fraud that can be accessed for these purposes:

i. The transfer was made to a non-arm's length person;

ii. The transferor was insolvent at the time of the transfer; and

iii. The consideration for the transfer was grossly inadequate.

56 The trustee relies on additional facts whose adequacy as badges of fraud are challenged by Mr. Coones. However, it does not need to go beyond the foregoing three badges of fraud which I have already found as facts above.

57 Upon the trustee proving that the payments made to Mr. Coones' corporation were accompanied by badges of fraud, the court will presume that the bankrupt intended to defraud, defeat, or delay a creditor unless the responding party proves that the bankrupt did not have such intent. Mr. Coones submitted that the payments were made in the ordinary course as part of his consulting agreement to which the bankrupt had agreed in April, 2012, some 18 months before it became insolvent. Would that there was evidence of *bona fide* value flowing from Mr. Coones or his company to the bankrupt even at April, 2012, this argument might have had more weight. Having already found that the bankrupt was not operating with a commercial mind in dealing with Mr. Coones, continuing such operations when insolvent cannot

be said to be payments in the ordinary course that might in other circumstances be sufficient to rebut a presumption of fraudulent intent. While a solvent company may be entitled to make payments for non-commercial or uneconomic motivations, making those payments when insolvent, for no consideration, and while actively defrauding one's principal lender, cannot be seen to be acts in the ordinary course of business. The responding parties have not rebutted the presumption of fraudulent intent.

Outcome

58 As a result of the foregoing, the court orders 1219172 Ontario Inc. and its privy Brian Coones to pay to the estate of the bankrupt $159,330 under s. 96 (1) of the BIA.

59 The trustee may deliver up to five pages of costs submissions by March 17, 2017. The respondents may deliver up to five pages in response by March 31, 2017. Both shall include costs outlines no matter what position they take. Both may also include any relevant offers to settle. All documents shall be delivered in searchable PDF attachments to an email to my Assistant. No cases or statutory materials are to be provided. References to cases and statutory material, if any, shall be by hyperlink to CanLII or another online service embedded in the submissions.

Motion granted.

Footnotes

1 Under clause (e) of the definition of *Initial Bankruptcy Event* in s. 2 of the BIA, the receivership was "the application in respect of which a bankruptcy order is made" and a receivership is not an application of the type to which clause (d) of the definition apples.

2018 ONSC 1101
Ontario Superior Court of Justice

National Telecommunications v. Stalt

2018 CarswellOnt 5360, 2018 ONSC 1101, 291 A.C.W.S. (3d) 24, 59 C.B.R. (6th) 263

IN THE MATTER OF THE BANKRUPTCY OF NATIONAL TELECOMMUNICATIONS INC. OF THE TOWN OF VAUGHAN, IN THE PROVINCE OF ONTARIO

NATIONAL TELECOMMUNICATIONS INC. OF THE TOWN OF VAUGHN IN THE PROVINCE OF ONTARIO (Applicant) and STALT TELCOM CONSULTING INC. AND COSIMO STALTERI (Respondents)

L.A. Pattillo J.

Heard: February 13, 2018
Judgment: April 6, 2018
Docket: 31-2014067

Counsel: James Clark, for Applicant
Michael Farace, for Respondents

***L.A. Pattillo J.*:**

Introduction

1 This is a motion by Deloitte Restructuring Inc. ("Deloitte"), in its capacity as Trustee of the Estate of National Telecommunication Inc. ("NTI"), a bankrupt, for declaration pursuant to s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*") that certain transactions between NTI and Stalt Telcom Consulting Inc. ("Stalt Telcom") in late 2013 and early 2014 were transfers at undervalue and an order that the Respondents, Stalt Telcom and its privy, Cosimo Stalteri, pay the Estate the sum of $334,841.

Background

2 By order dated April 9, 2015, Deloitte was appointed as Receiver of NTI. By further order dated June 30, 2015, Deloitte was authorized, among other things, to file an assignment in bankruptcy by and on behalf of NTI. Subsequently, on July 10, 2015, NTI was assigned into bankruptcy and Deloitte was appointed Trustee.

3 NTI is an Ontario corporation which operated as a re-seller of data communications equipment from property located in Vaughan, Ontario. NTI's sole director and principal was Nelson Guyatt ("Guyatt"). NTI's principal banker and first secured creditor was HSBC Bank Canada ("HSBC") and, at least since the fall of 2013, NTI was required to report its financial information to HSBC on a monthly basis. The Trustee found the books and records of NTI to be incomplete, inaccurate and containing material misstatements.

4 Stalt Telcom is an Ontario corporation which was incorporated on November 14, 2013. It was incorporated in order to help out NTI. Stalt Telcom's registered head office is the home address of the parents of the Respondent Cosimo Stalteri ("Cosimo"). Franco Staltari ("Franco"), Cosimo's 22 year-old son, is the sole officer, director and shareholder. Stalt Telcom never had any inventory or equipment.

5 As part of its investigation into the affairs of NTI, the Trustee noticed that NTI received two separate payments from Stalt Telcom on November 18, 2013, and January 31, 2014 respectively, totaling $497,000.00. Further, following the payments, NTI made a number of payments to Stalt Telcom in the period immediately preceding the receivership totaling $1,055,581.00. Subsequently, Stalt Telcom advised that on December 13, 2013 it also advanced $223,740.00 on NTI's behalf to Telogiks ULC, pursuant to the direction of Guyatt. The following sets out the amounts received directly or indirectly by NTI from Stalt Telcom and the monies paid by NTI to Stalt Telcom:

DATE	To: NTI	To: Stalt Telcom	Total Consideration Received by Stalt Telcom
18-Nov-13	$200,000.00		
9-Dec-13		$203,390.00	
27-Jan-14		$54,955.00	
—			
	$200,000.00	**$258,345.00**	**$58,345.00**
—			
13-Dec-13	$223,740.00		
27-Jan-14		$50,000.00	
29-Jan-14		$125,000.00	
24-Feb-14		$7,275.00	
5-May-14		$145,000.00	
—			
	$223,740.00	**$327,275.00**	**$103,535.00**
—			
31-Jan-14	$297,000.00		
5-May-14		$150,000.00	
17-Oct-14		$111,871.00	
4-Nov-14		$208,090.00	
—			
	$297,000.00	**$469,961.00**	**$172,961.00**
—			
TOTAL	**$720,740.00**	**$1,055,581.00**	**$334,841.00**

6 Other than the cancelled cheques themselves and NTI's books and records, there is no documentation from either NTI or Stalt Telcom to explain the reason for the payments and their terms other than an email from Elston Richardson ("Richardson"), Stalt Telcom's accountant to Guyatt dated December 10, 2013 asking "for invoices for funds paid out and funds received from Stalt Telecom", and a reply email enclosing an NTI invoice to Stalt Telcom dated November 18, 2013 for 1 "polycom order" for $176,991.15 and HST of $23,008.85 for a total of $200,000.00. Also on December 10, 2013, Guyatt responded to Richardson's email stating that he'd paid the same back, "plus $3000k commissions". The email concludes: "Will have another invoice this week for a quick turn around."

7 The Trustee examined Guyatt, Franco, Cosimo and Richardson concerning the payments.

8 Guyatt described NTI's dealings with Stalt Telcom as follows: "Basically, if you are asking what the premise of Stalt was for NTI, it would be to bridge a deal where, if I didn't have the funds, he would help out. I would pay it back, and he would make a little bit of money, and I would make a little bit of money." Guyatt agreed that effectively, NTI was borrowing the money from Stalt and paying it back "with whatever interest or money we worked out." Guyatt said NTI borrowed from Stalt when it had no room on its HSBC line of credit.

9 Guyatt went on to say that it wasn't like he was borrowing money. Rather he described it as a payable and a receivable. He would borrow the money from Stalt and then create an invoice for it which would then be added to NTI's list of receivables.

10 NTI's books and records indicate that when it received the two payments from Stalt Telcom, it created an account receivable from Stalt Telcom for the amount received. NTI then credited sales and HST payable, creating the appearance that NTI sold inventory and was paid for the sale, including collecting HST. Conversely, when NTI paid Stalt Telcom, it entered an "account payable". The journal entry debited "NTI Telecom equipment purchased" and "HST paid" creating the appearance that NTI purchased inventory and then paid the invoice and HST.

11 Franco was examined by counsel for the Trustee on October 21, 2015. Prior to the examination, he met with Cosimo and Richardson to prepare and was given some documentation including copies of some cheques to take to the examination. He testified that the payments from Stalt Telcom were loans with interest at 2% per month. He produced a breakdown of the loans with interest. It was clear from his testimony that he knew very little about the transactions.

12 Cosimo was examined on February 26, 2016. He testified that Stalt Telcom was incorporated to loan money and that was its sole business. While his son was the sole officer, director and shareholder of Stalt Telcom, he described him as inexperienced. He said he was the one who identified investment opportunities, arranged for payments of investment monies and received cheques for profits on the investments. The money NTI paid back was paid to him. He agreed that the payments to NTI were straight loans at, he thought, about 20% interest. It was supposed to be paid back within six months. The only documentation was the cheques.

13 The Trustee commenced this motion by Notice of Motion dated January 10, 2017. In support, the Trustee filed the affidavit of Paul Casey ("Casey"), a Senior Vice-President of Deloitte, and the person having carriage of both the receivership and the bankruptcy of NTI. Casey's affidavit sets out the background, the transactions and the results of the examinations of Franco, Cosimo and Guyatt. He referred to the transactions as "loans" and set out in detail how NTI accounted for the transactions in its books and records.

14 In response to the motion, Cosimo filed an affidavit sworn February 24, 2017. In the affidavit, Cosimo recants that part of his testimony given during his February 26, 2016 examination where he agreed that the transactions between Stalt Telcom and NTI were loans. He said that he was never advised of his right to have a lawyer present at his examination and was under the impression that he was attending the examination to assist with the bankruptcy proceedings of NTI. He stated he didn't expect "to be compelled to respond to scrutiny surrounding the transactions between Stalt Telecom and NTI." He also said that the term "loan" was never defined by counsel for the Trustee and that he was not certain what was in the Trustee's counsel's mind when he referred to the term "loan" throughout the examination. He also states that counsel's questions concerning interest rates were "hypothetical scenarios" without reference to any specific advance. He further states that he feels that Franco's evidence regarding interest rates is not accurate given "admissions that he had no knowledge of the investments."

15 After taking issue with the Trustee's characterization of the transactions as loans, Cosimo states that the monies advanced by Stalt Telcom to NTI were investments in a joint venture and any monies paid to Stalt Telcom were profits arising, payable to Stalt Telcom as a joint venture partner.

16 On August 12, 2017, Richardson swore an affidavit to "assist the Court to understand the nature of the relationship between Stalt Telecom and the bankrupt, National Telecommunications Inc." Richardson deposes that he was present when Guyatt and Cosimo met in October 2013 to discuss investing in the purchase of telecommunications equipment together. It was agreed that Cosimo would incorporate a sole-purpose corporation for the purpose of entering into joint venture investments with NTI for the purchase of telecommunications equipment. Guyatt and Cosimo agreed to apportion the profits for each deal on a 50/50 basis or on a percentage of profits basis.

Position of the Parties

17 The Trustee submits that the transactions between NTI and Stalt Telcom in late 2013 and early 2014 were transactions at undervalue within the meaning of s. 2 of the *BIA* to the extent of the excess monies received by Stalt Telcom over and above the monies paid by Stalt Telcom to NTI or on its behalf. The Trustee further submits that

NTI and Stalt Telcom were not dealing at arm's-length and that at the time of the transactions, NTI was insolvent and intended to defraud, defeat or delay its creditors. Accordingly, pursuant to s. 96(1) (b)(ii) of the *BIA*, all of the excess monies received by Stalt Telcom ($334,841) must be paid to the Estate. Finally, the Trustee submits that Cosimo is a person privy to the transfer and is also liable under s.96 of the *BIA* for the payment of such monies.

18 Stalt Telcom and Cosimo submit that the transactions were not at undervalue. Rather they submit the evidence establishes that the monies received by Stalt Telcom represented its share of the joint venture profits. Further, they submit that at all material times, Stalt Telcom and NTI were dealing at arms-length. Lastly, they submit that even if they were not dealing at arm's-length, that NTI was solvent at the time of the transactions and there was no intention to defraud, defeat or delay a creditor.

Transfers at Undervalue

19 Section 96(1) of the *BIA* provides that a court may declare that a transfer undervalue is void and order that a party to the transfer or any other person who is privy to the transfer pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor if

(a) the party was dealing at arm's length with the debtor and

i. the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy;

ii. the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

iii. the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

i. the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

ii. the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

The Issues

20 The following issues are raised by the parties:

1. Were the transfers at undervalue and if so, for how much;

2. Were NTI and Stalt Telcom acting at arm's-length;

3. What is the date of the initial bankruptcy event; and

4. Was Cosimo a person who is privy to the transfer pursuant to s. 96 of the *BIA*?

Discussion

1) Transfer At Undervalue

21 Section 2 of the *BIA* defines "transfer at undervalue" to mean a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

22 In this case, there is no dispute that the consideration received by the debtor (NTI) was the three payments by Stalt Telcom to NTI or on its behalf totaling $720,740 and the fair market value of all the payments from NTI to Stalt Telcom was $1,055,581.

23 Section 96(2) of the *BIA* provides:

> 96(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

24 The Trustee has provided evidence which I accept that in its opinion, the fair market value of the property Stalt Telcom provided to NTI was $720,740, the sum of the three amounts advanced by Stalt Telcom on November 18, 2013, December 13, 2013 and January 31, 2014 and the value of the actual consideration given by NTI to Stalt Telcom was $1,055,581, the total of all the payments.

25 Stalt Telcom and Cosimo submit that their evidence that the amounts paid by Stalt Telcom to NTI were an investment in a joint venture and the monies received back from NTI was Stalt Telcom's share of the profits in the joint venture constitute the "evidence to the contrary" referred to in s. 96(2) of the *BIA* such that there was no transfer at undervalue.

26 I do not accept the evidence of Cosimo and Richardson that the transactions were a joint venture and the monies Stalt Telcom received represented a share of profits. The Respondents have produced no agreements or other documents that confirm such an agreement. The only evidence to that effect is the evidence of Cosimo and Richardson which is inconsistent and not credible when viewed against the other evidence.

27 The evidence of the Respondents concerning the nature of the transactions in issue started with Franco testifying on his examination that the transactions were a loan at 2% interest. I accept that Franco was not very experienced or familiar with the transactions but he was briefed on them shortly before the examination by both his Dad and Richardson who were familiar with them.

28 Next followed Cosimo's evidence confirming that it was a loan for six months but with an interest rate "of about 20%". Cosimo's evidence that it was a loan is consistent with Franco's which makes sense given Cosimo (along with Richardson) briefed his son on the transactions in advance of his examination by the Trustee. Although there are inconsistencies in the terms, both father and son agreed they were loans.

29 Following Cosimo's examination, the Trustee wrote a letter to him dated May 12, 2016 advising that it was aware of two loans from Stalt Telcom to NTI and seven payments from NTI to Stalt Telcom and that if he disagreed or had any further information concerning his business dealings with NTI, he should advise the Trustee forthwith. In response, Cosimo sent a letter dated May 24, 2016, drafted by Richardson, which advised of an additional loan on December 13, 2013 made on behalf of NTI and paid to Telogiks ULC on the direction of Guyatt. The letter enclosed "a listing to assist in reconciling the loans/investments and repayments."

30 The reasons later advanced by Cosimo in his attempt to resile from the transactions being loans lack any credibility. He received the same Notice of Examination as Franco did and was aware it related to the affairs of NTI. According to him, the transactions in issue were the only ones Stalt Telcom did with NTI. To say he didn't expect that he'd be compelled to answer questions about the transactions defies credibility. Further, to say, as he did, that he wasn't certain what was in

the Trustee's counsel's mind when he used the term "loan" during the examination and that when he used the term "loan" he was referring to monies advanced in the form of an investment also completely defies credibility, particularly given the evidence that Stalt Telcom had previously lent money to another party. Nor does he attempt to explain his letter of May 24, 2016, referred to above, where, well after his examination, he is still referring to the transactions as loans.

31 I also do not accept Richardson's evidence that Cosimo and Guyatt agreed to enter into joint venture investments. If his evidence is correct, he clearly misled Franco as to the nature of the transactions when he prepared him for his examination. More importantly, he does not explain his involvement in drafting the letter of May 24, 2016 referring to the transactions as loans or his email to Guyatt on December 10, 2013, shortly after the first transaction which states "Can I trouble you for invoices for funds paid out and funds received from Stalt Telecom" and the reply received from Guyatt some eight minutes later beginning: "Dear Customer" and enclosing an invoice from NTI to Stalt Telcom dated November 18, 2013 for $200,000, inclusive of GST. That invoice is the complete antitheses of a joint-venture investment in NTI for the purchase of third party equipment.

32 For the above reasons, therefore, there is no evidence to the contrary to dislodge the Trustee's opinion. Accordingly, the difference between the value of the consideration received by NTI ($720,740) and the value of the consideration given by NTI ($1,055,581) is $334,841.00.

2) Arm's-Length

33 There is no evidence that NTI and Stalt Telcom or its principles are related to each other and the parties agree that the two companies are not "related persons" within the definitions of related persons in s. 4 of the *BIA*.

34 Section 4(4) of the *BIA* provides that whether persons not related to one another were at a particular time dealing with each other at arm's-length is a question of fact.

35 The Trustee submits that NTI and Stalt Telcom were not dealing with each other at arm's-length at the time of the transactions in issue. The Trustee points to the suspicious nature of the transactions including the large returns to Stalt Telcom, the lack of a credible or consistent explanation for the transactions, and the absence of any documentation or security in respect of the transactions. The Trustee submits that the transactions have none of the indicia of transactions done between parties who are dealing at arm's-length.

36 Stalt Telcom submits that it was operating at arm's-length from NTI in respect of the transactions. It relies on Cosimo's evidence that Stalt Telcom operated entirely independently from NTI and had no prior dealings with it. It maintains based on the evidence of Stalt and Richardson that Stalt Telcom was engaged in a joint venture with NTI.

37 In an earlier proceeding involving NTI styled *National Telecommunications Inc., Re*, 2017 ONSC 1475 (Ont. S.C.J. [Commercial List]), Myers J. held that the mere fact that a transfer was made for less than fair market value consideration was not sufficient on its own to support a finding of non-arm's-length dealing. Rather, in reaching such conclusion, the court must look at the totality of the evidence concerning the relationship between the parties and "normal commercial imperatives" (see para. 48). The indicia of a commercial transaction have also been described as "ordinary commercial incentives".

38 The approach of considering the degree to which the transaction departs from what would otherwise be considered ordinary commercial incentives is similar to the approach adopted by Wilton-Siegel J. in *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781 (Ont. S.C.J.) at paras. 41 and 42:

> 41 Section 96 is directed at transfers by insolvent persons for a consideration that is materially or significantly less than the fair market value of the property. In this context, the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It addresses situations in which the economic self-interest of the transferor is, or is

likely to be, displaced by other non-economic considerations that result in the consideration for the transfer failing to reflect the fair market value of the transferred property.

42 While I do not think that the existence of a partnership or joint venture relationship is sufficient on its own to establish a non-arm's length status, I consider that the absence of any economic interest of a transferor at the point of termination of a business relationship, together with evidence of accommodation of the wishes of the transferee, can support a finding that there was a non-arm's length relationship. [Emphasis Added.]

39 The idea that arm's-length dealing should display certain characteristics that conform with generally-accepted commercial incentives has been upheld by the Supreme Court of Canada. In *McLarty v. R.*, 2008 SCC 26 (S.C.C.), Rothstein J. explained,

43 It has long been established that when parties are not dealing at arm's-length, there is no assurance that the transaction "will reflect ordinary commercial dealing between parties acting in their separate interests" (*Swiss Bank Corp. v. Minister of National Revenue* (1972), [1974] S.C.R. 1144 (S.C.C.), at p. 1152). The provisions of the Income Tax Act pertaining to parties not dealing at arm's length are intended to preclude artificial transactions from conferring tax benefits on one or more of the parties. Where the parties are found not to be dealing at arm's length, the taxpayer who has made an acquisition is deemed to have made the acquisition at fair market value regardless of whether the amount paid was in excess of fair market value. [Emphasis Added.]

40 Various decisions of the Tax Court of Canada dealing with the issue of arm's-length transactions provide additional support for the position that transactions must display a commercially legitimate character in order to be considered the product of arm's-length dealing. In *Crawford & Co. v. Minister of National Revenue* [1999 CarswellNat 3185 (T.C.C. [Employment Insurance])], 1999 CanLII 352, Porter, D.J.T.C.C. held,

43 In the end it comes down to those traders, strangers, in the marketplace. The question that should be asked is whether the same kind of independence of thought and purpose, the same kind of adverse economic interest and same kind of bona fide negotiating has permeated the dealings in question, as might be expected to be found in that marketplace situation. If on the whole of the evidence that is the type of dealing or transaction that has taken place then the Court can conclude that the dealing was at arm's length. If any of that was missing then the converse would apply.

41 Based on the above, therefore, I conclude that the finding of fact mandated by s. 4(4) of the *BIA* requires a determination, based on the totality of the evidence, of whether the transaction involved generally accepted commercial incentives such as bargaining and negotiation in an adversarial format and the maximizing of a party's economic self-interest. In the absence of any such indicia, the inference that arises is that the parties were not dealing at arm's-length.

42 In the present case, there is no evidence that the three transactions in issue displayed any of the characteristics of ordinary commercial incentives, regardless of whether the transactions were loans or an investment in a joint venture. In fact, the evidence in respect of the transactions is just the opposite. The evidence of the participants to the transactions provides different versions of what took place, none of which match the accounting or establish any form of bargaining or negotiation.

43 If the transactions were loans, there is no evidence of what would normally occur between two parties engaged in a commercial lending transaction. While there is evidence of a meeting between Guyatt and Cosimo, there is no evidence of any negotiation concerning interest rates, term, security or repayment. Nor do the amounts paid by NTI to Stalt Telcom over and above repayment of the monies provided bear any resemblance to a commercial lending rate or otherwise. They appear to be random payments.

44 If, as the Respondents submit, the monies paid by Stalt Telcom were investments in a joint venture, there is also no evidence that the parties were engaged in a transaction involving normal commercial incentives. There is no evidence

documenting the agreement, what the profit was NTI made on the monies provided by Stalt Telcom and what basis was for the monies paid by NTI to Stalt Telcom over and above the money provided.

45 The evidence of the invoice from NTI and the emails between NTI and Richardson in respect of the first transaction together with the significant amount of the overpayment by NTI to Stalt Telcom without any credible explanation to explain it is sufficient, in my view, to establish that there was no generally accepted commercial basis for the transactions.

46 As a result, I find as a fact that NTI and Stalt Telcom were not dealing at arm's-length in respect of the three payments to NTI by Stalt Telcom on November 18, 2013, December 13, 2013 and January 31, 2014 and the subsequent payments to Stalt Telcom by NTI between December 9, 2013 and November 4, 2014.

3) Initial Bankruptcy Event

47 In the earlier NTI proceeding noted above, Myers J. concluded, based on the date of the issuance of the notice of application for receivership by HSBC, that the initial bankruptcy event as defined in s. 2 of the *BIA* for NTI was March 26, 2015. The Respondents take no issue with that finding.

48 Accordingly, the date of the initial bankruptcy event is March 26, 2015.

4) Privy

49 Section 96(3) of the *BIA* provides that a "person who is privy" is a person who is not dealing at arm's-length with a party to a transfer and, by reason of the transfer, receives a benefit directly or indirectly.

50 Sections 4(5) of the *BIA* provide, in part, that persons who are related to each other are deemed not to deal with each other at arm's-length. Section 4(2) (b) provides in part:

> 4(2) For the purposes of this Act, persons are related to each other and are related persons if they are
>
> (a) individuals connected by blood relationship, marriage, common-law partnership or adoption;
>
> (b) an entity and
>
> i. a person who controls the entity, if it is controlled by one person,
>
> ii. a person who is a member of a related group that controls the entity, or
>
> iii. any person connected in the manner set out in paragraph (a) to a person described in subparagraphs (i) or (ii);

51 Pursuant to ss. 4(2)(a) and 4(2)(b)(iii) of the *BIA*, therefore, Cosimo is related to Stalt Telcom and pursuant to s. 4(5) is deemed to not deal with it at arm's-length.

52 Cosimo's evidence is that, although Stalt Telcom was controlled by Franco, he was in complete control of the corporation and benefited from the transactions with NTI. Additionally, he caused Stalt Telcom and Franco, its sole shareholder to benefit from the transactions too.

53 Accordingly, Cosimo is "a person who is privy" to the transfers within the meaning of s. 96(3) of the *BIA*.

Conclusion

54 In light of my finding that NTI and Stalt Telcom were not acting at arm's-length in respect of the three transactions in issue, s. 96 (1) (b) of the *BIA* is engaged.

55 Section 96 (1)(b)(ii) of the *BIA* encompasses transactions that occurred five years prior to the date of the initial bankruptcy event, which I have found is March 26, 2015, if NTI was insolvent at the time of the transactions or it intended to defraud, defeat or delay a creditor. In my view, the evidence establishes all of the elements required to bring the impugned transactions within s. 96 (1)(b)(ii).

56 All of the transactions in issue took place within five years prior to March 26, 2015. Further, the Trustee's evidence, which I accept, is that in its view, NTI was insolvent on or before November 18, 2013, the date of the first transaction. The Respondents submit, based primarily on NTI's financial statements for the years ended October 31, 2011, 2012 and 2013, that it was not insolvent. However, the statements were unaudited and as the Trustee stated, NTI's books and records were incomplete, inaccurate and contained material misstatements.

57 Finally, based on Guyatt's evidence as previously referred to herein, the evidence of the invoice by NTI to Stalt Telcom in respect of the initial payment from Stalt Telcom, the related email correspondence and NTI's recording of the transaction in its books and records, I am satisfied that, by entering into the transactions, NTI intended to defraud or delay HSBC Bank, its major creditor, by falsifying its receivables and payables in order to mislead HSBC Bank, who was monitoring NTI's financial position closely at the time.

58 Accordingly, pursuant to s. 96 of the *BIA*, the payments by NTI to Stalt Telcom between December 9, 2013 and November 4, 2014 to the extent that they are more than the amounts received by NTI from Stalt Telcom are void as being transfers at undervalue. Stalt Telcom and Cosimo Stalt, who is privy to the transfers, are ordered to pay to the Trustee for the Estate of NTI the sum of $334,841.00 which is the difference between the monies paid by Stalt Telcom to or on behalf of NTI and the monies paid by NTI to Stalt Telcom.

59 At the conclusion of the argument, counsel advised that their costs submissions should await my decision as there were offers to settle in play. Accordingly, in the absence of an agreement on costs, counsel should arrange a 9:30 a.m. scheduling appointment before me to set a date for cost submissions.

Motion granted.

1988 CarswellOnt 184
Ontario Supreme Court

Nuove Ceramiche Ricchetti S.p.A. v. Mastrogiovanni

1988 CarswellOnt 184, [1988] O.J. No. 2569, 76 C.B.R. (N.S.) 310

NUOVE CERAMICHE RICCHETTI S.p.A. v. MASTROGIOVANNI and CLASSIC TILE DISTRIBUTORS LTD.

Trainor J.

Judgment: November 23, 1988
Docket: Toronto No. 23013/84

Counsel: *E. Van Woudenberg* , for plaintiff.
B. Brucker , for defendants.

Trainor J. **(orally):**

1 This action is for a declaration that the transfer of the assets of Classic Ceramic Tiles Importing and Distributing Ltd. ("Ceramic"), a company owned and controlled by Nicola Mastrogiovanni, in April 1983 to another company owned and controlled by him, the defendant Classic Tile Distributors Ltd. ("Tile") is null and void as against the plaintiff because it was a fraudulent conveyance.

2 In addition, the plaintiff claims damages for conspiracy, fraud and punitive damages.

3 The plaintiff is an Italian company. It sold tiles to Ceramic and on 27th October 1983 obtained a consent judgment for $100,000 plus interest and costs against that company. The claim made by the plaintiff against Ceramic was defended up to the date of the consent judgment on 27th October 1983. The basis of the defence was that the tiles were defective.

4 Between the time of the transfer of assets on 4th April 1983 and the judgment in October 1983, the fact of the transfer was not disclosed by Ceramic or its principal, Mastrogiovanni, at the pre-trial that was held in the action, nor was it disclosed when the consent judgment was negotiated.

5 The principal of Ceramic failed to attend on examination as a judgment debtor. When a subsequent appointment was taken out he did attend but was not prepared to answer crucial questions. Rather than answer, he referred those questions to his accountant, who was not in attendance at the time. Subsequently, on 4th June, the accountant was examined in aid of execution and details of the transfer of assets were obtained.

6 Prior to the judgment Tile was incorporated and, as disclosed in the evidence, all of the assets of Ceramic were transferred to Tile. The defendant Mastrogiovanni says that the transfer of assets was not made to defeat the plaintiff's claim but was effected because Ceramic's reputation in Italy, with other tile suppliers, was ruined as a result of the dispute with respect to the defective tiles.

7 The defendant Mastrogiovanni testified that he was unaware of defects until he received customer complaints. He says he had to make good on the complaints by paying damages. He further testified that he sold all of the tiles but they had to be sold at reduced prices because of the complaints. He said that he sold the remaining tiles to cover his shipping and customs duty costs that had been prepaid.

8 The defence did not produce any invoices, documents or witnesses to support this evidence. On the other hand, in cross-examination, Mr. Mastrogiovanni agrees that to date the plaintiff has not been paid any money on account, either of the original indebtedness or on the judgment that was issued.

9 At the time of the transfer Ceramic owed the Royal Bank approximately $140,000 and that debt was secured by a number of securities. In addition, cash and personal assets of Mr. Mastrogiovanni and his wife were pledged with the bank. The total security held by the bank was far in excess of the debt. In basic terms, what transpired was that Mr. Mastrogiovanni, the controlling mind of Ceramic, without assistance of a solicitor, simply took the book value of Ceramic's chattels and inventory from that company's financial statements and at that value transferred those assets to Tile. Tile had been recently incorporated for the purpose of receiving the transfer. Tile, in turn, assumed the then bank debts.

10 Within a period of a few months the cash security held by the bank was dramatically increased, virtually doubled. Mr. Mastrogiovanni, without any supporting documents or witnesses, says this was accomplished because an aunt gave his wife a substantial sum of money that was pledged with the bank and, in addition, he received money from the sale of real estate he owned. He testified the bank received the mortgage payments from the real estate that he sold.

11 In the period from March 1983, the bank's security was augmented by the following cash securities: a $25,000 term deposit in March 1983, a $35,000 term deposit in May 1983, a further term deposit of $25,000 on 16th December 1983, a savings account pledge of some $22,000, assignment of the balance of a mortgage of $122,304, and lastly, a collateral mortgage on Mr. Mastrogiovanni's home of $60,000.

12 Shortly after the purported sale of assets, the new company moved to larger quarters a short distance away. Tile's first financial statement, dated February 1984, shows a bank debt of $300,000 and a substantial increase in the amount of inventory, over the inventory that had been held by Ceramic. The sale of assets by Ceramic had the effect of eliminating all of Ceramic's trade accounts payable. They totalled approximately $155,000 as of the date of the sale, and 90 per cent of this liability was the plaintiff's trade account.

13 The transfer allowed Mr. Mastrogiovanni, in effect, to carry on the same business as he had previously carried on at a new and improved location and without the burden of the accounts payable of Ceramic. The sale was made without invoking the mandatory provisions of the Bulk Sales Act.

14 A cursory examination of the financial statements and the bill of sale discloses that Ceramic's accounts receivable, during the years 1980 through 1983, ranged between a low of $30,000 and a high of approximately $81,000 as of 31st March 1983 year end. At the time of the sale to Tile there were no receivables. The bill of sale does not show accounts receivable as an asset being transferred from Ceramic to Tile, nor does it show any value for goodwill.

15 Ceramic was, at the time, an operating company. There is no evidence of pressure from the bank or any other creditor except the plaintiff. Mr. Mastrogiovanni and his accountant did not deal with the matters that I have just referred to in their evidence. The financial statements contain no explanation, as they should, of the unusual transactions, particularly with respect to the disappearance of accounts receivable.

16 Mr. Brucker, counsel for the defendant, on these facts, wisely conceded that the circumstances were suspicious and that he had an obligation to call evidence. His position is that I should believe Mr. Mastrogiovanni in that he did not intend to defeat, hinder or delay the plaintiff, but he merely wished to start afresh and be able to deal with suppliers in Italy where Ceramic's name had lost its good reputation.

17 The law on the subject of fraudulent conveyances is accurately stated by Mr. Justice Anderson in *Re Fancy* (1984), 46 O.R. (2d) 153, 51 C.B.R. (N.S.) 29, 8 D.L.R. (4th) 418 (S.C.) . The relevant sections of this legislation 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.

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and *bona fide* to a person not having at the time of the conveyance to him notice or knowledge of the intent set forth in that section.

4. Section 2 applies to every conveyance executed with the intent set forth in that section notwithstanding that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of *bona fides* and want of notice or knowledge on the part of the purchaser.

18 In *Re Fancy* , supra, Anderson J. said [p. 36]:

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 of 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.

19 The "badges of fraud" referred to by Mr. Justice Anderson are those set out in *Re Dougmoor Realty Hldg. Ltd.; Fisher v. Wilgorn Invt. Ltd.*, [1967] 1 O.R. 66, 10 C.B.R. (N.S.) 141, 59 D.L.R. (2d) 432 :

20 (1) secrecy

21 (2) generality of conveyance

22 (3) continuance in possession by debtor

23 (4) some benefit retained under the settlement to the settlor.

24 In this case, the badges that I have referred to specifically are present as well as others. The alter ego of both Ceramic and Tile, Mr. Mastrogiovanni, knew that the plaintiff's claim was proceeding to trial and yet he kept the transfer a secret even while consenting to judgment. The bill of sale was prepared without the aid of solicitors. It did not comply with the Bulk Sales Act and it, together with Ceramic's financial statements, fail to explain or account for the disappearance of the accounts receivable. There was no explanation given as to why a going concern was selling its assets at book value and without any amount disclosed for the value of goodwill.

25 Control of the assets following the transfer remained with Mr. Mastrogiovanni. He was able to carry on the same business on the same street under almost the same name. Even he confused the names during his testimony. As a consequence, not a day's work was lost nor a day's income and he was able to do this without the burden of the accounts payable that Ceramic had incurred. His explanation, unsupported by evidence that should have been readily available, if his explanation was true, bears little resemblance to reality.

26 The fact that he was able to raise substantial amounts of cash after the transaction had closed leads me to the irresistible inference that the money came from the collection of his receivables.

27 The use of the same street address by a company with virtually the identical name owned and operated by the same principal and carrying on the same business can hardly be said to accomplish the purpose of starting afresh and clearing one's name with its creditors. It is more consistent with keeping the goodwill of the old customers who did business with the previous company.

28 The defence argues that because the bank held security for its debt, the plaintiff has lost nothing. In my view, that contention is not supportable.

29 Firstly, receivables and goodwill should have been declared and they were not. Those assets would have been available to the plaintiff.

30 Secondly, the value of inventory is unrealistic for a going concern.

31 Thirdly, the bank manager of the Royal Bank, who held the security, was not called as a witness. I infer his evidence would not support the defence position. Bank security may or may not rank in priority to a trade creditor. There is nothing in the record to tell me that had the plaintiff seized inventory prior to the bank's securities crystallizing, the plaintiff would not have realized on its seizure.

32 The secret actions of the defendant's principal, Mr. Mastrogiovanni, deprived the plaintiff of any opportunity to attempt to recover its debt from the assets held by Ceramic. Mr. Mastrogiovanni, as I have said, was the alter ego of both companies. His unlawful actions benefited both Tile and Mr. Mastrogiovanni in his personal capacity. Conspiracy is simply an illegal contract.

33 In *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 145 D.L.R. (3d) 385 at 398 -99, 47 N.R. 191 , Estey J. said the following:

> 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.

34 In *T.L. Raymond Elec. (London) Ltd. v. Idylwild Home Ltd.* (1984), 7 C.L.R. 210 at 219 (Ont. H.C.) , Killeen L.J.S.C. said:

> What is clear beyond question, in the modern cases interpreting the Salomon principle is that fraudulent or flagrantly manipulative misconduct on the part of the key owner or owners of the "one-man" type of company will almost invariably lead to an attribution of civil liability against such persons where such misconduct causes financial loss to others: the veil will be pierced because justice and equity demands that such be done.

35 In *Lehndorff Can. Pension Properties Ltd. v. Davis & Co.* (1987), 10 B.C.L.R. (2d) 342, 39 C.C.L.T. 196 (S.C.) , the headnote reads as follows:

Upon authority, if a director acts within the scope of his authority and with good faith, the company is itself liable for any such breach of contract as it may commit, for the act of the director is the act of the company itself. If such director acts in bad faith or outside the scope of his authority, however, he may become personally liable in tort.

36 Mr. Mastrogiovanni, in his individual or personal capacity, caused Ceramic to unlawfully transfer its assets to Tile. He acted then in his individual capacity in that unlawful transfer and he, as well, acted as a director of Tile in the transaction. In doing so, he gave a benefit to himself and to Tile at the expense of the plaintiff.

37 The damage in conspiracy is the injury to the plaintiff, and in this case it is the amount of the debt.

38 I consider the case one of flagrant misconduct where Mr. Mastrogiovanni's secrecy and the circumstances of the transaction are sufficient to call for an award of penal damages. Mr. Mastrogiovanni's testimony did not enhance his position in this regard.

39 I have endorsed the record as follows:

For reasons given this day judgment is to issue against the defendant corporation in terms of paragraphs 9(a) and (b) of the Statement of Claim.

Judgment is to issue against Nicola Mastrogiovanni for

(1) $100,000 plus interest at 11% per annum from 4 April, 1983 to date.

(2) penal damages $10,000.

(3) Costs to the plaintiff against all defendants.

Application allowed.

At paras. 18-21

1995 CarswellOnt 312
Ontario Court of Justice (General Division)

Petrone v. Jones

1995 CarswellOnt 312, [1995] O.J. No. 1478, 33 C.B.R. (3d) 17, 55 A.C.W.S. (3d) 552

MICHAEL PETRONE, on behalf of himself and all other creditors of TIMOTHY JOSEPH JONES v. TIMOTHY JOSEPH JONES and CATHERINE SUSAN JONES

Wright J.

Heard: March 24, 1995
Judgment: May 19, 1995
Docket: Doc. Thunder Bay 5906-94

Counsel: *Douglas Shanks* , for plaintiff.
Daniel Newton , for defendants.

***Wright J.*:**

1 In this action the plaintiff claims, on behalf of himself and all other creditors of the defendant Timothy Joseph Jones, an order setting aide a conveyance whereby Timothy Joseph Jones conveyed property known as 153 Iris Crescent, Thunder Bay, Ontario to his wife, Catherine Susan Jones. The plaintiff moves for summary judgment. An order will go setting aside the said conveyance and declaring that Timothy Joseph Jones is the owner of a one-half interest in lot 60, plan 55M-481.

2 In the period December 1992-January 1993 the defendant, Timothy Joseph Jones, entered into business arrangements with the plaintiff, Michael Petrone. Amongst other things these arrangements involved Jones signing a promissory note for $27,000 in favour of Petrone and operating a delicatessen by the name of Healthy Lifestyle. During the next year Jones made payments on the promissory note and operated Healthy Lifestyle.

3 On April 12, 1994 the defendants consulted a solicitor concerning the transfer of Jones' property to protect it from any judgment obtained by Petrone. The solicitor pointed out to the defendant the nature of the *Fraudulent Conveyances Act* and explained why such a conveyance would contravene the Act. He explained that that Act would allow Petrone to take proceedings to set aside any such conveyance.

4 The defendants then acknowledged that the loan to Petrone would have to be paid back and discussed with their solicitor the transfer of property in anticipation of Jones leaving Healthy Lifestyle and embarking on a new business venture. The solicitor expressed the opinion that a rearrangement of property holdings prior to embarking on a new business venture might well protect that property in the event of difficulties being encountered in the future as a result of a new business venture.

5 Accordingly he prepared transfer number F044015 whereby the two defendants joined in to transfer, as joint tenants, their interest in 153 Iris Crescent (the matrimonial home) to the defendant Catherine Susan Jones. This was dated April 22, 1994.

6 On April 18, 1994 Jones resigned from Healthy Lifestyle. On the 27th of May, 1994 Petrone sued Timothy Jones on the promissory note. Judgment was ultimately obtained. This action was commenced on the 12th of July, 1994. The defendants delivered a statement of defence. The plaintiff has now moved for summary judgment under R.20.

7 The plaintiff relies upon s. 2 of the *Fraudulent Conveyances Act* , R.S.O. 1990, c. F.29.

8 Section 2 provides as follows:

> 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.

9 The plaintiff argues:

10 That the defendant Timothy Jones conveyed his only asset to his wife for no consideration, at a time when he owed the plaintiff money and with the expressed intention of hindering or delaying future creditors in the collection of their debts, accounts, etcetera. The plaintiff asks that the conveyance be set aside.

11 The defendant points to his intention as conveyed to the solicitor who drew up the conveyance. The defendant, Timothy Jones, submits that he had no intention of defeating, hindering, delaying or defrauding Petrone, that his expressed intention was to arrange his affairs in order to protect his property from the vicissitudes of any business venture he might enter into in the future.

12 The defendant submits that these transactions are not void as against the whole world. They are only void as against those persons whose claims it was his intention to defeat, hinder, delay, etcetera. The defendant submits that there must be a specific intent to defraud this creditor and not creditors in general. There having arisen no future creditors the conveyance should not be set aside.

13 The defendant submits that it is the transferor's intention at the time of the conveyance that is important and not his intention subsequently.

14 The defendant does not point to any authority which holds that a transaction entered into with the specific intent of defeating, hindering, delaying, etc., one creditor may be valid as against another creditor.

15 The defendant submits that the issue of intention is a factual one which must await the trial.

16 I do not agree.

17 On a motion fur summary judgment the court may, on a common sense basis, draw inferences from the evidence. Even where matters of credibility must be determined on conflicting evidence the court may take a "hard look" at the merits and decide if any conflict is more apparent than real. (*Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.) , at p. 238.)

18 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 .)

19 Even if we consider the direct evidence that the defendant had no intention of defeating, hindering, etcetera 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?

20 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.

21 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.

22 In *Re Optical Recording Laboratories Inc.* (1990), *(*sub nom. *Optical Recording Laboratories Inc. v. Digital Recording Corp.)* 1 O.R. (3d) 131 , at 139, the Court of Appeal quoted the following passage from Dunlop, *Creditor-Debtor Law in Canada* (Toronto: Carswell, 1981), at p. 513:

> Lord Mansfield concluded that the Common Law had always been strongly against fraud in every shape and that the Statute of Elizabeth [13 Elizabeth c. 5, the predecessor of the *Fraudulent Conveyances Act*] - '*cannot receive too liberal a construction, or be too much extended in suppression of fraud* .'

[Emphasis in original]

23 It is not too liberal a construction of the statute 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.

24 Order accordingly. I may be spoken to regarding costs.

Application granted.

2016 ONCA 610
Ontario Court of Appeal

Purcaru v. Seliverstova

2016 CarswellOnt 12336, 2016 ONCA 610, 269 A.C.W.S. (3d) 291, 39 C.B.R. (6th) 15, 80 R.F.L. (7th) 28

Felicia Purcaru (Applicant / Respondent) and Anna Seliverstova, Marina Seliverstova, Mircea Purcaru, Redina Inc., Daribo Consulting Inc., and Dan Purcaru (Respondents / Appellants)

Robert J. Sharpe, P. Lauwers, B.W. Miller JJ.A.

Heard: June 22, 2016
Judgment: August 4, 2016
Docket: CA C61335

Proceedings: affirming *Purcaru v. Seliverstova* (2015), 2015 ONSC 6679, 2015 CarswellOnt 16478, 69 R.F.L. (7th) 388, [2015] O.J. No. 5615, F.L. Myers J. (Ont. S.C.J.); additional reasons at *Purcaru v. Seliverstova* (2015), 69 R.F.L. (7th) 427, 2015 ONSC 7515, 2015 CarswellOnt 18199, F.L. Myers J. (Ont. S.C.J.)

Counsel: Gary S. Joseph, Kenneth Younie, for Appellants
Morris Cooper, for Respondent

***B.W. Miller J.A.*:**

Background

1 This appeal is from an order awarding relief to the respondent under provisions of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F-29. The respondent's ex-husband, Don Purcaru, and the appellant Marina Seliverstova, who had been in a relationship with Mr. Purcaru, were found to have acted in concert to convey property to Ms. Seliverstova with the intention of defeating Mr. Purcaru's creditors, chiefly the respondent.

2 Mr. Purcaru's financial obligations to the respondent were a consequence of the end of their marriage. The respondent applied in 2004 for an order for divorce and corollary relief. After a trial in 2009, Mr. Purcaru was ordered by Paisley J. to pay the respondent in excess of $1 million in arrears of spousal and child support and for equalization of net family property, in addition to on-gong child support and awards of costs.

3 In the current proceedings, the trial judge made an order voiding transfers of funds from Mr. Purcaru to Ms. Seliverstova that had enabled Ms. Seliverstova to purchase two residential condominium units in 2006 and 2008, one of which was purchased in the name of her daughter, the appellant Anna Seliverstova.

4 For the reasons set out below, I would dismiss the appeal. The appeal is largely an attack on the trial judge's determinations of credibility and factual findings related to the impugned transactions. The trial judge rejected much of Ms. Seliverstova's testimony as "a pack of lies", found her explanations for the impugned transactions to be "lacking of cogency and credibility", and found that she shared Mr. Purcaru's intention to defeat, hinder, delay or defraud his creditors. These determinations of credibility and factual findings were open to the trial judge, are entitled to deference, and there is no basis upon which this court could interfere with them. These findings are dispositive of most of the appellants' four grounds of appeal, which are addressed below.

Ground 1: The trial judge shifted the burden of proof to the appellants

5 The appellants argue that the trial judge erred by impermissibly shifting the burden of proof to them, requiring that they disprove the respondent's allegations. I do not accept this submission. The trial judge correctly stated the law with respect to burden of proof where there is an allegation of fraudulent conveyance. It is up to the challenger of a transaction to establish on a balance of probabilities that a conveyance was made with the intent to 'defeat, hinder, delay or defraud creditors or others', within the meaning of s. 2 of the *Fraudulent Conveyances Act*. Whether Mr. Purcaru had that intention is a question of fact, to be determined from the circumstances at the time of the transactions. If a challenger raises evidence of one or more 'badges of fraud' that can give rise to an inference of an intent to defraud, the evidential burden then falls on those defending the transaction to adduce evidence showing the absence of fraudulent intent (*Fancy, Re* (1984), 46 O.R. (2d) 153 (Ont. Bktcy.)), *Nuove Ceramiche Ricchetti S.p.A. v. Mastrogiovanni*, [1988] O.J. No. 2569 (Ont. H.C.), pp. 4, 5).

6 Among the badges of fraud identified by the trial judge in this case are: (1) the transactions between Mr. Purcaru and Ms. Seliverstova were not at arm's length, (2) the transactions were not only secretive, they were in violation of Mr. Purcaru's disclosure obligations under the *Family Law Rules*, and (3) the transactions were made without consideration.

7 The evidential burden then fell on Ms. Seliverstova to adduce evidence to show that the purpose of the transactions was not to defeat Mr. Purcaru's creditors. Both Ms. Seliverstova and Mr. Pucaru testified at trial, and their explanations were found 'to be lacking in cogency and credibility.' Ms. Seliverstova's explanation of the transactions — that funds transferred to her from Mr. Purcaru were repayments of significant unsecured and undocumented loans that she had previously made to Mr. Purcaru — was rejected because it was not supported by documentary evidence and ran contrary to the evidence of how Ms. Seliverstova otherwise conducted her financial affairs. The trial judge found that she was very careful with her funds, moving funds around to take advantage of modest improvements in interest rates, borrowing from credit cards with low introductory rates, and protecting her financial interest by registering a mortgage from her daughter when she purchased a residence in her daughter's name. He therefore found it incredible that someone who was so careful and cautious in all her financial dealings, would make large, unsecured, and undocumented loans. The trial judge found the documentary evidence proffered by Ms. Seliverstova to be incomplete and unpersuasive. He did not believe the account she gave as to the source of the funds that she used for the purchases of the two condominiums, including her evidence that funds that she had received from a bank account in Cyprus originated with her mother in Russia, rather than Mr. Pucaru. He concluded that she was acting as a conduit to put Mr. Pucaru's assets beyond the reach of the respondent.

8 In short, the trial judge found the transactions to have been fraudulent, based on inferences that he made from the factual record. As this court held in *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 ONCA 425 (Ont. C.A.), such findings are entitled to deference, and there is no basis upon which we could interfere with them. There was no reversal of the burden, as argued by the appellants, or requirement that they prove a negative. The trial judge found facts that supported an inference of fraud. The explanations provided by the appellants were simply not believable.

Ground 2: The trial judge erred by not assessing the intent at the time of the transactions

9 The appellants argue, rightly, that the requisite fraudulent intent is to be assessed at the time of the impugned transactions: *Business Development Bank of Canada v. Samarsky*, 2012 ONSC 3002 (Ont. S.C.J.), para. 22. They contend that the trial judge erred by attributing to the appellants knowledge, in 2006 and 2008, of the outcome of the family law proceedings between Mr. Purcaru and the respondent that culminated in the order of Paisley J. in 2009.

10 The appellants argue that until that order was made, neither Ms. Seliverstova nor Mr. Purcaru could have known that Mr. Purcaru would have such a substantial liability to the respondent. Therefore, in 2006 and 2008 when the condominiums were purchased, they could not have formed the intent to defeat the claims of the respondent.

11 I reject this argument for the reasons given by the trial judge, who found that 'once the applicant commenced her application for divorce and corollary relief, the applicant became a contingent creditor of Dan Purcaru with 100% likelihood of obtaining some award or settlement.' Additionally, the trial judge found, on the evidence, including Ms. Seliverstova's attendances in court during the proceedings, that Ms. Seliverstova also knew of the divorce proceedings at the time of the transactions and engaged in the transactions with the intent to defeat the respondent's claims against Mr. Purcaru:

> The extensive efforts to which they went to launder Dan Purcaru's funds and hide the truth of the transactions that they conducted in light of the multiple badges of fraud surrounding the transactions especially, in light of Marina Seliverstova's knowledge of the divorce proceedings, leads me to readily conclude that Marina Seliverstova was an active and knowing participant in Dan Purcaru's effort to defeat the rights of the applicant.

12 I reject this ground of appeal.

Ground 3: Trial judge erred by speculating and making impermissible inferences

13 The appellant argues that the trial judge erred in law by engaging in speculation in order to make factual findings that were not supported by the evidence.

14 I do not agree. The trial judge surveyed the records of the financial dealings of Mr. Purcaru and Ms. Seliverstova that were available to him. He did not, on his reckoning, have a complete picture of their dealings. He concluded that this was deliberate:

> It was painfully obvious during the trial that Dan Purcaru and Marina Seliverstova created an impenetrable web of transactions and made only partial disclosure to try to support Marina Seliverstova's story. While Marina Seliverstova has made some disclosures which she characterized as extensive, in almost every case there are breaks or discontinuity in the line of transactions so that one can never be sure as to precisely where money originated, was mixed around, and then ended up. It might be as she claims. But it may not be so. For the reasons stated in the specific situations below, I do not accept the credibility of Marina Seliverstova's evidence. In short, I do not believe her.

15 The trial judge made findings of fact from the evidence that was before him and drew inferences from those findings. The appellants have not identified any impermissible speculation.

Ground 4: Error in fixing prejudgment interest rate

16 The appellants argue that the trial judge erred in exercising his discretion to fix a rate of prejudgment interest other than the rate prescribed by s. 127 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This argument was not strenuously pursued in the oral hearing, and I see no merit in it.

Fresh evidence

17 The appellants sought leave to introduce as fresh evidence on the appeal an affidavit from Ms. Seliverstova providing additional bank records from Bank of Montreal and Hellenic Bank in Cyprus, in support of her argument that the funds she received from Hellenic Bank had come from her mother in Russia and not Mr. Purcaru.

18 I would deny leave to introduce fresh evidence. This evidence does not satisfy the *Palmer* test for the admissibility of fresh evidence. It does not show the source of the funds that were in the account, and is thus of no assistance in resolving the matters in dispute in this litigation. Neither am I persuaded that it could not have been discovered previously by Ms. Seliverstova, exercising due diligence.

Disposition

19 I would deny leave to introduce fresh evidence, and would dismiss the appeal. I would award costs to the respondent on a partial indemnity basis in the amount of $25,000, inclusive of disbursements and HST.

***Robert J. Sharpe J.A.*:**

I agree.

***P. Lauwers J.A.*:**

I agree.

Appeal dismissed.

2000 CarswellOnt 3676
Ontario Superior Court of Justice

Research Capital Corp. v. Brounsuzian

2000 CarswellOnt 3676, 100 A.C.W.S. (3d) 298

Research Capital Corporation, Plaintiff and Vartevar E. Brounsuzian and 1094250 Ontario Ltd., Defendant

Research Capital Corporation, Plaintiff and Steven Nowack and Vartevar E. Brounsuzian, Defendants

Vartevar E. Brounsuzian, Plaintiff by Counterclaim and Research Capital Corporation and Carol Sands, Defendants by Counterclaim

Hoilett J.

Heard: March 27 - April 20, 2000
Judgment: October 13, 2000
Docket: Doc. 97-CV-134601CM, 97-CV-129884CM

Proceedings: additional reasons at *Research Capital Corp. v. Brounsuzian* (December 14, 2000), 97-CV-134601CM, 97-CV-129884CM (Ont. S.C.J.)

Counsel: *John R. Sproat*, for Plaintiff.
David Shiller, for Defendant, Nowack.
Jessica Kimmel, for Defendant, Vartevar E. Brounsuzian.

***Hoilett, J.*:**

1 This is an action brought by Research Capital Corporation (R.C.C.) against the defendant Nowack for the balance outstanding on a margined account held by Nowack with the plaintiff. As against the defendant, Brounsuzian, the plaintiff's action is in respect of an agreement of guarantee furnished by Brounsuzian to secure the Nowack account.

2 In a companion action, No. 97-CV-134601CM, brought by R.C.C. against Brounsuzian and 1094250 Ontario Limited, the plaintiff seeks a declaration, together with certain ancillary relief, that a December 18, 1996 conveyance of 79 Marydale Ave., Markham, Ontario, by Brounsuzian to the numbered company was in contravention of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29.

3 Brounsuzian has counterclaimed against the plaintiff, alleging, among other things, breach of fiduciary duty. As well, Brounsuzian has cross-claimed against Nowack, seeking to be indemnified in respect to any damages that may be awarded against him.

4 Before turning to a review of facts material to the issues raised in this trial, a thumbnail sketch or profile of the parties may assist in illuminating these reasons as well as some of the conclusions reached therein. It is sufficient for that purpose to note that R.C.C. is a brokerage firm, a vehicle through which investors are able to effect transactions on the stock market.

5 Nowack is a thirty-seven year old young man who, for approximately one-half of his life, has held a variety of occupations. Although not formally certified, he has, during the past several years, been a player in the stock market.

6 Notwithstanding his lack of formal certification, however, Nowack's expertise in the financial market is recognized, as is evidenced by his several appearances on television panels of experts commenting on the financial market. Recognition of Mr. Nowack's expertise has also been evidenced by his being quoted in financial publications on issues relating to the stock market, an example of which was "The Financial Post" for Wednesday, March 20, 1996. (See Exhibit 1, Tab 13).

7 It might reasonably be concluded, therefore, that, as an investor, Mr. Nowack is not an amateur, as will become even more evident in a later review of the evidence.

8 Mr. Brounsuzian is a successful and seasoned businessman of several years standing, who has, over the years, been involved in one aspect or another of the sheet metal industry, a business in which he is still currently engaged. Mr. Brounsuzian's current operation was not described as state-of-the art but it is one in which modern (or high) technology has been embraced. Prior to Mr. Brounsuzian becoming engaged with R.C.C., he had not operated a margin account but in other respects, he may fairly be described as being a seasoned investor at the time he first engaged the services of R.C.C.

9 Ms. Carol Sands, a registered representative, employed by R.C.C, was "introduced" to Mr. Nowack by another client of hers, one Eric Fein. Other evidence shows that Nowack and Fein were long-time friends, dating back to school days. Quite apart from Mr. Fein's "introduction", however, Mr. Nowack, because of his profile in the world of portfolio management, had already been a part of Ms. Sand's consciousness. She could not be precise as to when that consciousness first arose.

10 The evidence indicates that Ms. Sands' early contact with Mr. Nowack was by telephone. In accordance with the requirements of the Investment Dealers' Association [and the T.S.E.] requirements, Ms. Sands completed a new client's application form, the purpose of which is to obtain a profile of the investor as to: investment objective, investment experience and risk tolerance, among other things. Tab 46, dated August 23, 1996, Mr. Nowack's original new client's application form, discloses, among other things, that Mr. Nowack had net liquid assets of $1,000,000.00, net fixed assets of $500,000.00, and an annual income of $100,000.00. In other words, a net worth of $1.5M. (ref. Exhibit 1, Tab 46).

11 Mr. Nowack, in his evidence, takes issue with the accuracy of the figures recorded by Ms. Sands but there is no reason in my view to doubt that Ms. Sands accurately recorded the information she obtained form Mr. Nowack. The accuracy of other information recorded on the form has not been impugned by Mr. Nowack.

12 The genesis of the issues between the parties is to be found in three transactions, each for 1,000 Dell shares. Two of those transactions were effected on August 28 and the third on August 29, 1996. Each of the transactions was a short sale transacted through a margined account opened by Nowack with R.C.C. The total purchase price involved in those transactions was $196,473.92. (See Exhibit 1, Tab 54).

13 In accordance with the practices of the Stock Exchange, Mr. Nowack was obliged to fund the transactions by September 3, 1996, the "settlement date", or three business days following the "transaction date". Ms. Sands was led to believe by Mr. Nowack that he was making the necessary arrangements to ensure that his account would be funded in accordance with the regulatory requirements. It is sufficient to say at this point that "shorting" a stock is in effect selling shares not currently owned by the trader in anticipation that the share will fall in value; the hope being that the trader will be able to turn a quick profit. Unfortunately for all the parties involved in this action, two flies soon appeared in the ointment. The first was that Mr. Nowack failed to come up with the necessary funds on the settlement date and, contrary to his expectation as well as that of Ms. Sands, the price of Dell shares rose, and kept rising. The result was a deficiency in Mr. Nowack's account comprising two elements, namely, the "settlement" funds that were never forthcoming and, secondly, the loss engendered by the rising price of Dell shares.

14 What followed in the ensuing days were attempts to accommodate Mr. Nowack, relying on his promises to come up with the necessary funds to satisfy the deficiency in his account. It is not in dispute that it was open to R.C.C. to close out Nowack's account when he failed to meet his financial obligations on the settlement date. There is no need for

a blow-by-blow account of all that happened up to and including September 13, 1996; a highlighting of the significant events will suffice.

15 It is not in dispute that Ms. Sands was in a greatly compromised position. Her job was potentially at stake and she was at risk of being obliged to pay for the shortfall in Nowack's account. Her upset and concern were discernible. Ms. Sands discussed the problem with Mr. Nowack, as did she with her seniors at R.C.C. In particular, she had discussions with Kevin McQuaid, the Director of Operations and with Ms. Christine Dameron, the Manager of Credit and Client Services. Among the resolutions to the financial problem associated with the Nowack account discussed with Mr. Nowack was finding a guarantor for his account. Equivocation in the evidence concerning whose idea it was is not one which in my view requires resolution because it was an option that satisfied, at least in substantial part, the immediate concerns of Ms. Sands and Mr. Nowack. I find as a fact, on the evidence, that it was Mr. Nowack's wish to keep the position in his Dell account open and, similarly, a guarantee had the potential to save Ms. Sands harmless from the possible economic consequences that faced her and her employers were the Nowack account to go into default.

16 Discussions with Mr. Nowack culminated in the understanding that Ms. Sands would raise with another of her clients, Mr. Brounsuzian, the possibility of his furnishing the necessary guarantee for the Nowack account. Although I am of the view that Mr. Brounsuzian may have exaggerated the amount of time he spent on the telephone as well as his own sentimental response to the emotions communicated by Ms. Sands over the telephone, I have no doubt that Ms. Sands' emotional upset was palpable and that Mr. Brounsuzian was, at least in part, moved by sentiment. Be that as it may, Mr. Brounsuzian, late in the afternoon of Friday, September 13, 1996, agreed on the telephone to provide the guarantee. Mr. Nowack was made privy to all the developments in consequence of a three-party telephone conference call. More or less concomitant with, or as an immediate sequel to, the agreements reached by telephone, Ms. Sands arranged for Mr. Nowack to attend at R.C.C.'s offices on the late afternoon of Friday, September 13. Although not in the strict technical sense of the term "time was of the essence". In that regard, I accept Mr. Nowack's evidence that Ms. Sands pressed him to come to the office that afternoon notwithstanding his demurral because of the Jewish Sabbath. It is worthy of note that as of September 13, 1996, Nowack and Brounsuzian were unknown to each other, although Mr. Brounsuzian may have been vaguely aware of who Nowack was by virtue of his reputation. The safe conclusion is that such knowledge as Brounsuzian had of Nowack as of that date was the briefing provided him by Ms. Sands in her overtures to him concerning a guarantee for Nowack's account. Apart from the guarantee promised by Mr. Brounsuzian, Ms. Sands set in place the following safeguards for Mr. Brounsuzian.

17 Ms. Sands had Mr. Nowack execute a trading agreement in favour of Mr. Brounsuzian, an agreement which gave Brounsuzian effective, joint and several control over the account. As well she had Mr. Nowack execute a promissory note in the amount of $50,000.00 in favour of Mr. Brounsuzian. The loss in the account at the time was in the order of $36,000.00 (U.S.), more or less. Ms. Sands also recommended that Mr. Nowack and Mr. Brounsuzian meet over the weekend, a meeting which would enable Mr. Brounsuzian to make his own assessment of Mr. Nowack. Each was provided with the other's phone number by Ms. Sands. There was one other agreement reached between Mr. Nowack and Mr. Brounsuzian, an agreement in which Mr. Nowack promised to provide Mr. Brounsuzian with one year's worth of professional advice as well as indemnifying Mr. Brounsuzian from any loss. The same agreement provided that any profit in the account would go to Mr. Brounsuzian. Finally, Ms. Sands arranged for the guarantee to be delivered to Mr. Brounsuzian at the end of the day, and she so informed him. The arrangement was that Ms. Dameron, who happened to live in general vicinity of Mr. Brounsuzian's office, would deliver it to him on her way home. It is common ground that Ms. Dameron met with Mr. Brounsuzian on her way home from work and delivered to him a copy of the agreement of guarantee. While there are minor variations in the accounts of their meeting rendered by Ms. Dameron and Mr. Brounsuzian, they are in substantial agreement concerning the general purport of their discussions and concerning the length of that meeting. To the extent that there is any conflict in their evidence, I accept as being more probable that of Ms. Dameron. The following are among the reasons that impel me to that preference.

(i) Generally speaking, I found Mr. Dameron to be a forthright witness.

(ii) She made more or less contemporaneous notes of the general purport of the meeting.

(iii) The length of their meeting, which Mr. Brounsuzian allows could have been as long as twenty-five minutes is quite consistent with the discussions reported by Ms. Dameron.

(iv) Mr. Brounsuzian reported that he was led to believe by Ms. Sands that a clerk, which I understood to mean a low-ranking employee, would be delivereing the guarantee. The length of the meeting and the admitted contents of their discussions are more consistent with a meeting with someone of Ms. Dameron's rank and responsibility than it is with a low-ranking clerk.

18 More important than the disagreements in Ms. Dameron's and Mr. Brounsuzian's evidence, however, are the areas of their agreement. Both are agreed that Ms. Dameron explained the document to Mr. Brounsuzian and both are agreed that Mr. Brounsuzian was encouraged, if not urged, to take time over the weekend to think about the guarantee and whether or not he wanted to sign it. Equally significant also is the fact that, rather than pressuring Mr. Brounsuzian into signing the agreement, Ms. Dameron in fact enquired of Mr. Brounsuzian as to "what was in it for him?"

19 Consistent with Ms. Sands' suggestion and with what it was anticipated would happen, Messrs. Nowack and Brounsuzian met over the weekend; first for breakfast at Bregman's on Sunday morning and later at Mr. Nowack's apartment where, according to both their recounting of events, Mr. Nowack, as it were, "showed off" his computer system and its effectiveness as a tool for trading in the stock market. I think it is a fair reading of the evidence that Mr. Brounsuzian was favourably impressed. I think it equally fair to conclude that, although I accept Mr. Brounsuzian's evidence that he did not probe Mr. Nowack concerning his assets, Mr. Brounsuzian was also satisfied that Mr. Nowack appeared to be someone of substance as opposed to being a "fly-by-night" amateur. Regardless of what the motivation was, therefore, the weekend framed by September 13 and 16, 1996 marked a watershed in the evolution of the events precipitating this action. I turn now to a review of the chain of events flowing from that watershed.

20 The Guarantee Agreement, a fairly standard form agreement, provides, in part, as follows:

. . . . .

This guarantee shall be construed as an absolute, continuing and unlimited guarantee of payment without regard to the regularity validity or enforceability of any liability or obligation of the client hereby guaranteed, and shall cover all debts and liabilities of the client to you from time to time and shall apply to and secure any ultimate balance due or remaining unpaid to you and shall be binding as a continuing security on me until receipt by you of written notice from me..., to make no further advances or extensions of credit on the security of this guarantee.

I acknowledge that this agreement has been delivered free of any conditions and that no representations have been made to me affecting my liability under this agreement except as may be specifically embodied herein. I acknowledge that this guarantee is executed under seal. This guarantee is in addition and supplemental to all other guarantees held or which may hereafter be held by you regardless of whether or not any other person has executed a guarantee in favour of the client... (Exhibit 1, Tab 65)

21 The Guarantee Agreement was executed September 13, 1996 and witnessed by one Sona Brounsuzian. Mr. Brounsuzian denied being informed by Ms. Dameron that the guarantee was unlimited. Ms. Dameron's notes concerning the meeting, however, records that she explained the guarantee to Mr. Brounsuzian, including the fact that the guarantee was unlimited. Mr. Brounsuzian penned the following amendment to the agreement, Tab 65, supra:

P.S. NOTE THAT THIS GUARANTEE APPLIES ONLY TO THE EXISTING SHORT POSITION OF 3,000 SHARES OF DELL STOCK.

Mr. Brounsuzian is the only one who initialed the proposed amendment.

22 I accept as much more probable Ms. Dameron's evidence concerning her explanation of the guarantee to Mr. Brounsuzian. Although Mr. Brounsuzian's proposed amendment is not without equivocation, it is wholly consistent

with an attempt on his part to expunge from the agreement its unlimited liability provision. There are, however, other persuasive reasons for my preferring Ms. Dameron's version of events. Apart form Ms. Dameron's candour to which I earlier made reference, a reading of the complete text of Ms. Dameron's notes relating to the meeting makes it abundantly clear that it is a balanced reporting. I say balanced because of a refreshing candour in which there are clearly notations favourable to Mr. Brounsuzian and reflective of Ms. Dameron's own bemusement at the arrangement into which Mr. Brounsuzian was entering. I cite the following excerpts from Ms. Dameron's notes which, in my opinion, support the view I have expressed; there are others:

. . . . .

Why are you [referring to Mr. Brounsuzian] willing to do this?

= "To be honest with you, I don't know."

Is there any business or financial incentive for you to guarantee this a/c

= "No, I don't care about making (sic) 2 or 3M$" ... "I have enough money".

= felt under pressure Friday afternoon. Sense of urgency. Therefore I left everything with him ... take the weekend to be sure.

. . . . .

= Ed's [Mr. Brounsuzian's] conversation with Steve (Nowack) ... (sic)

Steve told Ed he has 5 to 7 [?] millions under management. (who knows?).

Was under the impression there are assets, but all tied up in investments (if so why don't we have them) ... (Exhibit 1, Tab 67)

23 Ms. Dameron also spoke to Mr. Brounsuzian on September 16, 1996 and made more or less contemporaneous notes of that conversation; the full text of which is reproduced following:

Sept. 16/96 = 11:00 a.m.

- phoned Ed [Brounsuzian]
- still wants to go ahead with the guarantee. Had (Ed) (sic) a personal meeting with Steve [Nowack] on Sunday for about an hour & $^{1}/_{2}$. Feels confident that Steve knows what he is doing.
- Ed is going to alter the guarantee to limit the guarantee to short sale of 3000 Dell Computer Corp. In turn we will freeze the account so no other transactions can (sic) be done in the account except to cover the Dell./ This was done. (Exhibit 1, Tab 68)

24 Concerning the proposed amendment to the guarantee, all those plaintiff's witnesses who spoke to the issue testified that it was not open to the plaintiff to accept limited guarantees. Mr. Kevin Quaid, the representative of the plaintiff having most authority, testified that although he shared the view that limited guarantees were contrary to the I.D.A. regulations, it was his intention to freeze the Nowack's account limited to the Dell shares; in effect, "limiting" the guarantee, although not in dollar amount, to the 3,000 Dell shares only. Those views, however, were the private musings of Mr. McQuaid, none of which was communicated to Brounsuzian.

25 Apart from the original purchase price of Dell shares that were sold short, in respect of which Mr. Nowack had made no contribution, his account was in a loss position of $36,457.00 (U.S.), more or less. Mr. Brounsuzian testified that he was of the view when he executed the Guarantee Agreement that his risk was limited to that amount. I shall later indicate in these reasons why I am of the opinion that that evidence of Mr. Brounsuzian's is inconsistent with other undisputed evidence and with his own conduct.

26 The period from September 1996 to December 1996 was marked by, among others, the following significant events: The price of Dell shares in the market continued to rise with the consequent deterioration of Nowack's financial position and a corresponding increase in Brounsuzian's risk. For reasons which, in retrospect, defy rational explanation, a form of thrombosis developed so far as the management of Nowack's Dell account was concerned. The plaintiff and each of the defendants had the right to close out the account at any time but none chose to do so, buoyed obviously by one of the phenomena that fires the stock market; namely, the optimism that the price of your favourite stock will rise or fall, depending on which direction on the price scale best favours your fortune. The result was that by early December 1996, the loss position of Nowack's Dell account was $121,152.06, and, by January 31 st , 1997 the loss position had grown to $173,699.90.

27 Ms. Sands in December 1996, recognized the increasing risk to Brounsuzian and arranged with Nowack to provide additional security to Brounsuzian in the form of another promissory note in the amount of $200,000.00 Mr. Brounsuzian confirmed that Ms. Sands had suggested that Nowack provide him with additional security in the form of the second promissory note in the amount of $200,000.00. Found at *Exhibit 1, Tab 92*, the note is dated December 10, 1996. Mr. Brounsuzian testified that when he spoke to Ms. Sands about the second promissory note he indicated to her that he thought he had put a limit on it. Be that as it may, a meeting was arranged between Nowack and Brounsuzian at a Second Cup Coffee venue where the $200,000.00 promissory note was consummated. Except as to the amount, which Brounsuzian testified was completed by Nowack, the $200,000.00 promissory note is in Brounsuzian's handwriting.

28 Mr. Brounsuzian testified that he had a general appreciation of the purport of a guarantee agreement. He was appreciative also of the significance of the $50,000.00 promissory note as representing Nowack's indemnification to him against any loss that may be suffered by Brounsuzian by virtue of his guarantee of Nowack's account.

29 Those circumstances alone would be sufficient to invite the inference that Mr. Brounsuzian must have been aware of the fact that his liability under the guarantee could not have been fixed. What makes all the more incredible his present posture that his liability was fixed at $36,000.00 (U.S.), more or less, at least as of the date December 10, 1996, is the fact that there is absolutely no other rational explanation for Ms. Sands requesting and for Mr. Nowack furnishing additional indemnity in the form of the $200,000.00 promissory note. Mr. Brounsuzian indicated, however, that the second promissory note did set off something of an alarm, although he did nothing in response to that alarm, for example, seeking independent legal advice or vehemently protesting the open-ended risk, which, in the circumstances, must have come as a big surprise to him, at least if credit is to be given to his claim that he believed that his liability was limited in dollar amount, fixed as of September 13, 1996.

30 One of the issues that has arisen in the dispute between the parties is whether or not the effect of Mr. Brounsuzian's guarantee was to constitute his and Mr. Nowack's one account for all practical purposes; one consequence of which would be, in certain circumstances, to restrict Mr. Brounsuzian's trading in his own account. Mr. Brounsuzian denies that that was ever his understanding. Evidence given by Ms. Sands as well as Mr. McQuaid is to the contrary. Speaking to that issue, as well as the issue of the defendant's claim that the guarantee was limited in amount to the $36,000.00 (U.S.), more or less, as of September 13, 1996, is a letter from Mr. McQuaid to Mr. Brounsuzian. The letter, the text of which follows, was the sequel to a then recent conference call involving Mr. Brounsuzian.

> Dear Ed:
>
> Thanks for taking the time to discuss in some detail the Guarantee/Guarantor relationship you have set up with Mr. Steve Nowack. As you know, this agreement effectively calls for yours and Mr. Nowack's accounts to be treated as one for all practical purposes. You have indicated that you would like to be able to trade your own personal account more actively, as you feel you can make significant profits by doing so. Although your accounts are undermargined at this point approx. $170,000 Canadian, we propose the following:

We will allow your accounts to be undermargined a maximum of $250,000 [presumably, "Canadian"]. If the account exceeds that level, it must be resolved immediately.

• you will continue to hold the [1] 4000 short Dell position as you feel the stock will pull back to the $60 U.S. area in the near future. You feel that the maximum that you would have to hold this position, before the stock pulled back to the $60 U.S. range would be two months, and we would be agreeable to you holding it for no longer than that. However, if the stock moves back to that area, and then begins again to move back up, we would expect you to cover immediately.

• your account must be fully margined no later than June 30 th , 1997, and must remain so.

• you acknowledge by this agreement, that the guarantee/guarantor relationship between yourself and Mr. Nowack continue in force and effect. (Exhibit 1, Tab 115 of which Tab 114 is a better copy)

31 The above letter was faxed to Mr. Brounsuzian on or about February 24, 1997 and was returned to Mr. McQuaid on or about March 17, 1997, executed by Mr. Brounsuzian. The letter, or agreement, was executed on that same date by Mr. McQuaid on behalf of Research Capital.

32 What tends to put in question Mr. Brounsuzian's repudiation of the general purport of the letter cum-agreement of March 17, 1997, apart from his execution of it, is the lack of any meaningful and timely protest. That response, or lack of it, becomes all the more resounding when one has regard to Mr. McQuaid's letter of April 25, 1997, to Mr. Brounsuzian, which was met with the same deafening silence. The April 25, 1997 letter is reproduced following:

Dear Ed:

RE: Your account 13-193LE-4

As per our Letter-Agreement of February 21, 1997, signed by yourself on March 17, 1997, your account was to never exceed a required to margin $250,000. As you are aware, your account has been undermargined approx. $400,000 recently due to the drop in Bre-X. We have discussing (sic) this issue for the past three weeks, but as of this moment, no payment has been received, in violation of the agreement.

Therefore, if a minimum of $150,000 is not received by Monday, April 28, 1997, at 9:30 A.M., we will be required to liquidate your account to mitigate our exposure. Payment may be delivered by courier directly to my attention at the below noted address. (Exhibit 1, Tab 124)

33 The cover page to Mr. Brounsuzian's faxed response to Tab 115, supra, which bears his approving signature, records the following notation under the caption "MESSAGE":

LETTER REGARDING MY ACCOUNT & STEVEN NOWACK (Exhibit 1, Tab 119)

The significance of that notation is that it tends to put in issue Mr. Brounsuzian's claim that he was unaware that his and Nowack's accounts were being treated as one, certainly to the extent necessary to guarantee the indebtedness. Mr. Brounsuzian's evidence is rendered all the more implausible when one considers that the above Tab 119 reference by him was in the context of, and in response to, Tab 115, supra, the opening paragraph of which reads, in part, as follows:

As you know, this agreement effectively calls for yours and Mr. Nowack's accounts to [be] treated as one for all practical purposes....

Concerning why he executed the document notwithstanding his claim that it misrepresented the discussions he had with Mr. McQuaid, Mr. Brounsuzian testified that he was "forced" to sign it in order that he could trade in his account.

34 Mr. Brounsuzian, by innuendo, if not explicitly, seeks to burden Ms. Sands with the responsibility for his investment decisions. The evidence, in my opinion, does not support that characterization. The following appears from the evidence in that regard. While it is true that Ms. Sands knew Mr. Brounsuzian as a client and, arguably, made use of that knowledge when she canvassed him as a possible guarantor for Mr. Nowack's account, the fact is Mr. Brounsuzian was an experienced player in the stock market who invested in a variety of stocks, including the ill-fated Bre-X in which he invested heavily, and lost heavily. Ms. Sands was one only of some three agents with whom Mr. Brounsuzian dealt, involving different investment brokers. Ms. Sands was diligent in furnishing Mr. Brounsuzian on a regular basis with literature relating to investment opportunities and various stocks that were featured. The evidence indicates that literature was sent both on request and on Ms. Sands' own initiative. Ms. Sands on occasion recommended or suggested stocks to Ms. Brounsuzian, but, I find as a fact that decisions to purchase or sell any individual stock was Mr. Brounsuzian's independent decision. There is no evidence to support one suggestion by counsel for Mr. Brounsuzian that a chart showing the economic performance of Dell stocks sent to Mr. Brounsuzian by Ms. Sands on or about September 11, 1996 was designed improperly to influence his decision in relation to any arrangement he entered into with Mr. Nowack. Were it a case of one isolated publication sent to Mr. Brounsuzian that inference may have been an arguable one but all the indications are of a healthy relationship between investor and agent in which the agent sought to keep the client well-informed and up-to-date.

35 The principal question to be answered is whether or not the nature of the relationship between Ms. Sands (and inferentially, the plaintiff) and Mr. Brounsuzian was such as to impose on Ms. Sands a fiduciary duty to Mr. Brounsuzian together with all its attendant obligations.

36 Stated briefly, counsel for Mr. Brounsuzian contends that by virtue of the professional relationship that existed between Ms. Sands and Mr. Brounsuzian, which she submits was advisory, and because of the confidential information relating to Mr. Brounsuzian to which she was privy, Mr. Brounsuzian was peculiarly vulnerable. The court is urged to find that in those circumstances, Ms. Sands owed a fiduciary duty to Mr. Brounsuzian; in particular, she was obliged not to place herself in a position of conflict and in the circumstances that obtained she owed to Mr. Brounsuzian a duty of full disclosure. Ms. Kimmel, arguing for Mr. Brounsuzian, submits that not only did Ms. Sands place herself in conflict by inviting Mr. Brounsuzian to guarantee another client's account which she had allowed to be operated in breach of not only TSE and the Investment Dealers Association rules but also in breach of the plaintiff's own house rules. That breach by Ms. Sands was exacerbated by her failure to make those disclosures to Mr. Brounsuzian which, it is submitted, she was dutybound to make. The following are the alleged non-disclosures complained of:

1. That virtually no money had ever been contributed by Mr. Nowack to his margined account; in other words, there were two components to the account's deficit; namely, the absence of equity and the trading loss;

2. That the effect of the guarantee was to limit Brounsuzian's trading in his own account;

3. That the plaintiff was of the view that Brounsuzian's handwritten amendment to the guarantee was unenforceable;

4. That Dameron and McQuaid had information to suggest Nowack had no assets;

5. That at least one view taken of the guarantee was that it placed Brounsuzian in the position of a client who had shortsold Dell on September 13, 1996 and who continued to hold the position;

6. That the guarantee was intended to cover both components of the deficit in Nowack's account.

37 Counsel for Mr. Brounsuzian further argues that Ms. Sands was obliged to insist on Mr. Brounsuzian obtaining independent legal advice.

38 Counsel for Mr. Brounsuzian places much reliance on the decision of the Supreme Court of Canada in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.). That was a case in which the plaintiff alleged material non-disclosure and breach

of fiduciary duty in the context of a contract for investment advice and other tax-related financial services. Before turning to a brief look at the court's decision it is instructive to set out the facts that inspired the court's decision. Mr. Justice LaForest, who spoke for the majority of the court, summarized the relevant facts in the "introduction" to his reasons as follows; at page 393:

> ...Mr. Simms had developed a special expertise in relation to multi-unit residential buildings (MURBs). In 1980 the appellant Mr. Hodgkinson retained Mr. Simms' services in the areas of tax planning and preparation, and in finding stable, tax-sheltering investments. Mr. Hodgkinson was a "neophyte" in the field of tax planning and tax-related investments. He approached Mr. Simms as an independent professional who would give him the impartial service and advice he was looking for. Mr. Hodgkinson decided to put himself in Mr. Simms' hands with respect to his tax planning and tax sheltering needs. In the course of their relationship, Mr. Simms recommended four MURB projects to Mr. Hodgkinson as meeting his investment criteria. Mr. Hodgkinson duly invested in these projects. What Mr. Hodgkinson did not know, however, was that at the time Mr. Simms was making these recommendations, he was in a financial relationship with the developers of the project. The more MURBs Mr. Simms sold to Simms and Waldman clients, the larger the fees he reaped from the developers...

39 A further elaboration of the facts indicated that Mr. Simms was a chartered accountant and that he "advised and assisted the developers in the analysis and maximization of tax deductible expenses that could be incorporated in the real estate investments offered for sale".

40 Justice LaForest, after reviewing a number of the leading authorities on fiduciary relationships refers at pages 409-10 to:

> ...certain relationships that have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interest of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal...
>
> . . . . .
>
> Thus, outside the established categories [i.e., those categories in which the rebuttable presumption arises], what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

41 Referring to the "banker-customer" context as one of those "non-established" categories, Justice LaForest made the following observation at page 410-411:

> . . . . .
>
> In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a bank customer and banker are conducted on a creditor- debtor basis; [authorities omitted]. Similarly, the relationship of an investor to his or her discount broker will not likely give rise to a fiduciary duty, where the broker is simply a conduit of information and order taker. There are, however, other advisory relationships where, because of the presence of elements such as trust, confidentiality, and the complexity and importance of the subject matter, it may be reasonable for the advisee to expect that the advisor is in fact exercising his or her special skills in that other party's best interests, unless the contrary is disclosed. Professor Finn describes these kinds of relationships in the following terms in "The Fiduciary Principle", supra, at pp. 50-51:
>
> > ...fiduciary responsibilities will be exacted where the function of the advisor represents himself as performing, and for which he is consulted, is that of counseling an advised party as to how his interests will or might best be served in a matter considered to be of importance to his personal or financial well-being; and in which the adviser would be expected both to be disinterested, save for his remuneration, and to be free of adverse responsibilities unless the contrary is disclosed at the outset. *It does seem to be the case here, that our ready*

acceptance of a fiduciary expectation is coloured both by our assumption that credence is likely to be given to any advice given and by our perception of the social importance of the advisory function itself. [emphasis added]

42 Mr. Justice LaForest, after reviewing the law relating to fiduciary responsibility in its more generic manifestations, addressed more particularly the concept in the context of investment advice, at pages 418 to 420:

> ...courts have consistently shown a willingness to enforce a fiduciary duty in the investment advice aspect of many kinds of financial service relationships [citations omitted]. In all these cases, as here, the ultimate discretion or power in the disposition of funds remained with the beneficiary. In addition, where reliance on the investment advice is found, a fiduciary duty has been affirmed without regard to the level of sophistication of the client, or the client's ultimate discretion to accept or reject the professional's advice [citation omitted]. Rather, the common thread that unites this body of law is the measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff reliance in fact.

43 The learned justice then went on at page 419 to cite with approval Keenan J.'s exposition of the relevant principle in *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 (Ont. Gen. Div.) at 234-236:

> The relationship of broker and client is not *per se* a fiduciary relationship. ... Where the elements of trust and confidence and reliance on skill and knowledge and advice are present, the relationship is fiduciary and the obligations that attach are fiduciary. On the other hand, if those elements are not present, the fiduciary relationship does not exist. ... the circumstances can cover the whole spectrum from total reliance to total independence. An example of total reliance is found in the case of *Ryder v. Osler, Wills, Bickle Ltd.* (1985), 49 O.R. (2d) 609, 16 D.L.R. (4th) 80 (H.C.J.). A $400,000 trust for the benefit of an elderly widow was deposited with the broker. An investment plan was prepared and approved and authority given to operate a discretionary account.... At the other end of the spectrum is the unreported case of *Merit Investment Corp. v. Mogil*, Ont. H.C.J. Anderson J., March 23, 1989 (summarized at 14 A.C.W.S. (3d) 378), in which the client used the brokerage firm for processing orders. He referred to the account executive as an "order taker", whose advice was not sought and whose warnings were ignored.
>
> . . . . .
>
> The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in a broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence and undertakes to advise, the broker must do so fully, honestly and in good faith.... It is the trust and reliance placed by the client which gives to the broker the power and in some cases, discretion, to make a business decision for the client. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly.

Justice LaForest adopted the above statement of the law in the following terms:

> In my view, this passage represents an accurate statement of fiduciary law in the context of independent professional advisory relationships, whether the advisers be accountants, stockbrokers, bankers, or investment counsellors. Moreover, it states a principled and workable doctrinal approach. Thus, where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor.

44 Speaking of the "advisory context" LaForest J. speaks of the susceptibility of a client to be harmed by virtue of "the simple but unassailable fact that the advise given by the independent adviser is not likely to be viewed with suspicion, rather, it is likely to be followed..." He then continued at page 431:

> A retainer, when combined with the disclosure of confidential information or the vesting of discretion or power, is strong evidence of an underlying dynamic or power dependency in relation to certain duties. The appellant's testimony confirms the overt, if not explicit, power transfer which in fact occurred. He stated, "I was paying him for his advise. If I didn't want to take it, why would I pay him? I do not disagree with any of his advice". This

remark cannot help but strike one as intuitively reasonable, particularly given the appellant's relative inexperience in MURB investing. As I noted earlier, the refusal to protect this reliance on the grounds that the appellant somehow had the means to protect his own interest is to take an impoverished view of the law in this area.

45 Justice LaForest spoke too of the reliance implicit in the advisor-advisee relationship, and noted at page 432:

. . . . .

Reliance in this context does not require a wholesale substitution of decision-making power from the investor to the advisor.... As I see it, the reality of the situation must be looked at to see if the decision is effectively that of the advisor, an exercise that involves a close examination of facts. Here, as I see it, the trust and reliance the appellant placed in the respondent (a trust and reliance assiduously fostered by the respondent) was such that the respondent's advice was in substance an exercise of a power or discretion reposed in him by the appellant. That was the view taken by the trial judge respecting the appellant's investment in the four MURB projects, and her decision is amply supported by the evidence.

46 Concerning the scope of the reliance in the *Hodgkinson* case, Justice LaForest, made the following further observation at pp. 433-434:

The respondent, for his part, actively cultivated this high degree of reliance. He was fully aware of the appellant's lack of experience with MURBs, and he held himself out as an expert in the assessment of MURB-type investments. The respondent's influence over the appellant was built upon the latter's confidence that the respondent was independent from the developers...

The trial judge was satisfied, at p. 127, that it was the appellant's intention to, "drop his tax and financial-planning problems into Mr. Simms' lap and to go about his business as a stockbroker". All the while, the respondent was fully aware that the appellant's lack of expertise meant that he wielded considerable influence over the appellant's investment decisions.

47 Apart from *Hodgkinson v. Simms*, supra, counsel for Mr. Brounsuzian referred me to a number of other authorities. Among those authorities were the leading cases of *Lloyd's Bank v. Bundy* (1974), [1975] Q.B. 326 (Eng. C.A.)and *Commerce Capital Trust Co. v. Berk* (1989), 68 O.R. (2d) 257 (Ont. C.A.); additional reasons in (1989), 69 O.R. (2d) 735 (Ont. C.A.), both of which cases were canvassed in *Hodgkinson*, *supra*. Speaking generally, none of the authorities cited significantly illuminate the principles so thoroughly canvassed by Justice LaForest in the *Hodgkinson* case. What seems abundantly clear from all the cases is that they are, as is often the case, fact-driven. In *Cassey v. Morrison* (1993), 15 O.R. (3d) 223 (Ont. C.A.), on appeal from (1989), 67 O.R. (2d) 65 (Ont. H.C.), for example, the defendant, a lawyer, entered into a partnership agreement with clients, who were, as well, long-time friends and neighbours, misrepresenting or at least not accurately disclosing the extent of his own financial investment nor the full extent of the encumbrance on the property, a restaurant, the subject of the partnership. There should be little surprise in the fact that the court had no difficulty in finding for the plaintiff not only on the facts of the case, but also because of the inherent fiduciary nature of the solicitor-client relationship.

48 *Commerce Capital Trust Co. v. Berk*, supra, was also a case involving a solicitor who had a solicitor-client relationship with a mortgagor and a mortgagee and was fixed with liability in circumstances where he failed to disclose material facts to the mortgagee. That non-disclosure went directly to the quality of the risk the mortgagee was assuming. Again, the court had no difficulty in finding an inherent fiduciary duty and a breach of that duty.

49 *Royal Bank v. Fogler, Rubinoff* (1991), 5 O.R. (3d) 734 (Ont. C.A.), on appeal from *Ontario Judgements*, (March 14, 1988), Doc. 2012/85 (Ont. H.C.), was a case in which a firm of solicitors disbursed funds contrary to the terms of a trust with which they were impressed.

50 The court in finding that a fiduciary relationship existed between a firm of stockbrokers and its client in the case of *Pielsticker v. Gray*, [1947] 3 D.L.R. 249 (Ont. C.A.), as appears from the court's reasons, at page 252, found as a fact that the client relied on the firm and took its advice:

> ...Mr. Knight was a partner in Draper Dobie & Co. and the appellant testifies that he "took advice from Mr. Knight, certainly on all the important purchases of stock that I made and I took advice from him in selling B.E.A.R.". He states: "I relied on his judgment" and "that continued right up until we had a little row on February 17th and 18th." Further, he says: "Mr. Knight had been telling me that he had been my broker for the whole year of 1943, advising me on buying stocks and particularly about selling Bear; he had been advising me all through the year to keep on selling Bear, and at this time he was advising me to give this option to Pielsticker with the same idea, that without such a deal Bear wouldn't be saleable and I should anyhow keep on selling Bear."
>
> . . . . .

51 There is probably one paragraph from the comprehensive reasons of LaForest J. which, among many others, may serve as a useful approach in determining the existence or non-existence of a fiduciary relationship. He made the following observation at page 405 of *Hodgkinson v. Simms*, *supra*:

> From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important indicium of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.

52 I have quoted at some length the facts as found or as characterized in *Hodgkinson*, *supra*, an authority on which counsel for Mr. Brounsuzian places much reliance and more sparingly from other authorities relied on by her. I have so done because, as is often the case, it is simple enough to state the principle. The application of that principle, however, may not be divorced from the facts that inspired its application.

53 Applying, therefore, the principles as they appear in the authorities to the facts in the present case, I am of the view that there was not a fiduciary relationship existing between the plaintiff and Mr. Brounsuzian. The relationship between the plaintiff and Brounsuzian bore none of the hallmarks of those factual circumstances where the court found a fiduciary relationship to exist. At all material times, Mr. Brounsuzian was a well-informed and seasoned trader who, as of 1994, had opened the following trading accounts:

1. Midland Walwyn, Toronto office, in which Ms. Sands was his registered representative,

2. Midland Walwyn, Kitchener Waterloo office, where his representative was one William Young,

3. TD Evergreen where his registered representative was one Sandra Spencer,

4. A TD Greenline discount-broker account, without a designated registered representative.

54 As I indicated earlier, Ms. Sands fed Mr. Brounsuzian's voracious appetite for market information which included, among other things, the plaintiffs' own publications, the publications of other brokerage houses and the Bloomberg report. Contained in the literature with which Mr. Brounsuzian was supplied was literature reporting on BreX. R.C.C. in its own material sent to Brounsuzian, described BreX as "speculative buys" (see Tabs 85, 105 and 107). Equally clear as the fact of Ms. Sands as a source of information is the fact that Mr. Brounsuzian made his own investment decisions. The term "adviser" as a descriptor for the role played by Ms. Sands in her relationship is inflationary, and so to describe her would be to diminish the significance of that term. Ms. Sands' role stands in stark contrast to the role played by Mr.

Simms in the *Hodgkinson* case, supra, where it would not be inappropriate to describe the service that he offered to, and was sought by, the plaintiff as a boutique service.

55 There was none of those indicia of vulnernability of which LaForest J. spoke in *Hodgkinson*, *supra*; Ms. Sands exercised no discretion over Mr. Brounsuzian's account, she exerted no undue influence over him.

56 Notwithstanding my conclusion that there was nothing in the broker-client relationship between the plaintiff and Mr. Brounsuzian which rendered it fiduciary, the question remains concerning whether or not the circumstances created by procuring Brounsuzian as a guarantor for Nowack's delinquent account materially altered that relationship so as to stamp it with the obligations of a fiduciary.

57 It is common ground that the guarantor-guarantee relationship created between Brounsuzian and Nowack was an unusual one. Assuming good faith on the part of the parties entering into such agreement however, there was no evidence led to suggest that it was clearly wrong, or even prohibited. Much of the evidence I have already canvassed bears on the issue here raised and the following conclusions reasonably flow from that evidence.

58 Ms. Sands had knowledge of Brounsuzian's financial circumstances, he having been a client of hers, first at Midland Walwyn and later at R.C.C. Brounsuzian's new client applicant form, dated March 1996, showed him as having net fixed assets of $5,000,000.00, net liquid assets of $500,000.00 and an annual income of approximately $200,000.00.

59 Ms. Sands, when she approached Brounsuzian, was candid as to her reasons for doing so; indeed, her patent vulnerability inspired sympathy in Brounsuzian, aware as he was that financially she was at risk, as was her job.

60 With Brounsuzian's full concurrence Ms. Sands put in place a structure or framework to minimize the risk to Brounsuzian.

61 Although in retrospect the judgment has been demonstrated to be faulty, Ms. Sands, at the time she introduced Nowack and Brounsuzian, had no reason to conclude that Nowack was not a person of substance. Nowack's then seeming temporary impecuniosity may have been cause for some suspicion, but, it has to be viewed in the context of Nowack's then reputation and the fact that he was introduced to Sands by another client of hers of some substance, namely Eric Fein.

62 Although the issue of duress was not pressed, and for good reason, in my opinion; it is worth observing that notwithstanding Brounsuzian's evidence that he felt under pressure, the evidence is clear that quite the contrary has been demonstrated to be true. Ms. Dameron's candid and credible evidence to the contrary supports that conclusion. Notwithstanding Mr. Brounsuzian's evidence to the effect that he felt honourbound to affirm the agreement he had reached by telephone on September 13, 1996, he was urged to think about the agreement concerning which Ms. Dameron did not conceal her own skepticism. There is not one shred of evidence to support the conclusion that Brounsuzian's will was subservient to that of another.

63 This is not a case in which an unsophisticated client is presented with a four or five page document, all in fine print, and is required to sign it after a cursory review. Mr. Brounsuzian had at least the weekend in which to review the agreement and to meet with the person whose account he was guaranteeing. Mr. Brounsuzian had ample opportunity to seek independent legal advice had he so chosen; the absence of which is only relevant if the party executing the document reasonably claims to be unaware of the character of the document being executed. Quite the contrary obtains in the present case. It is clear in any event that "there is no magic in independent legal advice and in each case the question must be considered on the facts". (See *Bank of Montreal v. Featherstone* (1989), 68 O.R. (2d) 541 (Ont. C.A.), and *DeFaveri v. Toronto Dominion Bank*, [1999] O.J. No. 822 (Ont. C.A.)).

64 Regardless of the prudence, or otherwise, of entering into the original agreement, Mr. Brounsuzian's entire course of conduct tends to confirm the existence of the agreement as argued on behalf of the plaintiff. Apart from the evidence I have already canvassed which tends to support that conclusion, there is evidence given by Ms. Sands concerning the two

500 orders taken by her from Mr. Brounsuzian for the purchase of Dell shares to cover, in part, the Dell short position in the Nowack account. Exhibit 16, together with the notations made by Ms. Sands on the related trading tickets, evidences the two transactions. Mr. Brounsuzian denies placing those two orders. Concerning that conflict in the evidence, as in the case of other conflict in the evidence given by Ms. Sands and Mr. Brounsuzian, I accept as being much more probable and credible Ms. Sands' evidence. According to evidence given by Ms. Sands, her successor to the Brounsuzian file, Mr. Michael Ohnona, and Mr. McQuaid, there was regular, in some instances almost daily, communication with Mr. Brounsuzian concerning the status of the account in issue. Mr. Brounsuzian's consistent position was that he wanted to keep the Dell position open. According to Ms. Sands the two 500-share transactions were Mr. Brounsuzian's partial responses to her urgings to buy Dell shares and cut the losses.

65 Taken at its face value, the purport of Mr. Brounsuzian's evidence is that there was minimal communication between him and representatives of the plaintiff during the latter months of 1996 and up to the spring (April — May, 1997) when the plaintiff decided "to pull the plug" and close the account. By all reasonable and credible accounts the circumstances relating to the Nowack account were urgent and Mr. Brounsuzian's understatement of the extent of communication between him and the plaintiff's representatives, at all material times, belies that urgency. There was a lot at stake for all the parties involved and the plaintiff's evidence relating to the extent and nature of the communication between its representatives and Mr. Brounsuzian carries with it a much greater air of reality.

66 Probably the most significant circumstances in the present case are those which are lacking and which, when they exist, invite the court's remedial intervention. I refer here to the aura of "fraud", "deceit" or "stench of dishonesty". (See *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (B.C. S.C.)).

67 Upon a review of all the circumstances, therefore, I am of the view that the circumstances surrounding the consummation of the guarantee did not create as between the plaintiff and Mr. Brounsuzian a fiduciary relationship; but even if I had been persuaded to the contrary, I am of the view that the evidence does not demonstrate a breach of that duty.

68 The most damaging evidence in my view, is the plaintiff's failure originally to inform Brounsuzian that Nowack had not made the contribution he was required to on the settlement date, but viewed in the context of all the then current events and the commonly shared view that the accommodation would be short-term, it was more probably an oversight than a deliberate concealment. In any event, I am not satisfied that it was a material omission. The language of the guarantee is broad in its scope and, except for the arguable limitation inscribed on it by Mr. Brounsuzian, is unlimited.

69 For all the foregoing reasons therefore, I am of the view that the plaintiff is entitled to recover judgment against Mr. Brounsuzian in accordance with the terms of the guarantee.

70 The position of counsel for Mr. Nowack may be briefly summarized. He adopts the argument advanced on behalf of Mr. Brounsuzian in impugning the guarantee. It is argued on behalf of Nowack that although the fiduciary duty was owed to Brounsuzian, its breach rendered Nowack also a victim. Counsel concedes that Nowack got the ball rolling by his failure to fund his account. It is also conceded that it was open to Nowack to close out the account at any time. Mr. Shiller argues, however, it should be accepted that the whole idea of a guarantee was Ms. Sands, and, she having set in motion the whole scheme, its consequences should not fall on his client's shoulders; certainly not beyond the amount of the deficit as it existed on September 13, 1996. Mr. Nowack's counsel contends, further, that it was always open to the plaintiff to close out the account and stem the haemorrhaging that was taking place.

71 Mr. Shiller submits that it is open to the court to find negligence on the part of Ms. Sands, and therefore the plaintiff. In support of that argument he relies on the disputed evidence of Mr. Nowack that he gave instructions to Ms. Sands on or about September 3, 1996 concerning closing out the account. Her failed compliance with those instructions is tantamount to compensible negligence. Concerning that conflict in the evidence Mr. Shiller submits that the evidence of Mr. Nowack should be preferred to that of Ms. Sands. He relies, in part, for the support of that argument on what

he submits was a lack of candour on the part of Ms. Sands concerning whose initiative it was in procuring a guarantor and concerning the degree of urgency that prevailed relating to Nowack's account on or about September 13, 1996.

72 The following are reasons why, in my view, the arguments advanced on behalf of Nowack should not prevail:

• Any issues of credibility ought, in my view, to be resolved in favour of Ms. Sands. I indicated earlier in these reasons that I found Ms. Sands to be a credible witness. Standing by itself, that would not be reason enough to reject Mr. Nowack's. The conclusion is inescapable, however, that the information originally given to Ms. Sands by Mr. Nowack concerning his financial circumstances was misleading.

• Concerning the buy orders that Mr. Nowack claims to have given Mr. Sands in early September 1996, a search of the plaintiff's records yielded no "no-fill tickets" which is normally generated when for any reason an order cannot be filled. Even if Nowack's evidence were taken at face value, however, he was aware very shortly after that the order had not, for whatever reason, been filled, and, he took no steps either to replace the order or to complain of what he perceived as a failure on Ms. Sands' part.

• Unwisely, as it turned out, Ms. Sands went well beyond the call of duty, with Nowack's full knowledge, concurrence and cooperation to put in place a scheme of accommodation relying on his representations concerning his ability to meet his financial obligations.

• It may be gratuitous in all the circumstances to seek to apportion blame, but, if need be, there can be little doubt that the lion's share must rest on Nowack's shoulders, because he, of all the parties, was fully aware of his own impecuniosity and, blithely, as it were, allowed to deteriorate a situation of which he had full knowledge and over which he had complete control. Stated briefly, to the extent that equitable principles are applicable, they do not weigh in Mr. Nowack's favour.

73 Stated very simply, therefore, Mr. Nowack's obligation to the plaintiff is clear and they are entitled to judgment against him for the amount claimed and there will be judgment for the plaintiff accordingly.

74 Equally clear, in my view, is Nowack's obligation to his co-defendant and the cross-claimant. Accordingly, Brounsuzian is entitled to be indemnified in respect to his obligation to the plaintiff in accordance with his agreement with Nowack.

75 I turn next to the plaintiff's claim for a declaration that the December 18, 1996 conveyance by Brounsuzian of 79 Marydale Avenue, Markham, Ontario to 1094250 Ontario Ltd. is a fraudulent conveyance, contrary to Section 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c.F.29. Section 2 of the Act provides that:

> 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.

76 Apart from the facts I have already reviewed relating the obligation to the plaintiff arising from the September 13, 1996 guarantee, and upon which the plaintiff relies, the following other evidence bears upon the issue of the alleged fraudulent conveyance.

77 79 Marydale Avenue was, at all material times, Mr. Brounsuzian's matrimonial home, and, as of the time of this trial, he continued to reside there. According to Mr. Brounsuzian, the home was purchased in 1987 in his wife's name. Following a 1995 separation, followed by a 1997 divorce, his wife moved out and he continued to reside there. It was agreed, he testified, that as part of the separation agreement, it was agreed that he or his company would buy the house and his wife would receive a lump sum payment. Mr. Brounsuzian testified, further, that when he sought financing for a mortgage, he found it easier for him, personally, to get mortgage financing than it was for his company. It should be noted that Brounsuzian is the sole officer and director of the numbered company. Exhibit 1, Tab 12, dated October 31,

1995, is the transfer deed evidencing the conveyance of the property to Mr. Brounsuzian by his wife. Mr. Brounsuzian testified that it was always his intention to have his company hold tittle to 79 Marydale Avenue, as an investment. The December 18, 1996 transfer was just a fulfillment of that intention. Consistent with that intention and prior to the end of 1996, he had made arrangements with his lawyer, one Alan Smith, to effect the transfer for income tax purposes. Exhibit 1, Tab 96, dated December 18, 1996, is the deed evidencing that transfer. Mr. Brounsuzianuzian expressly rejects any suggestion that his decision to transfer the property, or the fact of its transfer, had anything to do with the state of his account with the plaintiff, which account he maintains, was in good standing at the time of the property's transfer. It was not intended, he testified, to avoid potential creditors.

78 Mr. Smith testified that at or about the time of Mr. and Mrs. Brounsuzian's separation, he recalls discussing with Mr. Brounsuzian, as part of the settlement discussions the prospect of the house being transferred to the company. Mr. Smith identified an unexecuted copy of an Assignment of Agreement of Purchase and Sale, dated August 23, 1994 as evidencing such an intention. The proposed Assignment of Agreement is between Vartevar E. Brounsuzian, in Trust ("Assignor") and 1094250 Ontario Ltd. (referred to as "ASSIGNEE"). Contained in the copy of that Assignment Agreement are the following "RECITALS":

> 1. By an Agreement of Purchase and Sale... VALECON DEVELOPMENTS INC., as Vendor agrees to sell, and the Assignor, as Purchaser agreed to Purchase certain lands described as Lot 36, Plan 65M-2481, Town of Markham, Regional Municipality of York;
>
> 2. The Agreement provided that the Assignor has the right to assign the Agreement to any company, person, firm, partnership or corporation;
>
> 3. The Assignee herein, is the Corporation contemplated in the Agreement as an assignee;
>
> 4. The Agreement provides that upon assignment of the Assignor to the Assignee, the Assignee shall, for all intends and purposes, stand in the place and stead of the Assignor and the Assignor shall be relieved of all obligations under the Agreement. (Exhibit 1, Tab 7)

79 Mr. Smith, in a reporting memorandum, dated May 23, 1995, reported to 1094250 Ontario Ltd. Mr. Brounsuzian concerning the incorporation of the numbered company (See Exhibit 1, Tab 8) and, by letter dated august 28, 1995, reported to Mr. Brounsuzian concerning his "SEPARATION". After listing the enclosures, the letter continued:

> With respect to the Agreement of Purchase and Sale for the house, it may be better to have an option agreement, whereby your numbered company has the option to purchase the house from Christine for..... My reasoning is that you may not wish to have an Agreement of Purchase and Sale for the house which Christine could then act upon, demanding.... The Option Agreement, if you decide to use that route, can then be referred to in the Separation Agreement. (Exhibit 1, Tab 9)

80 The issue of the house was again addressed by Mr. Smith reporting to Mr. Brounsuzian on the Separation Agreement. The letter, dated September 11, 1995, contained the following concluding paragraphs:

> As we discussed prior to the completion of the Separation Agreement, you decided that you will probably transfer the house into your name rather than that of your company, at least initially. Therefore, the above-noted agreement can be completed at a later date if necessary.
>
> Please contact me once you have decided how you wish to hold title to the property, and once you are prepared to pay the balance of the settlement money to Ms. Brounsuzian.
>
> As my involvement with this matter is at an end for the time being, I take the liberty of enclosing my account for professional services rendered, to this point in time, which I trust you will find in order. (Exhibit 1, Tab 10)

81 Mr. Brounsuzian testified on cross-examination that he was aware in October 1995 that a principal residence was exempt from capital gains tax and that it had to remain in his name for that benefit to accrue to him. He testified, however, that, because of [presumably unhappy] memories he did not want to continue living in the house. Notwithstanding the transfer of ownership, however, he continued living in the house because he was too busy to undertake all that was necessary to find a new house and to move. Mr. Brounsuzian indicated that he received no accounting advice concerning the transfer [i.e., of any advantage to him] but his understanding was that he could depreciate the value of the house (as opposed to the land) at the rate of 5% pre annum. Concerning the seemingly long hiatus between his expression to his lawyer of an intent to transfer the property and the time of the actual transfer, Mr. Brounsuzian testified that Mr. Smith was a busy sole practitioner and he was free to effect the transfer at his leisure. He conceded that he received no money from the company in consideration for the transfer. One question and answer left it unclear as to whether there was actually any consideration flowing from the company to Mr. Brounsuzian in 1997; at least, it appeared from the exchange that there was an attempt at such payment.

82 Houghton J., in *Ashcroft Holding Ltd. v. Almas* (1992), 11 C.B.R. (3d) 221 (B.C. S.C.) at 227, quoted from the judgment of Sedgewick J., in *Sun Life Assurance Co. v. Elliott* (1900), 31 S.C.R. 91 (S.C.C.), who, at page 94, made the following observation in respect to the comparable British legislation:

. . . . .

Lord Hatherley, in the leading case of *Freeman v. Pope* lays down the principle as follows at p. 541:

> ...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 customers 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, and the case is within the statute...

83 Houghton J. then went on to review the facts of the case before him in a search for what, if any, "badges of fraud" were to be found; in other words, such indicia as would warrant inferring a fraudulent intent on the part of the defendant. After observing that an inference of fraud would be warranted if the grantor rendered himself insolvent after the conveyance, Houghton J. went on to find that there were several badges of fraud which [were] apparent in the circumstances of [the] case.... He further concluded that "the result of the transfer of shares was to virtually denude Mr. Almas of assets...". There is no need to detail the facts of the *Ashcroft* case here beyond noting that there were two impugned transactions, one involving the matrimonial home which was transferred to Almas' wife pursuant to a matrimonial agreement. Houghton J. concluded that, as far as the matrimonial home was concerned, the conveyance, even if fraudulent, was saved by the section of the legislation which makes invulnerable to attack a conveyance made in good faith and for valuable consideration to a person not having knowledge of the intent to defraud. The other impugned transaction involving the none-arms-length transfer of shares was found to be clouded by those "badges of fraud", and, therefore, in violation of the statute.

84 In the present case, while there may be some justification for suspicion given the timing of the transfer which, arguably, was fictional, given its non-arms-length nature, there was no evidence led concerning Mr. Brounsuzian's financial circumstances, apart from that dealing with his stock market transactions and his financially unparticularized success as a businessman. Certainly there was no evidence based on which it could reasonably be concluded that Mr. Brounsuzian would be unable to satisfy any judgment ordered against him. On the positive side, there is credible evidence that the intent to transfer the matrimonial home to an identified company predated any of this litigation or any of the circumstances precipitating it. Even though civil fraud, in the minds' of lawyers and judges, may not carry the same taint as criminal fraud, a finding of civil fraud is still a serious conclusion to reach. The evidence in support of such a conclusion, therefore, should be persuasive. I am not so persuaded in the present case. For all the foregoing reasons, therefore, the plaintiff's claim in that regard will be denied.

85 In the result, therefore, there will be judgment for the plaintiff against both defendants.

86 There will be judgment for Brounsuzian against Nowack on the cross-claim.

87 Brounsuzian's counterclaim against the plaintiff is ordered dismissed; and the plaintiff's claim for a declaration that the conveyance of 79 Marydale Ave. was in violation of the *Fraudulent Conveyances Act* is ordered dismissed.

88 Counsel may arrange through my secretary to address the issue of costs at a time that is mutually convenient.

89 I will also entertain submissions concerning whether the plaintiff's recovery against Mr. Brounsuzian should reflect the limitation that Mr. McQuaid testified the plaintiff had privately concluded they would in recognition of Mr. Brounsuzian's handwritten endorsement on the guarantee.

Order accordingly.

Footnotes

1 There had been a split in the Dell shares; hence the 2000 short Dell position became 4000.

2011 ONSC 7465
Ontario Superior Court of Justice [Commercial List]

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.

2011 CarswellOnt 14401, 2011 ONSC 7465, 88 C.B.R. (5th) 320

Return on Innovation Capital Ltd. as agent for Roi Fund Inc, Roi Sceptre Canadian Retirement Fund, Roi Global Retirement Fund and Roi High Yield Private Placement Fund and Any Other Fund Managed by Roi from time to time (Applicants) and Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co and Gandi Special Holdings LLC. (Respondents)

Newbould J.

Judgment: December 16, 2011
Docket: 09-CL-8172

Proceedings: additional reasons to *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List])

Counsel: Harvey Chaiton, Maya Poliak for Monitor, BDO Canada Limited
Mathew Halpin, Evan Cobb for TA Associates Inc.
Christopher J. Cosgriffe for Harry Gandy, James Gandy, Trent Garmoe

***Newbould J.*:**

1 On August 25, 2011 I released my endorsement on a motion brought by BDO Canada Limited in its capacity as a court-appointed Monitor of Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co, and Gandi Special Holdings LLC (the "Gandi Group") for advice and directions, and particularly to determine preliminary issues in connection with the indemnity claims made by Hary Gandy, James Gandy and Trent Garmoe (the "Claimants") against all of the Gandi Group.

2 The Monitor was successful and seeks costs of the motion on a partial indemnity basis. The position of the Monitor was supported by TA Associates, Inc. ("TA Associates ") which also seeks costs on a partial indemnity basis. The cost orders are opposed by the Claimants.

3 The usual rule is that absent some special circumstance, costs follow the event. In this case, the Claimants assert that costs are rarely made in a CCAA proceeding and should not be made in this case. Reliance is placed on the following statement of the Ontario Court of Appeal in *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165 (Ont. C.A.):

> 4. We make no order as to costs of the underlying motions. We understand that the conventional approach in CCAA proceedings is to rarely make costs orders, with the result that each party bears its own costs. There are sound policy reasons that underlie this approach, which include the reality that as a result of the situation of the insolvent company, the amount of funds available for distribution is limited and parties ought not to expect to recover their litigation costs: see *Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487, at para. 31 (Gen. Div.) and *Re Calpine Canada Energy Limited*, [2008] A.J. No. 965, at para. 1. We see no reason to depart from the usual practice.

4 The statement of the Court of Appeal that cost orders are rarely made in CCAA proceedings is somewhat surprising. Recently, for example, in *Grant Forest Products Inc., Re* (2009), 58 C.B.R. (5th) 127 (Ont. S.C.J. [Commercial List]) in a motion in a CCAA proceeding between the former chairman and the secured lenders, I ordered costs to be paid to the former chairman. That decision was affirmed by the Court of Appeal (2010), 101 O.R. (3d) 383 (Ont. C.A.) in which costs were also awarded for the appeal. See also my comments in *Thomas Cook Canada Inc. v. Skyservice Airlines Inc.*, [2011] O.J. No. 4378 (Ont. S.C.J. [Commercial List]) in a case dealing with costs in a receivership matter.

5 I do not read the decision of the Court of Appeal as laying down a principle that costs should rarely be ordered in CCAA proceedings. The statement is "We understand that..." and indicates that the court was essentially passing on what it was told, which I think was an overstatement. The cases cited do not stand for any general principle that costs are rarely ordered. In *Canadian Asbestos Services Ltd. v. Bank of Montreal* [1993 CarswellOnt 226 (Ont. Gen. Div.)], Chadwick J. in declining costs in a CCAA proceeding stated:

> 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.

6 In *Calpine Canada Energy Ltd., Re* [2008 CarswellAlta 1163 (Alta. Q.B.)] Romaine J. ordered costs to be paid in a CCAA proceeding. Regarding the issue of whether costs are ordered in CCAA proceedings, she did not state that costs are rarely made, but rather that it was often that cost orders were not made. She stated:

> Often in proceedings under the Companies' Creditors Arrangement Act, costs are not awarded against unsuccessful parties.

7 I agree with Romaine J. that cost orders are often not made in CCAA proceedings. I do not agree that they are rarely made and, as I said, I do not read the decision in *Re Calpine* as dictating otherwise.

8 The Claimants contend that in CCAA proceedings, Monitors are officers of the court with an obligation to act independently and to consider the interests of the debtor and creditors, with a duty to remain neutral as between the various stakeholders in the CCAA proceedings. Thus it is claimed that the Monitor should not be entitled to costs for taking a position that was contrary to the interests of the Claimants.

9 While Monitors are officers of the court and intended normally to provide neutral services and neutral advice, BDO in this case had obligations beyond that of a typical Monitor. By order of Cameron J. dated March 9, 2010, BDO as Monitor was empowered and authorized to do a number of things on behalf of the Gandi companies, including being authorized to file a plan of compromise or arrangement. This order was necessitated because under the CCAA process, all of the business and assets of the Gandi companies had been sold and all of the directors and officers had resigned and there was no functioning board of directors. Proceeds from the sale were sufficient to pay off secured creditors and on the same day, BDO was authorized by Cameron J. to establish a claims procedure to distribute the available cash from the sale of assets among the unsecured creditors.

10 The claims process was substantially completed by November 2010 and the Monitor prepared a consolidated plan of compromise and arrangement and scheduled a motion for approval to file the plan. On December 20, 2010 the Claimants filed proofs of claim in excess of $76 million. The basis for their claim is set out in my endorsement of August 25, 2011. On February 18, 2011 the Claimants brought a motion for leave to file their claims. At that time the Monitor raised concerns regarding the evidence supporting the claims and the fact that a portion of them appeared to constitute equity claims. Morawetz J. granted the Claimants leave to file their claims late and noted that the Monitor could apply to the court regarding preliminary issues that had been identified.

11 The Claimants alleged that they were *de jure* directors and officers of the corporate entities in the Gandi Group. TA Associates had advanced $75 million to the Gandi Group by way of $25 million of debt and $50 million of equity. In January 2009, TA Associates commenced an arbitration proceeding against the Claimants. In the arbitration TA Associates claimed damages against the Claimants in an amount of US $75 million with interest, being the total amount of TA Associates' investment in the Gandi Group. The arbitration has not yet been heard on its merits.

12 The Claimants asserted an entitlement to indemnification by the Gandi Group in respect of any award of damages which may be made against them in the arbitration together with all legal fees incurred by the Claimants in defending the arbitration. Their right to be indemnified was hotly contested as was the question of whether their claim was an equity claim has to $50 million. The Claimants were thus not normal creditors in a CCAA proceeding, but rather sophisticated individuals seeking to put themselves in a position to substantially dilute the unsecured creditors on an indemnity that had to be determined, one way or the other. The indemnity claims of the Claimants, if permitted, would have delayed distributions to all creditors for a considerable period of time.

13 On March 11, 2011 the Monitor disallowed the indemnity claims of the Claimants and advised them that based on the evidence filed in support of the indemnity claims, any indemnity claim would be solely against Gandi Holdings. The Claimants then served a notice of dispute, which led to the motion before me.

14 In the circumstances of this case, I find no fault with the actions of the Monitor in bringing the matter before the Court and taking the position that it did. It really had no other choice. It was the Monitor who was charged with the responsibility of filing a plan of compromise and arrangement, and the form in which the plan would finally be settled depended on the outcome of the motion.

15 In the circumstances, I am of the view that Monitor is entitled to its costs on a partial indemnity basis as it was successful.

16 The claim for costs by TA Associates is opposed by the Claimants. TA Associates is a substantial creditor and would be severely affected if the indemnity claims of the Claimants were accepted by the Monitor. It participated in the motion. It filed an affidavit of Mr. Johnson who was cross-examined by counsel for the Claimants. TA Associates' counsel examined one of the Claimants on his affidavit and participated fully in the motion. The Claimants oppose any order for costs in favour of TA Associates whose participation they contend was redundant. I do not agree. Whether the indemnities are proper claims in the CCAA proceedings is of importance to TA Associates because the indemnities are said to protect the Claimants in the event that an award is made against them in the arbitration commenced by TA Associates in the U.S. The Claimants had to know that if they succeeded in their position, that would give them some leverage in the arbitration proceedings as TA Associates would be making a claim in the arbitration that if successful would partially end up coming out of its own pocket. The Claimants could not have expected TA Associates to sit back, particularly as it was the Monitor who brought the motion for directions and it was not clear at the outset exactly what the Monitor would do in the motion.

17 In my view TA Associates is entitled to its costs, although some recognition is to be given to the fact of duplication of efforts in considering what a fair and reasonable cost order is to be made against the Claimants.

18 The monitor seeks costs of $45,431.09, inclusive of HST, for fees and disbursements of $10,804.91, inclusive of HST. It also seeks fees and disbursements from BDO of $12,178.99, inclusive of HST. Apart from the usual work done on a motion such as this, because the Claimants alleged they were officers and directors of all members of the Gandi Group, it was necessary to consult U.S. Counsel regarding some of the Gandi companies that were incorporated in Delaware and Texas. In the face of a lack of written indemnities, the Claimants took the position that the indemnities were in the possession, power or control of the Monitor. Because of that position taken by the Claimants, counsel for the Monitor had to attend at the offices of the former solicitors of the Gandi Group to review the corporate governance documents. BDO and its counsel had to review 11 boxes of books and records of the Gandi Group in storage and 29

additional boxes at the Claimants' request. The Monitor was also required to review the books and records of the Gandi Group to disprove the allegations made by the Claimants that the Monitor authorized payment of certain legal fees of the Claimants in the arbitration.

19 The Claimants contend that the work done by counsel for BDO was excessive. While it is not required that the Claimants produce information as to the amount of time spent by its counsel, its failure to do so is something to be taken into account. In *Risorto v. State Farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), Wrinkler J. (as he then was) stated:

> The attack on the quantum of costs, insofar as the allegations of excess are concerned, in the present circumstances is no more than an attack in the air. I note that State Farm has not put the dockets of its counsel before the court in support of its submission. Although such information is not required under Rule 57 in its present form, and the rule enumerates certain factors which would have to be considered in exercising the discretion with respect to the fixing of costs in any event, it might still provide some useful context for the process if the court had before it the bills of all counsel when allegations of excess and "unwarranted over-lawyering" are made. In that regard, the court is also entitled to consider "any other matter relevant to the question of costs". (See rule 57.01(1)(i).) In my view, the relative expenditures, at least in terms of time, by adversaries on opposite sides of a motion, while not conclusive as to the appropriate award of costs, is still, nonetheless, a relevant consideration where there is an allegation of excess in respect of a particular matter.

20 In *Frazer v. Haukioja*, 2010 ONCA 249 (Ont. C.A.), it was contended that the trial judge erred in awarding costs against the defendant. LaForme, J.A. for the court stated:

> Dr. Haukioja argued before the trial judge that Grant Frazer's counsel docketed almost twice as much time as his own. This, he says is relevant to Dr. Haukioja's reasonable expectations and establishes that he could not reasonably have expected Mr. Frazer's counsel to have invested so much more time than his own.
>
> The answer to this argument is found in the submissions of Grant Frazer that were made to this court.
>
> In making his finding with respect to the application of that part of rule 57.07(1)(0.b) "the amount of costs that an unsuccessful party could reasonably expect to pay..." the trial judge noted Mr. Haukioja's failure to provide adequate information as to his own legal costs incurred. He also agreed with the observations of Nordheimer J. in *Hague v. Liberty Mutual Insurance Co.*, [2005] O.J. No. 1660at para.16 that, "the failure to volunteer that information may undermine the strength of the unsuccessfully part's criticisms of the successful party's requested costs." In that regard, his decision is entirely consistent with the authorities, and in particular the dicta of the Divisional Court in Andersen, "the inference must be that the [unsuccessful] Defendants devoted as much or more time and money" as did the successful Plaintiffs: *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508 (Ont. S.C.J.) at paras. 24 to 27.

21 In reviewing the cost outline filed on behalf of the Monitor, nothing on the face of it would indicate that excessive time was spent. This was not a straightforward matter by any means and involved some novel issues. Nor do I think that the hourly rates used were excessive, being $350 per hour for Mr. Chaiton who was called in 1982 and $170 for Ms. Poliak who was called in 2007.

22 The Claimants contend that work done by BDO should not be permitted. The work done by BDO was entirely in connection with the motion and was necessitated by the need to review books and records and to supervise the Claimants' review of the record boxes. These costs would not have been incurred but for the position taken by the Claimants. In my view the cost of the work done by BDO was for and incidental to the motion and permissible in accordance with section 131 of the *Courts of Justice Act*.

23 TA Associates claims fees of $37,055 and disbursements of $4,522.11. In reviewing the cost outline filed on behalf of TA Associates, nothing on the face of it would indicate that excessive time was spent. As well, the hourly rates appear

reasonable, being $350 per hour for Mr. Halpin who was called in 1986 and $165 per hour for Mr. Cobb who was called in 2008.

24 Taking into account the factors enumerated in rule 57.01, including the time spent, the results achieved, the complexity of the matter, the issue of possible duplication by counsel for the Monitor and for TA Associates, and also considering the amount of costs that an unsuccessful party such as TA Associates in the circumstances of this motion could reasonably expect to pay, I order that costs be paid by the Claimants within 30 days as follows:

1. To the Monitor for its counsel's fees and disbursements, $50,000 inclusive of HST.

2. To the Monitor for its fees and disbursements, $12,000 inclusive of HST.

3. To TA Associates for its counsel's fees and disbursements, $30,000 inclusive of HST.

Order accordingly.

Royal Bank of Canada *Appellant*

v.

North American Life Assurance Company and Balvir Singh Ramgotra *Respondents*

INDEXED AS: ROYAL BANK OF CANADA *v.* NORTH AMERICAN LIFE ASSURANCE CO.

File No.: 24316.

1995: November 8; 1996: February 22.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Bankruptcy — Settlement of funds — RRSP transferred in good faith to RRIF (insurance annuity) for benefit of third party — Settlements made up to five years prior to bankruptcy void against trustee in bankruptcy if interest of settlor in property did not pass on settlement — RRIFs normally exempt from claims of bankrupt's creditors — Bankruptcy declared within five years of transfer — Whether transfer to RRIF a settlement — If so, whether or not settlement void against trustee in bankruptcy — If so, whether or not funds in RRIF available to satisfy claims of creditors notwithstanding exempt status of RRIF — Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 67, 91 — The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, ss. 2(kk), 158.

In June 1990, respondent Ramgotra transferred the funds from his RRSPs into a RRIF managed by respondent insurance company. His wife was designated beneficiary under the RRIF and payments began that August. Circumstances related to relocation of respondent's medical practice led him to make an assignment into bankruptcy in February 1992. On his absolute discharge from bankruptcy in January 1993, his only assets were his clothing and household contents, and the RRIF. While the RRSPs would have been subject to his creditors' claims, the RRIF constituted a life insurance annuity and was therefore exempt from their claims on the basis of s. 67(1)(*b*) (property divisible among creditors on bankruptcy does not include property exempt from seizure under provincial law) of the *Bankruptcy and*

Banque Royale du Canada *Appelante*

c.

La Nord-Américaine, compagnie d'assurance-vie et Balvir Singh Ramgotra *Intimés*

RÉPERTORIÉ: BANQUE ROYALE DU CANADA *c.* NORD-AMÉRICAINE, CIE D'ASSURANCE-VIE

N° du greffe: 24316.

1995: 8 novembre; 1996: 22 février.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Faillite — Disposition de fonds — REER transférés de bonne foi dans un FERR (rente d'assurance) au profit d'un tiers — Inopposabilité au syndic des dispositions faites au cours des cinq ans qui précèdent la faillite si les intérêts du disposant dans les biens n'ont pas cessé lorsque fut faite la disposition — FERR normalement à l'abri des réclamations des créanciers de la faillite — Cession de biens dans les cinq ans du transfert — Le transfert dans le FERR est-il une disposition? — Dans l'affirmative, la disposition est-elle inopposable au syndic? — Si oui, les fonds du FERR peuvent-ils servir à régler les réclamations des créanciers en dépit de l'exemption dont bénéficie le FERR? — Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3, art. 67, 91 — The Saskatchewan Insurance Act, R.S.S. 1978, ch. S-26, art. 2kk), 158.

En juin 1990, l'intimé Ramgotra a transféré les fonds de ses REER dans un FERR géré par la compagnie d'assurance intimée. Son épouse a été désignée bénéficiaire du FERR et les paiements ont commencé en août de la même année. Par suite d'événements liés à l'exercice de sa profession de médecin, l'intimé a fait cession de ses biens en février 1992. Lorsqu'il a obtenu sa libération absolue, en janvier 1993, il n'a conservé pour tous biens que ses vêtements, le contenu de sa maison et le FERR. Alors que les REER auraient été touchés par les réclamations de ses créanciers, le FERR, parce qu'il constituait une rente d'assurance-vie, était à l'abri de leurs réclamations par l'effet conjugué de l'al. 67(1)*b*) (les biens constituant le patrimoine attribué aux créanciers ne comprennent pas les biens qui sont exempts de saisie

Insolvency Act (*BIA*), when read in conjunction with ss. 2(kk)(vii) (life insurance includes annuities) and 158(2) (life insurance money and contract is exempt from seisure where a spouse is designated beneficiary) of *The Saskatchewan Insurance Act*. The trustee in bankruptcy applied for a declaration that the transfer of the RRSP funds into the RRIF was void, pursuant to s. 91(2) of the *BIA*, which declares, in part, that "settlements" made one to five years prior to bankruptcy are void against the trustee if "the interest of the settlor in the property did not pass" upon settlement. The trustee's application was dismissed at trial because the transfer of the RRSP funds into the RRIF had been made in good faith and not for the purpose of defeating the claims of his creditors. Appellant's appeal to the Saskatchewan Court of Appeal was dismissed. The issues here were: (1) whether the transaction was a settlement within the meaning of s. 91 *BIA*; (2) if so, whether the settlement was void against the trustee in bankruptcy under the second branch of s. 91(2); and, (3) if so, whether the funds in the RRIF were available to satisfy the claims of the creditors despite the RRIF's exempt status under s. 67(1)(*b*).

Held: The appeal should be dismissed.

When respondent Ramgotra transferred the funds from his two RRSPs into an RRIF designating his wife as beneficiary, the funds became exempt from execution or seizure by reason of s. 67(1)(*b*) *BIA*, when read in conjunction with ss. 2(kk)(vii) and 158(2) of *The Saskatchewan Insurance Act*. Even if the beneficiary designation was a settlement within s. 91 *BIA*, and was void against the trustee in bankruptcy pursuant to the second branch of s. 91(2), the RRIF remained exempt from the claims of respondent Ramgotra's creditors and, in particular, the appellant.

Jurisprudential consensus has emerged that the designation of a beneficiary under a life insurance policy constitutes a s. 91 settlement. Respondent Ramgotra effected a settlement triggering s. 91.

Sections 67(1)(*b*) and 91 *BIA* are not in conflict. The two provisions can be reconciled by giving effect to their distinct terms, and by recognizing their distinct roles in bankruptcy. Section 91 dictates that certain settled property will fall back into the estate of the bankrupt in the possession of the trustee, while s. 67 is

sous le régime de lois provinciales) de la *Loi sur la faillite et l'insolvabilité* (*LFI*) ainsi que du sous-al. 2kk)(vii) (assurance-vie s'entend également d'une rente) et du par. 158(2) (les sommes assurées et le contrat d'assurance-vie sont exempts de saisie lorsque le conjoint est désigné bénéficiaire) de *The Saskatchewan Insurance Act*. Le syndic a demandé un jugement déclaratoire portant que, en vertu du par. 91(2) *LFI*, le transfert des fonds des REER dans le FERR était nul. Ce paragraphe énonce notamment que sont inopposables au syndic les «dispositions» de biens faites au cours des cinq ans qui précèdent la faillite si «les intérêts du disposant dans ces biens n'ont pas cessé» lorsque fut faite la disposition. Au procès, la demande du syndic a été rejetée pour le motif que l'intimé avait agi de bonne foi en transférant les fonds des REER dans le FERR et non dans le but de frustrer les réclamations de ses créanciers. L'appel à la Cour d'appel de la Saskatchewan interjeté par l'appelante a lui aussi été rejeté. Les questions en litige sont les suivantes: (1) L'opération est-elle une disposition au sens de l'art. 91 *LFI*? (2) Dans l'affirmative, la disposition est-elle inopposable au syndic en vertu du second volet du par. 91(2)? (3) Si oui, les fonds du FERR peuvent-ils servir à régler les réclamations des créanciers en dépit de l'exemption dont bénéficie le FERR en vertu de l'al. 67(1)*b*)?

Arrêt: Le pourvoi est rejeté.

Lorsque l'intimé Ramgotra a transféré les fonds de ses deux REER dans un FERR dont son épouse a été désignée bénéficiaire, ces sommes sont devenues exemptes d'exécution ou de saisie par l'effet conjugué de l'al. 67(1)*b*) *LFI* ainsi que du sous-al. 2kk)(vii) et du par. 158(2) de *The Saskatchewan Insurance Act*. Même si la désignation d'un bénéficiaire était une disposition au sens de l'art. 91 *LFI*, et qu'elle était inopposable au syndic conformément au second volet du par. 91(2) *LFI*, le FERR est demeuré à l'abri des réclamations des créanciers de l'intimé Ramgotra et, en particulier, de celle de l'appelante.

Il s'est établi, dans la jurisprudence, un consensus que la désignation d'un bénéficiaire aux termes d'une police d'assurance constitue une disposition au sens de l'art. 91. L'intimé Ramgotra a fait une disposition qui a déclenché l'application de l'art. 91.

Il n'y a pas incompatibilité entre l'al. 67(1)*b*) et l'art. 91 *LFI*. Il est possible de concilier les deux articles en donnant effet à leur texte respectif et en reconnaissant les rôles distincts qu'ils jouent en matière de faillite. Alors que l'art. 91 indique que certains biens ayant fait l'objet d'une disposition reviennent dans le patrimoine

directed at the exercise of administrative powers over the estate by the trustee. Where a settlement is void against the trustee under s. 91, then in normal circumstances, the trustee is empowered to administer the settled asset and use it to satisfy the claims of creditors. However, in the special case where the asset is exempt under s. 67(1)(*b*), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors.

Respondent Ramgotra's property interest in the RRIF passed to and vested in the trustee in bankruptcy by operation of s. 71(2) *BIA*. The future contingent interest of the designated beneficiary under the RRIF was not captured by s. 71(2), since it had been settled on the designated beneficiary prior to bankruptcy. The trustee in bankruptcy could apply to have this settlement set aside under s. 91(2) *BIA*.

The effect of s. 91 is to render certain settlements void against the trustee in bankruptcy. A life insurance policy, however, is rendered exempt under s. 67(1)(*b*) by the designation of a beneficiary and this status continues so long as the designation is "in effect" according to s. 158(2) of *The Saskatchewan Insurance Act*. The fact that a beneficiary designation is void against the trustee under federal legislation does not necessarily result in its no longer having effect *vis-à-vis* the claims of creditors under the provincial legislation which s. 67(1)(*b*) incorporates.

It was not necessary to decide whether respondent Ramgotra effected a void settlement under the second branch of s. 91(2) when he designated his wife as beneficiary of his RRIF. Even if the settlement were void against the trustee in bankruptcy, that would not allow the trustee to use the funds in the RRIF to satisfy the claims of creditors such as the appellant bank. The RRIF is an exempt asset pursuant to the provincial legislation incorporated into s. 67(1)(*b*): it is not property which is divisible among creditors. Given this, even if Mrs. Ramgotra's future contingent interest in the RRIF had passed into the possession of the trustee through the application of s. 91(2), the RRIF was property "incapable of realization" by the trustee pursuant to s. 40(1) *BIA*. Therefore, the trustee was obliged to return it to respondent Ramgotra prior to applying for his discharge. Regardless of whether or not respondent Ramgotra's settlement was void against the trustee, the

du failli en la possession du syndic, l'art. 67 porte sur les pouvoirs de nature administrative exercés par ce dernier sur le patrimoine. Lorsque, en vertu de l'art. 91, une disposition est inopposable au syndic, celui-ci est, dans des circonstances normales, habilité à administrer le bien ayant fait l'objet de la disposition et à l'appliquer au règlement des réclamations des créanciers. Cependant, dans les cas particuliers où il s'agit d'un bien exempt en vertu de l'al. 67(1)*b*), le syndic ne peut alors exercer ses pouvoirs de distribution car le bien ne fait pas partie du patrimoine attribué aux créanciers.

L'intérêt de propriété de l'intimé Ramgotra dans le FERR est passé et a été dévolu au syndic en application du par. 71(2) *LFI*. L'intérêt futur et éventuel de la bénéficiaire désignée aux termes du FERR n'est pas tombé dans le champ d'application du par. 71(2), puisque la disposition de ce bien en faveur de la bénéficiaire désignée avait eu lieu avant la faillite. Il était loisible au syndic de demander l'annulation de cette disposition en vertu du par. 91(2) *LFI*.

L'article 91 a pour effet de rendre certaines dispositions inopposables au syndic. Toutefois, lorsqu'il s'agit d'une police d'assurance-vie, c'est la désignation d'un bénéficiaire qui la rend exempte en vertu de l'al. 67(1)*b*). Aux termes du par. 158(2) de *The Saskatchewan Insurance Act*, la police d'assurance-vie conserve sa qualité de bien exempt tant que la désignation est «en vigueur». Le fait qu'une désignation de bénéficiaire soit inopposable au syndic en vertu de la loi fédérale n'a pas nécessairement pour effet de rendre cette désignation inopérante à l'égard des réclamations des créanciers sous le régime des lois provinciales pertinentes incorporées par l'al. 67(1)*b*).

Il n'est pas nécessaire de décider si l'intimé Ramgotra a fait une disposition inopposable visée par le second volet du par. 91(2) lorsqu'il a désigné son épouse à titre de bénéficiaire de son FERR. Même si la disposition était inopposable au syndic, cela n'autorisait pas ce dernier à utiliser les fonds du FERR pour régler les réclamations des créanciers telle la banque appelante. Le FERR est un bien exempt aux termes des lois provinciales incorporées par l'al. 67(1)*b*), c'est-à-dire qu'il ne fait pas partie des biens constituant le patrimoine attribué aux créanciers. Pour cette raison, même si l'intérêt futur et éventuel de M^me^ Ramgotra dans le FERR était passé en la possession du syndic par l'application du par. 91(2), le FERR était un bien «non réalisable» par le syndic aux termes du par. 40(1) *LFI*. Par conséquent, le syndic était tenu, avant de demander sa libération, de retourner ce bien à l'intimé Ramgotra. Peu importe que la disposition faite par l'intimé Ramgotra soit ou non

exempt status of the RRIF is an absolute bar to the appellant's claim.

Whether a settlor has acted in good faith or for the purpose of defeating creditors is not relevant to the question of whether a settlement has been made within s. 91. In contrast, however, a settlor's intention is highly relevant where a settlement is being challenged under provincial fraud legislation. It was not necessary to determine if a life insurance beneficiary designation can be set aside as a fraudulent conveyance of property. The provincial fraud provisions are clearly remedial in nature and should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects. There is a strong case for concluding that a life insurance beneficiary designation is both a "juridical act" and a "disposition" or "conveyance" of "property".

The *Statute of Elizabeth*, assuming without deciding that it remains in force, would allow creditors to challenge fraudulent conveyances, including life insurance beneficiary designations, without having to prove that, at the time of the conveyance, the debtor was insolvent, was unable to pay his or her debts in full, or knew that he or she was on the eve of insolvency.

Cases Cited

Applied: *Re Bozanich*, [1942] S.C.R. 130; **considered**: *Re Wozniuk* (1987), 76 A.R. 42; *Re Geraci* (1970), 14 C.B.R. (N.S.) 253, rev'g (1969), 13 C.B.R. (N.S.) 86; *Re Sykes* (1993), 18 C.B.R. (3d) 148; *Re Pearson* (1977), 23 C.B.R. (N.S.) 44; *Nicholson v. Milne* (1989), 74 C.B.R. (N.S.) 263; **disapproved**: *Wilson v. Doane Raymond Ltd.* (1988), 69 C.B.R. (N.S.) 156; *Re Yewdale* (1995), 30 C.B.R. (3d) 194; **referred to**: *Royal Bank v. Oliver* (1992), 11 C.B.R. (3d) 82; *In re Lowndes; Ex parte Trustee* (1887), 18 Q.B.D. 677; *Shrager v. March*, [1908] A.C. 402; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *M.N.R. v. Anthony* (1995), 124 D.L.R. (4th) 575; *Re Malloy* (1983), 48 C.B.R. (N.S.) 308; *Alberta Treasury Branches v. Guimond* (1987), 70 C.B.R. (N.S.) 125; *Camgoz (Trustee of) v. Sun Life Assurance Co. of Canada* (1988), 70 C.B.R. (N.S.) 131, aff'd (1988), 72 C.B.R. (N.S.) 319; *Klassen (Trustee of) v. Great West Life Assurance Co.* (1990), 1 C.B.R. (3d) 263; *Re Douyon* (1982), 134 D.L.R. (3d) 324; *Re MacDonald*

inopposable au syndic, la qualité de bien exempt du FERR est un obstacle insurmontable à la réclamation de l'appelante.

La question de savoir si un disposant a agi de bonne foi ou dans le but de frustrer ses créanciers n'est pas pertinente pour déterminer s'il y a eu disposition au sens de l'art. 91. En revanche, l'intention du disposant est éminemment pertinente lorsqu'une disposition est contestée en vertu des lois provinciales en matière de fraude. Il n'est pas nécessaire de déterminer s'il est possible de faire annuler, en tant que transfert frauduleux de biens, la désignation d'un bénéficiaire d'une assurance-vie. Les dispositions législatives provinciales en matière de fraude visent manifestement à créer un recours, et elles devraient donc recevoir une interprétation équitable, large et libérale qui favorise la réalisation de leur objet. Il y a de bonnes raisons de conclure que la désignation d'un bénéficiaire d'une assurance-vie est à la fois un «acte juridique» et une «aliénation» ou un «transfert» de «biens».

À supposer — sans en décider — que le *Statute of Elizabeth* soit toujours en vigueur, ce texte permettrait aux créanciers de contester des transferts frauduleux, y compris la désignation du bénéficiaire d'une assurance-vie, sans avoir à prouver que, au moment où ceux-ci ont été effectués, le débiteur était insolvable ou incapable de payer la totalité de ses dettes, ou encore qu'il se savait sur le point d'être insolvable.

Jurisprudence

Arrêt appliqué: *Re Bozanich*, [1942] R.C.S. 130; **arrêts examinés**: *Re Wozniuk* (1987), 76 A.R. 42; *Re Geraci* (1970), 14 C.B.R. (N.S.) 253, inf. (1969), 13 C.B.R. (N.S.) 86; *Re Sykes* (1993), 18 C.B.R. (3d) 148; *Re Pearson* (1977), 23 C.B.R. (N.S.) 44; *Nicholson c. Milne* (1989), 74 C.B.R. (N.S.) 263; **arrêts critiqués**: *Wilson c. Doane Raymond Ltd.* (1988), 69 C.B.R. (N.S.) 156; *Re Yewdale* (1995), 30 C.B.R. (3d) 194; **arrêts mentionnés**: *Royal Bank c. Oliver* (1992), 11 C.B.R. (3d) 82; *In re Lowndes; Ex parte Trustee* (1887), 18 Q.B.D. 677; *Shrager c. March*, [1908] A.C. 402; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *M.N.R. c. Anthony* (1995), 124 D.L.R. (4th) 575; *Re Malloy* (1983), 48 C.B.R. (N.S.) 308; *Alberta Treasury Branches c. Guimond* (1987), 70 C.B.R. (N.S.) 125; *Camgoz (Trustee of) c. Sun Life Assurance Co. of Canada* (1988), 70 C.B.R. (N.S.) 131, conf. par (1988), 72 C.B.R. (N.S.) 319; *Klassen (Trustee of) c. Great West Life Assurance Co.* (1990), 1 C.B.R. (3d) 263; *Re Douyon* (1982), 134 D.L.R. (3d) 324; *Re*

(1991), 21 C.B.R. (3d) 211; *Canadian Imperial Bank of Commerce v. Meltzer* (1991), 6 C.B.R. (3d) 1; *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765; *Thompson v. Coulombe* (1984), 54 C.B.R. (N.S.) 254; *Zemlak (Trustee of) v. Zemlak* (1987), 66 C.B.R. (N.S.) 1; *Sovereign General Insurance Co. v. Dale* (1988), 32 B.C.L.R. (2d) 226; *Technurbe Building Construction Ltd. v. McKinley* (1989), 76 C.B.R. (N.S.) 106.

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Assignments and Preferences Act, R.S.N.S. 1989, c. 25, s. 4.
Assignments and Preferences Act, R.S.O. 1990, c. A.33, s. 4(1).
Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 2 "settlement" [am. S.C. 1992, c. 27, s. 3(2)], 16(3), 17, 18, 19, 24, 30(1)(*a*), (*b*), (*c*), (*j*), 40(1), 43(1), 49(1), 67(1) [rep. & sub. *idem* s. 33] (*a*), (*b*), (*c*), (*d*), 68 [*idem* s. 34], 71(2), 72(1), 91(1), (2), 3(*b*), 94, 98(1), 99, 158(*a*).
Bankruptcy Rules, C.R.C. 1978, c. 368, r. 89.
Civil Code of Québec, art. 1631 ("Paulian Action").
Exemptions Act, R.S.S. 1978, c. E-14, s. 2.
Frauds on Creditors Act, R.S.P.E.I. 1988, c. F-15, s. 2.
Fraudulent Conveyance Act, R.S.B.C. 1979, c. 142, s. 1.
Fraudulent Conveyances Act, R.S.M. 1987, c. F160, s. 2.
Fraudulent Conveyances Act, R.S.N. 1990, c. F-24, s. 3.
Fraudulent Conveyances Act, R.S.O. 1990, c. F.29, s. 2.
Fraudulent Preference Act, R.S.B.C. 1979, c. 143, s. 3.
Fraudulent Preferences Act, R.S.A. 1980, c. F-18, s. 2.
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Fraudulent Preferences and Conveyances Act, R.S.Y. 1986, c. 72, s. 2.
Insurance Act, R.S.A. 1980, c. I-5, s. 265.
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Fraudulent Conveyance Act, R.S.B.C. 1979, ch. 142, art. 1.
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Fraudulent Preferences Act, R.S.A. 1980, ch. F-18, art. 2.
Fraudulent Preferences Act, R.S.S. 1978, ch. F-21, art. 3.
Insurance Act, R.S.A. 1980, ch. I-5, art. 265.
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Insurance Act, R.S.O. 1960, ch. 190, art. 162(2) (maintenant L.R.O. 1990, ch. I.8, art. 196(2)).
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Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3, art. 2 «disposition» [mod. par L.C. 1992, ch. 27, art. 3(2)], 16(3), 17, 18, 19, 24, 30(1)*a*), *b*), *c*), *j*), 40(1), 43(1), 49(1), 67(1) [abr. & rempl. *idem* art. 33], *a*), *b*), *c*), *d*), 68 [*idem* art. 34], 71(2), 72(1), 91(1) [*idem* art. 40], (2), 3*b*), 94, 98(1), 99, 158*a*).
Loi sur les cessions en fraude des droits des créanciers, L.R.O. 1990, ch. F.29, art. 2.
Loi sur les cessions et préférences, L.R.O. 1990, ch. A.33, par. 4(1).
Loi sur les cessions et préférences, S.R.N.-B. 1973, ch. A-16, art. 2.
Loi sur les préférences et les transferts frauduleux, L.R.Y. 1986, ch. 72, art. 2.
Loi sur les transferts frauduleux de biens, L.R.M. 1987, ch. F160, art. 2.
Règles régissant la faillite, C.R.C. 1978, ch. 368, art. 89.

Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, ss. 2(kk)(i), (ii), (iii), (iv), (vii), 158(1), (2).

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APPEAL from a judgment of the Saskatchewan Court of Appeal (1994), 26 C.B.R. (3d) 1, 120 Sask. R. 277, 68 W.A.C. 277, 115 D.L.R. (4th) 536, [1994] 8 W.W.R. 26, [1994] I.L.R. ¶ 1-3089, dismissing an appeal from a judgment of Baynton J. (1993), 18 C.B.R. (3d) 1, 108 Sask. R. 257. Appeal dismissed.

Robert G. Kennedy and *Ian A. Sutherland*, for the appellant.

Gary A. Meschishnick and *Eric M. Singer*, for the respondent North American Life Assurance Co.

Robert D. Jackson, for the respondent Balvir Singh Ramgotra.

The judgment of the Court was delivered by

GONTHIER J. —

I. Issue

1 This case raises an important and controversial issue concerning the interpretation of ss. 67(1)(*b*)

Saskatchewan Farm Security Act, S.S. 1988-89, ch. S-17.1, art. 65.

Saskatchewan Insurance Act, R.S.S. 1978, ch. S-26, art. 2kk)(i), (ii), (iii), (iv), (vii), 158(1), (2).

Doctrine citée

Caplan, Lisa H. Kerbel. Case Comment (1994), 26 C.B.R. (3d) 252.

Cuming, R. C. C. «Section 91 (Settlements) of the Bankruptcy and Insolvency Act: A Mutated Monster» (1995), 25 *Can. Bus. L.J.* 235.

Dunlop, Charles Richard Bentley. *Creditor-Debtor Law in Canada*, 2nd ed. Scarborough, Ont.: Carswell, 1995.

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POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (1994), 26 C.B.R. (3d) 1, 120 Sask. R. 277, 68 W.A.C. 277, 115 D.L.R. (4th) 536, [1994] 8 W.W.R. 26, [1994] I.L.R. ¶ 1-3089, qui a rejeté l'appel formé contre la décision du juge Baynton (1993), 18 C.B.R. (3d) 1, 108 Sask. R. 257. Pourvoi rejeté.

Robert G. Kennedy et *Ian A. Sutherland*, pour l'appelante.

Gary A. Meschishnick et *Eric M. Singer*, pour l'intimée la Nord-Américaine, compagnie d'assurance-vie.

Robert D. Jackson, pour l'intimé Balvir Singh Ramgotra.

Version française du jugement de la Cour rendu par

LE JUGE GONTHIER —

I. La question en litige

Le présent pourvoi soulève une question importante et controversée relativement à l'interprétation

and 91 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (hereinafter "*BIA*"): Where a bankrupt has transferred registered retirement savings plan (RRSP) funds into a registered retirement income fund (RRIF) within the five years preceding bankruptcy, and where the RRIF is exempt from the claims of creditors under provincial legislation incorporated into the *BIA* by s. 67(1)(*b*), may a creditor set aside the transfer as a s. 91 "settlement", and thereby get at the RRIF despite its exempt status?

de l'al. 67(1)*b*) et de l'art. 91 de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3, et ses modifications, (ci-après la «*LFI*»). Voici cette question: Si un failli a transféré des fonds d'un régime enregistré d'épargne-retraite (REER) dans un fonds enregistré de revenu de retraite (FERR) au cours des cinq années précédant la faillite, et que le FERR est exempt des réclamations des créanciers en vertu de mesures législatives provinciales incorporées à la *LFI* par l'al. 67(1)*b*), un créancier peut-il faire annuler ce transfert pour le motif qu'il s'agit d'une «disposition» visée par l'art. 91, et, ainsi, avoir accès au FERR malgré l'exemption dont bénéficie ce bien?

II. Factual Background

II. Les faits

The respondent Ramgotra is a medical doctor who practised from 1971 to 1991 in Saskatoon, Saskatchewan. During this period, as a self-employed doctor responsible for his own retirement planning, he built up savings and investments, including two RRSPs. In May 1989, he became an associate at a Saskatoon medical clinic, but his share of the clinic expenses proved higher than expected. As a result, in February 1990, he opened his own practice. Unfortunately, the practice was not as successful as Dr. Ramgotra had hoped, partly because of a slow patient load, but also because Dr. Ramgotra suffers from insulin dependent diabetes and was required to reduce his work hours in response to his medical condition.

L'intimé, Ramgotra, est médecin, et il a exercé sa profession à Saskatoon, en Saskatchewan, de 1971 à 1991. Durant cette période, en tant que travailleur indépendant responsable de la planification financière de sa retraite, il a épargné et fait des placements, notamment en établissant deux REER. En mai 1989, il s'est associé à une clinique médicale de Saskatoon. Toutefois, comme sa part des dépenses de la clinique s'est révélée plus élevée que prévu, il a ouvert son propre cabinet en février 1990. Malheureusement, cette décision a été moins fructueuse qu'il avait espéré, en partie en raison d'une faible clientèle, mais également en raison du fait que, comme il est diabétique et doit être traité à l'insuline, il a dû réduire ses heures de travail. 2

In June 1990, at the suggestion of a financial adviser, Dr. Ramgotra transferred the funds from his two RRSPs into an RRIF under which his wife was designated as beneficiary. The RRIF was to provide Dr. Ramgotra with a gross monthly income of $1,066.20, and these payments commenced in August 1990. The respondent North American Life Assurance Company is the financial institution responsible for the management of the RRIF.

En juin 1990, à la suggestion d'un conseiller financier, le Dr Ramgotra a transféré les fonds de ses deux REER dans un FERR dont son épouse a été désignée bénéficiaire. Le FERR devait rapporter au Dr Ramgotra un revenu mensuel brut de 1 066,20 $. Ces paiements ont commencé en août 1990. L'autre partie intimée, la Nord-américaine, compagnie d'assurance-vie, est l'institution financière chargée de la gestion du FERR. 3

Ten months later, in May 1991, Dr. Ramgotra applied for and obtained a position as permanent physician with the Town of Dinsmore, Saskatchewan. He then attempted to negotiate with his landlord in Saskatoon in order to terminate the com-

Dix mois plus tard, soit en mai 1991, le Dr Ramgotra a postulé avec succès un poste permanent de médecin auprès de la ville de Dinsmore en Saskatchewan. Il a alors tenté de négocier avec le propriétaire de l'immeuble où il avait son cabinet à 4

mercial lease for his practice there. These negotiations were unsuccessful, and the landlord obtained a judgment against Dr. Ramgotra for approximately $30,000. This event led Dr. Ramgotra to make an assignment into bankruptcy in February 1992. When he received an absolute discharge from bankruptcy in January 1993, the only assets which he retained were his clothing and household contents, and the RRIF.

5 While Dr. Ramgotra's RRSPs would have been subject to the claims of his creditors, the RRIF constituted a life insurance annuity, and was therefore exempt from their claims on the basis of s. 67(1)(*b*) *BIA*, when read in conjunction with ss. 2(kk)(vii) and 158(2) of *The Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26. However, the trustee in bankruptcy applied under r. 89 of the *Bankruptcy Rules*, C.R.C. 1978, c. 368, for a declaration that the transfer of the RRSP funds into the RRIF was void, pursuant to s. 91(2) *BIA*. That provision declares, in part, that "settlements" made one to five years prior to bankruptcy are void against the trustee if "the interest of the settlor in the property did not pass" upon settlement.

6 At trial, the trustee's application was dismissed because Dr. Ramgotra's transfer of the RRSP funds into the RRIF had been made in good faith, and not for the purpose of defeating the claims of his creditors. An appeal to the Saskatchewan Court of Appeal by the appellant Royal Bank, Dr. Ramgotra's major creditor, was also dismissed.

III. Relevant Statutory Provisions

Saskatchewan Insurance Act, R.S.S. 1978, c. S-26:

2. — ...

(kk) "life insurance" means insurance whereby an insurer undertakes to pay insurance money:

(i) on death;

(ii) on the happening of an event or contingency dependent on human life;

Saskatoon la résiliation du bail commercial qui le liait à ce dernier. Les négociations n'ont pas porté fruit et le propriétaire a obtenu, contre le Dr Ramgotra, un jugement d'environ 30 000 $. Cet événement a amené le Dr Ramgotra à faire cession de ses biens au profit de ses créanciers en février 1992. Lorsqu'il a obtenu sa libération absolue, en janvier 1993, il n'a conservé pour tous biens que ses vêtements, le contenu de sa maison et le FERR.

Alors que les REER du Dr Ramgotra auraient été touchés par les réclamations de ses créanciers, le FERR, parce qu'il constituait une rente d'assurance-vie, était à l'abri de leurs réclamations par l'effet conjugué de l'al. 67(1)*b*) *LFI* ainsi que du sous-al. 2kk)(vii) et du par. 158(2) de *The Saskatchewan Insurance Act*, R.S.S. 1978, ch. S-26. Cependant, le syndic a demandé, conformément à l'art. 89 des *Règles régissant la faillite*, C.R.C. 1978, ch. 368, un jugement déclaratoire portant que, en vertu du par. 91(2) *LFI*, le transfert des fonds des REER dans le FERR était nul. Ce paragraphe énonce notamment que sont inopposables au syndic les «dispositions» de biens faites au cours des cinq ans qui précèdent la faillite si «les intérêts du disposant dans ces biens n'ont pas cessé» lorsque fut faite la disposition.

Au procès, la demande du syndic a été rejetée pour le motif que le Dr Ramgotra avait agi de bonne foi en transférant les fonds des REER dans le FERR et non dans le but de frustrer ses créanciers. L'appel à la Cour d'appel de la Saskatchewan interjeté par l'appelante, la Banque Royale, créancier principal du Dr Ramgotra, a lui aussi été rejeté.

III. Les dispositions législatives pertinentes

The Saskatchewan Insurance Act, R.S.S. 1978, ch. S-26:

[TRADUCTION] **2.** — ...

kk) «assurance-vie» Assurance par laquelle un assureur s'engage à verser une somme assurée:

(i) lorsque survient un décès,

(ii) lorsque survient un événement ou une éventualité se rattachant à la vie humaine,

(iii) at a fixed or determinable future time; or

(iv) for a term dependent on human life;

and, without limiting the generality of the foregoing, includes:

. . .

(vii) an undertaking given by an insurer, whether before or after this section comes into force, to provide an annuity or what would be an annuity except that the periodic payments may be unequal in amount;

158. — (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

(2) While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the rights and interests of the insured in the insurance money and in the contract are exempt from execution or seizure.

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

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

. . .

(*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

91. (1) Any settlement of property, if the settlor becomes bankrupt within one year after the date of the settlement, is void against the trustee.

(2) Any settlement of property, if the settlor becomes bankrupt within five years after the date of the settlement, is void against the trustee if the trustee can prove that the settlor was, at the time of making the settlement, unable to pay all his debts without the aid of the property comprised in the settlement or that the interest of the settlor in the property did not pass on the execution thereof.

(iii) lorsqu'arrive une date ultérieure déterminée ou déterminable,

(iv) pendant une période se rattachant à la vie humaine,

et, sans restreindre la portée générale de ce qui précède, «assurance-vie» s'entend également:

. . .

(vii) d'un engagement conclu par un assureur, avant ou après l'entrée en vigueur du présent article, de verser une rente dont le montant des versements périodiques peut varier;

158. — (1) Lorsqu'un bénéficiaire est désigné, les sommes assurées ne font pas partie de la succession de l'assuré et ne peuvent être réclamées par les créanciers de l'assuré, dès la survenance de l'événement qui rend les sommes assurées exigibles.

(2) Tant qu'est en vigueur la désignation en faveur du conjoint, d'un enfant, d'un petit-enfant ou du père ou de la mère de la personne dont la vie est assurée, ou de l'un d'eux, les droits et les intérêts de l'assuré dans les sommes assurées et dans le contrat sont exempts d'exécution ou de saisie.

Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3, et ses modifications:

67. (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:

. . .

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime de lois de la province dans laquelle sont situés ces biens et où réside le failli,

91. (1) Toute disposition est inopposable au syndic, si le disposant devient failli durant l'année qui suit la date de la disposition.

(2) Si le disposant devient failli au cours des cinq ans qui suivent la date de la disposition, toute disposition de biens est inopposable au syndic, si ce dernier peut prouver que le disposant était, lorsqu'il a fait la disposition, incapable de payer toutes ses dettes sans l'aide des biens compris dans la disposition, ou que les intérêts du disposant dans ces biens n'ont pas cessé lorsque fut faite la disposition.

(3) This section does not extend to any settlement made

. . .

(*b*) in favour of a purchaser or incumbrancer in good faith and for valuable consideration; . . .

IV. Decisions Below

1. *Saskatchewan Court of Queen's Bench* (1993), 18 C.B.R. (3d) 1

7 In his reasons, Baynton J. made two factual findings: (1) Dr. Ramgotra was solvent at the time he transferred the RRSP funds into the RRIF, and (2) the transfer was made in good faith, and not for the purpose of defeating creditors. Because of the former factual finding, the first branch of s. 91(2) *BIA* could not be used by the trustee to void the transfer. However, the second branch of s. 91(2) was still available, and the issue was whether the transfer was a "settlement" in which the interest of the settlor in the property did not pass at the time of settlement.

8 Relying on recent case law establishing that the exchange of non-exempt property for exempt property (i.e., "self-settlement") could constitute a settlement under s. 91 *BIA*, Baynton J. reached the tentative conclusion that the transfer in the case at bar fell within the second branch of s. 91(2) because it was a settlement in which, by definition, the property interest of the settlor did not pass. He refused, however, to declare the settlement void against the trustee in bankruptcy. He referred to his previous decision in *Royal Bank v. Oliver* (1992), 11 C.B.R. (3d) 82 (Sask. Q.B.), where a similar settlement was at issue. In *Oliver*, he decided that a *bona fide* exchange of property should not be a voidable settlement under s. 91(2). He effectively "borrowed" the concept of good faith which appears in s. 91(3)(*b*) *BIA* (but is not appli-

(3) Le présent article ne s'applique pas à une disposition faite:

. . .

b) soit de bonne foi et pour contrepartie valable, en faveur d'un acheteur ou d'un créancier hypothécaire; . . .

IV. Les décisions des juridictions inférieures

1. *La Cour du Banc de la Reine de la Saskatchewan* (1993), 18 C.B.R. (3d) 1

Dans ses motifs, le juge Baynton a tiré deux conclusions de fait: (1) le Dr Ramgotra était solvable au moment où il a transféré les fonds des REER dans le FERR, et (2) le transfert a été effectué de bonne foi et non dans le but de frustrer les créanciers. Vu la première conclusion de fait, le syndic ne pouvait s'appuyer sur le premier volet du par. 91(2) *LFI* pour considérer le transfert inopposable à son endroit. Il pouvait toutefois invoquer le second volet, ce qui soulevait la question de savoir si le transfert était une «disposition» n'ayant pas eu pour effet de faire cesser les intérêts du disposant dans les biens en cause au moment où elle a été faite.

Se fondant sur des décisions récentes établissant que le remplacement de biens non exempts par des biens exempts (c.-à-d. une «disposition à soi-même») pouvait constituer une disposition visée à l'art. 91 *LFI*, le juge Baynton est arrivé à la conclusion préliminaire que, en l'espèce, le transfert relevait du second volet du par. 91(2) puisqu'il s'agissait d'une disposition dans le cadre de laquelle, par définition, les intérêts du disposant dans les biens visés n'avaient pas cessé. Il a toutefois refusé de déclarer la disposition inopposable au syndic, mentionnant à cet effet sa décision antérieure dans *Royal Bank c. Oliver* (1992), 11 C.B.R. (3d) 82 (B.R. Sask.), affaire où il était question d'une disposition analogue. Dans *Oliver*, il a conclu qu'un remplacement de biens fait de bonne foi ne devait pas être considéré comme une disposition inopposable en vertu du par. 91(2). En fait, il a «emprunté» le concept de la bonne foi prévu à l'al. 91(3)*b*) *LFI* (qui ne s'applique cependant pas en cas de disposition à soi-même), et il s'en est servi

cable in the case of self-settlement), and used it to limit the common law definition of settlement.

Since Dr. Ramgotra had acted in good faith, and not for the purpose of defeating creditors, when he transferred his non-exempt RRSP funds into an exempt RRIF, Baynton J. concluded that the transfer was not a settlement which could be set aside under s. 91(2).

2. *Saskatchewan Court of Appeal* (1994), 26 C.B.R. (3d) 1

The Saskatchewan Court of Appeal unanimously dismissed the appellant's appeal. For the court, Jackson J.A. rejected the submission (which had been accepted by Baynton J.) that a settlement had been effected by the transfer of the non-exempt RRSP funds into the exempt RRIF. In her view, settlement within the meaning of the *BIA* involved settlement on a third party; the mere conversion of non-exempt property into exempt property was insufficient.

However, after a review of the jurisprudence on the meaning of settlement, Jackson J.A. concluded that the designation of a beneficiary under an insurance policy could constitute a settlement. Thus, when Dr. Ramgotra designated his wife as beneficiary under the RRIF, he settled a property interest on her. Jackson J.A. characterized this interest as a future contingent property interest.

Jackson J.A. then considered whether such a settlement could be declared void under the second branch of s. 91(2) concerning the passing of property. In her view, the essential issue was whether or not it was necessary to convey, or give up control over, all the interests in a particular piece of property in order for the property passing exception to be met. Jackson J.A. reviewed the case law on this issue, most of which concluded that a settlement in the form of an insurance beneficiary designation does not involve the passing of property because the settlor always maintains property interests in, and control over, the insurance after the designation. However, she preferred to rely on

pour restreindre la définition du terme «disposition» en common law.

Comme le Dr Ramgotra avait agi de bonne foi et non dans le but de frustrer ses créanciers lorsqu'il a transféré les fonds non exempts de son REER dans les fonds exempts du FERR, le juge Baynton a conclu que le transfert n'était pas une disposition pouvant être annulée en vertu du par. 91(2). 9

2. *Le Cour d'appel de la Saskatchewan* (1994), 26 C.B.R. (3d) 1

La Cour d'appel de la Saskatchewan a, à l'unanimité, rejeté l'appel formé par l'appelante. S'exprimant pour la cour, madame le juge Jackson a rejeté l'argument (qu'avait pour sa part accepté le juge Baynton) que le transfert des fonds non exempts du REER dans les fonds exempts du FERR, avait donné lieu à une disposition. À son avis, les dispositions visées par la *LFI* sont celles faites à un tiers; la simple conversion de biens non exempts en biens exempts ne suffit pas. 10

Toutefois, après avoir examiné la jurisprudence portant sur le sens du concept de «disposition», le juge Jackson a conclu que la désignation d'un bénéficiaire dans une police d'assurance pouvait constituer une disposition. En conséquence, lorsque le Dr Ramgotra a désigné son épouse à titre de bénéficiaire du FERR, il a disposé de son intérêt dans le bien en question en faveur de celle-ci. Pour le juge Jackson, il s'agissait d'un intérêt de propriété futur et éventuel. 11

Le juge Jackson s'est ensuite demandée si une telle disposition pouvait être déclarée inopposable en vertu du second volet du par. 91(2) qui concerne le transfert de la propriété des intérêts dans les biens visés. À son avis, il s'agissait essentiellement de déterminer s'il était nécessaire ou non qu'il y ait transfert de tous les intérêts dans un bien donné ou cession du contrôle sur ceux-ci pour que s'applique l'exception fondée sur le transfert de la propriété des intérêts dans les biens visés. Le juge Jackson a examiné la jurisprudence sur cette question et constaté que, dans la plupart de ces décisions, les tribunaux avaient conclu que les dispositions prenant la forme d'une désignation de 12

two early English cases, *In re Lowndes; Ex parte Trustee* (1887), 18 Q.B.D. 677, and *Shrager v. March*, [1908] A.C. 402 (P.C.), for the proposition that property passes if a settlor divests him- or herself of all interest in the property acquired by a third party beneficiary. Thus, the beneficiary designation in the case at bar passed a contingent property interest to Mrs. Ramgotra, and fully divested Dr. Ramgotra of that same property interest. Jackson J.A. held that this was sufficient to meet the property passing requirement of the second branch of s. 91(2), with the result that Dr. Ramgotra's designation of his wife as beneficiary under the RRIF was not void against his trustee in bankruptcy.

bénéficiaire d'une assurance n'entraînaient pas le transfert de la propriété des intérêts dans l'assurance, étant donné que, après la désignation, le disposant conserve toujours ses intérêts dans ce bien et son pouvoir de contrôle sur celui-ci. Elle a toutefois préféré se fonder sur deux vieilles décisions anglaises — *In re Lowndes; Ex parte Trustee* (1887), 18 Q.B.D. 677, et *Shrager c. March*, [1908] A.C. 402 (C.P.) — appuyant la thèse qu'il y a transfert de la propriété du bien visé si le disposant se départit de tous ses intérêts dans le bien acquis par un tiers bénéficiaire. Par conséquent, la désignation d'un bénéficiaire en l'espèce a eu pour effet de transférer à M^me^ Ramgotra un intérêt de propriété éventuel et, du même coup, de dépouiller complètement le D^r^ Ramgotra de cet intérêt. Le juge Jackson a conclu que cela suffisait pour satisfaire à la condition relative au transfert de la propriété des intérêts dans les biens visés prévue par le second volet du par. 91(2), de sorte que la désignation par le D^r^ Ramgotra de son épouse à titre de bénéficiaire du FERR n'était pas inopposable au syndic.

13 Jackson J.A.'s conclusion that the property passing requirement had been met was further reinforced by her view that any other conclusion would be contrary to bankruptcy policy and the purpose of RRIFs. She noted that if the designation of a beneficiary under an insurance policy were not found to pass property to the beneficiary, then all insurance beneficiary designations made within five years of bankruptcy would be void against the trustee in bankruptcy by operation of the second branch of s. 91(2), including those made in good faith when the bankrupt was solvent. Jackson J.A. was of the view that s. 91 *BIA* should be interpreted to avoid such an absurd result.

Le juge Jackson trouvait aussi un appui à sa conclusion que la condition relative au transfert de la propriété des intérêts dans les biens visés avait été respectée dans le fait que, à son avis, toute autre conclusion serait contraire à la politique en matière de faillite et à l'objet des FERR. Elle a souligné que, si la désignation d'un bénéficiaire en vertu d'une police d'assurance était jugée ne pas opérer transfert de propriété en faveur du bénéficiaire, alors toutes les désignations de bénéficiaires effectuées dans les polices d'assurance au cours des cinq années précédant une faillite seraient inopposables au syndic par l'application du second volet du par. 91(2), y compris celles ayant été faites de bonne foi lorsque le failli était solvable. De l'avis du juge Jackson, il faut interpréter l'art. 91 *LFI* de manière à éviter un résultat aussi absurde.

14 Finally, with respect to the *bona fide* test applied by the trial judge, Baynton J., Jackson J.A. stated that it was not necessary for her to adopt his position, but she nevertheless endorsed his analysis of

Enfin, relativement au critère de bonne foi qu'a appliqué le juge Baynton en première instance, le juge Jackson a déclaré qu'elle n'était pas tenue d'adopter la position de ce dernier, mais elle a

the difficulties associated with any interpretation of s. 91 *BIA* which would automatically void legitimate transactions made by solvent debtors. Jackson J.A. agreed with Baynton J. that to attack a beneficiary designation made by a solvent debtor, a trustee in bankruptcy should have to prove some lack of good faith on the part of the debtor. However, she disagreed that the creation of a good faith requirement for self-settlement under s. 91 would be appropriate. Instead, she opined that trustees may rely on other legislation, such as provincial fraud legislation, to attack bad faith self-settlements.

néanmoins souscrit à son analyse des difficultés qu'engendrerait toute interprétation de l'art. 91 *LFI* qui aurait pour effet de rendre automatiquement inopposables les opérations légitimes faites par des débiteurs solvables. Le juge Jackson a convenu avec le juge Baynton que, pour contester la désignation d'un bénéficiaire faite par un débiteur solvable, le syndic devrait être tenu d'établir la mauvaise foi de ce dernier. Toutefois, elle ne croyait pas qu'il serait judicieux de créer une exigence de bonne foi pour les dispositions à soi-même visées par l'art. 91. À son avis, les syndics peuvent invoquer d'autres lois, telles les lois provinciales en matière de fraude, pour contester les dispositions à soi-même faites de mauvaise foi.

V. Analysis

1. *Introduction*

In my recent decision in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, I had the opportunity to review the two fundamental purposes underlying the *BIA*. As I stated there, the first such purpose is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors, while the second is to provide for the financial rehabilitation of insolvent persons (at para. 7). The case at bar demonstrates that these two purposes may come into conflict. The appellant bank, Dr. Ramgotra's principal creditor, wishes to attach his RRIF in order to satisfy its outstanding financial claims against him. Not surprisingly, in light of Dr. Ramgotra's post-bankruptcy financial position, he resists the bank's attempts to seize one of his few remaining assets. He argues that the RRIF, being life insurance under s. 2(kk)(vii) of *The Saskatchewan Insurance Act*, is exempt from execution or seizure by creditors (s. 158(2) of *The Saskatchewan Insurance Act* and s. 67(1)(*b*) *BIA*). In short, the bank seeks an "equitable distribution" of Dr. Ramgotra's assets, while Dr. Ramgotra's "financial rehabilitation" is furthered if he maintains his interest in the RRIF.

V. Analyse

1. *Introduction*

Récemment, dans l'arrêt *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, j'ai eu l'occasion d'examiner les deux objectifs fondamentaux qui sous-tendent la *LFI*. Comme je l'ai dit dans cette affaire, le premier de ces objectifs est d'assurer un partage équitable des biens du débiteur failli entre les créanciers, tandis que le second consiste à favoriser la réhabilitation financière de la personne insolvable (au par. 7). Le présent cas montre que ces deux objectifs peuvent entrer en conflit. La banque appelante, qui est le principal créancier du Dr Ramgotra, souhaite saisir le FERR de ce dernier pour obtenir paiement des sommes qu'il lui doit. Il n'est pas étonnant, compte tenu de la situation financière dans laquelle il se trouve à la suite de sa faillite, que le Dr Ramgotra résiste aux tentatives de la banque de saisir un des rares biens qui lui restent. Il prétend que, comme le FERR est une assurance-vie au sens du sous-al. 2kk)(vii) de *The Saskatchewan Insurance Act*, ce bien est exempt d'exécution ou de saisie par les créanciers (par. 158(2) de *The Saskatchewan Insurance Act* et l'al. 67(1)*b*) *LFI*). Bref, la banque demande un «partage équitable» des biens du Dr Ramgotra, alors que le fait de lui laisser ses intérêts dans le FERR favoriserait sa «réhabilitation financière». 15

16 Since Dr. Ramgotra transferred the funds from his two RRSPs into his exempt RRIF when he was solvent, and not for the purpose of defeating his creditors, one might well wonder how the bank could get around the exempt status of the RRIF — a status which, on its face, constitutes an absolute bar to the bank's claim. In the general context of debtor-creditor relations, the bank would have no expectation at all of attaching Dr. Ramgotra's exempt RRIF. On the facts of this case, Dr. Ramgotra's creditors are not being denied something which they would otherwise have, since the general rule is that they would not be entitled to attach the RRIF unless it had been removed from Dr. Ramgotra's estate through a fraudulent conveyance. Why should Dr. Ramgotra's bankruptcy place creditors like the bank in a better position than they would be in absent the bankruptcy? The bank's position before this Court appears to conflict with the principle that creditors should not gain on bankruptcy any greater access to their debtors' assets than they possessed prior to bankruptcy: *M.N.R. v. Anthony* (1995), 124 D.L.R. (4th) 575 (Nfld. C.A.), at p. 580.

Puisque le Dr Ramgotra était solvable au moment où il a transféré les fonds de ses deux REER dans son FERR exempt, et qu'il ne cherchait pas, par cette mesure, à frustrer ses créanciers, on peut fort bien se demander de quelle façon la banque pouvait contourner l'exemption dont bénéficie le FERR — exemption qui, à première vue, constitue un obstacle insurmontable à la réclamation de la banque. Dans le contexte général des rapports entre débiteurs et créanciers, la banque n'aurait aucun espoir de saisir le FERR exempt du Dr Ramgotra. À la lumière des faits de la présente affaire, les créanciers du Dr Ramgotra ne sont pas privés d'une chose à laquelle ils auraient par ailleurs droit puisque, selon la règle générale, ils ne pouvaient saisir le FERR que si celui-ci avait été soustrait du patrimoine du Dr Ramgotra par suite d'un transfert frauduleux. Pourquoi la faillite du Dr Ramgotra devrait-elle placer des créanciers comme la banque dans une position plus avantageuse qu'ils ne le seraient si ce n'était de la faillite? La thèse avancée par la banque devant notre Cour paraît entrer en conflit avec le principe que les créanciers ne devraient pas, du fait d'une faillite, obtenir des droits plus étendus sur les biens de leurs débiteurs qu'ils n'en possédaient avant la faillite: *M.N.R. c. Anthony* (1995), 124 D.L.R. (4th) 575 (C.A.T.-N.), à la p. 580.

17 Moreover, the policy of exempting life insurance investments and policies from execution or seizure under the *BIA*, where family members are designated as beneficiaries, is sound. Given the importance of insurance in providing for the welfare of dependents upon the death of the insured, an insurance policy may be characterized as a necessity. In Saskatchewan, as in the other provinces, many other necessities are excluded from the property of a bankrupt which is subject to execution or seizure by creditors. Examples include food, fuel, clothing, household items, tools of a trade (*The Exemptions Act*, R.S.S. 1978, c. E-14, s. 2), farm buildings, farming equipment, and livestock (*The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, s. 65). One might well characterize exempt property collectively as the "bare minimum" which a bankrupt is entitled to maintain

Qui plus est, le fait, dans la *LFI*, d'exempter des mesures d'exécution ou de saisie les polices et placements d'assurance-vie lorsque des membres de la famille sont désignés bénéficiaires est une politique judicieuse. En effet, vu l'importance de l'assurance pour le bien-être des personnes à charge de l'assuré après son décès, il est possible de qualifier les polices d'assurances de nécessité de la vie. En Saskatchewan, tout comme dans les autres provinces, de nombreux autres biens indispensables sont exclus des biens d'un failli qui peuvent faire l'objet de mesures d'exécution ou de saisie par les créanciers. Parmi les biens ainsi exclus, mentionnons la nourriture, le combustible, les vêtements, les articles ménagers, les outils nécessaires à la pratique d'un métier (*The Exemptions Act*, R.S.S. 1978, ch. E-14, art. 2), les bâtiments et l'équipement agricoles, et le bétail (*The Saskatchewan*

in order to facilitate his or her rehabilitation following bankruptcy.

Farm Security Act, S.S. 1988-89, ch. S-17.1, art. 65). On pourrait fort bien qualifier l'ensemble des biens exempts de «strict minimum» que le failli a le droit de conserver pour faciliter sa réhabilitation après la faillite.

Thus, the bank's claim before this Court is at odds with the exempt status of the property in question, the policy justification underlying that exempt status, and its own expectations prior to Dr. Ramgotra's bankruptcy as to what it would be able to attach. However, the bank is challenging the transaction which transferred the RRSP funds into the RRIF. The bank claims that this transaction was a settlement within the meaning of s. 91 *BIA*, that Dr. Ramgotra's property interest did not pass at the time of the settlement, and that the settlement is void pursuant to the second branch of s. 91(2) (i.e., the "property passing branch"). According to the bank, the funds at issue are not exempt from execution or seizure because the transaction which rendered them exempt is void.

18 En conséquence, la réclamation de la banque devant notre Cour est incompatible avec l'exemption dont bénéficie le bien en cause ainsi qu'avec la justification de principe qui sous-tend cette exemption et avec les attentes mêmes qu'avait la banque, avant la faillite du Dr Ramgotra, quant à ce qu'elle pourrait saisir. Il n'en reste pas moins que la banque conteste l'opération par laquelle les fonds des REER ont été transférés dans le FERR. Elle prétend que cette opération était une disposition au sens de l'art. 91 *LFI*, que les intérêts du Dr Ramgotra dans ce bien n'ont pas cessé au moment de la disposition et que celle-ci est inopposable en vertu du second volet du par. 91(2) (le «volet concernant le transfert de la propriété des intérêts dans les biens visés»). Selon la banque, les sommes d'argent en cause ne sont pas exemptes d'exécution ou de saisie, car l'opération qui les a rendues exemptes est nulle.

The issues raised by the bank are three-fold: (1) is the transaction in the case at bar a settlement within the meaning of s. 91 *BIA*; (2) if so, is the settlement void against the trustee in bankruptcy under the second branch of s. 91(2); and (3) if so, are the funds in the RRIF available to satisfy the claims of Dr. Ramgotra's creditors despite the RRIF's exempt status under s. 67(1)(*b*). These issues are not new. They have been the source of considerable controversy in the lower courts, where four competing approaches have been adopted. I will deal with each of these in turn. However, I should state at the outset that I find none of them to be a satisfactory resolution of the problem presented by the case at bar and similar cases. I prefer an approach which recognizes the distinct roles of ss. 67(1)(*b*) and 91 in bankruptcy, as outlined below.

19 La banque soulève trois questions: (1) L'opération visée en l'espèce est-elle une disposition au sens de l'art. 91 *LFI*? (2) Dans l'affirmative, la disposition est-elle inopposable au syndic en vertu du second volet du par. 91(2)? (3) Si oui, les fonds du FERR peuvent-ils servir à régler les réclamations des créanciers du Dr Ramgotra en dépit de l'exemption dont bénéficie le FERR en vertu de l'al. 67(1)*b*)? Ces questions ne sont pas nouvelles. Elles sont à l'origine d'une importante controverse au sein des juridictions inférieures, où quatre approches divergentes ont été adoptées. Je vais les examiner à tour de rôle. Je tiens cependant à signaler au départ que, selon moi, aucune de ces approches ne permet de régler de manière satisfaisante le problème que soulèvent la présente espèce et des affaires analogues. Je préfère une approche qui tienne compte des rôles distincts que jouent, en matière de faillite, l'al. 67(1)*b*) et l'art. 91, comme nous le verrons ci-après.

2. *The Competing Approaches in the Lower Courts*

(i) The exchange of a non-exempt asset for an exempt asset is a settlement under the *BIA*, and is voidable against the trustee in bankruptcy pursuant to s. 91 where made in the five years preceding bankruptcy (the "*Wilson* approach")

20 The first approach to the problem raised by the case at bar involves the more general issue of whether a self-settlement is caught by s. 91 *BIA*. Such an approach is typified by the decision of the Alberta Court of Appeal in *Wilson v. Doane Raymond Ltd.* (1988), 69 C.B.R. (N.S.) 156. There, the appellant dairy farmers sold their milk quota, a non-exempt asset, and used the proceeds to purchase a condominium, an exempt asset. A month later, they made assignments into bankruptcy. The trustee in bankruptcy sought an order declaring the condominium purchase to be a void settlement of property under s. 69(1) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, (now s. 91(1)) *BIA*.

21 For the Court of Appeal, Haddad J.A. relied upon the decision of the Alberta Queen's Bench in *Re Wozniuk* (1987), 76 A.R. 42, a case the facts of which are strikingly similar to those of the case at bar. In *Re Wozniuk*, it was held that a self-settlement in which a non-exempt RRSP was exchanged for an exempt life insurance annuity was a settlement within the meaning of the *BIA*. Haddad J.A. agreed with this proposition, adding at p. 159 that "[a] settlement within the scheme of the statute occurs when a disposition of property reduces the bankrupt estate available to the trustee for distribution to creditors". He thus concluded that the appellants' conversion of non-exempt property into exempt property was a void settlement under the *BIA*, since it had the effect of reducing the estate which was available to creditors. It made no difference that the appellants had effected the conversion for the purpose of obtaining a home for themselves, and not for the purpose of defeating creditors.

2. *Les approches divergentes des juridictions inférieures*

(i) La conversion d'un bien non exempt en bien exempt est, sous le régime de la *LFI*, une disposition inopposable au syndic en vertu de l'art. 91 si elle survient au cours des cinq années précédant la faillite (l'«approche *Wilson*»)

La première approche du problème en l'espèce soulève la question plus générale de savoir si les dispositions à soi-même sont visées par l'art. 91 *LFI*. L'illustration typique de cette approche est l'arrêt *Wilson c. Doane Raymond Ltd.* (1988), 69 C.B.R. (N.S.) 156, de la Cour d'appel de l'Alberta. Dans cette affaire, les producteurs laitiers appelants ont vendu leur contingent de lait, bien non exempt, et utilisé le produit de la vente pour acheter un condominium, bien exempt. Un mois plus tard, ils ont fait cession de leurs biens. Le syndic a alors demandé une ordonnance déclarant que l'achat du condominium lui était inopposable, conformément au par. 69(1) de la *Loi sur la faillite*, S.R.C. 1970, ch. B-3 (maintenant le par. 91(1) *LFI*).

S'exprimant pour la Cour d'appel, le juge Haddad s'est appuyé sur la décision de la Cour du Banc de la Reine de l'Alberta dans *Re Wozniuk* (1987), 76 A.R. 42, affaire dont les faits sont étonnamment semblables à ceux de l'espèce. Dans *Re Wozniuk*, il a été jugé qu'une disposition à soi-même dans le cadre de laquelle un REER non exempt a été remplacé par une rente d'assurance-vie exempte était une disposition au sens de la *LFI*. Le juge Haddad a souscrit à cette proposition, ajoutant, à la p. 159, qu'il y a [TRADUCTION] «disposition au sens de la loi lorsque l'opération en cause réduit le patrimoine du failli à distribuer aux créanciers par le syndic». Il a par conséquent conclu que la conversion par les appelants d'un bien non exempt en bien exempt était une disposition inopposable aux termes de la *LFI*, puisqu'elle avait pour effet de réduire le patrimoine disponible pour les créanciers. Le fait que les appelants avaient effectué la conversion afin de se procurer un logement et non dans le but de frustrer leurs créanciers ne changeait rien à la situation.

The principle flowing from *Wilson* and *Wozniuk*, namely that the exchange of a non-exempt asset for an exempt asset is a settlement under the *BIA*, and is voidable under s. 91, has been adopted in numerous cases: *Re Malloy* (1983), 48 C.B.R. (N.S.) 308 (Ont. S.C.); *Alberta Treasury Branches v. Guimond* (1987), 70 C.B.R. (N.S.) 125 (Alta. Q.B.); *Camgoz (Trustee of) v. Sun Life Assurance Co. of Canada* (1988), 70 C.B.R. (N.S.) 131 (Sask. Q.B.), aff'd (1988), 72 C.B.R. (N.S.) 319 (Sask. C.A.); *Klassen (Trustee of) v. Great West Life Assurance Co.* (1990), 1 C.B.R. (3d) 263 (Sask. Q.B.). Moreover, this principle was adopted by the trial judge, Baynton J., in the case at bar, and in his earlier decision in *Oliver*, *supra*.

Le principe qui découle des affaires *Wilson* et *Wozniuk*, à savoir que le remplacement d'un bien non exempt par un bien exempt est une disposition au sens de la *LFI* et inopposable aux termes de l'art. 91, a été adopté dans de nombreuses décisions: *Re Malloy* (1983), 48 C.B.R. (N.S.) 308 (C.S. Ont.); *Alberta Treasury Branches c. Guimond* (1987), 70 C.B.R. (N.S.) 125 (B.R. Alb.); *Camgoz (Trustee of) c. Sun Life Assurance Co. of Canada* (1988), 70 C.B.R. (N.S.) 131 (B.R. Sask.), conf. par (1988), 72 C.B.R. (N.S.) 319 (C.A. Sask.); *Klassen (Trustee of) c. Great West Life Assurance Co.* (1990), 1 C.B.R. (3d) 263 (B.R. Sask.). En outre, ce principe a été adopté par le juge Baynton dans le présent cas, en première instance, ainsi que dans sa décision antérieure dans *Oliver*, précité. 22

The approach which found favour with the Alberta Court of Appeal in *Wilson* was rejected, I think properly, by the Saskatchewan Court of Appeal in the case at bar. In my view, it is incorrect to conclude that a person may settle property on him- or herself. This is confirmed by the traditional judicial understanding of "settlement", as stated by this Court in *In re Bozanich*, [1942] S.C.R. 130. Rinfret J. described "settlement" as follows at pp. 138-39:

> Without attempting to give a definition of the word — and more particularly of that word as used in section 60 — it seems to me sufficient for the purpose of interpreting the section to adopt a passage of Cave J., in the case of *In re Player; Ex parte Harvey* (1885), 15 Q.B.D. 682, at 686-687:
>
> > One must look at the whole of the language of the section in applying that definition, and consider what is meant by "settlement". Although "settlement", by the 3rd subsection, "shall for the purposes of this section include any conveyance or transfer of property", yet I think the view of my brother Mathew is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person. [Emphasis added.]

L'approche qu'a privilégiée la Cour d'appel de l'Alberta dans l'arrêt *Wilson* a été rejetée, avec raison selon moi, par la Cour d'appel de la Saskatchewan dans l'affaire qui nous intéresse. Je suis d'avis qu'il est erroné de conclure qu'une personne peut disposer de biens en faveur d'elle-même. Cette opinion est d'ailleurs confirmée par l'interprétation traditionnelle du mot «disposition» par les tribunaux, qu'a exprimée notre Cour dans *In re Bozanich*, [1942] R.C.S. 130. Le juge Rinfret a décrit ce mot ainsi, aux pp. 138 et 139: 23

> [TRADUCTION] Sans tenter de définir le mot — et plus particulièrement tel qu'il est utilisé à l'art. 60 — il me semble suffisant, pour interpréter cet article, d'adopter le passage suivant des motifs du juge Cave dans l'affaire *In re Player; Ex parte Harvey* (1885), 15 Q.B.D. 682, aux pp. 686 et 687:
>
> > Il faut, dans l'application de cette définition, examiner l'ensemble du libellé de l'article et se demander ce qu'on entend par «disposition». Même si, aux termes du paragraphe 3, «disposition» s'entend également, pour l'application du présent article, de tout transport ou transfert de propriété», je demeure d'avis que l'opinion de mon collègue Mathew est bien fondée et que ce mot est utilisé dans son sens ordinaire. L'opération en cause doit tenir de la nature d'une disposition, même si elle peut être effectuée par voie de transport ou de transfert. L'opération doit avoir pour finalité et pour objet une disposition, c'est-à-dire l'aliénation d'un bien qui sera détenu pour le bénéfice d'une autre personne. [Je souligne.]

Rinfret J. then added, at p. 141:

> The Act, as broad as it is, allows of a clear distinction between settlements though effected by a conveyance or transfer of property and conveyances or transfers of property not in the nature of a settlement.

24 There is no room in the definition of settlement adopted by this Court in *Re Bozanich* for a "settlement onto oneself", since the settlement must involve the transfer of property to be held for the enjoyment of another person. It would seem that the lower courts have departed from this aspect of *Re Bozanich*, and have held that a self-settlement is a settlement under the *BIA*, because the exchange of non-exempt property for exempt property is one convenient means of defeating creditors. As the court reasoned in *Re Wozniuk* at p. 62, a bankrupt should not be able to "bootstrap himself" out of s. 91 "by taking non-exempt property and converting it into property which would be exempt".

25 Although the court in *Wilson* thought that excluding self-settlements from s. 91 *BIA* would allow for considerable abuse, it seems to me that the contrary conclusion is more problematic. If creditors may attach self-settled property by attacking the self-settlement under s. 91 *BIA*, notwithstanding the exempt status of the property, then the result follows that such property is attachable in all cases where the self-settlement occurred in the five years preceding bankruptcy, including those cases where the bankrupt was solvent and acting in good faith at the time of the impugned transaction. In his article, "Section 91 (Settlements) of the Bankruptcy and Insolvency Act: A Mutated Monster" (1995), 25 *Can. Bus. L.J.* 235, Professor Cuming strongly criticized the judicial extension of the concept of settlement to include self-settlement as "patently unreasonable", at p. 235, and "a dramatic mutation", at p. 238. He added, at p. 242:

Le juge Rinfret a ajouté ceci, à la p. 141:

> [TRADUCTION] La Loi, aussi générale qu'elle soit, permet d'établir une distinction nette entre les dispositions, même celles effectuées par voie de transport ou de transfert de propriété, et les transports ou transferts de propriété qui ne tiennent pas de la nature d'une disposition.

La définition de disposition adoptée par notre Cour dans *Re Bozanich* ne laisse aucune place aux «dispositions à soi-même», puisqu'il doit y avoir transfert d'un bien qui sera détenu pour le bénéfice d'une autre personne. Il semble que les juridictions inférieures se soient écartées de cet aspect de l'arrêt *Re Bozanich* et aient conclu qu'une disposition à soi-même est une disposition visée par la *LFI* parce que la conversion de biens non exempts en biens exempts est un moyen pratique de frustrer les créanciers. Suivant le raisonnement de la cour dans *Re Wozniuk*, à la p. 62, un failli ne devrait pas avoir la possibilité de «se soustraire par lui-même» à l'application de l'art. 91 [TRADUCTION] «en convertissant des biens non exempts en biens qui seraient exempts».

Bien que, dans *Wilson*, la cour ait estimé que le fait d'exclure les dispositions à soi-même du champ d'application de l'art. 91 *LFI* ouvrirait la porte à de graves abus, il me semble que la solution contraire pose davantage de problèmes. En effet, si on permet aux créanciers de saisir, en vertu de l'art. 91 *LFI*, des biens ayant fait l'objet d'une disposition à soi-même, même dans les cas où il s'agit de biens exempts, il s'ensuit que ces biens sont saisissables chaque fois que la disposition à soi-même est survenue au cours des cinq années qui précèdent la faillite, y compris dans les cas où le failli était solvable et a agi de bonne foi au moment de l'opération contestée. Dans son article intitulé «Section 91 (Settlements) of the Bankruptcy and Insolvency Act: A Mutated Monster» (1995), 25 *Can. Bus. L.J.* 235, le professeur Cuming a vivement critiqué l'élargissement, par les tribunaux, du concept de disposition pour y inclure les dispositions à soi-même, qualifiant cette interprétation de [TRADUCTION] «manifestement déraisonnable» à la p. 235 et de «mutation dramatique», à la p. 238. Il a ajouté ceci à la p. 242:

The problem of injustice arises when this expanded interpretation of the concept of settlement is combined with another Canadian-made adjunct to s. 91: that, in both such situations, the interest of the settlor does not pass on execution of the transfers, thereby bringing them within the third arm of s. 91. The logic of this reasoning appears to be as follows: the transfer of the property to the debtor is a settlement and the interest of the settlor did not pass on execution since, by definition, he retained or ended up with the interest or its equivalent.

[TRADUCTION] La question du risque d'injustice se soulève lorsque cette interprétation élargie du concept de disposition est conjuguée à un autre ajout à l'art. 91, de création canadienne celle-là: c'est-à-dire le fait que dans les deux situations susmentionnées les intérêts du disposant ne cessent pas lorsque le transfert est effectué, de sorte que celui-ci tombe alors sous le coup du troisième volet de l'art. 91. La logique de ce raisonnement paraît être la suivante: le transfert des biens en cause au débiteur est une disposition et les intérêts du disposant dans ces biens n'ont pas cessé lorsque fut faite la disposition puisque, par définition, ce dernier a conservé les intérêts ou leur équivalent, ou ceux-ci se sont retrouvés entre ses mains.

This approach alone, while unable to withstand close technical scrutiny, would not be a source of injustice if the property has not been converted into exempt property as a result of the unexecuted transaction. The "settled" property is divisible among the bankrupt settlor's creditors. The potential for injustice arises in situations where the "settlement" involves conversion of property from non-exempt to exempt property. [Emphasis added.]

Même si elle ne saurait résister à un examen formel serré, cette approche ne constituerait pas à elle seule une source d'injustice si les biens en cause n'ont pas été convertis en biens exempts du fait de l'opération non réalisée. Les biens «dont il a été disposé» font partie du patrimoine attribué aux créanciers du disposant failli. Le risque d'injustice naît lorsque la «disposition» emporte la conversion de biens non exempts en biens exempts. [Je souligne.]

I agree that there is considerable potential for injustice if the *Wilson* approach to self-settlement is adopted. The situation is quite different in the case of settlements on third parties, not only because in such cases the property of the settlor may well have passed, but also because of s. 91(3)(*b*). That provision states that a "settlement made . . . in favour of a purchaser or incumbrancer in good faith and for valuable consideration" is not void against the trustee in bankruptcy, thus providing a *bona fide* exception to s. 91(1) and (2). However, the provision is not available in the case of self-settlement because, (1) there is no "purchaser or incumbrancer", and (2) there is no exchange of "valuable consideration". The Act therefore affords no protection to self-settlors like Dr. Ramgotra, who have acted in good faith. This anomaly is a persuasive indication that Parliament did not intend s. 91 to apply to self-settlement.

26 Je conviens que le risque d'injustice est considérable si l'approche *Wilson* concernant les dispositions à soi-même est adoptée. Il en va tout autrement des dispositions faites à des tiers, non seulement parce que, dans de tels cas, il est fort possible que les intérêts du disposant dans les biens en cause aient cessé, mais également en raison de l'al. 91(3)*b*). Aux termes de cet alinéa, une «disposition faite [. . .] de bonne foi et pour contrepartie valable, en faveur d'un acheteur ou d'un créancier hypothécaire» est opposable au syndic. Il s'agit donc d'une exception — fondée sur la bonne foi — aux par. 91(1) et (2). Cependant, l'al. 91(3)*b*) ne peut être invoqué en cas de disposition à soi-même et ce pour les raisons suivantes: (1) il n'y a pas d'«acheteur ou [de] créancier hypothécaire», et (2) il n'y a pas d'échange pour «contrepartie valable». La Loi n'offre donc aucune protection à ceux qui, comme le Dr Ramgotra, se font de bonne foi une disposition à eux-mêmes. Cette anomalie est un indice probant que le législateur n'entendait pas que l'art. 91 s'applique aux dispositions à soi-même.

Further to this, I think that the inclusion of self-settlements within s. 91 is contrary to the purpose

27 Par ailleurs, j'estime qu'assimiler les dispositions à soi-même aux dispositions visée à l'art. 91

of that provision. As I will explain in greater detail below, s. 91 empowers the trustee in bankruptcy to return property to the bankrupt's estate, where it has been removed from the estate through a settlement by the bankrupt on a third party. Since a self-settlement does not transfer property to a third party, the property remains in the bankrupt's estate and vests in the trustee at the time of the bankruptcy (s. 71(2) *BIA*). What possible role could s. 91 have in that situation? Moreover, the property passing branch of s. 91(2) has traditionally been viewed as providing a means by which the trustee in bankruptcy may challenge *in futuro* settlements by the bankrupt on third party beneficiaries, and thereby avoid future claims by those beneficiaries against the bankrupt's estate. In other words, as Jackson J.A. reasoned in the court below at para. 50, the property passing test catches those transactions by solvent debtors that do not confer an immediate interest. The purpose of the second branch of s. 91(2) would be distorted if creditors could employ it to attach self-settled property, since a self-settlement is qualitatively different from the kinds of dealings at which the property passing test is aimed.

est contraire à l'objet de cet article. Comme je l'expliquerai plus en détail plus loin, l'art. 91 habilite le syndic à retourner des biens dans le patrimoine du failli lorsqu'ils en ont été soustraits au moyen d'une disposition faite par le failli en faveur d'un tiers. Puisqu'une disposition à soi-même n'a pas pour effet de transférer les biens visés à un tiers, ces biens demeurent dans le patrimoine du failli et sont dévolus au syndic au moment de la faillite (par. 71(2) *LFI*). Quel rôle l'art. 91 peut-il bien jouer dans un tel cas? Qui plus est, le volet du par. 91(2) qui concerne le transfert de la propriété des intérêts dans les biens visés a traditionnellement été considéré comme offrant au syndic un moyen de contester les dispositions *in futuro* faites par le failli en faveur de tiers bénéficiaires, et ainsi d'éviter que ces bénéficiaires présentent subséquemment des réclamations contre l'actif du failli. En d'autres termes, suivant le raisonnement du juge Jackson, au par. 50 de la décision de la Cour d'appel, le critère du transfert de la propriété des intérêts dans les biens visés s'applique aux opérations effectuées par des débiteurs solvables et qui ne confèrent pas un intérêt immédiat. L'objet du second volet du par. 91(2) serait dénaturé si des créanciers pouvaient l'invoquer pour saisir des biens ayant fait l'objet d'une disposition à soi-même, car une telle disposition est qualitativement différente du genre d'opérations visées par le critère susmentionné.

28 Ultimately, I think that the *Wilson* approach to s. 91 fails to strike an appropriate balance between the Act's dual, and sometimes conflicting, purposes of protecting creditors and rehabilitating bankrupts. Even though a self-settlement which creates an exempt asset has the effect of reducing the property available to creditors, one must not lose sight of the fact that the result of the transaction is the acquisition of an asset which is so essential to the bankrupt and his or her dependents that it has been rendered exempt from execution or seizure by provincial legislation incorporated into the Act by s. 67(1)(*b*). To interpret s. 91 *BIA* in a manner which automatically allows creditors to attach exempt property of such an essential character is, in my view, going too far.

En définitive, je crois que l'approche *Wilson* concernant l'art. 91 ne permet pas d'établir un juste équilibre entre les deux objectifs, parfois incompatibles, visés par la Loi, c'est-à-dire la protection des créanciers et la réhabilitation des faillis. Même si une disposition à soi-même créant un bien exempt a pour effet de réduire la masse des biens disponibles pour les créanciers, il ne faut pas oublier que le résultat de l'opération est l'acquisition d'un bien si essentiel au failli et aux personnes à sa charge qu'il a été rendu exempt d'exécution ou de saisie par les lois provinciales applicables incorporées dans la Loi par l'al. 67(1)*b*). Interpréter l'art. 91 *LFI* d'une manière qui permette automatiquement aux créanciers de saisir des biens exempts ayant un caractère à ce point essentiel est, à mon avis, aller trop loin.

Thus, I see no reason in this case to depart from the definition of settlement adopted by this Court in *Re Bozanich*, which requires a disposition by the settlor to a third party. To borrow the words of Rinfret J., self-settlement is a transfer of property not in the nature of a settlement.

(ii) *Bona fide* self-settlements are not settlements under s. 91 *BIA* (the "*Oliver* approach")

In light of my rejection of the *Wilson* approach, it is not necessary to deal with the *bona fide* exception developed by Baynton J. in *Oliver*, *supra*, and applied in the case at bar. Suffice it to say that I share Baynton J.'s concerns about the harshness of the legal approach taken in cases like *Wilson*. While I appreciate his solution to the problem, I note that he was bound to follow the *Wilson* view that self-settlements are subject to s. 91, since the Saskatchewan Court of Appeal had accepted this proposition in *Camgoz*, *supra*. As I explain below, I do not think that good faith is relevant to the question of whether a settlement has been made within the meaning of s. 91. I prefer the approach to self-settlement taken by the Saskatchewan Court of Appeal in the instant case.

(iii) The designation of a beneficiary under a life insurance plan is a settlement under the *BIA*, and is voidable against the trustee in bankruptcy pursuant to s. 91 where made in the five years preceding bankruptcy (the "*Geraci* (Court of Appeal) approach")

Although the Court of Appeal in the instant case found that Dr. Ramgotra's exchange of a non-exempt asset for an exempt asset was not, by the fact of the exchange alone, a settlement under s. 91, Jackson J.A. proceeded to hold that when Dr. Ramgotra designated his wife as beneficiary of the RRIF, he effected a s. 91 settlement. This

Par conséquent, je ne vois, en l'espèce, aucune raison de s'écarter de la définition de disposition adoptée par notre Cour dans *Re Bozanich* et qui exige qu'il y ait disposition en faveur d'un tiers par le disposant. Pour emprunter les termes du juge Rinfret, une disposition à soi-même est un transfert de propriété qui ne tient pas de la nature d'une disposition. 29

(ii) Les dispositions de bonne foi à soi-même ne sont pas des dispositions au sens de l'art. 91 *LFI* (l'«approche *Oliver*»)

Comme j'ai rejeté l'approche *Wilson*, il n'est pas nécessaire d'examiner l'exception fondée sur la bonne foi qui a été élaborée dans *Oliver*, précité, par le juge Baynton et appliquée en l'espèce. Qu'il suffise de dire que je partage les préoccupations du juge Baynton relativement à la rigueur de la position juridique adoptée dans des cas tels que l'affaire *Wilson*. Même si je reconnais la valeur de la solution que le juge a apportée au problème, il faut souligner qu'il était tenu de suivre l'opinion, énoncée dans l'arrêt *Wilson*, que les dispositions à soi-même sont visées par l'art. 91, étant donné que la Cour d'appel de la Saskatchewan avait accepté cette proposition dans *Camgoz*, précité. Comme je l'explique plus loin, je ne crois pas que la bonne foi soit un facteur pertinent à l'égard de la question de savoir s'il y a eu disposition au sens de l'art. 91. Je préfère l'approche adoptée par la Cour d'appel de la Saskatchewan dans la présente affaire relativement aux dispositions à soi-même. 30

(iii) La désignation d'un bénéficiaire en vertu d'un régime d'assurance-vie constitue une disposition au sens de la *LFI* et elle est inopposable au syndic, conformément à l'art. 91, lorsqu'elle est faite au cours des cinq années précédant la faillite (l'«approche *Geraci* (Cour d'appel)»)

Bien que, en l'espèce, la Cour d'appel ait statué que le fait que le Dr Ramgotra ait échangé un bien non exempt pour un bien exempt ne constituait pas, du seul fait de l'échange, une disposition au sens de l'art. 91, le juge Jackson a conclu que le Dr Ramgotra a effectué une disposition au sens de l'art. 91 lorsqu'il a désigné son épouse à titre de 31

approach, which is particular to life insurance plans, was based on the decision of the Ontario Court of Appeal in *Re Geraci* (1970), 14 C.B.R. (N.S.) 253. There, at a time when the bankrupt was clearly insolvent, he designated his wife as beneficiary of a life insurance policy with a cash surrender value of $9,000. The effect of the designation was to render the insurance exempt from execution or seizure. The trustee in bankruptcy applied for a declaration that the beneficiary designation was void under the first branch (i.e., the "insolvency branch") of what is now s. 91(2) *BIA*. For the court, Jessup J.A. reasoned at pp. 255-56:

bénéficiaire du FERR. Cette approche, qui est particulière aux régimes d'assurance-vie, reposait sur la décision de la Cour d'appel de l'Ontario dans *Re Geraci* (1970), 14 C.B.R. (N.S.) 253. Dans cette affaire, à un moment où le failli en cause était clairement insolvable, ce dernier avait désigné son épouse à titre de bénéficiaire d'une police d'assurance-vie dont la valeur de rachat nette s'élevait à 9 000 $. La désignation avait eu pour effet d'exempter l'assurance des mesures d'exécution ou de saisie. Le syndic a demandé un jugement déclarant que la désignation de la bénéficiaire lui était inopposable en vertu du premier volet (c.-à-d. le «volet de l'insolvabilité») de ce qui est maintenant le par. 91(2) *LFI*. S'exprimant pour la cour, le juge Jessup a fait le raisonnement suivant, aux pp. 255 et 256:

I think there emerges from the authorities a definition of the ordinary meaning of "settlement" that it is a disposition of property to be held, either in original form or in such form that it can be traced, for the enjoyment of some other person; and that the designation of a beneficiary of an insurance policy is such a disposition .... Having regard to the wide ranging affairs to which the Bankruptcy Act applies, I do not think that the word "settlement" in s. 60(1) [now s. 91] of that statute should be given a restricted meaning. The respondent argues that the designation of the wife as beneficiary of the policy was not a disposition of property because she would acquire no property rights in or benefit from the policy, unless and until the prior death of the bankrupt. I think it would be more accurate to say the wife's rights are contingent on the death of her husband. But the definition of property in s. 2(*o*) of the Bankruptcy Act, which is in the widest terms, includes "every description of estate, interest and profit, present or future, vested or *contingent*, in, arising out of, or incident to property" .... Moreover, the circumstance that the wife's contingent interest in the policy may be divested by the designation of a different beneficiary does not derogate from the fact that she has an interest until there is divestiture. [Italics added by Jessup J.A.]

[TRADUCTION] Je suis d'avis qu'il se dégage de la jurisprudence et de la doctrine une définition selon laquelle le mot «disposition», dans son sens ordinaire, s'entend de la disposition d'un bien qui sera détenu — soit dans sa forme originale, soit dans une forme permettant d'en suivre la trace — pour le bénéfice d'une autre personne, et selon laquelle la désignation du bénéficiaire d'une police d'assurance constitue une telle disposition ... Compte tenu du large éventail de situations visées par la Loi sur la faillite, je ne crois pas qu'il convienne de donner un sens restrictif au mot «disposition» figurant au par. 60(1) [maintenant l'art. 91] de cette loi. L'intimé prétend que la désignation de l'épouse à titre de bénéficiaire de la police n'était pas une disposition de biens étant donné que l'épouse n'allait acquérir les droits de propriété sur la police ou profiter des bénéfices découlant de celle-ci que si le failli décédait avant elle. Je crois qu'il serait plus juste de dire que les droits de l'épouse sont subordonnés au décès de son époux. Cependant, la définition du mot biens à l'al. 2*o*) de la Loi sur la faillite, qui est exprimée en termes très généraux, vise notamment «toute espèce de droits, d'intérêts ou de profits, présents ou futurs, acquis ou *éventuels*, dans des biens, ou en provenant ou s'y rattachant».... De plus, même si l'épouse peut se voir privée de son intérêt éventuel dans la police en cas de désignation d'un bénéficiaire différent, cela ne change rien au fait qu'elle continue d'avoir cet intérêt tant que pareille modification de la désignation ne survient pas. [Les italiques sont du juge Jessup.]

He thus concluded that the beneficiary designation in question, having been made when the bankrupt

Le juge Jessup a donc conclu que, comme la désignation du bénéficiaire avait été faite à l'époque où

was insolvent, was void against the trustee in bankruptcy.

This reasoning appealed to Jackson J.A., and has been followed by several courts: *Re Douyon* (1982), 134 D.L.R. (3d) 324 (Que. Sup. Ct.); *Re MacDonald* (1991), 21 C.B.R. (3d) 211 (Alta. Q.B.); *Re Yewdale* (1995), 30 C.B.R. (3d) 194 (B.C.S.C.). I too find it persuasive. It is also significant that the *BIA* was amended in 1992 to include a definition of "settlement" as follows:

> **2.** . . .
> "settlement" includes a contract, covenant, transfer, gift and designation of beneficiary in an insurance contract, to the extent that the contract, covenant, transfer, gift or designation is gratuitous or made for merely nominal consideration; [Emphasis added.]

(*Act to Amend the Bankruptcy Act*, S.C. 1992, c. 27, s. 3(2))

This definition was not in force when the circumstances of the instant appeal arose (in fact, between 1949 and 1992, there was no statutory definition of settlement in *BIA*). However, in light of *Geraci* and the cases following it, I think that a jurisprudential consensus has emerged that the designation of a beneficiary under a life insurance policy constitutes a s. 91 settlement. The new statutory definition reflects this consensus. On this basis, I agree with Jackson J.A. that Dr. Ramgotra effected a settlement triggering s. 91.

After concluding that the designation of Mrs. Ramgotra as beneficiary of Dr. Ramgotra's RRIF was a s. 91 settlement, Jackson J.A. turned to the second branch of s. 91(2), and inquired as to whether Dr. Ramgotra's interest in the settled property passed at the time of settlement. The settlement would only be void against the trustee in bankruptcy if Dr. Ramgotra's interest had not passed. This raised the perplexing issue of which "interest" should be considered in relation to the property passing requirement: Dr. Ramgotra's present interest in the RRIF itself, which certainly did

le failli était insolvable, elle était inopposable au syndic.

Ce raisonnement, qui a plu au juge Jackson, a été suivi par de nombreux tribunaux: *Re Douyon* (1982), 134 D.L.R. (3d) 324 (C. sup. Qué.); *Re MacDonald* (1991), 21 C.B.R. (3d) 211 (B.R. Alb.); *Re Yewdale* (1995), 30 C.B.R. (3d) 194 (C.S.C.-B.). Je le trouve moi aussi convaincant. Autre fait significatif, la *LFI* a été modifiée en 1992 afin d'y inclure la définition suivante de «disposition»: 32

> **2** . . . .
> «disposition» S'entend notamment des contrats, conventions, transferts, donations et désignations de bénéficiaires aux termes d'une police d'assurance faits à titre gratuit ou pour un apport purement nominal. [Je souligne.]

(*Loi modifiant la Loi sur la faillite*, L.C. 1992, ch. 27, par. 3(2))

Cette définition n'était pas en vigueur lorsque sont survenus les faits ayant donné naissance au présent pourvoi (de fait, entre 1949 et 1992, la *LFI* ne renfermait aucune définition du mot «disposition»). Toutefois, à la lumière de l'arrêt *Geraci* et des décisions qui l'ont suivi, je crois qu'il s'est établi, dans la jurisprudence, un consensus que la désignation d'un bénéficiaire aux termes d'une police d'assurance constitue une disposition au sens de l'art. 91. La nouvelle définition ajoutée à la Loi reflète ce consensus. Pour ce motif, je conviens avec le juge Jackson que le Dr Ramgotra a fait une disposition qui a déclenché l'application de l'art. 91.

Après avoir conclu que la désignation de Mme Ramgotra à titre de bénéficiaire du FERR du Dr Ramgotra était une disposition au sens de l'art. 91, le juge Jackson a appliqué le second volet du par. 91(2) et s'est demandée si les intérêts du Dr Ramgotra dans le bien dont il avait été disposé avaient cessé lorsque fut faite la disposition. Celle-ci n'était en effet inopposable au syndic que si les intérêts du Dr Ramgotra n'avaient pas cessé, ce qui soulevait la question complexe de savoir quels sont les «intérêts» qui devaient être pris en considération dans l'application de la condition relative au 33

not pass at the time of settlement, or the future contingent interest which he had obviously passed to Mrs. Ramgotra when she became his beneficiary? (For a general discussion of this controversial issue, see David J. McKee, "Debtor-Creditor Issues Affecting Annuity Contracts" (1993), 12 *Est. & Tr. J.* 247, at pp. 272-78, and Norwood and Weir, *Norwood on Life Insurance Law in Canada* (2nd ed. 1993), at pp. 253-56.)

transfert de la propriété des intérêts dans les biens visés: s'agissait-il des intérêts actuels du Dr Ramgotra dans le FERR lui-même, qui n'avaient certainement pas cessé lorsque fut faite la disposition, ou des intérêts futurs et éventuels que le Dr Ramgotra avait manifestement transférés à son épouse lorsqu'elle est devenue sa bénéficiaire? (Pour une analyse générale de cette question controversée, voir David J. McKee, «Debtor-Creditor Issues Affecting Annuity Contracts» (1993), 12 *Est. & Tr. J.* 247, aux pp. 272 à 278, et Norwood et Weir, *Norwood on Life Insurance Law in Canada* (2e éd. 1993), aux pp. 253 à 256.)

34 Before this Court, the parties focused their submissions on the property passing issue. This was not surprising, as Jackson J.A. wrote substantial reasons justifying her conclusion that the relevant property interest was the future contingent interest which had passed to Mrs. Ramgotra. Jackson J.A.'s position was in direct conflict with the decision in *Re MacDonald*, *supra*. The difficulty with Jackson J.A.'s position is that it does violence to the distinction which s. 91(2) requires to be made between *in futuro* and immediate transfers of property. The settlement of a contingent and revocable future interest in RRIF funds is an *in futuro* settlement, i.e., the settlor's interest in the property does not pass at the moment of the settlement. If the settlement of a contingent and revocable future interest were considered an immediate transfer of property, as Jackson J.A. proposes, it is difficult to imagine what sort of settlement of future property could not be so described.

Devant notre Cour, les parties ont fait porter l'essentiel de leurs arguments sur la question du transfert de la propriété des intérêts dans les biens visés. Cela n'est guère étonnant compte tenu du fait que le juge Jackson a rédigé de longs motifs à l'appui de sa conclusion que l'intérêt de propriété pertinent était l'intérêt futur et éventuel transmis à Mme Ramgotra. La position du juge Jackson allait directement à l'encontre de la décision rendue dans l'affaire *Re MacDonald*, précitée. Le problème que soulève la position du juge Jackson est que sa position fait violence à la distinction qui, en application du par. 91(2), doit être faite entre les transferts immédiats de biens et ceux faits *in futuro*. La disposition d'un intérêt futur éventuel et révocable dans les fonds d'un FERR est une disposition *in futuro*, c.-à-d. une disposition n'ayant pas pour effet, lorsqu'elle est faite, de faire cesser les intérêts du disposant dans le bien en question. Si la disposition d'un intérêt futur éventuel et révocable était considérée comme étant un transfert immédiat de biens, comme le propose le juge Jackson, il est difficile d'imaginer quelle sorte de disposition d'un intérêt futur pourrait échapper à cette description.

35 Since the designation of a beneficiary was an *in futuro* settlement made within the five years prior to Dr. Ramgotra's bankruptcy, it is void against the trustee, pursuant to s. 91(2). However, this does not mean that the RRIF funds may be distributed to the creditors of the estate. For the reasons given below, the exempt status of the life-assured RRIF remains in effect under provincial law so as

Comme la désignation d'une bénéficiaire était une disposition *in futuro* faite au cours des cinq années précédant la faillite du Dr Ramgotra, elle est inopposable au syndic, conformément au par. 91(2). Toutefois, cela ne signifie pas que les fonds du FERR peuvent être attribués aux créanciers de la faillite. Pour les motifs qui suivent, la qualité de bien exempt du FERR comportant une assurance-

to block the creditors' claims. Before explaining why this is so, I will examine the fourth approach to the problem raised in the instant case.

(iv) Where property is exempt from execution or seizure by creditors, pursuant to s. 67(1)(*b*) *BIA*, then its exempt status prevails over the fact that it became exempt as a result of a voidable settlement (the "*Geraci* (trial) approach")

Dr. Ramgotra argued forcefully in his submissions that since his RRIF was an exempt property under *The Saskatchewan Insurance Act*, and since this exemption is incorporated into the *BIA* by s. 67(1)(*b*), then it should be irrelevant that the funds in the RRIF were settled when his wife was designated as the beneficiary. In essence, Dr. Ramgotra urged this Court to hold that the exemption provision of the Act should be given effect regardless of s. 91.

Support for Dr. Ramgotra's submission can be found in the judgment of Houlden J. in the trial decision in *Re Geraci* (1969), 13 C.B.R. (N.S.) 86 (Ont. S.C.) (a judgment later overturned by the Ontario Court of Appeal, as discussed above). Houlden J. began by confirming that the designation of a beneficiary under a life insurance policy is a settlement within the *BIA*. He then observed that by reason of the beneficiary designation, the policy itself was exempt from execution or seizure by creditors pursuant to s. 162(2) of *The Insurance Act*, R.S.O. 1960, c. 190 (re-enacted by S.O. 1961-62, c. 63, s. 4) (now s. 196(2) of the *Insurance Act*, R.S.O. 1990, c. I.8). He construed the effect of the exemption as follows, at pp. 92-93:

. . . I believe on a close examination of s. 162(2) that it is the clear intention of the section to make the policy

vie demeure valide sous le régime des lois provinciales applicables, bloquant ainsi les réclamations des créanciers. Avant d'expliquer pourquoi il en est ainsi, je vais examiner la quatrième approche du problème soulevé par le présent pourvoi.

(iv) Lorsque, conformément à l'al. 67(1)*b*) *LFI*, le bien en cause est exempt d'exécution ou de saisie par les créanciers, sa qualité de bien exempt l'emporte alors sur le fait qu'il a acquis cette qualité par suite d'une disposition inopposable (l'«approche *Geraci* (première instance)»)

Dans son argumentation, le D^r^ Ramgotra a plaidé avec vigueur que, comme son FERR est un bien exempt sous le régime de *The Saskatchewan Insurance Act* et que cette exemption est incorporée dans la *LFI* par l'al. 67(1)*b*), le fait qu'il y a eu disposition des fonds du FERR au moment de la désignation de son épouse à titre de bénéficiaire ne devrait avoir aucune pertinence. Essentiellement, le D^r^ Ramgotra exhorte notre Cour de conclure que les dispositions de la Loi qui concernent les exemptions produisent leurs effets malgré l'art. 91. 36

La prétention du D^r^ Ramgotra trouve appui dans la décision rendue, en première instance, par le juge Houlden dans *Re Geraci* (1969), 13 C.B.R. (N.S.) 86 (C.S. Ont.) (décision par la suite infirmée par la Cour d'appel de l'Ontario, voir la discussion qui précède). Le juge Houlden a d'abord confirmé que la désignation d'un bénéficiaire aux termes d'une police d'assurance-vie est une disposition au sens de la *LFI*. Il a ensuite souligné que, du fait de cette désignation, la police elle-même était exempte d'exécution ou de saisie par les créanciers conformément au par. 162(2) de *The Insurance Act*, R.S.O. 1960, ch. 190 (réédicté par S.O. 1961-62, ch. 63, art. 4) (maintenant le par. 196(2) de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8). Il a interprété ainsi l'effet de l'exemption, aux pp. 92 et 93: 37

[TRADUCTION] . . . je crois qu'il ressort d'un examen attentif du par. 162(2) que cette disposition vise claire-

immune from attack by creditors while the wife is designated as beneficiary.

. . .

In my opinion, s. 162(2) has been drafted to provide for the group of persons who were formerly called "preferred beneficiaries". It is now possible to name a person who would formerly have been a preferred beneficiary and at the same time, if the designation is not irrevocable, to retain the right to borrow against, surrender or otherwise deal with the policy, but in my view, the Legislature by the wording of s. 162(2) has made it plain that the policy, while such a designation is in effect, is not to be "exigible for the benefit of (his) creditors": see Mulock C.J.O., in *Royal Bank of Canada v. Dumart*, [1932] O.R. 661 (C.A.).

Houlden J. recognized that some injustice would result from giving precedence to the exempt status of the life insurance policy. For example, an insolvent debtor could convert all his or her assets into cash, purchase a life insurance policy, and render it exempt from seizure by designating a family member as beneficiary. However, he wrote at p. 94:

At the present time, if my interpretation of The Insurance Act is correct, the Legislature had decided that an insurance policy coming within s. 157(1) or s. 162(2) is not available to creditors and, in my opinion, there is good moral justification for this position. Insurance is a very different asset from say a house or an automobile . . . . It is purchased to provide for the dependants of the insured and it is ordinarily paid for in small amounts over the insured's lifetime. I believe there are very good reasons for exempting policies of insurance from seizure . . . .

38 Houlden J.'s reasons in *Geraci* largely repeat the view he expressed in an earlier article, "Life Insurance Contracts in Ontario" (1963), 4 C.B.R. (N.S.) 113, at p. 115:

If a [beneficiary] designation is made in favour of a spouse, child, grandchild or parent of a person whose life is insured, the rights and interests of the insured in

ment à mettre la police d'assurance à l'abri des attaques des créanciers tant que la conjointe en est la bénéficiaire désignée.

. . .

À mon avis, le par. 162(2) a été conçu pour pourvoir aux besoins des personnes qui étaient auparavant appelées «bénéficiaires privilégiés». Il est maintenant possible de désigner une personne qui, auparavant, aurait été un bénéficiaire privilégié, tout en maintenant, si la désignation n'est pas irrévocable, le droit d'emprunter sur la police, de la céder ou de l'aliéner d'une autre façon. Toutefois, je suis d'avis que, en adoptant le libellé du par. 162(2), la législature a clairement indiqué que tant qu'une telle désignation est en vigueur la police n'est pas «exigible pour le bénéfice de (ses) créanciers»: voir le juge en chef Mulock de l'Ontario dans *Royal Bank of Canada c. Dumart*, [1932] O.R. 661 (C.A.).

Le juge Houlden a reconnu que le fait d'accorder la préséance à la qualité de bien exempt de la police d'assurance-vie créerait une certaine injustice. Par exemple, un débiteur insolvable pourrait convertir en argent la totalité de son actif, acheter une police d'assurance-vie et rendre ce bien exempt de saisie en désignant un membre de sa famille à titre de bénéficiaire. Le juge Houlden a cependant écrit ceci, à la p. 94:

[TRADUCTION] À l'heure actuelle, si mon interprétation de *The Insurance Act* est juste, la législature a décidé qu'une police d'assurance visée par le par. 157(1) ou le par. 162(2) ne peut être réclamée par les créanciers; à mon avis, cette position repose sur une excellente justification morale. En effet, l'assurance est un élément d'actif très différent d'une maison ou d'une automobile par exemple . . . L'assuré achète une assurance pour pourvoir aux besoins des personnes à sa charge et, en général, cette assurance est payée au moyen de petits versements faits pendant toute la vie de l'assuré. Je crois qu'il y a de très bonnes raisons de soustraire les polices d'assurance aux saisies . . .

Dans ses motifs dans *Geraci*, le juge Houlden a repris en grande partie l'opinion qu'il avait exprimée dans un article rédigé auparavant et intitulé «Life Insurance Contracts in Ontario» (1963), 4 C.B.R. (N.S.) 113, à la p. 115:

[TRADUCTION] Si une désignation [à titre de bénéficiaire] est faite en faveur d'un conjoint, d'un enfant, d'un petit-enfant ou du père ou de la mère de la per-

the insurance money and in the contract are exempt from execution or seizure (s. 162(2)). Even if the designation of such a beneficiary is not irrevocable, a trustee in bankruptcy cannot deal with such a policy because the rights and interests of the insured are declared to be exempt from execution and seizure and by s. 39(*b*) [now s. 67(1)(*b*)] of the Bankruptcy Act property of a bankrupt does not include property which is exempt from execution or seizure. It would seem that s. 162(2) is drawn with s. 39(*b*) in mind as it uses the identical wording of s. 39(*b*).

sonne assurée, les droits et intérêts de l'assuré dans les sommes assurées et dans le contrat ne peuvent faire l'objet ni d'exécution ni de saisie (par. 162(2)). Même si la désignation de ce bénéficiaire n'est pas irrévocable, le syndic ne peut rien faire à l'égard de cette police parce que les droits et intérêts de l'assuré sont déclarés exempts d'exécution ou de saisie, et que, aux termes de l'al. 39*b*) [maintenant l'al. 67(1)*b*)] de la Loi sur la faillite, les biens d'un failli ne comprennent pas les biens qui sont exempts d'exécution ou de saisie. Il semble que le par. 162(2) ait été rédigé à la lumière de l'al. 39*b*) puisqu'il emploie un libellé identique à celui-ci.

On appeal, Jessup J.A. rejected Houlden J.'s construction of the exemption and settlement provisions of the *BIA*, arguing at p. 258:

39 En appel, le juge Jessup a rejeté l'interprétation qu'avait donnée le juge Houlden des articles de la *LFI* concernant les exemptions et les dispositions, faisant valoir les motifs suivants à la p. 258:

If a settlement of property which comes within s. 60(1) [now s. 91(1)] of the Bankruptcy Act, both as to substance and as to time, is none the less to be taken as exempt, by virtue of s. 39(*b*), from the claims of a bankrupt's creditors merely because it would enjoy that exemption under provincial law apart from s. 60(1), the result would be to make s. 60(1) completely nugatory. I cannot conceive that to have been the intent of Parliament. The proper rule of construction is to harmonize all sections of an enactment and this is achieved in the present case by applying s. 39(*b*) in the light of s. 60(1) and not despite s. 60(1). I would, therefore, hold that property settled by a bankrupt within a year before his bankruptcy includes property rendered exempt from execution or seizure, under the laws of the relevant province, as a result of the settlement. [Emphasis added.]

[TRADUCTION] Si une disposition de biens entrant dans le champ d'application du par. 60(1) [maintenant le par. 91(1)] de la Loi sur la faillite, et ce tant en ce qui concerne la nature de cette disposition que le moment où elle a été effectuée, doit néanmoins être considérée, en vertu de l'al. 39*b*), comme étant à l'abri des réclamations des créanciers du failli du seul fait qu'elle jouirait de cette exemption sous le régime des lois provinciales indépendamment du par. 60(1), cela aurait pour effet de rendre le par. 60(1) tout à fait inefficace. Je ne peux imaginer que le Parlement ait pu avoir une telle intention. La règle d'interprétation qui s'applique est celle qui veut que l'on interprète en harmonie toutes les dispositions d'un texte de loi, objectif qui est atteint dans la présente affaire si on applique l'al. 39*b*) à la lumière du par. 60(1) et non en dépit de celui-ci. Je conclus par conséquent que les biens dont le failli dispose au cours de l'année qui précède sa faillite comprennent les biens qui, par suite d'une disposition, sont devenus exempts d'exécution ou de saisie sous le régime des lois de la province en cause. [Je souligne.]

Jessup J.A.'s reasoning was expressly rejected in preference to that of Houlden J. by the British Columbia Supreme Court in *Re Sykes* (1993), 18 C.B.R. (3d) 148. Meredith J. noted, at para. 19, that Jessup J.A.'s reasons in *Geraci*

40 Le raisonnement du juge Jessup a été expressément écarté au profit de celui du juge Houlden par la Cour suprême de la Colombie-Britannique dans *Re Sykes* (1993), 18 C.B.R. (3d) 148. Le juge Meredith a souligné, au par. 19, que les motifs du juge Jessup dans *Geraci*

. . . seems . . . to tag onto s. 167(*b*) [*sic*] words such as "unless the disposition of the property referred to amounts to a settlement referred to in s. 91". That comes close to judicial legislation.

[TRADUCTION] . . . semblent . . . ajouter à l'al. 167*b*) [sic] des mots comme «sauf si la disposition des biens en cause équivaut à une disposition visée à l'art. 91». Cela tient du droit prétorien.

Meredith J. was not prepared to go that route, and instead concluded that the exempt status of the life insurance policy in question was conclusive in that it was not available for seizure by creditors, even though it became exempt as a result of a voidable settlement (see also, *Canadian Imperial Bank of Commerce v. Meltzer* (1991), 6 C.B.R. (3d) 1 (Man. Q.B.), which adopted Houlden J.'s construction of the exemption provisions of the *BIA*).

Le juge Meredith n'était pas disposé à suivre cette voie. Il a plutôt statué que la qualité de bien exempt dont bénéficiait la police d'assurance-vie en question permettait de conclure que les créanciers ne pouvaient la saisir, même si l'exemption résultait d'une disposition inopposable (voir également *Canadian Imperial Bank of Commerce c. Meltzer* (1991), 6 C.B.R. (3d) 1 (B.R. Man.), où la cour a adopté l'interprétation donnée par le juge Houlden des articles de la *LFI* concernant les exemptions).

41 The debate between Houlden J. and Jessup J.A. in *Geraci*, which was taken up by Meredith J. in *Sykes*, was premised on the view that ss. 67(1)(*b*) and 91 *BIA* were in conflict. As Michael J. McCabe stated in his article, "Execution Against an R.R.S.P." (1990), 76 C.B.R. (N.S.) 218, at p. 234:

> The issue, simply stated, is which takes precedence, the exemption provision of s. 67 incorporating the provincial exemptions or the settlement provision of s. 91.

Le débat entre les juges Houlden et Jessup dans *Geraci*, qu'a relancé le juge Meredith dans *Sykes*, prenait pour acquis qu'il y a conflit entre l'al. 67(1)*b*) et l'art. 91 *LFI*. Comme l'a écrit Michael J. McCabe dans son article intitulé «Execution Against an R.R.S.P.» (1990), 76 C.B.R. (N.S.) 218, à la p. 234:

> [TRADUCTION] Exprimée simplement, la question est de savoir lequel, de l'art. 67 qui incorpore les exemptions provinciales, ou de l'art. 91 qui concerne les dispositions, a préséance.

In resolving this issue, both Houlden J. and Jessup J.A. undertook a "lesser of two evils" -type analysis. Houlden J. preferred to give effect to s. 67(1)(*b*) over s. 91, to avoid the result that every designation of a beneficiary under a life insurance policy, made within one year of bankruptcy (or within five years if the designation was made when the debtor was insolvent, or if the property interest of the debtor did not pass when the beneficiary was designated), would be voidable. He thought that instances in which such a designation would be made for the purpose of defeating creditors would be rare, and that "it is better to permit injury to the creditors [in those rare cases] than to inflict the undoubted hardship of the forfeiture of a life's investment" (at p. 94). Jessup J.A. reached the opposite conclusion, because Houlden J.'s interpretation of s. 67(1)(*b*) would render s. 91 "completely nugatory". Nevertheless, Jessup J.A. added, at p. 259:

Pour résoudre cette question, les juges Houlden et Jessup se sont tous deux lancé dans une analyse visant à trouver la solution constituant «le moindre mal». Le juge Houlden a préféré donner préséance à l'al. 67(1)*b*) sur l'art. 91, afin d'éviter que toutes les désignations de bénéficiaires aux termes de polices d'assurance-vie faites au cours de l'année précédant la faillite (ou des cinq années qui précèdent la faillite si la désignation a été faite lorsque le débiteur était insolvable, ou si les intérêts de propriété du débiteur n'ont pas cessé lorsque fut faite la désignation) soient inopposables. Il croyait que les cas où une telle désignation serait faite dans le but de frustrer des créanciers seraient rares et qu'[TRADUCTION] «il est préférable de permettre que les créanciers subissent un préjudice [dans ces rares cas] plutôt que d'infliger l'épreuve indubitable que constitue la perte d'un placement de toute une vie» (à la p. 94). Le juge Jessup a tiré la conclusion contraire, pour le motif que l'interprétation donnée par le juge Houlden de l'al. 67(1)*b*) rendrait l'art. 91 «tout à fait inefficace». Le juge Jessup a néanmoins ajouté ceci, à la p. 259:

It does seem unjust that moneys paid in good faith over a period of years to secure a man's wife and children should be available to his creditors . . . .

He then suggested a legislative amendment to avoid this result.

If I had to choose between the approaches of Houlden J. and Jessup J.A., then I would prefer that of Houlden J. for two reasons. First, I think that Jessup J.A. exaggerated the impact on s. 91 of Houlden J.'s construction, since settlements which change the status of property from non-exempt to exempt are only a portion of the settlements subject to s. 91. Houlden J.'s position certainly does not render s. 91 "completely nugatory", as stated by Jessup J.A. at p. 258. Second, Jessup J.A.'s interpretation of s. 67(1)(*b*) clearly favours the interests of creditors over the rehabilitation interest of the bankrupt settlor. The Act itself provides no indication that this should be so in the circumstances presented by the instant case, or *Geraci*. I do not believe that Parliament intended the funds in exempt life insurance plans to be subject to execution and seizure by creditors, simply on the basis that a settlement occurred when a beneficiary was designated. After all, it is the designation which makes the asset exempt under the provincial legislation incorporated into s. 67(1)(*b*). Are we really to believe that Parliament intended the very act which renders an asset exempt to be the cause of its losing its exempt status? I do not think so. Like Houlden J., I think that it would be preferable to respect the exempt status of a life insurance policy, even where the policy became exempt as a result of a s. 91 settlement.

In any event, I reject the view that ss. 67(1)(*b*) and 91 *BIA* are in conflict, and that the resolution of the case at bar requires me to choose one provision over the other on the basis of policy considerations. In fact, I think that it is possible to rec-

[TRADUCTION] Il semble effectivement injuste de permettre que des sommes d'argent versées de bonne foi pendant des années par un homme pour pourvoir aux besoins de son épouse et de ses enfants soient disponibles pour ses créanciers . . . .

Il a alors proposé une modification à la loi en vue d'éviter pareil résultat.

Si j'avais à choisir entre l'approche du juge Houlden et celle du juge Jessup, j'opterais pour celle du juge Houlden et ce pour deux raisons. Premièrement, je crois que le juge Jessup a exagéré l'impact sur l'art. 91 de l'interprétation du juge Houlden, puisque les dispositions qui ont pour effet de rendre exempt un bien qui ne l'est pas ne forment qu'une partie des dispositions visées par l'art. 91. La position du juge Houlden ne rend certainement pas l'art. 91 «tout à fait inefficace», comme l'a affirmé le juge Jessup, à la p. 258. Deuxièmement, l'interprétation qu'a faite ce dernier de l'al. 67(1)*b*) favorise clairement les intérêts des créanciers plutôt que l'objectif de réhabilitation du disposant failli. La Loi elle-même ne renferme aucune indication qu'il devrait en être ainsi dans les circonstances de l'espèce ou dans celles de l'affaire *Geraci*. Je ne crois pas que le législateur entendait que les sommes se trouvant dans des régimes d'assurance-vie exempts puissent faire l'objet de mesures d'exécution ou de saisie par les créanciers, simplement parce qu'il y a disposition lorsqu'un bénéficiaire est désigné. Après tout, c'est la désignation qui rend le bien exempt sous le régime de la loi provinciale incorporée dans l'al. 67(1)*b*). Devons-nous vraiment croire que le législateur entendait que l'acte même par lequel un bien devient exempt soit en même temps la cause de la perte de cette qualité? Je ne le crois pas. À l'instar du juge Houlden, j'estime qu'il serait préférable de respecter la qualité de bien exempt des polices d'assurance-vie, même lorsqu'elles ont acquis cette qualité par suite d'une disposition visée à l'art. 91.

42

Quoi qu'il en soit, je ne suis pas d'accord avec l'opinion qu'il y a incompatibilité entre l'al. 67(1)*b*) et l'art. 91 *LFI* et que, pour résoudre la présente affaire, je dois choisir un article au dépens de l'autre en me fondant sur des considérations de

43

oncile the two provisions by giving effect to their distinct terms, and by recognizing their distinct roles in bankruptcy.

3. *The Preferred Approach to the Problem in the Case at Bar*

(v) Even if a settlement which creates an exempt asset is void **against the trustee in bankruptcy** under s. 91, the exempt status of the asset under provincial law remains in effect to block **the claims of creditors**

44 In reconciling ss. 67(1)(*b*) and 91 *BIA*, it is important to remember that the general scheme through which a bankrupt's estate is divided by the trustee among creditors involves two distinct stages. First, the Act provides that an insolvent person "may make an assignment of all his property for the general benefit of his creditors" (s. 49(1)), or that creditors "may file in court a petition for a receiving order against a debtor" (s. 43(1)). At the time of the assignment or receiving order, the trustee in bankruptcy is obligated to take possession of the assets forming the estate of the bankrupt. Thus, by operation of s. 71(2), the bankrupt's property passes to and vests in the trustee:

71....

(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

Section 16(3) *BIA* imposes a duty on the trustee to "take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory . . . ." Section 158(*a*) imposes a complimentary duty on the bankrupt to inform the trustee of all his or her property which is in his or her possession or control, and to deliver it to the

politique. En fait, je crois qu'il est possible de concilier les deux articles en donnant effet à leur texte respectif et en reconnaissant les rôles distincts qu'ils jouent en matière de faillite.

3. *L'approche privilégiée à l'égard du problème soulevé en l'espèce*

(v) Même si une disposition ayant pour effet de créer un bien exempt est inopposable **au syndic** en vertu de l'art. 91, l'exemption reconnue à ce bien par la loi provinciale demeure valide et écarte **les réclamations des créanciers**

Lorsqu'on réconcilie l'al. 67(1)*b*) et l'art. 91 *LFI*, il est important de se rappeler que le mécanisme général par lequel le patrimoine du failli est partagé par le syndic entre les créanciers comporte deux étapes distinctes. Premièrement, aux termes de la Loi, une personne insolvable «peut faire une cession de tous ses biens au profit de ses créanciers en général» (par. 49(1)), ou les créanciers «peuvent déposer au tribunal une pétition en vue d'une ordonnance de séquestre contre un débiteur» (par. 43(1)). Au moment de la cession ou de l'ordonnance de séquestre, le syndic est tenu de prendre possession des biens qui forment le patrimoine du failli. Ainsi, par l'effet du par. 71(2), les biens du failli passent et sont dévolus au syndic:

71....

(2) Lorsqu'une ordonnance de séquestre est rendue, ou qu'une cession est produite auprès d'un séquestre officiel, un failli cesse d'être habile à céder ou autrement aliéner ses biens qui doivent, sous réserve des autres dispositions de la présente loi et des droits des créanciers garantis, immédiatement passer et être dévolus au syndic nommé dans l'ordonnance de séquestre ou dans la cession, et advenant un changement de syndic, les biens passent de syndic à syndic sans transport, cession, ni transfert quelconque.

Aux termes du par. 16(3) *LFI*, le syndic «prend possession des titres, livres, dossiers et documents, ainsi que tous les biens du failli, et dresse un inventaire . . .» L'alinéa 158*a*) impose de plus au failli, à titre gracieux, l'obligation de révéler et de remettre au syndic tous ses biens qui sont en sa possession ou sous son contrôle. D'autres disposi-

trustee. Other provisions of the Act elaborate upon the powers, duties and functions of the trustee during the property-passing stage of bankruptcy (see, in particular, ss. 17, 18, 19 and 24 *BIA*).

Once the bankrupt's property has passed into the possession of the trustee, the Act provides the trustee with the power to administer the estate. For example, the trustee may, with the permission of the estate inspectors, sell or dispose of assets (s. 30(1)(*a*)), lease real property (s. 30(1)(*b*)), carry on the business of the bankrupt (s. 30(1)(*c*)), or divide certain property among the creditors (s. 30(1)(*j*)). The ultimate purpose of these administrative powers is to manage the estate, in order to provide equitable satisfaction of the creditor's claims. This, then, is the estate-administration stage of bankruptcy, one distinct aspect of which is the distribution of the estate among creditors.

During the property-passing stage of bankruptcy, the trustee is empowered under s. 91 of the Act to set aside certain settlements which have reduced the size of the estate. Thus, s. 91 outlines the circumstances in which a settlement will be voidable at the behest of the trustee in bankruptcy. If a settlement is declared void against the trustee, then the settled property reverts back to the bankrupt's estate, and falls into the possession of the trustee in bankruptcy. Several other provisions of the *BIA* have relevance to the property-passing stage. For example, s. 94 renders certain assignments of book debts void against the trustee; s. 98(1) empowers the trustee to take possession of any money or proceeds from the sale of settled property to a third party, where the original settlement was void; and s. 99 dictates that while property acquired by the bankrupt after the bankruptcy vests in the trustee, it may be transferred by the bankrupt to a good faith purchaser, unless the trustee intervenes in the transaction (in which case the transaction is void against the trustee).

After-acquired property is also dealt with in s. 68, which constitutes a complete code in respect of a bankrupt's salary, wages or other remuneration. The provision stipulates that after-acquired remu-

tions de la Loi précisent les fonctions, pouvoirs et obligations du syndic à l'étape de la passation des biens du failli (voir en particulier les art. 17, 18, 19 et 24 *LFI*).

Une fois que les biens du failli sont passés en la possession du syndic, la Loi habilite ce dernier à administrer le patrimoine. Ainsi, avec la permission des inspecteurs, le syndic peut vendre ou aliéner des biens (al. 30(1)*a*)), donner à bail des biens immeubles (al. 30(1)*b*)), continuer le commerce du failli (al. 30(1)*c*)), ou partager certains biens parmi les créanciers (al. 30(1)*j*)). Ces pouvoirs d'administration visent en définitive à faire en sorte que l'actif soit géré de façon à permettre le règlement équitable des réclamations des créanciers. Il s'agit de l'étape de l'administration du patrimoine du failli, dont l'un des aspects est l'attribution de l'actif aux créanciers. 45

Durant l'étape de la passation des biens du failli au syndic, ce dernier est habilité, en vertu de l'art. 91 de la Loi, à annuler certaines dispositions qui ont eu pour effet de réduire la taille du patrimoine. L'article 91 énonce donc les circonstances dans lesquelles une disposition sera annulable à la demande du syndic. Si une disposition est déclarée inopposable au syndic, les biens dont il a été disposé sont retournés au patrimoine du failli et le syndic en prend possession. Plusieurs autres dispositions de la *LFI* s'appliquent à l'étape de la passation des biens au syndic. Par exemple, l'art. 94 rend inopposables au syndic certaines cessions de créances comptables; le par. 98(1) habilite le syndic à prendre possession des sommes d'argent ou autre produit de la vente de biens dont il a été disposé en faveur d'un tiers lorsque la disposition initiale était nulle; et l'art. 99 prévoit que, même si les biens acquis par le failli après la faillite sont dévolus au syndic, ils peuvent néanmoins être transférés par le failli à un acheteur de bonne foi, sauf si le syndic intervient (auquel cas l'opération lui est inopposable). 46

Il est également question des biens acquis après la faillite à l'art. 68, lequel forme un code complet relativement au traitement, salaire ou autre forme de rémunération que reçoit le failli. Aux termes de 47

neration will not pass to and vest in the trustee unless the trustee intervenes by applying for a court order directing the payment of the remuneration (or a portion of it) to the trustee (*Marzetti v. Marzetti*, [1994] 2 S.C.R. 765, at p. 794). Where the trustee obtains such a court order, then the remuneration which passes into his or her possession is also divisible among creditors, even if it would otherwise be exempt from execution or seizure under provincial law. This is because s. 68 operates "notwithstanding section 67(1)", with the result that a provincial exemption for remuneration which would otherwise be incorporated into s. 67(1)(*b*) is ineffective: *Marzetti*, at pp. 792-93 and 795. I note that Parliament considered it necessary to exclude explicitly after-acquired remuneration from the operation of s. 67(1)(*b*), thereby overriding the exempt status of the remuneration under provincial law, in order to ensure that in those circumstances where such remuneration passed to the trustee, it was also divisible among creditors. This supports the view that absent a specific override of s. 67(1)(*b*), exempt property which passes to and vests in the trustee, whether as a result of ss. 71(2) or 91, will not be divisible among creditors.

cet article, la rémunération reçue après la faillite ne passe et n'est dévolue au syndic que s'il intervient en demandant au tribunal de rendre une ordonnance portant que lui soit payée cette rémunération (ou une partie de celle-ci) (*Marzetti c. Marzetti*, [1994] 2 R.C.S. 765, à la p. 794). Lorsque le syndic obtient une telle ordonnance du tribunal, la rémunération qui passe alors en sa possession fait également partie du patrimoine attribué aux créanciers, même si elle serait par ailleurs exempte d'exécution ou de saisie sous le régime de la loi provinciale applicable. Il en est ainsi parce que l'art. 68 s'applique «[n]onobstant l'article 67(1)», de sorte que l'exemption provinciale applicable à la rémunération et qui serait autrement incorporée à l'al. 67(1)*b*) est inopérante: *Marzetti*, aux pp. 792, 793 et 795. Je souligne que le législateur a jugé nécessaire d'exclure explicitement la rémunération acquise après la faillite du champ d'application de l'al. 67(1)*b*), écartant ainsi la qualité de bien exempt reconnue à la rémunération par les lois provinciales, pour faire en sorte que, dans les cas où cette rémunération passe au syndic, elle soit également attribuée aux créanciers. Cela vient étayer l'opinion voulant que, en l'absence de dérogation expresse à l'al. 67(1)*b*), les biens exempts qui passent et sont dévolus au syndic, par l'application soit du par. 71(2) soit de l'art. 91, ne feront pas partie du patrimoine attribué aux créanciers.

48 Unlike provisions of the Act such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property. Thus, property which is divisible among creditors is defined very broadly in s. 67(1) as:

> (*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
>
> (*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Contrairement à d'autres dispositions de la Loi tels le par. 71(2) et les art. 91 et 68, le par. 67(1) ne vise aucunement l'étape de la passation des biens du failli au syndic. Ce paragraphe porte plutôt sur l'étape de l'administration du patrimoine et précise les biens de l'actif qui sont disponibles pour régler les réclamations des créanciers. Il est en fait une directive au syndic sur la façon de disposer des biens visés. En conséquence, les biens constituant le patrimoine attribué aux créanciers sont décrits en termes très généraux au par. 67(1):

> *c*) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;
>
> *d*) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

However, the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(*a*)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(*b*)). While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.

Thus, it can be seen that ss. 91 and 67 relate to two different stages of bankruptcy. Section 91 dictates that certain settled property will fall back into the estate of the bankrupt in the possession of the trustee, while s. 67 is directed at the exercise of administrative powers over the estate by the trustee. Where a settlement is void against the trustee under s. 91, then in normal circumstances, the trustee is empowered to administer the settled asset, and use it to satisfy the claims of creditors. However, in the special case where the asset is exempt under s. 67(1)(*b*), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors. This two-stage analysis is similar to the one adopted by Henry J. of the Ontario Supreme Court in *Re Pearson* (1977), 23 C.B.R. (N.S.) 44. That case was concerned with the issue of whether a trustee in bankruptcy could revoke the designation of a beneficiary under a life insurance plan, and substitute the estate as beneficiary. Although the plan itself was exempt from the *BIA*, the trustee sought to defeat the exemption by exercising a "power" under s. 47(*d*) [now s. 67(1)(*d*)]. Henry J. dismissed the trustee's application, and in doing so characterized the effect of the exemption provisions of the Act as follows, at pp. 48-49:

What comes into the hands of the trustee on the occurrence of the bankruptcy are the rights and interests of the insured in the insurance money and in the contract as they stood at the date of the bankruptcy. When that event occurred, those rights and interests were, by s. 170 of The Insurance Act, exempt from execution or seizure. In my opinion, so far as the creditors of the bankrupt are

Cependant, deux catégories de biens ne peuvent être attribués aux créanciers par le syndic: les biens détenus par le failli en fiducie pour toute autre personne (al. 67(1)*a*)), et les biens qui sont exempts d'exécution ou de saisie sous le régime des lois de la province concernée (al. 67(1)*b*)). Même si ces biens deviennent partie du patrimoine du failli en la possession du syndic, ce dernier ne peut, en raison de l'art. 67, exercer sur eux ses pouvoirs d'attribution de l'actif.

Cela permet donc de constater que les art. 91 et 67 régissent deux étapes différentes de la faillite. Alors que l'art. 91 indique que certains biens ayant fait l'objet d'une disposition reviennent dans le patrimoine du failli en la possession du syndic, l'art. 67 porte sur les pouvoirs de nature administrative exercés par ce dernier sur le patrimoine. Lorsque, en vertu de l'art. 91, une disposition est inopposable au syndic, celui-ci est, dans des circonstances normales, habilité à administrer le bien ayant fait l'objet de la disposition et à l'appliquer au règlement des réclamations des créanciers. Cependant, dans les cas particuliers où il s'agit d'un bien exempt en vertu de l'al. 67(1)*b*), le syndic ne peut alors exercer ses pouvoirs de distribution car le bien ne fait pas partie du patrimoine attribué aux créanciers. Cette analyse à deux volets est semblable à celle adoptée par le juge Henry de la Cour suprême de l'Ontario dans *Re Pearson* (1977), 23 C.B.R. (N.S.) 44. Cette affaire portait sur la question de savoir si un syndic peut révoquer la désignation d'un bénéficiaire faite aux termes d'un régime d'assurance-vie et substituer la faillite à titre de bénéficiaire. Même si le régime lui-même était exempt de l'application de la *LFI*, le syndic a cherché à contourner cette exemption en exerçant un «pouvoir» visé à l'al. 47*d*) [maintenant l'al. 67(1)*d*)]. Le juge Henry a rejeté la demande du syndic, qualifiant ainsi l'effet des dispositions de la Loi relatives aux exemptions, aux pp. 48 et 49:

[TRADUCTION] En cas de faillite, passent dans les mains du syndic, tels qu'ils étaient à la date de la faillite, les droits et intérêts de l'assuré dans les sommes assurées et dans le contrat. Lorsque cet événement s'est produit en l'espèce, les droits et intérêts en question étaient, conformément à l'art. 170 de l'Insurance Act, exempts d'exécution ou de saisie. À mon avis, en ce qui concerne

concerned, that situation crystallized at the time the bankruptcy occurred, and that property by virtue of s. 47(*b*) [now s. 67(1)(*b*)] of the Bankruptcy Act was impressed with its character of not being divisible among the creditors, for all the purposes of the bankruptcy.

I adopt this as a correct statement of the law. Therefore, while an asset which is exempt under provincial law passes into the possession of the trustee at the time of bankruptcy, the exemption itself bars the trustee from dividing the asset among creditors where s. 67(1)(*b*) is operative.

50 Relating this to the circumstances in the case at bar, at the time of Dr. Ramgotra's bankruptcy application, his property interest in the RRIF passed to and vested in the trustee in bankruptcy by operation of s. 71(2) *BIA*. Mrs. Ramgotra's future contingent interest as the designated beneficiary under the RRIF was not captured by s. 71(2), since it had been settled on her prior to bankruptcy. It was open to the trustee in bankruptcy to apply to have this settlement set aside under s. 91(2) *BIA*. As I noted above, the settlement was void under s. 91(2) and, consequently, Mrs. Ramgotra's future contingent interest passed to and vested in the trustee. The trustee in bankruptcy possessed the complete set of property interests associated with the RRIF. But the trustee could not divide the RRIF among creditors because its exempt status under s. 67(1)(*b*) *BIA* continued regardless of s. 91. In other words, the role of s. 91 is to bring settled property back into the estate of the bankrupt in the possession of the trustee. Therefore, while s. 91 could be employed to bring Dr. Ramgotra's RRIF fully into the possession of the trustee in bankruptcy, it has no bearing on the issue of whether or not the RRIF is exempt under s. 67(1)(*b*).

51 The appellant has argued that when a settlement creating an exempt asset has been set aside under s. 91, then the exempt status itself is no longer effective. In other words, the existence of a valid settlement is a logical precondition to the enforce-

les créanciers du failli, cette situation s'est cristallisée au moment où est survenue la faillite, et l'al. 47*b*) [maintenant l'al. 67(1)*b*)] de la Loi sur la faillite a eu pour effet de soustraire ces biens du patrimoine attribué aux créanciers pour tout ce qui concerne la faillite.

Je fais mien cet exposé conforme au droit. Par conséquent, même si au moment de la faillite un bien exempt sous le régime des lois provinciales passe en la possession du syndic, l'exemption elle-même empêche ce dernier de partager le bien entre les créanciers lorsque l'al. 67(1)*b*) s'applique.

Si on applique ce qui précède aux circonstances de l'espèce, au moment où le Dr Ramgotra a présenté sa demande de faillite, son intérêt de propriété dans le FERR est passé et a été dévolu au syndic en application du par. 71(2) *LFI*. L'intérêt futur et éventuel de Mme Ramgotra à titre de bénéficiaire désignée aux termes du FERR n'est pas tombé dans le champ d'application du par. 71(2), puisque la disposition de ce bien en faveur de l'épouse avait eu lieu avant la faillite. Il était loisible au syndic de demander l'annulation de cette disposition en vertu du par. 91(2) *LFI*. Comme je l'ai signalé précédemment, la disposition était inopposable aux termes du par. 91(2), et, en conséquence, l'intérêt futur et éventuel de Mme Ramgotra est passé et a été dévolu au syndic, qui est alors entré en possession de tous les intérêts de propriété rattachés au FERR. Par contre, le syndic ne pouvait partager le FERR entre les créanciers puisque ce bien continuait, malgré l'art. 91, d'être exempt en vertu de l'al. 67(1)*b*) *LFI*. En d'autres termes, l'art. 91 a pour rôle de ramener dans le patrimoine du failli en la possession du syndic les biens ayant fait l'objet d'une disposition. Par conséquent, bien que l'art. 91 puisse être invoqué pour mettre le syndic en pleine possession du FERR du Dr Ramgotra, il n'a aucune incidence sur la question de savoir si le FERR est exempt en vertu de l'al. 67(1)*b*).

L'appelante a fait valoir que, dans les cas où une disposition ayant pour effet de créer un bien exempt est annulée en vertu de l'art. 91, l'exemption elle-même ne vaut plus. En d'autres termes, l'existence d'une disposition valide est une condi-

ability of a s. 67(1)(*b*) exemption. This argument found favour in *Re Yewdale*, *supra*, where Tysoe J. stated at p. 204:

> While s. 67(1)(*b*) does provide an exemption for insurance annuities, it cannot be viewed in isolation. An asset can only be properly exempted under s. 67(1)(*b*) if the transaction creating the asset is valid. If the transaction is void under s. 91 (or any other provision), the exempted asset must be considered to revert to its form prior to the invalid transaction. If its prior form was not an exempted asset, s. 67(1)(*b*) is not applicable.

With respect, I cannot agree. The effect of s. 91 is to render certain settlements void against the trustee in bankruptcy. However, in the case of a life insurance policy, it must be remembered that what renders it exempt under s. 67(1)(*b*) is the designation of a beneficiary. According to s. 158(2) of *The Saskatchewan Insurance Act*, the exempt status of the life insurance policy continues so long as the designation is "in effect". To reach the conclusion of Tysoe J. in *Re Yewdale*, I would have to find that the designation in the case at bar is no longer "in effect" for the purpose of preventing distribution of the funds in the RRIF to Dr. Ramgotra's creditors, because the designation "is void against the trustee". However, I do not think that the fact a beneficiary designation is void against the trustee under federal legislation necessarily results in it no longer having effect vis-à-vis the claims of creditors under the provincial legislation which s. 67(1)(*b*) incorporates. As I stated above, ss. 91 and 67(1)(*b*) are directed at different stages of bankruptcy, and play different roles. Section 91 assists in identifying the property of the bankrupt which comes into the possession of the trustee, whereas s. 67(1)(*b*) is relevant in determining the property in the trustee's possession over which he or she may exercise his or her administrative powers. I therefore prefer a construction of ss. 91 and 67(1)(*b*) which recognizes their distinct roles in bankruptcy, as opposed to a construction which holds one to be a precondition of the other.

tion préalable logique à l'application d'une exemption fondée sur l'al. 67(1)*b*). Cet argument a été accepté dans *Re Yewdale*, précité, où le juge Tysoe a déclaré ceci, à la p. 204:

> [TRADUCTION] Même si l'al. 67(1)*b*) établit une exemption à l'égard des rentes d'assurance, il ne doit pas être analysé isolément. Un bien ne peut bénéficier à juste titre de l'exemption prévue par l'al. 67(1)*b*) que si l'opération créant ce bien est valide. Si cette opération est nulle suivant l'art. 91 (ou tout autre article), le bien exempté doit être considéré comme ayant repris la forme qu'il avait avant l'opération invalide. Si, sous sa forme originale, le bien n'était pas exempt, alors l'al. 67(1)*b*) ne s'applique pas.

En toute déférence, je ne suis pas d'accord. L'article 91 a pour effet de rendre certaines dispositions inopposables au syndic. Toutefois, lorsqu'il s'agit d'une police d'assurance-vie, il faut se rappeler que c'est la désignation d'un bénéficiaire qui la rend exempte en vertu de l'al. 67(1)*b*). Aux termes du par. 158(2) de *The Saskatchewan Insurance Act*, la police d'assurance-vie conserve sa qualité de bien exempt tant que la désignation est «en vigueur». Pour conclure comme l'a fait le juge Tysoe dans *Re Yewdale*, il me faudrait statuer que, parce qu'elle est «inopposable au syndic», la désignation faite en l'espèce n'est plus «en vigueur» et n'a pas pour effet d'empêcher le partage des fonds du FERR entre les créanciers du D^r^ Ramgotra. Toutefois, je ne crois pas que le fait qu'une désignation de bénéficiaire soit inopposable au syndic en vertu de la loi fédérale a nécessairement pour effet de rendre cette désignation inopérante à l'égard des réclamations des créanciers sous le régime des lois provinciales pertinentes incorporées par l'al. 67(1)*b*). Comme je l'ai dit plus tôt, l'art. 91 et l'al. 67(1)*b*) régissent des étapes différentes de la faillite et jouent des rôles distincts. L'article 91 aide à identifier les biens du failli qui passent en la possession du syndic, alors que l'al. 67(1)*b*) permet de déterminer ceux parmi ces biens sur lesquels le syndic peut exercer ses pouvoirs d'administration. Je préfère donc une interprétation de l'art. 91 et de l'al. 67(1)*b*) reconnaissant le rôle distinct de ces dispositions législatives en matière de faillite à une interprétation faisant de l'une de ces dispositions une condition préalable à l'application de l'autre.

52 Therefore, even though Dr. Ramgotra effected a void settlement under the second branch of s. 91(2) when he designated his wife as beneficiary of his RRIF, that does not allow the trustee to use the funds in the RRIF to satisfy the claims of creditors such as the appellant bank. The RRIF is an exempt asset pursuant to the provincial legislation incorporated into s. 67(1)(*b*), meaning that it is not property which is divisible among creditors. Given this, even though Mrs. Ramgotra's future contingent interest in the RRIF had passed into the possession of the trustee through the application of s. 91(2), the RRIF was property "incapable of realization" by the trustee pursuant to s. 40(1) *BIA*. Therefore, the trustee was obliged to return it to Dr. Ramgotra prior to applying for his discharge: *Thompson v. Coulombe* (1984), 54 C.B.R. (N.S.) 254 (Que. C.A.), at p. 257; *Zemlak (Trustee of) v. Zemlak* (1987), 66 C.B.R. (N.S.) 1 (Sask. C.A.), at pp. 9 and 11. Despite the fact that Dr. Ramgotra's settlement was void against the trustee, the exempt status of the RRIF is an absolute bar to the appellant bank's claim.

Par conséquent, même si le Dr Ramgotra a fait une disposition inopposable visée par le second volet du par. 91(2) lorsqu'il a désigné son épouse à titre de bénéficiaire de son FERR, cela n'autorisait pas le syndic à utiliser les fonds du FERR pour régler les réclamations des créanciers telle la banque appelante. Le FERR est un bien exempt aux termes des lois provinciales incorporées par l'al. 67(1)*b*), c'est-à-dire qu'il ne fait pas partie des biens constituant le patrimoine attribué aux créanciers. Pour cette raison, même si l'intérêt futur et éventuel de Mme Ramgotra dans le FERR était passé en la possession du syndic par l'application du par. 91(2), le FERR était un bien «non réalisable» par le syndic aux termes du par. 40(1) *LFI*. Par conséquent, le syndic était tenu, avant de demander sa libération, de retourner ce bien au Dr Ramgotra: *Thompson c. Coulombe* (1984), 54 C.B.R. (N.S.) 254 (C.A. Qué.), à la p. 257; *Zemlak (Trustee of) c. Zemlak* (1987), 66 C.B.R. (N.S.) 1 (C.A. Sask.), aux pp. 9 et 11. En dépit du fait que la disposition faite par le Dr Ramgotra soit inopposable au syndic, la qualité de bien exempt du FERR est un obstacle insurmontable à la réclamation de la banque appelante.

4. *The Application of Provincial Fraud Legislation*

4. *L'application des lois provinciales en matière de fraude*

53 In the lower courts which have considered the issue presented by the case at bar, considerable concern has been expressed over the fact that the conversion of a non-exempt asset into an exempt asset is a convenient means for a bankrupt to reduce the size of his or her estate available to creditors. Thus, the bankrupt's intention in effecting a transaction, and the impact of the transaction on creditors, have both been important factors directing the jurisprudence related to ss. 91 and 67(1)(*b*) *BIA*. Of course, in the case at bar, Dr. Ramgotra acted in good faith, and not for the purpose of defeating his creditors' claims. One could well imagine more troubling circumstances, however.

Devant les juridictions inférieures qui ont examiné la question soulevée par le présent pourvoi, de vives inquiétudes ont été exprimées à l'égard du fait que la conversion d'un bien non exempt en bien exempt est un moyen commode par lequel un failli peut réduire la taille du patrimoine disponible pour les créanciers. En conséquence, l'intention du failli lorsqu'il effectue l'opération et les conséquences de celle-ci pour les créanciers ont été des facteurs importants dans l'orientation de la jurisprudence relative à l'art. 91 et à l'al. 67(1)*b*) *LFI*. De toute évidence, en l'espèce, le Dr Ramgotra a agi de bonne foi et non dans le but de frustrer les réclamations de ses créanciers. Néanmoins, il serait bien possible d'imaginer des circonstances plus troublantes.

54 In her case comment on the Saskatchewan Court of Appeal decision in the instant case Lisa H. Kerbel Caplan ((1994), 26 C.B.R. (3d) 252),

Dans son commentaire sur la décision de la Cour d'appel de la Saskatchewan dans la présente affaire Lisa H. Kerbel Caplan ((1994), 26 C.B.R.

argues that at common law, the role of intention has focused "on the settlor's intention that the donee hold the settled property in its current form or in a traceable form", and not on the settlor's purpose in making a settlement (at p. 253). Like her, I am of the view that whether a settlor has acted in good faith, or for the purpose of defeating creditors, is not relevant to the question of whether a settlement has been made within s. 91.

(3d) 252), prétend que, en common law, pour ce qui est de l'intention, on s'est attaché principalement à [TRADUCTION] «l'intention du disposant que le donataire détienne le bien en question dans sa forme originale ou sous une forme qui permette d'en suivre la trace», et non à l'objectif visé par le disposant lorsqu'il effectue la disposition (à la p. 253). Comme cet auteur, je suis d'avis que la question de savoir si un disposant a agi de bonne foi ou dans le but de frustrer ses créanciers n'est pas pertinente pour déterminer s'il y a eu disposition au sens de l'art. 91.

In contrast, however, a settlor's intention is highly relevant where a settlement is being challenged under provincial (or territorial) fraud legislation: *Fraudulent Conveyances Act*, R.S.N. 1990, c. F-24, s. 3; *Assignments and Preferences Act*, R.S.N.S. 1989, c. 25, s. 4; *Assignments and Preferences Act*, R.S.N.B. 1973, c. A-16, s. 2; *Frauds on Creditors Act*, R.S.P.E.I. 1988, c. F-15, s. 2; *Civil Code of Québec*, art. 1631 ("Paulian Action"); *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, s. 4(1), and *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, s. 2; *The Fraudulent Conveyances Act*, R.S.M. 1987, c. F160, s. 2; *The Fraudulent Preferences Act*, R.S.S. 1978, c. F-21, s. 3; *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18, s. 2; *Fraudulent Conveyance Act*, R.S.B.C. 1979, c. 142, s. 1, and *Fraudulent Preference Act*, R.S.B.C. 1979, c. 143, s. 3; *Fraudulent Preferences and Conveyances Act*, R.S.Y. 1986, c. 72, s. 2. (Note: the Northwest Territories has no legislation on fraudulent conveyances or preferences.) In fact, several lower courts have suggested that bad faith settlements, made for the purpose of defeating creditors, may be set aside under these statutes. Although it is not strictly necessary to decide this issue in the case at bar, since Dr. Ramgotra was found by Baynton J. to have acted in good faith, I am mindful of the need to provide some guidance to bankrupts, trustees, creditors and lower courts.

55 En revanche, l'intention du disposant est éminemment pertinente lorsqu'une disposition est contestée en vertu des lois provinciales (ou territoriales) en matière de fraude: *Fraudulent Conveyances Act*, R.S.N. 1990, ch. F-24, art. 3; *Assignments and Preferences Act*, R.S.N.S. 1989, ch. 25, art. 4; *Loi sur les cessions et préférences*, S.R.N.-B. 1973, ch. A-16, art. 2; *Frauds on Creditors Act*, R.S.P.E.I. 1988, ch. F-15, art. 2; *Code civil du Québec*, art. 1631 («action en inopposabilité»); *Loi sur les cessions et préférences*, L.R.O. 1990, ch. A.33, par. 4(1), et *Loi sur les cessions en fraude des droits des créanciers*, L.R.O. 1990, ch. F.29, art. 2; *Loi sur les transferts frauduleux de biens*, L.R.M. 1987, ch. F160, art. 2; *The Fraudulent Preferences Act*, R.S.S. 1978, ch. F-21, art. 3; *Fraudulent Preferences Act*, R.S.A. 1980, ch. F-18, art. 2; *Fraudulent Conveyance Act*, R.S.B.C. 1979, ch. 142, art. 1, et *Fraudulent Preference Act*, R.S.B.C. 1979, ch. 143, art. 3; *Loi sur les préférences et les transferts frauduleux*, L.R.Y. 1986, ch. 72, art. 2. (Remarque: les Territoires du Nord-Ouest n'ont aucun texte de loi sur les préférences ou transferts frauduleux). De fait, plusieurs juridictions inférieures ont avancé que les dispositions faites de mauvaise foi, dans le but de frustrer les créanciers, peuvent être annulées sous le régime de ces lois. Bien qu'il ne soit pas absolument nécessaire en l'espèce de trancher la question, étant donné que le juge Baynton a statué que le Dr Ramgotra avait agi de bonne foi, je suis conscient du besoin de donner certaines indications aux faillis, aux syndics, aux créanciers et aux juridictions inférieures.

56 Generally, where a conveyance has rendered property exempt from execution or seizure by creditors under provincial legislation, but the conveyance itself is void against those creditors pursuant to provincial fraud legislation, then the exemption is not in effect vis-à-vis those creditors. In terms of the law of bankruptcy, I would hold that a bankrupt cannot enjoy the benefit of a s. 67(1)(*b*) exemption where the property in question became exempt by reason of a fraudulent conveyance declared void pursuant to provincial law. I note that Houlden J. concluded in *Geraci* (trial), at p. 92, that a s. 67(1)(*b*) exemption has force even where the property became exempt under provincial law as a result of a fraudulent conveyance. I do not agree. In my view, a precondition to s. 67(1)(*b*) protection is that the property in question is exempt against the claims of creditors under provincial law. A fraudulent conveyance rendering property exempt is void against creditors, as illustrated by s. 3 of the Saskatchewan Act:

> **3.** . . . 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 a bank, company or corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced. [Emphasis added.]

Since a fraudulent conveyance rendering property exempt is void against creditors by operation of provincial law, the property is not exempt from execution or seizure by creditors under provincial law, as required by s. 67(1)(*b*) *BIA*. Section 67(1)(*b*) therefore has no application, once a fraudulent conveyance is found to have occurred.

57 Can a life insurance beneficiary designation be set aside as a fraudulent conveyance of property?

De façon générale, lorsqu'un transfert a pour effet de rendre un bien exempt d'exécution ou de saisie par les créanciers sous le régime des lois provinciales pertinentes, mais que le transfert lui-même est inopposable à ces créanciers conformément aux lois provinciales relatives à la fraude, l'exemption est inopérante à l'égard de ces créanciers. En matière de droit de la faillite, je conclurais qu'un failli ne peut bénéficier de l'exemption prévue à l'al. 67(1)*b*) si le bien en question est devenu exempt par suite d'un transfert frauduleux déclaré nul conformément au droit provincial. Je note que le juge Houlden a conclu, dans *Geraci* (première instance), à la p. 92, que l'exemption prévue à l'al. 67(1)*b*) s'applique même lorsque le bien est devenu exempt sous le régime des lois provinciales par suite d'un transfert frauduleux. Je ne suis pas d'accord. À mon avis, une condition préalable à l'application de la protection offerte par l'al. 67(1)*b*) est que le bien en question soit à l'abri des réclamations des créanciers sous le régime des lois provinciales. Un transfert frauduleux ayant pour effet de rendre un bien exempt est inopposable aux créanciers, comme le fait voir l'art. 3 de la Loi de la Saskatchewan:

> [TRADUCTION] **3.** . . . les donations, transferts, cessions, remises ou paiements de quelque bien que ce soit, réel ou personnel — chatels ou effets, lettres de change, obligations, billets ou titres, ou actions, dividendes, primes ou bonis d'une banque, d'une compagnie ou d'une personne morale —, qu'effectue une personne insolvable ou incapable au moment de l'opération de payer la totalité de ses dettes — ou qui se sait sur le point d'être insolvable — en vue de frustrer, d'entraver, de retarder ou de léser ses créanciers ou certains d'entre eux sont inopposables aux créanciers concernés. [Je souligne.]

Étant donné qu'un transfert frauduleux ayant pour effet de rendre un bien exempt est inopposable aux créanciers par l'application des lois provinciales, le bien en question n'est pas, comme l'exige l'al. 67(1)*b*) *LFI*, exempt d'exécution ou de saisie par les créanciers sous le régime des lois provinciales. L'alinéa 67(1)*b*) ne s'applique donc pas si un transfert est jugé frauduleux.

Est-il possible de faire annuler, en tant que transfert frauduleux de biens, la désignation d'un

This question has generated some conflict in the lower courts. In *Geraci* (trial), for example, Houlden J. found at p. 89 that the beneficiary designation could be attacked under s. 2 of Ontario's Act, since it was a conveyance made with the fraudulent intent of defeating creditors. The Court of Appeal, *per* Jessup J.A., agreed, at p. 259:

> I agree with the learned trial Judge that the declaration made by the bankrupt, changing the beneficiary of his policy of insurance to his wife while he was insolvent, was a fraudulent conveyance within the meaning of s. 2 of The Fraudulent Conveyances Act and, if it were necessary to do so, I would hold that it was therefore fraudulent and void against his creditors and that such a void designation does not attract the protection against creditors provided by either s. 162 or s. 157 of the present Insurance Act.

Geraci was not followed on this point in *Sovereign General Insurance Co. v. Dale* (1988), 32 B.C.L.R. (2d) 226 (S.C.). There, the defendant had transferred the funds from a non-exempt RRSP into an insurance annuity which was exempt from execution or seizure under s. 147 of British Columbia's *Insurance Act*, R.S.B.C. 1979, c. 200, because his wife was the designated beneficiary of the plan. The plaintiff, who had obtained judgment against the defendant, sought to set aside the transfer of the RRSP funds into the annuity on the basis that it was a fraudulent conveyance. Gibbs J. held that the defendant had the necessary intent for fraud because he effected the fund transfer in order to hinder the plaintiff from realizing on its judgment. He then turned to the question of whether the transfer was a "disposition of property" which could be set aside under the British Columbia's *Fraudulent Conveyance Act*. After stating that Jessup J.A.'s reasons in *Geraci* were obiter on this point, and that the issue remained unresolved, Gibbs J. held at pp. 230-31:

bénéficiaire d'une assurance-vie? Cette question a donné lieu à des opinions divergentes dans les juridictions inférieures. Dans *Geraci* (première instance), par exemple, le juge Houlden a conclu, à la p. 89, que la désignation d'un bénéficiaire pouvait être attaquée aux termes de l'art. 2 de la Loi ontarienne, puisqu'il s'agit d'un transfert fait dans l'intention frauduleuse de frustrer les créanciers. Le juge Jessup, s'exprimant pour la Cour d'appel, a souscrit à cette conclusion, à la p. 259:

> [TRADUCTION] Je suis d'accord avec le juge de première instance que la déclaration qu'a faite le failli afin de désigner son épouse à titre de bénéficiaire de sa police d'assurance, pendant qu'il était insolvable, était une cession frauduleuse au sens de l'art. 2 de la Loi sur les cessions en fraude des droits des créanciers. De plus, s'il était nécessaire de le faire, je conclurais que cette désignation par le failli était en conséquence frauduleuse et inopposable à ses créanciers, et qu'une telle désignation inopposable ne jouit pas de la protection contre les créanciers offerte par l'art. 162 ou l'art. 157 de l'actuelle Loi sur les assurances.

58 L'arrêt *Geraci* n'a pas été suivi sur ce point dans *Sovereign General Insurance Co. c. Dale* (1988), 32 B.C.L.R. (2d) 226 (C.S.). Dans cette affaire, le défendeur avait transféré les fonds d'un REER non exempt dans une rente d'assurance qui, en vertu de l'art. 147 de l'*Insurance Act* de la Colombie-Britannique, R.S.B.C. 1979, ch. 200, était exempte d'exécution ou de saisie parce que son épouse était la bénéficiaire désignée du régime. La demanderesse, qui avait obtenu jugement contre le défendeur, a demandé l'annulation de la conversion en rente des fonds des REER en plaidant qu'il s'agissait d'un transfert frauduleux. Le juge Gibbs a conclu que le défendeur avait eu l'intention requise en matière de fraude puisqu'il avait effectué le transfert des fonds dans le but d'empêcher la demanderesse d'exécuter son jugement. Le juge s'est ensuite demandé si le transfert était une «disposition de biens» qui pouvait être annulée aux termes de la *Fraudulent Conveyance Act* de la Colombie-Britannique. Après avoir déclaré que les motifs du juge Jessup sur ce point dans l'arrêt *Geraci* constituaient une opinion incidente et que la question n'avait pas encore reçu de réponse, le juge Gibbs a statué ainsi, aux pp. 230 et 231:

In my opinion, it is not appropriate to look at the consequences that flow from the naming of the wife as beneficiary under the insurance contract to determine whether an interest in property has been disposed of. That seems to have happened in a number of the cases cited. With respect, I think that is the wrong approach for whatever statutory protection might or might not be afforded to the "interest" conveyed cannot be determinative of what the "interest" is. In my view, the task must be to inquire whether the "interest", if that is the correct terminology, has any of the commonly understood incidents of property. When I follow that course I am led to the conclusion that it does not.

. . .

Until a vesting occurs, the expression "interest" is probably nothing more than a convenient label to describe a future expectation which may never become a reality; for instance, the insured may change the beneficiary, or the beneficiary may predecease the insured. Until vesting, if that ever occurs, the expectation of the beneficiary is not real property, or personalty; it is not a chose in action; it is not merchantable; it is not exigible. At the most it is expectancy based upon a contingency. It has been held to be within the broad definition of property in the Bankruptcy Act which includes a future contingent interest incident to property, but it does not follow that it is subsumed within the single word "property" in the Fraudulent Conveyance Act. In my opinion, it is not.

Thus, according to Gibbs J., the transfer of funds at issue was not a conveyance of "property" which could be set aside under the British Columbia Act.

59 I do not intend to resolve this issue in the case at bar. However, I would make the following observation. The technical question of whether a life insurance beneficiary designation is a "property conveyance" does not arise under art. 1631 of the *Civil Code of Québec*, which allows creditors to set aside fraudulent "juridical acts":

1631. A creditor who suffers prejudice through a juridical act made by his debtor in fraud of his rights, in particular an act by which he renders or seeks to render

[TRADUCTION] À mon avis, il ne convient pas d'examiner les conséquences qui découlent de la désignation de l'épouse à titre de bénéficiaire aux termes du contrat d'assurance pour déterminer s'il a été disposé d'un intérêt dans un bien. Il semble pourtant que ce soit ce qu'on a fait dans un certain nombre des affaires citées. Avec égards, je ne crois pas que ce soit la bonne méthode, car la nature de la protection d'origine législative dont pourrait bénéficier ou non l'«intérêt» transféré ne détermine pas la nature de cet «intérêt». À mon avis, il faut plutôt se demander si l'«intérêt», si c'est bien là le terme qui convient, a l'un ou l'autre des attributs communément reconnus de la propriété. Lorsque j'applique cette analyse, j'en arrive à la conclusion que non.

. . .

Jusqu'à ce qu'il y ait dévolution, l'expression «intérêt» n'est probablement rien d'autre qu'une étiquette commode pour décrire une attente future, qui pourrait ne jamais se concrétiser; en effet, l'assuré pourrait désigner un bénéficiaire différent, ou le bénéficiaire désigné pourrait décéder avant l'assuré. Jusqu'à ce qu'il y ait dévolution, si effectivement cela se produit, l'attente du bénéficiaire ne constitue pas un bien réel ou un bien personnel; elle n'est pas un droit incorporel; elle n'a pas de valeur marchande et elle n'est pas exigible. Tout au plus repose-t-elle sur une éventualité. On a dit de cette attente qu'elle est visée par la définition générale de «*property*» [«biens» en français] dans la Loi sur la faillite, qui comprend un intérêt futur et éventuel se rattachant à des biens, mais il ne s'ensuit pas pour autant qu'elle est subsumée dans le seul mot «*property*» figurant dans la Fraudulent Conveyance Act. À mon avis, elle ne l'est pas.

Ainsi, selon le juge Gibbs, le transfert de fonds en question n'était pas un transfert de «biens» susceptible d'être annulé en vertu de la Loi de la Colombie-Britannique.

Je n'entends pas résoudre cette question en l'espèce, mais je ferai néanmoins la remarque suivante. La question spécifique de savoir si la désignation d'un bénéficiaire d'une assurance-vie est un «transfert de biens» ne se pose pas sous le régime de l'art. 1631 du *Code civil du Québec*, qui permet aux créanciers de faire annuler des «actes juridiques» frauduleux:

1631. Le créancier, s'il en subit un préjudice, peut faire déclarer inopposable à son égard l'acte juridique que fait son débiteur en fraude de ses droits, notamment

himself insolvent, or by which, being insolvent, he grants preference to another creditor may obtain a declaration that the act may not be set up against him.

However, the other provincial statutes all refer to some sort of "conveyance" or "disposition" of "property" with the "intent to defeat" creditors' claims. All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects, as required by provincial statutory interpretation legislation (see, for example, *The Interpretation Act, 1993*, S.S. 1993, c. I-11.1, s. 10). I agree with the following observation by Professor Dunlop in *Creditor-Debtor Law in Canada* (2nd ed. 1995), at p. 598, that the purpose of fraudulent conveyance legislation:

> . . . is to strike down all conveyances of property made with the intention of delaying, hindering or defrauding creditors and others except for conveyances made for good consideration and *bona fide* to persons not having notice of such fraud. The legislation is couched in very general terms and should be interpreted liberally. [Emphasis added.]

Given the need for a broad and liberal interpretation, I would suggest that there is a strong case for concluding that a life insurance beneficiary designation is both a "juridical act", and a "disposition" or "conveyance" of "property".

5. *The Application of the Statute of Elizabeth*

In the Court of Appeal, Jackson J.A. suggested that *An Acte agaynst fraudulent Deedes Gyftes Alienations, &c. (Statute of Elizabeth)*, 1571 (Eng.) 13 Eliz. 1, c. 5, would be available to challenge fraudulent transactions rendering property exempt from execution or seizure. The *Statute of Elizabeth* is the model for the fraudulent conveyance legisla-

l'acte par lequel il se rend ou cherche à se rendre insolvable ou accorde, alors qu'il est insolvable, une préférence à un autre créancier.

Cependant, les autres lois provinciales font toutes état de quelque forme de «transfert» ou «aliénation» de «biens» dans «l'intention de frustrer» les réclamations des créanciers. Toutes les dispositions législatives provinciales en matière de fraude visent manifestement à créer un recours, et elles ont pour objet de permettre aux créanciers de faire annuler une vaste gamme d'opérations mettant en cause un large éventail d'intérêts de propriété, lorsque de telles opérations ont été effectuées dans le but de frustrer leurs réclamations légitimes. Les lois en question devraient donc recevoir une interprétation équitable, large et libérale qui favorise la réalisation de leur objet, comme l'exigent les diverses lois d'interprétation provinciales (voir, par exemple, *The Interpretation Act, 1993*, S.S. 1993, ch. I-11.1, art. 10). Je suis d'accord avec l'observation suivante du professeur Dunlop, dans *Creditor-Debtor Law in Canada* (2e éd. 1995), à la p. 598, qui affirme que les lois relatives aux transferts frauduleux ont pour objet:

> [TRADUCTION] . . . de permettre l'annulation de tous les transferts de biens effectués dans l'intention de retarder, d'entraver ou de frauder les créanciers et d'autres personnes, sauf les transferts faits de bonne foi et avec contrepartie valable à des personnes n'ayant aucune connaissance de cette fraude. Ces lois sont rédigées en termes très généraux et devraient être interprétées de manière libérale. [Je souligne.]

60 Étant donné l'interprétation large et libérale qu'il faut donner, je dirais qu'il y a de bonnes raisons de conclure que la désignation d'un bénéficiaire d'une assurance-vie est à la fois un «acte juridique» et une «aliénation» ou un «transfert» de «biens».

5. *L'application du Statute of Elizabeth*

61 En Cour d'appel, le juge Jackson a avancé que la loi intitulée *An Acte agaynst fraudulent Deedes Gyftes Alienations, &c. (Statute of Elizabeth)*, 1571 (Ang.) 13 Eliz. 1, ch. 5, pourrait être invoquée à l'encontre d'opérations frauduleuses ayant pour effet de rendre des biens exempts d'exécution ou de saisie. Le *Statute of Elizabeth* est le texte

tion of the common law provinces, as discussed above. Its archaic language states that:

> . . . all and every Feoffement Gyfte Graunte Alienation Bargayne and Conveyaunce of Landes Tenements Hereditams Goodes and Catalls or of any of them [[which were] contryved of Malyce Fraude Covyne Collusion or Guyle [with the] Purpose and Intent to delaye hynder or defraude Creditors] [shall be] clearely and utterly voyde frustrate and of none Effecte.

In *Nicholson v. Milne* (1989), 74 C.B.R. (N.S.) 263 (Alta. Q.B.), Virtue J. considered the applicability of the *Statute of Elizabeth* in a situation where the defendants had each rendered RRSP and mutual funds exempt under Alberta's *Insurance Act*, R.S.A. 1980, c. I-5, s. 265, by transferring the funds into life insurance policies under which family members were named as beneficiaries. The issue before Virtue J. was whether the transfers could be set aside under Alberta's *Fraudulent Preferences Act*, or alternatively under the *Statute of Elizabeth*. He observed that the principal difference between the two statutes was that the provincial legislation required the gift or conveyance to have been made when the debtor was insolvent, was unable to pay his or her debts in full, or knew that he or she was on the eve of insolvency, whereas this was not a requirement under the *Statute of Elizabeth*. He then decided to proceed under the *Statute of Elizabeth*, in order to avoid dealing with the insolvency issue. He found that the fund transfers were effected for the purpose of defeating creditors, and then decided that the transfers, and the beneficiary designations, were "conveyances" subject to the *Statute of Elizabeth*, at p. 274:

> The term "Conveyance" (like the term transfer) is itself wide enough to encompass every method of disposing of, or parting with, property or an interest therein, absolutely or conditionally. The word is of general meaning and, given a liberal interpretation, includes the transactions here which resulted in the transfer of entitlement to the benefits of the R.R.S.P. property from

qui, dans les provinces de common law, a servi de modèle pour la rédaction des lois relatives aux transferts frauduleux dont il a été question précédemment. Rédigée dans un langage archaïque, cette loi prévoit ceci:

> [TRADUCTION] . . . tous les fieffements, donations, concessions, aliénations, marchés et transferts de bien-fonds, tènements, héritages, marchandises et chatels, ou de l'un d'eux, [faits avec malice, fraude, collusion, duperie ou supercherie [dans l']intention de retarder, d'entraver ou de frauder les créanciers sont] clairement et absolument nuls et de nul effet.

Dans *Nicholson c. Milne* (1989), 74 C.B.R. (N.S.) 263 (B.R. Alb.), le juge Virtue s'est penché sur l'applicabilité du *Statute of Elizabeth* dans une situation où les différents défendeurs avaient rendu des REER et des fonds mutuels exempts sous le régime d'une loi de l'Alberta, l'*Insurance Act*, R.S.A. 1980, ch. I-5, art. 265, en transférant les sommes en cause dans des polices d'assurance-vie dont ils avaient désigné des membres de leur famille respective bénéficiaires. La question dont était saisi le juge Virtue était de savoir si ces transferts pouvaient être annulés en vertu de la *Fraudulent Preferences Act* de l'Alberta ou, subsidiairement, en vertu du *Statute of Elizabeth*. Le juge a souligné que la principale différence entre les deux lois était que la loi provinciale exigeait que les donations ou transferts aient été faits lorsque le débiteur était insolvable ou incapable de payer la totalité de ses dettes, ou encore à un moment où il se savait sur le point d'être insolvable, alors que le *Statute of Elizabeth* ne posait pas cette exigence. Il a alors décidé d'appliquer le *Statute of Elizabeth* afin d'éviter d'avoir à examiner la question de l'insolvabilité. Il a d'abord conclu que les transferts de fonds avaient été effectués dans le but de frustrer les créanciers, puis, à la p. 274, il a statué que les transferts et les désignations de bénéficiaires étaient des «transferts» visés par le *Statute of Elizabeth*:

> [TRADUCTION] Le mot «transfert» (tout comme le mot cession) est lui-même suffisamment large pour englober tous les moyens par lesquels une personne dispose ou se départit d'un bien ou d'un intérêt sur celui-ci, de façon absolue ou conditionnelle. Ce mot a un sens général et, si on l'interprète de manière libérale, il vise aussi les opérations effectuées en l'espèce et qui ont eu pour effet

the debtor to another in such a way as to remove it from execution by creditors. In my view, such a transaction comes within the meaning of "conveyance", as that term is used in the Statute of Elizabeth.

de transférer le droit aux prestations du REER du débiteur à une autre personne, de telle façon que ce bien a été soustrait aux mesures d'exécution des créanciers. À mon avis, une telle opération est visée par le mot «transfert» utilisé dans le Statute of Elizabeth.

Thus, the fraudulent transfers and beneficiary designations were void, and the funds in the life insurance policies were not exempt from execution or seizure under the *Insurance Act* (see also *Technurbe Building Construction Ltd. v. McKinley* (1989), 76 C.B.R. (N.S.) 106 (Alta. Q.B.)).

En conséquence, les désignations de bénéficiaire et transferts frauduleux étaient nuls, et les fonds des polices d'assurance-vie n'étaient pas exempts d'exécution ou de saisie en vertu de l'*Insurance Act* (voir également *Technurbe Building Construction Ltd. c. McKinley* (1989), 76 C.B.R. (N.S.) 106 (B.R. Alb.)).

Several of the provincial fraudulent conveyance statutes impose an insolvency requirement, like that contained in Alberta's Act: Nova Scotia, New Brunswick, Prince Edward Island, Saskatchewan and Yukon. Thus, assuming without deciding that the *Statute of Elizabeth* remains in force in those jurisdictions, it would allow creditors to challenge fraudulent conveyances without having to prove that, at the time of the conveyance, the debtor was insolvent, was unable to pay his or her debts in full, or knew that he or she was on the eve of insolvency.

62 Plusieurs lois provinciales relatives aux transferts frauduleux imposent une exigence d'insolvabilité analogue à celle figurant dans la Loi de l'Alberta: Nouvelle-Écosse, Nouveau-Brunswick, Île-du-Prince-Édouard, Saskatchewan et Yukon. Par conséquent, à supposer — sans en décider — que le *Statute of Elizabeth* soit toujours en vigueur dans ces provinces et ce territoire, ce texte permettrait aux créanciers de contester des transferts frauduleux sans avoir à prouver que, au moment où ceux-ci ont été effectués, le débiteur était insolvable ou incapable de payer la totalité de ses dettes, ou encore qu'il se savait sur le point d'être insolvable.

There remains some controversy as to whether the *Statute of Elizabeth* is in force in all of the common law provinces and territories. Professor Dunlop discusses this issue in *Creditor-Debtor Law in Canada*, *supra*, and suggests at p. 597 that the Statute has likely been repealed in British Columbia, Manitoba, Newfoundland and Ontario, where pure fraudulent conveyance legislation (i.e., legislation without the insolvency requirement) has been enacted. Since the matter was not argued in the case at bar, it would be inappropriate to decide here whether the *Statute of Elizabeth* remains in force in any particular jurisdiction. Suffice it to say that if the Statute is in force in a province or territory, then it will be available to challenge fraudulent conveyances rendering property exempt from execution or seizure under provincial law. I should add that my comments above concerning the issue of whether a life insurance beneficiary designation

63 Il subsiste une certaine controverse quant à savoir si le *Statute of Elizabeth* est en vigueur dans l'ensemble des provinces et territoires de common law. Le professeur Dunlop analyse cette question dans *Creditor-Debtor Law in Canada*, *op. cit.*, et avance, à la p. 597, que le Statute a vraisemblablement été abrogé en Colombie-Britannique, au Manitoba, à Terre-Neuve et en Ontario, provinces où ont été édictées des mesures législatives visant les transferts purement frauduleux (c'est-à-dire ne comportant d'exigence d'insolvabilité). Comme la question n'a pas été débattue en l'espèce, il serait inopportun de décider si le *Statute of Elizabeth* est encore en vigueur dans une province donnée. Qu'il suffise de dire que si le Statute est en vigueur dans une province ou dans un territoire il pourra alors être invoqué pour contester des transferts frauduleux ayant pour effet de rendre des biens exempts d'exécution ou de saisie sous le régime des lois

is a "property conveyance" apply equally in the case of the *Statute of Elizabeth.*

6. *Conclusion*

64 When Dr. Ramgotra transferred the funds from his two RRSPs into an RRIF under which his wife was the designated beneficiary, the funds became exempt from execution or seizure by reason of s. 67(1)(*b*) *BIA*, when read in conjunction with ss. 2(kk)(vii) and 158(2) of *The Saskatchewan Insurance Act*. Even though the beneficiary designation was a settlement within s. 91 *BIA*, and was void against the trustee in bankruptcy pursuant to the second branch of s. 91(2), the RRIF remained exempt from the claims of Dr. Ramgotra's creditors and, in particular, the appellant bank.

VI. Disposition

65 The appeal is therefore dismissed with costs to the respondents.

Appeal dismissed with costs.

Solicitors for the appellant: Gauley & Co., Saskatoon.

Solicitors for the respondent North American Life Assurance Company: MacDermid, Lamarsh, Saskatoon.

Solicitors for the respondent Balvir Singh Ramgotra: Goldstein, Jackson, Gibbings, Saskatoon.

provinciales applicables. J'ajouterais que les commentaires que j'ai formulés plus tôt sur la question de savoir si la désignation d'un bénéficiaire d'une assurance-vie constitue un «transfert de biens» s'appliquent également en ce qui concerne le *Statute of Elizabeth.*

6. *Conclusion*

Lorsque le Dr Ramgotra a transféré les fonds de ses deux REER dans un FERR dont son épouse a été désignée bénéficiaire, ces sommes sont devenues exemptes d'exécution ou de saisie par l'effet conjugué de l'al. 67(1)*b*) *LFI* ainsi que du sous-al. 2kk)(vii) et du par. 158(2) de *The Saskatchewan Insurance Act*. Même si la désignation d'un bénéficiaire était une disposition au sens de l'art. 91 *LFI*, et qu'elle était inopposable au syndic conformément au second volet du par. 91(2) *LFI*, le FERR est demeuré à l'abri des réclamations des créanciers du Dr Ramgotra et, en particulier, de celle de la banque appelante.

VI. Dispositif

Le pourvoi est par conséquent rejeté avec dépens en faveur des intimés.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante: Gauley & Co., Saskatoon.

Procureurs de l'intimée la Nord-Américaine, compagnie d'assurance-vie: MacDermid, Lamarsh, Saskatoon.

Procureurs de l'intimé Balvir Singh Ramgotra: Goldstein, Jackson, Gibbings, Saskatoon.

Canada Supreme Court Reports

Recueil des arrêts de la Cour suprême du Canada

Part 3, 1996 Vol. 1

3e cahier, 1996 Vol. 1

Cited as [1996] 1 S.C.R. 369-570

Renvoi [1996] 1 R.C.S. 369-570

NOTICE TO THE PROFESSION

Counsel practising before the Court and their agents are requested to ensure that the Court is advised of any changes that affect the record in any motion, application for leave or appeal they may have before the Court. A number of instances have occurred recently in which changes in matters affecting the record filed with the Court were not brought to the Court's attention. Such changes included, but were not limited to, amendments to legislation pertinent to the appeal, further proceedings in the case and changes to the reasons for judgment of the court appealed from.

Further information about this notice may be obtained from Louise Meagher, Deputy Registrar, at (613) 996-7520.

AVIS AUX AVOCATS

Les avocats qui plaident devant la Cour et leurs correspondants sont priés d'aviser la Cour de tout changement qui concerne le dossier d'une requête, d'une demande d'autorisation ou d'un appel devant la Cour. Dans plusieurs cas récemment, la Cour n'a pas été avisée de ces changements. Il peut s'agir de modifications à des dispositions législatives applicables dans un appel, du dépôt d'autres procédures dans l'affaire ou de modifications aux motifs du jugement de la cour de juridiction inférieure.

Toutes questions concernant le présent avis doivent être adressées à Louise Meagher, registraire adjoint, au (613) 996-7520.

ANNE ROLAND

REGISTRAR REGISTRAIRE

May, 1996 Mai 1996

NOTICE TO THE PROFESSION

Counsel on applications for leave and on appeals are requested to advise the Court, in writing, of any legal requirement to use initials instead of proper names in cases before the Court. Such a requirement could be imposed by statute, as in proceedings involving young offenders; child protection proceedings; affiliation proceedings; and adoption proceedings or imposed by judicial order as in criminal and civil proceedings involving victims of sexual offences.

As most of the Court's hearings are later broadcast on television, counsel are also asked to advise the Registrar of any problems that this may cause.

Any inquiries respecting this notice should be directed to Louise Meagher, Deputy Registrar, at (613) 996-7520.

AVIS AUX AVOCATS

Les avocats dans les demandes d'autorisation d'appel et les appels doivent aviser la Cour par écrit des cas où il est légalement requis de remplacer par des initiales les noms complets dans une affaire dont la Cour est saisie. Cette obligation peut découler de la loi, dans des instances relatives à de jeunes contrevenants, à la protection de la jeunesse, à la filiation ou à l'adoption, ou être imposée judiciairement, notamment dans les instances civiles et criminelles concernant des victimes d'infractions de nature sexuelle.

Comme la plupart des audiences de la Cour sont télédiffusées en différé, les avocats sont également priés d'aviser le Registraire des problèmes que cela pourrait causer.

Il est possible d'obtenir de plus amples renseignements auprès de Me Louise Meagher, registraire adjoint, au (613) 996-7520.

ANNE ROLAND

REGISTRAR REGISTRAIRE

May, 1996 Mai 1996

At paras. 53-57

David Brock Henry *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Barry Wayne Riley *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada and Attorney General of Ontario *Interveners*

INDEXED AS: R. *v.* HENRY

Neutral citation: 2005 SCC 76.

File Nos.: 29952, 29953.

Hearing: April 23, 2004.

Present: McLachlin C.J. and Iacobucci, Major, Binnie, Arbour, LeBel and Fish JJ.

Rehearing: January 12, 2005.

Judgment: December 15, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Self-incrimination — Retrial of accused on same charge — Crown cross-examining accused on their testimony given at prior trial to impeach their credibility — Whether use of statements made at first trial violated accused's right against self-incrimination guaranteed by s. 13 of Canadian Charter of Rights and Freedoms — Whether s. 13 available to accused who choose to testify at their retrial on same indictment.

David Brock Henry *Appelant*

c.

Sa Majesté la Reine *Intimée*

- et -

Barry Wayne Riley *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général du Canada et procureur général de l'Ontario *Intervenants*

RÉPERTORIÉ : R. *c.* HENRY

Référence neutre : 2005 CSC 76.

N^os^ du greffe : 29952, 29953.

Audition : 23 avril 2004.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Binnie, Arbour, LeBel et Fish.

Nouvelle audition : 12 janvier 2005.

Jugement : 15 décembre 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 COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Auto-incrimination — Nouveau procès des accusés pour la même infraction — Contre-interrogatoire des accusés sur leur témoignage donné à leur procès antérieur mené par le ministère public dans le but d'attaquer leur crédibilité — L'utilisation des déclarations faites par les accusés à leur premier procès porte-t-elle atteinte au droit de ne pas s'incriminer que leur garantit l'art. 13 de la Charte canadienne des droits et libertés? — Les accusés qui choisissent de témoigner à leur nouveau procès pour la même infraction peuvent-ils se prévaloir de l'art. 13?

Courts — Supreme Court of Canada — Decisions — Circumstances in which prior Supreme Court decisions will be reconsidered or revised — Compelling circumstances.

Courts — Supreme Court of Canada — Decisions — Obiter dicta — Whether obiter dicta in prior Supreme Court decisions binding on lower courts — Weight to be given to obiter dicta.

In their retrial on a charge of first degree murder the accused told a different story under oath than they had five years earlier at their first trial on the same charge. At the new trial, the Crown cross-examined the accused on these prior inconsistent statements for the purpose of impeaching their credibility. They were again convicted of first degree murder. On appeal the accused argued that notwithstanding the fact they were not (and could not be) compelled to testify at their first trial, they ought nevertheless to have been protected as voluntary witnesses at their second trial from exposure of the contradictory testimony they gave at the first trial, despite the misleading impression with which such non-disclosure would have left the jury. The search for truth, they contended, is limited by s. 13 of the *Canadian Charter of Rights and Freedoms*. The majority judgment of the Court of Appeal rejected this argument and upheld the conviction. The dissenting judge would have ordered a new trial because on his view of *Noël* the use of the prior inconsistent statements in those circumstances violated the accused's right against self-incrimination.

Held: The appeals should be dismissed.

Section 13 of the *Charter* is not available to an accused who chooses to testify at his retrial on the same indictment. The purpose of s. 13 is to protect individuals from being indirectly compelled to incriminate themselves. As in the case of s. 5 of the *Canada Evidence Act*, s. 13 embodies a *quid pro quo*: when a witness who is compelled to give evidence in a proceeding is exposed to the risk of self-incrimination, the state offers, in exchange for that witness's testimony, protection against the subsequent use of that evidence against him. Here, the accused freely testified at their first trial and freely testified at their second trial. The compulsion, which is the source of the *quid pro quo* which in turn lies at the root of s. 13, was missing. Accordingly, their s. 13 *Charter* rights were not violated by the Crown's cross-examination. They were in

Tribunaux — Cour suprême du Canada — Décisions — Circonstances dans lesquelles les décisions antérieures de la Cour suprême seront réexaminées ou révisées — Circonstances impérieuses.

Tribunaux — Cour suprême du Canada — Décisions — Remarques incidentes — Les remarques incidentes figurant dans les décisions antérieures de la Cour suprême lient-elles les tribunaux d'instance inférieure? — Poids à accorder aux remarques incidentes.

À leur nouveau procès pour meurtre au premier degré, les accusés ont donné sous serment une version des faits différente de celle qu'ils avaient présentée cinq ans plus tôt lors de leur premier procès pour la même infraction et le ministère public les a contre-interrogés sur leurs déclarations antérieures incompatibles dans le but d'attaquer leur crédibilité. Ils ont à nouveau été déclarés coupables de meurtre au premier degré. En appel, les accusés ont soutenu que, même s'ils n'avaient pas été (et ne pouvaient être) contraints de témoigner à leur premier procès, ils devaient tout de même, lorsqu'ils ont témoigné de leur propre gré à leur deuxième procès, être protégés contre la communication de leur témoignage incompatible donné au premier procès, malgré l'impression trompeuse que cette non-divulgation pouvait donner au jury. Selon eux, l'art. 13 de la *Charte canadienne des droits et libertés* limite la recherche de la vérité. Les juges majoritaires de la Cour d'appel ont rejeté cet argument et confirmé la condamnation. Le juge dissident aurait ordonné un nouveau procès parce que, selon son interprétation de l'arrêt *Noël*, l'utilisation des déclarations antérieures incompatibles dans ces circonstances violait le droit des accusés de ne pas s'incriminer.

Arrêt : Les pourvois sont rejetés.

L'accusé qui choisit de témoigner à son nouveau procès pour la même accusation ne peut pas se prévaloir de l'art. 13 de la *Charte*. L'objet de l'art. 13 est de protéger les individus contre l'obligation indirecte de s'incriminer. À l'instar de l'art. 5 de la *Loi sur la preuve au Canada*, l'art. 13 établit un *quid pro quo* ou une contrepartie : lorsqu'un témoin contraint de déposer au cours d'une procédure judiciaire risque de s'auto-incriminer, l'État lui offre une protection contre l'utilisation subséquente de cette preuve contre lui en échange de son témoignage. En l'occurrence, les accusés ont choisi librement de témoigner à leurs premier et deuxième procès. La contrainte à l'origine de la contrepartie, qui constitue un élément essentiel de l'art. 13, n'existait pas. Par conséquent, leur contre-interrogatoire par le ministère public n'a pas porté atteinte aux droits

no need of protection "from being indirectly compelled to incriminate themselves". [22] [42-43] [47] [60]

The jurisprudence of this Court has not been altogether consistent on the scope of s. 13 and it is therefore desirable to retrace the path from *Dubois* to *Noël*. The Court's practice, of course, is against departing from its precedents unless there are compelling reasons to do so. Such circumstances exist here in respect of *Mannion*. The consequences of failing to adhere consistently to a purposeful interpretation of s. 13 have only emerged over time as the courts have struggled to apply the *Kuldip* distinction between impeachment of credibility and incrimination in ways that, as the accused's invocation of *Noël* illustrates, have become unduly and unnecessarily complex and technical. The defence and the prosecution both view with scepticism the idea that triers of fact can truly isolate the purpose of impeaching credibility from the purpose of incrimination. They agree on the problem but disagree about the solution. Moreover, the insistence that s. 13 has the same application in a retrial of the same accused on the same indictment as it does in a trial where the accused was formerly not an accused but a compellable witness, has led to an unfair dilution of the s. 13 protection in the latter situation. The attempt to subject these very different situations to the same constitutional rule results in the end in a satisfactory solution for neither. [8] [24] [44-46]

Reviewing the Court's s. 13 jurisprudence in light of its purpose ("to protect individuals from being indirectly compelled to incriminate themselves"), the argument of the Attorney General of Canada that *Dubois* was wrongly decided is rejected. The accused has a right not to testify. The Crown cannot file his testimony given at the prior trial (now overturned) as part of its case-in-chief at the retrial, because to do so would permit the Crown indirectly to compel the accused to testify at the retrial in circumstances where s. 11(*c*) of the *Charter* would not permit such compelled self-incrimination directly. The Crown must prove its case without recruiting the accused to incriminate himself. [22] [39-40]

On the other hand there are persuasive reasons for declining to follow *Mannion*. In that case, the accused freely testified at his first and second trials. The compulsion which is the source of the *quid pro quo*, which in turn lies at the root of s. 13, was missing. Denying the Crown the opportunity to cross-examine the accused on

que l'art. 13 de la *Charte* leur garantit. Ils n'avaient pas besoin d'être protégés « contre l'obligation indirecte de s'incriminer ». [22] [42-43] [47] [60]

La jurisprudence de la Cour n'a pas toujours été constante en ce qui concerne la portée de l'art. 13. Il est donc indiqué de retracer son évolution de *Dubois* à *Noël*. Il n'est pas d'usage à la Cour de s'écarter des précédents à moins de raisons impérieuses. De telles circonstances existent en l'espèce relativement à l'arrêt *Mannion*. Les conséquences du défaut de retenir systématiquement une interprétation téléologique de l'art. 13 se sont manifestées graduellement, au fur et à mesure que les tribunaux ont essayé de trouver tant bien que mal des façons d'appliquer la distinction établie dans *Kuldip*, entre attaquer la crédibilité de l'accusé et l'incriminer, qui sont devenues inutilement et indûment complexes et formalistes, comme le démontre l'utilisation de *Noël* faite par les appelants en l'espèce. La défense et la poursuite sont toutes les deux sceptiques concernant la capacité du juge des faits de dissocier réellement l'objectif d'attaquer la crédibilité d'un accusé de celui de l'incriminer. Elles reconnaissent ce problème, mais elles ne s'entendent pas sur la solution. De plus, en soutenant que l'art. 13 s'applique de la même façon qu'il s'agisse du deuxième procès d'un même accusé pour la même infraction ou du procès d'un accusé qui n'était qu'un témoin contraignable dans l'instance antérieure, on a indûment affaibli la protection offerte par l'art. 13 dans cette deuxième situation. En voulant appliquer la même règle constitutionnelle à ces situations très différentes, on aboutit à un résultat insatisfaisant dans les deux cas. [8] [24] [44-46]

Après avoir examiné sa jurisprudence sur l'art. 13 en fonction de son objet (« protéger les individus contre l'obligation indirecte de s'incriminer »), la Cour rejette l'argument du procureur général du Canada voulant que l'arrêt *Dubois* soit mal fondé. L'accusé a le droit de ne pas témoigner. Le ministère public ne peut pas déposer le témoignage de l'accusé au procès antérieur (maintenant annulé) en preuve principale au nouveau procès, parce que l'y autoriser lui permettrait de contraindre indirectement l'accusé à témoigner à son nouveau procès dans des circonstances où l'al. 11*c*) de la *Charte* interdit de le forcer directement à s'auto-incriminer. Le ministère public doit faire sa preuve sans faire appel à l'accusé pour qu'il s'auto-incrimine. [22] [39-40]

Par ailleurs, il existe des raisons convaincantes de ne pas suivre l'arrêt *Mannion*. Dans cette affaire, l'accusé avait choisi librement de témoigner à ses premier et deuxième procès. La contrainte à l'origine de la contrepartie, qui constitue un élément essentiel de l'art. 13, n'existait pas. Le refus de permettre au ministère

his prior voluntary testimony gave him a constitutional immunity to which he was not entitled. In *Mannion*, the Court did not adopt an interpretation in line with the purpose of s. 13. [42] [45]

Kuldip should be affirmed insofar as it permitted cross-examination of the accused on the inconsistent testimony he volunteered at his first trial. However, insofar as the Court felt compelled by *Mannion* to narrow the purpose of the cross-examination to the issue of credibility, the decision in the instant case not to follow *Mannion* renders such restriction no longer operative. If the contradiction of testimony gives rise to an inference of guilt, s. 13 of the *Charter* does not preclude the trier of fact from drawing the common sense inference. [48]

Noël is a classic example of prosecutorial abuse of the very "bargain" s. 13 was designed to enforce. Called to testify at somebody else's trial, Noël was a compellable witness who at common law could have refused to answer the Crown's questions that tended to show his guilt. He was compelled by s. 5(1) of the *Canada Evidence Act* to answer the incriminating questions, and in consequence he invoked the protection of s. 5(2). When s. 5(2) says "the answer so given shall not be used or admissible in evidence", it means not to be used for any purpose, including the impeachment of credibility. *Noël* is affirmed on its facts. [49]

Further, even though s. 13 talks of precluding the use of prior evidence "to incriminate that witness", and thus implicitly leaves the door open to its use for other purposes such as impeachment of credibility, experience has demonstrated the difficulty in practice of working with such distinctions. As the distinction is unrealistic in the context of s. 5(2), it must equally be unrealistic in the context of s. 13. Accordingly, by parity of reasoning, prior compelled evidence should, under s. 13 as under s. 5(2), be treated as inadmissible in evidence against an accused, even for the ostensible purpose of challenging his or her credibility, and be restricted (in the words of s. 13 itself) to "a prosecution for perjury or for the giving of contradictory evidence". *Allen* was a straightforward application of *Noël* and its correctness is confirmed. [50-51]

Much of the argument on this appeal was directed to *obiter* statements in various s. 13 cases. The notion is

public de contre-interroger l'accusé sur son témoignage antérieur volontaire a conféré à ce dernier une immunité constitutionnelle à laquelle il n'avait pas droit. Dans *Mannion*, la Cour n'a pas retenu une interprétation conforme à l'objet de l'art. 13. [42] [45]

L'arrêt *Kuldip* doit être confirmé, dans la mesure où il permet le contre-interrogatoire d'un accusé sur les déclarations incompatibles qu'il a faites volontairement à son premier procès. Toutefois, comme la Cour s'est sentie obligée, par l'arrêt *Mannion*, de limiter le but du contre-interrogatoire à une attaque de la crédibilité, la présente décision de ne pas suivre l'arrêt *Mannion* a rendu cette restriction inopérante. Si les contradictions permettent d'inférer la culpabilité, l'art. 13 de la *Charte* n'empêche pas le juge des faits de tirer des conclusions fondées sur le bon sens. [48]

L'affaire *Noël* est l'exemple classique du non-respect par la poursuite du « marché » même auquel l'art. 13 vise à donner effet. Appelé à témoigner au procès d'un tiers, M. Noël était un témoin contraignable qui, suivant la common law, aurait pu refuser de répondre aux questions de la poursuite qui tendaient à l'incriminer. Le paragraphe 5(1) de la *Loi sur la preuve au Canada* l'obligeant à répondre aux questions incriminantes, il s'est prévalu de la protection prévue au par. 5(2). Le libellé du par. 5(2) selon lequel la réponse d'un témoin « ne peut être invoquée et n'est pas admissible en preuve » signifie qu'elle ne peut être invoquée à quelque fin que ce soit, même pas pour attaquer sa crédibilité. L'arrêt *Noël* est confirmé, compte tenu des faits en cause. [49]

De plus, bien que l'art. 13 dispose que le témoignage antérieur d'une personne ne peut être « utilisé pour l'incriminer », et qu'il laisse ainsi implicitement subsister la possibilité de l'utiliser à une autre fin, par exemple pour attaquer sa crédibilité, l'expérience a démontré qu'il était difficile d'appliquer cette distinction en pratique. Si cette distinction est irréaliste dans le contexte du par. 5(2), elle doit aussi l'être dans le contexte de l'art. 13. En conséquence, par souci de cohérence, il faut conclure que le témoignage antérieur forcé doit être considéré, tant sous le régime de l'art. 13 que sous celui du par. 5(2), comme inadmissible en preuve contre l'accusé, même dans le but manifeste d'attaquer sa crédibilité, et que son utilisation doit se limiter, selon les termes mêmes de l'art. 13, aux « poursuites pour parjure ou pour témoignages contradictoires ». L'affaire *Allen* est un cas d'application pure et simple de l'arrêt *Noël* et son bien-fondé est confirmé. [50-51]

Les arguments soulevés dans le pourvoi étaient en grande partie axés sur des remarques incidentes

sometimes (erroneously) attributed to *Sellars* that each phrase in a judgment of this Court should be treated as if enacted in a statute. Such an approach is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience. The submissions of the attorneys general were predicated on a strict and tidy demarcation between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which they say may safely be ignored. This supposed dichotomy is an oversimplification of how the common law develops. The traditional view is that "a case is only an authority for what it actually decides". Care must be taken in determining how broadly or how narrowly to draw "what it actually decides". Beyond the *ratio decidendi* which is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. To the extent that *obiter* statements in this Court's earlier s. 13 cases are inconsistent with the rationale of compulsion (the "*quid pro quo*"), they should no longer be regarded as authoritative. [52-53] [57] [59]

The result of a purposeful interpretation of s. 13 is that an accused will lose the *Mannion* advantage in relation to prior volunteered testimony but his or her protection against the use of prior compelled testimony will be strengthened. The two different situations will be treated differently instead of homogenized, and the unpredictability inherent in sorting out attacks on credibility from attempts at incrimination will be avoided. [60]

Cases Cited

Overruled: *R. v. Mannion*, [1986] 2 S.C.R. 272; **overruled in part:** *R. v. Kuldip*, [1990] 3 S.C.R. 618,

figurant dans la jurisprudence relative à l'art. 13. On interprète souvent (à tort) l'arrêt *Sellars* comme voulant que chaque énoncé d'un jugement de la Cour soit traité comme s'il s'agissait d'un texte de loi. Cette thèse n'est pas étayée par la jurisprudence et va à l'encontre du principe fondamental de l'évolution de la common law au gré des situations qui surviennent. Les observations des procureurs généraux présupposaient qu'il existe une ligne de démarcation très nette entre la *ratio decidendi* bien circonscrite d'une affaire, qui a force contraignante, et les remarques incidentes, dont on peut, selon eux, faire abstraction sans danger. Cette prétendue dichotomie procède d'une simplification à outrance du mode évolutif de la common law. Selon l'opinion classique, « une décision ne fait autorité qu'à l'égard des questions qu'elle tranche effectivement ». Il faut prendre soin de ne pas circonscrire trop largement ni trop étroitement les « questions [que la décision] tranche effectivement ». Au-delà de la *ratio decidendi*, qui est généralement ancrée dans les faits, le point de droit tranché par la Cour peut être aussi étroit que la directive au jury en cause dans *Sellars* ou aussi large que le test établi par l'arrêt *Oakes*. Les remarques incidentes n'ont pas et ne sont pas censées avoir toutes la même importance. Leur poids diminue lorsqu'elles s'éloignent de la stricte *ratio decidendi* pour s'inscrire dans un cadre d'analyse plus large dont le but est manifestement de fournir des balises et qui devrait être accepté comme faisant autorité. Au-delà, il s'agira de commentaires, d'exemples ou d'exposés qui se veulent utiles et peuvent être jugés convaincants, mais qui ne sont certainement pas « contraignants » comme le voudrait le principe *Sellars* dans son expression la plus extrême. L'objectif est de contribuer à la certitude du droit, non de freiner son évolution et sa créativité. Dans la mesure où les remarques incidentes figurant dans les autres arrêts de la Cour sur l'art. 13 sont incompatibles avec la justification de la contrainte (la contrepartie), ils ne devraient plus être considérés comme faisant autorité. [52-53] [57] [59]

Selon une interprétation téléologique de l'art. 13, l'accusé perdra l'avantage que lui conférait l'arrêt *Mannion* relativement à son témoignage antérieur volontaire, mais sa protection contre l'utilisation de ses témoignages antérieurs forcés sera renforcée. Ces deux situations différentes ne seront pas assimilées, mais traitées différemment, et l'imprévisibilité inhérente à la distinction entre attaquer la crédibilité de quelqu'un et tenter de l'incriminer sera éliminée. [60]

Jurisprudence

Arrêt rejeté : *R. c. Mannion*, [1986] 2 R.C.S. 272; **arrêt rejeté en partie :** *R. c. Kuldip*, [1990] 3 R.C.S.

rev'g (1988), 40 C.C.C. (3d) 11; **distinguished:** *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *R. v. Noël*, [2002] 3 S.C.R. 433, 2002 SCC 67, rev'g (2001), 156 C.C.C. (3d) 17; *R. v. Allen*, [2003] 1 S.C.R. 223, 2003 SCC 18, rev'g (2002), 208 Nfld. & P.E.I.R. 250, 2002 NFCA 2; **referred to:** *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58; *R. v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5; *R. v. Calder*, [1996] 1 S.C.R. 660; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; *R. v. Bernard*, [1988] 2 S.C.R. 833; *Quinn v. Leathem*, [1901] A.C. 495; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Sellars v. The Queen*, [1980] 1 S.C.R. 527; *Re Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association* (1981), 120 D.L.R. (3d) 101; *R. v. Sansregret*, [1984] 1 W.W.R. 720; *R. v. Barrow* (1984), 65 N.S.R. (2d) 1; *Clark v. Canadian National Railway Co.* (1985), 17 D.L.R. (4th) 58; *Scarff v. Wilson* (1988), 33 B.C.L.R. (2d) 290; *Moses v. Shore Board Builders Ltd.* (1993), 106 D.L.R. (4th) 654; *Friedmann Equity Developments Inc. v. Final Note Ltd.* (1998), 41 O.R. (3d) 712; *Cardella v. Minister of National Revenue* (2001), 268 N.R. 168, 2001 FCA 39; *R. v. Chartrand* (1992), 74 C.C.C. (3d) 409; *R. v. Hynes* (1999), 26 C.R. (5th) 1; *R. v. Vu* (2004), 184 C.C.C. (3d) 545, 2004 BCCA 230; *McDiarmid Lumber Ltd. v. God's Lake First Nation* (2005), 251 D.L.R. (4th) 93, 2005 MBCA 22; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Valente v. The Queen*, [1985] 2 S.C.R. 673.

Statutes and Regulations Cited

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APPEALS from a judgment of the British Columbia Court of Appeal (Southin, Newbury and Hall JJ.A.) (2003), 186 B.C.A.C. 106, 306 W.A.C. 106, 179 C.C.C. (3d) 307, 14 C.R. (6th) 241, 111 C.R.R. (2d) 1, [2003] B.C.J. No. 2068 (QL), 2003 BCCA 476, upholding the convictions of the accused for first degree murder. Appeals dismissed.

Gil D. McKinnon, *Q.C.*, and *Lisa Sturgess*, for the appellants.

Alexander Budlovsky and *Nikos Harris*, for the respondent.

Kenneth J. Yule, *Q.C.*, and *Ronald C. Reimer*, for the intervener the Attorney General of Canada.

M. David Lepofsky, for the intervener the Attorney General of Ontario.

The judgment of the Court was delivered by

BINNIE J. — In their retrial on a charge of first degree murder the appellants told a different story under oath than they had five years earlier at their first trial on the same charge. They were cross-examined at the subsequent trial on these prior inconsistent statements. They were again convicted of first degree murder. They claim this use of prior statements violated their constitutional right against self-incrimination guaranteed by s. 13 of the *Canadian Charter of Rights and Freedoms*.

The right against self-incrimination is of course one of the cornerstones of our criminal law. The right to stand silent before the accusations of the state has its historical roots in the general revulsion against the practices of the Star Chamber, and in modern times is intimately linked to our adversarial system of criminal justice and the presumption of innocence. Section 13 of the *Charter* gives

Lambert, Douglas. « *Ratio Decidendi* and *Obiter Dicta* » (1993), 51 *Advocate (B.C.)* 689.
Wilson, Bertha. « Decision-making in the Supreme Court » (1986), 36 *U.T.L.J.* 227.

POURVOIS contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Southin, Newbury et Hall) (2003), 186 B.C.A.C. 106, 306 W.A.C. 106, 179 C.C.C. (3d) 307, 14 C.R. (6th) 241, 111 C.R.R. (2d) 1, [2003] B.C.J. No. 2068 (QL), 2003 BCCA 476, qui a confirmé les déclarations de culpabilité des accusés pour meurtre au premier degré. Pourvois rejetés.

Gil D. McKinnon, *c.r.*, et *Lisa Sturgess*, pour les appelants.

Alexander Budlovsky et *Nikos Harris*, pour l'intimée.

Kenneth J. Yule, *c.r.*, et *Ronald C. Reimer*, pour l'intervenant le procureur général du Canada.

M. David Lepofsky, pour l'intervenant le procureur général de l'Ontario.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — À leur nouveau procès pour meurtre au premier degré, les appelants ont donné sous serment une version des faits différente de celle qu'ils avaient présentée cinq ans plus tôt lors de leur premier procès et ils ont été contre-interrogés sur leurs déclarations antérieures incompatibles. Ils ont à nouveau été déclarés coupables de meurtre au premier degré. Ils soutiennent que cette utilisation de leurs déclarations antérieures porte atteinte au droit constitutionnel de ne pas s'incriminer que leur garantit l'art. 13 de la *Charte canadienne des droits et libertés*. 1

Le droit de ne pas s'incriminer est, bien sûr, l'une des pierres angulaires de notre droit criminel. Le droit de garder le silence devant les accusations de l'État tire ses origines historiques de la répugnance générale suscitée par les méthodes de la Chambre étoilée et, de nos jours, il est étroitement lié à notre système contradictoire de justice criminelle et à la présomption d'innocence. L'article 13 de la *Charte* 2

constitutional protection to a more specific privilege against *testimonial* self-incrimination. In *Dubois v. The Queen*, [1985] 2 S.C.R. 350, the Court stated at p. 358 that

> the purpose of s. 13, when the section is viewed in the context of s. 11(*c*) and (*d*), is to protect individuals from being indirectly compelled to incriminate themselves, to ensure that the Crown will not be able to do indirectly that which s. 11(*c*) prohibits. [Emphasis added.]

It seems a long stretch from the important purpose served by a right designed to protect against compelled self-incrimination to the proposition advanced by the appellants in the present case, namely that an accused can volunteer one story at his or her first trial, have it rejected by the jury, then after obtaining a retrial on an unrelated ground of appeal volunteer a different and contradictory story to a jury differently constituted in the hope of a better result because the second jury is kept in the dark about the inconsistencies.

3 The protective policy of s. 13 must be considered in light of the countervailing concern that an accused, by tailoring his or her testimony at successive trials on the same indictment, may obtain through unexposed lies and contradictions an unjustified acquittal, thereby bringing into question the credibility of the trial process itself. Effective cross-examination lies at the core of a fair trial: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 608; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 663; *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58, at para. 76; *R. v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5, at para. 41. Catching a witness in self-contradictions is one of the staples of effective cross-examination.

4 Having said that, there are observations in the Court's previous s. 13 jurisprudence that can fairly be said to fuel the appellants' argument (none of which escaped their counsel's skilful attention). It is therefore necessary to return to the foundational case of *Dubois* and trace the subsequent

octroie une protection constitutionnelle à un privilège plus spécifique protégeant contre l'auto-incrimination *testimoniale*. Dans *Dubois c. La Reine*, [1985] 2 R.C.S. 350, la Cour a dit ce qui suit, à la p. 358 :

> ... l'objet de l'art. 13, lorsqu'il est interprété dans le contexte des al. 11*c*) et *d*), est de protéger les individus contre l'obligation indirecte de s'incriminer, pour veiller à ce que la poursuite ne soit pas en mesure de faire indirectement ce que l'al. 11*c*) interdit. [Je souligne.]

Il y a un monde entre l'objet important visé par un droit destiné à protéger contre l'auto-incrimination forcée et la prétention des appelants, selon laquelle un accusé peut, après avoir donné volontairement une version des faits à son premier procès, l'avoir vue rejetée par le jury et avoir obtenu un nouveau procès pour un motif distinct, soumettre volontairement une version différente et contradictoire à un jury différemment constitué, dans l'espoir que celui-ci rendra un verdict plus favorable parce que les contradictions avec la première version ne lui seront pas révélées.

La finalité protectrice de l'art. 13 a un contrepoids dont il faut tenir compte, soit la crainte qu'un accusé puisse ajuster son témoignage au cours de procès successifs relativement à la même accusation et ainsi être acquitté à tort, grâce à des mensonges et des contradictions non révélés, ce qui ébranlerait la crédibilité du processus judiciaire lui-même. Un contre-interrogatoire efficace constitue une composante essentielle d'un procès équitable : *R. c. Seaboyer*, [1991] 2 R.C.S. 577, p. 608; *R. c. Osolin*, [1993] 4 R.C.S. 595, p. 663; *R. c. Shearing*, [2002] 3 R.C.S. 33, 2002 CSC 58, par. 76; *R. c. Lyttle*, [2004] 1 R.C.S. 193, 2004 CSC 5, par. 41. Mettre au jour les contradictions dans les déclarations d'un témoin est l'un des éléments principaux d'un contre-interrogatoire efficace.

Cela dit, la jurisprudence de notre Cour qui porte sur l'art. 13 renferme des observations qui, il faut le reconnaître, peuvent alimenter les arguments des appelants (et qui n'ont pas échappé à la vigilance de leurs avocats). Il faut donc revenir à l'arrêt fondamental *Dubois* et passer en revue les

jurisprudence to clarify the role and function of s. 13, and to explain why the appellants' interpretation of s. 13 overshoots its purpose, and why it must therefore be rejected. The appeals, in the result, will be dismissed.

I. Introduction

The present case arises out of a botched "rip-off" of a marijuana-growing operation ("grow-op") at Port Coquitlam, British Columbia. The appellants admit they carried out the rip-off, stealing 170 marijuana plants, in the course of which the in-house caretaker of the grow-op was murdered. He was suffocated by 24 feet of duct tape being wound around his head, blocking the passage of air to his nose and mouth. The appellants admit their involvement. They accept culpability for manslaughter. At issue is whether the proper verdict is manslaughter or murder.

The Crown's case rested on both physical evidence and out-of-court statements by both appellants to undercover police officers. In accordance with *Dubois*, the Crown did not attempt to file at the retrial as part of its case-in-chief the testimony of the appellants at their first trial.

At the close of the Crown's case on the retrial, both appellants decided to testify. As he had at the first trial, Henry again claimed that he was intoxicated, but other than remembering being intoxicated he now admitted to no significant recollection of what happened. Riley testified in chief that while he had "on occasion" lied at the first trial he now had a clear recollection that he was not in the room when the fatal winding took place. He argued that his candour in admitting previous falsehoods was a badge of present truthfulness. Riley's defence strategy at the retrial thus incorporated his testimony at the previous trial. Henry's defence was more simple. Not only did he claim to recall less at the second trial than he testified to at the first trial, at times he seemed to suggest that he did not

décisions qui ont suivi, afin de clarifier le rôle et la fonction de l'art. 13 et d'expliquer pourquoi l'interprétation qu'en proposent les appelants excède l'objet de cette disposition et doit être écartée. Les appels seront donc rejetés.

I. Introduction

L'affaire résulte d'un vol bâclé dans des installations de culture de marijuana à Port Coquitlam en Colombie-Britannique. Les appelants ont avoué avoir commis ce vol, qui leur a permis de s'emparer de 170 plants de marijuana et lors duquel le gardien des installations, qui résidait sur place, a été tué. Le gardien est mort par asphyxie, 24 pieds de ruban adhésif enroulés autour de sa tête l'empêchant d'inspirer par le nez ou par la bouche. Les appelants ont reconnu leur participation au crime. Ils ont admis leur culpabilité pour homicide involontaire coupable. Restait à savoir s'ils devaient être condamnés pour homicide involontaire coupable ou pour meurtre. 5

La preuve du ministère public reposait à la fois sur des éléments de preuve matérielle et sur des déclarations extra-judiciaires faites par les deux appelants à des agents d'infiltration. Conformément à l'arrêt *Dubois*, le ministère public n'a pas cherché, lors du deuxième procès, à déposer en preuve principale le témoignage des appelants à leur premier procès. 6

À la clôture de la preuve soumise par le ministère public lors du nouveau procès, les deux appelants ont décidé de témoigner. Comme il l'avait fait au premier procès, M. Henry a prétendu avoir été ivre, mais il a cette fois affirmé n'avoir aucun autre souvenir notable de ce qui s'était passé. En interrogatoire principal, M. Riley a pour sa part reconnu avoir menti « quelquefois » lors du premier procès, mais il a déclaré se souvenir maintenant clairement qu'il ne se trouvait pas dans la pièce lorsque le bâillon fatal a été posé. Il a fait valoir que l'aveu sincère de ses mensonges antérieurs était garant de sa franchise actuelle. La stratégie de la défense de M. Riley au nouveau procès incorporait donc le témoignage qu'il avait donné lors du procès antérieur. La défense de M. Henry était plus simple. Non 7

even recall that an earlier trial had taken place. The Crown took the view that it was entitled to cross-examine both appellants on the testimony given at the prior trial for the purpose of impeaching their credibility, and did so, relying in this respect on *R. v. Kuldip*, [1990] 3 S.C.R. 618. The defence says that such cross-examination even for the purpose of impeachment of credibility was unfair, but in any event that the distinction in these circumstances between the purposes of impeachment of credibility and incrimination is illusory. Reliance was placed on *R. v. Noël*, [2002] 3 S.C.R. 433, 2002 SCC 67, and *R. v. Allen*, [2003] 1 S.C.R. 223, 2003 SCC 18, to exclude the damaging inconsistencies. The Crown, for its part, says that the accused in volunteering their testimony at the second trial stepped outside the protection of s. 13, and that any observations to the contrary in the Court's previous s. 13 jurisprudence should be reconsidered. Thus issue was joined on the proper scope of s. 13.

8 I pause at this juncture to observe that both parties view with scepticism the idea that the trier of fact can truly isolate the purpose of impeaching credibility from the purpose of incrimination. They agree on the problem but disagree about the solution. The appellants' solution, relying on *Noël*, is that unless the statements used to contradict the present testimony were innocuous when made at the first trial, and still innocuous at the second trial, they should be altogether excluded, i.e. even for the limited purpose of challenging credibility. They wish to see a roll-back of *Kuldip*. Otherwise, they fear, the contradictions may well be used by the trier of fact for the forbidden purpose of incrimination. The Crown also recognizes the troublesome nature of the distinction but, relying on *Kuldip*, says that fair trial considerations absolutely require that the contradictions in the evidence of an accused be exposed. The Crown then goes further than *Kuldip* in saying that the trier of fact should be able to make of the contradictions what it wishes, including drawing an inference of guilt, and indeed that a realistic appraisal of the

seulement il a affirmé ne pas se souvenir d'éléments qu'il avait relatés dans son témoignage au premier procès, mais il a parfois laissé entendre qu'il ne se rappelait même pas avoir subi un premier procès. Le ministère public a contre-interrogé les deux appelants sur leur témoignage au premier procès dans le but d'attaquer leur crédibilité, s'appuyant à cet égard sur l'arrêt *R. c. Kuldip*, [1990] 3 R.C.S. 618. La défense a soutenu qu'un tel contre-interrogatoire était inéquitable, même s'il visait à miner la crédibilité, et que la distinction entre l'objectif d'incriminer un accusé et celui d'attaquer sa crédibilité était de toute façon illusoire dans les circonstances. Elle a invoqué les arrêts *R. c. Noël*, [2002] 3 R.C.S. 433, 2002 CSC 67, et *R. c. Allen*, [2003] 1 R.C.S. 223, 2003 CSC 18, pour faire valoir que les contradictions préjudiciables ne devaient pas être révélées. Le ministère public a soutenu, pour sa part, qu'en décidant de témoigner à leur deuxième procès, les accusés se sont exclus de la protection offerte par l'art. 13 et qu'il y a lieu de reconsidérer les remarques à l'effet contraire dans la jurisprudence antérieure de la Cour sur l'art. 13. L'objet du pourvoi est donc la portée de l'art. 13.

J'ouvre ici une parenthèse pour signaler le scepticisme des deux parties concernant la capacité du juge des faits de dissocier réellement l'objectif d'attaquer la crédibilité d'un accusé de celui de l'incriminer. Elles reconnaissent ce problème, mais elles ne s'entendent pas sur la solution. Les appelants, citant l'arrêt *Noël*, prétendent que les déclarations utilisées pour contredire le nouveau témoignage doivent être exclues purement et simplement, même si leur utilisation vise uniquement à miner la crédibilité, à moins qu'elles aient été inoffensives lorsqu'elles ont été faites au premier procès et qu'elles le soient toujours dans le cadre du second procès. Ils souhaitent que la Cour revienne sur l'arrêt *Kuldip*, à défaut de quoi ils craignent que le juge des faits utilise les contradictions dans le but prohibé d'incriminer l'accusé. Le ministère public reconnaît lui aussi que cette distinction pose problème, mais il soutient, en s'appuyant sur l'arrêt *Kuldip*, qu'il est indispensable à l'équité du procès que les contradictions dans les témoignages d'un accusé soient révélées. S'aventurant plus loin que l'arrêt *Kuldip*, il va même jusqu'à dire que le juge

trial process permits no other conclusion, human nature being what it is.

It has long been recognized that the distinction between credibility and incrimination in this particular context is "troublesome" (as Lamer C.J. described it in *Kuldip*, at p. 635) and "difficult" (as Martin J.A. described it in *Kuldip* when the case was before the Ontario Court of Appeal ((1988), 40 C.C.C. (3d) 11, at p. 23)). As both the defence lawyers and the prosecutors agree that a problem exists, the question is: what should be done about it, having regard to the 20 years of experience since *Dubois*?

II. Facts

On October 17, 2001, a jury convicted the two appellants of the first degree murder of Timothy Langmead, who had operated a marijuana "grow-op" at Port Coquitlam, B.C. In the course of a "rip-off" of that operation by the appellants, Langmead was tied to a chair, had duct tape wound around his mouth and nose, and suffocated. At their first trial in 1996 the appellants admitted their involvement in the unlawful confinement that led up to his death, but they pleaded diminished responsibility because of intoxication.

The appellant Riley and the victim Langmead were acquaintances. They had both done work over the years for the same marijuana dealer. In fact Riley had helped set up the marijuana grow-op in Port Coquitlam that was being tended by Langmead on the night Langmead was killed. Riley claimed that he was owed $5,000 to $10,000 by the drug dealer for wiring a bypass of the hydro meter and other services. On the night of June 8, 1994, he and two accomplices planned to help themselves to some marijuana plants by way of compensation.

Riley and the appellant Henry knew each other from high school in the B.C. Interior. The two of them, along with another individual (Gabe Abbott, who was not charged) drove to Langmead's house.

des faits devrait pouvoir utiliser les contradictions comme il le souhaite, y compris en inférer la culpabilité de l'accusé, et que, la nature humaine étant ce qu'elle est, une perception réaliste du processus d'instruction ne permet pas d'autre conclusion.

Il est depuis longtemps reconnu qu'il est difficile, dans ce contexte, de faire la distinction entre attaquer la crédibilité d'un accusé et l'incriminer (le juge en chef Lamer l'a signalé dans *Kuldip* à la p. 635, tout comme l'avait fait le juge Martin de la Cour d'appel de l'Ontario dans cette même affaire ((1988), 40 C.C.C. (3d) 11, p. 23)). Les avocats de la défense et de la poursuite s'entendant sur l'existence de ce problème, il reste à déterminer comment y remédier, à la lumière de ce qui s'est produit depuis le prononcé de l'arrêt *Dubois* il y a 20 ans. 9

II. Les faits

Le 17 octobre 2001, un jury a déclaré les deux appelants coupables du meurtre au premier degré de Timothy Langmead, qui s'occupait d'installations de culture de marijuana à Port Coquitlam (C.-B.). Pendant le vol perpétré par les appelants dans ces installations, M. Langmead a été ligoté sur une chaise; il a eu le nez et la bouche recouverts de ruban adhésif et il est mort asphyxié. Lors de leur premier procès, en 1996, les appelants ont avoué leur participation à la séquestration qui a entraîné la mort de la victime, mais ils ont invoqué la défense d'ivresse pour atténuer leur responsabilité. 10

M. Riley et la victime se connaissaient. Ils avaient tous deux travaillé au cours des ans pour le même trafiquant de marijuana. De fait, M. Riley avait participé à la mise en place des installations de culture de Port Coquitlam dont M. Langmead s'occupait la nuit où il a été tué. M. Riley a prétendu que le trafiquant lui devait entre 5 000 $ et 10 000 $ pour divers services rendus, dont le contournement du compteur d'électricité. La nuit du 8 juin 1994, avec deux complices, il a décidé de récupérer son dû en s'appropriant des plants de marijuana. 11

Les appelants Riley et Henry s'étaient connus à l'école secondaire dans l'intérieur de la Colombie-Britannique. Accompagnés d'une troisième personne (Gabe Abbott, qui n'a pas été accusé), ils se 12

They said they expected that Langmead would not be home, but he was, or came home shortly after they entered the house. Riley knew that Langmead recognized him from their earlier dealings. Although the details are not clear, it seems there was some struggle between Riley and Langmead. Once subdued, Langmead was put in a chair and his arms secured by rope or duct tape. He began to yell. Tape was applied to his mouth. The question was whether Henry or Riley applied the fatal windings of 24 feet of duct tape to Langmead's mouth and nose, or whether it was both of them, and with what intent. After the killing, the three intruders stole marijuana plants, a guitar, a VCR and a van. They took Langmead's body with them. They drove a couple of hours to the Alexandra Bridge in the Fraser Canyon, threw the body into the river and rolled the van over a cliff. Nine days later, Langmead's body was found floating downstream. The duct tape was still wound around his head.

13 The police mounted an undercover operation and obtained incriminating statements from both of the appellants boasting of responsibility for the death of Langmead. After Riley's arrest, he made some further admissions to the police.

14 Both appellants were convicted of first degree murder, but in 1999 the British Columbia Court of Appeal held that the trial judge had failed to properly instruct the jury on the defence of intoxication. A new trial was ordered: (1999), 117 B.C.A.C. 49, 1999 BCCA 22.

15 At the second trial Henry continued to advance the defence of intoxication but Riley largely resiled from it, seeking instead to use his greater recollection of events to push the responsibility onto Henry. He testified to having assisted in securing Langmead's mouth with a few small pieces of tape only to stop him yelling, and said that thereafter Henry was alone with Langmead. Both men,

sont rendus en voiture chez M. Langmead. Selon leurs dires, ils ne s'attendaient pas à ce qu'il soit là, mais il s'y trouvait ou il y est arrivé peu après leur introduction dans la maison. M. Riley savait que M. Langmead l'avait reconnu parce qu'ils avaient déjà fait affaire ensemble. Les détails ne sont pas clairs, mais il semble qu'une lutte se soit engagée entre MM. Riley et Langmead. Une fois maîtrisé, M. Langmead a été assis sur une chaise à laquelle on lui a attaché les bras à l'aide de cordes ou de ruban adhésif. Il a commencé à crier. On lui a mis du ruban adhésif sur la bouche. Reste à savoir si c'est M. Riley, M. Henry ou les deux qui ont couvert la bouche et le nez de M. Langmead avec les 24 pieds de ruban adhésif qui l'ont tué, et dans quelle intention. Après le meurtre, les trois intrus ont volé des plants de marijuana, une guitare, un magnétoscope et une fourgonnette. Ils ont emporté le cadavre de M. Langmead avec eux. Après avoir conduit quelques heures jusqu'au pont Alexandra dans le canyon du fleuve Fraser, ils ont jeté le corps dans le fleuve et poussé la fourgonnette en bas d'une falaise. Neuf jours plus tard, le corps a été retrouvé flottant en aval. Sa tête était encore entourée de ruban adhésif.

Des policiers ont mis en place une opération d'infiltration et ont obtenu des déclarations incriminantes des deux appelants, qui se sont vantés d'avoir tué M. Langmead. Après son arrestation, M. Riley a fait d'autres aveux à la police.

Les deux appelants ont été déclarés coupables de meurtre au premier degré, mais la Cour d'appel de la Colombie-Britannique a statué, en 1999, que le juge du procès n'avait pas donné au jury des directives appropriées concernant le moyen de défense d'ivresse et elle a ordonné la tenue d'un nouveau procès : (1999), 117 B.C.C.A. 49, 1999 BCCA 22.

Au deuxième procès, M. Henry a persisté à invoquer le moyen de défense d'ivresse, mais M. Riley l'a en grande partie abandonné et a plutôt cherché à tirer parti de ses souvenirs plus précis pour faire porter la responsabilité à M. Henry. Il a témoigné avoir aidé à fermer la bouche de M. Langmead avec quelques petits bouts de ruban adhésif, mais seulement pour l'empêcher de continuer à crier, et avoir

through their counsel, again admitted criminal responsibility for manslaughter. The only live issue at the second trial, as at the first trial, was whether it was a case of murder.

ensuite laissé M. Langmead seul avec M. Henry. Par l'intermédiaire de leur avocat, les deux hommes ont de nouveau reconnu leur responsabilité criminelle pour homicide involontaire coupable. La seule question à trancher au deuxième procès était, comme au premier, celle de savoir s'ils pouvaient être déclarés coupables de meurtre.

1. *Relevant Enactments*

Canadian Charter of Rights and Freedoms

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Canada Evidence Act, R.S.C. 1985, c. C-5

5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

1. *Dispositions législatives pertinentes*

Charte canadienne des droits et libertés 16

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5

5. (1) Nul témoin n'est exempté de répondre à une question pour le motif que la réponse à cette question pourrait tendre à l'incriminer, ou pourrait tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit.

(2) Lorsque, relativement à une question, un témoin s'oppose à répondre pour le motif que sa réponse pourrait tendre à l'incriminer ou tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit, et si, sans la présente loi ou toute loi provinciale, ce témoin eût été dispensé de répondre à cette question, alors, bien que ce témoin soit en vertu de la présente loi ou d'une loi provinciale forcé de répondre, sa réponse ne peut être invoquée et n'est pas admissible en preuve contre lui dans une instruction ou procédure pénale exercée contre lui par la suite, sauf dans le cas de poursuite pour parjure en rendant ce témoignage ou pour témoignage contradictoire.

2. *Judicial History*

(a) The Trial Judge's Instructions on the Use of Prior Inconsistent Statements

The trial judge instructed the jury that they could use a witness's prior inconsistent statement whether given "under oath or otherwise" to assess the credibility of that witness's testimony, but that they could not use the prior statement for proof of its truth unless the witness adopted the statement as

2. *Historique judiciaire*

a) Les directives du juge du procès concernant l'utilisation des déclarations antérieures incompatibles

Le juge du procès a dit au jury qu'il pouvait avoir recours aux déclarations antérieures incompatibles d'un témoin, qu'elles aient été faites [TRADUCTION] « sous serment ou non », pour évaluer sa crédibilité, mais qu'il ne pouvait les considérer comme faisant foi de leur véracité à moins que le témoin n'ait admis 17

true. There was no objection by defence counsel to this portion of the charge.

18 Dealing specifically with references in the testimony to "another proceeding", the trial judge instructed the jury that they were not to speculate as to the nature or outcome of those proceedings. He also reminded the jury that Riley had admitted to lying under oath, and that this was a factor to be considered in assessing his credibility as a witness.

(b) The British Columbia Court of Appeal ((2003), 186 B.C.A.C. 106, 2003 BCCA 476)

19 A three-judge panel of the British Columbia Court of Appeal divided on the scope to be given to this Court's decision in *Noël*. In Southin J.A.'s analysis, *Noël* stands for the proposition that the testimony of a witness tending to prove him guilty of an offence, if given on someone else's trial, could not be used at his own subsequent trial for that same offence. The protection did not apply to the retrial of the same accused on the same charge.

20 Newbury J.A. took the view that on the facts both appellants had "opened the door" in their own testimony to being cross-examined on the prior inconsistent statements given at the first trial. The trade-off between the right of the Crown to compel a witness to answer questions — the response to which might incriminate him — and the right of an accused *qua* witness not to incriminate himself, does not apply where he has chosen to testify regarding previous incriminating statements given by himself in the first trial. Here the appellants' testimony had not been compelled; rather, it was offered in the second trial in an apparent attempt to gain credibility. The Crown was entitled to cross-examine on that evidence, she held.

21 Hall J.A., dissenting, considered that *Noël* had narrowed the permissible ambit of cross-examination of an accused in a retrial of the same

qu'elles étaient vraies. Les avocats de la défense ne se sont pas opposés à cette partie des directives.

Sur la question précise de la mention d'une [TRADUCTION] « autre procédure » dans le témoignage, le juge du procès a informé le jury qu'il ne devait pas faire de conjectures sur la nature ou l'issue de cette procédure. Il lui a également rappelé que M. Riley avait admis avoir menti lors d'un témoignage donné sous serment et qu'il s'agissait là d'un facteur à prendre en considération pour évaluer sa crédibilité comme témoin.

b) La Cour d'appel de la Colombie-Britannique ((2003), 186 B.C.A.C. 106, 2003 BCCA 476)

Les trois juges qui ont entendu l'appel étaient partagés sur la question de la portée à donner à l'arrêt *Noël* de notre Cour. Selon la juge Southin, cet arrêt pose le principe que le témoignage tendant à prouver la culpabilité du témoin, donné au procès d'une autre personne, ne peut être subséquemment utilisé au procès du témoin pour la même infraction, mais que cette protection ne s'applique pas au nouveau procès du même accusé pour la même infraction.

Au vu des faits, la juge Newbury a estimé que les témoignages des deux appelants avaient « ouvert la porte » à leur contre-interrogatoire sur les déclarations antérieures incompatibles qu'ils avaient faites lors du premier procès. Selon elle, le compromis entre le droit du ministère public de contraindre un témoin à répondre à des questions — susceptibles de l'incriminer — et le droit d'un accusé témoin de ne pas s'incriminer ne trouve pas application lorsque l'accusé choisit de témoigner relativement à des déclarations antérieures incriminantes qu'il a faites au premier procès. Les appelants en l'espèce n'ont pas été contraints de témoigner; ils ont plutôt déposé au deuxième procès pour tenter, semble-t-il, de renforcer leur crédibilité. Elle était donc d'avis que le ministère public était admis à les contre-interroger sur ces déclarations.

Le juge Hall, dissident, estimait que l'arrêt *Noël* avait restreint le champ du contre-interrogatoire auquel un accusé pouvait être soumis lors de son

charge. On this view the cross-examination at the second trial of both appellants infringed the prohibition imposed by s. 13 of the *Charter*. The Crown used portions of Riley's previous testimony to show that he was more of a direct participant in the death of the victim than he had acknowledged in his testimony-in-chief at the second trial. The Crown's cross-examination of both appellants on the prior inconsistent statements was not just directed to credibility. Its effect was to incriminate them as being active participants in the murder. This was contrary to the principles laid down in *Noël* and *Allen*. He was not persuaded that the verdicts concerning both men would necessarily have been the same absent the error. He would have allowed the appeals of both appellants and ordered a third trial on the same charge. The appeal thus comes to us as of right based on Hall J.A.'s dissent on the proper scope of *Noël* and *Allen*.

nouveau procès pour la même infraction. Ainsi, le contre-interrogatoire des deux appelants à leur deuxième procès violait l'interdiction imposée par l'art. 13 de la *Charte*. Le ministère public s'était servi de passages du témoignage antérieur de M. Riley pour démontrer qu'il avait pris une part plus directe au décès de la victime qu'il ne l'avait reconnu dans son témoignage principal au deuxième procès. Le contre-interrogatoire des deux appelants sur leurs déclarations antérieures incompatibles ne visait pas uniquement à attaquer leur crédibilité. Il a eu pour effet de les incriminer comme ayant participé activement au meurtre, ce qui contrevenait aux principes formulés dans les arrêts *Noël* et *Allen*. Le juge Hall n'était pas convaincu que les verdicts auraient nécessairement été les mêmes, dans les deux cas, si cette erreur n'avait pas été commise. Il aurait accueilli les deux appels et ordonné un troisième procès pour la même accusation. Notre Cour est donc saisie d'un appel de plein droit fondé sur la dissidence du juge Hall concernant la portée à donner aux arrêts *Noël* et *Allen*.

III. Analysis

The consistent theme in the s. 13 jurisprudence is that "the purpose of s. 13 . . . is to protect individuals from being indirectly compelled to incriminate themselves" (*Dubois*, at p. 358, and reiterated in *Kuldip*, at p. 629). That same purpose was flagged in *Noël*, the Court's most recent examination of s. 13, by Arbour J., at para. 21:

> Section 13 reflects a long-standing form of statutory protection against compulsory self-incrimination in Canadian law, and is best understood by reference to s. 5 of the *Canada Evidence Act*. Like the statutory protection, the constitutional one represents what Fish J.A. called a *quid pro quo*: when a witness who is compelled to give evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers protection against the subsequent use of that evidence against the witness in exchange for his or her full and frank testimony. [Emphasis added.]

There is thus a consensus that s. 13 was intended to extend s. 5 of the *Canada Evidence Act* to give further and better effect to this purpose. As McIntyre J. pointed out in *Dubois*, in reasons that

III. Analyse

22 Le thème constant de la jurisprudence relative à l'art. 13 est que « l'objet de l'art. 13 [. . .] est de protéger les individus contre l'obligation indirecte de s'incriminer » (*Dubois*, p. 358, répété dans *Kuldip*, p. 629). Dans *Noël*, le plus récent des arrêts de notre Cour portant sur l'art. 13, la juge Arbour a insisté sur cet objet, le décrivant ainsi, au par. 21 :

> L'article 13 incorpore une protection légale contre l'auto-incrimination forcée établie de longue date en droit canadien, et la meilleure façon de l'interpréter est de l'examiner en regard de l'art. 5 de la *Loi sur la preuve au Canada*. À l'instar de la protection légale, la protection constitutionnelle représente ce que le juge Fish a qualifié de *quid pro quo*, ou contrepartie : lorsqu'un témoin contraint de déposer au cours d'une procédure judiciaire risque de s'auto-incriminer, l'État lui offre une protection contre l'utilisation subséquente de cette preuve contre lui en échange de son témoignage complet et sincère. [Je souligne.]

23 Il y a donc consensus sur le fait que l'art. 13 vise à élargir la protection prévue à l'art. 5 de la *Loi sur la preuve au Canada*, afin de mieux réaliser cet objet. Comme le juge McIntyre l'a souligné

dissented in the result but not on this point, s. 13 "does not depend on any objection made by the witness giving the evidence. It is applicable and effective without invocation, and even where the witness in question is unaware of his rights" (p. 377). Further, s. 13 "is not limited to a question in respect of which a witness would have been entitled to refuse to answer at common law and its prohibition against the use of incriminating evidence is not limited to criminal proceedings. It confers a right against incrimination by the use of evidence given in one proceeding in any other proceedings" (p. 377). *Noël*, our most recent pronouncement, also agreed that s. 13 was intimately linked (though not necessarily limited to) the role and function traditionally served by s. 5 of the *Canada Evidence Act*.

24 Despite these broad areas of agreement, the Court's s. 13 jurisprudence bristles with observations that enable the appellants to argue with a measure of indignation that notwithstanding the fact they were not (and could not be) compelled to testify at their first trial, they ought nevertheless to have been protected as volunteers at their second trial from exposure of the contradictory testimony they gave at the first trial, despite the misleading impression with which such non-disclosure would have left the jury. The search for truth, they say, is limited by constitutional considerations. The appellants rely in particular on observations made in *Noël*, even though *Noël* did not involve the retrial of an accused on the same indictment, but the trial of an accused whose previous testimony had been compelled at the trial of somebody else on charges related to the same subject matter. *Noël* was a classic application of s. 5(2) of the *Canada Evidence Act*, which in fact had wisely been invoked on Noël's behalf at the earlier trial of that other person, who happened to be his brother. It is therefore desirable to retrace the essentials of the jurisprudence from *Dubois* to *Noël* to determine whether the appellants' position on s. 13 is well founded.

dans ses motifs de dissidence quant au résultat mais non sur ce point dans *Dubois*, l'art. 13 « ne dépend aucunement de la formulation d'une objection par le témoin en question. Cette protection est applicable et opérante sans qu'il soit nécessaire de l'invoquer et même lorsque le témoin en question n'est pas au courant de ses droits » (p. 377). De plus, la protection de l'art. 13 « ne se limite pas à une question à laquelle un témoin aurait pu refuser de répondre en *common law* et l'interdiction d'utiliser un témoignage incriminant n'est pas restreinte à des procédures criminelles. L'article 13 confère le droit de ne pas être incriminé par l'utilisation d'un témoignage dans d'autres procédures que celles dans lesquelles il a été donné » (p. 377). L'arrêt *Noël*, notre plus récente décision sur la question, réitère aussi que l'art. 13 est étroitement lié (sans toutefois se limiter nécessairement) au rôle et à la fonction traditionnels de l'art. 5 de la *Loi sur la preuve au Canada*.

En dépit de ces consensus généraux, la jurisprudence de notre Cour sur l'art. 13 fourmille de commentaires qui permettent aux appelants de faire valoir avec une certaine indignation que, même s'ils n'ont pas été (et ne pouvaient être) contraints de témoigner à leur premier procès, ils devaient tout de même, lorsqu'ils ont témoigné de leur propre gré à leur deuxième procès, être protégés contre la communication de leur témoignage incompatible donné au premier procès, malgré l'impression trompeuse que cette non-divulgation pouvait donner au jury. Selon eux, des considérations constitutionnelles limitent la recherche de la vérité. Les appelants invoquent plus particulièrement des observations formulées dans *Noël*, même si cette affaire ne concernait pas la tenue d'un nouveau procès sur une même accusation, mais le procès d'un accusé qui avait été contraint de témoigner antérieurement au procès d'un tiers sur des accusations ayant le même fondement. L'arrêt *Noël* est un cas classique d'application du par. 5(2) de la *Loi sur la preuve au Canada*, que l'avocat de M. Noël avait judicieusement invoqué lors du procès antérieur du tiers, qui était en l'occurrence le frère de l'accusé. Il est donc indiqué de reprendre les principes fondamentaux énoncés dans la jurisprudence, de *Dubois* à *Noël*, pour décider du bien-fondé de la position des appelants au sujet de l'art. 13.

1. *The Scope of Section 13 of the Charter*

Section 13 of the *Charter* precludes "incriminating evidence" given in one proceeding from being "used to incriminate that witness in any other proceedings". Incriminating evidence means "something 'from which a trier of fact may infer that an accused is guilty of the crime charged'": *Kuldip*, at p. 633. The meaning of this protection in the context of a retrial of an accused on the same charge was first considered in *Dubois*. The question was phrased in that case by Lamer J. (as he then was): "When a new trial is ordered on the same charge or on an included offence by a court of appeal, can the Crown adduce as evidence-in-chief the testimony given by an accused at the former trial?" (p. 353 (emphasis added)). Dubois was charged with second degree murder. At his first trial he admitted that he had killed the deceased but alleged justification. He was convicted, but successfully appealed the conviction and was granted a new trial on grounds of a misdirection to the jury. At the retrial, as part of its case-in-chief, the Crown read in Dubois' testimony from the first trial over an objection by Dubois' counsel based on s. 13 of the *Charter*. Dubois chose not to testify nor did he call any evidence. He was again convicted. The majority of our Court agreed that the testimony of the accused at the first trial could not be used by the Crown as part of its "case to meet" to incriminate the accused at the retrial on the same charge.

More specifically, *Dubois* concluded that the reference in s. 13 to "other proceedings" includes a retrial on the same indictment and that the term "witness" in s. 13 also applies to an accused testifying (voluntarily) in his or her own defence. Lamer J., for the majority, held that "given the nature and purpose of the [s. 13] right, which is essentially protection against self-incrimination, the issue of whether the testimony was compulsory or voluntary at the moment it was given is largely

1. *La portée de l'art. 13 de la Charte*

25 L'article 13 de la *Charte* énonce que « [c]hacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures ». On qualifie d'incriminant un élément qui « pourrait faire conclure au juge des faits que l'accusé est coupable du crime allégué » (*Kuldip*, p. 633). C'est dans *Dubois* que la portée de cette protection a été examinée pour la première fois dans le contexte du nouveau procès d'un accusé pour la même accusation. Le juge Lamer (plus tard Juge en chef) a formulé ainsi la question qui se posait : « Lorsqu'une cour d'appel ordonne un nouveau procès à l'égard d'une même accusation ou d'une infraction comprise, la poursuite peut-elle présenter à titre de preuve principale le témoignage donné par un accusé au cours du premier procès? » (p. 353 (je souligne)). M. Dubois était accusé de meurtre au deuxième degré. Lors du premier procès, il avait avoué avoir tué la victime, tout en invoquant des justifications. Il avait été déclaré coupable, mais sa condamnation avait été infirmée en appel en raison de directives erronées données au jury. Un nouveau procès avait été ordonné, lors duquel le ministère public avait inclus dans sa preuve principale le témoignage donné par M. Dubois au premier procès, malgré une objection de son avocat fondée sur l'art. 13 de la *Charte*. M. Dubois n'avait pas témoigné et n'avait présenté aucune preuve. Il avait été déclaré coupable une deuxième fois. Les juges majoritaires de notre Cour ont estimé qu'au deuxième procès pour la même accusation, le ministère public ne pouvait, à des fins incriminantes, inclure dans la « preuve complète » qu'il lui incombait de présenter le témoignage donné par l'accusé au premier procès.

26 Plus précisément, l'arrêt *Dubois* a établi que les mots « autres procédures » figurant à l'art. 13 comprennent un deuxième procès pour la même accusation et que cette disposition s'applique au témoignage donné (de manière volontaire) par un accusé pour sa propre défense. Le juge Lamer, s'exprimant au nom de la majorité, a déclaré qu'« étant donné la nature et le but du droit, qui est essentiellement la protection contre l'auto-incrimination, la question de savoir si le témoignage était obligatoire ou

irrelevant. The focus of the right is on the second proceedings, the time at which the previous testimony is sought to be used, rather than the time at which it is given" (p. 361). At the second proceeding, however, Dubois was not a witness. He was exercising his absolute right not to testify at all. Therefore, as Lamer J. pointed out at p. 365: "I do not see how the evidence given by the accused to meet the case as it was in the first trial could become part of the Crown's case against the accused in the second trial, without being in violation of s. 11(*d*) [the presumption of innocence], and to a lesser extent of s. 11(*c*) [the right not to be compelled to be a witness]."

27 In my view, the same result would have followed if at the retrial in the present case the appellants had chosen not to testify. Whether or not the appellants had been voluntary witnesses at the earlier trial would have been, in that respect, irrelevant. At the second trial the testimony, had the Crown been permitted to file it as part of the case-in-chief, would have been compelled, and its use, on a purposeful interpretation of s. 13, prohibited.

28 *Dubois* was applied in *R. v. Mannion*, [1986] 2 S.C.R. 272, where, as in the present case, the Crown attempted to use prior inconsistent statements in the *cross-examination* of an accused at a retrial. The accused was charged with raping a woman in Edmonton. Shortly thereafter, but before an arrest could be made, he left Edmonton heading for British Columbia. Whether or not his departure could give rise to an inference of guilt depended in part on whether he knew of the rape investigation before he left. At the first trial he said that when he spoke to a police officer before his departure, he had been told that the officer wanted to see him concerning a rape. At the second trial, no doubt sensing the danger, he changed his story to say that while he knew the officer wanted to speak with him, he understood it was about his work as a police informant on unrelated matters, and he was afraid to speak to the officer because he had not lived up to certain obligations. At the second trial, the accused was

volontaire au moment où il a été donné est en grande partie non pertinente. Le droit vise principalement les secondes procédures, la date où l'on cherche à utiliser le témoignage antérieur, plutôt que celle où il a été donné » (p. 361). Lors de la deuxième instance, toutefois, M. Dubois n'a pas témoigné. Il a exercé son droit le plus absolu de ne pas témoigner. Par conséquent, le juge Lamer a souligné, à la p. 365 : « Je ne vois pas comment le témoignage donné par l'accusé pour réfuter la preuve soumise au premier procès pourrait, sans contrevenir à l'al. 11*d*) [le droit d'être présumé innocent], et à un degré moindre à l'al. 11*c*) [le droit de ne pas être contraint de témoigner], faire partie de la preuve présentée par la poursuite contre l'accusé au second procès. »

Je suis d'avis que le résultat aurait été le même si les appelants avaient décidé en l'espèce de ne pas témoigner au deuxième procès. À cet égard, il aurait été sans conséquence que les appelants aient témoigné volontairement ou non au procès antérieur. Si le ministère public avait été autorisé à déposer leur témoignage en preuve principale au deuxième procès, il se serait agi d'un témoignage forcé dont une interprétation téléologique de l'art. 13 interdit l'utilisation.

Les principes formulés dans *Dubois* ont été appliqués dans *R. c. Mannion*, [1986] 2 R.C.S. 272. Dans cette affaire, comme en l'espèce, le ministère public avait tenté, lors d'un nouveau procès, de *contre-interroger* un accusé sur des déclarations antérieures incompatibles. M. Mannion avait été accusé d'avoir violé une femme à Edmonton. Peu après le crime, mais avant d'être arrêté, il avait quitté Edmonton et s'était rendu en Colombie-Britannique. La possibilité que son départ puisse faire conclure à sa culpabilité dépendait en partie de la question de savoir si, avant de partir, il était au courant qu'il y avait enquête sur le viol. Lors du premier procès, il avait affirmé que l'agent de police auquel il avait parlé avant de partir lui avait dit qu'il voulait le voir au sujet d'un viol. Lors du deuxième procès, flairant sans doute le danger, il a modifié sa version et indiqué qu'il savait que l'agent voulait lui parler mais qu'il pensait que c'était à propos de son travail d'informateur concernant

cross-examined on the different explanation he gave at the first trial, which the Crown submitted for the truth of its content. McIntyre J., for the Court, held that the cross-examination was improper. In doing so, however, he focussed on the *purpose* of the cross-examination (incrimination), rather than the *purpose* of s. 13 (protection against *compelled* self-incrimination). McIntyre J., with the unanimous support of his colleagues, accepted that the result of the holding in *Dubois* (in which he had dissented) dictated the outcome in *Mannion*. The distinction between Dubois' status as a compelled witness at the second trial and Mannion's status as a volunteer at both trials was not commented upon.

d'autres affaires et qu'il avait peur de lui parler parce qu'il ne s'était pas acquitté de certaines obligations. Il a été contre-interrogé sur l'explication différente qu'il avait fournie au premier procès et que le ministère public a présentée comme faisant foi de son contenu. Rendant jugement pour la Cour, le juge McIntyre a statué que le contre-interrogatoire était inadmissible. En tirant cette conclusion, toutefois, il a mis l'accent sur l'*objet* du contre-interrogatoire (l'incrimination) plutôt que sur l'*objet* de l'art. 13 (la protection contre l'*obligation* de s'incriminer). Le juge McIntyre, à l'opinion duquel ses collègues ont unanimement souscrit, a conclu que la décision rendue dans *Dubois* (où il était dissident) dictait l'issue dans *Mannion*. Il n'a formulé aucun commentaire sur le fait que le témoignage de M. Dubois à son deuxième procès était un témoignage forcé, tandis que M. Mannion avait témoigné volontairement à ses deux procès.

The Court returned to a purposive interpretation in *Kuldip*. The accused was charged with failing to remain at the scene of a car accident with the intent of escaping civil or criminal liability. At his first trial he volunteered that he had reported the accident to a constable at a police station in Toronto whom he identified as P.C. Brown. The Crown established that Brown was not on duty on the day in question. At the retrial, the accused again chose to testify, but changed his story to accommodate that awkward fact. Lamer C.J. for the majority of the Court held that the accused was properly confronted with his prior inconsistent statement:

29 La Cour est revenue à une interprétation téléologique dans *Kuldip*. L'accusé avait été inculpé d'omission de s'arrêter lors d'un accident dans l'intention d'échapper à toute responsabilité civile ou criminelle. Lors de son premier procès, il avait déclaré volontairement avoir signalé l'accident à un agent d'un poste de police de Toronto, qu'il avait identifié comme P.C. Brown. Le ministère public a prouvé que cet agent n'était pas en fonction ce jour-là. Lors de son nouveau procès, l'accusé a une fois de plus choisi de témoigner, mais il a modifié sa version des faits pour se sortir de cette situation embarrassante. Au nom des juges majoritaires de la Cour, le juge en chef Lamer a statué que l'accusé avait été à bon droit confronté à ses déclarations antérieures incompatibles :

> An interpretation of s. 13 which insulates such an accused from having previous inconsistent statements put to him/her on cross-examination where the only purpose of doing so is to challenge that accused's credibility, would, in my view, "stack the deck" too highly in favour of the accused. [p. 636]

> Interpréter l'art. 13 de façon à protéger l'accusé contre un contre-interrogatoire portant sur ses déclarations antérieures incompatibles aux seules fins d'attaquer sa crédibilité, équivaudrait, à mon avis, à trop « fausser la donne » en faveur de l'accusé. [p. 636]

In other respects, *Kuldip* followed where *Mannion* had led. Lamer C.J. stated that the questions raised in the appeal were "identical to those examined by this Court in *Mannion*" (p. 628). The only difference in his view was that in *Mannion*, the

30 À d'autres égards, *Kuldip* a suivi la voie tracée par *Mannion*. Le juge en chef Lamer a estimé que les questions soulevées dans le pourvoi étaient « identiques à celles que la Cour a étudiées dans l'arrêt *Mannion* » (p. 628), à l'unique différence

purpose of the cross-examination was to incriminate, whereas in *Kuldip* it was to impeach credibility. A successful impeachment would do no more than nullify the accused's testimony. The Crown could not obtain a conviction except on the basis of other evidence.

31 Of interest in *Kuldip* is the example given by Lamer C.J., at p. 634, of a witness at a murder trial who testifies that the accused could not have murdered the victim in Ottawa because on the day in question they were both in Montreal doing a bank robbery. If the witness were later charged with the bank robbery in Montreal, and changed his story at his trial to say that in fact he was in Ottawa that day, Lamer C.J. said it would not infringe s. 13 to impeach credibility using the earlier admission (despite the fact the statement was incriminating both when given at the earlier trial and when used at the later trial). However the trial judge must warn the jury "that it would not be open to it to conclude, on the basis of his previous statement, that the accused was in Montreal on the day of the alleged bank robbery nor to conclude that the accused did, in fact, commit the bank robbery" (pp. 634-35). As will be seen, the facts of the example anticipate, to some extent, the situation in *Noël*.

32 *Kuldip* thus qualified *Mannion*. If the prior testimony is used at the retrial to incriminate, *Mannion* says s. 13 is violated. If the prior testimony is used to impeach credibility, and thereby to nullify the accused's retrial testimony, *Kuldip* says s. 13 permits it. As Lamer C.J.'s example of the bank robber shows, however, the distinction poses problems. There can be few triers of fact, whether judge or jurors, who would not have found the prior admission of the accused, that on the day in question he was in Montreal robbing a bank, probative on the issue of guilt of that offence.

que, dans *Mannion*, le contre-interrogatoire visait à incriminer l'accusé, tandis que, dans *Kuldip*, il visait à attaquer sa crédibilité. Le fait de réussir à discréditer l'accusé témoin aurait pour unique conséquence d'anéantir son témoignage. Le ministère public ne pourrait obtenir une condamnation sans l'appuyer sur d'autres éléments de preuve.

Dans l'arrêt *Kuldip*, le juge en chef Lamer donne, à la p. 634, l'exemple intéressant d'un témoin affirmant, lors d'un procès pour meurtre, que l'accusé ne peut avoir tué la victime à Ottawa parce que, cette journée-là, l'accusé et le témoin étaient à Montréal, occupés à dévaliser une banque. Si le témoin est par la suite accusé du vol de banque commis à Montréal et qu'il modifie sa version des faits à son procès pour affirmer qu'il se trouvait à Ottawa le jour en question, il ne serait pas contraire à l'art. 13, selon le juge en chef Lamer, d'utiliser la déclaration antérieure du témoin pour attaquer sa crédibilité (malgré que cette déclaration ait été incriminante à la fois lorsqu'elle a été donnée au procès antérieur et lorsqu'elle est utilisée au procès subséquent). Toutefois, le juge du procès doit avertir le jury « qu'il ne peut s'inspirer de la déclaration antérieure pour conclure que l'accusé se trouvait à Montréal le jour du vol de banque ni pour conclure que l'accusé a de fait commis le vol de banque » (p. 634). Comme on le verra, les faits de cet exemple préfigurent jusqu'à un certain point la situation de l'affaire *Noël*.

Kuldip apporte donc des réserves à *Mannion*. *Mannion* pose que l'utilisation du témoignage antérieur de l'accusé dans le but de l'incriminer lors de son nouveau procès viole l'art. 13. *Kuldip* statue que l'art. 13 permet néanmoins le recours au témoignage antérieur de l'accusé s'il vise à attaquer sa crédibilité et à anéantir ainsi son témoignage au nouveau procès. Comme l'illustre l'exemple du voleur de banque donné par le juge en chef Lamer, cette distinction pose toutefois des difficultés. En prenant connaissance du témoignage antérieur de l'accusé selon lequel il se trouvait à Montréal à dévaliser une banque le jour en question, peu de juges des faits, qu'ils soient juges ou jurés, réussiraient à ne lui attribuer aucune valeur probante quant à la culpabilité relativement à cette infraction.

Kuldip was endorsed by *Noël*, which applied the s. 13 jurisprudence to the case of an accused who at the previous trial was not the accused but a mere witness at somebody else's trial (as in Lamer C.J.'s bank robbery example in *Kuldip*). The accused had testified as a compellable witness during his brother's trial about his complicity in the senseless strangulation of a nine-year-old boy. He was subsequently charged with the murder, but at his own trial he denied any such complicity. The Crown put to him statement after statement that he had made at the earlier trial, which he acknowledged having made, and which formed an important element (if it was not virtually conclusive) in establishing his guilt. In that context, and recognizing that when testifying as a witness at his brother's trial Noël had claimed the protection of s. 5 of the *Canada Evidence Act*, Arbour J. emphasized the *quid pro quo* "when a witness who is compelled to give evidence in a court proceeding is exposed to the risk of self-incrimination" (emphasis added) and held that "the state offers protection against the subsequent use of that evidence against the witness in exchange for his or her full and frank testimony" (para. 21). The emphasis in *Noël* on the *quid pro quo* reinforces the link between s. 13 of the *Charter* and s. 5 of the *Canada Evidence Act* and the whole issue of compelled testimony. It must be recognized that a witness who was also the accused at the first trial is at *both* trials a voluntary rather than a compelled witness, and therefore does not offer the same *quid pro quo*. (The notion that an accused who volunteers testimony can simultaneously object to answering questions whose answers may tend to incriminate him or her is a difficult concept. The whole point of volunteering testimony is to respond to the prosecution's case. Even answers to his or her own counsel's questions may tend to incriminate.)

Despite the difference between the trial of an accused who was a compelled witness in another "proceeding" and the retrial of an accused who volunteered evidence at both the first and second trials, the appellants here rely on the observation of Arbour J. at para. 4 of *Noël*:

L'arrêt *Noël* a confirmé l'arrêt *Kuldip*. Il a appliqué la jurisprudence relative à l'art. 13 au procès d'un accusé qui avait auparavant témoigné au procès d'un autre accusé, comme dans l'exemple du vol de banque donné par le juge en chef Lamer dans *Kuldip*. L'accusé avait déposé à titre de témoin contraignable au procès de son frère, relativement à sa complicité dans le meurtre gratuit d'un garçonnet de neuf ans mort par strangulation. Il avait par la suite été accusé de meurtre mais, à son propre procès, il avait nié toute complicité. Le ministère public l'avait confronté à de nombreuses déclarations, qu'il avait reconnu avoir faites au procès antérieur et qui constituaient un élément important (sinon pratiquement déterminant) de la preuve de sa culpabilité. Dans ce contexte, la juge Arbour, reconnaissant que M. Noël avait témoigné au procès de son frère en invoquant la protection de l'art. 5 de la *Loi sur la preuve au Canada*, a souligné qu'il y avait *quid pro quo*, ou contrepartie, « lorsqu'un témoin contraint de déposer au cours d'une procédure judiciaire risque de s'auto-incriminer, l'État lui offre une protection contre l'utilisation subséquente de cette preuve contre lui en échange de son témoignage complet et sincère » (par. 21 (je souligne)). L'accent mis sur la notion de contrepartie dans l'affaire *Noël* renforce le lien entre, d'une part, l'art. 13 de la *Charte* et l'art. 5 de la *Loi sur la preuve au Canada* et, d'autre part, toute la question du témoignage forcé. Il faut reconnaître que le témoin qui était aussi l'accusé au premier procès témoigne volontairement aux *deux* procès, sans y être contrait, et qu'il ne fournit donc pas la même contrepartie. (L'idée qu'un accusé qui décide de témoigner puisse en même temps refuser de répondre à des questions parce que ses réponses pourraient l'incriminer est difficile à saisir. Un accusé ne choisit de témoigner que pour réfuter la preuve du ministère public. Même les réponses aux questions de son propre avocat peuvent tendre à l'incriminer.)

33

Malgré la différence entre le procès d'un accusé qui a été contraint de témoigner dans une autre « procédure » et le nouveau procès d'un accusé qui a témoigné volontairement à ses deux procès, les appelants appuient leur argumentation sur le commentaire fait par la juge Arbour au par. 4 de l'arrêt *Noël* :

34

When an accused testifies at trial, he cannot be cross-examined on the basis of a prior testimony unless the trial judge is satisfied that there is no realistic danger that his prior testimony could be used to incriminate him. The danger of incrimination will vary with the nature of the prior evidence and the circumstances of the case including the efficacy of an adequate instruction to the jury.

The facts of *Noël* provide an interesting parallel to Lamer C.J.'s bank robbery example in *Kuldip*. In Lamer C.J.'s example, the prior testimony was considered admissible for impeachment, although it was undeniably incriminatory when given, and would almost certainly have been taken as incriminatory if allowed into evidence at the second trial. In *Noël*, the Crown's incriminatory purpose was unmistakable. Yet in both the bank robber example and in *Noël* itself the prior testimony was compelled, and its use thus posed a serious problem not only under the *Dubois* analysis of s. 13 but under s. 11(*c*) of the *Charter* and s. 5(2) of the *Canada Evidence Act*. (For present purposes, evidence of compellable witnesses should be treated as compelled even if their attendance was not enforced by a subpoena.)

35 *Kuldip* can be seen as an attempt by the Court to put the brakes on *Mannion*, but in its unwillingness to reconsider its reasoning in *Mannion*, the Court was required to resort to reliance on the sometimes difficult distinction between the purposes of impeachment of credibility and incrimination. Although this distinction is well established in the law (see, e.g., *R. v. Calder*, [1996] 1 S.C.R. 660, at para. 25), its practicality in this particular context is frequently questioned. It is worth setting out in full what was said by Arthur Martin J.A., writing in *Kuldip*, when it was before the Ontario Court of Appeal:

Furthermore, in my view, where the prior evidence is used ostensibly to impeach the accused's credibility only, it nevertheless does assist the Crown in its case and, in a broad sense, may help to prove guilt. It is often difficult to draw a clear line between

[L]'accusé qui témoigne à son procès ne peut être contre-interrogé relativement à un témoignage qu'il a rendu antérieurement, sauf si le juge du procès est convaincu qu'il n'existe aucun risque réaliste que ce témoignage antérieur puisse être utilisé pour l'incriminer. Le risque d'incrimination variera selon la nature du témoignage antérieur et les circonstances de l'affaire, y compris l'efficacité de directives appropriées données au jury.

Les faits de l'affaire *Noël* permettent un parallèle intéressant avec l'exemple du vol de banque donné par le juge en chef Lamer dans l'arrêt *Kuldip*. Dans cet exemple, le témoignage antérieur était admissible pour attaquer la crédibilité, même s'il était incontestablement incriminant au moment où il a été donné et s'il était presque certain qu'il aurait été considéré tel au deuxième procès s'il y avait été admis en preuve. Dans *Noël*, le but du ministère public d'incriminer l'accusé était indéniable. Pourtant, tant dans l'exemple du voleur de banque que dans l'affaire *Noël*, le témoignage antérieur n'était pas volontaire, et son utilisation soulevait par conséquent un grave problème non seulement au regard de l'analyse de l'art. 13 faite dans *Dubois* mais également au regard de l'al. 11*c*) de la *Charte* et du par. 5(2) de la *Loi sur la preuve au Canada*. (En l'espèce, il y a lieu de considérer la déposition d'un témoin contraignable comme un témoignage forcé même si le témoin n'a pas été assigné formellement.)

On peut voir dans *Kuldip* une tentative de la Cour de circonscrire la portée de l'arrêt *Mannion*, mais en voulant éviter de reconsidérer le raisonnement qu'elle avait suivi dans *Mannion*, la Cour a dû recourir à la distinction, parfois difficile à faire, entre l'objectif d'attaquer la crédibilité de l'accusé et l'objectif de l'incriminer. Bien que cette distinction soit bien établie en droit (p. ex. voir *R. c. Calder*, [1996] 1 R.C.S. 660, par. 25), son utilité pratique dans le contexte qui nous occupe est souvent remise en question. Ce qu'en a dit le juge Arthur Martin de la Cour d'appel de l'Ontario dans *Kuldip*, mérite d'être cité textuellement :

[TRADUCTION] J'estime en outre que même si le témoignage antérieur est visiblement utilisé dans le seul but d'attaquer la crédibilité, il n'en concourt pas moins à prouver les allégations du ministère public et, dans un sens large, il peut contribuer à établir la culpabilité.

cross-examination on the accused's prior testimony for the purpose of incriminating him and such cross-examination for the purpose of impeaching his credibility. If the court concludes on the basis of the accused's contradictory statements that he deliberately lied on a material matter, that lie could give rise to an inference of guilt. [p. 23]

Il est souvent difficile de faire la distinction entre un contre-interrogatoire portant sur le témoignage antérieur de l'accusé en vue de l'incriminer et le même genre de contre-interrogatoire en vue d'attaquer sa crédibilité. Le tribunal qui, à partir des déclarations contradictoires d'un accusé, conclut que ce dernier a menti sciemment sur un point important, pourrait en inférer qu'il est coupable. [p. 23]

In Martin J.A.'s view, successful invocation of s. 5(2) of the *Canada Evidence Act* ought to exclude the prior testimony of the witness for *any* purpose, including impeachment of credibility (p. 20). Arbour J., writing in *Noël* in the context of incriminating statements made by a current accused at the earlier trial of somebody else, agreed with this interpretation (paras. 31-33) except for her acceptance of *Kuldip* in the very limited case of statements innocuous when made at the first trial and still innocuous with respect to the issue of guilt at the second trial (paras. 30 and 45). This, she observed, is the only outcome consistent with the *quid pro quo* that "lies at the heart of s. 13" (para. 25), which should be interpreted in a manner "co-extensive with that of s. 5(2) of the *Canada Evidence Act*" (para. 34).

Suivant le juge Martin, lorsque la protection prévue au par. 5(2) de la *Loi sur la preuve au Canada* s'applique, le témoignage antérieur du témoin ne peut être utilisé à *quelque* fin *que ce soit*, même pas pour miner sa crédibilité (p. 20). Dans *Noël*, dans le contexte de déclarations incriminantes faites par l'accusé actuel au procès antérieur d'un tiers, la juge Arbour a souscrit à cette interprétation (par. 31-33), sauf dans un cas très limité où elle estime que *Kuldip* s'applique, soit celui des déclarations qui étaient inoffensives lorsqu'elles ont été faites au premier procès et qui le sont toujours lorsqu'il s'agit d'établir la culpabilité au deuxième procès (par. 30 et 45). Selon elle, seul ce résultat est compatible avec la contrepartie « qui constitue un élément essentiel de l'art. 13 » (par. 25), lequel doit être interprété comme ayant « la même portée que celle accordée au par. 5(2) de la *Loi sur la preuve au Canada* » (par. 34).

The controversial aspect of *Noël* lies in its *obiter* extending to an accused at a retrial on the same indictment the identical protection enjoyed by witnesses who are compelled to testify at the trial of somebody else (or in another "proceeding"), and who can therefore invoke both s. 13 of the *Charter* and s. 5(2) of the *Canada Evidence Act*. *Noël* decides that in both cases, the root of this protection lies "in the *quid pro quo*" (para. 22) under which as a matter of legislative policy, testimonial immunity at common law was exchanged in 1893 for a limited testimonial *use* immunity.

36 L'aspect controversé de l'arrêt *Noël* réside dans l'opinion incidente qui accorde à l'accusé subissant un nouveau procès pour la même accusation une protection identique à celle dont bénéficient les témoins qui sont contraints de témoigner au procès d'un tiers (ou dans une autre « procédure »), et qui peuvent par conséquent invoquer tant l'art. 13 de la *Charte* que le par. 5(2) de la *Loi sur la preuve au Canada*. Selon l'arrêt *Noël*, dans les deux cas, « il s'agit à l'origine d'une contrepartie » (par. 22) qui procède du choix fait par le législateur en 1893 de remplacer l'immunité testimoniale en common law par une immunité limitée touchant l'*utilisation* du témoignage.

Noël was subsequently applied by this Court in *Allen*. That too was a case of an accused being confronted with prior testimony he had given as a witness at the trial of somebody else for the same murder. The Newfoundland Court of Appeal,

37 Notre Cour a par la suite appliqué l'arrêt *Noël* dans l'affaire *Allen*, laquelle concernait elle aussi un accusé confronté à un témoignage antérieur donné au procès d'un tiers pour le même meurtre. La Cour d'appel de Terre-Neuve (le juge

O'Neill J.A. dissenting, found that the cross-examination was directed to credibility, and was therefore authorized by *Kuldip*: (2002), 208 Nfld. & P.E.I.R. 250, 2002 NFCA 2. Some of the prior compelled testimony used "to impeach" included statements that the accused had killed or thought he had killed the victim. In a brief judgment, this Court without much discussion applied *Noël* to find a s. 13 violation.

38 To recapitulate: *Dubois* was an attempt to compel testimony at a retrial; *Mannion* and *Kuldip* involved the use of prior voluntary testimony of an accused at the retrial; and *Noël* and *Allen*, were attempts by the Crown to use the compelled testimony of a witness at an earlier trial who had become the accused at the later trial. Despite this variation, in all of these cases except *Kuldip*, the prior testimony was excluded on the basis of s. 13 operating in combination with s. 11(*c*) of the *Charter* (and, in *Noël*, with s. 5(2) of the *Canada Evidence Act*). Clearly there has not been consistent adherence to the underlying purpose of s. 13, namely "to protect individuals from being indirectly compelled to incriminate themselves" (emphasis added) (*Dubois*, at p. 358; *Kuldip*, at p. 629; and *Noël*, at para. 21).

2. *Should the Court Reconsider Dubois?*

39 The Attorney General of Canada submits that the Court should overrule *Dubois* and hold that s. 13 has no application to a retrial. The rationale underlying *Dubois* for extending s. 13 protection to an accused in a retrial, however, was because when a "new" trial is ordered the accused is entitled not to testify at all. Thus, to allow the Crown simply to file the testimony of the accused given at the prior trial (now overturned) would permit the Crown indirectly to compel the accused to testify at the retrial where s. 11(*c*) of the *Charter* would not permit such compelled self-incrimination directly. The Crown must prove its case without

O'Neill était dissident) avait conclu que le contre-interrogatoire visait à attaquer la crédibilité et qu'il était donc autorisé en vertu de *Kuldip* : (2002), 208 Nfld. & P.E.I.R. 250, 2002 NFCA 2. Le témoignage forcé utilisé afin de « discréditer » le témoin comprenait notamment des déclarations dans lesquelles l'accusé disait avoir tué la victime ou penser l'avoir tuée. Dans un jugement succinct, notre Cour a appliqué l'arrêt *Noël*, sans procéder à une longue analyse, et elle a conclu qu'il y avait eu violation de l'art. 13.

Pour récapituler, *Dubois* portait sur une tentative de forcer un témoignage lors d'un nouveau procès; *Mannion* et *Kuldip* concernaient l'utilisation, lors d'un nouveau procès, du témoignage volontaire que l'accusé avait donné antérieurement; dans *Noël* et *Allen*, le ministère public a voulu utiliser contre l'accusé, lors de son procès, le témoignage forcé qu'il avait donné à titre de témoin dans un procès antérieur. En dépit de ces différences, dans tous les cas sauf *Kuldip*, le témoignage antérieur a été exclu sur le fondement de l'art. 13, appliqué en conjonction avec l'al. 11*c*) de la *Charte* (et, dans *Noël*, avec le par. 5(2) de la *Loi sur la preuve au Canada*). On constate à l'évidence que certaines décisions s'éloignent de l'objet fondamental de l'art. 13, qui consiste à « protéger les individus contre l'obligation indirecte de s'incriminer » (je souligne) (*Dubois*, p. 358; *Kuldip*, p. 629; et *Noël*, par. 21).

2. *La Cour devrait-elle reconsidérer l'arrêt Dubois?*

Le procureur général du Canada soutient que la Cour devrait revenir sur sa décision dans *Dubois* et déclarer que l'art. 13 ne s'applique pas à un nouveau procès. Toutefois, la raison fondamentale pour laquelle l'arrêt *Dubois* statue que la protection prévue à l'art. 13 s'étend à l'accusé qui subit un « nouveau » procès est le droit de l'accusé de ne pas témoigner du tout à son nouveau procès. Ainsi, en permettant au ministère public de déposer simplement le témoignage de l'accusé au procès antérieur (maintenant annulé), on lui permettrait de contraindre indirectement l'accusé à témoigner à son nouveau procès, alors que l'al. 11*c*) de la *Charte* lui

recruiting the accused to self-incriminate. As Lamer J. pointed out,

> the accused is being *conscripted* to help the Crown in discharging its burden of *a case to meet*, and is thereby denied his or her right to stand mute until a case has been made out. [Emphasis in original; p. 365.]

Dubois, to repeat, was an attempt to compel testimony. The result was correct and we should decline the invitation to revisit it.

3. *Should the Court Reconsider Mannion?*

While *Mannion* followed *Dubois* on the textual point that the words "other proceedings" in s. 13 include a retrial of the same accused on the same indictment, it did not ask the further question whether excluding cross-examination on the prior volunteered testimony would further the *purpose* of s. 13 identified in *Dubois*, namely "to protect individuals from being indirectly compelled to incriminate themselves" (p. 358 (emphasis added)). *Mannion* was under reserve at the same time as *Dubois* and, as stated, the Court seems to have concluded that the result in the latter dictated the outcome of the former.

In my view, the crux of the problem is this. In *Dubois*, the prosecution sought to pre-empt the right of the accused not to testify. The filing of the earlier testimony was compelled self-incrimination. In *Mannion*, there was no such compulsion. The accused freely testified at his first trial and freely testified at his second trial. The compulsion, which lies at the root of the *quid pro quo* which in turn lies at the root of s. 13, was missing. Experience in the 20 years since *Dubois* and *Mannion* were decided shows that taking our eye off the underlying purpose of s. 13 has given rise to a number of distinctions and sub-distinctions that in the end have proven unworkable. Indeed in *Noël*, as Fish J.A. pointed out when the case was

interdit de le forcer directement à s'auto-incriminer. Le ministère public doit faire sa preuve sans faire appel à l'accusé pour qu'il s'auto-incrimine. Comme le juge Lamer l'a fait remarquer,

> l'accusé serait alors *forcé* d'aider la poursuite à s'acquitter du fardeau de *présenter une preuve complète* et en conséquence privé de son droit de se taire jusqu'à ce que la preuve ait été faite. [En italique dans l'original; p. 365.]

L'affaire *Dubois*, je le répète, portait sur la tentative de forcer un témoignage. Cette décision est bien fondée, et la Cour devrait refuser de la reconsidérer. 40

3. *La Cour devrait-elle reconsidérer l'arrêt Mannion?*

Bien que l'arrêt *Mannion* ait suivi l'arrêt *Dubois* quant à savoir si les mots « autres procédures » à l'art. 13 comprennent le nouveau procès d'un même accusé pour la même accusation, il n'a pas poursuivi l'analyse et examiné la question de savoir si l'exclusion du contre-interrogatoire sur le témoignage antérieur donné volontairement permettrait de réaliser l'*objet* de l'art. 13 défini dans *Dubois*, c'est-à-dire de « protéger les individus contre l'obligation indirecte de s'incriminer » (p. 358 (je souligne)). L'affaire *Mannion* était en délibéré en même temps que l'affaire *Dubois* et, comme on l'a indiqué, la Cour semble avoir conclu que l'issue de cette dernière dictait celle de *Mannion*. 41

À mon avis, le nœud du problème est le suivant. Dans *Dubois*, le ministère public voulait agir d'une façon qui aurait empiété sur le droit de l'accusé de ne pas témoigner. Le dépôt du témoignage antérieur équivalait à une auto-incrimination forcée. Cette contrainte était absente dans l'affaire *Mannion*, où l'accusé avait choisi librement de témoigner à ses deux procès. La contrainte à l'origine de la contrepartie, qui constitue un élément essentiel de l'art. 13, n'existait pas. Ce qui s'est produit au cours des 20 années écoulées depuis les arrêts *Dubois* et *Mannion* démontre qu'en s'éloignant de l'objet fondamental de l'art. 13, on tend à établir des distinctions et sous-distinctions qui mènent à des impasses fonctionnelles. Ainsi, 42

before the Quebec Court of Appeal, the jury asked a question which clearly demonstrated their failure (or unwillingness) to grasp the distinction between use of prior statements for the impeachment of credibility and use of prior statements for the purpose of incrimination (see (2001), 156 C.C.C. (3d) 17, at paras. 169 and 173-74, and in this Court, at paras. 19-20).

43 In my respectful view, notwithstanding the strong Court that decided *Mannion* and the cases that followed it, we should hold that s. 13 is *not* available to an accused who chooses to testify at his or her retrial on the same indictment.

44 The Court's practice, of course, is against departing from its precedents unless there are compelling reasons to do so: *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 777-83; and *R. v. Robinson*, [1996] 1 S.C.R. 683, at paras. 16-46. Nevertheless, while rare, departures do occur. In *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, it was said that "[t]his Court has made it clear that constitutional decisions are not immutable, even in the absence of constitutional amendment" (p. 704), and in the *Charter* context the Court in *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, effectively overturned the result (if not the reasoning) in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, and *Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858. In the area of human rights, important reappraisals were made in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (overturning the reasoning in *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561), and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (overturning *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183). The Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection.

comme le juge Fish siégeant alors à la Cour d'appel du Québec l'a souligné dans *Noël*, le jury a posé une question indiquant indéniablement qu'il ne réussissait pas (ou n'était pas disposé) à saisir la distinction entre attaquer la crédibilité de l'accusé et l'incriminer (voir [2001] R.J.Q. 1464, par. 169 et 173-74, et les motifs de notre Cour, par. 19-20).

Je suis d'avis que, malgré l'arrêt unanime de la Cour dans *Mannion* et les arrêts qui ont suivi, il nous faut statuer qu'un accusé qui choisit de témoigner à son nouveau procès pour la même accusation *ne* peut *pas* se prévaloir de l'art. 13.

Naturellement, il n'est pas d'usage à la Cour de s'écarter des précédents à moins de raisons impérieuses : *R. c. Salituro*, [1991] 3 R.C.S. 654; *R. c. Chaulk*, [1990] 3 R.C.S. 1303; *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, p. 777-783; *R. c. Robinson*, [1996] 1 R.C.S. 683, par. 16-46. Néanmoins, il lui arrive effectivement de s'en écarter, même si elle le fait rarement. L'arrêt *Clark c. Compagnie des chemins de fer nationaux du Canada*, [1988] 2 R.C.S. 680, précise que la « Cour a affirmé clairement que les décisions constitutionnelles ne sont pas immuables et ce, même en l'absence d'une modification constitutionnelle » (p. 704) et, dans *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7, elle a effectivement écarté, dans le contexte de la *Charte*, le résultat auquel elle était parvenue (sinon son raisonnement) dans *Kindler c. Canada (Ministre de la Justice)*, [1991] 2 R.C.S. 779, et *Renvoi relatif à l'extradition de Ng (Can.)*, [1991] 2 R.C.S. 858. D'importantes réévaluations ont été faites dans le domaine des droits de la personne, notamment dans *Central Alberta Dairy Pool c. Alberta (Human Rights Commission)*, [1990] 2 R.C.S. 489 (rejetant le raisonnement adopté dans *Bhinder c. Compagnie des chemins de fer nationaux du Canada*, [1985] 2 R.C.S. 561), et *Brooks c. Canada Safeway Ltd.*, [1989] 1 R.C.S. 1219 (rejetant *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183). Cependant, la Cour doit se montrer particulièrement prudente avant d'écarter un précédent lorsque ce revirement a pour effet d'affaiblir une protection offerte par la *Charte*.

I believe there are compelling reasons for declining to follow *Mannion*. The first, as discussed earlier, is that *Mannion* did not adopt an interpretation in line with the purpose of s. 13 spelled out in *Dubois*. Although *Dubois* had said that no distinction should be drawn between testimony that had been compelled or voluntary at the first trial, that comment was made in the context of an attempt to compel testimony at the second trial. The second reason is that the consequences of failing to return to the purpose of s. 13 have only emerged over time as the courts have struggled to work with the distinction between impeachment of credibility and incrimination in ways that, as the appellants' invocation of *Noël* illustrates in the present case, become "unduly and unnecessarily complex and technical": *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 859. In *Noël*, it will be recalled, the Court identified permissible cross-examination by reference to testimony "innocuous" when made at the initial trial and "innocuous" when used at the retrial, opening up consideration of various combinations and permutations of statements innocuous/incriminating, incriminating/innocuous and incriminating/incriminating, an exercise in classification that when argued on a question by question basis can become both protracted and somewhat unpredictable, as an examination of the questions at issue in the present appeal illustrates.

Je crois qu'il existe des raisons impérieuses de ne pas suivre l'arrêt *Mannion*. Premièrement, je le répète, l'interprétation retenue dans *Mannion* n'était pas conforme à l'objet de l'art. 13 défini dans *Dubois*. Bien que la Cour ait indiqué, dans *Dubois*, qu'il n'y avait pas lieu de distinguer les témoignages selon qu'ils étaient forcés ou volontaires au premier procès, elle a fait ce commentaire dans le contexte d'une tentative de forcer un témoignage au second procès. Deuxièmement, les conséquences du défaut de se reporter à l'objet de l'art. 13 se sont manifestées graduellement, au fur et à mesure que les tribunaux ont essayé de trouver tant bien que mal des façons d'appliquer la distinction entre attaquer la crédibilité de l'accusé et l'incriminer qui, comme le démontre l'utilisation de *Noël* faite par les appelants en l'espèce, sont devenues « inutilement et indûment complexe[s] et formaliste[s] » : *R. c. Bernard*, [1988] 2 R.C.S. 833, p. 859. On se rappellera que, dans *Noël*, la Cour a déterminé quels contre-interrogatoires étaient permis en faisant référence au témoignage qui est « inoffensif » au procès initial et demeure « inoffensif » au moment où il est utilisé lors du nouveau procès, ouvrant ainsi la porte à l'examen de diverses combinaisons et permutations de déclarations inoffensives/incriminantes, incriminantes/inoffensives et incriminantes/incriminantes, un exercice de classification qui, s'il est exécuté individuellement pour chaque question, peut durer longtemps et donner un résultat imprévisible, comme le révèle l'examen des questions en litige en l'espèce.

The third reason, and I think the most important, is that the insistence that s. 13 has the same application in a retrial of the same accused on the same indictment as it does in a trial where the accused was formerly not an accused but a compellable witness has led to an unfair dilution of the s. 13 protection in the latter situation. Thus in the bank robbery example in *Kuldip*, the compelled testimony given as a witness at somebody else's trial would virtually guarantee the bank robber's conviction in his own subsequent prosecution. This is contrary to sound principle. Even though the bank robber was a compelled witness who had given *quid pro quo* testimony (as in *Noël*) at somebody else's trial, he would receive no greater or lesser protection than

Enfin, la troisième raison — et, à mon avis, la plus importante — est qu'en soutenant que l'art. 13 s'applique de la même façon qu'il s'agisse du deuxième procès d'un même accusé pour la même infraction ou du procès d'un accusé qui n'était qu'un témoin contraignable dans l'instance antérieure, on a indûment affaibli la protection offerte par l'art. 13 dans cette deuxième situation. Ainsi, dans l'exemple du voleur de banque évoqué dans *Kuldip*, la déposition forcée qu'il a faite en qualité de témoin au procès d'un tiers lui vaudrait presque inévitablement d'être déclaré coupable lors de son propre procès. Ce résultat serait contraire à des principes judicieux. Même si le voleur de banque a été contraint de témoigner au procès d'un tiers,

an accused who had been under no such compulsion at the earlier trial (*Kuldip* and *Mannion*). The attempt to subject these very different situations to the same constitutional rule results in the end in a satisfactory solution for neither.

47 In *Noël*, the Court saw the unfairness of putting *compelled* testimony to the accused and held that the Crown would be permitted to cross-examine an accused on prior testimony only

> when there is no possibility that the jury could use the content of the prior testimony to draw an inference of guilt, except to the limited extent that a finding that the accused has been untruthful under oath could be damaging to his defence. [Emphasis added; para. 54.]

The "no possibility" test significantly raises the bar set in *Kuldip*, yet one can readily see the need for such a stringent test on the facts of *Noël*, where the prior statements were made by a compelled witness who had invoked s. 5(2) of the *Canada Evidence Act*. However, the stringency of the "no possibility" test in *Noël* does not provide a satisfactory resolution in the case of a retrial of the accused who volunteers testimony at both trials and then seeks to shelter self-serving inconsistencies behind a *Charter* barrier. While the appellants argue (with some justification) that such an immunity flows from the *Mannion* line of cases, such a result is completely inconsistent with a purposive reading of s. 13. For these reasons, I believe *Mannion* should not be followed. Accused persons who testify at their first trial and then volunteer inconsistent testimony at the retrial on the same charge are in no need of protection "from being indirectly compelled to incriminate themselves" in any relevant sense of the word, and s. 13 protection should not be available to them.

fournissant ainsi sa contrepartie (comme dans *Noël*), la protection dont il bénéficierait ne serait pas différente de celle accordée à un accusé qui n'aurait pas fait l'objet d'une telle contrainte lors du procès antérieur (*Kuldip* et *Mannion*). En voulant appliquer la même règle constitutionnelle à ces situations très différentes, on aboutit à un résultat insatisfaisant dans les deux cas.

Dans *Noël*, la Cour a reconnu qu'il serait contraire à l'équité de confronter un accusé à son témoignage *forcé*, et elle a statué que le ministère public ne serait être autorisé à contre-interroger un accusé sur un témoignage antérieur que

> lorsqu'il est impossible que le jury puisse utiliser le contenu du témoignage antérieur pour inférer la culpabilité de l'accusé, sauf dans la mesure où la constatation que l'accusé a menti sous serment pourrait nuire à sa défense. [Je souligne; par. 54.]

Le critère de l'« impossibilité » est nettement plus exigeant que celui énoncé dans *Kuldip*, mais la nécessité d'un critère aussi rigoureux est facile à constater si l'on se reporte à l'affaire *Noël*, où les déclarations antérieures avaient été faites par un témoin forcé qui avait invoqué le par. 5(2) de la *Loi sur la preuve au Canada*. Toutefois, la rigueur du critère de l'« impossibilité » énoncé dans *Noël* ne donne pas un résultat satisfaisant lorsqu'un accusé témoigne volontairement à ses deux procès et tente ensuite de protéger ses déclarations incompatibles intéressées en invoquant la *Charte*. Bien que les appelants avancent l'argument (justifié dans une certaine mesure) qu'une telle immunité découle des arrêts rendus dans la lignée de *Mannion*, ce résultat est totalement incompatible avec une interprétation téléologique de l'art. 13. J'estime, pour ces raisons, qu'il n'y a pas lieu de suivre l'arrêt *Mannion*. Les accusés qui, sans y être contraints, décident de témoigner à leur nouveau procès pour y faire des déclarations incompatibles avec celles qu'ils ont faites volontairement à leur premier procès relativement à la même accusation n'ont pas besoin d'être protégés « contre l'obligation indirecte de s'incriminer », quel que soit le sens attribué à ce mot, et ils ne devraient pas bénéficier de la protection de l'art. 13.

4. *Should the Court Reconsider Kuldip?*

Insofar as *Kuldip* permitted cross-examination of the accused on the inconsistent testimony he volunteered at his first trial, *Kuldip* should, of course, be affirmed. However, insofar as the Court felt compelled by *Mannion* to narrow the purpose of the cross-examination to the impeachment of credibility, and to deny the probative effect of the answers on the issue of guilt or innocence, it seems to me our decision today not to follow *Mannion* renders such restrictions no longer operative. If the contradiction reasonably gives rise to an inference of guilt, s. 13 of the *Charter* does not preclude the trier of fact from drawing the common sense inference.

5. *Should the Court Reconsider Noël?*

Noël is a classic example of prosecutorial abuse of the very "bargain" s. 13 was designed to enforce. Noël was not on trial at the time he gave the testimony subsequently relied upon by the Crown. He was a compellable witness who at common law could have refused to answer the Crown's questions that tended to show his guilt. He was compelled by s. 5(1) of the *Canada Evidence Act* to answer the incriminating questions, and in consequence he invoked the protection of s. 5(2). When s. 5(2) says "the answer so given shall not be used or admissible in evidence", it means not to be used for *any* purpose, including the impeachment of credibility. We should affirm the correctness of the result in *Noël* on its facts.

I would go further. Even though s. 13 talks of precluding the use of prior evidence "to incriminate that witness", and thus implicitly leaves the door open to its use for purposes other than incrimination such as impeachment of credibility (as *Kuldip* accepted), experience has demonstrated the difficulty in practice of working with that distinction. If, as *Noël* held, and as Arthur Martin J.A.

4. *La Cour devrait-elle reconsidérer l'arrêt Kuldip?*

48 L'arrêt *Kuldip* devrait bien sûr être confirmé, dans la mesure où il permet le contre-interrogatoire d'un accusé sur les déclarations incompatibles qu'il a faites volontairement à son premier procès. Toutefois, comme la Cour s'est sentie obligée, par l'arrêt *Mannion*, de limiter le but du contre-interrogatoire à une attaque de la crédibilité et de nier aux réponses tout effet probant relativement à la culpabilité ou à l'innocence, je crois que la présente décision de ne pas suivre l'arrêt *Mannion* a rendu ces restrictions inopérantes. Si les contradictions permettent raisonnablement d'inférer la culpabilité, l'art. 13 de la *Charte* n'empêche pas le juge des faits de tirer des conclusions fondées sur le bon sens.

5. *La Cour devrait-elle reconsidérer l'arrêt Noël?*

49 L'affaire *Noël* est l'exemple classique du non-respect par la poursuite du « marché » même auquel l'art. 13 vise à donner effet. M. Noël ne subissait pas son propre procès lorsqu'il a fait le témoignage que le ministère public a voulu utiliser par la suite. Il était un témoin contraignable qui, suivant la common law, aurait pu refuser de répondre aux questions de la poursuite qui tendaient à l'incriminer. Le paragraphe 5(1) de la *Loi sur la preuve au Canada* l'obligeant à répondre aux questions incriminantes, il s'est prévalu de la protection prévue au par. 5(2). Le libellé du par. 5(2) selon lequel la réponse d'un témoin « ne peut être invoquée et n'est pas admissible en preuve » signifie qu'elle ne peut être invoquée à *quelque* fin *que ce soit*, même pas pour attaquer sa crédibilité. Nous devons confirmer la validité de l'arrêt *Noël*, compte tenu des faits en cause.

50 J'irais plus loin. Bien que l'art. 13 dispose que le témoignage antérieur d'une personne ne peut être « utilisé pour l'incriminer », et qu'il laisse ainsi implicitement subsister la possibilité de l'utiliser à une autre fin que pour l'incriminer, par exemple pour attaquer sa crédibilité (comme l'a reconnu l'arrêt *Kuldip*), l'expérience a démontré qu'il était difficile d'appliquer cette distinction en pratique.

observed in *Kuldip*, the distinction is unrealistic in the context of s. 5(2) of the *Canada Evidence Act*, it must equally be unrealistic in the context of s. 13 of the *Charter*. Accordingly, by parity of reasoning, I conclude that the prior *compelled* evidence should, under s. 13 as under s. 5(2), be treated as inadmissible in evidence against the accused, even for the ostensible purpose of challenging his or her credibility, and be restricted (in the words of s. 13 itself) to "a prosecution for perjury or for the giving of contradictory evidence".

Si, comme l'a statué l'arrêt *Noël* et l'a fait remarquer le juge Arthur Martin dans *Kuldip*, cette distinction est irréaliste dans le contexte du par. 5(2) de la *Loi sur la preuve au Canada*, elle doit aussi l'être dans le contexte de l'art. 13 de la *Charte*. Par souci de cohérence, je conclus donc que le témoignage antérieur *forcé* doit être considéré, tant sous le régime de l'art. 13 de la *Charte* que sous celui du par. 5(2) de la *Loi sur la preuve au Canada*, comme inadmissible en preuve contre l'accusé, même dans le but manifeste d'attaquer sa crédibilité, et que son utilisation doit se limiter, selon les termes mêmes de l'art. 13, aux « poursuites pour parjure ou pour témoignages contradictoires ».

6. *Should the Court Reconsider Allen?*

6. *La Cour devrait-elle reconsidérer l'arrêt Allen?*

51 *Allen* was a straightforward application of *Noël* to an accused who was confronted with prior compelled testimony given at the trial of somebody else. He had given his *quid pro quo*. The decision was correct.

L'affaire *Allen* est un cas d'application pure et simple de l'arrêt *Noël* à un accusé confronté à des déclarations antérieures qu'il avait faites à titre de témoin contraignable au procès d'un tiers. Il avait fourni sa contrepartie. Cette décision est correcte.

7. *The Significance of Obiter Dicta in Noël*

7. *La portée des remarques incidentes exprimées dans Noël*

52 The Attorney General of Ontario, in particular, argued more strenuously about some of the *obiter* commentary in *Noël* than about its actual result, such as Arbour J.'s suggestion that circumstances enabling a *Kuldip* type cross-examination might be "rare" (para. 60). The Attorney General worries that this sort of *obiter* will be seen as binding on trial courts. I do not think this "concern" is plausible. The comment was neither part of the legal analysis nor a direction to trial courts. It was simply an observation by an experienced judge. More significantly, the respondent and the intervening attorneys general contend that everything said in *Noël* about the application of s. 13 to an accused in a retrial on the same charge is *obiter*. While I agree that every judgment has to be read in light of the facts the Court was dealing with, and that *Noël* was emphatically not a case of a retrial of the same accused on the same indictment, nevertheless I believe the submissions of the attorneys general presuppose a strict and tidy demarcation between

Le procureur général de l'Ontario, en particulier, a fait valoir son point de vue sur certaines remarques incidentes exprimées dans *Noël* avec plus d'énergie que sur les principes effectivement établis par cette décision, notamment en ce qui concerne l'observation de la juge Arbour selon laquelle les circonstances où le contre-interrogatoire sera permis conformément à *Kuldip* seront « rares » (par. 60). Le procureur général craint que les tribunaux de première instance se sentent liés par ce genre de remarques. Cette « crainte » n'est pas plausible selon moi. Ce commentaire ne faisait nullement partie de l'analyse juridique et ne constituait aucunement une directive à l'intention des tribunaux de première instance. Il s'agissait simplement d'une observation émanant d'une juge expérimentée. Ce qui est plus important, l'intimée et les procureurs généraux intervenants soutiennent que tout ce qui est dit dans *Noël* au sujet de l'application de l'art. 13 au nouveau procès d'un accusé pour la même accusation n'a que valeur

the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which they say may safely be ignored. I believe that this supposed dichotomy is an oversimplification of how the common law develops.

de remarque incidente. Bien que je convienne qu'il faille interpréter chaque décision en fonction des faits en cause et que l'affaire *Noël* ne mettait absolument pas en cause le nouveau procès d'un accusé pour la même accusation, je suis d'avis que l'affirmation des procureurs généraux présuppose qu'il existe une ligne de démarcation très nette entre la *ratio decidendi* bien circonscrite d'une affaire, qui a force contraignante, et les remarques incidentes, dont on peut, selon eux, faire abstraction sans danger. À mon avis, cette prétendue dichotomie procède d'une simplification à outrance du mode évolutif de la common law.

The traditional view expressed by the Earl of Halsbury L.C. was that "a case is only an authority for what it actually decides", and that

Selon l'opinion classique exprimée par le comte Halsbury, lord chancelier, [TRADUCTION] « une décision ne fait autorité qu'à l'égard des questions qu'elle tranche effectivement », et

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> every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

> [TRADUCTION] chaque jugement doit être interprété tel qu'il s'applique aux faits particuliers qui ont été établis, ou que l'on présume avoir été établis, car la plupart des énoncés qui y figurent ne se veulent pas des exposés de l'ensemble du droit, mais sont régis et nuancés par les faits particuliers de l'affaire dans laquelle ils se trouvent.

(*Quinn v. Leathem*, [1901] A.C. 495 (H.L.), at p. 506)

(*Quinn c. Leathem*, [1901] A.C. 495 (H.L.), p. 506)

The caution was important at the time, of course, because the House of Lords did not then claim the authority to review and overrule its own precedents. This is no longer the case. Even in the time of the Earl of Halsbury L.C., however, the challenge was to know how broadly or how narrowly to draw "what it actually decides" (p. 506). In Canada in the 1970s, the challenge became more acute when this Court's mandate became oriented less to error correction and more to development of the jurisprudence (or, as it is put in s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to deal with questions of "public importance"). The amendments to the *Supreme Court Act* had two effects relevant to this question. Firstly, the Court took fewer appeals, thus accepting fewer opportunities to discuss a particular area of the law, and some judges felt that "we should make the most of the opportunity by adopting a more expansive approach to our

Naturellement, cette mise en garde était importante à l'époque, parce que la Chambre des Lords ne se prétendait pas alors autorisée à réviser et à écarter ses propres décisions. Ce n'est plus le cas aujourd'hui. Toutefois, même à l'époque du comte Halsbury, la difficulté consistait à ne pas circonscrire trop largement ni trop étroitement les [TRADUCTION] « questions [que la décision] tranche effectivement » (p. 506). Dans les années 1970, au Canada, cette difficulté s'est accrue avec la réorientation de la mission de notre Cour, qui consiste désormais moins à corriger les erreurs et davantage à développer la jurisprudence (ou à analyser des questions ayant de « l'importance [. . .] pour le public », aux termes du par. 40(1) de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26). Les modifications apportées à la *Loi sur la Cour suprême* ont eu deux effets pertinents pour la question qui nous occupe. Premièrement, la Cour a autorisé moins

decision-making role": B. Wilson, "Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227, at p. 234. Secondly, and more importantly, much of the Court's work (particularly under the *Charter*) required the development of a general analytical framework which necessarily went beyond what was essential for the disposition of the particular case. In those circumstances, the Court nevertheless intended that effect be given to the broader analysis. In *R. v. Oakes*, [1986] 1 S.C.R. 103, for example, Dickson C.J. laid out a broad purposive analysis of s. 1 of the *Charter*, but the dispositive point was his conclusion that there was no rational connection between the basic fact of possession of narcotics and the legislated presumption that the possession was for the purpose of trafficking. Yet the entire approach to s. 1 was intended to be, and has been regarded as, binding on other Canadian courts. It would be a foolhardy advocate who dismissed Dickson C.J.'s classic formulation of proportionality in *Oakes* as mere *obiter*. Thus if we were to ask "what *Oakes* actually decides", we would likely offer a more expansive definition in the post-*Charter* period than the Earl of Halsbury L.C. would have recognized a century ago.

54 From time to time there have been statements of some members of this Court that have been taken to suggest that other courts are bound by this Court's considered ruling on a point of law, even a point not strictly necessary to the conclusion. Most famously, in *Sellars v. The Queen*, [1980] 1 S.C.R. 527, at p. 529, Chouinard J. resolved an issue respecting jury instructions by reference to an earlier decision of this Court and said:

de pourvois, se donnant ainsi moins de possibilités d'examiner un point de droit particulier, et certains juges ont estimé qu'il fallait [TRADUCTION] « tirer le plus grand parti possible de l'occasion offerte, en abordant notre fonction décisionnelle dans une perspective plus large » : B. Wilson, « Decision-making in the Supreme Court » (1986), 36 *U.T.L.J.* 227, p. 234. Deuxièmement, et ce qui est plus important, la Cour a dû, dans bon nombre de dossiers (en particulier, ceux concernant la *Charte*), élaborer un cadre général d'analyse qui débordait nécessairement le strict minimum requis pour trancher le pourvoi. En pareil cas, la Cour voulait néanmoins conférer une certaine force contraignante à ce cadre général. Ainsi, le juge en chef Dickson, dans *R. c. Oakes*, [1986] 1 R.C.S. 103, a établi une méthode d'analyse téléologique générale pour l'application de l'article premier de la *Charte*, alors que le dispositif proprement dit de cet arrêt statuait qu'il n'existait aucun lien rationnel entre le simple fait d'avoir des stupéfiants en sa possession et la présomption légale que cette possession avait pour but d'en faire le trafic. Cependant, l'ensemble de la démarche décrite pour l'application de l'article premier était censée lier les autres tribunaux canadiens, et a effectivement été perçue ainsi. Il faudrait être bien téméraire aujourd'hui pour prétendre que l'énoncé classique du juge en chef Dickson sur la proportionnalité, dans l'arrêt *Oakes*, n'est qu'une remarque incidente. C'est pourquoi si l'on se demande quelles « questions l'arrêt *Oakes* tranche effectivement », on arrivera probablement à une définition plus large depuis l'entrée en vigueur de la *Charte* que celle que le comte Halsbury aurait formulée un siècle auparavant.

Certaines observations faites par des juges de notre Cour ont été interprétées, à l'occasion, comme signifiant que les autres tribunaux sont liés par l'opinion que la Cour exprime sur un point de droit après l'avoir examiné attentivement, même lorsqu'il n'était pas nécessaire qu'elle l'examine pour rendre jugement. Citons en exemple l'arrêt *Sellars c. La Reine*, [1980] 1 R.C.S. 527, l'un des cas les plus notoires, où le juge Chouinard tranche une question concernant les directives au jury en se reportant à un arrêt antérieur de la Cour et dit, à la p. 529 :

. . . this is the interpretation that must prevail.

As it does from time to time, the Court has thus ruled on the point, although it was not absolutely necessary to do so in order to dispose of the appeal.

This statement was perfectly understandable in context. So far as Chouinard J. was concerned, the Court of which he was a member had ruled on the point, and he proposed to be consistent and follow it. However, the "*Sellars* principle", as it came to be known, was thought by some observers to stand for the proposition that whatever was said in a majority judgment of the Supreme Court of Canada was binding, no matter how incidental to the main point of the case or how far it was removed from the dispositive facts and principles of law; for varying views see, e.g., *Re Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association* (1981), 120 D.L.R. (3d) 101 (Ont. C.A.); *R. v. Sansregret*, [1984] 1 W.W.R. 720 (Man. C.A.); *R. v. Barrow* (1984), 65 N.S.R. (2d) 1 (S.C.); *Clark v. Canadian National Railway Co.* (1985), 17 D.L.R. (4th) 58 (N.B.C.A.); *Scarff v. Wilson* (1988), 33 B.C.L.R. (2d) 290 (C.A.); *Moses v. Shore Board Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.); *Friedmann Equity Developments Inc. v. Final Note Ltd.* (1998), 41 O.R. (3d) 712 (C.A.); *Cardella v. Minister of National Revenue* (2001), 268 N.R. 168, 2001 FCA 39. Other cases are more critical: *R. v. Chartrand* (1992), 74 C.C.C. (3d) 409 (Man. C.A.); *R. v. Hynes* (1999), 26 C.R. (5th) 1 (Nfld. C.A.); *R. v. Vu* (2004), 184 C.C.C. (3d) 545, 2004 BCCA 230; *McDiarmid Lumber Ltd. v. God's Lake First Nation* (2005), 251 D.L.R. (4th) 93, 2005 MBCA 22.

Some of these comments simply reflect the practical consideration that disregarding the majority view of this Court on a point of law, even if it was not strictly necessary for the disposition of the case in which it was expressed, may just precipitate a successful appeal. Other comments suggested that the "*Sellars* principle" had ripened into a new doctrine of law. This extension was challenged in "*Ratio Decidendi* and *Obiter Dicta*" (1993), 51 *Advocate (B.C.)* 689, by the Honourable Douglas Lambert, writing extra-judicially, who canvassed the case law and concluded that at least

. . . telle est l'interprétation qui prévaut.

La Cour, comme elle le fait à l'occasion, s'est ainsi prononcée sur la question, même s'il n'était pas indispensable de le faire pour disposer du pourvoi.

55 Cet énoncé était bien compréhensible dans son contexte. Pour le juge Chouinard, l'instance décisionnelle dont il faisait partie avait statué sur la question, et il entendait faire preuve de cohérence et appliquer la règle. Toutefois, certains observateurs ont considéré que le « principe *Sellars* », comme on a fini par l'appeler, voulait que chaque observation figurant dans les motifs des juges majoritaires, si accessoire soit-elle par rapport à la question principale et si éloignée soit-elle des faits et principes de droit déterminants, avait force contraignante; pour différents points de vue, voir, p. ex., *Re Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association* (1981), 120 D.L.R. (3d) 101 (C.A. Ont.); *R. c. Sansregret*, [1984] 1 W.W.R. 720 (C.A. Man.); *R. c. Barrow* (1984), 65 N.S.R. (2d) 1 (C.S.); *Clark c. Canadian National Railway Co.* (1985), 17 D.L.R. (4th) 58 (C.A.N.-B.); *Scarff c. Wilson* (1988), 33 B.C.L.R. (2d) 290 (C.A.); *Moses c. Shore Board Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (C.A.C.-B.); *Friedmann Equity Developments Inc. c. Final Note Ltd.* (1998), 41 O.R. (3d) 712 (C.A.); *Cardella c. Canada*, [2001] A.C.F. nº 322 (QL), 2001 CAF 39. D'autres décisions sont plus critiques : *R. c. Chartrand* (1992), 74 C.C.C. (3d) 409 (C.A. Man.); *R. c. Hynes* (1999), 26 C.R. (5th) 1 (C.A.T.-N.); *R. c. Vu* (2004), 184 C.C.C. (3d) 545, 2004 BCCA 230; *McDiarmid Lumber Ltd. c. God's Lake First Nation* (2005), 251 D.L.R. (4th) 93, 2005 MBCA 22.

56 Certains de ces commentaires expriment simplement le point de vue pragmatique voulant que faire abstraction d'une opinion majoritaire de la Cour sur un point de droit, même non essentiel à l'arrêt, risque de se traduire par une infirmation en appel. D'autres laissent entendre que le « principe *Sellars* » a accédé au rang de nouvelle règle de droit, ce que nie le juge Douglas Lambert dans l'article « *Ratio Decidendi* and *Obiter Dicta* » (1993), 51 *Advocate (B.C.)* 689. Il y passe en revue la jurisprudence et conclut que la confusion est attribuable en partie, du moins, à une erreur dans la traduction

some of the confusion was due to an error translating Chouinard J.'s opinion from French to English as well as by an overstatement by the writer of the English headnote in *Sellars* itself. More recently, Professor M. Devinat, in "L'Autorité des obiter dicta de la Cour suprême" (1998), 77 *Can. Bar Rev.* 1, suggested that some courts were only too willing to broaden the scope of the "*Sellars* principle" to lighten their own workload by minimizing what remained for them to decide. If Professor Devinat is correct, the effect would be to deprive the legal system of much creative thought on the part of counsel and judges in other courts in continuing to examine the operation of legal principles in different and perhaps novel contexts, and to inhibit or skew the growth of the common law. This would be a consequence totally unforeseen and unintended by the Court that decided *Sellars*. Thus the notion of "binding effect" as a matter of law was disavowed by this Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 168, for example, where Lamer C.J., writing for six members of the seven-judge panel said that "the remarks of Le Dain J. [writing for the Court in *Valente v. The Queen*, [1985] 2 S.C.R. 673] were strictly *obiter dicta*, and do not bind the courts below".

57 The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its

de l'opinion du juge Chouinard du français à l'anglais et à une exagération de la part de l'auteur de la version anglaise du sommaire de l'arrêt *Sellars* lui-même. Plus récemment, dans « L'Autorité des obiter dicta de la Cour suprême » (1998), 77 *R. du B. can.* 1, le professeur M. Devinat a exprimé l'avis que certains tribunaux n'étaient que trop heureux d'élargir la portée du « principe *Sellars* » pour alléger leur charge de travail en minimisant ce qu'il leur restait à décider. Si le professeur Devinat a raison, ce phénomène aurait pour effet de priver le système de justice d'un important apport créateur de la part des avocats et des juges d'autres tribunaux constamment appelés à examiner l'application des principes juridiques dans des contextes différents et peut-être inédits, et de freiner ou de fausser l'évolution de la common law. Or, les juges qui ont rendu l'arrêt *Sellars* n'ont absolument pas voulu ni prévu cette conséquence. Par conséquent, notre Cour a rejeté la notion d'effet juridiquement contraignant, par exemple, dans le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, où le juge en chef Lamer, s'exprimant au nom de six des sept juges de la formation, a écrit au par. 168 : « les remarques du juge Le Dain [qui a rédigé le jugement de la Cour dans *Valente c. La Reine*, [1985] 2 R.C.S. 673] étaient strictement une opinion incidente, qui ne lie pas les juridictions inférieures ».

Pour reprendre la formulation du comte Halsbury, il faut se demander chaque fois quelles questions ont été effectivement tranchées. Au-delà de la *ratio decidendi* qui est généralement ancrée dans les faits, comme l'a signalé le comte Halsbury, le point de droit tranché par la Cour peut être aussi étroit que la directive au jury en cause dans *Sellars* ou aussi large que le test établi par l'arrêt *Oakes*. Les remarques incidentes n'ont pas et ne sont pas censées avoir toutes la même importance. Leur poids diminue lorsqu'elles s'éloignent de la stricte *ratio decidendi* pour s'inscrire dans un cadre d'analyse plus large dont le but est manifestement de fournir des balises et qui devrait être accepté comme faisant autorité. Au-delà, il s'agira de commentaires, d'exemples ou d'exposés qui se veulent utiles et peuvent être jugés convaincants, mais qui ne sont certainement pas « contraignants » comme le

growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

voudrait le principe *Sellars* dans son expression la plus extrême. L'objectif est de contribuer à la certitude du droit, non de freiner son évolution et sa créativité. La thèse voulant que chaque énoncé d'un jugement de la Cour soit traité comme s'il s'agissait d'un texte de loi n'est pas étayée par la jurisprudence et va à l'encontre du principe fondamental de l'évolution de la common law au gré des situations qui surviennent.

These propositions may be illustrated by *Noël* itself. At paragraph 36 and following, Arbour J. summarizes aspects of the jurisprudence under s. 5(2) of the *Canada Evidence Act*, including points not necessary to the *Noël* judgment itself. The discussion, while *obiter*, is (as the saying goes) learned *obiter*, and would quite properly be regarded in future cases as an authoritative summary. On the other hand, the "rare circumstances" comment that bothered the Attorney General of Ontario was not part of the analysis, and should not be taken as imposing a rule or norm or even a statistical hurdle limiting other courts. 58

L'arrêt *Noël* lui-même peut servir d'illustration à cet égard. Aux paragraphes 36 et suiv., la juge Arbour résume certains points de la jurisprudence relative au par. 5(2) de la *Loi sur la preuve au Canada*, dont des points non essentiels pour la décision à rendre dans *Noël*. Cet examen, même s'il s'agit d'une remarque incidente, est ce qu'on peut appeler une analyse savante, et il pourrait fort bien être considéré dans des dossiers ultérieurs comme un résumé qui fait autorité. Par contre, la remarque quant aux « rares circonstances » qui inquiétait le procureur général de l'Ontario ne faisait pas partie de l'analyse et ne doit pas être perçue comme imposant une règle, une norme ou même un obstacle statistique qui limite la marge de manœuvre des autres tribunaux.

It is neither desirable nor practical to go through *Dubois*, *Mannion*, *Kuldip* and *Noël* to identify which of the *obiter* statements urged upon us by counsel at the hearing of this appeal should be regarded as authoritative. The present reasons endeavour to re-establish the core concept stated in *Dubois* that "the purpose of s. 13, when the section is viewed in the context of s. 11(*c*) and (*d*), is to protect individuals from being indirectly compelled to incriminate themselves" (p. 358). To the extent statements in the other cases are inconsistent with the rationale of compulsion (the "*quid pro quo*"), they should no longer be regarded as authoritative. 59

Il ne serait ni utile ni souhaitable de passer au crible les arrêts *Dubois*, *Mannion*, *Kuldip* et *Noël* pour déterminer, parmi les remarques incidentes invoquées par les avocats à l'audition du pourvoi, celles qui devraient être considérées comme faisant autorité. Les présents motifs veulent rétablir le concept fondamental formulé dans *Dubois*, selon lequel « l'objet de l'art. 13, lorsqu'il est interprété dans le contexte des al. 11*c*) et *d*), est de protéger les individus contre l'obligation indirecte de s'incriminer » (p. 358). Dans la mesure où les énoncés figurant dans les autres arrêts sont incompatibles avec la justification de la contrainte (la contrepartie), ils ne devraient plus être considérés comme faisant autorité.

IV. Conclusion

IV. Conclusion

The result of a purposeful interpretation of s. 13 is that an accused will lose the *Mannion* advantage in relation to prior *volunteered* testimony but his or 60

Selon une interprétation téléologique de l'art. 13, l'accusé perdra l'avantage que lui conférait l'arrêt *Mannion* relativement à son témoignage antérieur

her protection against the use of prior *compelled* testimony will be strengthened. The two different situations will be treated differently instead of homogenized, and the unpredictability inherent in sorting out attacks on credibility from attempts at incrimination will be avoided.

61 For the foregoing reasons, I conclude that the s. 13 *Charter* rights of the appellants (who were volunteers at both trials) were not violated by the Crown's cross-examination. Their appeals must therefore be dismissed.

Appeals dismissed.

Solicitors for the appellant Henry: J. M. Brian Coleman and Lisa Sturgess, Vancouver.

Solicitor for the appellant Riley: Gil D. McKinnon, Vancouver.

Solicitor for the respondent: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

volontaire, mais sa protection contre l'utilisation de ses témoignages antérieurs *forcés* sera renforcée. Ces deux situations différentes ne seront pas assimilées, mais traitées différemment, et l'imprévisibilité inhérente à la distinction entre attaquer la crédibilité de quelqu'un et tenter de l'incriminer sera éliminée.

Pour ces motifs, je conclus que le contre-interrogatoire mené par le ministère public n'a pas porté atteinte aux droits que l'art. 13 de la *Charte* garantit aux appelants — qui ont témoigné volontairement à leurs deux procès. Je suis donc d'avis que leurs pourvois doivent être rejetés.

Pourvois rejetés.

Procureurs de l'appelant Henry : J. M. Brian Coleman et Lisa Sturgess, Vancouver.

Procureur de l'appelant Riley : Gil D. McKinnon, Vancouver.

Procureur de l'intimée : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Michael Garfield Lyttle *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* LYTTLE

Neutral citation: 2004 SCC 5.

File No.: 29412.

2003: October 17; 2004: February 12.

Present: McLachlin C.J. and Major, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Witnesses — Cross-examination — Right of accused to cross-examine prosecution witnesses — Whether counsel must provide evidentiary foundation for cross-examination or whether good faith basis sufficient for raising questions.

Criminal law — Procedural unfairness at trial — Curative proviso — Defence counsel obliged to call police investigators as her own witnesses against her wishes and to forfeit statutory right to address jury last — Whether resulting trial unfairness could be saved by applying curative proviso — Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).

The victim was severely beaten by five men. He claimed that he had been beaten over a gold chain but two police officers stated in separate reports, which were disclosed to the defence, that they believed the attack was related to a drug debt. The victim identified the accused in a photographic line-up. The defence theory was that the beating related to an unpaid drug debt and that the victim had identified the accused as his assailant to protect the real offenders — his associates in a drug ring. The Crown did not intend to call the officers as witnesses. In a *voir dire* and repeatedly at trial, the trial judge stated that defence counsel could only proceed with her proposed cross-examination of the Crown's witnesses if she provided substantive evidence of the drug debt theory. Defence counsel called the officers and the accused lost his statutory right to address the jury last. The defence did not present any other evidence. The accused was convicted of robbery, assault causing bodily

Michael Garfield Lyttle *Appelant*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ : R. *c.* LYTTLE

Référence neutre : 2004 CSC 5.

N° du greffe : 29412.

2003 : 17 octobre; 2004 : 12 février.

Présents : La juge en chef McLachlin et les juges Major, Binnie, Arbour, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Preuve — Témoins — Contre-interrogatoire — Droit de l'accusé de contre-interroger les témoins à charge — L'avocat doit-il présenter des éléments de preuve au soutien de son contre-interrogatoire ou est-il suffisant qu'il soit de bonne foi lorsqu'il pose ses questions?

Droit criminel — Iniquité procédurale au procès — Disposition réparatrice — L'avocate de la défense a été obligée d'assigner elle-même les policiers enquêteurs et de renoncer au droit que lui reconnaît la loi de s'adresser au jury en dernier — L'injustice en résultant pouvait-elle être corrigée par l'application de la disposition réparatrice? — Code criminel, L.R.C. 1985, ch. C-46, art. 686(1)b)(iii).

Ayant subi une sévère correction aux mains de cinq hommes, la victime a affirmé avoir été battue au sujet d'une chaîne en or. Toutefois, dans des rapports distincts communiqués à la défense, deux policiers ont dit croire que l'agression était reliée à une dette de drogue. La victime a identifié l'accusé à l'occasion d'une séance d'identification photographique. La thèse de la défense était que l'attaque se rapportait à une dette de drogue impayée et que la victime avait désigné l'accusé comme étant son agresseur afin de protéger les véritables malfaiteurs — ses associés au sein d'un réseau de trafiquants de drogue. Le ministère public n'entendait pas citer les policiers comme témoins. Au cours d'un voir-dire ainsi qu'à plusieurs reprises au cours du procès, le juge a indiqué que l'avocate de la défense ne pourrait contre-interroger les témoins à charge comme elle projetait de le faire que si elle fournissait une preuve de fond étayant sa thèse de la dette de drogue. L'avocate de la défense a

harm, kidnapping and possession of a dangerous weapon. In affirming the convictions, the Court of Appeal held that the trial judge had erred in requiring defence counsel to call evidence in support of her drug debt theory but that the verdict could be saved by resort to s. 686(1)(*b*)(iii) of the *Criminal Code*.

Held: The appeal should be allowed and a new trial ordered.

The trial judge unduly restricted the right of the accused to conduct a full and proper cross-examination of the principal Crown witness. The accused was not required to undertake to call evidence to support his drug debt theory as a condition for permitting the cross-examination. The right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence. The right of cross-examination, which is protected by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*, must be jealously protected and broadly construed. A question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true without being able to prove it otherwise than by cross-examination. "A good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. The information may fall short of admissible evidence and may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition and there is no requirement of an evidentiary foundation for every factual suggestion put to a witness in cross-examination. Where a question implies the existence of a disputed factual predicate that is manifestly tenuous or suspect, a trial judge may seek assurance that a good faith basis exists for the question. If the judge is satisfied in this regard and the question is not otherwise prohibited, counsel should be permitted to put the question to the witness. In this case, the existence of a good faith basis for the defence's drug debt theory had become apparent over the course of the

elle-même assigné les policiers et l'accusé a de ce fait perdu le droit que lui accorde la loi de s'adresser au jury en dernier. La défense n'a présenté aucune autre preuve. L'accusé a été déclaré coupable de vol qualifié, de voies de fait causant des lésions corporelles, d'enlèvement et de possession d'arme dangereuse. Confirmant les déclarations de culpabilité, la Cour d'appel a estimé que le juge du procès avait commis une erreur en exigeant de l'avocate de la défense qu'elle produise des éléments de preuve au soutien de sa thèse de la dette de drogue, mais elle a conclu que le verdict pouvait être maintenu par application du sous-al. 686(1)*b*)(iii) du *Code criminel*.

Arrêt : Le pourvoi est accueilli et un nouveau procès est ordonné.

Le juge du procès a indûment limité le droit de l'accusé de mener un contre-interrogatoire complet et approprié du principal témoin à charge. L'accusé n'était pas tenu de s'engager à présenter des éléments de preuve au soutien de sa thèse de la dette de drogue pour être autorisé à procéder au contre-interrogatoire. Le droit d'un accusé de contre-interroger les témoins à charge, sans se voir imposer d'entraves importantes et injustifiées, est un élément essentiel du droit à une défense pleine et entière. Le droit de contre-interroger, qui est garanti par l'art. 7 et l'al. 11*d*) de la *Charte canadienne des droits et libertés*, doit être protégé jalousement et être interprété généreusement. Il est possible de contre-interroger un témoin sur des points qui n'ont pas besoin d'être prouvés indépendamment, pourvu que l'avocat soit de bonne foi lorsqu'il pose ses questions. Il n'est pas inhabituel qu'un avocat prête foi à un fait qui est effectivement vrai, sans qu'il soit capable d'en faire la preuve autrement que par un contre-interrogatoire. La « bonne foi » est fonction des renseignements dont dispose le contre-interrogateur, de l'opinion de celui-ci sur leur probable exactitude et du but de leur utilisation. Ces renseignements peuvent ne pas être des éléments de preuve admissibles et ils peuvent avoir un caractère incomplet ou incertain, pourvu toutefois que le contre-interrogateur ne soumette pas au témoin des hypothèses qui soient inconsidérées ou qu'il sait être fausses. Le contre-interrogateur peut soulever toute hypothèse qu'il avance honnêtement sur la foi d'inférences raisonnables, de son expérience ou de son intuition et rien ne l'oblige à présenter un fondement de preuve à l'égard de chaque fait soumis à un témoin. Lorsqu'une question implique l'existence d'une assise factuelle contestée et manifestement fragile ou suspecte, le juge du procès peut demander à l'avocat l'assurance qu'il pose la question de bonne foi. Si les assurances données à cet égard satisfont le juge et que la formulation de la question n'est pas prohibée pour une autre raison, l'avocat devrait être autorisé à poser la question au

two *voir dires*. The trial judge erred in law by requiring an evidentiary foundation for the cross-examination.

The trial judge's error cannot be cured by resort to s. 686(1)(*b*)(iii) of the *Code*. The ruling had an intimidating effect on defence counsel, disrupted the rhythm of her cross-examinations, and manifestly constrained their scope. It obliged defence counsel to call police investigators as her own witnesses against her wishes. The Crown was permitted to cross-examine its own officers and the accused was found to have forfeited his statutory right to address the jury last. This had a fatal impact on the fairness of the trial. It cannot be said that in the absence of the trial judge's error, there is no reasonable possibility that the verdict would have been different and it would be wrong in these circumstances to apply the curative proviso.

Cases Cited

Explained: *R. v. Howard*, [1989] 1 S.C.R. 1337; *Browne v. Dunn* (1893), 6 R. 67; **disapproved:** *R. v. Fiqia* (1993), 145 A.R. 241; *R. v. Fickes* (1994), 132 N.S.R. (2d) 314; **referred to:** *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Cook*, [1997] 1 S.C.R. 1113; *R. v. Bencardino* (1973), 15 C.C.C. (2d) 342; *R. v. Krause*, [1986] 2 S.C.R. 466; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Meddoui*, [1991] 3 S.C.R. 320; *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374; *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58; *Michelson v. United States*, 335 U.S. 469 (1948); *R. v. Norman* (1993), 16 O.R. (3d) 295; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Rondel v. Worsley*, [1969] 1 A.C. 191; *R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Anandmalik* (1984), 6 O.A.C. 143; *R. v. Wallick* (1990), 69 Man. R. (2d) 310.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(*d*).
Criminal Code, R.S.C. 1985, c. C-46, ss. 651(3), 686(1)(*b*)(iii).

Authors Cited

Brauti, Peter M. "Improper Cross-Examination" (1998), 40 *Crim. L.Q.* 69.

témoin. En l'espèce, l'existence de la bonne foi requise pour justifier la présentation de la thèse de la dette de drogue était ressortie clairement au cours des deux voir-dires. Le juge du procès a commis une erreur de droit en exigeant, pour la tenue du contre-interrogatoire, la production d'un fondement de preuve.

Il est impossible de remédier à l'erreur du juge du procès en appliquant le sous-al. 686(1)*b*)(iii) du *Code criminel*. La décision contestée du juge du procès a eu un effet inhibiteur sur l'avocate de la défense, elle a perturbé le rythme de ses contre-interrogatoires et elle a clairement limité leur portée. Cette décision a obligé l'avocate de la défense à citer, bien malgré elle, les policiers enquêteurs comme témoins à décharge. Le ministère public a été autorisé à contre-interroger ses propres agents et l'accusé a été considéré comme ayant renoncé au droit que la loi lui accorde de s'adresser au jury en dernier. Cette situation a eu des conséquences fatales sur l'équité du procès. Il est impossible d'affirmer qu'il n'existe aucune possibilité raisonnable que le verdict eût été différent en l'absence de l'erreur du juge du procès. De plus, il serait erroné dans les circonstances d'appliquer la disposition réparatrice.

Jurisprudence

Arrêts expliqués : *R. c. Howard*, [1989] 1 R.C.S. 1337; *Browne c. Dunn* (1893), 6 R. 67; **arrêts critiqués :** *R. c. Fiqia* (1993), 145 A.R. 241; *R. c. Fickes* (1994), 132 N.S.R. (2d) 314; **arrêts mentionnés :** *R. c. Stinchcombe*, [1991] 3 R.C.S. 326; *R. c. Cook*, [1997] 1 R.C.S. 1113; *R. c. Bencardino* (1973), 15 C.C.C. (2d) 342; *R. c. Krause*, [1986] 2 R.C.S. 466; *R. c. Seaboyer*, [1991] 2 R.C.S. 577; *R. c. Osolin*, [1993] 4 R.C.S. 595; *R. c. Meddoui*, [1991] 3 R.C.S. 320; *R. c. Logiacco* (1984), 11 C.C.C. (3d) 374; *R. c. McLaughlin* (1974), 15 C.C.C. (2d) 562; *United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901; *R. c. Shearing*, [2002] 3 R.C.S. 33, 2002 CSC 58; *Michelson c. United States*, 335 U.S. 469 (1948); *R. c. Norman* (1993), 16 O.R. (3d) 295; *Palmer c. La Reine*, [1980] 1 R.C.S. 759; *Rondel c. Worsley*, [1969] 1 A.C. 191; *R. c. Bevan*, [1993] 2 R.C.S. 599; *R. c. Anandmalik* (1984), 6 O.A.C. 143; *R. c. Wallick* (1990), 69 Man. R. (2d) 310.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 11*d*).
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Doctrine citée

Brauti, Peter M. « Improper Cross-Examination » (1998), 40 *Crim. L.Q.* 69.

Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

APPEAL from a judgment of the Ontario Court of Appeal (2002), 61 O.R. (3d) 97, 167 C.C.C. (3d) 503, 4 C.R. (6th) 1, 163 O.A.C. 33, [2002] O.J. No. 3308 (QL), affirming a judgment of the Superior Court of Justice. Appeal allowed.

David M. Tanovich, for the appellant.

Shelley Hallett, for the respondent.

The judgment of the Court was delivered by

MAJOR AND FISH JJ. —

I. Introduction

1 Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.

2 That is why the right of an accused to cross-examine witnesses for the prosecution — without significant and unwarranted constraint — is an essential component of the right to make full answer and defence.

3 The Court of Appeal found in this case that the trial judge had unduly restricted the right of the accused to conduct a full and proper cross-examination of the principal Crown witness. We agree with that finding.

4 We agree as well that the judge's error resulted from his understandable misapplication of this Court's decision in *R. v. Howard*, [1989] 1 S.C.R. 1337. The trial judge considered that he was bound by *Howard* to require the appellant to "follow up with substantive evidence" every factual hypothesis defence counsel intended to put to a Crown witness in cross-examination. As the Court of Appeal made plain, this is not the law: *Howard* did not purport to

Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto : Butterworths, 1999.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (2002), 61 O.R. (3d) 97, 167 C.C.C. (3d) 503, 4 C.R. (6th) 1, 163 O.A.C. 33, [2002] O.J. No. 3308 (QL), qui a confirmé un jugement de la Cour supérieure de justice. Pourvoi accueilli.

David M. Tanovich, pour l'appelant.

Shelley Hallett, pour l'intimée.

Version française du jugement de la Cour rendu par

LES JUGES MAJOR ET FISH —

I. Aperçu

Bien que le contre-interrogatoire puisse souvent s'avérer futile et parfois se révéler fatal, il demeure néanmoins un ami fidèle dans la poursuite de la justice ainsi qu'un allié indispensable dans la recherche de la vérité. Dans certains cas, il n'existe en effet aucun autre moyen de mettre au jour des faussetés, de rectifier une erreur, de corriger une distorsion ou de découvrir un renseignement essentiel qui, autrement, resterait dissimulé à jamais.

Voilà pourquoi le droit de l'accusé de contre-interroger les témoins à charge — sans se voir imposer d'entraves importantes et injustifiées — est un élément essentiel du droit à une défense pleine et entière.

En l'espèce, la Cour d'appel a conclu que le juge du procès avait indûment limité le droit de l'accusé de mener un contre-interrogatoire complet et approprié du principal témoin à charge. Nous souscrivons à cette conclusion.

Nous sommes nous aussi d'avis que l'erreur commise par le juge résulte de son application erronée, mais compréhensible, de l'arrêt de notre Cour *R. c. Howard*, [1989] 1 R.C.S. 1337. S'estimant lié par cette décision, le juge du procès a exigé de l'appelant qu'il [TRADUCTION] « étaye par une preuve de fond » chacune des hypothèses factuelles que son avocate avait l'intention de soumettre à un témoin à charge en contre-interrogatoire. Comme l'a

change the well-established rule in this regard, and should not be understood to have added an evidentiary burden to the requirement of good faith that has long been considered the governing standard.

The Court of Appeal nonetheless concluded that the judge's misapplication of *Howard* could be cured by resort to the harmless error proviso of s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.

With respect, we have reached a different conclusion.

First, because the trial judge's impugned ruling had an intimidating effect on defence counsel, disrupted the rhythm of her cross-examinations, and manifestly constrained their scope.

Second, because the ruling obliged defence counsel, against her wishes, to call police investigators as her own witnesses. The Crown was then permitted to cross-examine its own officers — while the appellant, having been obliged by a mistaken ruling to call them, was found to have thereby forfeited his statutory right to address the jury last.

In this latter regard, we do not think it necessary to consider here afresh whether it is generally an advantage to have the last word. Many able and experienced counsel — and others — certainly take that view. Moreover, the defence, where it calls no witnesses, is given that right by s. 651(3) of the *Criminal Code*. Here, the defence wished to exercise that right and was prevented from doing so by the judge's erroneous ruling in law.

For these reasons and those that follow, we have concluded that the trial judge's misapprehension of the governing principles of cross-examination had a fatal impact on the conduct of the defence and on the fairness of the trial.

clairement indiqué la Cour d'appel, il ne s'agit pas là du droit applicable : l'arrêt *Howard* n'a pas modifié la règle établie à cet égard et il n'a pas eu pour effet d'ajouter un fardeau de preuve à l'obligation de bonne foi qui est depuis longtemps considérée comme la norme applicable.

La Cour d'appel a néanmoins jugé qu'il était possible de remédier à l'application erronée de l'arrêt *Howard* par le juge du procès au moyen de l'exception relative aux erreurs sans conséquence prévue au sous-al. 686(1)*b*)(iii) du *Code criminel*, L.R.C. 1985, ch. C-46. 5

En toute déférence, nous arrivons à une conclusion différente, et ce pour les raisons suivantes. 6

Premièrement, la décision contestée du juge du procès a eu un effet inhibiteur sur l'avocate de la défense, elle a perturbé le rythme de ses contre-interrogatoires et elle a clairement limité leur portée. 7

Deuxièmement, la décision a obligé l'avocate de la défense à citer, bien malgré elle, les policiers enquêteurs comme témoins à décharge. Le ministère public a été autorisé à contre-interroger ses propres agents — alors que l'appelant, qui a été contraint de les assigner à cause d'une décision erronée, s'est de ce fait trouvé à renoncer au droit que la loi lui accorde de s'adresser au jury en dernier. 8

Pour ce qui est de ce dernier aspect, nous ne jugeons pas nécessaire, dans le présent pourvoi, de réexaminer la question de savoir s'il est en général avantageux de parler en dernier. Nombre d'avocats compétents et expérimentés — ainsi que d'autres personnes — sont assurément de cet avis. En outre, le par. 651(3) du *Code criminel* reconnaît expressément ce droit à la défense lorsqu'elle n'assigne aucun témoin. En l'espèce, la défense souhaitait exercer ce droit et elle en a été empêchée par la décision erronée en droit du juge. 9

Pour les motifs qui précèdent et pour ceux exposés ci-après, nous estimons que l'interprétation erronée par le juge du procès des principes régissant le contre-interrogatoire a eu des conséquences fatales sur la conduite de la défense et sur l'équité du procès. 10

11 In our respectful view, the appeal should therefore be allowed and a new trial ordered.

II. Facts

12 On February 19, 1999, Stephen Barnaby was viciously beaten by five men with baseball bats, four of them said to have been masked. He was found outside an apartment building, collapsed, shivering, with broken bones and with other severe injuries to his head and legs. He had no wallet, no house keys and no identification.

13 Barnaby told a uniformed officer, with whom he spoke briefly soon after the attack, that he had been beaten over a gold chain.

14 Detective Sean Lawson, initially assigned to the case, stated in his "Occurrence Report" that the attack was believed to be over a drug debt and the victim was being less than truthful. His suspicion in this regard was based on a conversation with Barnaby at the hospital, on the ferocity of the beating, on the fact that Barnaby had a drug-related conviction, and on other elements of Detective Lawson's own preliminary investigation.

15 On the following morning, referring to the Barnaby attack in his "Daily Major" report summarizing all serious crimes that had occurred during his shift, Detective-Sergeant Ian Ganson wrote: "believed to be [over] a drug debt [. . .] further inquiries". Ganson, it should be noted, never spoke directly with Barnaby. He merely relied, in the usual way, on information he had received from subordinate investigators and uniformed officers.

16 Lawson's "Occurrence Report" and Ganson's "Daily Major" report were disclosed to the defence

À notre humble avis, le pourvoi doit donc être accueilli et un nouveau procès doit être ordonné.

II. Faits

Le 19 février 1999, Stephen Barnaby a été sauvagement battu à coups de bâtons de baseball par cinq hommes, dont quatre étaient, dit-on, masqués. Il a été retrouvé à l'extérieur d'un immeuble d'habitation, inconscient, grelottant et souffrant de fractures et de blessures graves à la tête et aux jambes. Il n'avait sur lui ni portefeuille, ni clés de maison, ni pièces d'identité.

Monsieur Barnaby a dit à un policier en uniforme avec qui il s'est brièvement entretenu peu après l'agression qu'on l'avait battu à propos d'une chaîne en or.

Dans son [TRADUCTION] « Rapport circonstancié » (« *Occurrence Report* »), le détective Sean Lawson, initialement chargé de l'affaire, a écrit que l'attaque était selon lui reliée à une dette de drogue et que la victime ne disait pas toute la vérité. Le détective Lawson fondait ses soupçons à cet égard sur une conversation qu'il avait eue avec M. Barnaby à l'hôpital, sur la brutalité de la râclée, sur la déclaration de culpabilité prononcée antérieurement contre ce dernier pour une infraction liée à la drogue et sur d'autres éléments découverts au cours de ses démarches préliminaires.

Le lendemain matin, faisant état de l'agression commise contre M. Barnaby dans son [TRADUCTION] « Rapport quotidien sur les infractions graves » (« *Daily Major* »), lequel résume tous les crimes graves survenus pendant son quart de travail, le sergent-détective Ian Ganson a écrit ceci : [TRADUCTION] « [s]erait reliée à une dette de drogue [. . .] l'enquête se poursuit ». Il convient de souligner que le sergent-détective Ganson n'a jamais parlé directement à M. Barnaby. Il s'est simplement fié, comme à l'habitude, aux renseignements reçus d'enquêteurs subalternes et de policiers en uniforme.

Le « Rapport circonstancié » du détective Lawson et le « Rapport quotidien sur les infractions graves »

in a timely manner, as required by law. See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

Detective Michael Korb and his partner, Detective Martin Ottaway, took over the investigation the day after the attack and obtained a statement from Barnaby at the hospital. Korb and Ottaway were aware of the "drug deal gone bad" theory mentioned by Lawson and Ganson, but both testified that it did not influence their investigation. Unlike Lawson and Ganson, Korb and Ottaway believed Barnaby's version of the assault and the reasons for it.

Barnaby, at a photographic line-up, identified the appellant as the unmasked attacker.

III. Proceedings Below

A. *Ontario Superior Court of Justice*

The appellant's trial commenced, before judge and jury, on October 21, 1999.

Crown counsel was aware, from pre-trial discussions, of the defence theory that Barnaby's beating related to an unpaid drug debt and that he had identified the appellant as his assailant to protect the real offenders — his associates in a drug ring.

Before opening his case, Crown counsel urged the trial judge to prohibit cross-examination along these lines in the absence of the "required" evidentiary foundation. In support of its position, the Crown relied on *Howard*, *supra*, and stated that neither Lawson nor Ganson would be called as Crown witnesses.

Throughout the ensuing *voir dire*, the trial judge made it clear that, on his view of the law, the defence could only proceed with its proposed cross-examination if it provided "substantive evidence"

du sergent-détective Ganson ont, comme l'exige la loi, été communiqués à la défense en temps utile. Voir *R. c. Stinchcombe*, [1991] 3 R.C.S. 326.

17 Le lendemain de l'attaque, le détective Michael Korb et son coéquipier, le détective Martin Ottaway, ont pris l'enquête en main et obtenu une déclaration de M. Barnaby à l'hôpital. Messieurs Korb et Ottaway étaient au courant de la thèse de la [TRADUCTION] « transaction de drogue ayant mal tourné » mentionnée par MM. Lawson et Ganson, mais ils ont tous les deux témoigné que cette thèse n'avait pas influencé leur enquête. Contrairement à leurs collègues, MM. Korb et Ottaway ont prêté foi à la version de M. Barnaby au sujet de l'agression et aux raisons qu'il a données à cet égard.

18 Lors d'une séance d'identification photographique, M. Barnaby a identifié l'appelant comme étant l'agresseur non masqué.

III. Historique des procédures

A. *Cour supérieure de justice de l'Ontario*

19 Le procès de l'appelant devant juge et jury a débuté le 21 octobre 1999.

20 L'avocat du ministère public avait pris connaissance, au cours de discussions préalables au procès, de la thèse de la défense suivant laquelle M. Barnaby aurait été battu à cause d'une dette de drogue et aurait identifié l'appelant comme étant son agresseur afin de protéger les véritables malfaiteurs — ses associés au sein d'un réseau de trafiquants de drogue.

21 Avant de présenter sa preuve, l'avocat du ministère public a demandé au juge du procès d'interdire tout contre-interrogatoire à ce propos, vu l'absence du fondement de preuve [TRADUCTION] « requis ». Au soutien de sa demande, le ministère public a invoqué l'arrêt *Howard*, précité, et déclaré que ni le détective Lawson ni le sergent-détective Ganson ne seraient cités comme témoins à charge.

22 Tout au long du voir-dire ayant suivi cette demande, le juge du procès a clairement indiqué que, suivant son interprétation du droit, la défense ne pouvait procéder au contre-interrogatoire projeté

of its "drug debt" theory. The following exchange is illustrative:

THE COURT: She is under no obligation at this point to advise as to the nature of her defence or what evidence she intends to call, but the law is quite clear that if you are making an allegation of that nature and of that substance, that you are required then to commit to leading some evidence in that regard. Is that your intention, madam, or . . . .

MS. ROBB [Defence counsel]: Your . . . Honour, my friend's well aware of the evidence. I didn't dream this up on my own. The investigating officers, within moments at arriving at the scene, checked CPIC and made notations to the effect that they didn't believe this was over a gold chain. They believed it was over a drug deal gone bad. That's where this came from, from the Crown's disclosure. [Emphasis added.]

23 When defence counsel refused to give an undertaking to present an evidentiary foundation for the proposed cross-examination, the trial judge repeated the constraint he was placing on the cross-examination of Crown witnesses:

MS. ROBB: Well, I mean you have to see my position, Your Honour. I can't investigate, prosecute, and prove Mr. Barnaby's a drug dealer. I'm not in a position to do that. The defence theory is that this man made up Mr. Lyttle as the attacker to protect himself from the people that beat him up because he didn't pay the money for drugs. That's the defence theory.

THE COURT: Well, he can give that evidence, not — you have no obligation to tell us whether you are calling him or not. But I can only tell you the law is that if you are going to make those allegations by cross-examining, in the course of cross-examination of the Crown witnesses, you had better follow up with substantive evidence. That is the law. [Emphasis added.]

24 In his preliminary ruling, later often repeated, the trial judge warned defence counsel that there was a danger of a mistrial if she put the "drug debt" allegations to the Crown witnesses and then failed to provide what he considered to be the necessary evidentiary support:

que si elle fournissait une « preuve de fond » étayant sa thèse de la « dette de drogue ». L'échange suivant illustre la position du juge :

[TRADUCTION] LA COUR : Elle n'a aucune obligation à ce moment-ci de révéler la nature de sa défense ou les éléments de preuve qu'elle entend présenter, mais le droit est très clair, si une allégation de cette nature est formulée, il faut s'engager à produire certains éléments de preuve à cet égard. Est-ce là votre intention, madame, ou . . .

M^ME^ ROBB [avocate de la défense] : Votre [. . .] Seigneurie, mon confrère est bien au fait de la preuve. Je n'ai rien inventé. Dans les instants qui ont suivi leur arrivée sur les lieux, les enquêteurs ont interrogé le CIPC et ont noté qu'ils ne croyaient pas que l'agression avait pour objet une chaîne en or. Ils estimaient qu'une transaction de drogue ayant mal tourné était à l'origine de l'agression. C'est de là que ça vient, de la preuve communiquée par le ministère public. [Nous soulignons.]

Lorsque l'avocate de la défense a refusé de s'engager à présenter un fondement de preuve au soutien du contre-interrogatoire qu'elle projetait de mener, le juge du procès a réitéré les limites qu'il imposait à l'égard du contre-interrogatoire des témoins à charge :

[TRADUCTION] M^ME^ ROBB : Bien, vous devez comprendre ma position, votre Seigneurie. Je ne peux enquêter sur M. Barnaby, intenter des poursuites contre lui et prouver qu'il est un trafiquant de drogue. Je ne suis pas en mesure de faire ça. La thèse de la défense est que cet homme a inventé le fait que M. Lyttle soit son agresseur afin de se protéger contre ceux qui l'ont battu parce qu'il n'a pas versé l'argent de drogues. Voilà la thèse de la défense.

LA COUR : Bien il peut fournir cette preuve, non — vous n'êtes pas obligée de nous dire si vous l'assignez ou non. Tout ce que je peux vous dire, c'est que le droit prévoit que si vous êtes pour faire ces allégations en contre-interrogatoire, dans le cours du contre-interrogatoire des témoins à charge, vous avez tout intérêt à les étayer ensuite par une preuve de fond. C'est le droit applicable. [Nous soulignons.]

Dans sa décision préliminaire, ainsi qu'à plusieurs reprises par la suite, le juge du procès a prévenu l'avocate de la défense du risque d'annulation du procès si elle faisait état aux témoins à charge des allégations relatives à la « dette de drogue » et si elle ne fournissait pas ultérieurement le fondement de preuve qu'il estimait nécessaire :

[THE COURT]: The answer is, if you are indicating that the questions are necessary to your defence, and that you will comply with the rule in *R. v. Howard*, and cases going back as far as *Browne* and *Dunn*, then I will certainly allow you to ask them, but there better be the follow-up at some point down the road.

MS. ROBB: All right. At this point when the Crown calls its first witness, regardless of follow-up, am I allowed to ask about the CPIC?

THE COURT: Yes. Certainly.

MS. ROBB: So, the only question you're saying I can't ask is to the victim?

THE COURT: I am not — no, you misunderstood me entirely. I am not saying you can or cannot ask any questions. It is your case, it is your defence, you conduct it as you see fit. I am just saying that there will be strict adherence to the rules of evidence, which require that if you ask a question of the nature we have discussed, that, at some point, you are required to produce some foundation or substantive basis for asking that question. You cannot simply pick out of the air an allegation of that nature and hope that it will persuade the jury. There has to be factual underpinning for it. And that if it comes later in the trial, fine, no problem . . . .

. . .

. . . you have done your duty.

. . .

But if it does not come, then you are subject to an application by the Crown for a mistrial. [Emphasis added.]

Later that same day, the submissions on the defence theory continued. The trial judge settled the issue by reiterating his previous ruling:

[THE COURT]: All right, we are going to handle this in the same way we are handling the other issue that we discussed at length this morning. You will be permitted to ask those questions. If you fail to follow-up, and under the *R. v. Howard* case you are obligated to, I presume by now you have read it. I will quote, just to deal with that

[TRADUCTION] [LA COUR] : La réponse est que, si vous affirmez que les questions sont nécessaires à votre défense et que vous allez vous conformer à la règle établie dans *R. c. Howard*, et à des décisions remontant aussi loin que l'arrêt *Browne* et *Dunn*, je vais alors certainement vous autoriser à les poser, mais il vaut mieux que la preuve requise suive à un moment donné.

M^ME^ ROBB : D'accord. À ce moment-ci, lorsque le ministère public appellera son premier témoin, indépendamment de la preuve à apporter plus tard, suis-je autorisée à le questionner au sujet du CIPC?

LA COUR : Oui, certainement.

M^ME^ ROBB : Donc, vous dites que la seule question que je ne peux poser s'adresse à la victime?

LA COUR : Je ne — non, vous ne m'avez pas compris du tout. Je ne dis pas que vous pouvez poser des questions ou que vous ne pouvez pas le faire. C'est votre cause, c'est votre défense, vous la menez comme bon vous semble. Je dis simplement qu'il y aura application stricte des règles de preuve, lesquelles exigent que si vous posez une question de la nature de celle dont nous avons discuté, vous êtes tenue, à un moment donné, de produire des éléments de preuve de fond étayant cette question. Vous ne pouvez tout simplement pas soulever comme ça une allégation de cette nature et espérer qu'elle convainque le jury. Cette allégation doit avoir un fondement factuel. Si ce fondement est établi plus tard au cours du procès, alors tout va bien, aucun problème . . .

. . .

. . . vous avez satisfait à votre obligation.

. . .

Mais s'il ne l'est pas, vous vous exposez à une demande d'annulation du procès par le ministère public. [Nous soulignons.]

Plus tard le même jour, la présentation des observations sur la thèse de la défense s'est poursuivie. Le juge du procès a tranché la question en réitérant sa décision antérieure :

[TRADUCTION] [LA COUR] : Bon, nous allons régler ça de la même manière que nous avons réglé l'autre question dont nous avons discuté en profondeur ce matin. Vous serez autorisée à poser ces questions. Si vous ne présentez pas les éléments de preuve requis, et suivant l'arrêt *R. c. Howard* vous êtes tenue de le faire, je

issue briefly, from page [1347] of the Judgment by Mr. Justice Lamer where he says quite clearly:

> "It is not open to the examiner or cross-examiner to put as a fact, or even a hypothetical fact, that which is not and will not become part of the case as admissible evidence."

MS. ROBB: Okay, Your Honour . . . .

THE COURT: So, there is your directive. If you fail to abide by that directive, there will be consequences. [i.e., a mistrial] . . . .

26 Near the end of the examination-in-chief of Ottaway, the second Crown witness, defence counsel expressed concern over the trial judge's ruling and raised the issue of a mistrial. In the absence of the jury, Ms. Robb indicated that she intended to pursue the "drug debt" theory in cross-examination and sought reassurance that in the event the Crown did ask for a mistrial, she would be permitted to address the court. The trial judge confirmed that the defence would be given such an opportunity and stated:

THE COURT: . . . You will be permitted to ask whatever questions you think are relevant to the defence of your client, and I will simply apply the rules of evidence, if, at some later [time] in the trial, you do not produce substantive evidence to – which, looking back, would have warranted that question and that suggestion to the witness. Now, we are going to leave it at that. We are going to bring the jury in. Let us get on with the trial.

I ask you, before they come in, Ms. Robb, to simply read the decision of Mr. Justice Darichuk in the Manitoba . . . Queen's Bench [*R. v. Evans* (1994), 93 Man. R. (2d) 77]. . . . He quite clearly says:

> "Does the right of cross-examination encompass the right to assert specific factual suggestions without confirmation from counsel that the matters suggested are or will be part of his or her case, and that evidence will be led on that subject? I think not."

27 The issue of the foundation for the defence theory arose again during the cross-examination of Ottaway. In order to avoid the possibility of a mistrial should defence counsel not abide by his ruling, the trial judge conducted a second *voir dire*, this

présume que vous l'avez lu depuis. Je citerai, juste pour régler rapidement cette question, cet extrait de la page [1347] du jugement du juge Lamer, où celui-ci dit très clairement :

> « Celui qui interroge ou contre-interroge ne peut pas présenter comme un fait, ni même comme un fait hypothétique, ce qui ne fait pas partie et ne fera pas partie des éléments admissibles et mis en preuve. »

M^ME ROBB : D'accord, votre Seigneurie . . .

LA COUR : Voilà donc votre directive. Si vous ne vous y soumettez pas, il y aura des conséquences. [c.-à-d. l'annulation du procès] . . .

Peu avant la fin de l'interrogatoire principal de M. Ottaway, le deuxième témoin à charge, l'avocate de la défense a exprimé certaines inquiétudes à l'égard de la décision du juge du procès et elle a soulevé la question de l'annulation du procès. En l'absence du jury, M^me Robb a précisé qu'elle entendait continuer à parler de la thèse de la dette de drogue lors du contre-interrogatoire et elle a demandé l'assurance que, si le ministère public sollicitait l'annulation du procès, elle serait autorisée à s'adresser au tribunal. Le juge du procès a confirmé que la défense aurait cette possibilité et il a déclaré ceci :

[TRADUCTION] LA COUR : . . . Vous serez autorisée à poser toutes les questions que vous estimez pertinentes pour la défense de votre client, et je ne ferai qu'appliquer les règles de preuve si, plus tard au cours du procès, vous ne présentez pas la preuve de fond afin — qui, avec le recul, aurait justifié cette question et cette suggestion au témoin. Bon nous allons nous arrêter là. Nous allons rappeler le jury. Continuons le procès.

Je vous demande simplement, avant qu'ils n'entrent, M^me Robb, de lire la décision de Monsieur le juge Darichuk, de la Cour du Banc de la Reine du Manitoba [*R. c. Evans* (1994), 93 Man. R. (2d) 77]. [. . .] Il dit très clairement :

> « Le droit de contre-interroger emporte-t-il celui d'avancer des faits précis sans confirmation par l'avocat que les points mentionnés font ou feront partie de sa thèse et que des éléments de preuve seront produits à ce sujet? Je ne crois pas. »

La question du fondement de preuve requis au soutien de la thèse de la défense s'est de nouveau soulevée pendant le contre-interrogatoire de M. Ottaway. Pour éviter que le procès ne soit annulé au cas où l'avocate de la défense ne se conformerait

time to determine the nature of the facts that would in his view warrant defence counsel's proposed cross-examination. Ottaway and Lawson were called to testify.

On the *voir dire*, the trial judge asked who would call Lawson. Obviously resigned to the trial judge's treatment of *Howard*, defence counsel replied, "Well, if my friend is not gonna call Officer Lawson, I will."

The trial judge considered that Lawson's testimony would provide what he saw as the "substantive evidence" requirement. And it was on this basis that he ultimately permitted the defence to cross-examine Crown witnesses with respect to its "drug debt" theory.

After Ottaway's evidence, and once the jury was excused, the trial judge returned to the evidentiary basis for defence counsel's cross-examination:

THE COURT: Just before we leave. Apropos and flowing from my ruling with respect to cross-examination, Ms. Robb, I noticed [on] a number of occasions you put questions to this witness, 1) inquiring as to whether he'd seen a BMW in the driveway; 2) whether he checked the owners of all the cars that they took the license plates from; 3) with respect to whether they saw a Maxima in the driveway; 4) whether Ms. Veta Smith had any outstanding charges for importing and 5) suggesting that there were many other suspects . . . that they investigated. These are all questions of the same nature as the one that you wanted to ask with respect to the drug deal situation. I assume you are going to be leading evidence with regard to these various items or there will be evidence coming out. There was no objection taken by your friend and they are not, of course, as egregious or perhaps as important to your defence as the drug related thing and I've given you the latitude to ask those questions but, you have a tendency to ask questions, take a no answer. We wonder whether there will be evidence down the road to substantiate the finding of a BMW, for instance, in the driveway.

pas à sa décision, le juge du procès a tenu un second voir-dire afin de déterminer cette fois la nature des faits qui justifieraient à son avis le contre-interrogatoire projeté par l'avocate de la défense. MM. Ottaway et Lawson ont été appelés à témoigner.

28 Au cours du voir-dire, le juge du procès a demandé qui assignerait le détective Lawson. Manifestement résignée à la façon dont le juge du procès appliquait l'arrêt *Howard*, l'avocate de la défense a répondu ceci : [TRADUCTION] « Bien, si mon confrère n'assigne pas l'agent Lawson, je le ferai. »

29 Le juge du procès estimait que le témoignage du détective Lawson apporterait ce qu'il considérait comme la « preuve de fond » requise et c'est sur ce fondement qu'il a fini par permettre à la défense de contre-interroger les témoins à charge à propos de sa thèse fondée sur la dette de drogue.

30 Après le témoignage de M. Ottaway et une fois le jury retiré, le juge du procès est revenu sur la question du fondement de preuve requis au soutien du contre-interrogatoire mené par l'avocate de la défense :

[TRADUCTION] LA COUR : Avant de quitter. À propos de ma décision concernant le contre-interrogatoire, M^me^ Robb, j'ai remarqué qu'à de nombreuses occasions vous avez posé à ce témoin des questions 1) lui demandant s'il avait vu une BMW dans l'entrée de l'immeuble, 2) s'il avait vérifié l'identité des propriétaires de tous les véhicules dont ils avaient relevé le numéro d'immatriculation, 3) s'ils avaient vu une Maxima dans l'entrée de l'immeuble, 4) si des accusations d'importation pesaient contre M^me^ Veta Smith et 5) suggérant que beaucoup d'autres suspects [. . .] avaient fait l'objet d'une enquête. Ce sont toutes des questions de la nature de celle que vous vouliez poser au sujet de la [transaction] de drogue. Je présume que vous allez présenter des éléments de preuve concernant ces différents points ou que des éléments de preuve se feront jour. Aucune objection n'a été soulevée par votre confrère et ces points ne sont pas aussi sérieux ou peut-être pas aussi importants pour votre défense que la thèse de la drogue, et je vous ai donné la latitude nécessaire pour poser ces questions, mais vous avez tendance à poser des questions, et à vous contenter d'un non comme réponse. Nous nous demandons si vous présenterez des éléments de preuve qui, par exemple, confirmeront la présence d'une BMW dans l'entrée de l'immeuble.

MS. ROBB: Well, Your Honour, I got . . . [that from the Crown's disclosure].

THE COURT: Technically, under the Rule you can't simply leave that hanging as you have.

31 When defence counsel later advised the court that she wished to address the jury last and did not wish to be forced to forego this right by calling evidence, the trial judge stated:

THE COURT: . . . Madam. I'm going to ask you not to use that terminology again. The Crown is not forcing you to call Lawson. The reason I am suggesting you must call Lawson is because you committed to call Lawson freely during the course of a *voir dire* in which you won the day and your point prevailed to a great extent upon the commitment you made to the court that you would call Lawson so that you would have the opportunity to abide by the *Howard* principle that if you are going to cross-examine in this particular area you have to produce, as the Crown says, "the beef". [Emphasis added.]

32 Defence counsel then asked the trial judge to himself call Lawson as a witness in accordance with *R. v. Cook*, [1997] 1 S.C.R. 1113, but the judge refused to do so.

33 As a result, Lawson and Ganson were called by the defence, and the appellant lost his statutory right to address the jury last. On cross-examination by the Crown, Lawson and Ganson described their "drug debt" suppositions as initial theories or "hunches" which appeared, they said, to have been disproved by further police investigation.

34 The defence did not present any other evidence.

35 The appellant was convicted of robbery, assault causing bodily harm, kidnapping and possession of a dangerous weapon.

B. *Ontario Court of Appeal* (2002), 61 O.R. (3d) 97

36 On appeal to the Ontario Court of Appeal, the court found that the trial judge had erred in applying

M^ME ROBB : Bien, votre Seigneurie, j'ai tiré [. . .] [cela de la preuve communiquée par le ministère public].

LA COUR : Techniquement, suivant la Règle, vous ne pouvez pas simplement laisser cette question en suspens comme vous l'avez fait.

Lorsque, plus tard, l'avocate de la défense a dit au tribunal qu'elle souhaitait s'adresser au jury en dernier et qu'elle ne voulait pas être obligée de renoncer à ce droit en produisant des éléments de preuve, le juge du procès a déclaré ceci :

[TRADUCTION] LA COUR : Madame, je vais vous demander de ne plus utiliser cette terminologie. Le ministère public ne vous oblige pas à assigner Lawson. La raison pour laquelle j'affirme que vous devez assigner Lawson est que vous vous êtes engagée de plein gré à l'assigner au cours d'un voir-dire où vous avez eu gain de cause, et votre argument a prévalu en grande partie parce que vous vous êtes engagée envers le tribunal à assigner Lawson, afin d'être en mesure de vous conformer au principe établi dans l'arrêt *Howard* qui requiert que, si vous entendez contre-interroger sur ce sujet en particulier, vous devez, comme le dit le ministère public, livrer « la marchandise ».

L'avocate de la défense a alors demandé au juge du procès de citer lui-même M. Lawson comme témoin, conformément à l'arrêt *R. c. Cook*, [1997] 1 R.C.S. 1113, mais le juge a refusé.

Par conséquent, MM. Lawson et Ganson ont été assignés par la défense et l'appelant a perdu le droit que lui reconnaît la loi de s'adresser au jury en dernier. Durant le contre-interrogatoire mené par le ministère public, MM. Lawson et Ganson ont présenté leurs hypothèses sur la « dette de drogue » comme étant des théories de départ ou des « intuitions » qui, ont-ils dit, se sont révélées non fondées lorsque la police a poussé son enquête.

La défense n'a présenté aucun autre élément de preuve.

L'appelant a été déclaré coupable de vol qualifié, de voies de fait causant des lésions corporelles, d'enlèvement et de possession d'arme dangereuse.

B. *Cour d'appel de l'Ontario* (2002), 61 O.R. (3d) 97

L'appelant a interjeté appel à la Cour d'appel de l'Ontario, qui a estimé que le juge du procès avait

Howard, but that the verdict could be saved, and the appeal dismissed, by resort to s. 686(1)(*b*)(iii) of the *Criminal Code*.

commis une erreur en appliquant l'arrêt *Howard*, mais que le verdict pouvait être maintenu et l'appel pouvait être rejeté en recourant au sous-al. 686(1)*b*)(iii) du *Code criminel*.

Delivering the judgment of the court, Carthy J.A. concluded (at para. 11) that the broad rule enunciated by Lamer J. (as he then was) in *Howard* had no application in the circumstances of this case as it was intended to apply only with respect to the cross-examination of expert witnesses:

37 Prononçant le jugement de la Cour d'appel, le juge Carthy a conclu (au par. 11) que la règle générale énoncée par le juge Lamer (plus tard Juge en chef) dans l'arrêt *Howard* ne s'appliquait pas dans les circonstances de l'espèce, car cette règle ne visait que le contre-interrogatoire des témoins experts :

Lamer J. could not have been intending to lay down a broad rule encompassing all forms of cross-examination and to be overruling well-established authorities of this court and others without referring to them. The implications of such a strict rule would pervade and restrict all traditional cross-examinations containing any element of speculation.

[TRADUCTION] Le juge Lamer ne saurait avoir eu l'intention d'établir une règle générale applicable à toutes les formes de contre-interrogatoire et d'écarter les précédents bien établis de notre cour et d'autres tribunaux sans les mentionner. Les incidences d'une règle aussi stricte s'étendraient à tous les contre-interrogatoires traditionnels comportant un élément de spéculation et en restreindraient la portée.

Carthy J.A. found, correctly in our view, that *Howard* did not overrule *R. v. Bencardino* (1973), 15 C.C.C. (2d) 342 (Ont. C.A.), which stood for the principle that counsel can cross-examine on matters he or she may not be able to prove directly so long as counsel had a good faith basis for asking the question. He also referred to *R. v. Krause*, [1986] 2 S.C.R. 466, and noted, at para. 19, that:

38 Le juge Carthy a estimé, à juste titre selon nous, que l'arrêt *Howard* n'écartait pas l'arrêt *R. c. Bencardino* (1973), 15 C.C.C. (2d) 342 (C.A. Ont.), lequel étaye le principe qu'un avocat peut contre-interroger le témoin sur des points qu'il n'est peut-être pas en mesure de prouver directement, pourvu qu'il pose ses questions en toute bonne foi. Il a aussi fait état de l'arrêt *R. c. Krause*, [1986] 2 R.C.S. 466, et mentionné ceci, au par. 19 :

[T]he general rule is for a broad right of cross-examination unconstrained by direct relevance to issues and then a narrower right, but not a compulsion, to rebut with further evidence if the issue is not collateral.

[TRADUCTION] [L]a règle générale reconnaît un large droit de contre-interroger qui n'est pas subordonné à une exigence de pertinence directe des questions avec les points en litige, puis un droit plus limité, qui n'est toutefois pas une obligation, de réfuter les dires du témoin par d'autres éléments de preuve s'il ne s'agit pas d'une question incidente.

The Court of Appeal held that the trial judge had erred in requiring defence counsel to undertake to call evidence to support her "drug debt" theory as a condition for permitting cross-examination on that subject.

39 La Cour d'appel a conclu que le juge du procès avait commis une erreur en imposant à l'avocate de la défense, comme préalable au contre-interrogatoire relatif à sa thèse de la « dette de drogue », qu'elle s'engage à présenter des éléments de preuve au soutien de celle-ci.

The court was satisfied, however, that this error had occasioned no substantial wrong or miscarriage of justice within the meaning of s. 686(1)(*b*)(iii) of the *Criminal Code* and dismissed the appeal.

40 Cependant, convaincue que cette erreur n'avait entraîné aucun tort important ni aucune erreur judiciaire au sens du sous-al. 686(1)*b*)(iii) du *Code criminel*, la Cour d'appel a débouté l'appelant.

IV. Discussion

41 As mentioned at the outset, the right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence. See *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 608, *per* McLachlin J. (as she then was):

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. . . . In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. [Emphasis added.]

42 In *R. v. Osolin*, [1993] 4 S.C.R. 595, Cory J. reviewed the relevant authorities and, at p. 663, explained why cross-examination plays such an important role in the adversarial process, particularly, though of course not exclusively, in the context of a criminal trial:

> There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence. See *R. v. Anderson* (1938), 70 C.C.C. 275 (Man. C.A.); *R. v. Rewniak* (1949), 93 C.C.C. 142 (Man. C.A.); *Abel v. The Queen* (1955), 115 C.C.C. 119 (Que. Q.B.); *R. v. Lindlau* (1978), 40 C.C.C. (2d) 47 (Ont. C.A.).

43 Commensurate with its importance, the right to cross-examine is now recognized as being protected

IV. Analyse

Comme il a été mentionné au départ, le droit d'un accusé de contre-interroger les témoins à charge, sans se voir imposer d'entraves importantes et injustifiées, est un élément essentiel du droit à une défense pleine et entière. Voir l'arrêt *R. c. Seaboyer*, [1991] 2 R.C.S. 577, p. 608, la juge McLachlin (maintenant Juge en chef) :

> Le droit de l'innocent de ne pas être déclaré coupable est lié à son droit de présenter une défense pleine et entière. Il doit donc pouvoir présenter les éléments de preuve qui lui permettront d'établir sa défense ou de contester la preuve présentée par la poursuite. [. . .] Bref, la dénégation du droit de présenter ou de contester une preuve équivaut à la dénégation du droit d'invoquer un moyen de défense autorisé par la loi. [Nous soulignons.]

Dans l'arrêt *R. c. Osolin*, [1993] 4 R.C.S. 595, le juge Cory a examiné la jurisprudence pertinente et, à la p. 663, il a expliqué pourquoi le contre-interrogatoire joue un rôle aussi important dans le processus de débat contradictoire, particulièrement — mais évidemment pas seulement — dans les procès criminels :

> Le contre-interrogatoire a une importance incontestable. Il remplit un rôle essentiel dans le processus qui permet de déterminer si un témoin est digne de foi. Même lorsqu'il vise le témoin le plus honnête qui soit, il peut permettre de jauger la fragilité des témoignages. Il peut servir, par exemple, à montrer le handicap visuel ou auditif d'un témoin. Il peut permettre d'établir que les conditions météorologiques pertinentes ont pu limiter la capacité d'observation d'un témoin, ou que des médicaments pris par le témoin ont pu avoir un effet sur sa vision ou son ouïe. Son importance ne peut être mise en doute. C'est le moyen par excellence d'établir la vérité et de tester la véracité. Il faut autoriser le contre-interrogatoire pour que l'accusé puisse présenter une défense pleine et entière. La possibilité de contre-interroger les témoins constitue un élément fondamental du procès équitable auquel l'accusé a droit. Il s'agit d'un principe ancien et bien établi qui est lié de près à la présomption d'innocence. Voir les arrêts *R. c. Anderson* (1938), 70 C.C.C. 275 (C.A. Man.); *R. c. Rewniak* (1949), 93 C.C.C. 142 (C.A. Man.); *Abel c. La Reine* (1955), 23 C.R. 163 (B.R. Qué.); et *R. c. Lindlau* (1978), 40 C.C.C. (2d) 47 (C.A. Ont.).

Vu son importance, le droit de contre-interroger est maintenant reconnu comme un droit protégé par

by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*. See *Osolin*, *supra*, at p. 665.

The right of cross-examination must therefore be jealously protected and broadly construed. But it must not be abused. Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value. See *R. v. Meddoui*, [1991] 3 S.C.R. 320; *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.); *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 (Ont. C.A.); *Osolin*, *supra*.

Just as the right of cross-examination itself is not absolute, so too are its limitations. Trial judges enjoy, in this as in other aspects of the conduct of a trial, a broad discretion to ensure fairness and to see that justice is done — and seen to be done. In the exercise of that discretion, they may sometimes think it right to relax the rules of relevancy somewhat, or to tolerate a degree of repetition that would in other circumstances be unacceptable. See *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 925.

This appeal concerns the constraint on cross-examination arising from the ethical and legal duties of counsel when they allude in their questions to disputed and unproven facts. Is a good faith basis sufficient or is counsel bound, as the trial judge held in this case, to provide an evidentiary foundation for the assertion?

Unlike the trial judge, and with respect, we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true, without being able to prove it otherwise than by cross-examination; nor is it uncommon for

l'art. 7 et l'al. 11*d*) de la *Charte canadienne des droits et libertés*. Voir l'arrêt *Osolin*, précité, p. 665.

44 Le droit de contre-interroger doit donc être protégé jalousement et être interprété généreusement. Il ne doit cependant pas être exercé de manière abusive. Les avocats sont liés par les règles de la pertinence et il leur est interdit de harceler le témoin, de faire des déclarations inexactes, de se répéter inutilement ou, de façon plus générale, de poser des questions dont l'effet préjudiciable excède la valeur probante. Voir *R. c. Meddoui*, [1991] 3 R.C.S. 320; *R. c. Logiacco* (1984), 11 C.C.C. (3d) 374 (C.A. Ont.); *R. c. McLaughlin* (1974), 15 C.C.C. (2d) 562 (C.A. Ont.); *Osolin*, précité.

45 Tout comme le droit de contre-interroger n'est pas lui-même absolu, les limites dont il est assorti ne le sont pas elles non plus. Le juge du procès jouit, à cet égard comme dans d'autres aspects de la conduite d'un procès, d'un large pouvoir discrétionnaire lui permettant d'assurer l'équité de celui-ci et de voir à ce que justice soit rendue — et perçue comme l'ayant été. Il peut arriver que, dans l'exercice de ce pouvoir discrétionnaire, le juge estime approprié d'assouplir quelque peu les règles de la pertinence ou de tolérer un degré de répétition qui serait par ailleurs inacceptable dans d'autres circonstances. Voir *United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901, p. 925.

46 Le présent pourvoi porte sur les contraintes que doivent respecter les avocats en raison de leurs obligations légales et déontologiques lorsque, en contre-interrogatoire, ils font allusion dans leurs questions à des faits contestés et non prouvés. La bonne foi de l'avocat est-elle suffisante ou ce dernier doit-il, comme a conclu le juge du procès en l'espèce, produire des éléments de preuve au soutien de ses affirmations?

47 En toute déférence, contrairement au juge du procès, nous croyons qu'il est possible de contre-interroger un témoin sur des points qui n'ont pas besoin d'être prouvés indépendamment, pourvu que l'avocat soit de bonne foi lorsqu'il pose ses questions. Il n'est pas inhabituel qu'un avocat prête foi à un fait qui est effectivement vrai, sans qu'il soit capable d'en faire la preuve autrement que par un

reticent witnesses to concede suggested facts — in the mistaken belief that they are already known to the cross-examiner and will therefore, in any event, emerge.

48 In this context, a "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.

49 In *Bencardino*, *supra*, at p. 347, Jessup J.A. applied the English rule to this effect:

> . . . whatever may be said about the forensic impropriety of the three incidents in cross-examination, I am unable to say any illegality was involved in them. As Lord Radcliffe said in *Fox v. General Medical Council*, [1960] 1 W.L.R. 1017 at p. 1023:
>
> > An advocate is entitled to use his discretion as to whether to put questions in the course of cross-examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth.

50 More recently, in *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58, while recognizing the need for exceptional restraint in sexual assault cases,

contre-interrogatoire; il n'est pas non plus inhabituel qu'un témoin récalcitrant admette les faits qu'on lui suggère — croyant erronément que le contre-interrogateur les connaît déjà et que, en conséquence, leur existence va de toute façon être révélée.

Dans ce contexte, la « bonne foi » est fonction des renseignements dont dispose le contre-interrogateur, de l'opinion de celui-ci sur leur probable exactitude et du but de leur utilisation. Des renseignements qui ne constitueraient par ailleurs pas des éléments de preuve admissibles peuvent être présentés aux témoins. En fait, des renseignements peuvent avoir un caractère incomplet ou incertain, pourvu que le contre-interrogateur ne soumette pas au témoin des hypothèses qui soient inconsidérées ou qu'il sait être fausses. Le contre-interrogateur peut soulever toute hypothèse qu'il avance honnêtement sur la foi d'inférences raisonnables, de son expérience ou de son intuition. Le but de la question doit être compatible avec le rôle que joue l'avocat en tant qu'auxiliaire de justice : il est à notre avis permis à l'avocat de suggérer un fait qu'il considère sincèrement possible à la lumière de faits connus ou d'hypothèses raisonnables; il est toutefois inacceptable et interdit selon nous d'énoncer un fait ou de suggérer implicitement son existence dans le but de tromper.

Dans l'arrêt *Bencardino*, précité, p. 347, le juge Jessup de la Cour d'appel de l'Ontario a appliqué la règle anglaise sur la question :

> [TRADUCTION] . . . indépendamment du caractère malséant des trois incidents survenus lors du contre-interrogatoire, il m'est impossible de conclure qu'ils ont quoi que ce soit d'illégal. Comme l'a dit lord Radcliffe dans l'arrêt *Fox c. General Medical Council*, [1960] 1 W.L.R. 1017, p. 1023 :
>
> > Un avocat dispose de la latitude voulue pour poser, en contre-interrogatoire, des questions reposant sur des éléments d'information qu'il n'est pas en mesure de prouver directement. Le prix à payer est que, s'il obtient une dénégation ou une réponse qui ne lui convient pas, cette réponse joue contre lui pour ce qu'elle vaut.

Plus récemment, dans l'arrêt *R. c. Shearing*, [2002] 3 R.C.S. 33, 2002 CSC 58, tout en reconnaissant l'exceptionnelle retenue dont doivent

Binnie J. reaffirmed, at paras. 121-22, the general rule that "in most instances the adversarial process allows wide latitude to cross-examiners to resort to unproven assumptions and innuendo in an effort to crack the untruthful witness . . .". As suggested at the outset, however, wide latitude does not mean unbridled licence, and cross-examination remains subject to the requirements of good faith, professional integrity and the other limitations set out above (paras. 44-45). See also *Seaboyer*, *supra*, at p. 598; *Osolin*, *supra*, at p. 665.

faire montre les avocats dans les affaires d'agression sexuelle, le juge Binnie a réaffirmé, aux par. 121-122, la règle générale établissant « la grande latitude que, dans la plupart des cas, le processus contradictoire laisse aux contre-interrogateurs de recourir à des hypothèses et à des insinuations non prouvées pour tenter de désarçonner le témoin qui ment . . . ». Toutefois, comme il a été mentionné au départ, cette vaste latitude ne saurait être assimilée à la liberté d'action absolue et le contre-interrogatoire reste assujetti aux obligations de bonne foi et d'intégrité professionnelle ainsi qu'aux autres limites précisées plus tôt (par. 44-45). Voir également les arrêts *Seaboyer*, précité, p. 598, et *Osolin*, précité, p. 665.

A trial judge must balance the rights of an accused to receive a fair trial with the need to prevent unethical cross-examination. There will thus be instances where a trial judge will want to ensure that "counsel [is] not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box". See *Michelson v. United States*, 335 U.S. 469 (1948), at p. 481, *per* Jackson J.

51 Le juge du procès doit établir un juste équilibre entre le droit de l'accusé à un procès équitable et la nécessité d'empêcher la tenue d'un contre-interrogatoire contraire à l'éthique. Il surviendra en conséquence des cas où le juge du procès voudra s'assurer que [TRADUCTION] « l'avocat ne se contente pas simplement d'attaquer à l'aveuglette une réputation imprudemment compromise ou de poser une question non fondée afin de lancer une insinuation injustifiée à l'intention des jurés ». Voir *Michelson c. United States*, 335 U.S. 469 (1948), p. 481, le juge Jackson.

Where a question implies the existence of a disputed factual predicate that is manifestly tenuous or suspect, a trial judge may properly take appropriate steps, by conducting a *voir dire* or otherwise, to seek and obtain counsel's assurance that a good faith basis exists for putting the question. If the judge is satisfied in this regard and the question is not otherwise prohibited, counsel should be permitted to put the question to the witness.

52 Lorsqu'une question implique l'existence d'une assise factuelle contestée et manifestement fragile ou suspecte, le juge du procès peut à bon droit prendre les mesures qui s'imposent — soit en tenant un voir-dire soit autrement — pour obtenir de l'avocat l'assurance qu'il pose la question de bonne foi. Si les assurances données à cet égard satisfont le juge et que la formulation de la question n'est pas prohibée pour une autre raison, l'avocat devrait être autorisé à poser la question au témoin.

Central to the trial judge's ruling in this case was his understandable but mistaken view of *Howard*.

53 Un aspect central de la décision du juge du procès en l'espèce est l'interprétation, par ailleurs compréhensible mais erronée, qu'il a donnée de l'arrêt *Howard*.

The Court of Appeal distinguished *Howard* on the basis that it applied only to expert witnesses.

54 La Cour d'appel a déclaré l'arrêt *Howard* inapplicable à l'espèce pour le motif que cette décision ne viserait que les témoins experts.

55 In our respectful opinion, the *ratio* of *Howard* has been misunderstood and misapplied. *Howard* dealt essentially with the admissibility of evidence. Unfortunately, the reasons of Lamer J. have been applied beyond their context and the record in this case leaves no doubt that a misapprehension of *Howard* weighed heavily on the trial of the appellant.

56 In *Howard*, the accused and his co-accused had been tried jointly and found guilty of first degree murder. The Court of Appeal concluded that the trial judge had erred in some respects and ordered a new trial. The co-accused pleaded guilty to second degree murder prior to the second trial. At the first trial, both the Crown and defence called footprint experts in order to establish or disprove, respectively, that the footprints found beside the body of the victim were those of the co-accused, a certain Trudel.

57 At the second trial, before the defence expert testified, the Crown sought the court's permission to ask the defence expert on cross-examination whether or not the fact that the co-accused had pleaded guilty to the murder and had accepted a statement of facts that put him at the scene of the crime would change the expert's opinion that the footprints were not those of the co-accused as he had testified at the first trial. The trial judge ruled that the Crown could ask the question. The defence chose not to call the expert.

58 The issue was whether or not the Crown was entitled to refer, in cross-examining the defence expert, to the guilty plea entered by the co-accused. It is in this context that *Howard* must be understood. The *ratio* of *Howard*, at p. 1348, is that counsel should not inject bias into the application of the witness's expertise by being told of, and asked to take into account, a fact that is corroborative of one of the alternatives he is asked to "scientifically determine":

À notre humble avis, la *ratio decidendi* de l'arrêt *Howard* a été mal comprise et mal appliquée. Cet arrêt portait essentiellement sur l'admissibilité de la preuve. Malheureusement, les motifs du juge Lamer ont reçu une application débordant leur contexte et, en l'espèce, il ressort indubitablement du dossier que l'interprétation erronée de l'arrêt *Howard* a pesé lourd au procès de l'appelant.

Dans l'arrêt *Howard*, l'accusé et son coaccusé ont été jugés ensemble et reconnus coupables de meurtre au premier degré. La Cour d'appel a conclu que le juge de première instance avait commis certaines erreurs et elle a ordonné la tenue d'un nouveau procès. Le coaccusé a plaidé coupable à une accusation de meurtre au deuxième degré avant le second procès. Au cours du premier procès, le ministère public et la défense ont tous deux cité des experts en empreintes de pieds, pour déterminer si les empreintes relevées près du corps de la victime étaient celles du coaccusé, un certain Trudel.

Au deuxième procès, avant que l'expert de la défense ne témoigne, le ministère public a sollicité du tribunal l'autorisation de demander à l'expert de la défense, en contre-interrogatoire, si le fait que le coaccusé avait plaidé coupable à l'accusation de meurtre et avait accepté un exposé des faits précisant qu'il se trouvait sur les lieux du crime modifiait l'opinion qu'il avait exprimée au premier procès, à savoir que les empreintes n'étaient pas celles du coaccusé. Le juge du procès a estimé que le ministère public pouvait poser la question. La défense a choisi de ne pas faire témoigner son expert.

Il s'agissait de décider si l'avocat du ministère public avait le droit de parler du plaidoyer de culpabilité du coaccusé au cours du contre-interrogatoire du témoin expert de la défense. C'est dans ce contexte que l'arrêt *Howard* doit être interprété. Selon la *ratio decidendi* de l'arrêt *Howard*, exprimée à la p. 1348, les avocats ne doivent pas influencer l'application par le témoin expert de ses connaissances spécialisées en lui communiquant un fait qui corrobore l'une des possibilités qu'on lui demande d'« établir scientifiquement » et en lui demandant de prendre ce fait en considération :

Experts assist the trier of fact in reaching a conclusion by applying a particular scientific skill not shared by the judge or the jury to a set of facts and then by expressing an opinion as to what conclusions may be drawn as a result. Therefore, an expert cannot take into account facts that are not subject to his professional expert assessment, as they are irrelevant to his expert assessment; *a fortiori*, as injecting bias into the application of his expertise, he should not be told of and asked to take into account such a fact that is corroborative of one of the alternatives he is asked to scientifically determine. If the Crown experts had been told by the police when they were retained that Trudel had in fact confessed and that he acknowledged facts that established that it was his footprint, we would be left in doubt as to whether their conclusion is a genuine scientific conclusion. This is so because their expertise does not extend to Trudel's credibility, and what he admits to is totally irrelevant to what they were asked to do to help the Court, that is apply their scientific knowledge to the relevant "scientific facts", i.e., the moulds, etc.

Les experts aident le juge des faits à arriver à une conclusion en appliquant à un ensemble de faits des connaissances scientifiques particulières, que ne possèdent ni le juge ni le jury, et en exprimant alors une opinion sur les conclusions que l'on peut en tirer. Par conséquent, un expert ne peut pas tenir compte de faits qui ne sont pas soumis à son examen à titre d'expert professionnel, car ils n'ont pas de rapport avec son examen d'expert; à fortiori, on ne devrait pas lui communiquer ni lui demander de prendre en considération un fait qui corrobore l'une des possibilités qu'on lui demande d'établir scientifiquement car cela fausserait l'expertise elle-même. Si les policiers avaient dit aux experts de la poursuite, lorsqu'on avait retenu leurs services, que Trudel avait avoué et qu'il reconnaissait les faits qui établissaient qu'il s'agissait de ses empreintes de pieds, il nous faudrait nous demander si leur conclusion est vraiment scientifique. Il en est ainsi parce que leur domaine d'expertise ne s'étend pas à la crédibilité de Trudel et que ce qu'il a admis n'a absolument rien à voir avec ce qu'on leur a demandé de faire pour aider la Cour, c'est-à-dire d'appliquer leurs connaissances scientifiques aux « faits scientifiques » pertinents, à savoir les moules, etc.

Stated another way, the Crown should not have been authorized to ask the expert to take into account the co-accused's guilty plea or his adoption of the Crown's statement of facts. The Crown had not called the co-accused as a witness and as Lamer J. later pointed out, at p. 1349, "[a]t the next trial Trudel may be called, if the Crown so chooses, to testify to these facts that would tend to prove that [the expert] was wrong in his conclusion." 59

Autrement dit, le ministère public n'aurait pas dû être autorisé à demander à l'expert de prendre en considération le plaidoyer de culpabilité du coaccusé ou le fait que ce dernier avait souscrit à l'exposé des faits du ministère public. Celui-ci n'avait pas cité le coaccusé comme témoin et, comme le juge Lamer l'a ensuite souligné à la p. 1349, « [d]ans le cadre du nouveau procès, le ministère public peut, s'il le souhaite, appeler Trudel à témoigner sur les faits qui tendraient à prouver que [l'expert] s'est trompé dans sa conclusion. »

The source of the confusion in *Howard* may originate in the following remarks by Lamer J., at p. 1347: 60

Les remarques suivantes du juge Lamer, à la p. 1347 de l'arrêt *Howard*, pourraient être à l'origine de la confusion :

> The fact that Trudel had pleaded guilty and had acknowledged that the footprint was his was not at the time the question intended to be put to the expert, and was not going to become, a fact adduced in evidence; nor was it a fact that could fairly be inferred from the facts in evidence. It is not open to the examiner or cross-examiner to put as a fact, or even a hypothetical fact, that which is not and will not become part of the case as admissible evidence. [Emphasis added.]

> Le fait que Trudel avait plaidé coupable et avait reconnu que les empreintes de pieds étaient les siennes n'était pas un fait présenté en preuve à l'époque où l'on voulait poser la question à l'expert et n'allait pas le devenir par la suite. Ce n'était pas non plus un fait qu'on pouvait vraiment déduire des faits soumis en preuve. Celui qui interroge ou contre-interroge ne peut pas présenter comme un fait, ni même comme un fait hypothétique, ce qui ne fait pas partie et ne fera pas partie des éléments admissibles et mis en preuve. [Nous soulignons.]

The question that the Crown proposed to put to the expert in *Howard* would have circumvented the 61

Dans l'arrêt *Howard*, la question que le ministère public se proposait de poser à l'expert lui aurait

rules of evidence. Trudel had not testified and his guilty plea was not adduced in evidence. The question and answer were irrelevant to the validity of the expert's opinion and therefore inadmissible. There is a crucial difference between questions put on cross-examination that relate to and rely on inadmissible evidence and cross-examination on unproven facts. See P. M. Brauti, "Improper Cross-Examination" (1998), 40 *Crim. L.Q.* 69, at p. 91.

62 Rather than confining *Howard* to the admissibility of evidence as Finlayson J.A. did in *R. v. Norman* (1993), 16 O.R. (3d) 295 (C.A.), at p. 310, trial and appellate courts, as illustrated in this appeal, have not infrequently interpreted *Howard* as standing for a broad proposition that restricts cross-examination to questions based on facts established in evidence. See *R. v. Fiqia* (1993), 145 A.R. 241 (C.A.), at paras. 44-50; *R. v. Fickes* (1994), 132 N.S.R. (2d) 314 (C.A.), at paras. 9-10.

63 The conclusion that *Howard* mandates or authorizes the requirement of an evidentiary foundation for every factual suggestion put to a witness (expert or not) in cross-examination is misplaced. *Howard* cannot be invoked for this purpose. It is unlikely that the Court intended to add an evidentiary requirement to the foundation for cross-examination and thus limit the scope of cross-examination which had been developed by the long history of the common law and accompanying jurisprudence. *Howard* therefore cannot be accepted as an authority beyond the *ratio* of that case which concerned the admissibility of certain evidence.

64 The trial judge also made reference to the case of *Browne v. Dunn* (1893), 6 R. 67 (H.L.), as support for the proposition that an evidentiary foundation is required for questions put in cross-examination. He was mistaken. The rule in *Browne v. Dunn* requires counsel to give notice to those witnesses whom the

permis de contourner les règles de preuve. Trudel n'avait pas témoigné et son plaidoyer de culpabilité n'était pas soumis en preuve. La question et la réponse étaient sans rapport avec la validité de l'opinion de l'expert et elles étaient par conséquent inadmissibles. Il existe une différence fondamentale entre le fait de poser, en contre-interrogatoire, des questions qui portent et reposent sur des éléments de preuve inadmissibles et le fait de contre-interroger un témoin sur des faits non établis. Voir P. M. Brauti, « Improper Cross-Examination » (1998), 40 *Crim. L.Q.* 69, p. 91.

Au lieu de restreindre l'arrêt *Howard* à l'admissibilité de la preuve, ainsi que l'a fait le juge Finlayson dans l'arrêt *R. c. Norman* (1993), 16 O.R. (3d) 295 (C.A.), p. 310, il est arrivé assez fréquemment, comme en témoigne le présent pourvoi, que des tribunaux de première instance et d'appel tirent de cet arrêt la proposition générale voulant que les seules questions autorisées en contre-interrogatoire soient celles portant sur les faits étayés par la preuve. Voir *R. c. Fiqia* (1993), 145 A.R. 241 (C.A.), par. 44-50; *R. c. Fickes* (1994), 132 N.S.R. (2d) 314 (C.A.), par. 9-10.

La conclusion selon laquelle l'arrêt *Howard* a pour effet d'exiger, ou de permettre au tribunal d'exiger, un fondement de preuve à l'égard de chaque fait soumis à un témoin (expert ou non) en contre-interrogatoire est injustifiée. Cet arrêt ne peut être invoqué au soutien d'une telle proposition. Il est peu probable que la Cour ait voulu ajouter un fardeau de preuve aux exigences déjà applicables au contre-interrogatoire et ainsi limiter la portée de celui-ci, portée qui avait évolué au fil de la longue histoire de la common law et de la jurisprudence pertinente. On ne saurait donc accepter que l'arrêt *Howard*, qui portait sur l'admissibilité de certains éléments de preuve, fasse autorité au-delà de sa *ratio decidendi*.

Le juge du procès a aussi invoqué l'arrêt *Browne c. Dunn* (1893), 6 R. 67 (H.L.), pour étayer la proposition selon laquelle il est nécessaire de présenter un fondement de preuve à l'égard des questions posées en contre-interrogatoire. Il a fait erreur. La règle établie dans *Browne c. Dunn* oblige l'avocat à

cross-examiner intends later to impeach. The rationale for the rule was explained by Lord Herschell, at pp. 70-71:

> 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.

The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case. See *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at pp. 781-82; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 954-57. In any event, the foregoing rule in *Browne v. Dunn* remains a sound principle of general application, though irrelevant to the issue before the trial judge in this case.

prévenir les témoins dont il entend mettre en doute la crédibilité ultérieurement. La justification de cette règle a été expliquée ainsi par lord Herschell, aux p. 70-71 :

> [TRADUCTION] Bien, vos Seigneuries, je ne peux m'empêcher d'affirmer qu'il m'apparaît absolument essentiel au déroulement régulier d'une instance, lorsqu'un avocat entend suggérer qu'un témoin ne dit pas la vérité sur un point en particulier, d'attirer l'attention de ce témoin sur ce fait en lui posant en contre-interrogatoire certaines questions indiquant qu'on fera cette imputation, et non d'accepter son témoignage et d'en faire abstraction comme s'il était absolument incontesté puis, lorsqu'il lui est impossible d'expliquer — ce qu'il aurait peut-être pu faire si ces questions lui avaient été posées — les circonstances qui, prétend-on, montrent que sa version des faits ne doit pas être retenue, de soutenir qu'il n'est pas un témoin digne de foi. Vos Seigneuries, il m'a toujours semblé que l'avocat qui entend mettre en doute le témoignage d'une personne doit, lorsque cette personne se trouve à la barre des témoins, lui donner l'occasion d'offrir toute explication qu'elle est en mesure de présenter. De plus, il me semble qu'il ne s'agit pas seulement d'une règle de pratique professionnelle dans la conduite d'une affaire, mais également d'une attitude essentielle pour agir de façon loyale envers les témoins. On souligne parfois le caractère excessif du contre-interrogatoire auquel un témoin est soumis, reprochant à ce contre-interrogatoire d'être abusif. Toutefois, il me semble qu'un contre-interrogatoire mené par un avocat péchant par excès de zèle peut se révéler beaucoup plus équitable pour le témoin que le fait de ne pas le contre-interroger puis de suggérer qu'il ne dit pas la vérité, je veux dire sur un point à l'égard duquel il n'est par ailleurs pas clair qu'il a été pleinement informé au préalable qu'on entendait mettre en doute la crédibilité de sa version des faits.

65

Bien qu'elle vise à faire en sorte que les témoins et les parties soient traités équitablement, cette règle n'a pas un caractère absolu. La mesure dans laquelle elle est appliquée est une décision qui relève du pouvoir discrétionnaire du juge du procès, eu égard à toutes les circonstances de l'affaire. Voir *Palmer c. La Reine*, [1980] 1 R.C.S. 759, p. 781-782; J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 954 et 957. Quoi qu'il en soit, la règle susmentionnée établie dans l'arrêt *Browne c. Dunn* demeure un principe valable d'application générale, bien qu'elle ne soit pas pertinente pour la question dont était saisi le juge du procès en l'espèce.

66 As long as counsel has a good faith basis for asking an otherwise permissible question in cross-examination, the question should be allowed. In our view, no distinction need be made between expert and lay witnesses within the broad scope of this general principle. Counsel, however, bear important professional duties and ethical responsibilities, not just at trial, but on appeal as well. This point was emphasized by Lord Reid in *Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.), at pp. 227-28, when he said:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. . . . [Emphasis added.]

67 By requiring an evidentiary foundation on the basis of *Howard*, the trial judge erred in law. Over the course of the two *voir dires* the existence of a good faith basis for the defence's "drug debt" theory had, in any event, become apparent. This basis included, but was not limited to, the police reports, the complainant Barnaby's drug conviction, his admission at the preliminary hearing that he had dealt in drugs, and the drug conviction of the complainant's acquaintance who drove him to the alleged scene of the attack.

Pourvu que l'avocat agisse de bonne foi lorsqu'il pose en contre-interrogatoire une question par ailleurs admissible, cette question devrait être autorisée. À notre avis, il n'est pas nécessaire d'établir de distinction entre les témoins experts et les témoins profanes à l'intérieur du vaste cadre de ce principe général. Toutefois, les avocats sont assujettis à d'importantes obligations professionnelles et déontologiques, non seulement au cours du procès mais aussi en appel. Lord Reid a souligné l'importance de ce point dans l'arrêt *Rondel c. Worsley*, [1969] 1 A.C. 191 (H.L.), p. 227-228, lorsqu'il a dit ceci :

> [TRADUCTION] Tout avocat a envers son client l'obligation de ne pas hésiter à soulever tout point, à faire valoir tout argument et à poser toute question — aussi répugnante que puisse être cette intervention — qui selon lui aide la cause de son client. Cependant, en tant qu'officier de justice soucieux de l'intérêt de l'administration de la justice, il a envers le tribunal, les normes de sa profession et le public une obligation primordiale qui peut entrer en conflit et qui dans bien des cas entre effectivement en conflit avec les désirs d'un client ou avec ce que le client estime être ses intérêts personnels. L'avocat ne doit pas induire le tribunal en erreur, il ne doit pas se permettre de lancer des accusations contre l'autre partie ou les témoins sans avoir en sa possession les renseignements suffisants pour les étayer, il ne doit pas cacher de la jurisprudence ou des documents qui pourraient être défavorables à ses clients, mais que le droit ou les normes de sa profession l'obligent à déposer. . . [Nous soulignons.]

Le juge du procès a commis une erreur de droit en exigeant, sur la base de l'arrêt *Howard*, la production d'un fondement de preuve. De toute façon, l'existence de la bonne foi requise pour justifier la présentation de la thèse de la dette de drogue était ressortie clairement au cours des deux voir-dires. Parmi les éléments étayant cette bonne foi, mentionnons les rapports de police, la déclaration de culpabilité figurant au dossier du plaignant Barnaby pour une affaire de drogue et son aveu, à l'enquête préliminaire, qu'il avait vendu de la drogue et la déclaration de culpabilité pour une affaire de drogue prononcée contre la personne — une connaissance du plaignant — qui l'avait conduit sur les lieux présumés de l'agression.

V. Conclusion

In order to determine whether there has been no substantial wrong or miscarriage of justice as a result of a trial judge's error, an appellate court must determine "whether there is any reasonable possibility that the verdict would have been different had the error at issue not been made". See *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617.

In *R. v. Anandmalik* (1984), 6 O.A.C. 143, at p. 144, the Ontario Court of Appeal recognized that the importance of cross-examination becomes even more critical when credibility is the central issue in the trial:

> In a case where the guilt or innocence of the [accused] largely turned on credibility, it was a serious error to limit the [accused] of his substantial right to fully cross-examine the principal Crown witness. It would not be appropriate in the circumstances to invoke or apply the curative provisions of s. 613(1)(*b*)(iii) [now s. 686(1)(*b*)(iii)].

The Manitoba Court of Appeal echoed these sentiments in *R. v. Wallick* (1990), 69 Man. R. (2d) 310, at p. 311:

> Cross-examination is a most powerful weapon of the defence, particularly when the entire case turns on credibility of the witnesses. An accused in a criminal case has the right of cross-examination in the fullest and widest sense of the word as long as he does not abuse that right. Any improper interference with the right is an error which will result in the conviction being quashed.

It follows that where, as here, a trial judge improperly interfered with an accused's right to cross-examine, infused a mistrial chill into the proceedings, and placed conditions on a legitimate line of questioning that forfeited the accused's statutory right to address the jury last, a substantial wrong occurred and an unfair trial resulted.

This alone is sufficient to dispose of the appeal in the appellant's favour.

V. Conclusion

Afin de déterminer si l'erreur du juge du procès a causé un tort important ou une erreur judiciaire grave, la cour d'appel saisie de la question doit se demander « s'il existe une possibilité raisonnable que le verdict eût été différent en l'absence de l'erreur en question ». Voir *R. c. Bevan*, [1993] 2 R.C.S. 599, p. 617. 68

Dans l'arrêt *R. c. Anandmalik* (1984), 6 O.A.C. 143, p. 144, la Cour d'appel de l'Ontario a reconnu que le contre-interrogatoire revêt une importance plus cruciale encore lorsque la crédibilité est la question centrale du procès : 69

> [TRADUCTION] Dans une affaire où la culpabilité ou l'innocence de l'[accusé] dépendait largement de la question de la crédibilité, ce fut une grave erreur que de priver l'[accusé] de son droit fondamental de contre-interroger pleinement le principal témoin de la poursuite. Il ne serait pas approprié dans les circonstances d'invoquer ou d'appliquer les dispositions réparatrices du sous-al. 613(1)*b*)(iii) [maintenant le sous-al. 686(1)*b*)(iii)].

La Cour d'appel du Manitoba a fait écho à cette opinion dans l'arrêt *R. c. Wallick* (1990), 69 Man. R. (2d) 310, p. 311 : 70

> [TRADUCTION] Le contre-interrogatoire est un outil très puissant à la disposition de la défense, particulièrement lorsque toute l'affaire repose sur la crédibilité des témoins. Dans un procès criminel, l'accusé a le droit de contre-interroger les témoins, et ce au sens le plus complet et le plus large du terme, pourvu qu'il n'abuse pas de ce droit. Toute limitation irrégulière de ce droit constitue une erreur susceptible d'entraîner l'annulation de la déclaration de culpabilité.

Il s'ensuit que dans les cas où, comme en l'espèce, le juge du procès a limité irrégulièrement le droit de l'accusé de contre-interroger, a fait peser la menace d'annulation du procès et a subordonné la présentation d'une série de questions légitimes au respect de conditions qui ont eu pour effet de faire perdre à l'accusé le droit que lui confère la loi de s'adresser au jury en dernier, un tort important a été causé et un procès inéquitable en a résulté. 71

Cette conclusion justifie à elle seule de trancher le pourvoi en faveur de l'appelant. 72

73 Moreover, we are not convinced that, in the absence of the trial judge's error, there is no "reasonable possibility that the verdict would have been different". See *Bevan*, *supra*, at p. 617.

74 In our respectful view, it would be wrong in these circumstances to apply the curative proviso.

75 We would instead allow the appeal and order a new trial.

Appeal allowed.

Solicitors for the appellant: Pinkofskys, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

En outre, nous ne sommes pas convaincus qu'il n'existe aucune « possibilité raisonnable que le verdict eût été différent » en l'absence de l'erreur commise par le juge du procès. Voir l'arrêt *Bevan*, précité, p. 617.

À notre humble avis, il serait erroné dans les circonstances d'appliquer la disposition réparatrice.

Au contraire, nous sommes d'avis d'accueillir le pourvoi et d'ordonner la tenue d'un nouveau procès.

Pourvoi accueilli.

Procureurs de l'appelant : Pinkofskys, Toronto.

Procureur de l'intimée : Procureur général de l'Ontario, Toronto.

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2015 ONCA 237
Ontario Court of Appeal

R. v. Quansah

2015 CarswellOnt 4940, 2015 ONCA 237, [2015] O.J. No. 1774, 121 W.C.B. (2d) 253, 125 O.R. (3d) 81, 19 C.R. (7th) 33, 323 C.C.C. (3d) 191, 331 O.A.C. 304

Her Majesty the Queen, Respondent and Richard Quansah, Appellant

David Watt, M. Tulloch, M.L. Benotto JJ.A.

Heard: August 27, 2014
Judgment: April 10, 2015
Docket: C47082

Proceedings: leave to appeal refused *R. v. Quansah* (2016), [2016] S.C.C.A. No. 203, [2016] C.S.C.R. No. 203, 2016 CarswellOnt 14797, 2016 CarswellOnt 14796, Gascon J., McLachlin C.J.C., Moldaver J. (S.C.C.)

Counsel: Brian Snell, Gabriel Gross-Stein, for Appellant
David Finley, for Respondent

Comment

This clearly written decision of Justice Watt is a reminder that the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) continues to be an important consideration for counsel in criminal trials. The Crown's version of events was of a premeditated jailhouse murder, carried out after a verbal altercation between inmates from rival gangs. The evidence was that each morning, the cells were remotely unlocked for an hour, but that the doors would re-lock when shut unless objects were used to prop them open. This seems like an improvised and unpredictable system of security for a correctional facility. The Crown witnesses, who were allies of the victim, offered a version of events in which the accused took advantage of the automatic unlocking to surprise the sleeping victim, aided by another inmate who made sure that the door did not close and lock the accused in the cell with the victim. The accused's version saw the victim awake and keeping the door open with a shoe, suggesting that he was expecting the accused and ready to fight.

The accused's cellmate, another ally of the victim, described the accused as nursing a grudge against the victim and plotting his revenge all night, evidence supporting the Crown's claim of planning and deliberation required for first-degree murder. The accused, on the other hand, said he slept little the night before the stabbing because his cellmate had threatened him and he wanted to avoid a surprise attack during the night.

In considering these competing versions of events, it would certainly have been helpful for the jury to have observed the Crown witnesses being confronted with the accused's version. The failure to do this merited some response. The Crown's delay in objecting, however, made it difficult to recall the witnesses. Instead, the trial judge offered a modest caution to the jury, telling them that it was simply a comment that they were not required to follow, and reminding the jury that the deficits of counsel were not to be visited on the accused. As Justice Watt notes, this is the type of decision that is entitled to considerable deference on appeal.

Janine Benedet

Allard School of Law, University of British Columbia

***David Watt J.A.*:**

1 Minh Tu challenged Richard Quansah to a fight. At first, Quansah demurred. The next morning, Quansah answered the challenge. He killed Tu.

2 Quansah said he stabbed Tu in self-defence. The jury at Quansah's trial decided otherwise and found him guilty of first degree murder.

3 Quansah appeals. He argues that the trial judge misapprehended the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.)) and, as a result, included in his charge an instruction that was not warranted and fatally compromised the fairness of his trial.

4 I would not give effect to these claims and would dismiss the appeal.

The Background Facts

5 To appreciate the arguments advanced, some background about the circumstances in which Tu died is necessary before the focus is shifted to the cross-examination of various witnesses at trial and the evidence given by Quansah.

A. The Central North Correctional Centre

The Floor Plan

6 Central North Correctional Centre (CNCC) is a prison that houses inmates awaiting trial, as well as those serving sentences of up to two years less one day. The prison consists of six living units. Each unit houses six trapezoidal ranges. The ranges are arranged in a circular fashion, like pieces of a pie, around a central rotunda.

7 A common area or "day room", which contains tables and stools fixed to the floor, occupies the central part of each range.

8 Two levels of cells are located along the outside walls of each range. Food is passed through two "feeding hatches" in the wall separating the range from the rotunda.

9 From a control module in the centre of the rotunda, guards have a clear line of sight into the range, but not into the interior of the cells or the shower area.

The Cell Doors

10 The cell doors are unlocked or "cracked" at 9:00 a.m. and remain unlocked for one hour. The doors can be opened by cell occupants during this time but relock if they are pushed closed. To enter or exit a cell, without being locked in or out, the door must be left to rest gingerly on its pins or an object inserted in the space between the door and the door frame.

The Range

11 In early May 2004, Tu and Quansah were both inmates in Unit 1-A. Tu had been there about three weeks, Quansah for about half that time. Tu was skilled in martial arts and, according to some inmates, "the toughest guy on the range."

12 Tu was a late sleeper. He often remained asleep in his cell after the doors had been "cracked" at 9:00 a.m.

The Social Circles

13 Allegiances in Unit 1-A divided along racial lines. Tu was aligned with white and Asian inmates, including the Crown witnesses Dean Ireland, Edward Clare and Michael Ayres. Quansah was associated with a group of black and Arab prisoners including David Clarke, Nana Prempeh and Jawad Mir, none of whom testified at trial.

The Inmate Code

14 An informal inmate "code" regulates life among the prisoners. The code requires any inmate challenged to a fight by another inmate to fight. An inmate who fails to respond to the challenge may be beaten, stabbed or kicked off the range, as determined by senior inmates. An inmate who at first fails to respond to a challenge to fight may restore his reputation by "showing up" subsequently through arrangements made with senior inmates.

15 The areas best suited for fights between inmates are those not visible to the guards from the control module: the shower area and inside individual cells. The best time for cell fights is in the morning after the cell doors have been "cracked".

B. Events Leading Up to the Stabbing

The Game of "Risk"

16 Inmates at CNCC played the board game, "Risk", at tables in the day room.

17 On May 4, 2004 inmate Lavallee, Tu and some other inmates were about to begin a game of "Risk". Quansah was in the shower. Lavallee yelled at Quansah to hurry up. Quansah responded angrily. Quansah left the shower area, walked over to the table where the "Risk" game was underway and assaulted Lavallee, although Lavallee claimed Quansah did not hit him.

The Challenge

18 Tu stood up by the table. He challenged Quansah to a fight. Tu stripped down to his shorts and walked over to the shower area where he practiced a few kicks. He called out to Quansah again. Quansah said he was scared or scared to fight Tu. Another inmate yelled "six up" indicating that guards were watching.

19 No fight occurred.

The Aftermath

20 Accounts differ about what happened between Tu and Quansah after Tu challenged Quansah to a fight.

21 According to Quansah, Tu emerged from the shower with three other inmates, including Quansah's cellmate, Ayres. They blocked Quansah's view of the television. Tu accused Quansah of causing trouble on the range. A guard came to the window and Tu retreated. Soon after, another guard took Quansah to the rotunda and asked if there was a problem. When Quansah returned, Tu accused Quansah of "ratting" him out and then walked away.

22 Other inmates talked to Tu later and testified that Tu considered the altercation over and was prepared to let things die down.

23 Quansah was concerned about the consequences of having backed down when Tu called him out to fight. He would be labelled a "punk" and his position with other inmates would be compromised. Other inmates noticed that Quansah was uncharacteristically quiet and stared at Tu. There was some evidence that Quansah wrote out a "kite" — a written message to inmates on another range — and passed it through the door to the adjacent range.

The Evening Meeting

24 That same evening some senior inmates on the range met with Quansah in the common area. They told Quansah he had to fight with Tu or he would be kicked off the range. Quansah was concerned he would be "rushed" by Tu's friends but was assured by one of the inmates that he would be backed.

25 Quansah agreed to fight Tu one-on-one.

After Lock-up

26 When the cells were locked for the evening, the guards conducted a search for weapons. Quansah was strip searched. No weapons were found.

27 Ayres was Quansah's cellmate. According to Ayres, Quansah remained angry about the argument with Tu. Quansah said "that guy doesn't know me. I'm not a punk. This isn't over." Quansah testified that Ayres, a friend of Tu, threatened him. Quansah was afraid that Ayres might harm him during the night. Quansah did not fall asleep until Ayres left the cell early in the morning to go to court.

C. The Stabbing

28 It was uncontested at trial that Quansah stabbed Tu to death in Tu's cell after the doors were "cracked" at 9:00 a.m. on May 5, 2004. Quansah and Tu were the only persons in the cell at the time of the stabbing. Nobody saw Quansah with a knife when he entered Tu's cell that morning.

29 The accounts varied about what happened shortly before Quansah entered and after he left Tu's cell.

The Account of Edward Clare

30 Clare was an ally of Tu. After the cell doors had been "cracked", he saw Clarke (who did not testify), a member of Quansah's group, open and shut the door to Billy Tran's cell, locking Tran inside. Locked in the cell, Tran, a friend of Tu, could not help in any altercation with Quansah.

31 Quansah walked by another inmate, Brooks, and said it "better be one-on-one." Quansah walked into cell number nine, Tu's cell, as Clarke opened the cell door and held it open. Clare heard some noise from the cell. The cell door opened. Clarke almost fell down. The door partially closed and then opened again. Clare could see blood. Clarke put a bottle in the door to prevent it from closing all the way. Somebody yelled from inside the cell: "you thought you had me last night".

32 According to Clare, when Quansah left the cell, his shirt was pulled down at the front. Quansah said "holy fuck" as he left Tu's cell.

The Account of Dean Ireland

33 Ireland, another member of Tu's group, saw Quansah and Clarke walk up the stairs to the upper level of cells after the doors were "cracked" at 9:00 a.m. on May 5. Quansah gave Mir, an ally, a "Muslim hug", then entered Tu's cell and closed the door so that it would not lock behind him.

34 Ireland heard a loud banging from inside the cell. He saw Quansah's arm come out of the door and then quickly disappear from view. He did not see a knife. Clarke inserted a shampoo bottle between the door and the doorframe to prevent the door from locking. Seconds later, Quansah walked out of the cell, his t-shirt stretched at the shoulder. Quansah held a bloody knife in his right hand.

The Robert Fallis Version

35 Fallis saw Quansah walk up the stairs to the second level of cells, hug Mir and then walk down the corridor with Clarke and Prempeh towards Tu's cell. Quansah walked into the cell. Mir looked over the railing towards the rotunda area. Prempeh looked in the window of Tu's cell. Clarke held the door against his foot to prevent it from opening or closing.

36 About 30 seconds later, Fallis heard a noise from inside Tu's cell. The cell door opened. Quansah's leg came out the door and then returned inside the cell. The door partially closed. Soon afterwards, Quansah walked out of the cell. He stared straight ahead. His left hand was cupped, his shirt ripped on the left side.

Richard Quansah's Account

37 Quansah gave evidence at trial. He testified that when the cell doors were "cracked" on May 5 he walked from his cell to Tu's cell, intending to have a consensual fight with Tu without weapons. En route, he learned from Clarke that something had been done to ensure that Tu's ally, Tran, would not get involved. When he arrived at the second level of the range, Quansah met Mir. They hugged "in the Muslim style". Together with Clarke, Quansah walked towards Tu's cell. The door to the cell rested on its latch. A shoe kept the door open.

38 Through the window in the cell door, Quansah saw Tu seated, facing the bed. Quansah entered. Tu jumped up. The fight began. Tu tried to knee and kick Quansah in the crotch. They exchanged punches. Tu doubled over from a punch and then rammed Quansah backwards into the door. Tu broke free, turned and grabbed something from the desk. He made a throwing motion. Quansah heard "a clatter" and then saw a knife on the ground.

39 The men exchanged looks. Both lunged for the knife. Tu bent over to grab the knife. Quansah pushed Tu back and then grabbed the knife with his right hand. Tu tried to pry the knife out of Quansah's hand. Quansah told Tu to stop. Quansah began to panic. He pushed Tu away. Tu jumped back. Quansah stabbed Tu as Tu continued to advance towards him. Tu draped himself over Quansah. Quansah then stabbed Tu in the back. Tu moaned. Quansah ran out of the cell.

D. After the Stabbing

The Denouement

40 After leaving Tu's cell, Quansah walked to the cell occupied by Mir and Ireland. There, he washed and disposed of the knife and changed his shirt. The knife was never recovered. Some strips of cloth were found in the plumbing in the cell occupied by Mir and Ireland.

41 When a lock-down was announced, Quansah returned to his cell. There he was strip searched. He had a cut on one of his hands, but very little blood on his clothing and no blood on his shoes.

The Knife

42 Ireland claimed that he had seen a knife in Quansah's right hand when Quansah left Tu's cell. Ireland described it as a pocket knife with a three inch blade and a string attached to it. Ireland's sketch of the knife was filed as an exhibit at trial. No one else gave evidence about seeing a knife in Quansah's hand before he entered or after he left Tu's cell.

43 About three or four days before the argument over the board game, Ireland said he had seen Tu with a knife. When Ireland asked Tu about the knife, Tu said: "you'll never know when you need it."

The Cause of Death

44 When paramedics arrived, Tu was conscious. He would not say what had happened, but did tell the first responders that he had returned to his cell after breakfast. Tu suffered six stab wounds, divided equally between his chest and his back, as well as a defensive wound to his left hand.

45 Tu died from stab wounds to his chest.

The Positions of the Parties at Trial

46 It was the position of the trial Crown (not Mr. Finley) that Quansah, humiliated by Tu during the argument about the game of "Risk", got together with Clarke, Prempeh and Mir after the incident and plotted Tu's murder. The murder was to take place the next morning in Tu's cell. To ensure that Tu was alone, Clarke confined Tu's ally, Tran, to his cell. Quansah entered Tu's cell as he slept and stabbed Tu to death with a knife he had taken there for that very purpose.

47 At trial, counsel for Quansah (not Mr. Snell, who is counsel on appeal) contended that Quansah had been humiliated by Tu in their altercation over the game of "Risk". To restore his reputation sullied by his failure to fight Tu when challenged, and to ensure his continued safety in the institution, Quansah went to Tu's cell early the next morning. Quansah's purpose was to engage in a consensual one-on-one fight. The fight began as a fist fight. As the fight progressed, Tu produced a knife. The men struggled over the knife. Quansah gained control of the knife and stabbed Tu in self-defence.

The Grounds of Appeal

48 The appellant advances two related grounds of appeal.

49 First, the appellant says the trial judge erred in holding that trial counsel had breached the rule in *Browne v. Dunn*, by failing:

i. to cross-examine Clare, Fallis and Ireland about a shoe propping open the door to Tu's cell before the appellant arrived on the morning of the stabbing;

ii. to cross-examine Fallis on Quansah's alleged remark, "your friend needs help", as Quansah left Tu's cell after the stabbing; and

iii. to cross-examine Ayres on whether he threatened Quansah in their cell the night before the stabbing.

50 Second, the appellant contends that the trial judge erred in instructing the jury. [1] The appellant alleges the trial judge erred in telling the jury they could consider, as a factor in assessing the weight to be assigned to Quansah's evidence, the failure to cross-examine these witnesses and thus afford them an opportunity to respond to the contradictory version offered by the appellant. Quansah's version was the sole support for self-defence. The appellant also alleges the trial judge should have reminded the jury that counsel's failure to cross-examine could have been inadvertent.

Ground #1: Breach of the Rule in Browne v. Dunn

A. Three Specific Incidents

51 The first ground of appeal alleges that the trial judge erred in finding that trial counsel for the appellant breached the rule in *Browne v. Dunn* by failing to put, in cross-examination of four inmate witnesses, three specific incidents about which the appellant testified in advancing self-defence.

52 One incident involved a threat allegedly made by the appellant's cellmate, Ayres, several hours before Tu was killed. The second related to the state of Tu's cell door when the appellant entered shortly after 9:00 a.m. on May 5. The third had to do with a remark the appellant allegedly made to Fallis in the presence of two other inmates as he left Tu's cell and proceeded to Mir's cell to dispose of the knife and some clothing.

53 A brief reference to the evidence of the appellant and the inmate witnesses about each incident provides a basis upon which to assess the validity of this claim.

The Ayres Threat

54 The appellant testified that he and his cellmate, Ayres, did not get along. The appellant wanted Ayres moved out of their cell. Ayres was a friend of Tu and had threatened the appellant after the incident with the game of "Risk". The appellant was concerned that Ayres might "jump" him. After lock down, Ayres talked about the incident and said that bad things were going to happen. The appellant said he slept little that night in fear that Ayres would attack him.

55 Ayres gave evidence that, in their discussion about the incident with the board game, the appellant, in describing himself, told Ayres that he was not a "punk". It seemed the appellant did not consider the incident with Tu to be over.

56 Trial counsel for the appellant never suggested to Ayres in cross-examination that he had threatened the appellant that bad things would happen to him or said anything which might lead the appellant to believe that anything of that nature would occur.

The Shoe in the Door

57 The appellant testified that when he arrived at the door to Tu's cell shortly after 9:00 a.m. on May 5 he noticed a shoe already in place to prevent the door from locking. Clarke was with the appellant to ensure the fight was one-on-one. The appellant saw Tu, sitting down in his cell, apparently "collecting his thoughts". Clarke remained outside the cell when the appellant entered and began his fight with Tu.

58 Clare saw Clarke open the door to Tu's cell. The appellant entered. Clarke held the door to prevent it from closing. The door opened twice during the altercation inside. Each time the door opened, Clarke pushed it back. Clarke also put a bottle on the floor to prevent the door from locking.

59 Clare was not cross-examined about the door to Tu's cell. Nor was he asked about Clarke's activities there. No suggestion was put to Clare that a shoe was already in the doorway when Clarke and the appellant approached Tu's cell. Clare confirmed that Tu was usually a late sleeper. Clare had no idea what Tu was doing in his cell as the appellant and Clarke approached or what happened inside the cell after the appellant entered.

60 Fallis saw Clarke open the door for the appellant and hold it open using his hand and foot after the appellant entered Tu's cell.

61 Fallis was not cross-examined about the condition of the door to Tu's cell when the appellant and Clarke approached. Counsel did not put any suggestion to Fallis that the door was held open by a shoe. Fallis was not cross-examined about what Clarke did at the door after the appellant had entered.

62 Ireland, a very reluctant and uncooperative witness for the Crown, gave evidence that the appellant entered Tu's cell and rested the door so that it would not lock. Later, Clarke put a shampoo bottle on the floor to prevent the door from locking.

63 In cross-examination, Ireland confirmed that Clarke held or wedged something in Tu's cell door to ensure that it did not lock. It was never suggested to Ireland that the cell door was held open by a shoe already in place when the appellant and Clarke arrived.

64 Clarke did not testify.

The Post-offence Remark

65 In his testimony, the appellant said that, as he left Tu's cell after the stabbing and went to Mir's cell, he passed inmates Brooks and Fallis. He said to Fallis: "your friend needs some help".

66 Fallis gave no evidence about any remark made by the appellant after he left Tu's cell. It was not suggested to Fallis in cross-examination that the appellant had made such a remark as he headed toward Mir's cell.

B. The Positions of the Parties

67 Mr. Snell, counsel on appeal, says trial counsel did not violate the rule in *Browne v. Dunn* in connection with any of the issues found by the trial judge.

68 So far as the alleged threat by Ayres is concerned, Mr. Snell contends that the rule in *Browne v. Dunn* was neither engaged nor violated. The appellant took no issue with Ayres's claim that the appellant did not sleep the night before he killed Tu. The appellant offered a contrary explanation to the inference of planning that emerged from Ayres's evidence — fear of reprisal due to Ayres's threats. In the overall context of the case, the point was of no great significance. Failure to cross-examine on it did not offend the rule in *Browne v. Dunn* and worked no great mischief.

69 In connection with the failure to cross-examine Fallis, Ireland and Clare about the shoe in the doorway to Tu's cell when the appellant and Clarke arrived, Mr. Snell says this evidence held no impeachment value and thus did not engage the rule in *Browne v. Dunn*. The important point was the consensual nature of the fight, not what held Tu's door open permitting the appellant to enter. Ireland and Fallis confirmed the consensual nature of the fight and nothing the appellant said later contradicted this core feature of their testimony. Clare was, and demonstrated himself to be, a highly suspect witness prone to exaggeration and unworthy of belief. Trial counsel was under no obligation to slog through every detail of the appellant's version to forestall a possible *Browne v. Dunn* objection.

70 Nor was the rule in *Browne v. Dunn* offended by the failure to cross-examine Fallis on the "your friend needs some help" comment as the appellant walked away from Tu's cell after the stabbing. Fallis gave no evidence in-chief about whether the appellant said, or did not say, anything to him at that time. It follows that the appellant's evidence claiming he made such a comment did not, indeed could not, impeach Fallis on his account of what the appellant said after the killing. Further, this evidence was insignificant in the context of the case as a whole.

71 For the respondent, Mr. Finley contends that each admitted failure of cross-examination implicated and offended the rule in *Browne v. Dunn*.

72 The failure to cross-examine Ayres about the threats he made the previous evening offended the rule in *Browne v. Dunn* though not to the same extent as the other breaches. Ayres's evidence in-chief, buttressed to some extent by other evidence, supported the Crown's position that the appellant was angry and ruminating over his impending attack on Tu. This supported the Crown's claim that Tu's murder was planned and deliberate. The appellant's claim that Ayres threatened him undermined Ayres's account and weakened the force of the evidence about the appellant's state of mind shortly before the killing. This was important and should have been put to Ayres in cross-examination.

73 Mr. Finley says the failure of the appellant's trial counsel to cross-examine Clare, Ireland and Fallis about the shoe in the doorway to Tu's cell was a serious breach of the rule. None of Fallis, Ireland or Clare said they saw anything in Tu's doorway holding the door ajar as Clarke and the appellant approached. Nothing was placed in the doorway or held the door open until *after* the appellant had entered. On the basis of this evidence, the jury could have concluded there was no dispute that Tu's door was open but unlocked before the appellant's arrival. A shoe in the door further suggested the Crown's witnesses were unreliable. In addition, the shoe in the door suggested Tu was up, not sleeping in as he usually did, and was waiting for the appellant. The inmate witnesses should have been confronted with this version of events.

74 Mr. Finley also characterizes the failure to cross-examine Fallis on the "your friend needs some help" remark as a serious breach of the rule. From Fallis's evidence-in-chief, the jury could reasonably conclude the appellant had said nothing, one way or the other, as he passed by Fallis en route from Tu's cell to Mir's cell, with a knife in his hand. The appellant's remark tended to show a state of mind inconsistent with a planned and deliberate murder and consistent with a consensual fight gone wrong. The remark could also be summoned to neutralize some post-offence conduct such as disposing of the knife and damaged clothing.

C. The Governing Principles

75 In *Browne v. Dunn*, Lord Herschell, L.C., explained that if a party intended to impeach a witness called by an opposite party, the party who seeks to impeach must give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence: *Browne v. Dunn*, pp. 70-71; *R.*

v. Henderson (1999), 134 C.C.C. (3d) 131 (Ont. C.A.), at p. 141; and *R. v. McNeill* (2000), 144 C.C.C. (3d) 551 (Ont. C.A.), at para. 44.

76 The rule in *Browne v. Dunn*, as it has come to be known, reflects a confrontation principle in the context of cross-examination of a witness for a party opposed in interest on disputed factual issues. In some jurisdictions, for example in Australia, practitioners describe it as a "puttage" rule because it requires a cross-examiner to "put" to the opposing witness in cross-examination the substance of contradictory evidence to be adduced through the cross-examiner's own witness or witnesses.

77 The rule is rooted in the following considerations of fairness:

i. Fairness to the witness whose credibility is attacked:

The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: *R. v. Dexter* 2013 ONCA 744, 313 O.A.C. 226, at para. 17; *Browne v. Dunn*, at pp. 70-71.

ii. Fairness to the party whose witness is impeached:

The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and

iii. Fairness to the trier of fact:

Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

78 In addition to considerations of fairness, to afford the witness the opportunity to respond during cross-examination ensures the orderly presentation of evidence, avoids scheduling problems associated with re-attendance and lessens the risk that the trier of fact, especially a jury, may assign greater emphasis to evidence adduced later in trial proceedings than is or may be warranted.

79 Failure to cross-examine a witness at all or on a specific issue tends to support an inference that the opposing party accepts the witness's evidence in its entirety or at least on the specific point. Such implied acceptance disentitles the opposing party to challenge it later or, in a closing speech, to invite the jury to disbelieve it: *R. v. Hart* (1932), 23 Cr. App. R. 202 (Eng. C.A.), at pp. 206 -207; *R. v. Fenlon* (1980), 71 Cr. App. R. 307 (Eng. C.A.), at pp. 313 -314.

80 As a rule of fairness, the rule in *Browne v. Dunn* is not a fixed rule. The extent of its application lies within the sound discretion of the trial judge and depends on the circumstances of each case: *R. v. Paris* (2000), 150 C.C.C. (3d) 162 (Ont. C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 124 (S.C.C.), at paras. 21-22; *R. v. Giroux* (2006), 207 C.C.C. (3d) 512 (Ont. C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 211 (S.C.C.), at para. 42.

81 Compliance with the rule in *Browne v. Dunn* does not require that every scrap of evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination. The cross-examination should confront the witness with matters of *substance* on which the party seeks to impeach the witness's credibility and on which the witness has not had an opportunity of giving an explanation because there has been no suggestion whatever that the witness's story is not accepted: *Giroux*, at para. 46; *McNeill*, at para. 45. It is only the nature of the proposed contradictory evidence and its significant aspects that need to be put to the witness: *R. v. Dexter* [2013 CarswellOnt 17418 (Ont. C.A.)], at para. 18; *R. v. Verney* (1993), 87 C.C.C. (3d) 363 (Ont. C.A.), at pp. 375 -376; *Paris*, at para. 22; and *Browne v. Dunn*, at pp. 70-71.

82 In some cases, it may be apparent from the tenor of counsel's cross-examination of a witness that the cross-examining party does not accept the witness's version of events. Where the confrontation is general, known to the witness

and the witness's view on the contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so.

83 It is worthy of reminder, however, that the requirement of cross-examination does not extend to matters beyond the observation and knowledge of the witness or to subjects upon which the witness cannot give admissible evidence.

84 The potential relevance to the credibility of an accused's testimony of the failure to cross-examine a witness for the prosecution on subjects of substance on which the accused later contradicts the witness' testimony depends on several factors. The factors include but are not limited to:

i. the nature of the subjects on which the witness was not cross-examined;

ii. the overall tenor of the cross-examination; and

iii. the overall conduct of the defence.

See *Paris*, at para. 23.

85 Where the subjects not touched in cross-examination but later contradicted are of little significance in the conduct of the case and the resolution of critical issues of fact, the failure to cross-examine is likely to be of little significance to an accused's credibility. On the other hand, where a central feature of a witness's testimony is left untouched by cross-examination, or even implicitly accepted in cross-examination, the absence of cross-examination is likely to have a more telling effect on an accused's credibility: *Paris*, at para. 23.

86 The confrontation principle is not violated where it is clear, in all the circumstances, that the cross-examiner intends to impeach the witness's story: *Browne v. Dunn*, at p. 71. Counsel, who has cross-examined the witness on the central features in dispute, need not descend into the muck of *minutiae* to demonstrate compliance with the rule: *Verney*, at p. 376.

D. The Principles Applied

87 I would not give effect to this ground of appeal.

88 Two preliminary and oft-made observations serve as my point of departure for the discussion that follows.

89 First, it is too easily overlooked that the rule in *Browne v. Dunn* is not some ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss. The rule is grounded in fairness, its application confined to matters of substance and very much dependent on the circumstances of the case being tried: *Verney*, at p. 376; *R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421 (Ont. C.A.), at para. 49.

90 Second, and as a consequence of the fairness origins of the rule, a trial judge is best suited to take the temperature of a trial proceeding and to assess whether any unfairness has been visited on a party because of the failure to cross-examine. Consequently, the trial judge's decision about whether the rule has been offended and unfairness has resulted is entitled to considerable deference on appeal: *Giroux*, at para. 49.

The Shoe in the Door

91 The state of Tu's cell door and Tu's position in the cell as the appellant approached and entered were of some importance to both the prosecution and defence at trial. It was not controversial that Tu slept late, at least as a general rule. Nor was it disputed that the appellant approached Tu's cell after the doors had been cracked open at 9:00 a.m. on May 5.

92 Fallis and Ireland gave evidence for the Crown about the appellant's approach to the door with Clarke. Clarke stayed outside the cell to ensure that the door did not close locking the appellant inside and that no one else entered during the fight. Neither reported seeing the door propped open by a shoe.

93 The appellant's account of the shoe in place when he approached the door and entered Tu's cell does not directly contradict a specific denial of the presence of a shoe by Fallis and Ireland. But the appellant's evidence about the shoe was central to his claim that Tu, contrary to his usual habit of sleeping late, was awake and awaiting the appellant's arrival. That Tu had taken the time to open the door and to secure it against accidental or premature closure could also render it more probable that he took other precautions to protect himself against a surprise attack, such as having a knife accessible to him in his cell. These arrangements tended to support the appellant's claim of self-defence and neuter the Crown's theory that the appellant took the knife with him when he entered Tu's cell, caught Tu off guard and then stabbed him to death.

94 None of Clare, Ireland or Fallis testified about seeing anything in the doorway to Tu's cell holding the door ajar as the appellant and Clarke approached and the appellant entered. According to both Clare and Ireland, it was only *after* the appellant had entered Tu's cell that his backup, Clarke, put a shampoo bottle in the doorway to ensure the door did not lock the appellant inside the cell with Tu. Fallis testified that Clarke's foot in the doorway was what prevented locking.

95 The appellant's version challenged the reliability of the evidence of Clare, Ireland and Fallis and the accuracy of their observations. The placement of the shoe in the door in advance of the appellant's entry was a matter of significance to the facts of the case and not some inconsequential detail. It was a subject on which both Fallis and Ireland should have been cross-examined. The failure to do so was of sufficient significance to permit the trial judge to find that counsel had not complied with *Browne v. Dunn*. The failure to cross-examine Clare was of less significance since it was clear to all parties that his evidence was of "so incredible and romancing a character" as to be unworthy of credit on any issue of significance: *Browne v. Dunn*, at p. 79.

The Ayres Threat

96 Ayres and the appellant were cellmates, but not friends. Ayres was a friend of Tu. Both testified that the appellant was awake during the night immediately preceding the killing. Ayres said the appellant was awake stewing in anger over the deceased. The appellant said he stayed awake because he was concerned Ayres would attack him during the night. Ayres was not cross-examined about any threats made to the appellant or about anything he may have said to the appellant about future consequences of the failure to respond to Tu's challenge.

97 The appellant's state of mind within hours of killing Tu was an important issue at trial. The appellant's account of his interaction with Ayres created an impression that the appellant was fearful of an attack from him, not that he was stewing over what Tu had done and was thus more likely to have been the aggressor in the fight the following morning.

The Post-offence Remark

98 The appellant walked by Fallis and Ireland after leaving Tu's cell. In their testimony, neither Fallis nor Ireland mentioned a comment by the appellant as he headed towards Mir's cell with the knife in his hand. At the very least, it was implicit in the account provided by Fallis and Ireland that the appellant had said nothing as he passed them by.

99 In his testimony, the appellant claimed that he said to Fallis "your friend needs some help" as he left Tu's cell and walked toward Mir's cell. Fallis then went to Tu's cell to check on him.

100 The appellant's testimony contradicted Fallis's evidence. Fallis's version reflects a lack of concern on the appellant's part for Tu, which tends to rebut the appellant's later claim of a killing in lawful self-defence. The appellant's version, and expressed concern about Tu's condition, provides some support for a claim that Tu died as a result of an unfortunate consequence of a consensual fight in which the appellant acted lawfully, rather than as a result of a previously-formulated plan to kill.

E. Conclusion

101 Whether the rule in *Browne v. Dunn* is offended by failure to cross-examine on a specific matter in a particular case cannot be determined in the abstract. Each case is different. The rule is flexible, not rigid. It is rooted in fairness. Reasonable people may differ about on which side of the line a failure to cross-examine on a particular point falls. A trial judge should be accorded considerable deference on a decision about its application. A trial judge has a reserved seat at trial. We have a printed record.

102 Another trial judge may not have considered what occurred here as offensive to the flexible rule in *Browne v. Dunn*. But that is beside the point. This trial judge did. I am unable to conclude that he abused his discretion in reaching that conclusion.

Ground #2: The Remedy for the Breach

103 The second ground of appeal has to do with the remedy applied by the trial judge for the breach of the rule in *Browne v. Dunn*.

104 It is helpful to begin with a brief outline of the circumstances in which the breach of the rule was first raised at trial.

A. The Complaint

105 The trial Crown made no complaint about any breach of the rule in *Browne v. Dunn* when the appellant testified at trial.

106 In a pre-charge conference held on July 5, 2006, prior to the closing addresses of counsel, the trial Crown raised the issue about breach of the rule. In a subsequent pre-charge conference held on July 7, 2006, he sought an instruction in the jury charge that the jury could take the failure of defence counsel to cross-examine Fallis, Ireland, Ayres and Clare on contradictory evidence given by the appellant into account in assessing the weight to assign to the appellant's (and the witnesses') testimony.

107 Trial counsel for the appellant took issue with Crown counsel's request. He submitted that Crown counsel was required first to seek leave to recall the witnesses and to obtain from them, under oath and subject to cross-examination, their response to the contradictory evidence. A failure to seek to recall the witnesses, trial counsel submitted, disentitled the Crown to the instruction it sought.

108 The trial Crown disputed the necessity for such a request as a condition precedent to the requested jury instructions. The Crown pointed out that Ayres was in custody and Fallis was in custody outside the province, rendering it impractical to recall them.

B. The Ruling of the Trial Judge

109 The trial judge was satisfied that Crown counsel had established breaches of the rule in *Browne v. Dunn*. He found that the breaches warranted a jury instruction similar to what was given by the trial judge in: *Giroux*, at para. 43.

110 The trial judge said nothing about the obligation of the Crown to first seek to recall the witnesses or the relevance of Crown counsel's failure to do so on the availability or content of the jury instruction Crown counsel sought.

C. The Position of the Parties

111 For the appellant, Mr. Snell says the proper remedy for breach of the rule in *Browne v. Dunn* in this case was to recall the witnesses to obtain their evidence about the contradictory version offered by the appellant. The trial Crown offered no explanation about the whereabouts of Clare and Ireland, thus no reason why they could not be recalled. Ayres and Fallis were both in custody. Their attendance could be easily secured by a judge's order. The authorities emphasize witness recall as the first option. The trial judge should have required the Crown to choose whether to recall the witness.

112 Mr. Snell submits that where the Crown fails to take up the recall option, or, as here, fails to request it, the Crown is *not* entitled to a *Browne v. Dunn* instruction. In either of these circumstances, only the traditional "you may believe some, all or none of what a witness says" instruction need be given and it is wrong to include the *Browne v. Dunn* instruction.

113 In the alternative, Mr. Snell says the instruction here was seriously flawed because it failed to remind jurors that counsel's failure to cross-examine may have been due to inadvertence, and thus should not be a factor the jurors could consider in assessing the appellant's credibility or the reliability of his evidence.

114 For the respondent, Mr. Finley replies with a reminder that once a breach of the rule has occurred, a trial judge has broad discretion to choose a remedy that best assures justice. Sometimes, the proper choice is to recall a witness. But not always. On other occasions, as here, justice is best served by a jury instruction.

115 Mr. Finley says the instruction remedy chosen by the experienced trial judge here demonstrates, by necessary implication, that the trial judge did not view the recall of witnesses as a viable solution, even though he made no specific mention of that alternative in his reasons. The choice of remedy is discretionary and dependent on a variety of factors, which in this case included completing the case expeditiously in advance of the long-standing commitments of jurors made on the basis of an estimate trial time long surpassed.

116 Mr. Finley acknowledges the trial Crown should have raised the *Browne v. Dunn* issue before the defence had closed its case when witness recall was a viable alternative. That said, the failure of trial Crown to ask for an order to permit recall of the witnesses does not bar the remedy applied here — the jury instruction that left failure to cross-examine as a factor, one of many, in assessing the appellant's credibility as a witness. The omission of a reference to inadvertence was not an error, particularly in light of the trial judge's conclusion that the failure was a deliberate and a tactical choice by trial counsel.

D. The Governing Principles

117 It should scarcely surprise that breaches of a rule grounded in fairness do not attract a single or exclusive remedy. The remedy is a function of several factors including, but not only:

- the seriousness of the breach;
- the context of the breach;
- the timing of the objection;
- the position of the offending party;
- any request to permit recall of a witness;
- the availability of the impugned witness for recall; and
- the adequacy of an instruction to explain the relevance of failure to cross-examine.

See *Dexter*, at para. 20; *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 (S.C.C.), at para. 65.

118 In the absence of a fixed relation between breach and remedy, appellate courts accord substantial deference to the discretion exercised by a trial judge in deciding what remedy is appropriate for breach of the rule: *Dexter*, at para. 22; *Giroux*, at para. 49; and *R. v. Blom* (2002), 61 O.R. (3d) 51 (Ont. C.A.), at para. 20.

119 In the menu of remedies available to a trial judge who has determined that the rule in *Browne v. Dunn* has been breached are recall of the witness and an instruction to the jury about the relevance of the failure to cross-examine as a

factor for them to consider in assessing the credibility of an accused as a witness and the reliability of his or her evidence: *Dexter*, at para. 21; *McNeill*, at paras. 46-47 and 49.

120 In many cases, the first remedy a trial judge might consider is the availability of the witness for recall. In cases in which the witness is available without undue disruption of trial continuity and disjoinder of the narrative, the aggrieved party has the option of recalling the witness or declining to do so. Failure to take advantage of the opportunity to recall a witness may mean that the aggrieved party may not get the benefit of a *Browne v. Dunn* instruction in the charge to the jury: *McNeill*, at para. 48. But the rule is not inflexible, nor is the failure to seek or to recall an available witness the death knell for a specific jury instruction: *Giroux*, at para. 48; *McNeill*, at para. 50. Said another way, recall is not always a condition precedent to inclusion of a *Browne v. Dunn* instruction: *Giroux*, at para. 48.

121 A trial judge who decides to give a specific instruction to the jury about the failure to comply with the rule in *Browne v. Dunn* as a factor to consider in the jury's credibility assessment need not pronounce a specific word formula to achieve that purpose. The instructions should not be characterized as a "special instruction", but should make it clear that the failure has relevance for the credibility of the witness who was not confronted with the contradictory evidence, as well as the credibility of the witness who gave the contradictory evidence. The instruction need not elaborate on the obligations of counsel: *Paris*, at paras. 27-29; *Dexter*, at para. 43.

122 A final point about the timing of a *Browne v. Dunn* objection is appropriate.

123 The trial Crown did not raise his *Browne v. Dunn* complaint until the pre-charge conference. The basis for the complaint arose when the appellant testified. The trial Crown said nothing then and nothing during the remainder of the defence case. After the defence had closed its case, the trial Crown did not ask the trial judge to recall the affected witnesses so that contradictory evidence could be put to them and their response heard by the jury.

124 Timely objection is consistent with the duty of Crown counsel under *R. v. Boucher* (1954), [1955] S.C.R. 16 (S.C.C.), at pp. 23-24; *Dexter*, at para. 37. Lying in the weeds to seize upon the failure to cross-examine as a basis for instruction that counsel's default tells against the credibility of an accused is inimical to the Crown's duty of fairness. At the very least, Crown counsel should provide some explanation for the lack of timely objection: *Giroux*, at para. 49; *Dexter*, at para. 37. No special rule applies to inmates or otherwise problematic witnesses. Absence of a timely objection to an alleged breach of the rule is a factor for the trial judge to consider in determining the nature of the remedy, if any, best suited to respond to the breach. On appeal, the absence of a timely objection is also a factor to be taken into account in determining whether the lateness of the objection, coupled with the remedy applied, caused sufficient unfairness that a miscarriage of justice resulted.

E. The Principles Applied

125 Several reasons persuade me not to give effect to this ground of appeal.

126 First, the trial judge's choice of remedy, a jury instruction about the impact of the breach as a factor in the assessment of the appellant's credibility, is entitled to considerable deference: *Dexter*, at para. 22; *Giroux*, at para. 49; and *Blom*, at para. 20. The remedy applied by the trial judge for the breach was one of several available to him under the existing jurisprudence in this province and elsewhere. The trial judge made no error in principle.

127 Second, the trial judge had the unenviable task of fashioning a remedy that met the ends of justice in the waning moments of a trial that had already extended well beyond its anticipated completion date. He had to take into account commitments jurors had made on the basis of the original trial estimate. The alternative of witness recall would have disrupted trial continuity and pushed the addresses of counsel and the charge further into the future, exacerbating the problems arising from the jurors' commitments. In the real world of trial management, perfect solutions are unattainable. The remedy chosen here was reasonable, took into account the relevant circumstances and met the ends of justice.

128 Third, the substance of the instruction was consistent with the governing authorities: *Dexter*, at para. 43. The trial judge told the jury that the failure to cross-examine the inmate witnesses on the contradictory aspects of the appellant's evidence was a *factor* that they were entitled, but not required, to consider in their determination of the weight to assign to the appellant's testimony. Permitted, in other words, but not required. The instruction did not expressly say or suggest by necessary implication that the failure to cross-examine required the jury to draw an adverse inference against the appellant's credibility or the reliability of his testimony.

129 Fourth, the trial judge characterized his instruction as a "comment" on the testimony of the appellant, having earlier apprised the jury that they were not bound by his comments on issues of fact. He also made it clear that the tactical decisions of counsel were not to be visited on the appellant. His failure to go further, for example to refer to the obligations of counsel in cross-examination or to make specific mention of "negligence", "inadvertence" or "oversight", did not render erroneous or otherwise compromise a proper instruction: *Paris*, at paras. 28-29.

130 Finally, on the issue of timing, this is yet another instance of Crown counsel waiting until the penultimate stage of the trial to register an objection based on a failure to comply with *Browne v. Dunn*. In cases like this, the *Browne v. Dunn* objection crystallizes when an accused gives evidence on a point of substance about which a relevant Crown witness was not cross-examined. The time is then ripe for an objection, despite the inevitable compromise of trial continuity that occurs when any objection is taken to the introduction of evidence in a jury trial.

131 This court and others have emphasized the importance of timely objections based on alleged failure to comply with the rule in *Browne v. Dunn*. Yet Crown dilatoriness persists, as in this case, as if some "Gotcha" principle were at work. Nothing is to be gained by such an approach which, in some cases at least, may compromise trial fairness and perhaps even integrity. The desired instruction will not always be given: *McNeill*, at para. 47; *Paris*, at para. 29.

Conclusion

132 For these reasons, I would dismiss the appeal.

***M. Tulloch J.A.*:**

I agree

***M.L. Benotto J.A.*:**

I agree

Appeal dismissed.

Appendix "A"

Regina v. Richard Quansah

Let me comment on Mr. Quansah's testimony that Tu had a shoe propping his door open in expectation of Quansah's arrival. It is for you to determine whether in fact a shoe was placed as Mr. Quansah says. To assist you in that determination I want to tell you a couple of factors, that you may, but you are not obliged to consider, as you determine how much weight you want to assign to Mr. Quansah's evidence.

It is clear that the presence of the shoe is an important piece of evidence capable of supporting the consensual nature of the confrontation in cell 9. While the consequences of tactical decisions made by his counsel at trial are not to be visited upon the accused, one factor you can consider as you determine how much weight to give Mr. Quansah's evidence is the opportunity given to other witnesses to challenge the evidence, the credibility of which you are assessing.

Messrs. Clare, Ireland and Fallis were all in a position to view the door to Tu's cell and possibly confirm the presence of a shoe, if that were so. They were thoroughly cross-examined to test their credibility and reliability on many issues, but none was asked about this material point, that is, whether they saw a shoe propping the door open before Quansah entered the cell. On a critical point to the defence which is a matter of substance upon which Mr. Quansah seeks to impeach the credibility of those witnesses, they were not afforded the opportunity to give an explanation by reason of there having been no suggestion whatsoever in the course of their evidence that their testimony would not be accepted on the issue of whether or how the door was situate in its unlocked state.

This simply means that Mr. Quansah's evidence, which came after that of Clare, Ireland and Fallis, was not held up to scrutiny to the same extent as was the testimony of Clare, Ireland and Fallis. You may consider that to be a factor that could reduce the weight that you may give to Mr. Quansah's evidence in regard the presence of Tu's shoe holding his cell door open in anticipation of Quansah's arrival, given that none of Clare, Ireland or Fallis was given an opportunity to comment.

While I am dealing with the matter of the weight to be given to Mr. Quansah's testimony, there are other matters about which none of Clare, Ireland or Fallis was given an opportunity to comment because while they were being questioned there was no suggestion that their story was not being accepted.

Mr. Quansah testified that he did not plan and deliberate the murder of Tu. Michael Ayers testified that he was Quansah's cell mate at the time and Quansah was awake the whole night brooding. Quansah admitted being awake the whole night until early morning when Ayers was taken from the cell in order to go to court. He testified that the reason he was awake was not because he was planning and deliberating what was to take place when the cell doors were unlocked later that morning, but he was awake all night because Ayers, who he regarded as a friend of his, taunted him when he went into the cell and he was afraid Ayers would harm him.

Ayers who testified before Quansah was never asked about threatening Quansah during the night as Quansah later testified. For the reasons I stated previously, that is a factor you may, but you are not required to, take into account in assessing Mr. Quansah's credibility.

Footnotes

1 The relevant part of the trial judge's charge is excerpted in Appendix "A".

2018 ONCA 448
Ontario Court of Appeal

R. v. Vorobiov

2018 CarswellOnt 7390, 2018 ONCA 448, [2018] O.J. No. 2536, 147 W.C.B. (2d) 446

Her Majesty the Queen (Respondent) and Ivgeny Vorobiov (Appellant)

John Laskin J.A., S.E. Pepall J.A., Arthur M. Gans J. (ad hoc)

Heard: November 30, 2017
Judgment: May 14, 2018
Docket: CA C56598

Counsel: Scott Hutchison, Apple Newton-Smith, for Appellant
Eric Siebenmorgan, Rachel Young, for Respondent

Subject: Criminal

APPEAL by accused from conviction of first-degree murder.

***John Laskin J.A.*:**

A. INTRODUCTON

1 Glen Davis was a wealthy businessman, an environmentalist, and a philanthropist. On May 18, 2007, he was murdered. He was shot and killed in an underground parking garage in Toronto. He was 66 years old.

2 Davis' nephew, Marshall Ross, orchestrated the murder. Ross enlisted his friend, Dimitri Kossyrine, to find someone to kill his uncle. Kossyrine recruited two people who worked for him, Jesse Smith and the appellant, Ivgeny Vorobiov.

3 All four men were charged with first degree murder. Before trial, Smith pleaded guilty to being an accessory after the fact for helping Vorobiov flee the scene of the murder. Kossyrine and Vorobiov were tried together. Ross was to be a co-accused in that trial as well, but pleaded guilty to first degree murder just before it began.

4 The trial concluded with the jury finding Vorobiov guilty of first degree murder, but unable to reach a decision on Kossyrine. He was later tried for a second time and convicted of first degree murder; his appeal from that conviction to this court was dismissed: see *R. v. Kossyrine*, 2017 ONCA 388, 138 O.R. (3d) 91 (Ont. C.A.).

5 The case against Vorobiov was compelling. It included: security video footage and an eyewitness placing Vorobiov at the scene of the murder; cellphone records; the evidence of Vorobiov's friend and former brother-in-law, Yuval Klein; Vorobiov's conduct after the murder; intercepted conversations among the various participants; Vorobiov's admissions in his evidence at trial; and the evidence of Smith, who named Vorobiov as the shooter.

6 In his defence, Vorobiov denied shooting Davis. He admitted that he had agreed to kill Davis for Ross, and that he had brought a gun and silencer to the parking garage on the day of the murder, but he claimed that when he was in the garage, he changed his mind. He said that Smith took the gun from him and shot Davis, after Vorobiov had walked away.

7 Of the four participants in the murder plot, only Vorobiov and Smith were at the parking garage on the day of the murder. After all the evidence was led at trial, the jury had a simple factual question to answer: who shot Davis, Smith or Vorobiov? The jury was satisfied beyond a reasonable doubt that Vorobiov did.

8 On his appeal, Vorobiov submits that the trial judge made three errors, the first in his conduct of the trial; the second and third in his charge to the jury:

1. The trial judge unjustifiably curtailed the defence's cross-examination of Smith and Detective Moreira, a police detective who interviewed Smith.

2. The trial judge erred by giving a *Browne v. Dunn* instruction concerning Smith's evidence.

3. The trial judge erred in his charge on Vorobiov's conduct after the murder by failing to tell the jury his conduct had no probative value.

9 I would not give effect to any of these three submissions. I would therefore dismiss Vorobiov's appeal.

B. ADDITIONAL BACKGROUND

(a) Ross' motive for the murder and the recruitment of Smith and Vorobiov

10 Ross' decision to have his uncle murdered was fuelled by greed and resentment. Ross ran a business renovating old homes and reselling them, but his business did poorly. Over the years, Davis had generously lent Ross large amounts of money, totalling two million dollars, none of which Ross had repaid. But Ross wanted more. And he resented Davis because though adopted, Davis had ended up with all of the family's money. So Ross decided to speed up what he mistakenly thought would be his inheritance by having Davis killed. [1]

11 Ross' first attempt in 2005 was unsuccessful. Davis was beaten with a baseball bat and left for dead, but survived. This attempt and the murder two years later went unsolved until November 2008, when one of the perpetrators in the earlier beating, while under arrest for unrelated charges, confessed to his role in the initial murder attempt. His confession led the police to the four suspects in Davis' murder: Ross, Kossyrine, Smith, and Vorobiov.

12 Ross and Kossyrine initially crossed paths through their respective businesses; Kossyrine often worked on home-building and renovation projects for Ross; and the two men became friends. Smith and Vorobiov became involved in the murder plot through their relationship with Kossyrine; both worked for him, and were also his friends. After the first attempt on Davis' life failed, Kossyrine recruited Smith and Vorobiov to carry out the murder, and Ross persuaded them to do so.

(b) The scene and timing of the murder

13 Davis was murdered in the P-2 parking level of a building at 245 Eglinton Avenue East in Toronto. He was shot on his way to retrieving his car after having lunch with a friend at a restaurant in the building. The murder occurred at approximately 1:53 p.m.

14 The building at 245 Eglinton Avenue East is located on the south-west corner of Eglinton Avenue East and Mount Pleasant Road. The building sits between Mount Pleasant Road on the west side and Taunton Road on the east side. It has four entrances and exits to the underground garage: an elevator to the building; a stairwell to Mount Pleasant Road; a stairwell to Taunton Road; and a vehicle ramp to Taunton Road.

15 On the day of the murder, the Taunton Road stairwell was unlocked and, unlike the other exits, had no security video. Vorobiov was shown in the building's security videos entering and leaving the garage about an hour before and just minutes after the murder. Although Smith was not captured on any of the garage's security footage around the time of the murder, Vorobiov claimed Smith could have come into the garage undetected by using the Taunton Road stairwell.

(c) The case against Vorobiov

16 As I have said, the case against Vorobiov included his own admissions at trial, his conduct after the murder, security video, eyewitness testimony, cellphone records, intercepted conversations, and the evidence of Klein and Smith. The following is a brief list of the key evidence against him:

- Vorobiov initially declined Ross' overtures to kill Davis but became interested when Ross offered him more money.

- Vorobiov eventually agreed to kill Davis for Ross.

- On the day of the murder, Smith and Vorobiov drove to 245 Eglinton Avenue East; Vorobiov brought with him a gun and silencer in his backpack.

- Vorobiov intended to kill Davis in the parking garage when Davis came to get his car after lunch; according to Vorobiov's testimony, Smith was to wait in Vorobiov's car and drive Vorobiov away after the murder.

- After Smith parked the car on Taunton Road, Vorobiov left the car, and with the gun and silencer in his backpack, went down the Taunton Road vehicle ramp. He went to the P-2 level where Davis' car was parked, and waited for him near the pedestrian stairwell on Mount Pleasant Road, which was the stairwell closest to the restaurant. Security video captured Vorobiov standing by the elevators on the P-2 level at 1:20 p.m.

- Security video showed Vorobiov alone, and carrying a backpack, going down the Taunton Road vehicle ramp at 12:52 p.m. Davis was shot at 1:53 p.m.; security video captured Vorobiov, with his backpack, walking up the Taunton Road vehicle ramp alone at 1:55 p.m.

- Vorobiov admitted that he was the person captured on the security video.

- Smith was not captured by security video during this entire timeframe.

- The building superintendent heard two loud bangs shortly after Davis entered the parking garage; he went to investigate and saw Vorobiov walking through the P-1 level and up the vehicle ramp soon after the gunshots; he did not see Smith or anyone else on the P-1 level.

- Vorobiov had a cellphone with him but did not make or receive any calls during the entire time he was in the underground garage; in contrast, Smith made and received numerous calls on his cellphone during that time, including many to Ross.

- Smith testified that when Vorobiov returned to the car after Davis was shot, he said to Smith: "I killed him".

- Immediately after Davis was killed, Smith drove Vorobiov away from the scene of the murder, and then drove to Port Perry; along the way they disposed of the gun, silencer, and backpack.

- Vorobiov's close friend and former brother-in-law Yuval Klein testified at trial that Vorobiov "said that he went in and it was done".

- Vorobiov and Kossyrine misled the police and tried to hinder their investigation.

(d) Vorobiov's defence

17 Vorobiov's defence was that, at the last minute, he decided he couldn't go through with killing Davis, that Smith took the gun from him, and that as he was walking back up the vehicle ramp, Smith fired the fatal shots.

18 Vorobiov testified that he first went to underground garage to look for Davis' car, which he found on the lower level. He then returned to the car he and Smith were driving, took his backpack, and re-entered the garage by going down the Taunton Road ramp.

19 About a half hour later, Smith came into the garage and asked Vorobiov what was taking so long. Vorobiov said Davis had not yet appeared and he was glad because he was ready to "walk away". Smith then went to find Davis. Vorobiov was about to leave by the elevator but saw a security camera so he stayed in the garage to wait for Smith. When Smith reappeared and said Davis would be down any minute, Vorobiov said "sorry I am not fucking doing it Jesse". Smith then reached into Vorobiov's backpack, took out the gun and silencer and said "just take the gun and put this on and get it over with". Vorobiov replied "you don't understand. I am not fucking doing it. I know there is a camera. The camera has already seen me".

20 Vorobiov tried to reach over and take back the gun but Smith pulled back, and Vorobiov was only able to grab the silencer. He then walked away and up the ramp. When he was almost at the top, he heard two loud bangs. He went back to see what was going on. He found Davis dead and saw Smith going through Davis' pockets. He told Smith to "get the fuck out of here", and walked back up the ramp to their car. Soon Smith appeared from the Taunton Road stairwell and they drove off. Smith was driving.

C. THE ISSUES

(1) Did the trial judge unjustifiably curtail defence's cross-examination of Smith and Detective Moreira?

21 The day after the murder, Smith flew to Cuba, where his wife and daughter lived. In early April 2009, about a month after Ross, Kossyrine, and Vorobiov had been arrested, Smith flew back to Canada with his family. He was arrested at the airport, charged with first degree murder, and interviewed by the police that evening. Later Smith retained a lawyer and, in May 2010, he gave a second interview to the police. Both interviews were conducted by Detective Moreira.

22 At the trial, the Crown first called Moreira, then Smith. Both were cross-examined by defence counsel for Kossyrine and defence counsel for Vorobiov (not Mr. Hutchison or Ms. Newton-Smith). The underlying objective of counsel for Vorobiov's cross-examination was to show that the police pushed Smith into giving a limited confession in which he minimized his own involvement in the murder plot and fingered Vorobiov as the shooter. Vorobiov's counsel sought to achieve this objective in two ways: by cross-examining Moreira to show how he used a specific interview technique to extract the narrative that Smith ultimately testified to at trial; and by cross-examining Smith to show how his narrative had changed from his first interview to his eventual trial testimony.

23 Vorobiov submits that the trial judge unjustifiably and unfairly curtailed both cross-examinations and, by doing so, undermined Vorobiov's defence and the fairness of his trial. Although I have concerns about the trial judge's interventions, on a review of the entire transcript of each cross-examination, I am persuaded that Vorobiov's defence counsel achieved his objective, and that the trial judge's interventions did not undermine Vorobiov's defence or deprive him of a fair trial.

24 As Major and Fish JJ. said in *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 (S.C.C.), at para. 41:

> [T]he right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make full answer and defence.

25 This right is thus essential to a fair trial — so it must be "jealously protected and broadly construed": *Lyttle*, at para. 44.

26 In their management of a trial, trial judges do have discretion to intervene if defence counsel abuse the right of cross-examination. That discretion is part of a trial judge's general discretion to manage a trial. Indeed, in *R. v. Jordan*, 2016 SCC 27 (S.C.C.), at para. 139, the majority wrote: "Trial judges should make reasonable efforts to control and manage the conduct of trials." Even so, trial judges should give defence counsel wide latitude in the way they conduct their cross-examinations. Simply because the trial judge disagrees with defence counsel's approach or line of questioning does not justify judicial intervention unless the approach or questioning is improper.

27 Context also matters. As in this case, where defence counsel is cross-examining a key Crown witness, where the credibility of that witness is pitted against the credibility of the accused, and where the stakes are high, as they are in a first degree murder trial, trial judges should intervene only in extreme cases.

28 Against this background, I turn to an outline of Smith's evolving narrative, the cross-examinations of Moreira and Smith, and Vorobiov's complaints about the trial judge's interventions.

(a) Smith's evolving narrative

29 Smith undoubtedly changed his story between his first police interview in which he admitted he lied, and his second police interview and trial testimony, in which he claimed to be telling the truth.

30 In his first police interview in April 2009, Smith admitted that he knew what was going on, but did not know what to do about it. He told Moreira that on the drive to Port Perry, Vorobiov was "calm, quiet and didn't say anything". When asked whether Vorobiov had changed his clothes, Smith replied: "I don't remember".

31 In May 2010, after spending a year in custody, Smith gave a second interview to the police, which was arranged by his lawyer. Smith decided to "improve my chances of not spending the rest of my life in jail" and "correct the lies in the first statement". In his second interview and trial testimony, Smith admitted he drove Vorobiov to the murder scene but now disclaimed any knowledge of what occurred. He said he just waited in the car, while Vorobiov went to a "meeting", without any idea of what Vorobiov intended to do. Smith was now adamant that only after they had driven away, did Vorobiov tell him he had killed Davis. And Smith insisted Vorobiov had changed his clothes on the drive to Port Perry.

32 Smith's evolving narrative in which he minimized his own involvement in the murder plot was the focus of the defence counsel's cross-examination.

(b) The cross-examination of Moreira

33 Vorobiov's defence counsel began cross-examining Moreira on his interview technique. He was trying to show that Moreira pressured Smith into minimizing his involvement in the murder and giving himself an out. Crown counsel did not object to this line of questioning. But the trial judge did. Toward the end of the first day of cross-examination, the trial judge excused the jury and then questioned the relevance of defence counsel's questioning. He noted that Smith was not on trial, and that defence counsel's questions were better put to Smith.

34 After a dialogue with counsel, however, the trial judge said he would give defence counsel "a little bit more leeway in the morning". The next morning the trial judge repeated that he would give defence counsel further leeway, though "not a great deal more". Defence counsel then completed his cross-examination without interruption.

35 I am inclined to agree with Vorobiov that the trial judge should not have intervened. Smith was not on trial, but Vorobiov's defence was that Smith shot Davis. Defence counsel's cross-examination of Moreira was not abusive or excessive. And I know of no rule of evidence that precluded it. Trying to show how the police got Smith to change his story was fair game.

36 Nonetheless, the trial judge's intervention — though ill-advised — did not undermine Vorobiov's defence. His counsel obtained from Moreira all the admissions he needed to make his case to the jury that the police ultimately "broke" Smith. In particular, Moreira agreed to the following important points:

- Moreira began the interview by telling Smith "he thought he did it", and then by asking Smith to explain his role.
- At times during the interview, Moreira exaggerated the evidence, an interview technique he used frequently.
- Moreira laid out the roles of the others, based on the police's investigation.

- The "theme of the interview", according to Moreira, was that the police knew much more about the answers to their questions than Smith thought they did.

- Moreira agreed he was giving Smith an opportunity to avoid spending approximately 32 years in jail before obtaining release on parole, and therefore an opportunity to avoid being separated from his daughter for a long period of time.

- Moreira told Smith that he knew he had not been forthcoming in his initial interview, and that this was his opportunity to prove he had a minimal role in the murder.

37 Before this court, Vorobiov fairly agrees that he cannot succeed on this ground of appeal solely on the basis of anything the trial judge did to limit the cross-examination of Moreira. I therefore turn to the cross-examination of Smith.

(c) The cross-examination of Smith

38 During defence counsel's cross-examination of Smith, he put to the witness verbatim many questions and answers from his police interview. He did so for about seven pages of transcript. Again Crown counsel did not object to this way of cross-examining. But again the trial judge did. In the jury's absence, the trial judge told defence counsel he considered this line of cross-examination improper. In the trial judge's view, defence counsel had to establish an inconsistency and put it directly to Smith; he could not put Smith's previous police statements to him.

39 I do not think the trial judge should have intervened. Crown counsel, who was very experienced, saw nothing wrong with the cross-examination. And in a first degree murder trial, defence counsel should have been given a wide berth when cross-examining the main Crown witness against his client.

40 But again, I am not persuaded that the trial judge's intervention undermined or prejudiced the defence. After the trial judge intervened, defence counsel continued his cross-examination of Smith without interruption, and obtained the following critical evidence, which laid the foundation for his closing address to the jury in which he argued that the police eventually did "break" Smith:

- Smith agreed that the police started to "break" him after the first hour of their "preamble".

- Smith admitted that what he said to the police in his first interview was contrary to his plea of being merely an accessory after the fact.

- In his first interview Smith admitted he had lied and implicated himself falsely because the police pressured him.

- Moreira held out a "life rope" to Smith by giving him an opportunity to explain his "minimal role" in the murder, but Smith lied to the police anyway.

- At the time of the second statement Smith knew he was charged with first degree murder and he realized he had to help himself.

(d) Conclusion on this ground of appeal

41 Despite the trial judge's interventions, defence counsel was not ultimately prevented from achieving his objective and obtaining from Moreira and Smith the admissions he needed to advance Vorobiov's defence before the jury. Thus, I conclude that the trial judge's interventions did not undermine Vorobiov's defence or deprive him of a fair trial. I would not give effect to this ground of appeal.

(2) Did the trial judge err by giving a Browne v. Dunn instruction concerning Smith's evidence?

42 The rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) dates back to the case by that name decided by the English House of Lords in 1893. The rule is rooted in fairness, principally to a witness whose credibility is challenged on cross-examination and to the party who called the witness. Lord Chancellor Hershell explained the rule at p. 70 of *Browne v. Dunn* as follows:

> [I]t 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 . . . 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. . . . [I]f you intend to impeach a witness you are bound, whilst he is in the box, to give him opportunity of making any explanation which is open to him: . . . 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. [Emphasis added.]

In short, if counsel intends to impeach an opposing witness on a matter, then, in fairness, counsel ought to put the contradictory version to the witness on cross-examination so that the witness has an opportunity to explain.

43 Over the years, courts have clarified the rule's scope and application. Four clarifications are relevant to this ground of appeal:

- A witness need not be confronted with every scrap of contradictory evidence, but should be confronted on contradictory matters of substance the witness has not had an opportunity to explain.

- However, even on matters of substance, the witness need not be confronted with contradictory evidence if the witness' view on that contradictory evidence is already apparent.

- If the rule is breached, then depending on the circumstances and context, the trial judge has a range of options to rectify the breach.

- A trial judge's determination whether the rule was breached, and if so the appropriate remedy, are entitled to substantial deference from an appellate court: see *R. v. Zvolensky*, 2017 ONCA 273, 135 O.R. (3d) 401 (Ont. C.A.), at paras. 134-136.

44 In the present case, Smith and Vorobiov gave contradictory evidence on an important matter: who bought the gun that was used to murder Davis. Smith, who was called by the Crown, testified that Vorobiov told him Ross had given Vorobiov $5,000 to buy a gun and Vorobiov had gone to Montreal and purchased one. Vorobiov, however, testified that Smith had bought the gun and silencer from someone he knew when he dealt drugs. When Smith was cross-examined, Vorobiov's counsel did not put to him Vorobiov's claim that Smith was a former drug dealer who had used his contacts to buy the murder weapon.

45 The trial judge concluded that defence counsel's failure to put Vorobiov's claim to Smith when he cross-examined Smith amounted to a breach of the rule in *Browne v. Dunn*. The trial judge therefore instructed the jury that in considering Smith's evidence, it could take into account instances where Smith did not have the opportunity to give his version of events:

> [I]n considering the different versions of the events as told to you by Ivgeny Vorobiov and Jesse Smith, some of the things that Mr. Vorobiov said that Mr. Smith did were not put to Mr. Smith when he gave evidence. As a result, Mr. Smith did not have the opportunity to tell you his response to those events or provide any information or explanation to you that might assist you in terms of deciding whether those events occurred. For example, it was not put to Jesse Smith that he had once been a drug dealer, and that from that past activity he knew someone who lived off Kennedy Road from whom Mr. Vorobiov says that Mr. Smith purchased the gun and the silencer. . . .

> When considering the evidence of Jesse Smith where it conflicts with the evidence of Ivgeny Vorobiov, you should take into account any instance where Mr. Smith did not have the opportunity to give his version of the events in response to the version of the events related to you by Mr. Vorobiov.
>
> This is a principle of general fairness. It applies to all witnesses. You should take into account any instance in which a witness did not have the opportunity to give his or her version of events in response to what counsel may now be suggesting to you is what occurred. [Emphasis added.]

46 Vorobiov submits that the trial judge's instruction was unfair and undermined the defence because it suggested Smith had been dealt with unfairly and those parts of Vorobiov's evidence not put to Smith should be disregarded. In support of this submission, Vorobiov makes three points: the Crown never claimed that Vorobiov's counsel had breached the rule; the charge was unnecessary because the matters put to Smith were not central in the case; and if the rule had been breached, the appropriate remedy would have been to address it in the evidence, for example by recalling Smith, and not in the trial judge's charge.

47 I do not agree with Vorobiov's submissions. Admittedly the Crown did not claim Vorobiov's counsel had breached the rule, but he did express his concern that "there are significant aspects of Mr. Vorobiov's testimony . . . that I have not heard before". And he asked the trial judge to include the instruction that was given in the trial judge's charge.

48 Moreover, the trial judge's determination whether the rule had been breached was his decision to make; he was not bound by the Crown's position. And in my view, his determination the rule had been breached was reasonable. Which of the two protagonists, Smith or Vorobiov, had bought the gun, was not a minor manner. It was of central importance. It informed the chief issue at trial, the identity of Davis' shooter and helped explain Vorobiov's and Smith's respective roles in the murder plot. And it was not a matter on which Smith's position was so apparent that giving him an opportunity to explain was unnecessary.

49 It is true Smith had testified that it was Vorobiov who had purchased the gun and silencer. But he should have had an opportunity to respond to Vorobiov's claim that he was a former drug dealer, with connections who could provide him with access to firearms — particularly as Smith claimed to have played only a minimal, accidental role in the murder.

50 The trial judge's choice of remedy — to address the breach in his charge — is entitled to deference and I see no basis for appellate interference: *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81 (Ont. C.A.), at para. 118. One possible way to address a breach of the rule in *Browne v. Dunn* is to recall a witness, but it is not the only way. Also, failing to recall a witness does not necessarily bar including a *Browne v. Dunn* instruction in a jury charge: *Quanash*, at para. 120; and *R. v. Giroux* (2006), 210 O.A.C. 50 (Ont. C.A.), at para. 48.

51 Here, Smith could have been recalled, but neither side asked for this remedy. The charge itself was worded in neutral terms. The trial judge did not highlight that the rule had been breached; he did not tell the jury it could disregard or disbelieve those parts of Vorobiov's evidence not put to Smith; and he did not suggest to the jury that Smith's account of who bought the gun should be believed.

52 To the contrary, the challenged instruction came immediately after the trial judge's *Vetrovec* warning[2] in which he cautioned the jury about relying on Smith's evidence without independent confirmation of it, in part because Smith had already lied to the police, and had already admitted his involvement in the plot that led to the murder.

53 I would not give effect to this ground of appeal.

(3) Did the trial judge err in his charge on Vorobiov's conduct after the murder by failing to tell the jury his conduct had no probative value?

54 An accused's conduct after the offence in question — now labeled "post-offence conduct" — is circumstantial evidence that may help the trier of fact determine the accused's culpability for the crime. In a jury trial, the trial judge is entitled to instruct the jury it may take into account the accused's post-offence conduct in deciding on the accused's guilt if, based on human experience and logic, the conduct shows that the accused acted in a manner consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person. If, on the other hand, the accused's post-offence conduct has no relevance to the accused's culpability, the trial judge should instruct the jury that the accused's conduct has no probative value and that the jury should not consider it in deciding on the accused's guilt for the offence charged: see *R. v. White*, [1998] 2 S.C.R. 72 (S.C.C.); *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433 (S.C.C.); and *R. v. Angelis*, 2013 ONCA 70, 296 C.C.C. (3d) 143 (Ont. C.A.).

55 Courts have long recognized that post-offence conduct may be ambiguous and may be misused by a jury. Thus, when a trial judge instructs a jury that it may take into account the accused's post-offence conduct, the trial judge should also instruct the jury that the accused may have an entirely innocent alternative explanation for that conduct, and that the jury should reject any alternative explanation before using the post-offence conduct to make inferences about the accused's culpability.

56 In this case, the trial judge instructed the jury that in deciding whether Vorobiov shot Davis it could take into account two categories of Vorobiov's post-offence conduct: Vorobiov's and Smith's trip to Port Perry after the murder; and communications between Vorobiov, Kossyrine, Ross, and Smith that the police intercepted in the years following the murder.

57 In the first category, the trial judge told the jury about the following post-offence conduct: Smith and Vorobiov left the scene of the murder and drove out of the city to Port Perry; along the way they disposed of the gun, silencer, and backpack; Smith changed his clothes and, according to him, so did Vorobiov (which Vorobiov denied doing); and Vorobiov told Klein he had disposed of "everything". In the second category, the trial judge told the jury that in the intercepted calls, the participants discussed, among other things, the police investigation, who might be recognized on the security videos, the creation of a false list of suspects to mislead the police, and the payment of money to Smith and Vorobiov to leave or stay out of Canada.

58 The trial judge then instructed the jury on the use it could make of Vorobiov's post-offence conduct:

> If you find that Mr. Vorobiov actually did what he is alleged to have done after the offence was committed, you must be careful not to immediately conclude that he did so because he was conscious of having committed the offence charged.
>
> To decide the reason for what Mr. Vorobiov did afterwards, you should consider all of the evidence. Of particular importance is evidence that offers any other explanation for this conduct.
>
> You must not use this evidence about what Mr. Vorobiov did afterwards in deciding or helping you decide that Mr. Vorobiov committed this offence unless you reject any other explanation for it.
>
> If you do not or cannot find that Mr. Vorobiov did those things because he was conscious of having done what is alleged against him, you must not use this evidence in deciding or in helping you to decide that Mr. Vorobiov committed the offence charged. On the other hand, if you find that what Mr. Vorobiov did afterwards was because he was conscious of having done what is alleged against him, you may consider this evidence, together with all of the other evidence, in reaching your verdict.

59 Defense counsel at trial did not object to this instruction or ask for a "no probative value" instruction. On appeal, however, Vorobiov contends that the trial judge's instruction was wrong for two reasons.

60 Vorobiov's main submission is that his post-offence conduct was not probative of the only live issue before the jury: who shot Davis, Vorobiov or Smith? It was not probative because Smith engaged in the very same post-offense conduct. Therefore, neither Vorobiov's nor Smith's conduct after the murder, especially their trip to Port Perry, could help the jury determine who the shooter was. At most, Vorobiov's post-offence conduct could show his involvement in the murder plot. But he had already admitted his involvement. He was therefore entitled to an instruction to the jury that his post-offence conduct was not relevant to or probative of the question whether he shot Davis, and should not be considered. The trial judge erred in law in failing to give this instruction.

61 Vorobiov's secondary submission is that, although the trial judge correctly told the jury it could not use Vorobiov's post-offence conduct in deciding whether Vorobiov shot Davis unless it rejected any other explanation, the trial judge erred because he did not instruct the jury on any alternative explanation.

62 I do not agree with either of Vorobiov's submissions. On his first submission, the probative value of post-offence conduct is case specific. Its relevance or irrelevance depends on the nature of the evidence, the live issues at trial, and the positions of the parties. In this context, if the accused's post-offence conduct is relevant to the accused's culpability for the offence charged, the jury may take it into account in determining the accused's guilt. A "no probative value" instruction is justified only if the accused's post-offence conduct is equally explained by or equally consistent with either the offence charged or some other culpable act — usually another culpable act admitted by the accused.

63 In this case, the only live issue for the jury to decide was the identity of the shooter. Vorobiov's position at trial was that he intended to murder Davis, but had a last minute change of heart. In other words, he admitted his involvement in the murder plot and his initial agreement to kill Davis, but denied he was the shooter. He claimed, instead, that Smith shot Davis and that he was angry at Smith for doing so.

64 Do logic and human experience suggest that Vorobiov would have been equally likely to flee the scene of the murder and drive with Smith to Port Perry if either he shot Davis or if he had a last minute change of heart and was angry at Smith for shooting Davis? If the answer to this question is "yes", then the trial judge erred by failing to give the jury a no probative value instruction on Vorobiov's post-offence conduct.

65 In my view, however, the answer to this question "no". If indeed Vorobiov had a change of heart and was angry at Smith for shooting Davis, then logic and human experience suggest Vorobiov might well have wanted to get as far away from Smith as possible. Instead he did the opposite. He remained at the scene of the murder; he allowed his own car to be used as the getaway car; he travelled with Smith to Port Perry; along the way he and Smith disposed of the gun, silencer and backpack; and then he and Smith spent Davis' cash at the casino in Port Perry. The jury could legitimately infer that Vorobiov's post-offence conduct was far more consistent with the conduct of a person who had shot Davis, than with the conduct of a person, who though planning to kill Davis, had changed his mind and refused to go ahead, and yet knew that his accomplice had done the shooting and was angry at him for doing so.

66 The jury could have alternatively inferred that Smith's flight to Port Perry with Vorobiov undermined Smith's claim that he did not know in advance Vorobiov intended to kill Davis that day, and that he only helped Vorobiov to get away from the scene of the murder. The jury could have inferred from Smith's flight that Smith was not merely driving the car, but was also the shooter. However, what inferences should be drawn from Smith's and Vorobiov's flight to Port Perry, and the disposal of the gun, silencer, and backpack along the way, were for the jury to decide. The trial judge did not err by not giving a no probative value instruction on Vorobiov's post-offence conduct.

67 On Vorobiov's secondary submission, Vorobiov is correct that the trial judge did not provide an alternative explanation for his post-offence conduct. The trial judge did not do so because Vorobiov offered no real alternative innocent explanation for his conduct. For example, he did not claim accident or self-defence. He did not offer any explanation for changing his clothes because he denied changing them. Nor did he explain why, despite his anger at

Smith, he went back into the car with him, spent the rest of the day with him, and helped him dispose of the gun and silencer and other evidence that, on Vorobiov's version of events, would have tied Smith to the murder.

68 Vorobiov did claim at trial that in his post-offence discussions he conspired with Kossyrine to lie to the police so that the police would not ask him any questions and would not identify him on the surveillance videos from the garage. I suppose the trial judge could have reviewed that explanation with the jury, though it could hardly have helped Vorobiov.

69 Even if I am wrong in holding that the trial judge erred by failing to instruct the jury that Vorobiov's post-offence conduct had no probative value, I would apply the so-called "curative proviso" in s. 686(1)(b)(iii) of the *Criminal Code*. That section states that even where a trial judge errs in law, an appellate court may dismiss the appeal if the error did not cause a "substantial wrong or miscarriage of justice."

70 One kind of error that invites the application of the proviso is an error that is "minor" because the error relates to a minor aspect of the case, and thus could not have prejudiced the accused or affected the verdict: See *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716 (S.C.C.).

71 If the trial judge erred in his instruction on post-offence conduct, the error was minor. The case against Vorobiov turned almost entirely on the security videos, which captured him in the parking garage an hour before and minutes after the shooting, the independent eye witness testimony of the building superintendent, and the absence of any confirmatory evidence Smith was in the parking garage when Davis was shot. The trial judge's instruction on post-offence conduct, even if in error, caused no substantial wrong or miscarriage of justice.

72 I would not give effect to this ground of appeal.

D. CONCLUSION

73 I would dismiss Vorobiov's appeal. The trial judge's interventions in defence counsel's cross-examinations of Smith and Moreira did not undermine Vorobiov's defence or deprive him a fair trial. Nor did the trial judge err in his *Browne v. Dunn* instruction to the jury or his charge on post-offence conduct.

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

I agree.

***Arthur M. Gans J.*:**

I agree.

Appeal dismissed.

Footnotes

1 Ross believed he would be named a beneficiary in Davis' will, but, as it turned out, he was not.

2 A warning about the risks of relying on the unconfirmed evidence of "unsavoury witnesses" — derived from the Supreme Court's decision in *R. v. Vetrovec*, [1982] 1 S.C.R. 811 (S.C.C.).

2018 ONCA 519
Ontario Court of Appeal

Saramia Crescent General Partner Inc. v. Delco Wire and Cable Limited

2018 CarswellOnt 8846, 2018 ONCA 519

Saramia Crescent General Partner Inc. (Plaintiff / Respondent) and Delco Wire and Cable Limited and IEWC Canada Corp. (Defendants / Appellants)

S.E. Pepall J.A., Trotter J.A., and I.V.B. Nordheimer J.A.

Heard: March 26, 2018
Judgment: June 7, 2018
Docket: CA C63845

Proceedings: Reversed, 2017 CarswellOnt 6965, 2017 ONSC 961, 279 A.C.W.S. (3d) 531 (Ont. S.C.J.); Varied, 2017 CarswellOnt 9156, 2017 ONSC 3507, 281 A.C.W.S. (3d) 489 (Ont. S.C.J.); Additional reasons, 2017 CarswellOnt 6965, 2017 ONSC 961, 279 A.C.W.S. (3d) 531 (Ont. S.C.J.)

Counsel: David R. Byers, Patrick G. Duffy, Michael Currie, for Appellants
Luisa J. Ritacca, Fredrick R. Schumann, for Respondent

On appeal from the judgment of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated May 2, 2017, with reasons for judgment reported at 2017 ONSC 961 and reasons for costs reported at 2017 ONSC 3507.

***I.V.B. Nordheimer J.A.*:**

1 The defendants appeal from the judgment of Akbarali J. that awarded the plaintiff damages in the amount of $1,277,000, along with interest and costs. The claim arises out of the defendants' repudiation of a commercial lease respecting a property owned by the plaintiff. Subsequent to the repudiation, the plaintiff sold the property. Liability was admitted and the only issue at trial was the assessment of what damages, if any, were due to the plaintiff by the defendants. The trial judge found that the property was not sold at fair market value and awarded damages for loss of rental profits as well as loss of capital appreciation on the property.

2 On appeal, the appellants primarily argue that the sale of the property fully mitigated or avoided any damages, and that damages for lost capital appreciation were too remote. Thus the central issue in this appeal is how damages arising from the repudiation of a commercial lease should be calculated.

3 In my view, the trial judge erred in some aspects of her assessment of the damages arising from the repudiation. I would therefore allow the appeal for the reasons that follow.

Background

4 The respondent/plaintiff, Saramia Crescent General Partner Inc. ("Saramia"), is a single-purpose Ontario company. It owned a single-tenant industrial property known municipally as 1 Saramia Crescent in the City of Vaughan, Ontario (the "Property").

5 The appellant/defendant, Delco Wire and Cable Limited ("Delco"), entered into a lease on August 3, 2000 with the prior owner of the Property (the "Lease"). The Lease was for a term of 15 years, expiring August 31, 2015.

6 On November 15, 2011, Agellan Capital Partners Inc. ("Agellan"), a company associated with Saramia, closed its purchase of the Property through a shell corporation for $2,575,000. The agreement of purchase and sale was then assigned to Saramia on the same day and Saramia engaged Agellan to be the asset manager for the Property. As a result, Saramia acquired the rights and responsibilities of the landlord under the Lease on November 15, 2011. Concurrently, Saramia and Delco agreed to extend the term of the Lease for a period of six years, from September 1, 2015 to August 30, 2021. The trial judge found that Saramia would not have purchased the Property if it had been unable to negotiate the lease extension.

7 In December 2012, the appellant/defendant, IEWC Canada Corp. ("IEWC"), purchased Delco's assets, including its interest in the Lease. The Lease was assigned to IEWC, with Saramia's consent, on or about December 31, 2012.

8 Shortly after its acquisition of Delco, IEWC decided to consolidate its overall operations at a facility that it owned in Aurora, Ontario. Consequently, it began efforts to sublease the Property. IEWC contacted CBRE Limited ("CBRE"), a commercial real estate services firm, to assist in locating a subtenant.

9 In the course of its search, CBRE did not find anyone who was interested in leasing the Property. However, it did identify a number of parties that were interested in purchasing and occupying the Property for their own use. CBRE approached Agellan about the possibility of selling the Property and was told by Agellan to "bring me a buyer". CBRE located at least three such potential buyers.

10 Saramia then negotiated agreements of purchase and sale with each of these three potential purchasers. Saramia set the purchase price at $3,450,000 based on its knowledge of the market and on the understanding that it would also receive a lease buy-out from IEWC. The agreements of purchase and sale included a vacant possession condition, allowing Saramia to refuse to carry out the transaction if vacant possession could not be provided by the closing date. Two of the three potential purchasers were unable to complete the transaction. However, the third purchaser was able to do so.

11 As part of this process, Saramia told CBRE that it would only consider selling the Property on the condition that it could negotiate a lease buyout with IEWC. CBRE said that IEWC was amenable to that.

12 In late October 2013, representatives of IEWC and Saramia attempted to negotiate mutually agreeable terms for the early termination of the Lease. However, an impasse developed over what the two parties thought was the appropriate measure for the lease buyout. Negotiations broke down.

13 On November 1, 2013, IEWC advised Saramia that it had paid rent to the end of November 2013, but that no further rent payments would be made under the Lease. Saramia accepted the repudiation of the Lease on November 14, 2013. On November 15, 2013, IEWC's lawyer wrote to Saramia advising that Saramia should proceed to sell the Property to mitigate its loss. On December 10, 2013, Saramia closed the sale of the Property. Saramia received $3,450,000 for the Property but incurred a $103,458 mortgage break fee for the early termination of the mortgage.

14 On February 5, 2014, Saramia commenced the underlying action against the appellants for damages for breach of the Lease. A five-day trial was held in December 2016.

The Trial Judge's Findings

15 The trial judge found that Saramia was forced to sell the Property when the appellants repudiated the Lease. She found that Saramia could not afford the ongoing maintenance and mortgage expenses associated with the Property without the rental income.

16 The trial judge also found that the sale of the Property in 2013 was not at fair market value. She found, as a consequence, that the sale of the Property did not make Saramia whole for the losses sustained as a result of the repudiation of the Lease.

17 The trial judge then reviewed the decision in *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.) for the basic principles relating to the proper assessment of damages arising from the breach of a lease. The trial judge then said, at para. 46:

> Laskin J.'s reasons are consistent with the fundamental principle that the goal of a damages award for breach of contract (including breach of lease) is to put the innocent party in the position it would have been in had the contract been performed as agreed. Ordinary principles of mitigation and remoteness are relevant. In the case of a breach of lease, the proper measure of damages is unpaid rent to the date of the breach plus the present value of the loss of the future rent, which is the present value of the unpaid rent for the unexpired period of the lease less the actual rental value of the premises for that period: see *Morguard Corp. v. 2063881 Ontario Inc.*, 2013 ONSC 7213at para. 23.

18 The trial judge, however, did not employ the above method of calculating the damages due to Saramia. Rather, she concluded that Saramia not only would have enjoyed the benefit of the lost rental profits under the Lease, but that it would also have enjoyed the capital appreciation of the Property. The trial judge concluded that the sale of the Property in 2013 did not account for these benefits, which Saramia would have enjoyed had the Lease been honoured.

19 The trial judge then proceeded to consider the three expert reports that were provided to her. One concerned the valuation of the Property as at December 31, 2015. The other two expert reports involved different discounted cash flow ("DCF") analyses presented for the purpose of quantifying the damages.

20 The expert report on valuation, prepared by Avison Young, appraised the Property's value as at December 31, 2015 on either an income generation measure or direct comparator measure. On the income measure, the Property was appraised at $4,180,000. On the direct comparator measure, the Property was appraised at $4,465,000. The trial judge accepted the $4,465,000 appraisal in her reasons. That appraisal value was then used in the DCF analyses to calculate total damages.

21 The first set of DCF analyses were prepared by Saramia's expert, KPMG. There were two primary scenarios analyzed in this report. [1] The first scenario assumed a sale price for the Property in 2021 (the end of the Lease term) by projecting the December 10, 2013 sale price of $3,450,000 forward to 2021 at an assumed growth rate and discount rate of 2% per year. Thus the DCF effectively assumed that the real value of the Property would remain constant past 2013. The respondent's damages under this scenario were $357,000.

22 In the second scenario, the 2021 sale price was arrived at using the December 31, 2015 appraised value of the Property of $4,465,000. This price was then projected forward to 2021 at the same assumed growth rate of 2% per year along with the same 2% discount rate. This, in turn, assumed that the 2015 real value for the Property remained constant. This scenario calculated Saramia's damages at $1,124,000.

23 The second set of DCF analyses were prepared by the appellants' expert, Cohen Hamilton Steger. This report responded to the various DCF scenarios presented in KPMG's report. Based on the two sale prices described above, the Cohen report concluded that Saramia suffered no loss from the breach of the Lease. To the contrary, Saramia was, in fact, better off as a result of the repudiation.

24 The trial judge adopted KPMG's second scenario as the basis for her damages award, that is, the scenario that employed the December 31, 2015 appraised value of the Property. However, she deducted the mortgage break fee amount that Saramia had to pay from the principal amount available for reinvestment for mitigation purposes. The trial judge also awarded an amount of contractual interest owing under the Lease. Ultimately, she left the calculation of the actual loss to the parties to work out.

Issues on Appeal

25 The appellants submit that the Property was sold at fair market value. The sale of the Property, therefore, fully mitigated Saramia's claimed capital loss and foregone rental profits attributable to the unexpired Lease term. Moreover, the appellants submit that damages for lost capital appreciation are too remote, the DCF is too unreliable, and the award of contractual interest amounted to double recovery. In any event, the appellants argue that the sale of the Property should have ended the accrual of damages past the date of sale.

26 Saramia submits that all of the trial judge's findings and conclusions are correct. Saramia contends that the purpose of contract damages is full indemnification and the trial judge's award reflects that fundamental principle.

27 As such, the issues on appeal are as follow:

(a) What is the proper measure of damages for breach of a commercial lease?

(b) Were the damages for lost capital appreciation too remote?

(c) Were the damages mitigated?

(d) Does the sale of the Property stop damages from accruing beyond the date of the sale?

(e) Are the damages as calculated by the DCF too uncertain?

(f) Was it an error to award the contractual interest amount as damages?

Standard of Review

28 A trial judge's determination of damages is a question of mixed fact and law. Thus, it attracts deference on review. In order for an appellate court to interfere with a determination of damages, the appellants must generally show that the trial judge committed a palpable and overriding error. However, there is an exception to that standard. Where the determination of damages involves extricable questions of law, those questions are subject to review for correctness.

29 In that regard, the proper approach to be taken by an appellate court in reviewing a damages award was summarized in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943 (S.C.C.) where Binnie J. said, at para. 80:

> It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the trial judge had made an error of principle of law, or misapprehended the evidence [. . .] 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.]

Analysis

(a) The measure of damages for the breach of a lease

30 As the trial judge recognized, the fundamental principles to be applied in calculating damages arising from the breach of a lease are set out in the *Highway Properties* decision. The applicable principle was stated by Laskin J., at p. 570: [2]

> The landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One

element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period. Another element would be the loss, so far as provable, resulting from the repudiation . . .

31 In this case, however, Saramia did not re-lease the Property. Rather, it sold the Property. While I will discuss the ramifications of that decision on the issue of mitigation of damages later, it still leaves Saramia with its claim for the present value of the unpaid rent. However, from that value, Saramia would be required to deduct any savings it obtained as a result of no longer owning the Property. Only then will the award of unpaid rent conform with the general principle that contract damages are intended to place the plaintiff in the position it would have occupied had the contract been performed.

32 In this case, the commercial lease was a "carefree" lease to Saramia, that is, the ongoing costs associated with the Property were to be borne by the appellants. Consequently, no deduction had to be made for those ongoing costs. However, Saramia, on the sale of the Property, no longer had to make the mortgage payments associated with the Property. Those savings had to be deducted from the lost rental payments in the DCF calculation. The same concern arises with respect to any fees due to Agellan or that otherwise would have been incurred had the Lease been honoured. The respondent's expert, KPMG, made those deductions in arriving at their damages calculations.

33 Had the trial judge's analysis ended at that point, there would be much less of an issue to address. However, the trial judge went on to consider the loss of capital appreciation on the Property. After reviewing some additional authorities on the issue, the trial judge said, at para. 58:

> The measure of damages for IEWC's breach must put Saramia in the position it would have been in had the lease obligations been honoured. Had IEWC not breached its obligations, Saramia would have continued to enjoy the stream of lease income. By 2015, it would have enjoyed significant capital appreciation in the property. By 2021, it would have enjoyed more lease income and the opportunity for further capital appreciation in the property (although it would also have run the risk of depreciation in the property). There is no evidence to allow me to conclude that the fair market value of the property in 2013 would account for these specific economic benefits that Saramia would have enjoyed had IEWC not repudiated the lease and forced the property's sale.

34 The first two sentences from this portion of the trial judge's decision are correct. The balance of that portion, however, reflects an error by the trial judge. As I have already set out, the law is clear that what the appellants are liable for are the rental payments that they did not make, subject to Saramia's duty to mitigate and the expenses Saramia avoided by selling the Property. Whatever "but for" capital appreciation there may, or may not, have been in the Property going forward, it is not a proper head of damages for which the appellants are liable through their repudiation of the Lease, if those losses are too remote — an issue to which I now turn.

(b) Remoteness of damages for lost capital appreciation

35 In order for a party to be liable for damages for the breach of a contract, the damages must not be too remote. The test for remoteness of contract damages was set out in the seminal decision of *Hadley v. Baxendale* (1854), 156 E.R. 145 (Eng. Exch.), at p. 151 *per* Alderson B.:

> Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

This test has been expressly adopted by the Supreme Court of Canada in several cases, including *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.), at para. 54.

36 As such, there are two branches to the *Hadley v. Baxendale* remoteness test. Damages may be recovered if: (i) in the "usual course of things", they arise fairly, reasonably, and naturally as a result of the breach of contract; or (ii) they were within the reasonable contemplation of the parties at the time of contract. It is important to highlight that remoteness applies to the type of loss suffered, not the quantity of a proximate loss: *1298417 Ontario Ltd. v. Lakeshore (Town)*, 2014 ONCA 802, 122 O.R. (3d) 401 (Ont. C.A.), at para. 137. The claimed damages for lost capital appreciation in the instant case, however, fall outside of both branches of *Hadley v. Baxendale*.

37 With respect to the first branch, the trial judge held at para. 91 of her reasons that "*[i]n these circumstances*, the loss of the capital appreciation was foreseeable and arose naturally from the breach of contract" (emphasis added). In so saying, the trial judge appears to conflate the two branches set out in *Hadley v. Baxendale*, and in doing so she erred.

38 The test under the first branch of remoteness is objective: *KPM Industries Ltd. v. Elmford Construction Co.* (1996), 30 C.L.R. (2d) 245, 1996 CarswellOnt 3594 (Ont. Gen. Div.), at para. 152, affirmed (1998), 113 O.A.C. 369 (Ont. C.A.); *R. v. Canamerican Auto Lease & Rental Ltd.* (1987), 37 D.L.R. (4th) 591 (Fed. C.A.), at p. 604; and G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 679.

39 The question is not whether the type of loss, *i.e.* lost capital appreciation, was foreseeable as arising naturally *in this case*. The inquiry is whether, as a general matter and objectively viewed, lost capital appreciation is a type of loss that foreseeably and naturally arises "according to the usual course of things" from the breach of a commercial lease. One of the factors that could be used to define the foreseeable and natural types of losses recoverable upon breach of contract is the objective bargain inherent in the contract. In a commercial lease, the tenant's bargain is the use of the premises for trade or commerce and the landlord's bargain is the receipt of rental income. Objectively viewed, the inherent bargain in a commercial lease does not include the opportunity to profit from speculative capital appreciation. In my view, therefore, damages for lost capital appreciation do not fairly and reasonably arise from the breach of a commercial lease.

40 This conclusion is consistent with other decisions that have considered the issue including, *Canadian Medical Laboratories Ltd. v. Stabile* (1992), 25 R.P.R. (2d) 106, 1992 CarswellOnt 593 (Ont. Gen. Div.), at para. 69, where Mandel J. found that the loss of capital appreciation does not "naturally arise from the breach or repudiation of a lease." Indeed, counsel did not refer us to any case where loss of capital appreciation constituted damages flowing from the repudiation of a lease.

41 With respect to the second branch of remoteness from *Hadley v. Baxendale*, there is nothing in the evidence that would support a conclusion that the parties contemplated, at the time that they entered into or extended the Lease, that capital appreciation of the Property would be something for which the tenant would be liable to the landlord if the Lease was breached. Indeed, at the time that the Lease was first signed, neither IEWC nor Saramia were parties to it. Nor is there any evidence that a reasonable person would have contemplated such a loss in light of the circumstances known to the parties.

42 The lost capital appreciation ought not to have formed part of the damages calculation in this case because it was not a matter that was in the reasonable contemplation of the parties at the time that the Lease was entered into. It is a head of damages that is simply too remote. I note that this same conclusion was reached by Wilson J. in *Langille v. Keneric Tractor Sales Ltd.*, [1987] 2 S.C.R. 440 (S.C.C.), at pp. 456-57 when dealing with the assessment of damages arising from the breach of a lease of chattels.

43 Moreover, in analyzing the second branch of *Hadley v. Baxendale* as she did, the trial judge looked at the reasonable contemplation of the parties as at the time of the breach, instead of at the time that the Lease was entered into. In this regard, the trial judge stated at para. 91 of her reasons:

> If the parties had contemplated this breach of contract at the time they entered into the contract, they would have contemplated the lost stream of lease income and the lost capital appreciation. I reach these conclusions because the breach of contract was not just the repudiation of the lease; it cannot be separated from the manner of the

repudiation of lease that forced the sale of the property in December 2013. The defendants knew that Saramia wanted a long-term lease and was not intending to sell; Saramia had negotiated the lease extension before purchasing the property. IEWC's broker was involved in efforts to sublet, then sell the property; IEWC thus knew that there were no prospective tenants for the single-tenanted property and that the property had appreciated significantly [. . .] IEWC knew that Saramia had agreed to sell expecting a lease buy-out but IEWC failed to meaningfully engage in negotiations. Instead it repudiated the lease in a manner that bound Saramia to the sale price to which it had agreed in the expectation it would also receive a lease buy-out.

[Emphasis added.]

In doing so, it appears that the trial judge fell into the same error that was identified in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79 (S.C.C.).

44 The relevant inquiry is not *if* the parties contemplated the *breach*. Rather, it is whether the parties reasonably contemplated that the *type of damages* claimed would be the probable result of a breach of the contract *at the time of contract*. As McLachlin C.J.C. said in *RBC*, at para. 12:

It is apparent that the majority of the Court of Appeal applied the proximity test wrongly. Instead of asking whether damages of this sort would have been within the reasonable contemplation of the parties had they put their minds to the potential breach when the contract was entered into, the majority of the Court of Appeal asked whether the *breach* was foreseeable.

[Emphasis in original.]

45 The Supreme Court has repeatedly held that the second branch of *Hadley v. Baxendale* is to be assessed from the standpoint of the parties at the time of contract. In *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.), at paras. 54-55, the court held:

It follows that there is only one rule by which compensatory damages *for breach of contract* should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle [. . .] In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation.

[Emphasis added.]

See also *Keays*, at paras. 55-56; and *Mustapha v. Culligan of Canada Ltd.* (2006), 84 O.R. (3d) 457, 275 D.L.R. (4th) 473 (Ont. C.A.), at paras. 61-67, affirmed 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at para. 19.

46 The requirement to assess the parties' reasonable contemplation at the time of contract also accords with one of the objectives of the second branch of *Hadley v. Baxendale*, which is to allocate the risk of loss for types of damages that do not arise naturally from a breach of the contract to the party that bargained to bear it. See, for example, *Transfield Shipping Inc. v. Mercator Shipping Inc.*, [2008] UKHL 48 (U.K. H.L.) *per* Lord Hoffmann. As Abella J. (dissenting in part) said in *RBC*, at para. 64 (and as this court noted in *Lakeshore*, at para. 138):

The principle of remoteness "imposes on damage awards reasonable limits which are required by fairness" [. . .] It aims "to prevent unfair surprise to the defendant, to ensure a fair allocation of the risks of the transaction, and to avoid any overly chilling effects on useful activities by the threat of unlimited liability" [. . .] This principle will be informed by the nature and culture of the business in question, and the particular contractual relationship between the parties . . .

47 In the instant case, however, the trial judge appears to have first identified the unique circumstances of the breach, and the losses flowing therefrom, and then reasoned back to conclude that the parties would have contemplated that such losses were to be borne by the appellants. The trial judge did not, as she should have, begin her analysis with whether

there was evidence that, at the time of contract, the loss of capital appreciation, in the face of a breach, would reasonably have been in the contemplation of the parties.

48 Indeed, apart from the appellants' knowledge that Saramia wanted a long-term tenant, the remaining bases for the trial judge's determination on this point were all events that arose after the Lease and the extension agreement were concluded. But it does not follow that knowledge that a landlord wants a long-term lease translates into knowledge that a landlord will be forced to sell the leased premises, much less sell at a loss, if the tenant repudiates the lease. There is simply no evidence that the parties, on or before November 15, 2011, reasonably contemplated who should bear the risk for lost capital appreciation. In my view, the claimed damages for lost capital appreciation on the Property were neither natural consequences of the breach of the Lease nor were they reasonably contemplated by the parties at the time of contract. As such, damages for lost capital appreciation are too remote in this case.

(c) Mitigation of damages for the breach of a lease

49 I now turn to the issue of how the damages are to be calculated given that Saramia did not re-lease the Property. Instead, Saramia sold the Property. On this issue, the appellants submit that the "first principle" of asset valuation prescribes that the fair market value of an asset is equivalent to the present value of future net cash flows that can be generated by that asset. As a result, the appellants contend that Saramia fully mitigated its damages, both lost rental income and lost capital appreciation, through its sale of the Property at fair market value, since the sale price necessarily includes the present value of future lost rental profits. The appellants argue that any damages award in this case would amount to double recovery.

50 The trial judge attempted to overcome this argument by finding that the sale of the Property was not at fair market value. Thus the sale could not have made Saramia "whole" by fully mitigating its losses since the sale price did not accurately reflect the present value of future cash flows.

51 I disagree with both the trial judge's reasons as well as the appellants' submissions on this issue.

(i) Trial judge's finding of not at fair market value

52 I start with the finding that the sale was not at fair market value. This finding reflects both a factual palpable and overriding error and a legal error in interpreting the term "fair market value".

53 I begin with the trial judge's finding that Saramia could not afford to hold the Property, without the receipt of the rental payments, and thus Saramia was forced to sell the Property when the appellants repudiated the Lease. That was a conclusion that was open to the trial judge on the evidence and there is no basis for this court to interfere with it. [3] However, having reached that conclusion, the palpable and overriding factual error arises from the fact that there was virtually no evidence that, when Saramia chose to sell the Property, it did so at anything other than fair market value. I note that neither party filed an appraisal of the Property as at 2013.

54 It was Saramia that set the sale price for the Property. There is no clear and objective evidence that in doing so Saramia sought a price that was anything less than what it thought the Property was worth. Although there was some evidence that Saramia set the sale price while, at the same time, understanding that it would also receive a lease buyout from IEWC, there is no evidence that the sale price was set at a lower amount because of this understanding. Rather, it appears that Saramia expected to receive the lease buyout in addition to the sale price it could achieve for the Property.

55 Nevertheless, the trial judge found that the sale was not at fair market value. In doing so, the trial judge relied on the evidence of Ms. Attard, a Vice-President of Saramia, and of Frank Camenzuli, an executive at Agellan, that the requirement that Saramia sell the Property with a vacant possession condition "negatively affected the value of the property".

56 In my view, it was a palpable and overriding error for the trial judge to have used this evidence while ignoring other relevant evidence on the issue, to reach the conclusion that she did. I say this for the following reasons.

57 First, as the trial judge acknowledged, neither Ms. Attard nor Mr. Camenzuli were experts. Their view on this issue was therefore of no real assistance. Indeed, it might fairly be viewed as being entirely self-serving given their respective connections to Saramia.

58 Second, their opinions appear to be contradicted by Saramia's own Property appraisal expert. In deciding on the fair market value of the Property in 2015, Avison Young was of the opinion that the Property was worth more without a tenant than with one — hence the higher appraisal on the direct comparator measure as opposed to the income generation measure. There was no evidence to suggest that this disparity in value would have been any different in 2013.

59 Third, in terms of the evidence on this point, KPMG said in its report, at p. 11:

> Our analysis of other market transactional data occurring throughout 2013 suggests Saramia achieved a price that was generally not lower than other comparable industrial properties transacting in the local market.
>
> [Footnote omitted.]

60 In reaching her conclusion about fair market value, the trial judge also expressed concern that the Property was only marketed for sale through one broker. However, there was no evidence that Saramia was precluded from using other brokers. If Saramia chose to rely solely on CBRE, it cannot now complain that the process was inadequate. The same holds true regarding Saramia's complaint that the Property was unlisted.

61 In the end result, the objective evidence was that CBRE obtained three prospective purchasers, all of whom were interested in purchasing the Property at the price set by Saramia. The available expert evidence was that the Property was worth more without a tenant than with one. The expert evidence also established that the sale price was comparable with other "industrial properties transacting in the local market". The trial judge's conclusion that the Property was not sold at fair market value is "not reasonably supported by the evidence" and thus constitutes a palpable and overriding error: *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.), at para. 110.

62 In addition, the trial judge's conclusion on this issue reflects an error of law in her understanding of the meaning of "fair market value". The well-established legal definition of fair market value is what a seller is willing to accept and a buyer is willing to pay on the open market in an arm's length transaction: *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633 (S.C.C.), at paras. 9 and 37; *Prolink Broker Network Inc. v. Jaitley*, 2015 ONSC 6484 (Ont. Div. Ct.), at para. 45; and *Victoria University v. GE Canada Real Estate Equity*, 2016 ONCA 646, 76 R.P.R. (5th) 104 (Ont. C.A.), at para. 103.

63 In reaching her conclusion on fair market value, the trial judge focussed on the fact that Saramia was not a willing seller because it was forced to sell the Property. With respect, that is not what "willing" relates to in this context. What "willing" refers to is the price that is to be offered and accepted. As Gonthier J. said in *Musqueam Indian Band*, at para. 37:

> "Value" in real estate law generally means the fair market value of the land, which is based on what a seller and buyer, "each knowledgeable and willing", would pay for it on the open market.
>
> [Emphasis added.]

64 There was no evidence that Saramia sold the Property at a "fire sale" price or that it otherwise did not obtain the price that it wanted. Indeed, the presence of Agellan, on Saramia's side, a company experienced in dealing with commercial properties who had been the original purchaser of the Property, would make it difficult to accept that anything other than a fair price would have been accepted. Further, the fact that three different purchasers were engaged in the sale

process would strongly suggest that the sale reflected fair market value. In my view, the trial judge's confusion with respect to the meaning of fair market value also renders her conclusion on this issue an error of law.

(ii) Appellants' submissions on mitigation

65 Despite my conclusion that the Property was sold at fair market value, I nevertheless reject the appellants' submission that damages were fully mitigated for two reasons.

66 First, as this court held in *Ticketnet Corp. v. Air Canada* (1997), 154 D.L.R. (4th) 271 (Ont. C.A.), at paras. 92-97 *per* Laskin J.A., there are circumstances where the sale of an asset will not fully indemnify the plaintiff for the lost value of future net cash flows. In all private law damages cases, the guiding principle is to award damages to place the plaintiff in the position he or she would have occupied had the wrong not occurred.

67 Second, the circumstances in this case differ from those in *Ronald Elwyn Lister Ltd. v. Dayton Tire Canada Ltd.* (1985), 52 O.R. (2d) 88, [1985] O.J. No. 2633 (Ont. C.A.), where this court accepted the appellants' proposed valuation method. In that case, the plaintiffs claimed conversion of business assets against the defendants. This court held that the value of the converted assets was equal to the net cash flows that would have been generated by the assets when used in the plaintiffs' business as a going concern. This court stated, at para. 64, that the plaintiff:

> . . . cannot recover both the value of its business as a going concern and, also, damages based on the value of its assets that were converted. The latter are, logically, contained in the former. They are reflected in the profit-earning potential of the company which is embodied in the capitalization approach. To give both net asset value and the value of the business as a going concern would be contrary to the business practice reflected in [the accounting expert's] evidence and, also, the law respecting damages . . .
>
> [Citation omitted.]

68 Here, however, Saramia did not sell its business as a going concern. The respondent was a single-purpose corporation. Its business was comprised of the Property and the Lease.[4] The respondent was only able to sell the Property. It was not able to sell the Property with the Lease since the appellants had repudiated the Lease. The proceeds from the sale of the Property, therefore, only account for the value of the Property. They do not account for the economic value that is derived from the Lease. This distinction between the value of land and the value of a lease was highlighted by the Supreme Court in *Musqueam*. Though the court split four-four-one on how the value of a leasehold interest should have affected the outcome in that case, both McLachlin C.J.C. and Gonthier J. (writing for the two four-judge opinions) at paras. 9 and 38, respectively, agreed that the fair market value of land is the exchange value of the land in fee simple — and does not include the value of a lease.

69 In my view, in the particular circumstances of this case, the proceeds from the fair market value sale of the Property do not compensate Saramia for the lost economic value derived from the Lease.

(iii) The proper application of mitigation

70 The conclusions above, however, do not mean that the sale of the Property has no impact on the mitigation of damages.[5] The appellants would have been entitled to a reduction in the damages for the rental payments that Saramia should have received by re-leasing the Property, except that did not happen. Put another way, Saramia did not lessen its damages by finding another tenant to occupy the Property. While this might be said to be a failure of the duty to mitigate, this court observed in *Canadian Medical Laboratories Ltd. v. Stabile* (1997), 98 O.A.C. 3, [1997] O.J. No. 684 (Ont. C.A.), varying (1992), 25 R.P.R. (2d) 106, 1992 CarswellOnt 593 (Ont. Gen. Div.) that, in some instances, a landlord can mitigate its damages by selling, rather than re-leasing, the premises. As Carthy J.A. said, at para. 34:

> It is my view that in appropriate circumstances a sale could be mitigation for loss of a tenant, and in those circumstances efforts to sell could be considered as satisfying the duty to mitigate.

71 I pointed out earlier that the trial judge found that Saramia could not afford to hold the Property while it looked for another tenant. It consequently had to sell the Property. In those factual circumstances, the sale of the Property satisfies the duty to mitigate. Indeed, IEWC invited Saramia to sell the Property precisely for the purpose of mitigating its damages.

72 The issue then becomes how damages are properly calculated where the Property has been sold. I return again to the basic approach established by *Highway Properties*, that is, that the damages are the present value of the unpaid stream of rental payments to the expiration of the lease. From that amount, however, all amounts saved by Saramia as a consequence of selling the Property must be deducted. This would include, in this case, the mortgage payments and any fees due to Agellan or that otherwise would have been incurred by Saramia had the Lease been honoured.

73 There is, however, another amount that, in my view, must fairly be deducted from the damages claimed. As a consequence of selling the Property, Saramia received a lump sum (the net sale proceeds after paying off the mortgage and other expenses) earlier than it otherwise may have if the Lease had been performed. Indeed, in this case, it received that lump sum some eight years before the intended termination of the Lease. Having chosen to mitigate its damages by selling the Property, and thus not be able to re-lease it, Saramia must account for the monies that it could have earned through an investment of that lump sum for the period of time remaining on the Lease. [6] In other words, the return on the alternate investment of that lump sum becomes, in one sense, the equivalent of a replacement for the net cash flow stream that was lost when the rental payments ceased.

74 The selection of the appropriate Property value to be used in the DCF is therefore material to the damages analysis because it determines the amount available to be reinvested for mitigation purposes. The appropriate Property value to be used in the DCF was the 2013 sale price. On this point, I note that there was no basis for using the value of the Property in 2015 to calculate the damages for lost capital appreciation, even if those damages were not too remote. Indeed, it is not evident what legal foundation there was for using the 2015 value in this case.

75 What seems to have happened is that Saramia obtained the 2015 value and then submitted it as the appropriate value to use on the basis that it was reasonably limiting its claim to just that amount. The trial judge appears to have accepted this proposition.

76 With respect, a plaintiff does not get to unilaterally decide what factors are appropriately considered in a damages assessment. It is the court's obligation to make those determinations and the court must do so based on the application of proper legal principles. In this case, if the claim for lost capital appreciation was not too remote, the relevant capital appreciation would have been as of the completion of the Lease in 2021. No evidence was led as to what the value of the Property would have been in 2021. Indeed, the only evidence on this point, as noted by the trial judge at para. 94 of her reasons, was that everyone acknowledged that "the real estate market is volatile and it is impossible to know whether the property's value in 2021 will be greater than or less than the 2015 fair market value appraisal".

77 Given that acknowledgement, using the 2015 fair market value was simply arbitrary. I also note that the use of the 2015 fair market value increased Saramia's damages calculation significantly.

78 The Property was sold in 2013 and Saramia received actual proceeds from that sale. The 2013 sale price was the only value that reflected how much Saramia had available to invest for mitigation purposes on a balance of probabilities. Thus damages should be calculated pursuant to the DCF scenario that was based on the 2013 sale price.

79 To dispel any suggestion to the contrary, I should add that this conclusion does not bring the issue of capital appreciation back into the equation because, at this stage of the analysis, I am not dealing with how the sale price related to the purchase price or how that relationship might have changed in the future. Rather, I am simply recognizing the reality that Saramia received a lump sum of cash earlier than it otherwise may have. Any benefit that Saramia obtains

from that earlier receipt must be accounted for and applied against the loss it incurred as a result of the appellants' repudiation.

80 I recognize that the appellants might say that the amount that Saramia could have earned from investing the sale proceeds may be substantially less than what a new tenant would have paid by way of rent. I do not dispute that possibility, but it was open to the appellants to lead evidence as to when a new tenant would likely have been found and the likely rent that a new tenant would have paid. They chose not to lead any of that evidence. They cannot now complain that those considerations are not taken into account in the mitigation of damages assessment when they did not provide the evidence to permit that analysis. This is especially so since it is the appellants who bear the onus of proving that mitigation was possible and that Saramia has failed in its duty to mitigate. In addition, and importantly, the duty to mitigate only requires Saramia to take *reasonable* steps, not any and all steps: *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.), at pp. 660-61; and *Evans v. Teamsters, Local 31*, 2008 SCC 20, [2008] 1 S.C.R. 661 (S.C.C.), at para. 30.

81 I am aware that, in this case, Saramia was apparently contractually bound to remit the proceeds of the sale of the Property to its limited partners and thus could not invest the monies and receive a return. However, that contractual requirement does not release Saramia from its duty to mitigate. The damages were incurred by Saramia and it is Saramia's duty to mitigate them. The Supreme Court expressly held in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675 (S.C.C.), at paras. 26-30, that a single-purpose corporation has a duty to mitigate. Saramia must therefore account for what it could reasonably have done with the lump sum it received, regardless of its particular corporate structure. I note on this point that Saramia accepts that its damages must be reduced by the opportunity it had to invest the net sale proceeds. [7]

82 The trial judge accepted that the hypothetical investment in a REIT basket, focused on Canadian industrial, commercial, and retail assets with a return of 6.0%, as utilized by KPMG, was appropriate. I do not see any basis to interfere with her conclusion in that regard. The trial judge was entitled to reach that conclusion on the evidence that was placed before her.

(d) Accrual of damages after the sale of the Property

83 The appellants submit that Saramia's sale of the Property prevented Saramia from being able to perform the Lease and therefore the accrual of damages for lost rental profits should end at the date of sale. [8] In support of this proposition, the appellants cite the trial court's decision in *Canadian Medical*, at para. 73. This issue of whether a plaintiff (who accepts a defendant's repudiation) must remain ready, willing, and able to perform the repudiated contract in order to claim damages for the breach has been described as "unresolved" in Canadian law: *Webster Estate v. Thomson*, 2008 ONCA 730, 241 O.A.C. 360 (Ont. C.A.), at para. 24, citing G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006), at pp. 550-51.

84 The confusion appears to stem from a line of English authorities, including for example, *Maredelanto Campania Naviera S.A. v. Bergbau-Handel GmbH* (1970), [1971] 1 Q.B. 164 (Eng. C.A.) where Megaw L.J. stated, at pp. 209-10:

> In my view, where there is an anticipatory breach of contract, the breach is the repudiation once it has been accepted, and the other party is entitled to recover by way of damages the true value of the contractual rights which he has thereby lost; subject to his duty to mitigate. If the contractual rights which he has lost were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.

85 In my view, those authorities are not apt in this case. Unlike the authorities that support the appellants' submission, Saramia's sale of the Property in this case was not an independent and inevitable event that would have occurred

regardless of the appellants' repudiation of the contract. In this regard, I share the trial judge's opinion that the trial decision in *Canadian Medical* is distinguishable because the breach of the lease in that case was not the factual cause of the sale of the property.

86 Moreover, it would be anathema to the purpose of the mitigation doctrine to hold that a reasonable action taken by the innocent party intended to mitigate damages could be used by the wrongdoer as a means to escape liability. To the extent that a defendant landlord sells a leased premises as a reasonable means of mitigating damages following a tenant's repudiation of a lease, the sale of the leased premises does not bar the landlord's claim for lost rental payments after the date of sale.

(e) The certainty of damages calculated by the DCF

87 I turn now to the calculation of damages using the DCF analysis. I begin by rejecting the appellants' submission that the DCF was "purely hypothetical" and that "the trial judge resorted to speculation to assess the landlord's damages — precisely what the case law warns against". DCF calculations based on projections of future performance have been accepted by this court as a sufficiently certain means of quantifying damages where the projections constitute a close approximation of what would have occurred on a balance of probabilities: *Ticketnet*, at para. 87.

88 I agree with the trial judge that the proper approach to calculating the damages in this case was the DCF method. I disagree, however, with the trial judge's conclusion that the 2015 fair market value appraisal was the appropriate value to use in the DCF calculation. The appropriate value to be used was the 2013 sale price, for the reasons that I have already given.

89 The trial judge referred to other differences in the DCF analyses that the experts undertook. She favoured the approach taken by KPMG on these issues. There is no basis upon which this court should interfere with those findings.

90 The trial judge also found that the mortgage break fee of $103,458, that Saramia had to pay in order to sell the Property in 2013, ought to have been deducted from the amount of the proceeds of sale that were available to invest for the balance of the term of the Lease, as opposed to simply awarding that amount as a separate head of damages. KPMG had done the latter. While I doubt that this makes any significant difference to the overall damages calculation, I agree with the trial judge that it makes more sense to treat that amount as reducing the sale proceeds that were available to be reinvested. This conclusion by the trial judge required the appropriate DCF calculation to be redone.

(f) The award of contractual interest

91 Finally, the trial judge awarded interest on a portion of the damages at the rate of 24% per year, as purportedly provided for in one clause of the Lease. That clause related to the interest that would accrue on rent not paid when it was due. It seems to me to involve a rather strained interpretation of that clause in the Lease to apply the interest rate to a portion of the damages calculated under the DCF analysis. This is especially so given that Saramia's interest calculations were "imprecise", to adopt the trial judge's characterization of them.

92 In any event, the trial judge's reasons are unclear as to the legal basis for the award of contractual interest. The reasons show that she could have intended either that the contractual interest was a head of expectation damages resulting from a breached contract, or an amount awarded pursuant to the enforcement of a subsisting contract. In both cases, the award was in error.

93 In the first case of expectation damages, the trial judge's award of contractual interest relies upon the assumption that, if the appellants remained in the tenancy until 2021, the appellants would have, in fact, defaulted on future rent payments such that this clause could be invoked. The trial judge simply stated that Saramia estimated that the appellants would incur such defaults for approximately 3/8 of the remaining eight years of the Lease. The trial judge did not analyze why she accepted Saramia's submission. The reasons therefore do not provide the necessary basis for meaningful appellate review on this issue. That failure warrants appellate intervention because the reasons fail to provide the required

link between the "what" and the "why": *Dovbush v. Mouzitchka*, 2016 ONCA 381, 131 O.R. (3d) 474 (Ont. C.A.), at paras. 19-25.

94 In the second case, Saramia's acceptance of the appellants' repudiation of the Lease terminated the Lease. As such, Saramia cannot claim that rent arrears following the appellants' repudiation continued to accrue past the date of termination. Saramia's remedy in this case is a claim for expectation damages, subject to sufficient proof as explained above. Saramia could have chosen not to accept the repudiation and sue for rent arrears accruing under what would then be an enforceable Lease, but it chose not to. Therefore, if the trial judge awarded contractual interest on the basis that rent arrears continued to accrue past the termination date, it was an error of law reviewable for correctness.

95 I do not see any reason to strain the language of the Lease in order to have some portion of the damages attract this higher rate of interest. Rather, the damages, calculated as of December 1, 2013, should attract prejudgment interest in the usual course, that is, under s. 128(1) of the *Courts of Justice Act*, R.S.O, 1990, c. C.43 to the date of judgment.

Conclusion

96 I would allow the appeal and set aside the trial judgment and the damages award. In its place, I would award damages and interest to be calculated in accordance with these reasons, which I summarize here for convenience:

- Damages are to be calculated using the KPMG DCF scenario based upon the Property's 2013 sale price and a REIT return of 6.0%.

- The mortgage break fee should be deducted from the net sale proceeds that are available to be reinvested based on the above KPMG DCF scenario.

- The loss of capital appreciation on the Property is not recoverable.

- The award of contractual interest is not recoverable. It is replaced with an award of prejudgment interest under s. 128(1) of the *Courts of Justice Act*.

97 If there are any issues in this regard, I would remit them back to the trial judge for resolution.

98 The appellants are entitled to their costs of the appeal in the agreed amount of $30,000, inclusive of disbursements and HST.

99 In terms of the costs of the trial, I recognize that, depending on the reduction in damages upon the recalculation, the offers to settle that were made may have a different effect than they first had before the trial judge. I therefore also remit both the award of trial costs, and the issue of the quantum of the trial costs, back to the trial judge for a fresh determination.

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

I agree.

***Trotter J.A.*:**

I agree.

Footnotes

1 Four total scenarios were presented in the KPMG report. The two key inputs that drove the four scenarios were the Property sale price and the reinvestment return rate. Only the variation in the sale price is relevant for the discussion at this point.

2 This measure of damages for breach of a lease was advanced by the appellant landlord in *Highway Properties*, and was adopted by Laskin J. at pp. 575-76.

3 As explained above, the conclusion regarding factual causation based on the "but for" test, however, is not sufficient to bring potential foregone capital appreciation on the Property into the contract damages analysis. A plaintiff must also prove that the type of loss is also sufficiently proximate.

4 I recognize that Saramia may hold other assets in its business, such as the Agellan management contract. However, I focus here on the assets that held material value.

5 See, *e.g.*, *365 Bay New Holdings Ltd. v. McQuillan Life Insurance Agencies Ltd.* (2007), 55 R.P.R. (4th) 117, [2007] O.J. No. 521 (Ont. S.C.J.), reversed on other grounds (2008), 64 R.P.R. (4th) 44, 2008 ONCA 100 (Ont. C.A.). Since the liability finding in that case was reversed on appeal, this court did not address the damages issue.

6 I note that this appears to have been the approach to damages adopted by O'Leary J. in *National Trust Co. v. Bongard, Leslie & Co.*, [1973] O.J. No. 1038 (Ont. H.C.), at paras. 30-34.

7 See respondent's factum at paras. 64 and 70.

8 This argument is distinct from contract frustration because, in this case, the appellants repudiated the Lease first. Saramia did not sell the Property before the appellants repudiated the Lease.

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

"debtor company" means any company that:

(a) is bankrupt or insolvent;

(b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

(c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised reorganization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> 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.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past*. I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;
>
> (e) developing restructuring alternatives; and
>
> (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage

some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.

> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the

hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's

> property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.
>
> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

Motion dismissed.

APPENDIX

2004 CarswellOnt 2936
Ontario Court of Appeal

Stelco Inc., Re

2004 CarswellOnt 2936, [2004] O.J. No. 1903

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Stelco Inc. and the other Applicants Listed on Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended

Doherty J.A., Laskin J.A., Moldaver J.A.

Judgment: May 5, 2004
Docket: CA M31129

Counsel: David P. Jacobs, for Moving Party
Michael E. Barrack, for Responding Party

Subject: Insolvency; Civil Practice and Procedure

Per Curiam:

1 Leave to appeal refused. Costs to the respondents Stelco in the amount by $2,000 and to the "primary lender" in the amount of $1000.

End of Document

2004 CarswellOnt 5200
Supreme Court of Canada

Stelco Inc., Re

2004 CarswellOnt 5200, 2004 CarswellOnt 5201, [2004] S.C.C.A. No. 336, 338 N.R. 196 (note)

Local Union No. 1005 United Steelworkers of America, Local Union No. 5328 United Steelworkers of America, Local Union No. 8782 United Steelworkers of America v. Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd., and Welland Pipe Ltd. (collectively "STELCO"), CIT Business Credit Canada Inc., GE Commercial Finance, Fleet Capital Canada (collectively the "Senior Lenders")

Binnie J., Charron J., McLachlin C.J.C.

Judgment: December 9, 2004
Docket: 30447

Proceedings: Leave to appeal refused, 2004 CarswellOnt 2936 (Ont. C.A.); Leave to appeal refused, 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List])

Counsel: None given

Subject: Insolvency; Civil Practice and Procedure

Per Curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number M31129, dated May 5, 2004, is dismissed with costs.

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At p. 95

THE SUN LIFE ASSURANCE COMPANY OF CANADA, (PLAINTIFF)..... } APPELLANT.

AND

ELLEN ELLIOTT (DEFENDANT).....RESPONDENT.

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*Oct. 23.
*Dec. 7.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Voluntary conveyance of land—13 Eliz. c. 5 (Imp.)—Solvent vendor—Action by mortgagee.

A voluntary conveyance of land is void under 13 Eliz. ch. 5 (Imp.) as tending to hinder and delay creditors though the vendor was solvent when it was made if it results in denuding him of all his property and so rendering him insolvent thereafter.

A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and that without first realizing his security.

Judgment of the Supreme Court of British Columbia (7 B. C. Rep. 189) reversed, Gwynne J. dissenting.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial in favour of the defendant.

The facts of the case are fully stated in the judgments published herewith.

Aylesworth Q.C. and *Wilson Q.C.* for the appellant.

Dockrill for the respondent.

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—Henry Elliott, in his lifetime, carried on business at New Westminster, B. C., acquiring sufficient money to enable him to retire from business about

*Present :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 7 B. C. Rep. 189.

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five years before his death, which occurred on the 7th November, 1896. On the 6th January, 1892, he, together with one Benjamin Douglas, borrowed $45,000 from the plaintiff company with interest at 7 p. c. payable half yearly, the principal to be paid by instalments of $2,000 each on the 1st of January in the years 1893, 1894, 1895, 1896, and the balance on the 1st January, 1897. On the 29th September, 1892, he, Elliott, borrowed the further sum of $12,000 from the plaintiffs, a mortgage being taken therefor on a portion of a certain island called Annacis Island on the Fraser River, and containing about 905 acres. Interest at 8 p. c. was payable half yearly, and the principal was to be repaid in instalments of $500 each on the 1st days of July in the years 1893, 1894, 1895 and 1896, and the balance, $10,000, on the 29th September, 1897. At the time of the execution of these mortgages Elliott was a man of good standing and repute financially, and was the owner not only of the property mortgaged but of several other valuable lands, and at the end of the year 1892 had at his credit in cash in the Banks of Montreal and British Columbia at New Westminster, the sum of $11,788.53. The evidence leads to the conclusion that in the year 1892 there was an undue inflation in the value of real estate in British Columbia, and it was conclusively established that from 1892 to 1896 there was an enormous and steadily increasing depreciation. In the years 1892 and 1893 the deceased, Elliott, duly paid the interest and taxes upon the mortgaged property, the taxes amounting to several thousands of dollars having since been paid by the plaintiffs as mortgagees. In the year 1894 Elliott withdrew from his accounts in the banks large sums of money, placing the same to the credit of his wife in the same banks, the result being that while at the time of his death he had but a very small sum to his credit in the

bank, his wife had $7,330.60. This was not, however, the full extent of his generosity. Between the 10th February and the 10th December, 1894, he conveyed the whole of his real estate (except perhaps his equity of redemption in the mortgaged lands), amounting in value to $27,500 to his wife and daughter, without valuable consideration, thereby practically denuding himself of all his real property, so that at the time of his death in November, 1896, all that came into the hands of his administrator was the sum of $71.82, and the liabilities, including the two mortgages to the plaintiffs, being between $50,000 and $60,000. This suit is brought to have the voluntary conveyances made by Elliott to his wife and daughter declared void under the statute 13 Elizabeth c. 5. The plaintiffs recovered judgment against the administrator on the 17th August, 1897, for $13,467.20 and costs $21.73, and an administration order was duly made by which it was declared that the estate was insolvent.

Upon the trial of the case before the learned Chief Justice of British Columbia, the action was dismissed as against the defendant, Ellen Elliott, widow of the deceased, but the plaintiffs recovered judgment against the daughter, which judgment affects but a very small portion of the land covered by the impeached conveyances. From this judgment an appeal was taken to the Supreme Court of British Columbia, two of the learned judges dismissing the appeal upon a technical ground to which I will refer hereafter, and the dissenting judge being of the opinion that the appeal should be allowed. I entirely agree with him upon the merits of the case.

It may willingly be admitted that the deceased at the time he executed the mortgages in question was in a perfectly solvent condition. There is no doubt of that, nor is there any doubt but that he was in a per-

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fectly solvent condition before he made the conveyances and gifts of money to his wife and daughter in 1894. But it is equally clear, and the learned trial judge admits, that the effect of these gifts and transfers, assuming that they were regular and legal, was to create the deceased an insolvent thereafter. While there were two enormous mortgage debts outstanding against him and after he had ceased to pay the instalments and interest thereon, and when he must have been conscious that the lands held by the plaintiffs as security for their loan were rapidly decreasing in value, and in all probability no longer affording sufficient security to enable the Company to realize its loan from them alone, he voluntarily and deliberately presents to his wife and daughter the whole of his remaining property, denuding himself of everything and depriving his creditors, the mortgagees, of any practical remedy they might have against him upon his personal covenant, and leaving them to their remedy against the mortgaged lands alone. I cannot conceive a more glaring infraction of the Statute of Elizabeth than this case affords, opposed as the conduct of the deceased was to the elementary principles of justice and common sense. The learned trial judge seems to have given judgment in favour of the widow because, as he thought, at the time of the transactions impeached, the deceased was solvent and therefore in a position to make a voluntary conveyance. He admits that after the conveyances and gifts he was insolvent; that at the time of his death he was insolvent; and he shut off during the trial further evidence as to the depreciation of the real estate in question since the execution of the original mortgages, but appears to have lost sight of the principle that where at any time a person is solvent and then makes a voluntary conveyance the effect of which is to make him insolvent, the settle-

ment is void, and that too, no matter what the intent of the settlor was.

Lord Hatherley, in the leading case of *Freeman* v. *Pope*, (1) lays down the principle as follows at p. 541:

> In *Spirett* v. *Willows* (2) 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.

And that case has been followed in this court on several occasions. So much for the main question. If there ever was a case where a man's generosity was at the expense of his justice it is the present case, and equity demands that so much of the subject matter of his generosity as will be sufficient to discharge his debts should be restored to his estate.

But it is said that inasmuch as the plaintiffs are mortgage creditors, they are not creditors within the statute of Elizabeth, and cannot bring this action. I do not think that the mere fact of a creditor having something in pawn, or pledge, or hypothec or mortgage, destroys his character as creditor, or deprives him of the right which the statute gives a creditor. If, however, he is a *secured* creditor, if he has sufficient of the assets of the debtor in his hands to fully cover

(1) 5 Ch. App. 538. (2) 3 De G. J. & S. 293.

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the indebtedness, then undoubtedly the statute was not intended for him, but for the general and unsecured creditors. The cases, at all events those by which we are bound, assume when dealing with the question of secured creditors that the security is ample for its purpose. But the authorities show, as May points out, (2 ed. p. 164),

> that if the property mortgaged is not sufficient to satisfy the debt (as is the case here), the mortgagee of course will be a creditor for the balance.

An Ontario case, *Crombie* v. *Young* (1), was cited as authority for the proposition above referred to, but that case is altogether different from this.

In that case it was shewn that at the time of the impeached transaction, a donation from a husband to his wife, the settlor was perfectly solvent after the conveyance, still possessing other lands and a large interest in the mortgaged property, far in excess of the mortgage. And it was held, whether rightly or wrongly, that under these circumstances, any intent to hinder or delay could not be imputed to him. As already shown the facts here are the reverse of those in *Crombie* v. *Young* (1). At the time of the impeached conveyances (and all evidence of intent except at that particular time is irrelevant), the mortgaged lands were probably wholly insufficient to pay the mortgage debt, and the voluntary conveyances themselves forever precluded the settlor from having any means of making up the shortage.

No authority was cited to us to show that before a creditor, having admittedly insufficient security, can bring suit under the statute of Elizabeth he must first realise his security. That question may properly be raised in an administration suit, but the mere fact of such non-realisation is not, in my view, a defence.

(1) 26 O. R. 194.

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Finally, the judgment of the learned trial judge dismissing the action against the defendant, Ellen Elliott, and setting aside the conveyance in favour of the defendant, Mary Logan, was entered on the 8th of May, 1899, and an appeal was taken from that judgment in due form on the 29th of May. Subsequently, the learned trial judge prepared a written statement of his reasons for judgments, these reasons, although prepared after judgment, forming part of the case, and as they are brief, I insert them here.

I am now told by the registrar that my reasons for judgment are desired on the part of the plaintiff for the purpose of an appeal.

There is some misunderstanding as to the position. Mr. Wilson, of counsel for the plaintiff, asked me during his argument upon authorities which he cited, to direct an issue as to the insolvency of the deceased at the time of the impeached transaction, *if* I should be of opinion that such insolvency was not sufficiently established.

I had a strong opinion during the trial that the evidence as to insolvency was not directed to the time in question sufficiently as between the plaintiff and Ellen Elliott, and I so intimated and upon further consideration I remained of this opinion.

But I informed counsel that I would direct an issue as requested in case the plaintiff was not satisfied to have judgment against Mary Logan with costs, and in favour of Ellen Elliott without costs.

These two defendants occupy different positions, and I think the destruction by Mrs. Elliott of the books of the deceased warranted the bringing of the action, although it did not appear that she was actuated by any improper motive in doing so.

Mr. Wilson, after taking time, stated in open court, during the sitting of the twenty-first of April last, that as I understood him, he elected to take judgment in the terms mentioned which were taken down by the registrar, and initialed by me, and judgment formally given accordingly.

I do not, for myself, see how the facts stated by the learned Chief Justice in any way can affect the rights of the plaintiff to appeal from the judgment previously rendered. If we are to accept the directions of their Lordships of the Judicial Committee of the Privy Council, who are inclined to treat judgments

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written, as the present was, after delivery, as ineffectual for any purpose whatever, this document should not have formed part of the case upon appeal, either to the court *en banc*, or to this court. *Brown* v. *Gugy* (1); *Richer* v. *Voyer* (2).

Mr. Wilson, of counsel for the plaintiff, was satisfied that no additional evidence upon the question of insolvency could be obtained, even if a reference were had, and to insist upon a reference would therefore be useless, and the matter remained there, the judge giving judgment in favour of Ellen Elliott, because, in his view the plaintiff had failed to establish a case against her and, against Mary Logan because they had succeeded in establishing a case against her. It was not a consent judgment in any case of the term, or a compromise. Mr. Wilson, counsel for the plaintiff, both in his factum and on the hearing of the appeal before us, repudiates the idea that there was any intention on his part of compromising. I have always understood a compromise to be a settlement where each party gives away to some extent at least. I can see nothing given away in the present case, either by the plaintiff to the defendant Ellen Elliott, or by her to the plaintiff.

The appeal should therefore be allowed with costs, together with all costs in the courts below, and judgment entered against the defendant Ellen Elliott setting aside, as against creditors, the conveyance in her favour set out in the amended statement of claim herein, with costs.

GWYNNE J. (dissenting).—This action was commenced by writ of summons issued out of the Supreme Court of British Columbia upon the 23rd day of

(1) 2 Moo. P. C. (N. S.) 341. (2) L. R. 5 P. C. 461.

August, 1897, against Ellen Elliott and Mary Logan as the defendants thereto.

In their statement of claim the plaintiffs allege that on the 29th day of December, 1892, one Henry Elliott (since deceased, the husband of the defendant Ellen Elliott, and father of the defendant, Mary Logan), executed to the plaintiffs an indenture of mortgage of certain lands therein mentioned for securing repayment to the plaintiffs of the sum of twelve thousand dollars then lent by the plaintiffs to the said Henry Elliott, together with interest thereon at the rate of eight per cent per annum. That upon the 19th of February, 1894, the said Henry Elliott conveyed to the defendant Ellen Elliott, his wife, certain lands and tenements in the province of British Columbia in the statement of claim mentioned, and that upon the 29th day of October, 1894, he conveyed to his daughter, the defendant, Mary Logan, certain lands in the statement of claim particularly mentioned, also situate in the Province of British Columbia. That the said Henry Elliott departed this life insolvent on or about the 7th day of November, 1896, and that one Charles George Major had been appointed administrator of his personal estate and effects. That on the 17th day of August, 1897, the plaintiffs recovered judgment by default against the said administrator for the sum of $13,467.20, and $21\frac{73}{100}$ costs.

The statement of claim then contains the paragraph following:

The plaintiff company say that the said Henry Elliott being to the knowledge of the defendants at that time in insolvent circumstances, or unable to pay his debts in full, *and at the same time indebted to the plaintiff company in divers large sums of money, conveyed the said hereditaments to the defendants voluntarily and without consideration, and with intent to delay, hinder and defraud the plaintiff company* and other

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the creditors of the said Henry Elliott in the payment of their just debts.

And the statement of claim prayed that the said conveyances be declared to be void as *against the plaintiffs* and all other creditors of the said Henry Elliott.

Now this statement of claim is in the precise form of the ordinary claim of a creditor who has proceeded or is proceeding to judgment, to set aside a voluntary conveyance as executed with the intent to delay or defeat the particular creditor and all other creditors from obtaining the fruits of a judgment recovered or to be recovered. In such cases the court goes no further than to avoid the deed in the event of a proper case being established leaving the several creditors to proceed by execution upon their judgments when recovered. It does not do anything further to assist the plaintiff unless the case made by the bill is one seeking for special relief applicable to the circumstances of the particular case. The defendants denied all the averments in the plaintiff's statement of claim, thus casting on the plaintiffs the burthen of every averment necessary to be established to justify a judgment avoiding the impeached conveyances. They also respectively expressly denied the crucial averment that Henry Elliott was insolvent when the deeds to the defendants were respectively executed.

At the trial it appeared that the plaintiffs not only held the mortgage mentioned in the statement of claim (in respect of which the judgment by default mentioned in the statement of claim was recovered) but also that on the 6th January, 1892, the said Henry Elliott and one Benjamin Douglas had executed to the plaintiffs a mortgage on certain lands therein mentioned situate in the City of New Westminster in British Columbia, in security for repayment to the plaintiffs of $45,000 and interest thereon at the rate of 7 per cent.

per annum, at the days and times and in the manner in the said indentures of mortgage mentioned. We have not on the record before us copies of these mortgages but only a short statement of their respective dates, of the lands therein respectively mentioned and the amounts thereby respectively secured: but they, no doubt, contained the powers of sale and lease on default usually inserted in all mortgages in British Columbia. It appeared also that upon the land mentioned in the mortgage of the 5th January, 1892, there were erected valuable buildings which in the year 1893 were leased at the sum of ($600 00) six hundred dollars per month and that the plaintiffs have been for some time in possession of these buildings receiving as mortgagees in possession the rents issuing thereout. What rents they are receiving now they did not shew, but they did admit on cross-examination that in the interval between the 1st December, 1896, and the 1st July, 1898, they received as such rents the sum of $7,503.60. It was also extracted from a witness of the plaintiffs that the lands in that mortgage were in 1894 of the value of $65,000.00 and that the buildings thereon were insured to the amount of $40,000.00

Then as to the 905 acres in the mortgage in the statement of claim mentioned one witness called by the plaintiffs valued these lands at ($10) ten dollars per acre, while another also called by the plaintiffs testified that in 1884 and at the present time these lands were well worth from ($15.00 to $20.00) fifteen to twenty dollars per acre, thus shewing at the lowest of these two last sums or $15.00 per acre the whole 905 acres to be worth $13,575.00 and at the mean between the two sums, or $17.50 per acre to be worth $16,837.50.

In a case like the present impeaching conveyances upon the ground of fraud the plaintiffs have no right to claim that more reliance should be placed on the

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testimony produced by them which placed the value of the lands at $10.00 per acre than upon the testimony of the witness also put forward by them to speak to value and who valued the same lands as well worth from $15.00 to $20.00 per acre. We have thus the value of the mortgaged lands to be: That the lands in the mortgage of the 6th of January, 1892, were, and so far as appears in the evidence still are worth the sum of $65,000.00 and are insured for $40.000, while the lands in the mortgage, in the statement of claim mentioned, were in 1894 and still are worth from $13,575.00 to $16,837 50 against which it was also extracted from the plaintiffs' witness that upon the 10th of February and and the 29th of October, 1894, the dates of the execution of the respective conveyances which are impeached the total amount due upon *both* mortgages together was $52,570.00, and upon the 1st of November, 1895, after the decease of Henry Elliott the sum of $52,500.00, of which sum if we attribute $12,500.00 to the mortgage in the statement of claim mentioned would leave only $40,000 00 due on 1st November, 1895, upon the other of which no mention is made in the pleadings, the whole of which sum was also covered by insurance.

This was the whole of the material evidence given in the case; all else was irrelevant, save that the only debts shewn in the evidence to have existed at the time of the decease of Henry Elliott independently of the plaintiffs' mortgage securities was the sum of $22.05 for a gas account and some taxes which being secured by liens on the lands assessed cannot be taken into consideration upon a question arising under the statute 13 Eliz. c. 5.

Upon this evidence the only judgment which upon the whole current of the authorities was warranted even if the plaintiffs were persons competent to maintain the action as set out in the statement of claim

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was a judgment dismissing the action with costs. *Lord Townshend* v. *Windham* (1); *Stephens* v. *Olive* (2); *Doe d. Garnons* v. *Knight* (3.)

In *Lush* v. *Wilkinson* (4), which was the case of a bill filed by a subsequent judgment creditor to set aside a post marriage voluntary settlement made by a husband in favour of his wife as void within 13 Eliz. c. 5, no antecedent debt was proved, but the plaintiff having asked for an inquiry as to antecedent debts Lord Alvanley dismissed the bill giving leave to file another.

Sir William Grant in *Kidney* v *Coussmaker* (5) referring to this case, said that as that bill had charged insolvency at the time of the execution of the voluntary settlement, and no proof was given of any debt in existence at that time,

the only reason for surprise was that Lord Alvanley did not absolutely dismiss the bill instead of giving leave to file another.

The only exception to the rule that a creditor subsequent to a voluntary deed can only set it aside upon proof of some antecedent debts or debt is if the evidence be such as to warrant the conclusion that the voluntary deed was executed with the design and intent of incurring future debts, and of defeating them by the voluntary deed. But we have here no such case. Moreover, as upon the appeal from the judgment of the learned trial judge the court offered the plaintiffs an inquiry as to antecedent debts which they declined to accept, we may reasonably conclude that they could supply no evidence upon the point, and the fact may be regarded as established that no such debt did exist in so far at least as this action between the plaintiffs and defendants was concerned,

(1) 2 Ves. Sr. 1,
(2) 2 Bro. C. (Belt) 90.
(3) 5 B. & C. 695.
(4) 5 Ves. 384.
(5) 12 Ves. 136.

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and that therefore the deeds which in the statement of claim are impeached have not been effectually impeached.

But the plaintiffs being creditors of Henry Elliott, deceased, holding mortgages upon real estate in security for their debt are not creditors within 13 Eliz. c. 5, that is to say, in the language of May at p. 141 of his book giving the rationale of the authorities upon the point:

> The enactment is clearly intended to prevent persons from conveying away the whole or any part of their property in derogation of the rights of those who as general creditors have a claim on the general assets of their debtor. Mortgagees therefore who have a specific portion of land set aside, and so far as their interest is concerned, freed from liability to the general creditors, and to which they can primarily at least, resort for the satisfaction of their claim are not to be regarded as "creditors," or at least *a mortgage debt is not properly speaking a debt for the purposes of the statute.*

And so even in the case of the general creditors filing a bill for the administration of the estate of a deceased person, and therein seeking to set aside a voluntary conveyance as a fraud upon creditors within the statute 13 Eliz. c. 5, upon the question whether at the time of the execution of the impeached conveyance the settlor had creditors, with intent to defraud when the impeached conveyance can be said to have been executed, debts secured by mortgage are not to be taken into consideration

The learned counsel for the plaintiffs felt himself compelled to admit, as indeed he could not do otherwise, that the plaintiffs could not on their own behalf maintain the present action, but he contended that the present action was maintainable upon the ground of its being, as he contended, an action on behalf of all creditors of the deceased as of the plaintiffs themselves referring to a passage in Mr. May's book, (p. 466,) which is in these words:

The bill ought to be filed by a creditor or creditors on behalf of himself or themselves and all other the unsatisfied creditors of the settlor deceased, citing *French* v. *French* (1).

What Mr. May is there referring to, as plainly appears by the case cited, is the case of a bill filed by one simple contract creditor upon behalf of himself and all other the creditors of a deceased person for an administration of the assets of the deceased, and praying for the avoidance of a voluntary conveyance standing in the way of such creditors. That such an action must be instituted by one or more creditors on behalf of all is a very different thing from saying that a mortgagee, whose interests are quite distinct from the interests of the general unsecured creditors, can by assuming to act on behalf of himself and all other creditors of a deceased person invoke the court to set aside a conveyance which is impeachable only as standing in the way of the general creditors in which number as we have seen the mortgagee is not to be counted.

No case has been cited in support of such a proposition, nor is there any sense in saying that what a mortgagee could not effect in a suit instituted on behalf of himself alone he can effect by professing to act on behalf of himself and others whose interests are wholly distinct from his. Moreover as already observed this action is not *in form* an action on behalf of all the creditors of the deceased. No relief is sought other than the mere avoidance of the deeds impeached, upon which relief being granted the court goes no further but leaves all the creditors to avail themselves of their rights as best they may—no other relief is asked for in the present action and the plaintiffs declare themselves to be ready to seize the property to satisfy their judgment.

(1) 6 DeG. M. & G. 95.

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The case of *French* v. *French* is reported in 1 Jur. N. S. 840; 2 Jur. N S. 169 and 6 DeG. M. & G. 95. In the first of these reports the bill is shewn to have been filed by a simple contract creditor on behalf of himself and all other the creditors of a deceased person for an administration of the assets of the deceased and to set aside a voluntary settlement as fraudulent within the statute 13 Eliz. c. 5 against such creditors, and the bill prayed that an account might be taken of the personal estate and effects of the deceased, and that it might be declared that an annuity granted by the impeached instrument was as against the creditors of the deceased fraudulent, and that the wife in whose favour the annuity was granted might be declared trustee thereof for the benefit of such creditors, and that a receiver might be appointed. In 2 Jur. N. S. 170 the form of the decree pronounced in the case is given as follows:

> There will be a declaration that the settlement of 1852 (the impeached conveyance) was void as against creditors and the accounts will be taken on that footing, without prejudice to any question that may be raised by Mrs. French in case the assets should turn out to be more than sufficient to pay all the debts.

That this suit must have been instituted by a creditor upon behalf of himself and all other creditors entitled to share in the general assets of the deceased there can be no doubt; but the present is not a case like that and here it is to be observed how careful the court was to provide for protection of the interests of the volunteer beneficiary. To such a suit a mortgagee would have been an unnecessary party, for when a mortgagor dies leaving lands mortgaged and other lands and personal estate not mortgaged the only assets of the deceased to be administered for the benefit of creditors are the equity of redemption in the mortgaged lands and the residue of the deceased's estate, real and personal. To a

bill by the general creditors of the deceased the mortgagee cannot be called upon to take any part; the equity of redemption in the mortgaged premises may be sold in such administration suit but not so as in any way to prejudice or interfere with the exercise by the mortgagee of all his rights under the mortgage. He may sell the whole estate absolutely under the powers of sale ordinarily inserted in all mortgages executed in every province of the Dominion. He may by petition be admitted into the administration suit and consent to a sale therein of the mortgaged premises, he receiving the whole of the proceeds of such sale until his mortgage debt, interest and costs are fully paid. In such a case he must submit to rendering an account of all monies received by him in respect of the mortgage and the decree is for the taking of such account and for sale of the mortgaged premises with the mortgagee's consent, and if the proceeds of the sale should prove insufficient to pay the mortgage debt, interest and costs, that then he should be admitted to prove for the balance not realized as a specialty creditor.

The cases are numerous but uniform on this subject. A few will suffice: *Mason* v. *Bogg* (1); *Greenwood* v. *Taylor* (2); *Carr* v. *Henderson* (3); *Ward* v. *McKinley* (4); *Crowle* v. *Russell* (5).

A mortgagee may also himself file a bill for an administration of the estate of the deceased. In such case he must render an account of all his receipts and dealings in respect of the mortgaged premises and shall retain his right to have the proceeds of the sale of the mortgaged premises applied wholly in payment of his mortgage debt, interest and costs, and in case of the proceeds of sale proving insufficient for that

(1) 2 My. & Cr. 443.
(2) 1 Russ. & My. 185.
(3) 11 Beav. 415.
(4) 10 Jur. N. S. 1063.
(5) 4 C. P. Div. 186.

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purpose, he shall be allowed to prove for the unsatisfied balance as in the case of his applying by petition to be let into an administration suit instituted by the general creditors and consenting to a sale of the mortgaged premises in that suit. *Brocklehurst* v. *Jessop* (1); *Tipping* v. *Power* (2); *King* v. *Smith* (3); *Aldridge* v. *Westbrook* (4); *Skey* v. *Bennett* (5); *Spensley* v. *Harrison* (6); *Pinchard* v. *Fellows* (7).

The decree in *Pinchard* v. *Fellows* (7) shews the form of decree in such cases. The decree directed an account to be taken of what was due to the plaintiff for principal, interest and costs of suit, including the costs of the account and consequent on the sale thereafter directed — account of the rents and profits of the mortgaged premises received by the plaintiff or which without wilful default might have been received, deducting what should appear to be due on such account of rents and profits from what appeared to be due to the plaintiff for principal, interest and costs. Lands comprised in plaintiffs' mortgages to be sold with the approbation of the judge and the money to arise by such sale to be paid into court; and that thereout on an application in chambers what should be certified to be due to the plaintiff be paid to him; but in case the money to arise by the sale should be insufficient to discharge the said amount to be so certified to be due to the plaintiff then the whole thereof to be paid to him. In case such monies should be insufficient to pay the amount due to the plaintiff he was declared entitled to come in with the other creditors of the deceased and to receive satisfaction for such deficiency out of the deceased's assets in a due course of administration.

(1) 7 Sim. 438.
(2) 1 Hare 405.
(3) 2 Hare 239.
(4) 5 Beav. 188.
(5) 2 Y. & C. Ch. 405.
(6) L. R. 15 Eq. 16.
(7) L. R. 17 Eq. 422.

Now, in the present case, to a bill filed by the plaintiffs for administration of the deceased Henry Elliott's estate, his co-mortgagor, Benjamin Douglas, if living, and his representatives if dead, must needs be a party or parties. No such bill having been instituted it is quite obvious, as indeed the frame of the statement of claim also shews, that the plaintiffs are standing upon what they consider to be their rights distinct from, and not, by any means, in concert with the general creditors, if there be any, of Henry Elliott, deceased.

The evidence adduced by the plaintiffs seems to shew that in truth the plaintiffs are the sole creditors of the deceased, for they proved that the whole amount of deceased debts, so far as known, amounted to something over $50,000, how much was not stated and the plaintiffs gave evidence that the amount due to them by the deceased at the time of his death was $52,500. The only debts spoken of were the $22.05 for the gas account and the taxes already referred to, but the point in issue in the case is not whether the deceased was indebted at the time of his death, but at the times when he executed the impeached conveyances, and no debt whatever was proved to have then been in existence but the debt to the plaintiffs secured by mortgage, and as the evidence shewed amply secured.

In so far as the present action is concerned there is no other conclusion justified by the evidence and by the fact that the plaintiffs refused the opportunity for further inquiries as to the indebtedness of Henry Elliott at the time of the execution of the impeached conveyances than that the said Henry Elliott was free from all debt, save that secured to the plaintiffs at the times of execution of the said conveyances and had a perfect right to execute them without any interference on the part of the plaintiffs. The only judgment therefore, which was justified by the evidence was one

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dismissing the plaintiff's action with costs, and the appeal, therefore, in my opinion, must be dismisssed with costs.

The defendant, Mary Logan, not having appealed from the judgment rendered against her we can not deal with it, but I apprehend that means can readily be found to prevent the plaintiffs attempting, if they should attempt, to enforce an execution against the lands mentioned in Mary Logan's deed to obtain satisfaction of the judgment in the statement of claim mentioned to have been recovered against the administrator of the estate of Henry Ellliott, or of any part thereof.

Appeal allowed with costs.

Solicitors for the appellant: *Wilson & Senkler.*

Solicitors for the respondent: *Morrison & Cockrill.*

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*Nov. 12.

*Dec. 7.

JAMES P. KENT (PLAINTIFF)..... APPELLANT;

AND

LORENZO ELLIS (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Pleading—Conversion—Defect in plaintiff's title—Statute of frauds.

In an action claiming damages for the conversion of goods the plaintiff must prove an unquestionable title in himself and if it appears that such title is based on a contract the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded.

It is only where the action is between the parties to the contract which one of them seeks to enforce against the other that the defendant must plead the Statute of Frauds if he wishes to avail himself of it.

Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 549) affirmed.

*Present :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

2018 ONSC 3158
Ontario Superior Court of Justice

Truestar Investments Ltd. v. Baer

2018 CarswellOnt 8093, 2018 ONSC 3158, 292 A.C.W.S. (3d) 292, 60 C.B.R. (6th) 70

TRUESTAR INVESTMENTS LTD. (Plaintiff) and IRIS BAER and JOSEPH CASSIDY (Defendants)

Sylvia Corthorn J.

Heard: September 12, 2017
Judgment: May 23, 2018
Docket: 16-67707

Counsel: Michael Hebert, for Plaintiff
Ryan Garrett, Danielle Perras (student-at-law), for Defendant, Iris Baer
No one, for Defendant, Joseph Cassidy

***Sylvia Corthorn J.*:**

Background

1 The plaintiff ("Truestar") is both a creditor and the assignee of the trustee in bankruptcy of 951584 Ontario Inc. ("Greenview"). In the latter capacity, Truestar seeks declaratory and other relief related to the transfers of properties by Greenview to the defendant, Iris Baer ("Baer"). The transfers were effected in August 2012 — less than three months prior to the date on which Greenview filed a notice of intention to make a proposal in bankruptcy

2 In total, six properties were transferred. The properties fall into two categories — three parcels of land referred to as "the Harcourt Properties" and three parcels of land referred to as "the Barry's Bay Properties". Collectively, the six parcels are referred to as the "Properties" and the transfers of the Properties as the "Transfers".

3 Baer is a former shareholder and director of Greenview. She is the spouse of Frank Yantha ("Yantha"). As of the dates of the Transfers, Yantha was the sole shareholder and director of Greenview.

4 In 2014, the Municipal Property Assessment Corporation ("MPAC") assessed values for the Harcourt Properties at $46,300, and for the Barry's Bay Properties at $180,000.

5 The stated consideration for the 2012 transfer to Baer of the Harcourt Properties is $2,704. None of that amount was paid by Baer to Greenview.

6 The stated consideration for the 2012 transfer to Baer of the Barry's Bay Properties is $90,000. In March and April 2012, Baer made a series of three payments to Greenview totalling $90,000. Baer's evidence is that the three payments were the consideration for the transfer of the Barry's Bay Properties.

7 The first of the three payments was in the amount of $60,000 and made by bank transfer. Greenview utilized these funds to pay $59,250 to the Ontario Power Authority for liquidated damages related to the completion of a biomass facility in Harcourt. The second and third payments were each made by cheque. The cancelled cheques do not include any information or notation to identify the purpose of each cheque.

8 In the Statement of Affairs filed by Greenview in February 2013, as part of the bankruptcy process, the assets listed include "Real property or immovable" with a total value of $500,000. The Properties are not included in the assets identified in that document.

9 Truestar and Baer agree that the matter is appropriate for determination by summary judgment. Cassidy did not defend the action, was not served with the materials on the motion for summary judgment, and was not represented on the return of the motion.

Positions of the Parties

a) Truestar

10 Truestar relies on three alternative arguments in support of the relief it requests. First, Truestar relies on s. 96(1)(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). That section sets out the circumstances in which a non-arm's length transfer may be declared void or monetary compensation may be ordered for a transfer at undervalue.

11 Truestar submits that the evidence supports findings that:

- The Transfers were made at undervalue;
- Baer and Greenview were not dealing at arm's length; and
- The Transfers occurred within the one-year period prior to the initial bankruptcy event.

12 Truestar requests a declaration that the Transfers are void or, in the alternative, an order that Baer pay to Truestar the difference between the fair market value of the Properties and the consideration, if any, paid by Baer in respect of the Transfers.

13 Truestar submits that if it is found that the Transfers were made at arm's length, the criteria to either set aside or order monetary compensation with respect to the undervalued transfers are met. In that regard, Truestar relies on s. 96(1)(a) of the *BIA*.

14 Second, Truestar relies on the criteria set out in s. 95(1) of the *BIA* for a fraudulent preference to be set aside. Truestar submits that:

- Greenview was insolvent at the time of the Transfers;
- The Transfers occurred within three months prior to the date of the initial bankruptcy event; and
- The Transfers had the effect of giving Baer a preference over other creditors at the time.

15 Third, Truestar submits that the Transfers are void as fraudulent conveyances within the meaning of s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, C. F.29 ("*FCA*"). Truestar highlights that the Transfers were made (a) after Greenview defaulted on a financing arrangement with Pacific & Western Bank of Canada ("PWBC"), and (b) less than three months prior to Greenview's initial bankruptcy event. The Transfers were at well less than the assessed values of the respective Properties. As such, it was Greenview's intention to defeat its creditors.

16 Truestar recognizes that it has the burden of establishing a fraudulent intention on the part of Greenview. Truestar submits that there are a number of badges of fraud in respect to the Transfers. If the court finds that one or more badges of fraud exist, then the burden shifts to Baer to provide an alternate explanation for the Transfers. Truestar submits that Baer has not, in response to the motion for summary judgment, provided an explanation to displace the badge(s) of fraud.

b) Baer

17 Baer argues that the outcome of the motion turns on the findings made with respect to the consideration given for the Transfers. Baer submits that upon reviewing the history of the dealings between Greenview, Baer, and a numbered company of which Baer is the sole owner, it is clear that (a) the Transfers were not made at undervalue, and (b) there was no intention on the part of Greenview to defraud its creditors.

18 With respect to each of the Harcourt Properties and the Barry's Bay Properties, Baer advances an alternative argument. Baer submits that (a) Greenview held the Harcourt Properties in trust for Baer pursuant to a resulting trust, and (b) the transfers of the Harcourt Properties in August 2012 were made pursuant to the terms of a verbal trust agreement.

19 Baer acknowledges that the existence of the resulting trust is not explicitly pleaded in her statement of defence. Baer requests that the court determine the summary judgment motion on the basis that leave to make the requisite amendment to the pleading to address the resulting trust was requested and granted.

20 The alternative argument with respect to the Barry's Bay Properties relates to a mortgage to Greenview from Baer's numbered company, in the amount of approximately $162,000. The mortgage remained on title until the Properties were transferred to Baer. Subsequent to the date of the Transfers, Baer arranged for the mortgage to be discharged even though the full amount owed on the mortgage remained outstanding.

21 Baer argues that the relief, if any, granted with respect to the Barry's Bay Properties must take into consideration the $162,000 mortgage to Greenview in favour of Baer's numbered company. Baer submits that:

a) If the transfers of the Barry's Bay Properties are to be set aside, then the mortgage should be placed back on title; or

b) If monetary compensation is ordered, then the amount to be paid should take into consideration the amount forgiven by Baer's numbered company when the mortgage was discharged.

The Issues

22 The issues to be determined on the motion for summary judgment are:

1. Were the transfers of the Harcourt Properties and/or the Barry's Bay Properties "at undervalue" within the meaning of either ss. 96(1)(a) or (b) of the *BIA*?

2. Did the transfers of the Harcourt Properties and/or the Barry's Bay Properties give Baer a "preference", within the meaning of s. 95(1) of the *BIA*, over Greenview's other creditors?

3. Were the transfers of the Harcourt Properties and/or the Barry's Bay Properties "fraudulent" within the meaning of s. 2 of the *FCA*?

4. To what relief, if any, is Truestar entitled?

Motion for Summary Judgment

23 I agree with Truestar and Baer that this matter is appropriate for determination on a motion for summary judgment (*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(1)(b) ("*Rules*")).

24 The record includes an affidavit sworn by Baer and the transcript of her cross-examination on that affidavit. In responding to the motion, Baer chose not to rely on evidence from any other individual.

25 Much of the evidence is undisputed — for example, the dates of the Transfers, the stated consideration for the Transfers, the timing of the Transfers in relation to Greenview's first bankruptcy event, and the history of transactions related to the Properties. Baer submits that her evidence is unchallenged because no reply affidavit was delivered on

behalf of Truestar. It is clear, however, that Truestar challenges some aspects of Baer's evidence on the basis of lack of credibility.

26 I am satisfied that I am in a position to make findings of credibility, where required. Truestar requests that a number of inferences (including adverse inferences) be drawn by reason of the lack of evidence from Yantha (Baer's spouse and the sole owner and director of Greenview, the latter as of the date of the Transfers). I am also satisfied that I am in a position to determine whether inferences are to be drawn (*Rules*, r. 20.02 (1)).

27 In summary, I find that there is no genuine issue requiring a trial and the record is such that I am able to "fairly and justly adjudicate the dispute [on] a timely, affordable and proportionate" motion for summary judgment (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), at para. 66).

Issue No. 1 — Transfer at Undervalue (s. 96(1) of the BIA)

28 Truestar's position is that whether the Transfers were at arm's length ("AL") or non-arm's length ("NAL"), the requisite criteria are met to support a finding that the Transfers were made at undervalue. The primary position taken by Truestar is that the Transfers were between NAL parties. On that basis, and pursuant to s. 96(1)(b)(i), Truestar need satisfy only two criteria for entitlement to relief. Truestar must demonstrate that the Transfers were:

a) At undervalue within the meaning of the *BIA*; and

b) Made within a year prior to the first bankruptcy event.

29 If the Transfers are found to be between AL parties, then two additional criteria must be satisfied:

c) Greenview was insolvent at the time of the Transfers or rendered insolvent by them; and

d) Greenview intended to defraud, defeat, or delay a creditor (s. 96 (1)(a)(i) — (iii) of the *BIA*).

30 I turn first to determine whether the Transfers were between AL or NAL parties.

a) Relationship Between Transferor and Transferee

31 The *BIA* does not include a definition of NAL for the purpose of s. 96 of the Act. It is therefore necessary to look to the case law for the applicable definition of "non-arm's length". The following definition has previously been relied on by this Court:

> Section 96 is directed at transfers by insolvent persons for a consideration that is materially or significantly less than the fair market value of the property. In this context, the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It addresses situations in which the economic self-interest of the transferor is, or is likely to be, displaced by other non-economic considerations that result in the consideration for the transfer failing to reflect the fair market value of the transferred property (*National Telecommunications Inc., Re*, 2017 ONSC 1475 (Ont. S.C.J. [Commercial List]), at para. 43, quoting Wilton-Siegel J. in *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781 (Ont. S.C.J.), at para. 41).

32 There is no evidence before the Court to suggest that Greenview and Baer were dealing in any manner other than NAL. The history of Greenview as a corporation, and the various transactions that occurred between Greenview, Baer, her numbered company, Yantha, and Yantha's business associates make it clear that the Transfers were carried out at NAL.

33 Therefore, the criteria to be applied in determining whether the Transfers were at undervalue, are the two set out in s. 96(1)(b)(i) of the *BIA*.

b) First Criterion — Transfer at Undervalue

34 "Transfer at undervalue" is defined in s. 2 of the *BIA* as, "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor."

i) Harcourt Properties

35 In support of her argument that the August 2012 Transfers for $2,107.44 (although not paid) were not undervalue, Baer relies on the value at which the Harcourt Properties were historically transferred. That argument misses the point for a number of reasons.

36 First, the historical transfers were between individuals and/or corporations in whom the individuals had an interest. The historical transfers were for business and other reasons, including, purportedly, assisting Greenview in securing financing for its business ventures. I note that on one occasion, 50 per cent of the Harcourt Properties was transferred for $2,107.44 (April 9, 2009). Within days of that transfer (April 14, 2009), the entirety of the Harcourt Properties was transferred, from Baer to Greenview, for the same consideration — $2,107.44. The consideration for that transfer was never paid.

37 There is no evidence to support a finding that the transfers of the Harcourt Properties in 2009 were at fair market value.

38 Second, going back in time to 2005, and the earliest of the transfers that included the Harcourt Properties, provides evidence in support of a finding that the transfers of the Harcourt Properties in both 2009 and 2012 were at undervalue.

39 When Baer and her numbered company originally purchased the Harcourt Properties and an adjacent parcel in 2005 ("Mill Property"), the consideration paid was $571,225. The Mill Property was sold in 2009 for a total of $367,500. Assuming no increase in the value of the subject properties between 2005 and 2009, the value of the Harcourt Properties as of 2009 was $203,725 ($571,225 — $367,500).

40 The third reason is the 2014 MPAC assessment of $46,300 for the Harcourt Properties. There is no evidence to explain (a) the basis for the consideration paid for the Harcourt Properties and the Mill Property in 2005, and (b) what appears to be a drop in the value of the Harcourt Properties from 2005 and/or 2009 to 2014. There is no evidence to suggest that the fair market value of the Harcourt Properties in 2012 was lower than $46,300 by a significant amount, if by any amount at all.

41 I find that the transfers of the Harcourt Properties from Greenview to Baer, in August 2012, were at undervalue.

ii) Barry's Bay Properties

42 Greenview purchased the Barry's Bay Properties in 1997 for $155,000. There were no transfers of these properties prior to the Transfers to Baer in August 2012.

43 Between 1997 and 2012, a numbered company owned by Baer registered a mortgage against the Mill Property, the Barry's Bay Properties, and the Harcourt Properties in the amount of $1,200,000 ("Mill Mortgage"). By August 2012, the Mill Mortgage had been discharged from the title to the Harcourt Properties and the title to the Mill Property. The latter property had, by that date, been sold.

44 As of August 2012, (a) only $162,000 had been advanced by Baer's numbered company to Greenview pursuant to the Mill Mortgage, (b) the Mill Mortgage was reduced to that amount, and (c) the only properties against which security for that amount was registered were the Barry's Bay Properties. That reduced mortgage is the subject of Baer's alternative argument discussed below under Issue No. 4.

45 The 2014 MPAC assessment of the fair market value of the Barry's Bay Properties is $180,000. In 2008, the MPAC assessment was $106,000. There is no evidence to suggest that between the date of Greenview's purchase of the properties and the date of the Transfers, the fair market value of the Barry's Bay Properties dipped below the original purchase price or below a six-figure number.

46 Baer argues that the total consideration paid in 2012 for the Barry's Bay Properties is $252,000. She combines the $90,000 paid to Greenview in the spring of 2012 with the amount owing on the Mill Mortgage. For that argument to succeed, the Court must be satisfied that (a) the $90,000 paid in three instalments, approximately four to five months prior to the date of the Transfers, relates to the Barry's Bay Properties, (b) the monies advanced pursuant to the Mill Mortgage bear any relationship to the fair market value of the Barry's Bay Properties, and (c) Baer assumed the Mill Mortgage.

47 I turn first to the three payments totaling $90,000 made in the spring of 2012. Baer's evidence is that the agreement to transfer the Barry's Bay Properties to her was reached with Greenview in early March 2012.

48 There is no documentary evidence to support either the existence of such an agreement or a finding that the $90,000 paid by Baer to Greenview, in March and April 2012, was in any way related to the Barry's Bay Properties. With respect to the $90,000 paid to Greenview, I note the following:

- On March 22, 2012, there was a transfer of $60,000 from Baer's personal chequing account with the Barry's Bay Credit Union;
- The transfer is said by Baer to have been to a bank account for Greenview;
- Immediately following receipt of the $60,000, Greenview paid $59,250 owing by it to the Ontario Power Authority;
- Had the $59,250 not been paid by Greenview at that time, the amount it owed to the Ontario Power Authority would have continued to increase; and
- There is nothing in writing on or about the two personal cheques from March ($10,000) and April ($20,000) 2012, to indicate that they relate in any way to the Barry's Bay Properties.

49 Baer's evidence is that the delay between the spring of 2012, when the $90,000 was paid, and August 2012, when the Transfers were registered on title, was the result of her being very busy and not attending to the requisite paperwork in a timely manner.

50 I agree with the submission on behalf of Truestar: greater emphasis is to be placed on Baer's conduct than on her evidence with respect to the transfers of the Barry's Bay Properties. When all of the evidence with respect to those transfers is considered, it is not possible to reconcile Baer's evidence with her conduct at the material times.

51 As one example, there is the mortgage of $162,000 registered on the Barry's Bay Properties prior to the date of the Transfers. Baer's evidence is that in addition to paying $90,000 for the Barry's Bay Properties, she assumed the $162,000 mortgage owing on the Mill Mortgage. For the following reasons, I reject that evidence and find that, even if Baer had paid the $90,000 for the purchase of the Barry's Bay Properties (and I find that she did not), the consideration for those properties did not include the assumption of the $162,000 mortgage:

- There is no documentation to support Baer's evidence with respect to the total consideration paid by Baer for the purchase of the Barry's Bay Properties;
- There are no documents as between Greenview, Baer, and the numbered company with respect to the assumption of the Mill Mortgage;

• The Land Transfer Tax Statement identifies $90,000 as the "total consideration" for the Barry's Bay Properties; and

• The Land Transfer Tax Statement does not identify any mortgage being assumed by Baer.

52 Baer is not an unsophisticated person in respect of either the operation of a business or to real estate transactions. She is a person of education and experience. She worked in the public sector in Germany before immigrating to Canada. She worked and continues to work in the private sector in Canada, as an owner and director of a number of privately-held companies. For a number of years prior to 2012, Baer was involved in financial and real property transactions with one or more of her spouse, companies owned in whole or in part by her spouse, and the business associates of her spouse.

53 I find that Baer was fully aware in August 2012 that she was representing a purported purchase price of $90,000 for the Barry's Bay Properties. I find that the contents of the Land Transfer Tax Statement are not, as Baer has suggests, an error on the part of her real estate lawyer.

54 I say "purported" purchase price because I find that the $90,000 paid in the spring of 2012 was not paid for the purchase of the Barry's Bay Properties. Even if the $90,000 could be said to be the purchase price, it is half of the fair market value identified in the 2014 MPAC assessment. As such, it would be a transfer at undervalue.

c) Second Criterion — Timing of Transfer

55 The second criterion under either of the AL and NAL scenarios is that the transfer occurred within the year prior to the date of the initial bankruptcy event (BIA, ss. 96(1)(a)(i) and (b)(i)). There is no doubt that the August 2012 Transfers were within the year prior to the October 2012 date on which Greenview filed its notice of intention to make a proposal.

56 I find that the second criterion under either scenario is satisfied.

d) Summary

57 The Transfers were at undervalue within the meaning of s. 2 of the *BIA*. Truestar is entitled to relief pursuant to s. 96(1)(b) of the *BIA*.

Issue No. 2 — Preference (s. 95(1) of the BIA)

58 Section 95(1) of the *BIA* sets out the criteria to be met for a finding that an insolvent person has transferred property to an individual and, in so doing, created a preference to that individual over another of the transferor's creditors.

59 Section 95 addresses both AL and NAL transactions. Given my finding that the Transfers from Greenview to Baer were NAL, the applicable criteria are those set out in s. 95 (1)(b):

> A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person,
>
> > (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

60 Section 95 requires that the transferor be "an insolvent person" at the date of the subject transfer. When cross-examined, Baer maintained that Greenview was not insolvent as of November 2012 when it filed a notice of intention to make a proposal in bankruptcy. Baer's evidence is that the purpose of filing the notice was as "protection [for Greenview] to get some time to get everything in place" (Transcript of Baer Cross-Examination, at p. 29).

61 When presented with the wording of the notice of intention, Baer acknowledged that as of November 22, 2012, Greenview was "an insolvent person". She also acknowledged that within the bankruptcy proceeding, she was identified personally as an unsecured creditor of Greenview in the amount of $105,350.

62 In the Statement of Affairs dated February 2013 and filed by Greenview in the bankruptcy proceeding, Greenview's liabilities total $6,240,580; its assets total $783,325; and the deficiency identified is $5,457,255 (approximately 88 per cent of the liabilities).

63 Based on the timing of the Transfers and the contents of the Statement of Affairs, I draw an inference and find that Greenview was insolvent when the Transfers were made.

64 As I have already noted, the Properties are not listed as part of the assets of Greenview. They could not be; they were transferred to Baer in August 2012. The effect of the Transfers was to remove real property valued by MPAC at approximately $230,000 from Greenview's assets and to give the Properties to one of Greenview's unsecured creditors (Baer) less than three months before the date of the initial bankruptcy event. In the circumstances, Baer was given preference over other creditors of Greenview.

65 I find that in addition to being transfers at undervalue, the Transfers constitute a preference within the meaning of s. 95(1)(b) of the *BIA*.

Issue No. 3 — Fraudulent Conveyance (s. 2 of the FCA)

66 The Transfers occurred (a) after Greenview went into default with one of its largest creditors (PWBC), and (b) less than three months before Greenview filed its notice of intention to make a proposal in bankruptcy. The Transfers were from Greenview to the spouse of Greenview's principal. The consideration paid (if paid at all) for the Properties was well below fair market value.

67 A "fraudulent conveyance" is defined in s. 2 of the *FCA*:

> 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.

68 Sections 3 and 4 of the *FCA* set out an exception to the application of s. 2 to transactions in issue. For the exception to apply, the purchaser must have paid "good consideration", made the payment "in good faith", and lacked knowledge of the intention of the transferor at the time of the transfer.

69 For the reasons set out above under Issue Nos. 1 and 2, I find that Baer is not entitled to rely on the exception created by ss. 3 and 4 of the *FCA*. Baer did not pay "good consideration" and, assuming she paid consideration (and I find that she did not), did not make the payment "in good faith". Given my findings in that regard, it is not necessary to address whether Baer had or lacked knowledge of Yantha's intention, at the time of the Transfers, to defeat, hinder, delay, or defraud creditors or others.

70 The Transfers bear badges of fraud including that:

a) The consideration paid, even assuming the alleged consideration was paid, was grossly inadequate; and

b) There was a close relationship between the debtor/transferor (Greenview) and the recipient (Baer) of the property. (See *Indcondo Building Corp. v. Sloan*, 2014 ONSC 4018 (Ont. S.C.J.), at para. 52, aff'd 2015 ONCA 752 (Ont. C.A.).)

71 Taking into consideration these badges of fraud, I find that Truestar has raised a *prima facie* case of fraud in relation to the Transfers. As a result, Baer has the burden of providing a reasonable alternative explanation in support of the Transfers. For the reasons discussed above under Issue Nos. 1 and 2, I find that Baer has failed to do so.

72 Baer did not offer an alternative reasonable explanation with respect to the transfer of the Barry's Bay Properties.

73 The alternative reasonable explanation upon which Baer relies with respect to the Harcourt Properties is that Greenview held the properties from 2009 to 2012 on the basis of a resulting trust in favour of Baer. For the reasons set out immediately below, I reject that explanation.

a) Resulting Trust — Harcourt Properties

74 Baer argues that the Harcourt Properties were transferred to her in 2012 pursuant to the terms of a resulting trust. Baer relies on the existence of a resulting trust because property held by a bankrupt in trust does not fall within the bankrupt's estate.

75 A resulting trust is not, however, formally part of Baer's pleading. Even if the pleading were amended as suggested on the return of the motion, my finding would remain the same: the evidence does not support a finding that Greenview held the Harcourt Properties pursuant to a resulting trust.

76 There are no documents to support the existence of a trust agreement. There is no evidence from Yantha to corroborate Baer's evidence with respect to a resulting trust.

77 I also consider Baer's intention when she transferred the properties to Greenview in April 2009. Baer's evidence is that the Harcourt Properties were transferred to Greenview at that time for the sole purpose of assisting Greenview in securing financing. Once again, it is not possible to reconcile Baer's evidence with what actually transpired.

78 Two charges were registered against the Harcourt Properties subsequent to the 2009 transfer of those properties from Baer to Greenview and prior to the 2012 transfer back to Baer. The first charge was to Joseph Cassidy ("Cassidy"), registered in January 2010, and in the amount of $150,000 ("Cassidy Mortgage"). The second charge was the Mill Mortgage, registered in August 2010, and in the amount of $1,200,000.

79 The timing of the registration of the Cassidy Mortgage and Mill Mortgage on the Harcourt Properties in relation to the timing of Greenview's negotiations with PWBC runs contrary to Baer's evidence that Greenview's ownership of the Harcourt Properties was an important factor in it securing financing. Baer's evidence is that Greenview began negotiations with PWBC in September 2010 — eight months after the Cassidy Mortgage was registered on title, and one month after the Mill Mortgage was registered on title. Ultimately, PWBC did not register any security against the Harcourt Properties.

80 The Cassidy Mortgage to Greenview was discharged in September 2011. After the Transfers in August 2012, another mortgage given by Cassidy, in the amount of $100,000, was registered against the Harcourt Properties. Baer's evidence is that the same mortgage had previously been registered against farm property that she owns. Baer submits that (a) because of that mortgage, she was able to advance $37,000 to Greenview *after* the date of the Transfers, and (b) the $37,000 forms part of the consideration for the transfer of those properties.

81 I find that Cassidy was someone to whom Baer and her spouse turned from time to time for financial assistance; when that assistance was provided, Cassidy secured the debt by registering a mortgage on title to one or more properties owned by Baer, Yantha, and/or their companies. I find that the transfer of the Harcourt Properties to Greenview in 2009 was not required to secure financing from Cassidy (i.e. the mortgage in the amount of $150,000 registered on those properties in 2010).

82 I find that the Harcourt Properties were not transferred from Baer to Greenview in 2009 (a) pursuant to a resulting trust, and (b) for the purpose of assisting Greenview in securing financing.

b) Summary — Fraudulent Conveyance

83 I find that (a) Truestar established a *prima facie* case of fraudulent conveyance with respect to the Transfers, and (b) Baer failed to provide a reasonable alternative explanation in support of the Transfers. Truestar is entitled to relief pursuant to the *FCA*.

Issue No. 4 — Relief

a) Relief Generally

84 The relief to which Truestar is entitled as a result of one or both of the findings with respect to the Transfers at undervalue and a fraudulent preference are (a) a declaration that one or more of the Transfers is void as against Truestar (as the assignee of the trustee in bankruptcy of Greenview), or (b) an order that Baer pay to the bankrupt's estate the difference between the value of the consideration received by Greenview from Baer and the value of the consideration paid by Greenview when it acquired the Properties.

85 The relief to which Truestar is entitled as a result of the finding that the Transfers constitute fraudulent conveyances is a declaration that the Transfers are void as against the creditors of Greenview.

86 The factum filed on behalf of Truestar on this motion states: "[o]wnership of the Harcourt Properties appears to have been frequently shuffled to suit Greenview's purposes". I agree with that statement. I find that to require the parties to address the issues of consideration received and paid by Greenview over time — in particular with respect to the Harcourt Properties — it would only serve to prolong the litigation unnecessarily and lead to inefficiencies.

87 I find that the appropriate relief is to declare the Transfers to be at undervalue and order that they be set aside. My finding in that regard is, however, subject to a determination of Baer's alternative argument with respect to the Barry's Bay Properties.

b) Mortgage on Barry's Bay Properties

88 Baer's alternative argument with respect to the Barry's Bay Properties is that if the transfers of those properties are set aside, then the discharge of the Mill Mortgage ($162,000) registered by Baer's numbered company on the title to those properties is also to be set aside. If Baer's alternative argument succeeds, then any subsequent transfer of the Barry's Bay Properties would be subject to the $162,000 mortgage.

89 Baer's evidence is that she would never have discharged the Mill Mortgage from the Barry's Bay Properties if she had known that "a party like Truestar would take issue with the transfer of the Barry's Bay Properties to [her]". First, it is important to note that the Mill Mortgage was granted by Baer's numbered company and not by Baer herself. It was the numbered company (1245906 Ontario Inc. and hereinafter "124 Inc.") and not Baer personally that agreed to the discharge of the Mill Mortgage from the Barry's Bay Properties.

90 Second, 124 Inc. is not a party to the motion for summary judgment. There is no evidence to suggest that the notice of motion, motion record, factum, and book of authorities on behalf of Truestar were served on 124 Inc.

91 Rule 37.07(1) of the *Rules* requires that a notice of motion "shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise." I am reluctant to grant relief that affects a corporate entity that is not a party to this motion (or the action) without first giving that party an opportunity to file evidence, if it wishes to do so, in response to the relief requested. The fact that Baer is the principal of 124 Inc. is not sufficient to address the lack of service of the materials on that corporation.

92 As a result, the issues raised by Baer's alternative argument with respect to the Barry's Bay Properties remain to be determined. Truestar shall take steps necessary to bring that matter before me in compliance with r. 37.07(1) of the *Rules*.

Summary

93 In summary, the following relief is granted:

a) A declaration is granted that the Transfers are at undervalue and therefore void as against the trustee in bankruptcy of Greenview;

b) The Transfers of the Properties, described in paragraphs 1(a) and (d) of Truestar's notice of motion dated November 24, 2016, shall be set aside;

c) The proceeds of sale of one or more of the Properties, if disposed of by Baer, shall be traced;

d) The trustee in bankruptcy of Greenview is prohibited from selling the Properties pending a further order of the Court with respect to the Mill Mortgage registered on the title to the Barry's Bay Properties as of August 2012; and

e) Truestar shall take the steps necessary, including service on 124 Inc. of a copy of this Ruling and of the order taken out pursuant to this Ruling, to bring back before me the issue of Truestar's request for the transfers of the Barry's Bay Properties to be set aside outright.

94 With respect to paragraph (c) above, there is no evidence before the Court that any one of the Properties was sold by Baer subsequent to the date of the Transfers. In the event Truestar learns of such a transfer, it shall take the steps necessary to bring the issue of tracing of proceeds before me either at the same time as or separate from the determination of the issues with respect to the Mill Mortgage and the Barry's Bay Properties.

95 I remain seized of this matter.

Costs

96 Costs of the motion for summary judgment to date shall be determined subsequent to the determination of Baer's alternative argument with respect to the $162,000 mortgage and any other substantive issues arising from this Ruling.

Motion granted.

2018 ONCA 401
Ontario Court of Appeal

Union Building Corporation of Canada v. Markham Woodmills Development Inc.

2018 CarswellOnt 6455, 2018 ONCA 401, 17 C.P.C. (8th) 1, 292 A.C.W.S. (3d) 426, 89 R.P.R. (5th) 212

Union Building Corporation of Canada (Applicant / Respondent) and Markham Woodmills Development Inc. (Respondent / Appellant)

C.W. Hourigan, Grant Huscroft, I.V.B. Nordheimer JJ.A.

Heard: April 19, 2018
Judgment: April 27, 2018
Docket: CA C64257

Proceedings: reversing *Union Building Corporation of Canada v. Markham Woodmills Development Inc.* (2017), 2017 CarswellOnt 12490, 2017 ONSC 4514, Lederer J. (Ont. S.C.J.); additional reasons at *Union Building Corporation of Canada v. Markham Woodmills Development Inc.* (2017), 2017 ONSC 6351, 2017 CarswellOnt 17783, Lederer J. (Ont. S.C.J.)

Counsel: Benjamin Zarnett, Francy Kussner, for Appellant
Gavin J. Tighe, Bill R. Michelson, for Respondent

***I.V.B. Nordheimer J.A.*:**

1 Markham Woodmills Development Inc. appeals from the judgment of Lederer J. that awarded the applicant, Union Building Corporation of Canada, the sum of $407,582, together with interest and costs.

2 For the reasons that follow, I would allow the appeal and dismiss the application.

Background

3 By an Agreement of Purchase and Sale made in July 2015 (the "APS"), the appellant agreed to sell to the respondent an undeveloped 3.6 acre parcel of land for a sale price of $3,960,000. The land was zoned agricultural and was part of a larger 19.29 acre parcel of land owned by the appellant in the City of Markham (the "City"). The respondent wished to purchase the land so that it could develop it for its head office.

4 The APS contained a provision, clause 17, making the sale conditional upon the City consenting to a severance of the land being sold to the respondent from the larger parcel owned by the appellant, pursuant to s. 50 of the *Planning Act*, R.S.O. 1990, c. P.13. Clause 17 provided that the appellant would seek the severance and satisfy any conditions the City imposed, except for conditions that were "onerous or unreasonable". In the event the City imposed an onerous or unreasonable condition, clause 17 provided that the appellant could give the respondent the opportunity to satisfy such severance condition. If the respondent chose not to do so, then the APS would be null and void. The full text of clause 17 appears in the appendix to these reasons.

5 The severance was obtained by the appellant but it was made subject to certain conditions. One of the severance conditions that the City imposed was to require the appellant to enter into the Cathedral West Cost Sharing Agreement (the "Cost Sharing Agreement") — a private agreement among other landowners in the area who were developing, or had developed, their lands. The appellant had no intention of developing its property and had not previously entered

into the Cost Sharing Agreement. One aspect of entering into the Cost Sharing Agreement was that the appellant would have to fund development related costs in the amount of $407,582.

6 The appellant took the position that this severance condition was onerous or unreasonable under clause 17. It was not developing the land. It was selling the land. The evidence showed that there was no precedent in the City for a non-developing vendor being forced, as a condition of severance, to enter into a cost sharing agreement among developers — something the City's Official Plan required only of "development proponents".

7 The appellant invoked its rights under clause 17 and gave the respondent the option to satisfy the severance condition. The respondent disagreed that the severance condition was onerous or unreasonable. It took the position that clause 17 required the appellant to satisfy the condition. However, in order to prevent the APS from floundering on this issue, the respondent agreed to pay the $407,582 necessary to satisfy the severance condition but reserved its rights to seek that amount back from the appellant. On that basis, the purchase of the property closed.

8 The respondent then brought the underlying application to the Superior Court of Justice for a determination that the appellant was required to pay the $407,582 that the respondent had paid to satisfy the severance condition. As the Notice of Application makes clear, the issue fell to be determined on the meaning of the words in clause 17. Indeed, in the Notice of Application, the respondent sought the following relief:

> a declaration that Woodmills is solely responsible for the associated costs of satisfying section 17 of the Purchase Agreement, and more specifically Unifor's $407,582 without prejudice payment/contribution to the City of Markham . . .

9 The hearing before the application judge proceeded on this basis. As the Notice of Application also states, the parties had agreed "that the Court should determine the single issue regarding the $407,582 payment".

10 In reaching his conclusion, however, the application judge took a different route. He decided the application based upon his interpretation of clause 19 of the APS, a provision that dealt with the requirement to get an amendment to the existing agricultural zoning for the property being conveyed. Indeed, the application judge said in his reasons, at para. 26:

> The issue in this case is not determined by an understanding of the application of clause 17 of the Agreement of Purchase and Sale. Rather it is the requirement found in clause 19 that the zoning for the intended development of the purchaser be in place and be "in full force and effect" (see para. [20] above) at the time the property was sold.

11 The application judge observed that clause 19 of the APS required the amended zoning to be in full force and effect at the time of closing. However, the amended zoning, as passed by the City, had a "hold" in place. The "hold" would be lifted once there was compliance with the Cost Sharing Agreement and payment of the accompanying obligations. The application judge concluded that the amended zoning was not "in full force and effect" until that payment was made. [1] Consequently, he found that the appellant was required to bear the costs associated with the Cost Sharing Agreement. He therefore granted the application and ordered the appellant to pay the $407,582 to the respondent.

Analysis

12 In a normal situation, an application judge's interpretation of a non-standard form contract is entitled to deference. This is because the interpretation of such a contract involves a question of mixed fact and law: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), at para. 50. As such, on an appeal from a judicial decision, the interpretation of a non-standard form contract is normally reviewable only for palpable and overriding error unless there is an extricable question of law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 36.

13 There are, however, situations where a broader principle involving natural justice overtakes questions of contractual interpretation. One of the instances where that broader principle is invoked is where a judge decides a proceeding on a

basis that was not "anchored in the pleadings, evidence, positions or submissions of any of the parties": *Labatt Brewing Co. v. NHL Enterprises Canada L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677 (Ont. C.A.), at para. 5. When that occurs, the judge commits an error of law: *Moore v. Sweet*, 2017 ONCA 182, 134 O.R. (3d) 721 (Ont. C.A.), at para. 30 (leave to appeal to S.C.C. allowed [2017] S.C.C.A. No. 156 (S.C.C.) with judgment reserved on February 8, 2018). That error results from the procedural unfairness that is visited upon the parties which, by itself, warrants appellate intervention: *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (Ont. C.A.), at para. 62.

14 In this case, the parties proceeded before the application judge for a determination of their respective rights based on the interpretation of clause 17 of the APS. More specifically, the parties sought a determination as to whether the payment required under the Cost Sharing Agreement, as a condition of the severance, was onerous or unreasonable under Clause 17. Clause 19 was not part of the dispute between the parties. In fact, the respondent never took the position that there was any failure by the appellant to comply with its obligations in respect of the property's zoning or the requirements of clause 19. There is also not a single mention of clause 19 in the Notice of Application nor is there any mention of the zoning issue generally. Further, this court was told that there was no mention of clause 19 during the course of the application hearing, save for a passing reference in the respondent's reply. While counsel for the respondent hedged on this issue at the appeal hearing, any doubt on this point is removed by the contents of the application judge's reasons on costs. In those reasons, he said, at paras. 5-6:

> Time was spent examining the requirement of severance, and how it should be applied in the particular context. As it is, the decision made reflects not on that question but on zoning and the responsibility to have the rezoning of the property "in full force and effect" at the time of sale.
>
> This understanding did not arise from the submissions made but from the separate consideration by the court. My concern for the award of costs does not stem from the failure of the applicant to establish bad faith or the unnecessary reliance of the respondent on what members of the municipal staff or others might have anticipated independent of the words of the agreement but on the fact that for all the effort made the answer lay in a place the parties, for whatever reason, did not identify.
>
> [Emphasis added.]

15 As the authorities make clear, the application judge's decision to dispose of the application on a basis that was not advanced by the parties amounts to a denial of procedural fairness. That reality mandates that the decision must be set aside. The issue then becomes whether the matter must be remitted back to the Superior Court of Justice for a fresh determination, or whether the issue can be determined by this court on the basis of the existing record and the arguments that were made by the parties on the interpretation of clause 17. [2]

16 In my view, the record and arguments allow this court to make its own determination pursuant to s. 134(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

17 Clause 17 permits the appellant to refuse to comply with a condition of severance that is onerous or unreasonable. The application judge made brief reference at the tail end of his reasons to the fact that, while the $407,582 that had to be paid under the Cost Sharing Agreement was approximately 10.3% of the $3,960,000 sale price, there was no evidence as to the percentage that the $407,582 represented in terms of the profit the appellant would make on the sale of the property. This led the application judge to say, at para. 32, "in the absence of context it is not possible to assess whether $407,582 is 'onerous'."

18 In my view, that is not the appropriate test to be applied in determining whether the amount to be paid under the Cost Sharing Agreement was onerous or unreasonable under clause 17. In fact, it is not the onerous exception that applies to the payment, it is the unreasonable exception. What renders the payment unreasonable, in these circumstances, is the fact that the appellant never had any intention of developing this property. It was selling the property. It was the respondent that wished to develop the property. I share the position of the appellant that it would be unreasonable for it

to have to pay what is undeniably a cost of development from the price that it negotiated for the sale of an undeveloped property.

19 In this regard, reasonableness must be interpreted objectively. There was ample objective evidence demonstrating that a reasonable person would not consider the requirement, that a vendor of undeveloped land pay the costs associated with the future development of the land, to be a reasonable interpretation of the APS. As noted earlier, there was no precedent in the City for a non-developing vendor being forced, as a condition of severance, to enter into a cost sharing agreement among developers. This conclusion is reinforced by the application judge's finding, at para. 30 of his reasons, that the appellant was "surprised" to find that it would be required to enter into the Cost Sharing Agreement, which related entirely to developers, in order to sever the property so that it could sell it.

20 I conclude that the condition imposed by the City, that the Cost Sharing Agreement be entered into, with the requisite $407,582 payment in order to obtain the severance, was an unreasonable one for the appellant to bear. It therefore fell to the respondent, under clause 17, to either bear that cost or terminate the APS. The respondent chose the former.

Conclusion

21 I would allow the appeal, set aside the judgment below, and dismiss the application.

22 In accordance with the agreement of the parties, the appellant is entitled to its costs of the appeal in the amount of $25,000, inclusive of disbursements and HST. The parties also agreed that, in the event that the appeal was successful, the appellant would be entitled to the costs of the application in the amount of $68,407.68, plus HST, as fixed by the application judge.

***C.W. Hourigan J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal allowed.

APPENDIX

17. Severance

This Agreement is subject to the express condition that this Agreement is effective only if the provisions of Section 50 of the *Planning Act* (Ontario), as amended from time to time, have been complied with. Forthwith following the date the size and configuration of the Property has been determined, the Vendor, at the Vendor's sole expense, shall make application for the consent of the Committee of Adjustment for the City of Markham in order to permit the conveyance of the Property to the Purchaser in accordance with the subdivision control provisions of the *Planning Act* and shall proceed diligently using all reasonable efforts to successfully complete this application.

All conditions imposed in the severance consent shall have been complied with on or before the Closing Date. The Vendor shall satisfy all conditions imposed in connection with the severance consent at its sole expense provided that such conditions are not onerous or unreasonable. In the event that the conditions of consent are onerous or unreasonable and as a result the Vendor is not prepared to satisfy the conditions imposed in the severance consent, the Purchaser at the Vendor's sole and unfettered discretion shall have the option of satisfying the conditions imposed in the severance consent at the cost of the Purchaser. If by October 30, 2016 (the "Severance Date") the necessary consent is not given, or if approval is given but conditions are attached which the Vendor is not prepared to satisfy for the reasons stated herein (and the Purchaser does not elect to satisfy, upon having been given the option to do so) or if approval is given but is

appealed and the Vendor is not prepared to defend such appeal, this Agreement shall be null and void, the Deposit and any accrued interest thereon shall be returned to the Purchaser and neither party shall have any future obligations to the other respecting this Agreement.

The Vendor shall prepare the reference plan(s) required in order to effect the severance consent at its sole cost and expense, which reference plan shall be subject to the Purchaser's written approval, acting reasonably.

Prior to submitting any materials to the Committee of Adjustment for the City of Markham in respect of the severance consent, the Vendor shall first deliver same to the Purchaser for the Purchaser's written approval, such approval not to be unreasonably delayed or withheld. The Vendor shall keep the Purchaser informed of all matters in connection with the severance process and shall provide the Purchaser with copies of all materials in respect thereof.

19. Zoning

The Purchaser acknowledges that the Property is currently zoned "Agricultural" and is designated as Business Park Corridor by the Official Plan of Markham. The Purchaser intends to construct a three storey office building of approximately 65,000 square feet with approximately 300 surface parking stalls ("Purchaser's Intended Development"). This Agreement shall be conditional until August 1, 2016 upon the Vendor obtaining Zoning in the Final Form required for the Purchaser's Intended Development of the Property. For the purposes of this Agreement, Zoning in Final Form shall mean an Official Plan amendment and/or rezoning of the Property re-designating and rezoning the Property to permit the Purchaser's Intended Development and such redesignation and rezoning being in full force and effect, with all appeal periods having expired without appeals, or all appeals having been determined to the satisfaction of the Purchaser without any further right of appeal. The required zoning change is to be undertaken at the sole cost and responsibility of the Vendor. Such rezoning may be completed prior to the Closing Date, but in the event that such rezoning is not completed, the Vendor or at its sole discretion may extend the Closing Date to such a time when the rezoning has been completed and is in force and effect. In such case, the Vendor shall notify the Purchaser in writing of the successor rezoning, and the Closing Date shall be amended to reflect thirty (30) days from such event. In the event that that Vendor is unable to obtain the necessary rezoning by December 1, 2016 then this agreement shall become null and void and the Vendor shall return all Deposits to the Purchaser with interest and without penalty.

Footnotes

1 I would observe, in passing, that this conclusion appears to be inconsistent with this court's decision in *Disera v. Liberty Developments Inc.*, 2008 ONCA 34, 63 R.P.R. (4th) 197 (Ont. C.A.).

2 I note that this case does not involve an application for judicial review or an appeal from an administrative tribunal where this court's jurisdiction to substitute its own decision may be more limited.

2002 CarswellOnt 4535
Ontario Superior Court of Justice

XDG Ltd. v. 1099606 Ontario Ltd.

2002 CarswellOnt 4535, [2002] O.J. No. 5307, 121 A.C.W.S. (3d) 18, 23 C.L.R. (3d) 67, 41 C.B.R. (4th) 294

XDG Limited, Plaintiffs and 1099606 Ontario Limited and General Electric Caoutak Canada Inc., Defendants

Gordon J.

Heard: July 9-12, 2002
Judgment: December 23, 2002 *
Docket: 1424/99

Counsel: I. Duncan, M. Van Bodegom for Plaintiff, XDG Limited
A. Speciale for Plaintiff, William Green Roofing Ltd.
L. Ricchetti for Defendant, General Electric Capital Canada Inc.
No one for 1099606 Ontario Limited

***Gordon J.*:**

1 A trial of this consolidated construction lien action was directed to determine the priority as between the lien claimants and the mortgagee with respect to certain lands in the City of Kitchener described as the "Dielcraft property".

Background

2 109606 Ontario Limited ("109") was incorporated on 30 November 1994. In December 1994 it purchased the Dielcraft property for $1,515,000. The property was leased to Euro United Corporation ("Euro United"), commencing 1 April 1995 for the purposes of storing raw material and finished product.

3 Mr. Sam Rehani was the sole director, officer and shareholder of 109. He was also the controlling shareholder and president of Euro United.

4 In 1998 and 1999 the lien claimants provided services and material to the Dielcraft property. Various contractors were involved, commencing with certain demolition work to the ultimate renovation, being the raising of the building roof. In the fall of 1999 the contractors left the job site as they were not being paid by 109. Claims for lien were registered on title commencing in October 1999.

5 Euro United, and related companies operating under a similar name in different jurisdictions, was financed by General Electric Capital Canada Inc. ("GECC") pursuant to a credit agreement dated 13 November 1998. By the end of March 1999 GECC determined Euro United was in a default position regarding certain covenants in the credit agreement. In April 1999 an amendment to this agreement resulted in 109 providing a guarantee and mortgage on the Dielcraft property in favour of GECC regarding the indebtedness of Euro United.

6 Euro United temporarily corrected its default position, but by August 1999 GECC determined there were significant problems. On 24 November 1999 GECC demanded payment from Euro United and 109. In December 1999 KPMC Inc. was appointed interim receiver of Euro United and 109. In June 2000, both companies were declared bankrupt and KMPG Inc. was appointed trustee of their estates. Sale of the property by the trustees was authorized in January 2002.

7 The sale proceeds are held by KPMG Inc. pending the outcome of this litigation. There are insufficient funds to pay the lien claimants and the mortgage holder.

Issues

8 Pursuant to the order of Sills J., granted 17 December 2001, the statement of issues identified the following:

1. Section 20 of the Ontario *Corporations Act*. Is the mortgage invalid or void as against the plaintiffs as a result of contravening section 20 of the Ontario *Business Corporations Act*?

2. Section 4 of the *Assignments and Preferences Act* and section 2 of the *Fraudulent Conveyances Act*.

Is the mortgage invalid or void as against the plaintiffs as an unlawful assignment or preference or as a fraudulent conveyance?

3. Section 78 of the *Construction Lien Act*.

(a) Was the mortgage registered prior to the time when the first lien arose in respect of the subject improvement, and, if so, to what extent does the mortgage have priority under section 78 of the Construction Lien Act?

(b) Was the mortgage registered as a subsequent mortgage, and, if so, to what extent does the mortgage have priority under section 78 of the *Construction Lien Act*?

Analysis

(i) Section 20 Business Corporation Act

(a) 109 and GECC

9 Euro United was involved in the manufacture and sale of plastic injection mould products, such as patio furniture. Some of their product was supplied to large retail stores in Canada and the United States. According to Mr. Paul Feehan, Senior Vice President of GE Capital Commercial Finance, Inc., a related company to GECC, Euro United was growing rapidly. Mr. Feehan, who was involved in the underwriting of Euro United's financing by GECC, reported the growth in sales went from $10,000,000 in 1996 to $102,000,000 in 1998.

10 The Canadian Imperial Bank of Commerce was the lending institution providing financing to Euro United. GECC, acting as agent for a syndicate of lenders, including itself, provided new replacement financing in November 1998 consisting of a revolving line of credit in the notional amount of $127,000,000 and a term loan of $50,000,000. The line of credit authorized from time to time was based on a formula pertaining to receivables and inventory.

11 Mr. Feehan, and others at GECC, conducted a due diligence investigation of Euro United from July to November 1998. The new financing terms were set out in the credit agreement dated 13 November 1998. GECC acquired security on the assets of Euro United.

12 GECC was aware of Euro United leased the Dielcraft property from the outset. A Landlord's Waiver and Consent, signed by Mr. Rehani on behalf of 109 and Euro United, dated 16 November 1998, was one of the documents in the security package. A copy of the lease was attached to this document indicating an annual rent to be paid by Euro United in the sum of $700,000 on a net net basis commencing 1 April 1996 and ending 31 March 2002. GECC was also aware Mr. Rehani controlled both companies.

13 By the end of March 1999, less than five months after the advance on the credit agreement, GECC became aware Euro United was in a default position. Amongst other items, Euro United had overstated its receivables, resulting in an overadvance on the line of credit of $15,300,000. In addition, Euro United had paid Mr. Rehani $525,000, apparently

with respect to his shareholder loan, and purchased and mortgaged their head office property in Oakville, both items lacking the required consent of GECC. At this point in time, GECC's exposure was $89,900,000 on the line of credit and $50,000,000 on the term loan.

14 Mr. Feehan, and others involved in the financing, met with Mr. Rehani on 5 April 1999. Mr. Rehani offered to add his real estate, the Dielcraft property, as collateral and indicated its value to be $7,000,000 to $8,000,000. There was an indication equity investors might become involved in Euro United. Mr. Feehan said GECC wanted to resolve the existing financing problems and move forward in their relationship with Euro United. He also acknowledged GECC wanted to buttress its existing security to cover Euro United's indebtedness.

15 On 6 April 1999 Mr. Feehan reported to his superior, setting out the issues and possible solutions. In addition to taking security on the Dielcraft property, he recommended a two percent bonus on the indebtedness and a $200,000 fee to charged to Euro United as well as acquiring an option to purchase equity on favourable terms. Mr. Feehan testified GECC had not yet concluded to retract its financing, that Euro United was thriving and although it had significant management and administrative problems, he felt GECC should "take the risk" and provide bridge financing.

16 Nevertheless, in his written report dated 5 April 1999, he told his superior:

> Therefore we recommend that GECC choose the least disruptive solution because it allows Advent to work towards our quickest and easiest exit (i.e. Lehman). In addition, GECC is receiving additional boot collateral and is getting paid for its risk with an equity opportunity in the future.

17 Upon receipt of approval from his superior, Mr. Feehan submitted a written proposal to Mr. Rehani on 9 April 1999. It was accepted the same date.

18 The security documentation was prepared and signed by 14 April 1999, within five days of the accepted proposal. The mortgage was registered on 15 April 1999. The documentation appears to have been prepared by the solicitors for GECC, McMillan, Binch, although it is noted Euro United and 109 were represented by Bennett Jones. Mr. Rehani signed all documentation for 109, including the guarantee for $11,5000,000 and the mortgage for $300,000,000. Numerous declarations and other documents were also executed by Mr. Rehani, including an insolvency certificate.

19 Mr. Feehan stated the amounts described in the guarantee and mortgage were determined by GECC's solicitors. The $11,500,000 stated in the guarantee resulted from Mr. Rehani's representation the value of 109's assets was $12,000,000 with only $100,000 in liabilities. The $300,000,000 referred to in the mortgage was to cover loans of the syndicated loan agreement although Mr. Feehan was not clear on this explanation.

20 The GECC proposal dated 9 April 1999 permitted it to conduct a due diligence investigation. For some unexplained reason, GECC chose not to make any inquiry with respect to 109. According to Mr. Feehan, GECC relied exclusively on the representations of Mr. Rehani.

21 In due course, GECC receive the executed security documents from its solicitors. There was no reporting letter regarding certification of title with respect to the Dielcraft property. Mr. Feehan indicated a certification was required and mistakenly assumed it was provided by the solicitors for 109.

22 GECC did not request financial statements from 109, nor did they conduct a credit check. They were unaware 109 had never filed income tax returns. GECC did not inspect the Dielcraft property nor did they obtain an appraisal.

23 The proposal contained a provision whereby GECC would release its mortgage if 109 obtained another mortgage, so long as the proceeds therefrom of at least $4,000,000 were contributed to Euro United as equity and applied to reduce the line of credit with GECC. This item was not included in the amending agreement.

24 Mr. Feehan said his only concern was the Dielcraft property be worth at least $4,000,000. He was not concerned with Mr. Rehani's representations as to the property value, nevertheless, no inquiry was made to appraise the property.

25 City Management & Appraisals Ltd. provided an appraisal report dated 3 April 2000 to KPMG Inc., in which they estimated the market value, as of 1 June 1999, at $3,190,000. This valuation appears to be accepted by the parties as the market value on 15 April 1999. The stated value, however, may be high as the appraiser also estimated market value as of 1 April 2000 to be $5,000,000, yet the property only sold for $2,896,000 in January 2002. There may have been intervening market conditions affecting the sale price although no evidence was presented.

26 Mr. Feehan also said GECC had no reason to question the representations made by Mr. Rehani although he offered to explanation. Without due diligence, it is equally reasonable to say GECC had no reason to believe those representations.

27 The declarations and certificates signed by Mr. Rehani, on or before 14 April 1999, as part of the security documents required by GECC contained numerous errors or, perhaps, deliberate false statements, examples of which are as follows:

(a) there was no change in the financial condition 109 which would have a material adverse effect on its ability to pay GECC and all rental payments where current when, in fact, Euro United had not paid its rent for at least four months and, therefore, 109 had no income;

(b) no material or services had been provided to the property, nor contracts signed, nor estimates given or, alternatively, all amounts have been paid in full and no liens have arisen within the meaning of the *Construction Lien Act* when, in fact, 109 had entered into substantial contracts in excess of $3,000,000 to renovate the building, work had started in August or September 1998, there were monies owing to one contractor, and, accordingly, liens had arisen;

(c) there were no encumbrances against the assets of 109 when, in fact, Engel Canada had an outstanding debenture or general security agreement;

(d) the value of assets was inflated and liabilities were not disclosed;

(e) 109 was up-to-date in filing income tax returns when, in fact, 109 had never filed a return since incorporation in 1994 and, further, there was significant, income tax owing.

28 All of these errors or misrepresentations would have been discovered on a due diligence investigation. GECC and its related companies are well known in the commercial finance business. They specialize in large commercial loans starting at $5,000,000. They are a sophisticated lending institution. Failure to perform a due diligence investigation of 109 is inconsistent with GECC's normal practice.

29 On 27 April 1999 Mr. Feehan was informed 109 and Euro United had increased the rental payment required from $700,000 to $1,400,000 per annum. No explanation was requested. Mr. Feehan was still unaware rent was not being paid.

30 Equity investors contributed $70,000,000 to Euro United over the two months following 15 April 1999 and the overadvance was paid off by 25 May 1999. GECC, however, did not release its mortgage on the Dielcraft property.

31 In August 1999 Euro United requested an overadvance of $300,000. GECC refused. Mr. Feehan said Euro United was growing rapidly without the proper financing to support the growth. In fact, this was similar to the comment he made in April 1999.

32 Mr. Feehan stated GECC discovered the construction project on the Dielcraft property in November 1994 when Mr. Rehani made mention of it, he says, for the first time.

33 On 24 November 1999 GECC demanded payment from Euro United and 109. The end result was the bankruptcy of these companies and the ultimate sale of assets by the trustee.

(b) Subsection 20(1). Business Corporations Act

34 Subsection 20(1) of the Ontario *Business Corporations Act*, as at the relevant time of the events, said:

> 20(1) Financial assistance by corporation —
>
> Except as permitted under subsection (2), a corporation with which it is affiliated, shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise,
>
> > (a) to any shareholder, director, officer or employee of the corporation or affiliated corporation or to an associate of any such person for any purpose; or,
> >
> > (b) to any person for the purpose of or in connection with a purchase of a share, or a security convertible into or exchangeable for a share, issued or to be issued by the corporation or affiliated corporations.
>
> where there are reasonable grounds for believing that,
>
> > (c) the corporation is or, after giving the financial assistance, would be unable to pay its liabilities as they become due; or
> >
> > (d) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan and in the form of any secured guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

35 The parties acknowledge 109 and Euro United were affiliated corporations and the guarantee and mortgage provided by 109 constituted financial assistance within the meaning of subsection 20(1).

36 The purpose of subsection 20(1), in part, is to prevent the dissipation of corporate assets that might otherwise prejudice the financial position of creditors and shareholders: see: Wayne D. Gray, *Corporate Guarantees*, 1999, Law Society of Upper Canada, Continuing Legal Education Lectures.

37 The initial determination is the amount of the financial assistance. The guarantee says $11,500,000, the mortgage says $300,000,000. There is some merit in relying on the amount stated in the mortgage, insofar as the mortgage is central to the issue in this litigation; however, I am of the view such is misleading. The explanation provided for this sum bears little, if any relationship to the actual credit agreement amendment. Further, 109's liability is from the guarantee, the mortgage only providing collateral security.

38 GECC suggests the financial assistance is limited to $4,000,000, relying on its 9 April 1999 proposal which allowed for such payment, but on strict conditions. This provision was not inserted in the amendment to the credit agreement, the guarantee or any of the security documents delivered on 14 April 1999. Further, GECC has always claimed entitlement to the full amount of the guarantee, namely $11,500,000, as confirmed by its demand letter on 24 November 1999 and, as well, Mr. Feehan's testimony at trial.

39 Accordingly, I find the amount of financial assistance was $11,500,000.

40 The test in subsection 20(1)(c) and (d) is an objective one, that is, were there reasonable grounds on 15 April 1999.

41 The practical difficulty regarding a review of the financial problems of Euro United and 109 is that much of the evidence relates to subsequent events. Their ultimate bankruptcy, however, cannot be relied upon as the basis for finding a breach of this statutory provision. There are, however, a number of matters that existed on 15 April 1999 and are relevant to this issue. The evidence established the following facts:

(i) 109 had no income as Euro United had not paid its rent for at least four months;

(ii) the only prior source of income for 109 had been rental payments from Euro United which it relied on to meet its obligations;

(iii) 109 had an outstanding debt to Engel Canada, subsequently calculated by KPMG to be $279,913, as at 30 June 1999;

(iv) 109 had never filed income tax returns and there was income tax owing, subsequently calculated by KPMG to be $1,441,200 as at 30 June 1999;

(v) similarly, there was goods and services tax owing by 109, subsequently calculated by KPMG to be $26,618 as at 30 June 1999;

(vi) it is reasonable to assume 109 had other ongoing expense in the normal course of business, particularly if Euro United was also not paying the property related expense;

(vii) 109 had $102,275 on deposit in its bank account;

(viii) the property was valued at $3,190,000;

(ix) other assets of 109 were described as rent owing from Euro United and monies owing from its shareholder, Mr. Rehani, but there was no evidence these were tangible assets;

(x) 109 had entered into construction contracts in excess of $3,000,000, much of it for future work, and, although contractors had been substantially paid to date, there were holdback monies owing to one contractor;

(xi) the GECC mortgage prevented the property being used by 109 as security to fund the construction project.

42 On 15 April 1999, 109 was not paying, nor was able to pay, its outstanding liabilities. It had no income and significant debt had accumulated. Even if Euro United had been paying rent, there would be insufficient income to pay liabilities. The construction project, commenced some months prior, would require substantial funding which could not come from income. The guarantee and mortgage to GECC compounded the situation by preventing use of the property as security for funding to pay liabilities.

43 In addition, the value of 109's assets on 15 April 1999, excluding the amount of the financial assistance, was less than its outstanding liabilities. The construction expense alone was equal to or exceeded the property value. The outstanding income tax liability suggests it was only a matter of time before failure would occur.

44 In my review of the evidence, it appears 109 failed the solvency and the balance sheet tests without having to take into account the financial assistance provided in the guarantee and mortgage, although it is possible 109 might have been able to meet most of its liabilities if Euro United was paying its rent and it could mortgage the property to fund the construction. Neither event occurred, nor was there evidence to suggest it would occur.

45 Nevertheless, consideration must given to whether there were reasonable prospects of GECC calling on the guarantee as of 15 April 1999. In this regard, the comments by Farley J. in *Clarke v. Technical Marketing Associates Ltd. (Trustee of)* (1992), 8 O.R. (3d) 734 (Ont. Gen. Div.) at p. 750:

> It does not seem to me that the words 'after giving the financial assistance' under either s. 44(1)(c) or (d) mean that the tests have to be applied on the assumption that the corporation giving the guarantee has had to make payment. The guarantee has been given as financial assistance when it was entered into and not when it might actually be called upon (or as if it had been called upon). Thus a guarantee would no appear to impinge upon the 'cash flow' requirement contemplated by s. 44(1)(c) if given on a naked basis.

However, one has to go back to the lead-in words 'where there are reasonable grounds for believing that'. This implies that one must form a reasonable opinion based on the facts of each case to see what the likelihood would be of the guarantee being called upon in the future so as to constitute it a 'liability' which must be paid as part of the 'liabilities as they become due' (s.44(1)(c).

46 The guarantee had only just been signed and, therefore, it might be said 109, Euro United and GECC were optimistic the financial problems at Euro United had been resolved, however, a more detailed analysis is required. GECC was buttressing its security, as acknowledged by Mr. Feehan. Within two months, equity investors inject $70,000,000 into Euro United and the overadvance is paid in full. The basis for the extra security appears resolved yet GECC does not release 109.

47 Despite Mr. Feehan's expressed optimism on 15 April 1999, it is clear GECC wanted more security as they were contemplating further default by Euro United. This is the only conclusion that can be drawn from Mr. Feehan's report on 5 April 1999 "our quickest and easiest exit". There was no acceptable evidence to the contrary and, therefore, I conclude the guarantee must be considered a liability in the solvency test under subsection 20(1)(c). It is also included on the basis it prevented 109 mortgaging the Dielcraft property to fund the construction project.

(c) Subsection 20(3), Business Corporations Act

48 Subsection 20(3) of the Ontario *Business Corporations Act*, as at the relevant time of the events, said:

(3) Validity of Contract — A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

49 GECC seeks to rely on this safe harbour provision.

50 It is apparent, on the evidence, GECC did not have actual "notice of contravention." The question is whether it can rely on the representations of Mr. Rehani and its failure to perform a due diligence investigation on as stated in the subsection, was GECC "a lender for value in good faith."

51 109 received no benefit from the guarantee and mortgage. The sole purpose of these documents, as said by Mr. Feehan, was so secure past indebtedness of Euro United. Monies may have been advanced by GECC to Euro United after 15 April 1999 but such was merely a continuation under the revolving letter of credit. Given the subsequent injection of funds by equity investors and the payment of the overadvance, GECC's failure to release 109 clearly demonstrates the purpose of this additional security to cover past indebtedness of Euro United. Therefore, in my view, GECC was not "a lender for value" within the meaning of subsection 20(3) as it relates to the financial assistance.

52 Further, failure to conduct a due diligence investigation cannot be used to establish "good faith" in the circumstances of this case. GECC made no attempt to investigate 109 which was inconsistent with their corporate practice as demonstrated in their inquiry in 1998 with respect to the Euro United application for financing. Here, a property inspection would, in a matter of minutes, reveal the construction project on the Dielcraft property and caused further inquiry. The normal request for financial statements would have led to finding the income tax liability. GECC also knew Mr. Rehani was responsible for several covenant breaches which ought to have raised concerns about his honesty.

53 In this regard, I adopt the comment by Huband J.A. in *Petro-Canada v. Cojef Ltd.*, [1992] M.J. No. 575 (Man. C.A.) where, at p. 2, he said:

There is merit in the argument that Petro-Canada cannot turn a blind eye toward the obvious. Moreover, Petro-Canada must be judged, not on the basis of an unsophisticated lender, but as one whose business it is to extend credit on the basis of guarantees. Petro-Canada is aware of the hazards of relying on a guarantee which proves unenforceable by virtue of sec. 42(1). It cannot claim the benefit of sec. 42(3) by ignoring the obvious and neglecting to ask questions.

54 *Upper Mapleview Inc. v. Stolp Homes (Veterans Drive) Inc.* (1997), 36 B.L.R. (2d) 31 (Ont. Gen. Div.), is comparable in many respects to the case at bar. In discussing this issue, Swinton J. also indicated the defendant "should not be held to the same standard of sophistication as Petro-Canada".

55 GECC is a sophisticated financial institution that well knows the necessity of a due diligence investigation. As such, it cannot rely on the suggestion a solvency certificate satisfies the test. GECC knew enough about the relationship between 109, Euro United and Mr. Rehani that necessitated further inquiry. The evidence clearly indicated GECC made no inquiry, not even a property inspection or search of title, and, further, there was an urgency in completing the transaction.

56 In this regard, the statement by Carthy J.A. in *Assaad v. Economical Insurance Group*, [2002] O.J. No. 2356 (Ont. C.A.), at p. 4, is appropriate:

> Suspicions combined with blindness adds up to an absence of good faith.

57 Mr. Wayne Gray, in his paper *Corporate Guarantees*, supra, offered this conclusion, at p. 3-39:

> Thus a prudent lender should not expect to rely on the safe harbour provision. Instead, it will take all steps available to it to ensure that it not only has on notice of the contravention but that it can also, if necessary, produce compelling evidence to a court that the lender addressed its mind to the statutory requirements and reasonably satisfied itself that the corporation providing the financial assistance was not contravening the provisions of its incorporation statute. Unless the lender takes appropriate steps so that it can adduce such evidence should the issue arise in litigation, it will risk encountering significant enforcement difficulties if its primary security from the borrower should become insufficient to meet the borrower's obligations.

58 GECC took no steps and, therefore, has no evidence to demonstrate its good faith. Reliance on Mr. Rehani's representations and failure to conduct a due diligence investigation was, in my view, willful blindness by GECC.

(d) Summary

59 In summary, I find 109 failed both the solvency and balance sheet test under subsections 20(1)(c) and (d) and, further, GECC cannot rely on the sale harbour provision of subsection 20(3). Accordingly, I find the mortgage from 109 to GECC is void as against the plaintiffs, as a result of contravention of section 20, *Business Corporations Act*.

(ii) Section 2, Fraudulent Conveyances Act Section 4, Assignment and Preferences Act

60 Although Mr. Rehani did not testify, it is likely he was optimistic, on 15 April 1999, Euro United and 109 would be successful business ventures. Optimism, however, is not evidence of good intentions. The mortgage to GECC, if it stands up, has the actual effect of defeating creditors. An objective analysis of the circumstances is necessary to determine if either, or both, of these statutory provisions apply.

(a) Section 2 Fraudulent Conveyances Act

61 Section 2 of the *Fraudulent Conveyances Act* says:

> 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 The financial circumstances of 109 were identified previously. In April 1999 Mr. Rehani, sole director, officer and shareholder of 109, knowing the financial situation, caused 109 to guarantee the indebtedness of Euro United, a company of which he was the president and controlling shareholder, and to provide collateral mortgage security on its

only real asset. Mr. Rehani's actions were facilitated by the willful blindness of GECC. Mr. Rehani was not truthful. He deliberately misrepresented the situation to GECC. GECC failed to make any inquiry.

63 At issue, therefore, is whether there was an intent to defeat or delay creditors, such as the lien claimants, some of whom had already commenced work on the Dielcraft property by 15 April 1999. There was no direct evidence of intent, however, as West J. said in *Home Savings & Loan Corp. v. Mathews* (1995), 49 R.P.R. (2d) 79 (Ont. Gen. Div.), at p. 87, "Intent can be inferred from the surrounding circumstances."

64 Over the years, the case law has referred to suspicious circumstances demonstrating "badges of fraud": see, for example *Solomon v. Solomon* (1977), 16 O.R. (2d) 769 (Ont. S.C.); and *Prodigy Graphics Group Inc. v. Fitz-Andrews*, [2000] O.J. No. 1203 (Ont. S.C.J.).

65 The evidence established the following, which may be appropriately considered in this analysis:

(i) the conveyance by 109 was in support of a related party, Euro United;

(ii) Mr. Rehani controlled both corporations;

(iii) 109 received no consideration;

(iv) the property conveyed was all of 109's real assets;

(v) 109 had existing and substantial debt such as for income tax, for creditors and was incurring future and substantial liability for creditors regarding the construction project;

(vi) the conveyance was completed with considerable haste, within five days;

(vii) disclosure to GECC was incomplete and in error which could have been discovered upon investigation;

(viii) Mr. Rehani had already committed acts of dishonesty regarding payment on his shareholders loan and acquisition and mortgaging of other property without the consent of GECC;

(ix) The conveyances exceeded the property value;

(x) Euro United was in financial difficulties, having defaulted on the credit agreement within five months of the advance; and,

(xi) There was good reason for GECC and Mr. Rehani to consider Euro United and 109 were insolvent, or about to be.

66 As Cameron J. said in *Prodigy Graphics*, supra, at p. 22:

> The badges of fraud are of evidentiary value in determining the issue of intent but are not conclusive evidence of fraud. Fraudulent intent is a matter of fact to be determined in the circumstances of each case or the basis of the evidence as a whole: *Meeker v. Cedar Products v. Edge* (1968), 12 C.B.R. (N.S.) 49 (B.C.C.A.).
>
> Once the suspicious circumstances raise a prima facie presumption of intent to hinder, defeat or defraud a creditor, the court may find the intent unless the presumption is displaced by corroborative evidence of the bona fides of the debtor in the suspect transaction: *Kingsbridge Grand Ltd. v. Vacca*, [1999] O.J. No. 4914 citing *Koop v. Smith* (1915), 51 S.C.R. 554; *Applecrest Investments Ltd. v. Toronto Masonry (1986) Ltd.*, [1997] O.J. No. 436; *Rinaldo v. Rosenfeld*, [1999] O.J. No. 4665.

67 In *Petrone v. Jones* (1995), 33 C.B.R. (3d) 17 (Ont. Gen. Div.), Wright J. at p. 20 provided this comment:

> 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 settler to have been to defect or delay his creditors. (*Sun Life Assurance Co. v. Elliott* (1900), 31 S.C.R. 91). ...
>
> Further: even if the plaintiff did not intent to defeat, hinder or delay their creditor but effected the transfer with a view to defeating, hindering or delaying potential future creditors his defence would still fail.

68 There are strong suspicious circumstances, or badges of fraud, as noted previously. Mr. Rehani knew of the construction project and the cost of same. He knew Euro United was not paying rent to 109. He knew 109 required the property to be mortgaged for the construction project expense as rent, if paid, was insufficient. He knew 109 already had significant liabilities, particularly for unpaid income tax. In spite of this knowledge, he caused 109 to pledge its only asset to GECC to secure Euro United's existing indebtedness. The only logical inference is that Mr. Rehani used 109 to support the financial difficulties of Euro United and, in so doing, used the property from which the contractors would look for payment.

69 Therefore, there is, in my view, a prima facie presumption of intent to defeat current and future creditors. GECC is unable to rebut this presumption as they failed to conduct a due diligence investigation and, therefore, had no knowledge, but should have, of the true circumstances on 15 April 1999.

70 Section 7 of the *Act* says:

> 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 the intent set forth in that section.

71 109 received no consideration for the conveyance. In *Courtesy Chevrolet Oldsmobile Ltd. v. Dhaliwal* (1987), 67 C.B.R. (N.S.) 72 (Ont. H.C.), Austin J. at p. 79 indicated:

> The jurisprudence makes it clear that where there is no 'good consideration', then the intent of the transferor alone is relevant.

72 Further, GECC cannot rely on section 3 for the same reasons as with respect to subsection 20(3) of the *Business Corporations Act*. Willful blindness is not good faith.

73 The plaintiffs argue a conveyance from 109 to Euro United for no consideration would be void under section 2 and, as the conveyance from 109 to GECC has the same effect, it should also be void. I agree. Substance, not form, is the determining factor.

(e) Section 4, Assignments and Preferences Act

74 Subsection 4(1) of the *Assignments and Preferences Act* says:

> 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 person's 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.

75 Subsection 4(1) includes a solvency test. As previously noted, under section 20, *Business Corporation Act*, 109 was, in my view, insolvent on 15 April 1999. 109 was also insolvent as defined in subsection 2(1) of the *Bankruptcy and Insolvency Act*: see also *Robinson v. Countrywide Factors Ltd.* (1977), 23 C.B.R. (N.S.) 97 (S.C.C.), at p. 136.

76 On 15 April 1999, 109 had no income and had existing liability for income tax and other debts. Construction work had commenced and there was an outstanding debt to one contractor. 109's liabilities exceeded its assets. The conveyance to GECC compounded 109's insolvency.

77 The evidence supports a prima facie case for insolvency of 109 and there is, therefore, a presumption of intent to defeat creditors, as noted in the analysis under the *Fraudulent Conveyances Act*. No evidence was presented to rebut the presumption.

78 Subsection 5(5)(d) of the Act says:

> Nothing in this Act,
>
> ellipsis;
>
> > (d) invalidates a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance of money is made to the debtor by the creditor in the belief that the advance will enable the debtor to continue the debtor's trade or business and to pay the debts in full.

79 No advance was made to 109. The pre-existing debt was Euro United's. There was no evidence to suggest any advance to Euro United would enable 109 to continue its business and pay its debts in full. Indeed, the evidence showed otherwise as confirmed by subsequent events. GECC, therefore, cannot rely on subsection 5(5)(d).

(f) Summary

80 In summary, I find the mortgage from 109 to GECC is void as against the plaintiffs, as a result of contravention of section 2 of the *Fraudulent Conveyances Act* and section 4 of the *Assignments and Preferences Act*.

(iii) Section 78, Construction Lien Act

81 Subsection 78(1) of the *Construction Lien Act* says:

> (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the matters.

Other subsections provide exceptions to this general priority in favour of construction liens. It is, therefore, necessary to determine if the mortgage to GECC is prior or subsequent to the construction liens.

82 In *Boehmers v. 794561 Ontario Inc.* (1993), 14 O.R. (3d) 781 (Ont. Gen. Div.); affirmed (1995), 21 O.R. (3d) 771 (Ont. C.A.), Killeen J. said:

> Section 78(1) is the overarching principle of the regime of the Act for the determination of priorities. It is, if you will, the central interpretative principle for the adjudication of conflicts of this type before the court in this case. Surely, it necessarily implies that, in cases of conflicts, as here, the burden must be on the mortgagee to persuade the court that it somehow falls clearly within a specified exception to the generalized priority of the liens.

83 The comment by Rosenberg J. in *697470 Ontario Ltd. v. Presidential Developments Ltd.* (1989), 69 O.R. (2d) 334 (Ont. Div. Ct.) is also of assistance where, at p. 337, he said:

> Accordingly, while the Act may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies it must be given a strict interpretation in determining whether it does in fact apply: *Clarkson Co. Ltd. v. Ace Lumber Ltd.* (1963), 36 D.L.R. (2d) 554 (S.C.C.)

84 Before proceeding to consider whether the mortgage was prior or subsequent, a preliminary finding is necessary as to whether there was one improvement or several improvements. "Improvement" is defined in the *Act* as:

> (a) any alteration, addition or repair to, or
>
> (e) any construction, erection or installation on any land and includes the demolition or removal of any building, structure or works or part thereof, and 'improved' has a corresponding meaning.

85 Various contractors provided services and materials for 109 at the Dielcraft property at different times. 109 entered into specific contracts with Jannick Electric Limited ("Jannick"), Aim Waste Management Limited ("Aim") and XDG Limited ("XDG"). Numerous subcontractors were also involved.

86 In the summer of 1998 Mr. Raymond El Jarnal, vice-president of Euro United and general manager of 109, began inquiring of contractors and consulting engineers as to renovations of the building located on the Dielcraft property. Several contractors expressed an interest and provided quotations for various components of the intended project. Contracts were then negotiated with the successful firms.

87 Jannick was on site in early September or perhaps August 1998 to disconnect electrical services. Aim commenced demolition work on 15 September 1998. Negotiations with XDG continued to January 1999 at which point Mr. El Jamal presented XDG with a draft contract. Giffel's Associates Limited ("Giffels"), 109's consulting engineers, prepared the contract in final form based on the terms as already negotiated. Although the written contract is dated 15 April 1999, it is on the same terms as negotiated and agreed to and, therefore, I find the contract between 109 and XDG was orally entered into in early January 1999.

88 XDG employees and others were on site on 7 June 1999, however, actual work was commenced on 3 March 1999 when Mr. Wayne Nosal of Design Plus started to prepare the architectural drawings. XDG employees also commenced work on its metal fabrication drawings on the same day.

89 The ultimate goal of the project was to raise the roof on the building, a large undertaking. XDG was to perform the actual work, however, demolition and electrical disconnection was required before they could commence work on site. In my view, therefore, this appears to be one project, or improvement, not several, as suggested by GECC.

90 Additional evidence confirms this observation. Aim was initially approached by another contractor in July 1998 to provide a quote for part of the project. 109 eventually contracted directly with Aim on 10 September 1998. Jannick's proposal to 109, dated 28 August 1998, stated it was "...to assist you in raising of your roof...". Also, the minutes of meeting on 19 November 1998, prepared by Giffels, refers to one project with numerous components.

91 Accordingly, I find there was one improvement. A comparison can be found in the situation in *Moffatt & Powell Ltd. v. 682901 Ontario Ltd.* (1992), Kirsch's C.L.C.F., 61.3 [49 C.L.R. 205 (Ont. Gen. Div.)] where Misener J. said:

> The 'construction' (and therefore the 'improvement') that Kuco undertook on the lands in question here was the erection of a three-storey residence for the elderly that contained 66 separate suites. All 16 lien claimants contracted with Kuco to perform work or services or to supply materials of that 'construction' (and therefore for that 'improvement'). Therefore, all performed work or services in respect of the same 'construction' — and therefore the 'same improvement.'

Section 15 of the *Act* says:

15. A persons' lien arises and takes effect when the person first supplies services or materials to the improvement.

92 Jannick was on site to disconnect electrical services, likely in August 1998, however, the evidence was not clear. Aim was on site to commence demolition on 15 September 1999. Therefore, the first lien arose at least by 15 September 1998 and, accordingly, the mortgage from 109 to GECC was a subsequent mortgage, and I so find.

93 Subsections 78(5) and (6) of that *Act* say:

78(5) Special priority against subsequent mortgages —

Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the lien arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

(6) General priority against subsequent mortgages —

Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect of the improvement, has priority over the liens arising from the improvement to the extent of any advances made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

94 As previously stated, the mortgage was provided as collateral security with respect to the prior indebtedness of Euro United. No advance was made to 109 nor did 109 benefit in any manner whatsoever. The statutory provisions refer to amounts advanced, not amounts secured: See *561861 Ontario Ltd. v. 1085043 Ontario Inc.* (1998), Kirsh's C.L.C.F. 78.50 [1998 CarswellOnt 2935 (Ont. Bktcy.)]

95 In *Marsil Mechanical v. A Reissing-Reissing Enterprise Ltd.* (1996), Kirsh's C.L.C.F. 78.40 [1996 CarswellOnt 301 (Ont. Gen. Div.)], Klowak J. said:

In considering the definition of 'advance' it seems to me that, for purposes of the *Construction Lien Act*...it must mean when the owner, or the owner's delegate, acquires actual control of the money.

96 Accordingly, I find there was no advance under the mortgage from 109 to GECC and, therefore, the lien claimants have priority pursuant to section 78 of the *Construction Lien Act*.

Conclusion

97 KPMG Inc., trustee in bankruptcy of 109, filed a statement of defence in this action but did not participate in the trial for obvious reasons. Representatives of 109 and Euro United were not called as witnesses by the participating parties. The issues dealt with the relationship between those corporations and GECC and, as well, the lien claimants. The plaintiffs were able to establish their case based upon the documents and oral testimony.

98 In many respects, GECC required testimony of representatives of 109 and Euro United. Although there was sufficient evidence for the findings made, there is a strong argument to also rely on findings of adverse inference as against GECC for failure to call these witnesses.

99 One theme was central to all issues in this litigation; that is, GECC's failure to perform its usual and customary due diligence investigation with respect to 109. There was no satisfactory answer for this neglect. GECC is a sophisticated

lending institution. It normally performs due diligence. Was its failure to do so an oversight or was GECC scrambling to gain additional security for a customer they knew was on the edge of failure?

100 It would be unconscionable and inequitable to allow a mortgagee to obtain priority based upon its willful blindness or negligence. Even the simplest of investigations would have revealed the construction project and led GECC to make further inquiry. They would easily have determined Mr. Rehani was not being truthful.

101 A due diligence investigation would, in my view, have led GECC to decide against mortgage security on the Dielcraft property.

102 A trial of issues was directed to determine the priority as between the lien claimants and the mortgagee. There were secondary issues that arose during the trial pertaining to the validity and quantum of some liens. Those issues were beyond the scope of the trial.

103 In result, the plaintiffs are entitled to a declaration the lien claimants have priority over the mortgage from 109 to GECC, subject to proof as to validity and quantum of the liens for which a further trial, if necessary, is directed.

104 If the parties cannot agree on the issue of costs, written submissions are required. The party seeking costs shall serve such submissions within 28 days of the release of this decision. The responding party shall have 14 days to serve submissions and a further 7 days is allowed for reply. All written submissions are to be filed by the last day for reply.

Action allowed.

Footnotes

* Additional reasons at (2003), 2003 CarswellOnt 1316, 41 C.B.R. (4th) 315 (Ont. S.C.J.) .

2004 CarswellOnt 1581
Ontario Superior Court of Justice (Divisional Court)

XDG Ltd. v. 1099606 Ontario Ltd.

2004 CarswellOnt 1581, [2004] O.J. No. 1695, 130 A.C.W.S.
(3d) 678, 186 O.A.C. 33, 1 C.B.R. (5th) 159, 35 C.L.R. (3d) 282

XDG LIMITED (Plaintiff / Respondent) and 1099606 ONTARIO LIMITED and GENERAL ELECTRIC CAPITAL (Defendants / Appellants)

O'Driscoll, E. Macdonald, Caputo JJ.

Heard: January 14, 2004
Judgment: April 23, 2004
Docket: Toronto 57/03

Proceedings: affirming *XDG Ltd. v. 1099606 Ontario Ltd.* (2002), 2002 CarswellOnt 4535, 23 C.L.R. (3d) 67, 41 C.B.R. (4th) 294 (Ont. S.C.J.); additional reasons at *XDG Ltd. v. 1099606 Ontario Ltd.* (2003), 2003 CarswellOnt 1316, 41 C.B.R. (4th) 315 (Ont. S.C.J.); and varying *XDG Ltd. v. 1099606 Ontario Ltd.* (2003), 2003 CarswellOnt 1316, 41 C.B.R. (4th) 315 (Ont. S.C.J.)

Counsel: Leonard Ricchetti for Appellant, General Electric Capital Canada Inc.
Irwin Duncan for Plaintiff / Respondent, XDG Limited
Anthony Speciale for Cross-Appellant, Wm. Green Roofing Inc., a lien claimant

***E. Macdonald J.*:**

NATURE OF PROCEEDINGS

1 General Electric Capital Canada Inc. (GECC) appeals from the December 23, 2002 judgment and February 27, 2003 award of costs of Gordon J. in a consolidated construction lien action in which judgment was granted in favour of XDG Limited (XDG) (representing several claimants) on the issue of the validity and priority of GECC's mortgage as against the lien claimants. Costs were awarded against GECC on a substantial indemnity basis.

2 GECC requests an order:

(a) setting aside the December 23, 2002 judgment and the February 27, 2003 costs order of Gordon J.;

(b) dismissing the claims of XDG (and all lien claimants) to any claim of priority over the GECC mortgage; and,

(c) awarding costs of the trial and appeal on a partial indemnity scale to GECC.

CROSS-APPEAL

3 Wm. Green Roofing Ltd. ("Green"), one of the lien claimants, cross-appeals and requests that the February 27, 2003 costs order of Gordon J. be set aside and that the costs at trial be awarded on a substantial indemnity basis to Green. Green seeks an increase in costs to the total amount of $83,937.50, plus $1,500 for disbursement, plus G.S.T. (See Appeal Book and Compendium, Tab 2) (Factum of cross-applicant, para. 12).

STANDARD OF REVIEW

4 On questions of fact, the standard of review for an appeal from the order of a judge is whether or not the decision of the judge was "clearly wrong". (*Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.)). A judge must have made a "palpable and overriding error" or a "manifest error" before interference can be justified (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.)).

5 Judicial discretion should not be interfered with unless it is apparent that the judge applied erroneous principles or disregarded or misinterpreted material evidence in a way that rendered the result "clearly wrong". (*Cosyns v. Canada (Attorney General)* (1992), 7 O.R. (3d) 641 (Ont. Div. Ct.)).

6 On questions of law, however, a judge's decision must be correct. On matters of law, the appellate court is free to replace the opinion of the trial judge with its own. (*Housen v. Nikolaisen*, *supra*).

APPEAL AS TO COSTS

7 A costs award is a discretionary decision and even after the introduction of specific costs grids, the court retains an inherent power in relation to costs that is not exhausted by statute. A court retains the authority to diverge from statutory guidelines if it considers it fair and reasonable to do so. (*Basdeo (Litigation Guardian of) v. University Health Network*, [2002] O.J. No. 597 (Ont. S.C.J.)). Matlow J. concluded that, despite the new rules and Costs Grid in Ontario, judges were left with a very broad statutory discretion and were entitled to consider anything that is relevant to the question of costs when determining by whom and to what extent costs shall be paid. (*Toronto (City) v. First Ontario Realty Corp.*, [2002] O.J. No. 2519 (Ont. S.C.J.)).

8 The new rules indicate that trial judges are to fix costs; only in exceptional circumstances are cases to be referred to assessment. (*Delrina Corp. v. Triolet Systems Inc.*, [2002] O.J. No. 3729 (Ont. C.A.)). Generally, the practice of a reviewing court is to grant judges deference in all decisions not vital to the disposition of a lawsuit. (*Noranda Metal Industries Ltd. v. Employers Liability Assurance Corp.* (2000), 49 C.P.C. (4th) 336 (Ont. S.C.J.)); (*Bank of Nova Scotia v. Liberty Mutual Insurance Co.*, [2003] O.J. No. 4474 (Ont. Div. Ct.)

9 For the reasons that follow, the appeal is dismissed.

BACKGROUND

10 GECC financed the operations of Euro United Corporation ("Euro") through a credit agreement, dated November 1998, that offered Euro a revolving line of credit of $127,000,000, subject to a margin formula. By March, 1999, Euro was in default of the margin formula. In exchange for continued and increased financing, the President and controlling shareholder of Euro, Sam Rehani ("Rehani"), gave GECC a first mortgage ("Mortgage"), registered on April 15, 1999, on property at 1 Deilcraft Place in Kitchener, Ontario, ("property") owned by 1099606 Ontario Limited ("109"), a company of which Sam Rehani was also the sole Director, Officer and Shareholder. Euro leased the property from "109".

11 At the time of the Mortgage, GECC obtained statutory declarations to the effect that no construction had been commenced or negotiated on the property and the Mortgage was not in breach of the financial assistance provisions of s. 20 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B. 16 (OBCA).

The Lien Claimants

12 Under a construction agreement, dated April 15, 1999, "109" retained XDG to perform certain improvements on the property. XDG asserts that work on the site had commenced in August 1998. By August 1999, "109" had failed to pay its progress invoice. XDG and various contractors and sub-contractors registered construction liens on title to the property in late 1999. The lien claimants then sought priority over the mortgage. By that point, Euro and "109" were insolvent and both were adjudged bankrupt on June 12, 1999.

TRIAL

13 At trial, Gordon J. found that the mortgage was not valid as against the lien claimants and that the lien claimants would be entitled to priority over GECC's Mortgage on the basis that (a) "109" failed both solvency tests in s. 20 of the OBCA (b) the Mortgage was void as against the lien claimants as being a fraudulent conveyance in contravention of both s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F. (FCA) and s. 4 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A. 33 (APA) and (c) GECC's Mortgage was registered after the first lien arose giving the lien claimants priority, pursuant to the priority provisions of the *Construction Lien Act*, R.S.O. 1990, c. C. 30 (CPA). In addition, Gordon J. found that GECC failed to conduct a due diligence review in addition to obtaining the representations and warranties of "109" and its officers and that GECC was not acting in good faith and was willfully blind, negligent or aware of Rehani's intent to defeat creditors, thereby depriving GECC of the benefit of its Mortgage. Gordon J. awarded costs on a substantial indemnity basis.

KEY ISSUES

1. Was the Mortgage void for:

    (a) contravening the financial assistance provisions of s. 20 of the OBCA?

    (b) contravening the FCA?; and,

    (c) contravening the APA?

2. Do the lien claimants have priority over the Mortgage by virtue of s. 78 of the CLA?

3. Was it appropriate to award costs on a substantial indemnity basis?

4. Is the cross-applicant, Green, entitled to an increase in its costs award?

POSITIONS OF THE PARTIES

GECC's Submissions

The Mortgage did not violate s. 20 of the OBCA

14 There was no evidence in April, 1999 when the Mortgage agreement was entered that either "109" or Euro would become insolvent. Advent, the Teachers' Pension Fund and Lehman Bros. all extended funds to Euro and none of these parties could have foreseen the eventual demise of Euro. Before August 1999, there was no evidence that "109" could not meet its financial obligations as they became due. "109" could pay all its liabilities as they became due as long as Euro paid the rent. The rent was paid until August, 1999. According to what was known in April 1999, "109" was in excellent financial condition. (Appellant's Factum, paras. 62-66)

15 The guarantee was not a liability or deduction from the realizable assets of "109". There were no reasonable prospects of the guarantee being called in April, 1999. There were no reasonable grounds for believing that the guarantee would cause the realizable assets to be exceeded by "109's" liabilities. (Appellant's Factum, paras. 68-69; *Clarke v. Technical Marketing Associates Ltd. (Trustee of)* (1992), 8 O.R. (3d) 734 (Ont. Gen. Div.)).

16 The "safe harbour" provision applies to GECC because it was a "lender of value" pursuant to s. 20(3) of the OBCA. GECC advanced monies to Euro that permitted Euro to continue to pay rent to "109". There is clear and uncontradicted evidence of continued and increased financing being provided in consideration of "109's" grant of the Mortgage.

GECC Acted in Good Faith

17 GECC was acting in good faith and it did not turn a blind eye to the obvious. GECC sought and obtained all the necessary representations and certificates from "109". GECC had no reason to question those representations in April,

1999. The courts have held that a solvency certificate would suffice in lieu of other inquiries. (*Upper Mapleview Inc. v. Stolp Homes (Veterans Drive) Inc.* (1997), 36 B.L.R. (2d) 31 (Ont. Gen. Div.)). GECC obtained a solvency certificate. (Appellant's Factum, para. 75)

Fraudulent Conveyances Act ("FCA")

18 XDG can only seek to set aside the Mortgage transaction if it was a creditor on April 14, 1999. XDG only became a creditor on September 17, 1999. The conditions that would allow a subsequent creditor to impeach a fraudulent conveyance were not proven in this case. XDG did not prove that "109" granted the Mortgage with the "intent to defeat, hinder, delay or defraud creditors". (Appellant's Factum, paras. 77-79) The *FCA* also requires proof that the transferee had "notice or knowledge" of that intent. There is no evidence that GECC had knowledge of any intent on the part of "109" to defraud creditors. (Appellant's Factum, para. 81)

Assignment and Preferences Act ("APA")

19 In order to defeat the Mortgage, XDG must prove that "109" was unable to pay its creditors or was insolvent or on the eve of insolvency in April, 1999, that XDG was a creditor at the time and "109" had the intent to defeat, hinder, delay or prejudice creditors and GECC knew or ought to have known of "109's" intentions to do so. There was no evidence in April 1999 that "109" was unable to pay its debts. If this cannot be proven, then the APA cannot apply to defeat the Mortgage. (Appellant's Factum, paras. 82-84)

20 It also cannot be proven that XDG was a creditor of "109" at the time of the transfer. As of April 14, 1999, there was no debt owing to XDG. There is also no evidence that "109" intended to prefer GECC over its creditors, nor is there evidence that GECC had knowledge of any intent to defeat other creditors. A court is not likely to set aside conveyances upon a mere suspicion that they are fraudulent. There must be firm evidence of fraudulent intent. (Appellant's Factum, paras. 86-88)

Construction Lien Act ("CLA")

21 Section 78(6) of the CLA states that "any advance made in respect of that conveyance, mortgage or other agreement" enjoys priority unless there has been registration or written notice of a claim for lien. Section 78(6) does not require that the advance be made to the owner. It simply states that the advance must be made in respect of that conveyance, mortgage or other agreement. GECC made advances in respect of the Mortgage; none of the subsequent advances to Euro would have been made if the Mortgage had not been granted. (Appellant's Factum, paras. 91-93)

Costs

22 Only conduct of a reprehensible nature should give rise to an award of solicitor and client costs. Gordon J. awarded substantial indemnity costs on the basis of his conclusion that GECC failed to conduct due diligence, was not acting in good faith and was willfully blind. The evidence does not support those conclusions Moreover, the actions described do not constitute reprehensible conduct. (Appellant's Factum, para. 103)

XDG's Submissions

23 The Mortgage violated s. 20 of the OBCA. At all relevant times, s. 20 of the OBCA prohibited financial assistance between affiliated corporations such as "109" and Euro where there were reasonable grounds for believing that the corporation granting the assistance was insolvent. The two tests that must be met to prove solvency are the "Cash Flow" test and "Balance Sheet" test. "109" could not meet either of these solvency tests at the time the Mortgage was granted to "109" to provide assistance to Euro. "109" was not able to pay its outstanding liabilities in April 1999. As well, the assets less the liabilities and stated capital of "109" were significantly less than the amount of the financial assistance or guarantee of $11.5 million. If "109" failed either of these two tests, the provision of the Mortgage violated s. 20 of the OBCA. (XDG's Factum, paras. 31-39)

24 GECC cannot rely on the "safe harbour" provision (s. 20(3) of the OBCA) because it was not a lender for value. The guarantee did not facilitate the extension of new credit. It merely provided security for pre-existing indebtedness. The "safe harbour" provision, therefore, cannot apply even if further credit was extended after the execution of the guarantee. (*Upper Mapleview Inc. v. Stolp Homes (Veterans Drive) Inc.* (1997), 36 B.L.R. (2d) 31 (Ont. Gen. Div.)).

25 Section 20(3) of the OBCA also imposes a positive obligation on a lender to exercise reasonable diligence to determine the solvency of the guarantor. Any evidence of suspicious circumstances is sufficient to put a creditor on its inquiry. Where a creditor is put on inquiry, but fails to inquire, it cannot rely on the "safe harbour" provisions of the OBCA.

The Mortgage was void pursuant to the FCA

26 A transaction is void by operation of s. 2 of the FCA if it is "made with intent to defeat, hinder, delay or defraud creditors or others". Badges of fraud have been developed to allow a court to infer intent from the circumstances of a transaction. Badges of fraud, such as: the transfer was made to a related party, the transaction was effected with unusual haste, and the transaction was supported with inaccurate documents are present in the GECC Mortgage transaction. (XDG's Factum, paras. 45-48)

27 Section 3 of the FCA provides some protection to creditors declaring that a transaction is not void where the transaction was made "upon good consideration and in good faith". The transaction in question was not made for good consideration. "109" received no funds from GECC and it received no benefit from Euro. It cannot be said that GECC acted in good faith because GECC ensured that "109" received none of the benefit of the Mortgage. (XDG's Factum, para. 51-53)

The Mortgage was void pursuant to the APA

28 A transaction is void under the APA if it was made with the intent to defeat, hinder, delay or prejudice creditors. The badges of fraud outlined in paragraph 47 of XDG's factum are evidence of an intent to defeat, hinder, delay or prejudice creditors. (XDG's Factum, paras. 54-57)

GECC failed to meet the onus under the CLA

29 The CLA is to be interpreted liberally in favour of lien claimants. The overarching principle of the CLA is that lien claimants have priority over other interests. It is necessary for a mortgagee to persuade the court that it falls within one of the exceptions to the general priority of lien claimants. (XDG's Factum, para. 58)

30 GECC failed to demonstrate that its Mortgage should take precedence over the lien claimants. The Mortgage was registered after the first lien arose. As such, GECC's priority was limited to the extent of any advance made in respect of the Mortgage. GECC did not advance any amount in respect of the Mortgage. Any advances made were made to Euro, not to "109", and they were made in respect of the Credit Agreement, not in respect of the Mortgage. (XDG's Factum, paras. 59-61; *David Schaeffer Engineering Ltd. v. D.T.A. Investments Inc.* (1998), 37 C.L.R. (2d) 26 (Ont. Master)). The courts have held that where a mortgage was registered to secure a pre-existing debt for the purposes of the CLA, no monies were advanced. (*561861 Ontario Ltd. v. 1085043 Ontario Inc.* (1988), Kirsh's C.L.C.F. 78.50 (Ont. Bktcy.) at 78.166-167 and 169).

Costs Award

31 GECC required leave to appeal the costs award. There are no grounds to support a request for leave. Gordon J. provided lengthy, detailed reasons for the costs award. The CLA costs provisions suggest that substantial indemnity costs should be awarded more readily than in regular civil proceedings. It was reasonable to censure GECC for relying on a mortgage that was grossly excessive and found to be void. (XDG's Factum, para. 66)

CONCLUSION

32 The overriding issue in this appeal is whether the trial judge's finding that, on the facts of this case, GECC had a legal obligation to conduct a due diligence of "109" and that a due diligence would have put GECC on notice of the financial problems of "109" and likely consequences that, in fact, flowed. That finding was the substantial basis for declaring the mortgage invalid with respect to the lien claimants.

33 The trial judge, in his reasons, carefully analyzed the evidence, both testimonial and written. There was no demonstrable error shown in the substantial factual findings of the trial judge. Gordon J. applied the correct legal principles to the facts.

34 GECC has failed to establish that Gordon J. was clearly wrong in his finding of facts or in his application of legal principles. The trial judge had a basis for his findings of fact and he applied the correct legal principles to those facts.

35 Because the trial judge concluded that GECC failed to conduct due diligence, was not acting in good faith and was willfully blind, his award of costs, on a substantial indemnity basis, was not an improper exercise of his discretion.

Costs of the Appeal

36 Prior to reserving judgment, we asked each of the three (3) counsel for his submissions as to costs of the appeal. Counsel for GECC produced a draft bill of costs showing a total of $47,179.34, all inclusive. Counsel for XDG filed a draft bill of costs requesting $21,545.89, all inclusive. Counsel for Wm. Green Roofing Ltd. (Green) requested costs on the appeal at $8,500.00 plus G.S.T. The question of Green's costs on appeal is decided later in these reasons.

37 GECC's appeal has been dismissed. There is no reason that costs should not follow the event. No one suggested that XDG's draft bill of costs on appeal contained any improper claims, was inaccurate or excessive in any way. XDG's costs on appeal, payable forthwith by GECC, are fixed at $21,545.89, all inclusive.

Cross-Appeal of Green as to its costs

38 In paragraph [3] above we refer to Green's cross-appeal. Green asks that the February 27, 2003 costs order of Gordon J. be set aside and substituted for a costs on either a partial or substantial indemnity basis fixed at $83,937.50 plus $1,500 for disbursements and applicable G.S.T.

39 Before Gordon J., Green was awarded costs against GECC in the amount of $9,000.00 for fees, $1,500 for disbursements and $735.00 for G.S.T. for a total of $11,235.00.

40 In this cross-appeal, Green asserts that the amount of $9,000.00 for fees is unjust and inconsistent with the conduct of GECC throughout, Green's Rule 49 offer, the factors enumerated in Rule 57.01(1) and s. 131 of the *Courts of Justice Act*. Green takes no issue with the $1,500.00 awarded by Gordon J. for disbursements.

41 All counsel consented that this court could hear this cross-appeal without a formal disposition of the leave which was sought, "if necessary", in the amended Notice of Cross-Appeal.

42 The award of costs is in the discretion of the trial judge. The material presented to us on this appeal addresses some of the concerns noted by Gordon J. While we do not say that Gordon J. was clearly wrong, we are compelled to the view that it would be clearly wrong if Green was held to an award of $9,000.00 for fees now that it has "backed out" of the bill of costs the items which Gordon J. specifically complained about. In our view, these adjustments compel an increase in the amount of costs that were awarded to Green.

43 More specifically, in the cross-appeal, Green has backed out the costs it incurred in the insolvency proceedings and in the litigation between it and XDG. In his reasons on costs, Gordon J. noted that Green sought costs on a substantial

indemnity basis fixed in the amount of $249,170.50. Gordon J. specifically referred to a number of problems with Green's material as follows:

(a) no docket entries were provided;

(b) costs are claimed regarding the insolvency proceedings;

(c) costs are claimed regarding the litigation between Green Roofing and XDG.

44 In paragraph [20] of his costs endorsement, Gordon J. correctly stated that a lien claimant is entitled to have its counsel participate in the proceedings even where the carriage of the action is granted to another claimant.

45 Now that Green has "backed out" the items referred to above, he seeks costs in this cross-appeal in the amount of $83,937.50. The materials contain a summary of the docketed time and hourly rates of participating lawyers. [1]

46 In our view, there is one other matter which compels an upward adjustment of costs in favour of Green. Gordon J. awarded $9,000.00 to Janick Electric for its time spent in the insolvency proceedings. The Janick lien was for $108,243.55. Green's lien was for almost six (6) times greater. Janick's counsel did not participate at the trial. We do not consider it fair to Green to measure its entitlement to costs by comparing its role to that of Janick. Their roles were substantially different. Green was substantially more involved in the proceedings and needed to be there to protect its interest.

47 In all of the circumstances we find the award of $9,000.00 of costs unreasonably low. The combination of factors set out above compel us to allow the cross-appeal and substitute our finding for costs which we would award to Green on a party and party basis and on the basis that the costs regarding the insolvency proceedings and the litigation between Green Roofing and XDG are backed out of the bill of costs of Green.

48 The process of fixing these costs is inherently arbitrary but it must be done in a manner that "reasonably and without arbitrary diminution acknowledges the efforts legitimately expended in that connection". See: *Carpenter v. Malcolm* (1985), 6 C.P.C. (2d) 176 (Ont. H.C.), at 178 per Catzman J. (as he then was). Fixing costs in this cross-appeal is made more difficult by the fact that we were not provided with actual docket entries.

49 We fix these costs at $40,000.00 together with $1,500.00 for disbursements and applicable G.S.T. These costs are payable by GECC forthwith. The cross-appeal is therefore allowed. $40,000.00 includes costs of the cross-appeal.

Appeal dismissed; cross-appeal granted.

Footnotes

1 These are summarized at paragraph [12] of Green's Factum in the cross-appeal.

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 III OF III

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