Court File No. BK-21-02734090-0031
Court of Appeal No. COA-22-CV-0451

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C 1985, c. B-3 AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

BOOK OF AUTHORITIES

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(the "YongeSL LPs")

January 23, 2023

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COURT FILE NOS.: CV-21-00655373-00CL/BK-21-02734090-0031, CV-21-00661386-00CL & CV-21-00661530-00CL
DATE: 20210629

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND:

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES

APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND RE: 2504670 CANADA INC., 8451761 CANADA INC. and CHI LONG INC., Applicants

AND

CRESFORD CAPITAL CORPORATION, YSL RESIDENCES INC, 9615334 CANADA INC., YG LIMITED PARTNERSHIP and DANIEL CASEY, Respondents

AND RE: 2583019 ONTARIO INCORPORATED AS GENERAL PARTNER OF YONGESL INVESTMENT LIMITED PARTNERSHIP, 2124093 ONTARIO INC., SIXONE INVESTMENT LTD., E&B INVESTMENT CORPORATION and TAIHE INTERNATIONAL GROUP INC., Applicants

AND

9615334 CANADA INC. AS GENERAL PARTNER OF YG LIMITED PARTNERSHIP and YSL RESIDENCES INC., Respondents

BEFORE: S.F. Dunphy J.

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Daniel Naymark and *Jamie Gibson*, for Sarven Cicekian, Mike Catsiliras, Ryan Millar and Marco Mancuso

Brendan Bowles and *John Paul Ventrella*, for GFL Infrastructure Group Inc.

Mark Dunn and *Carlie Fox*, for Maria Athanasoulis

George Benchetrit, for 2576725 Ontario Inc.

Joshua B. Sugar, for R. Avis Surveying Inc.

Paul Conrod, for Restoration Hardware Inc.

James MacLellan and *Jonathan Rosenstein,* for Westmount Guarantee Services Inc.

Albert Engle, for Priestly Demolition Inc.

HEARD at Toronto: June 23, 2021

AMENDED REASONS FOR INTERIM DECISION

Note: these reasons were amended on July 2, 2021 as more fully described in the in the concluding paragraphs hereof.

[1] The debtors are seeking approval of a bankruptcy proposal that has obtained the near unanimous approval of those affected creditors who cast a vote. Two groups of limited partnership unitholders have challenged the actions of the General Partner of the debtor YG Limited Partnership for much of the past year and urge me to annul the bankruptcy entirely or to reject the proposal and, if need be, to allow a Receiver or Trustee in bankruptcy to canvass the market fairly and objectively. Another unsecured creditor urges me to disregard much of the appraisal evidence tendered because she has been excluded from examining it and the result is a record that casts grave doubt as to whether fair value for stakeholders is being realized by this process.

[2] For the reasons that follow, I have decided that I will not approve the Proposal in the form it has been presented to me. The Proposal is yet able to be amended pursuant to art. 3.01 thereof and it is possible that an amendment may be formulated to address the concerns raised by the findings I outline below before a final decision on the fate of the Proposal is made.

Background facts

[3] A central issue in this case is the value of the "YSL Project" – the property owned by the debtor YSL as bare trustee for the limited partnership (the debtor YG LP) charged with developing it. Valuation is an area on which I must tread lightly in terms of what I can record in writing so as not to impact adversely any potential sale process that may be necessary in future.

[4] What follows is a general description of the capital structure of the debtors and the project sufficient to permit an understanding of the issues. For comparison purposes, it is relevant to consider the size of the project. There is no dispute that the "as if completed" value of the project is above $1 billion. How much above and based on which assumptions is an issue, but I provide the round figure solely for comparison purposes relative to the debt and equity interests discussed.

[5] The project is fully zoned and permitted for construction of an 85-story retail and condominium complex planned for the corner of Yonge St. and Gerard in downtown Toronto. Substantial pre-sales have been made. Demolition of the old structures and shoring up of the excavation have been largely completed. Unfortunately, things ground to halt in March of 2020 and the project has been stuck in the "hole in the ground" stage ever since.

The project ownership structure

[6] YP GP has a General Partner with nominal capital and a nominal interest in the limited partnership. The "equity" in the partnership effectively resides in the "A" units with approximately $14.8 million in capital but a capped right to return on that capital equivalent

to interest (12.25% per year rate of return) and the “B” units who alone receive all of the residual profits from the project without limit.

[7] The owner of the “B” units and the General Partner are under common control within the Cresford group of companies as are the parties recorded as payees of the $38.3 million related party debt to which I shall refer.

The project debt structure

[8] The secured debt – including registered mortgages and construction liens – stands at about $160 million. The figure for secured debt is slightly misleading. There is just over $100 million in deposits from condominium pre-sales made for the most part prior to 2019. These are insured by the second secured creditor whose claim would increase dollar for dollar if the relevant purchase agreements were repudiated and the deposits had to be returned. For this reason and to have an “apples to apples” idea of the debt structure, a figure of about $260 million in secured debt is appropriate.

[9] The third-party unsecured debt that has been identified by the Trustee is in the range of approximately $20 million plus or minus a few million dollars depending upon reserves allowed for claims yet to be filed or finalized. There are also various litigation claims outstanding the largest of which is from a former officer claiming that the limited partnership was a common employer and seeking, among other things, to enforce oral profit-sharing agreements. I have reviewed the Trustee’s report and in particular the Trustee’s reasoned conclusion that these claims are too contingent to be considered valid for voting purposes. I concur in that assessment. A conservative and prudent assessment of potential total unsecured claims is thus in the range of about $25 million – a figure advanced with full knowledge that the total of all contingent claims identified could be in the same order of magnitude again. For the purposes of this motion, I find the figures estimated by me above are reasonable – those findings are, of course, without prejudice to the creditors holding such claims proving them in due course.

[10] There is also $38.3 million in outstanding advances to YG LP recorded on its books from related parties. I have found those claims to be equity claims for all purposes relevant to this hearing for reasons I shall expand upon below.

[11] In round figures, one can thus consider there to be approximately $260 million of secured debt and about $20-$25 million of unsecured debt outstanding. The Proposal assumes all of the former and would pay 58% of the latter when finalized. The “fulcrum” stakeholders in this case are thus the unsecured creditors to the extent of the 42% of their claims that are compromised ($8.4 to $10.5 million) plus the “A” limited partners in YG LP ($14.8 million plus accrued “interest” entitlements) – such figures based upon the estimates and rulings that I have made and explained herein.

Summary of nine findings made

[12] The process of sifting through the mountains of evidence presented to me by the parties has been made exceptionally time-consuming and tedious by reason of the lack of usable electronic indexing in much of the materials filed. Tabs or electronic hyperlinks within compilations of electronically filed documents are non-existent in all but the most recently filed documents and there are many, many thousands of pages of documents presented. The profession is going to need to get on top of this problem as judges cannot and will not in future undertake such gargantuan efforts to sift through a case when a few moments of care and attention at the front end could simplify it to such a great degree.

[13] Time does not permit me to set forth in writing a complete account of my review of the evidence and my conclusions – a written summary of which I was about 75% through before the impossibility of completing it in the form intended within the time available became obvious. I shall instead present below nine conclusions which encapsulate my reasons for finding that the Proposal as it currently stands has failed to satisfy me of the matters required by s. 59(2) of the BIA or the common law test of good faith.

(i) The McCracken Affidavit is inadmissible

[14] As is often the case in Commercial Court matters, this case proceeded on a "real time" schedule. In addition to the bankruptcy case that was commenced with an NOI filed on behalf of the debtors on April 30, 2021, there were two applications commenced the day before by two groups of YG LP limited partners seeking, among other things, the removal of the General Partner and various declarations challenging the authority of the General Partner to act on behalf of the partnership in any capacity and alleging breaches of fiduciary duty by the General Partner. The Proposal itself was filed on May 27, 2021 working towards a scheduled June 10, 2021 creditor meeting. On June 1, 2021 I issued directions for the conduct of all three proceedings with a view to having the sanction hearing ready to proceed on June 23, 2021.

[15] The Proposal Sponsor is Concord Properties. Concord is not a party to any of these proceedings although it is central to all three. Concord sponsored the Proposal and is bearing all the costs of it under a Proposal Sponsor Agreement dated April 30, 2021.

[16] The limited partner applicants issued subpoenas to Mr. McCracken – apparently the officer of Concord responsible for this Proposal. On the advice of counsel, Mr. McCracken declined to appear absent an order compelling him to do so. Counsel took the position that leave was required under the Bankruptcy Rules to compel him to appear in the bankruptcy proceeding and declined to produce him.

[17] The position taken was a curious one given my specific direction on June 1 that I was *not* applying the BIA stay to the two applications and that specific aspects of both

applications would be heard and decided together on June 23, 2021 when the fairness hearing was conducted. The case timetable made specific allowances for responding records with respect to the limited partner applications and facta in relation to them. My ruling on June 1, 2021 was in both the civil and bankruptcy proceedings and bore the style of cause of both.

[18] Whether leave was or was not formally required to *compel* Mr. McCracken to appear, his failure has consequences in terms of the fairness of the process leading to the approval motion in front of me. The opponents of the Proposal were deprived of the opportunity to explore aspects of the unfairness or unreasonableness of the Proposal that they had raised. There was insufficient time available in the tight timetable to drop everything and bring a leave application. The position taken ran utterly contrary to the spirit and intent of my ruling on June 1, 2021 at which Concord's counsel appeared *and made submissions*. This is the sort of issue that counsel applying the "three C's" of the Commercial List ought to have agreed to disagree upon and produced the witness without prejudice to objections that might be raised.

[19] It is against the foregoing backdrop that the affidavit of Mr. McCracken – delivered the day prior to the fairness hearing – must be considered.

[20] The affidavit was filed far too late to permit any interested party to respond to it effectively or to cross-examine upon it. None of the subject-matter of the affidavit was new information. The affidavit was entirely devoted to providing responses to various issues seen in written arguments or that arose on the cross-examination of other witnesses.

[21] Concord appeared to consider itself sufficiently at interest to appear through counsel on June 1, 2021 while declining to submit to examination because of its non-party status when preparations for this hearing were in full swing a few days later. Permitting the admission of this affidavit at this juncture would be to sanction unfairness of the highest order. A timetable was worked out for the hearing of this motion – worked out, I might add, at a motion that Concord was present at through counsel. Whether or not Concord had the *right* to insist upon a further motion to compel its attendance during the pre-hearing procedures, it certainly knew that taking that position when there was no time available to challenge it in court would have the practical effect that it did.

[22] Lying in the weeds is a strategy, but it does not confer the right to spring out of them at will. I find the McCracken affidavit to be inadmissible and attach no weight to it.

(ii) No weight can be attached to the CBR April 2021 Appraisal

[23] The parties have very hotly debated the valuation evidence that is on the record before me. A portion of that valuation evidence has been sealed. My reason for doing so is straightforward: the approval of the Proposal cannot be taken for granted and it is thus

reasonably foreseeable that the project may have to be sold by a Trustee or Receiver in the near future and the ability of whichever court officer is charged with undertaking that sale to achieve the highest and best price available ought not to be impaired more than the circumstances already have by the disclosure of appraisals that may serve to skew market expectations. A significant portion of such evidence is part of the public record and between the public information and the use of carefully-framed circumlocutions I believe that I can convey my conclusions and reasons for them regarding the valuation evidence with reasonable clarity.

[24] Two of the appraisals before me, both from CBRE, are the most central to the questions I must determine. The first in time is dated August 8, 2019 providing CBRE's opinion of value as at July 30, 2019. This appraisal was prepared for the parent company of the debtors within the Cresford group and is based on the particular assumptions set out therein, including some supplied by Cresford. The second in time, also by CBRE, is dated April 30, 2021 as of March 16, 2021. This latter appraisal was prepared for Concord based on the assumptions set out therein, including some supplied by Concord. I shall not discuss in a public document the actual appraisal amounts in either, focusing instead on the differences between them.

[25] For present purposes, it is sufficient for me to observe that the 2021 CBRE appraisal is lower than the 2019 CBRE appraisal and lower by an amount that is significantly higher than the sum of the compromised amount of unsecured claims under the Proposal plus the total capital of the "B" unitholders in YG LP.

[26] I find that I can attach little weight to the 2021 CBRE appraisal in these circumstances because:

a. The assumptions given to CBRE by Concord were materially different than those used in the 2019 CBRE appraisal including as to such things as leasable square footage of residential and retail space;

b. When it formulated the instructions to CBRE, Concord was in the process of attempting to negotiate a Proposal to acquire the property through the bankruptcy process given lack of limited partner consents and was being commissioned at a time when Concord had a clear and obvious interest in having appraisal evidence suggesting that the project was at least partly underwater;

c. The downward alterations made by Concord to the square footage assumptions used by CBRE are unexplained, untested and appear to be admitted as having been quite preliminary at all events;

d. Concord did not submit Mr. McCracken to cross-examination to examine in depth the reasons for the significant negative difference between the two instructions given to CBRE on the conflicting appraisals;

e. The differences between the two have not been reasonably or adequately reconciled. There has been no general downward correction to residential real estate in Toronto that has been brought to the court's attention nor can the difference between the two appraisals reasonably be attributed solely to pandemic-induced alterations to the retail environment.

(iii) ALL Construction Lien Claims are Unaffected Creditors under the Proposal

[27] Under the Proposal, Construction Lien Claims are defined as "Unaffected Creditors". The Trustee indicates that the total amount of such claims is $11.865 million. Of this total, fifteen lien claimants with $9.19 million in lien claims outstanding entered into assignment agreements with the Proposal Sponsor. As these are non-voting Unaffected Creditors under the Proposal, Concord required them to file claims as Affected Creditors in order to acquire the right to vote and to name a proxy designated by Concord.

[28] There was some controversy about what precisely the lien claimants received in return for agreeing to convert claims that were to be paid $1.00 per $1.00 of valid claims under the Proposal into claims receiving no more than $0.58 per dollar of claim value. The Trustee-reported second-hand information from Concord denying any "side" deals does little to address this concern. Assurances as to the lack of a side deal do not serve the purpose of permitting a reasonable understanding of the main deal. None of them have been disclosed beyond a skeletal summary and Concord declined to permit a representative to be examined prior to the hearing.

[29] It is of course open to the Proposal Sponsor to make any proposal that satisfies the formal requirements of the BIA if the debtor is prepared to adopt it and submit it to the creditors and the creditors are willing to accept it with their eyes open. In this case however the Proposal Sponsor has induced $9.19 million of otherwise Unaffected Creditors to file claims as something they are not by definition (i.e. Affected Creditors) thereby effectively reducing the size of the cap from $65 million to $55.8 million and the maximum pool of funds available to the actual Affected Creditors described by the Proposal from $37.7 million to $32.4 million. These are material changes impacting all Affected Creditors that follow from arrangements made by the Proposal Sponsor outside the terms of the Proposal.

[30] The Proposal makes no provision for creditors "downshifting" their claims voluntarily. Lien claims are defined as "Unaffected Claims" and I see no basis for them to be accepted under the Proposal on any other basis particularly where doing so operates to the obvious detriment of the affected class members. This is not a case of a

secured creditor valuing its security and filing an unsecured claim for the shortfall. There are consequences to such a valuation exercise that are absent here.

[31] The "electing" lien claimants have little in common with the actual Affected Creditors who had no election to make. Despite having made the election, assuming there was any basis in the Proposal to make such an election (and it appears to me that there was not), such creditors retained their security intact. Pursuant to art. 9.01 of the Proposal, the Proposal would have "no effect upon Unsecured Creditors" which definition does not cease to apply to them by virtue of a make-shift "election" for which the Proposal makes no provision. They did not agree to surrender their security nor even to value it in the bankruptcy process. They agreed to sell their claims on whatever terms they chose to accept from the Proposal Sponsor secure in the knowledge that if, for any reason, the Proposal does not move forward, their security remains intact and unaffected.

[32] This is an element of unfairness in this that I find particularly disturbing. It is all the more disturbing when I am not at all persuaded that the unsecured creditors face the spectre of near certain annihilation in the event of a bankruptcy or receivership but face the very real prospect of additional and illegitimate dilution of their claim value were I to approve the Proposal as presented with the presence of lien claimants in the Affected Creditor pool.

(iv) The related party claims must be treated as equity

[33] A fundamental principle of the BIA is that equity claims are subordinate to debt claims. This principle is voiced in s. 60(1.7) of the BIA that provides quite simply that "[n]o proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid". Section 140.1 expresses a similar requirement in respect of dividends more generally. While there is some similarity behind the concept of "equity claims" in Canadian insolvency law and that of "equitable subordination" the two are separate and one and must not be confused with the other: *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662 (CanLII) at para. 101.

[34] The limited partner applicants submit that the intercompany advances appearing in the general ledger of YG LP should be treated as equity claims within the meaning of the BIA. The debtors on the other hand urge me to pass over this issue entirely arguing that approval of the proposal does not entail approval of any payment of intercompany claims. Such claims will ultimately be determined by the Trustee and if disallowed for any reason will receive no distribution.

[35] I cannot accept the debtors' argument that I should sweep the equity claims under the carpet to be dealt with another day in another forum. This is so for the following reasons:

a. The applicant limited partners have no standing to challenge the proof of the related party claims within the bankruptcy process even if their claims against related parties are not themselves released by the Proposal.

b. On June 1, 2021 I directed that issues raised in the two applications would be dealt with on June 23. A theme in those applications was, among others, the allegation that the General Partner had been seeking to divert substantial payments to Cresford from various investor proposals negotiated by the Cresford group ahead of limited partners, the allegations that representations had been made in the Subscription Documents and elsewhere that Cresford entities would be paid out of distribution after the "A" unit limited partners, that counsel for Cresford had confirmed that the intercompany loans were subordinated to the limited partners, that the General Partner had acted in breach of its fiduciary duties and that the Proposal was not being advanced in good faith; and
c. The timetable I approved on June 1 specifically contemplated the foregoing aspects of those applications being dealt with on June 23, 2021.

[36] If the related party claims are equity claims under the BIA, then it is also highly likely that the notional purchase price for the project being paid by the Proposal Sponsor under the Proposal must be viewed as being $22 million less than it might otherwise appear, a fact that is also material to the matters I must consider on this motion.

[37] The allegations of the applicant limited partners in the two outstanding applications challenge the good faith with which the Proposal has been advanced by the General Partner in part on the theory that the Proposal has in fact been advanced to secure payment of the related party claims in priority to the "A" unitholders and without securing their consent.

[38] For the foregoing reasons, I cannot avoid a consideration of whether the related party claims are equity claims. My conclusions on that subject are an integral part of any conclusion I must make on the subject of good faith or the criteria to be considered under s. 59(2) of the BIA.

[39] Are the related party claims identified by the Trustee in this case "equity claims"?

[40] The BIA contains a definition of "equity claims" that is deliberately non-exhaustive. In *Sino-Forest Corporation (Re),* 2012 ONCA 816 (CanLII) (at para. 44) the Court of Appeal found that the term should be given an expansive meaning to best secure the remedial intentions of Parliament.

[41] Subsequent cases have explored the concept of "equity claim" with a view to fleshing out its parameters. Some of the guidelines that can be distilled from that jurisprudence include the following:

a. Neither the "intention of the parties" as between non-arm's length parties nor the formal characterization they apply is conclusive as to the true nature of the transaction: *Tudor Sales Ltd. (Re),* 2017 BCSC 119 (CanLII) at para. 35 and *Alberta Energy Regulator v Lexin Resources Ltd*, 2018 ABQB 590 (CanLII) at para. 37.

b. The manner in which the transaction was implemented, and the economic reality of the surrounding circumstances must be examined to determine the true nature of the transaction with the form selected being merely the "point of departure" of the examination: *Lexin* at para. 37.

c. It is helpful to consider whether the parties to the transaction had a subjective intent to repay principal or interest on the alleged loan from the cash flows of the alleged borrower and, if so, was that expectation reasonable: *Lexin* at para. 41.

d. It is also helpful to consider the "list of factors" that courts have looked at in such cases – being careful not to apply them in a mechanical way or as a definitive checklist: *Lexin* at paras. 42-43.

e. Among the factors to examine are:

    i. the presence or absence of a fixed maturity date and schedule of payments (absence of such terms being a potential indicator of equity);

    ii. the presence or absence of a fixed rate of interest and interest payments. Again, it is suggested that the absence of a fixed rate of interest and interest payments is a strong indication that the advances were capital contributions rather than loans;

    iii. the source of repayments. If the expectation of repayment depends solely on the success of the borrower's business, the cases suggest that the transaction has the appearance of a capital contribution;

    iv. the security, if any, for advances; and

    v. the extent to which the advances were used to acquire capital assets. The use of the advance to meet the daily operating needs for the corporation, rather than to purchase capital assets, is arguably indicative of bona fide indebtedness: Lexin at paras. 42-43.

[42] The related party claims may be broken down into different buckets for the purposes of this analysis. The first one consists of payments that were made to retire loans taken out for the specific purpose of financing equity interests in YG LP. This

involved loans used to buy out the $15 million investment of a former limited partner, loans used to finance the Cresford group of companies' $15 million equity investment in Class B units as well as interest paid on both of these loans some or all of which has been recorded as obligations of YG LP on its books.

[43] Clearly advances made or charged to YG LP for the direct or indirect purpose of financing the purchase of an equity interest in YG LP are likely to the point of certainly to be characterized as equity claims of YG LP for the purposes of insolvency law. The evidence to this point supports the reasonable inference that a very substantial portion of the advances charged to YG LP by non-arm's length parties can be so characterized.

[44] A second category of advances made can only be described as "miscellaneous" comprised of various sporadic payments made by members of the Cresford group of companies that were recorded in the ledger of the limited partnership net of other payments made by the limited partnership to the Cresford group.

[45] The terms of the intercompany advances recorded on the general ledger of the limited partnership share the following characteristics:

a. They were all non-interest bearing without any defined term or maturity date; and

b. There are no loan documents evidencing any of them.

[46] Such payments as there were from YG LP on account of these advances were sporadic. The nature of the YG LP project is such that there is no cash flow nor any expectation of cash flow being available to repay the intercompany advances recorded until project completion when deposits and sales proceeds become available. The evidence does not suggest that intercompany advances were primarily short-term bridge advances pending the receipt of project financing that was to be used to repay them.

[47] There is substantial evidence that the related party advances were intended to be subordinated to holders of "A" units of YG LP and are thus equity claims. In the interest of time, I shall only summarize this evidence:

a. Direct written representations were made to the investors in YG LP "A" units as part of the subscription process that after payment of "project expenses" only "external lenders" debt would be repaid ahead of them and that distributions to "Cresford" – unambiguously referencing the group of companies rather than one entity – would come after repayment of invested capital and the agreed return on investment to the limited partner investors;

b. Cresford's communications to the limited partners never disclosed the existence of any "debt" owed to Cresford even when portraying "current debt" in various discussions with or disclosures made to them until very

recently (and long after the advances in question were recorded on YG LP's books);

c. Other Cresford group projects with similar capital structures also made representations that intercompany advances were treated as equity;

d. There was a direct, written representations made by prior counsel to the General Partner in October 2020 that such intercompany advances were "subsequent in priority" to the YG LP "A" unit investors – that admission has since been retracted without an adequate explanation for why it was an alleged error; and

e. Cresford's CFO also advised that the YG LP "A" unitholders would be paid in priority to "Cresford" a term used to describe the related group of Cresford companies under common control.

[48] A review of the foregoing factors in light of the jurisprudence leads me to the conclusion that the related party advances must be considered as equity claims for the purposes of this motion at least. Virtually all indicators reviewed point towards equity and there is little to no evidence leaning the other way.

(v) The implied value of the Proposal is $22 million less than assumed

[49] The Proposal operates to reduce the payments made to unsecured creditors if claims are lower than the $65 million cap. The converse is not the case. Absent the lien claims and the intercompany claims there is no mathematical prospect of the $65 million cap being operative unless the contingent and late-filed claims are resolved at levels far in excess of any reasonable estimate. This means that the consideration paid by Concord under the Proposal must be considered to be worth $22 million less than it might have been had the related party claims not been equity claims.

(vi) The general partner had authority to file the NOI

[50] The two groups of limited partners have raised three broad categories of objections to the capacity of the general partner to have filed the NOI and sought approval of the Revised Proposal: (i) as a matter of law, all partners including limited partners, must approve filing for bankruptcy; (ii) pursuant to the Limited Partnership Agreement, the general partner lacked the authority to file for bankruptcy; and (iii) the general partner ceased to be general partner prior to the filing. I shall consider each of these in turn.

S. 85(1) of the BIA

[51] Section 85(1) of the BIA provides that it "applies to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general

partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee.”.

[52] The limited partners’ position was that since all partners of a general partnership must authorize a bankruptcy filing and since s. 85(1) of the BIA applies the law in relation to general partnerships to limited partnerships in “like manner”, it follows that an NOI must be authorized by all limited partners in addition to the general partner. In support of this interpretation they cite the case of *Aquaculture component Plant V Limited Partnership (Re)*, 1995 CanLII 9324 (NS SC) where two NOI’s filed on behalf of limited partnerships were annulled on this basis.

[53] While the decision of Hamilton J. in the *Aquaculture* case is entitled to deference, it is not binding upon me. I find that I am unable to agree with its reasoning.

[54] The *Aquaculture* case stands quite alone in the jurisprudence on this topic – alone in the sense that none appear to have followed *or* disagreed with it as far as the research conducted by the parties has been able to determine. In the 26 years since it was decided, a significant number of limited partnerships have passed through our bankruptcy courts either for proposals or liquidations without apparent objection on this score. That practice of course does not have the effect of altering the law but it is at least a factor to consider given the number of times since then that Parliament has examined the BIA including with the addition of s. 59(4) that authorized changes to the constating documents of a debtor including a limited partnership.

[55] I reach a different conclusion than was reached in *Aquaculture* for the following reasons:

a. The use of general “in like manner” language in s. 85(1) of the BIA is intended to ensure that the provision is interpreted consistent with the objects of the BIA and not in a manner as to defeat those objects or render the benefits of the BIA largely inaccessible to limited partnerships. The procedure for filing an NOI was intended to offer debtors a swift and relatively low cost means of seeking creditor protection after a secured creditor gives the required ten-day notice of its intention to enforce. Requiring unanimous consent for filing of an NOI would have the practical effect of making the benefits of bankruptcy law unavailable to limited partnerships in practice in a large number of cases. Limited partnerships often have large numbers of limited partners and the time required to convene a meeting and obtain unanimous consent would require more time than secured creditors are required by law to give in the way of notice.

b. Provincial law generally provides that only general partners may bind a limited partnership (in Manitoba, s. 54(1) of the *The Partnership Act*, CCSM c P30) and the BIA treats partnerships and limited partnerships as a full

"debtor". The policy behind requiring all *general* partners to authorize a bankruptcy filing is obvious – all are liable without limit for the liabilities of the partnership. The same is not the case with a limited partnership.

c. Section 59 of *The Partnership Act* also provides that actions or suits in relation to the limited partnership may be brought and conducted by and against the general partners as if there were no limited partners. This too supports the proposition that the consent of limited partners is not required for the filing of an NOI on behalf of the partnership.

[56] I find that s. 85(1) of the BIA did not require the asset of each limited partner to the filing of an NOI.

[57] The limited partners also pointed to provisions of the Limited Partnership Agreement to allege that the General Partner had automatically ceased to be general partner of the partnership by reason of certain actions or that that it lacked the authority to file on behalf of the partnership.

Did the General Partner cease to be a general partner of YG LP at any time?

[58] The Proposal Sponsor Agreement is dated April 30, 2021 and was entered into between Concord as Proposal Sponsor and YG LP acting through the General Partner. It was executed prior to filing the NOI but *after* the two limited partner groups had filed their separate applications seeking, among other things, to remove the General Partner. To the extent it is relevant, there can be no question but that Concord was aware of the terms of the Limited Partnership Agreement at all relevant times when negotiating and entering into the Proposal Sponsor Agreement.

[59] Pursuant to s. 1.1 of the Proposal Sponsor Agreement, YG LP agreed to "use commercially reasonable efforts to effect a financial restructuring of [YG LP] that will result in the acquisition of the Property by the Proposal Sponsor together with [YG LP's] rights, title and interests in and to such Project-related contracts as may be stipulated". A draft of a proposal, substantially similar to the Proposal before this court for approval, was appended as a schedule to the Proposal Sponsor Agreement. The agreement was signed by Mr. Daniel Casey on behalf of each of the Cresford companies named as parties including YG LP.

[60] Section 10.14 of the YG LP Limited Partnership Agreement provides that "None of the following actions shall be taken unless it has *first* been approved by Special Resolution: (a) approving or disapproving the sale or exchange of all or substantially all of the business or assets of the Partnership"(emphasis added).

[61] The Proposal contemplated by the Proposal Sponsor Agreement clearly provides for the sale or exchange of all or substantially all of the business or assets of the Partnership. Section 1.1 of the Proposal Sponsor Agreement obliged YG LP to "use

commercially reasonable efforts" to cause this to occur, including by filing the NOI and to requesting court approval of the Proposal. As obliged by the Proposal Sponsor Agreement, YG LP filed an NOI, filed the Proposal and subsequently sought court approval of the Proposal.

[62] Entering into the Proposal Sponsor Agreement constituted the "approval" of YG LP to the sale or exchange of all or substantially all of the business or assets of the Partnership" even if approvals of other parties were also required in order to *complete* the transaction. The prohibition in art. 10.14(a) attaches to the approval of the action and not its completion.

[63] Section 7.1(c) of the Limited Partnership Agreement creates an Event of Default if the General Partner "becomes insolvent … consents to or acquiesces in the benefit of [the BIA]". By filing the NOI as a general partner of YG LP, the General Partner necessarily admitted to being insolvent at the time the NOI was filled out. There is no evidence that such state of insolvency arrived suddenly that day. The General Partner has accordingly admitted to the existence of an insolvency default under s. 7.1(c) of the Limited Partnership Agreement at some time prior to filing the NOI failing which no NOI would have been possible. By signing the Proposal Sponsor Agreement and agreeing to file the NOI to advance the Proposal, the General Partner also consented to the receiving the benefit of the BIA proposal provisions.

[64] For all of the foregoing reasons, the signing of the Proposal Sponsor Agreement amounts to an admission of further breaches of the Limited Partnership Agreement.

[65] Do such breaches entail the automatic removal of the authority of the General Partner to act as such at the time the NOI was actually filed? The answer in my view is that none of them have that effect.

[66] Section 11.2 of the Limited Partnership Agreement concerns the removal of the General Partner. Pursuant to s. 11.2(a), the General Partner "'may be removed" by a court of competent jurisdiction on certain named grounds. That has not occurred. Section 11.2(b) provides that the General Partner "shall cease to be general partner" if any of the named events occurs. None of the agreement to file an NOI, the state of being insolvent or the signing of the Proposal Sponsor Agreement can be read to be included in the list of events listed in s. 11.2(b). The *aftermath* of the filing of the NOI may well be such a trigger but the answer to that question would require me to contend with the effects of the automatic stay which has not been raised before me.

[67] Accordingly, I find that the NOI filed by the General Partner was not void or subject to any similar infirmity. The foregoing conclusion refers only to the actual filing of the NOI and specifically does not apply to the breaches of the Limited Partnership Agreement consequent upon entering into the Proposal Sponsorship Agreement discussed above.

(vii) The Proposal was the product of a flawed process and breaches of fiduciary duty by the General Partner

[68] There are two aspects to this part of the objections raised by the objecting limited partners. First, it is alleged that during the year leading up to the Proposal Sponsor Agreement, the General Partner breached its fiduciary duty to act in the best interests of the partnership by seeking to advance the interests of non-arm's length parties to the detriment of the limited partners while simultaneously frustrating every effort of the limited partners to access the information that the Limited Partnership Agreement and the Manitoba *Partnership Act* gave them the rights to see. Second, it is alleged that negotiating and entering into the Proposal Sponsor Agreement was a breach of fiduciary duties of the General Partner in that this was nothing less than deliberately negotiating and entering into an agreement to breach the Limited Partnership Agreement.

[69] As the sole general partner of YG LP, the General Partner was responsible for the management of the affairs of the limited partnership and was the only one able to bind the partnership. The General Partner owed a fiduciary duty to all of the partners of the firm in discharging that role and pursuant to s. 64 of *The Partnership Act*, is liable to account, both at law and in equity to the limited partners for its management of the firm.

[70] As I have outlined above, entering into the Proposal Sponsor Agreement was a clear violation of s. 10.14 of the Limited Partnership Agreement as it agreed to a process whereby substantially all of the property of the firm would be conveyed to a third party without the assent of the limited partners. The fact that the BIA stay of proceeding may impede or prevent the limited partners from seeking a direct remedy for that breach when the agreement was subsequently put into action by filing the NOI does not detract from the existence of a present breach the moment pen was put to paper. Further, whether the negotiations of the Proposal Sponsor Agreement consumed two weeks or two months, it was a breach of fiduciary duty to plan and then put into execution a deliberate breach of the Limited Partnership Agreement and doing so in the teeth of a pending application to stop the General Partner adds further weight to that conclusion.

[71] The debtors suggested that being in the proximity of insolvency dissolved or altered the fiduciary duties of the general partner owed to the limited partners. It is true that the law recognizes that the interests of creditors assume a greater weight the closer to insolvency the enterprise approaches. None of this dissolves the fiduciary obligations of the General Partner so much as it adds to them. It is at this point that the other aspect of the complaint of the limited partners enters the analysis.

[72] Nothing in what I have written suggests that a general partner cannot file an NOI where doing so appears on all of the facts and in the good faith exercise of the best business judgment of the general partner to be in the best interests of the enterprise as a whole to do so – a judgment that necessarily accounts for the obligations of the firm owed to its creditors.

[73] This filing was different because it came with strings attached: a binding Proposal Sponsor Agreement that granted exclusivity to a single party and obliged the General Partner to pursue one path and one path only to emerge from the process. Those strings did not get attached as a result of a process which itself discharged faithfully the fiduciary duties of the General Partner. Rather they were attached as the culmination of almost a year of battling to keep information away from limited partners that they had a right to access (in most cases at least) and the squandering of an expensively purchased window of restructuring breathing room looking not for the solution best able to discharge all of the obligations of the partnership but rather looking for the investor best able to secure the optimal outcome for the Cresford group of companies generally. In that process the limited partners were an obstacle to be circumvented and bankruptcy provided a possible key.

[74] Good faith in such circumstances is not assumed but must be shown. The evidence presented to me has rather persuasively convinced me that good faith took a back seat to self-interest.

[75] The parties have expended considerable effort in outlining the details of what occurred in that time frame. In the interests of time, I shall summarize the important take-aways from those events:

a. Until the Proposal Sponsor Agreement and the April 2021 CBRE report prepared for Concord, *all* appraisal evidence showed a profitable project likely to result in full coverage for all of the outstanding third-party debt obligations plus all of the obligations owed to limited partners;

b. The General Partner presented two potential transactions to the “A” unit limited partners in the second half of 2020 that provided for the full payment of all debt, the payment of approximately $38 million to non-arm’s length parties related to the General Partner and payment of obligations owed to the limited partners at a discount – the latter of the two proposals emanated from Concord;

c. The two proposals failed to proceed primarily because the General Partner was unable to provide a satisfactory explanation as to why Cresford related parties were to receive a substantial payment when limited partners were asked to accept a compromise the obligations due to them and limited partners had been assured that Cresford group obligations ranked behind them both when they made their investment and as late as October 2020 in a letter from counsel the debtors; and

d. The limited partners were in a continual tug-of-war trying to pry information out of the General Partner having had to resort to a court order at the

beginning of this year to obtain access to information that should have been available to them as of right.

[76] Few things are more precious in the restructuring business than time. YG LP was able to "purchase" more than a year of time with the forbearance arrangements that it worked out. That precious time appears to have been devoted solely to finding transactions that offered the greatest level of benefits for the Cresford group of companies. There is no evidence that any canvassing of the market – however constrained the market of developers capable of undertaking the completion of an 85-story mixed use tower in downtown Toronto may be – took place that was not indelibly tainted by the imperative of finding value for the Cresford group of companies rather than for the partnership itself.

(viii) The Affected Creditor vote was unanimous

[77] Despite the fact that I have found that fifteen of the forty-six votes cast in favour of the Proposal ought not to have been considered because they came from Unaffected Creditors, that determination does not impact the conclusion of the Trustee that the required statutory majorities voted in favour of the Proposal. There was but one negative vote cast and the Trustee disallowed that vote as being contingent. I have reviewed the Trustee's reasons for so ruling and find no fault with them. The removal of fifteen creditors and just over $9 million in claims does not detract from the fact that thirty-one creditors holding approximately $9 million in other claims cast votes in favour.

[78] While I am prepared to consider to some degree the impact of the assignment agreements negotiated by Concord (see below), I do not view such agreements as impacting the formal validity of the votes cast.

[79] I find that the Proposal received the required majority of two-thirds in value and over 50% in number of creditors voting in person or by proxy.

(ix) The probative value of most of the Affected Creditor vote is attenuated

[80] In the normal course, the agreement of a broad group of creditors to accept less than 100% of what they are owed is cogent evidence of the fairness and reasonable nature of a proposal. This is so as a matter of common sense and by a very long tradition in our law. It is not an indicator lightly to be ignored.

[81] I must also recognize that whatever doubts the evidence may raise as to the insolvency of the debtors in terms of the realizable value of their assets, there can be little doubt that the liquidity test for insolvency is met. The lien claimants have been unpaid for a year or more without any formal forbearance agreement. The first mortgagee has entered into a forbearance agreements but this expires on June 30, 2021.

[82] There was a window of time to find an out-of-court solution, but it would appear that the debtors have squandered it.

[83] The vote of the Affected Creditors *is* probative of fairness, but I find that its weight is attenuated in this case by the following circumstances:

a. Only a relatively small minority voted who did not also enter into assignment agreements;

b. The evidence is equivocal about precisely what consideration was received by those who entered into such assignment agreements – a relayed denial of "side-deals" without more adds little to the equation particularly when the deal itself is not disclosed;

c. Clearly if assigning creditors received or stand to receive more than the value allocated to them under the Proposal, their positive vote says little about the business judgment of the creditors at large to accept the value offered to satisfy their claims but says more about the willingness of the Proposal Sponsor to pay more than has been reflected in the Proposal itself.

d. This last-in-line class of creditors did not have available to it the range of information produced in connection with this approval motion.

Disposition

[84] I will not approve the Proposal in its present form. I have concluded that, as presented, the Proposal is not reasonable, it is not calculated to benefit the general body of creditors and there are serious issues regarding the good faith with which it has been prepared and presented by the debtors. The debtors and the Proposal Sponsor have the authority under art. 3.06 of the Proposal to amend the Proposal to address the concerns I have raised. It is up to them – with the approval of the Trustee – to do so if they are so inclined.

[85] I am directing the parties to return on Wednesday June 30 at 2:15 pm either to propose amendments to the Proposal that address the concerns I have raised in a substantive way or to address next steps.

[86] These written reasons expand upon the summary reasons I presented orally in a hearing on June 29, 2021. I have released these reasons with relatively little opportunity to proof them and correct typographical errors or minor nits or stylistic glitches. I shall do so over the next week when I have more time available to me and the capacity to call upon my able assistant Ms. Daisy Ng to assist in that effort. Accordingly, I shall be releasing an amended version of these reasons over the course of the next week with such minor and non-substantive corrections.

_____

S.F. Dunphy J.

Date: June 29, 2021

The foregoing is the corrected text of my reasons. Orphaned words have been removed or obvious missing words restored along with corrections of minor errors only. The parties have received a blackline version to compare the changes. Since releasing these reasons, I have adjourned the hearing scheduled for June 30, 2021 at 2:15 until July 9, 2021 at 10:00am. In so doing, I issued the following additional directions:

> As KSV Restructuring Inc. ("KSV") will become the bankruptcy trustee and court-appointed receiver on July 9, 2021 if no satisfactory amended proposal is approved at that time, this Court hereby authorizes and directs KSV to undertake the steps towards formulating a sales process that it would be undertaking if it had been appointed the receiver today.
> KSV's costs of doing so from July 1, 2021 shall be deemed costs of the receiver upon the granting of a receivership order on July 9, 2021 failing which all such costs will be deemed to be costs of the Proposal Trustee in the proposal proceeding.

Issued: July 2,2021

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S.F. Dunphy J.

TAB 2

Consolidated Court File No.: 31-2734090
DATE: 20210601

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. APPLICATION UNDER THE BANKRUPTY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

BEFORE: S.F. Dunphy J.

COUNSEL: *Shaun Laubman and Sapna Thakker* Lawyers for the Moving Parties, 2504670 Canada Inc ., 8451761 Canada Inc ., and Chi Long Inc.

Alexander Soutter Lawyers for the Moving Parties Yonge SL et al.

Harry Fogul, Lawyers for YG Limited Partnership and YSL Residences Inc.

David Gruber Lawyers for Plan Sponsor Concord Properties Development Corp.

Bobby Kaufman and Mitch Vininsky for Proposal Trustee KSV Restructuring Inc.

Robin Schwill for KSV Restructuring Inc.

James W. MacLellan for Sureties Aviva et al and Westmount

Jane Dietrich for Timbercreek Mortgage Servicing Inc. et al.

HEARD at Toronto: June 1, 2021

REASONS FOR DECISION

[1] These two similar motions were brought by two applicants who between them represent all or substantially all of the limited partners of YG Limited Partnership. The LP is in turn the object of a *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended proposal which is scheduled to be voted upon at a June 15, 2021 meeting of creditors and, if approved by them, submitted to the court for approval on June 23, 2021 at a scheduled sanction hearing.

[2] The motions before me seek to declare the *BIA* stay of proceedings to be inapplicable to the two applications discussed below or, in the alternative, to lift the BIA stay of proceedings to enable the two applications to proceed on a parallel track for a full hearing on June 23, 2021.

[3] While I was invited to make a ruling on the applicability of the *BIA* stay of proceedings to the two applications, I declined to do so. I shall leave for another day the question of whether the addition of s. 140.1 and s. 54.1 to the *BIA* in 2005 and 2007 had the result of including holders of equity claims in the definition of "creditor" or merely clarified the status of debt claims such as class action misrepresentation claims or contractual rescission claims whose origin lies in an equity interest. Whether the stay of proceedings is found to be inapplicable as a matter of law or whether I conclude that it should be lifted as a matter of equity and judicial discretion is a matter of legal but not practical interest. In either event, it is plain to me that the two applicants' arguments ought to be permitted a reasonable opportunity to be fleshed out and to be heard at the time the proposal is brought before the court for approval.

[4] The judge at a sanction hearing for a *BIA* proposal is always required to satisfy him or herself (i) that the application is procedurally sound in the sense that the statute and any relevant court orders relating to the approval process have been complied with; and (ii) that the proposal itself is fair and reasonable in all of the circumstances.

[5] The applicants raise grounds that – if established – would lead to the conclusion that either or both of the *BIA* Notice of Intention filed by the LP or the plan sponsorship agreement that forms the backbone of the proposed plan submitted to creditors for a vote were void. If true, there would be no proposal to approve. Further, they raise grounds that could lead to the conclusion that the plan itself is fundamentally unfair and unsound. Once again, if established, such grounds would be relevant to whether the judge at the sanction hearing can be satisfied that the proposed plan is fair and reasonable in all of the circumstances.

[6] The sanction hearing on June 23, 2021 is effectively the only opportunity the applicants will have to make their case. Deferring the hearing of their applications until after a potentially flawed or void proposal has been approved or implemented would be to deny them a hearing altogether. The arguments raised by them are neither spurious nor frivolous. I cannot purport to judge the merits of the claims at this early stage beyond concluding that they ought to be heard in the context of the sanction hearing on June 23, 2021.

[7] There is a difference between concluding that the two applicants need to be heard on June 23, 2021 and concluding that their applications ought to be heard in their entirety at the same time. A pragmatic approach is required to balance the competing interests, including those of creditors who may have a preference for even a flawed proposal over depending solely upon the tender mercies of a secured creditor initiating

its own realization process. There is only so much that can be accomplished in the time that is actually available. We must do the best we can do to be fair to all of the interests engaged in this process.

[8] The two applicants have initiated separate but largely identical proceedings against 9615334 Canada Inc. as general partner of the LP. At the risk of over-simplification, those two applications seek (i) an order that the general partner of the LP be removed from that role or a declaration that it has ceased to be general partner and can exercise none of the powers of a general partner over the LP; (ii) an order declaring that any agreements entered into by the general partner with the plan sponsor Concord are void; (iii) an order declaring the general partner to be in breach of the LP agreement; (iv) an order declaring the general partner to have breached its fiduciary obligations or its duty of good faith owed to the applicant limited partners; and (v) an order setting aside the NOI and the proposal as filed by the LP. One of the two applications (that of YongeSL et al) also has joined to it a request to appoint a Receiver on the grounds that it is just and convenient to do so.

[9] The primary relief sought on the two applications is (v) above. The applicants' position is that the NOI and the plan sponsorship agreement that underlies the proposal were filed or entered into by a general partner who had no authority to do so. The grounds for taking that position are the grounds for the relief sought in (i), (ii), (iii) and (iv). Those grounds are in turn based upon various provisions of the LP agreement that the applicants view as stripping the general partner of its authority to take certain steps (or to act as general partner) upon the happening of certain events including consenting to the appointment of a receiver or entering into the sponsorship agreement in relation to the plan.

[10] I am directing that the applicants should be entitled to seek to establish that the NOI is void or invalid by reason of the grounds alleged in support of the relief sought in (i) to (iv) above. In other words, the whole of both applications is not being heard on June 23, 2021 but so much of the grounds and evidence as are relevant to establish that the NOI and or plan sponsorship agreement are void shall be heard. Similarly, the alternative position of the applicants – that the grounds raised in support of invalidity are also grounds that justify exercising the discretion to reject the plan as unfair or unreasonable even if those grounds do not rise to the level of supporting a finding that the plan or the NOI itself are void – shall also be heard.

[11] I have passed over the claim of one of the applicants for a receiver purposefully. If the applicants are unable to establish that the NOI or the proposed plan are void and they are also unable to persuade the judge presiding over the sanction hearing to reject the proposed plan, the receivership application of YongeSL will be quite moot. If on the other hand the plan is not approved for any reason, then something of a vacuum would exist. The secured creditor Timbercreek has a pending application to enforce its security and to seek the appointment of a receiver that is currently scheduled for July

12, 2021. Timbercreek's counsel intends to file a short update affidavit for the June 23, 2021 sanction hearing and will be at the hearing for the purpose of alerting the court to its position should the plan not be approved for any reason. In that event, Timbercreek intends to ask the court to appoint a receiver either the same day or as soon after that date as is practicable. That position of course comes as a surprise to none of the parties nor should it. It is at least theoretically possible that the application by the LP unitholders for a receiver could have an object. In reality – given the volume of secured claims ahead of them – it is unlikely. That being said, I give them any necessary leave to proceed with that limited aspect of their application as well.

[12] In conclusion I am directing:

a. that the prayer for relief in paragraph 1(d) of the 2504670 Canada Notice of Application shall be heard in connection with the scheduled Sanction Hearing of the BIA proposal and that in connection with that hearing, the grounds cited in support of the relief sought in paragraph 1(a), (b), (e) and (f) thereof may be referred to (the same direction applying to the analogous prayers for relief in the YongeSL application);

b. both applicants shall also be heard on the question of whether the proposed plan is fair and reasonable having regard to their interests and to the grounds mentioned in the two Notices of Application; and

c. the YongeSL application to appoint a receiver will only be considered in the event that the plan is not approved for any reason but the hearing judge may decide to defer the hearing of that application in favour of hearing the application of Timbercreek to be heard prior to July 12, 2021.

[13] The parties have conferred on a case timetable needed to have all of these arguments placed in a coherent and developed way in front of the judge on June 23, 2021. That timetable is as follows:

June 7 - Cresford's Record with respect to the LPs' Applications

June 10 - LPs' Reply Records with respect to the LPs' Applications

June 11 - Cross examinations

June 16 - LPs' Factums with respect to the LPs' Applications

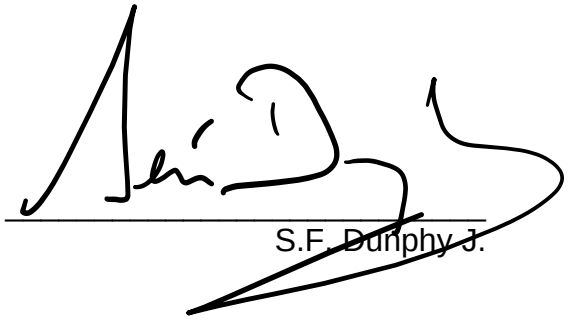
June 18 - Cresford's Factum re the LPs' Applications and Factum re BIA Proposal

June 21 - LPs' Reply Factums with respect to the LPs' Applications/Responding Factums with respect to the BIA Proposal

June 23 – Hearing

[14] I have given the parties directions regarding the conduct of the cross-examinations. Absent agreement to the contrary, the two applicants shall have a total of ½ day between them and the respondents to the applications (the GP) shall have ½ day.

[15] The parties are directed to adhere to the above timetable. Costs of these motions are reserved to be dealt with by the judge hearing these submissions on the merits at the sanction hearing.



S.F. Dunphy J.

Date: June 1, 2021

TAB 3

CITATION: YG Limited Partnership (Re), 2022 ONSC 6138
COURT FILE NO.: BK-21-02734090-0031
DATE: 20221101

SUPERIOR COURT OF JUSTICE – ONTARIO
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

RE: IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED
IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

BEFORE: Kimmel J.

COUNSEL: *Robin Schwill and Chenyang Li*, for the Proposal Trustee, KSV Restructuring Inc.

Jason Berall, for the Proposal Sponsor, Concord Properties Developments Corp.

Alexander Soutter, for Yonge SL LPs

Shaun Laubman, for Chi Long LPs

Mark Dunn and Sarah Stothart, for Maria Athanasoulis

HEARD: October 17, 2022

ENDORSEMENT
(FUNDING MOTION)

Overview

[1] YG Limited Partnership and YSL Residences Inc. (together, "YSL" or the "Debtor") filed Notices of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), which were procedurally consolidated pursuant to an Order dated May 14, 2021. The Debtor companies are special purpose entities established to hold the assets for a large real estate development in downtown Toronto known as the "YSL Project".

[2] This court approved an Amended Third Proposal dated July 15, 2021 (the "Proposal") on July 16, 2021. Under the Proposal, the moving party, KSV Restructuring Inc. (the "Proposal Trustee"), was authorized to deal with various claims against the Debtor, some of which were disputed.

[3] In the Proposal, Concord Properties Developments Corp. (the "Sponsor") covenanted in sections 10.2 and 11.1 to indemnify the Proposal Trustee for "all Administrative Fees and

Expenses (defined below) *reasonably incurred* [and not covered by the reserve established on the Proposal Implementation Date by the Sponsor in respect of the reasonably estimated additional Administrative Fees and Expenses anticipated to be incurred in connection with the administration of Distributions, resolution of any unresolved Claims … and the Proposal Trustee's discharge]". [emphasis added]

[4] "Administrative Fees and Expenses" are defined in the Proposal as "the fees, expenses and disbursements incurred by or on behalf of the Proposal Trustee, the solicitors for the Proposal Trustee, the solicitors of the Company both before and after the Filing Date."

[5] The Proposal Trustee brings this motion to compel the Sponsor to provide funding for the Proposal Trustee's continuing work towards the determination and/or resolution of the outstanding proofs of claim against the Debtor.[1] Jurisdictional questions have been raised within the motion.

[6] For reasons given orally at the hearing, I declined to grant the contested adjournment of this motion that the Sponsor asked for at the outset.

[7] For the reasons that follow, I have concluded that the Sponsor is not obligated to fund phase 2 of the Arbitration that was intended to determine the Athanasoulis Claim (as those terms are later defined herein). The Sponsor is obligated to indemnify the Proposal Trustee for its Administrative Fees and Expenses reasonably incurred to determine that claim itself, with the benefit of the Award from phase 1 of the Arbitration. The specific orders and directions arising from this ruling are detailed in this endorsement.

Background to the Motion

[8] As of October 2022, most of the claims filed against the Debtor had been settled or accepted by the Proposal Trustee. The largest claim, by far, filed against the Debtor is made by Maria Athanasoulis. This claim is comprised of $1 million for wrongful dismissal damages and $18 million in damages for alleged breaches of an oral profit-sharing agreement by which she alleges YSL must pay her 20% of the profits earned on the YSL Project (the "Athanasoulis Claim").

[9] The Athanasoulis Claim is one of three disputed claims by various stakeholders that the Proposal Trustee says have increased the professional costs associated with the Proposal and prevented the Proposal Trustee from completing the administration of these proceedings.

[10] As of the end of July 2022, the Proposal Trustee's Administrative Fees and Expenses totalled just under $1.2 million, excluding Harmonized Sales Tax. Included in that total were the costs of phase 1 of an arbitration held from February 22-25, 2022 (the "Arbitration") before William G. Horton ("the Arbitrator"). The Proposal Trustee and Ms. Athanasoulis both

[1] The motion originally sought the determination of the Sponsor's obligation to fund certain past expenses incurred by the Proposal Trustee; however, these expenses have been funded through previous advances from the Sponsor and the Sponsor advised that it is not seeking to "claw-back" monies previously advanced nor challenge the use of funds by the Proposal Trustee to date. Thus, the practical implication of this motion is only to deal with future funding obligations of the Sponsor.

participated in the Arbitration. It resulted in a partial award dated March 28, 2022 (the "Arbitration Award") that included findings that:

a. The Debtor had entered into an oral profit sharing agreement with Ms. Athanasoulis;

b. Ms. Athanasoulis was an employee of YSL; and

c. Ms. Athanasoulis was constructively dismissed by YSL in December 2019.

[11] The Proposal Trustee says that it agreed to arbitrate the Athanasoulis Claim because the existence of the oral profit sharing agreement upon which it was based, as well as Ms. Athanasoulis' status with the Debtors (and other entities within the same corporate group referred to as the Cresford Group), were disputed by the Debtor's representative(s) and the determination of those questions would turn on credibility assessments. In these circumstances, the Proposal Trustee believed that the determination of whether Ms. Athanasoulis had a profit sharing agreement, what its terms were and whether she was an employee who was constructively dismissed, could be best determined through a hearing with *viva voce* evidence.

[12] The Sponsor was told on December 1, 2021 "that arrangements are being made with [Mr.] Horton to arbitrate the claim in late February, which is the earliest available date."

[13] The terms of appointment of the arbitrator were signed by the Proposal Trustee and Ms. Athanasoulis on December 9, 2021 (the "Agreement to Arbitrate"). By its terms, the parties agreed to:

a. appoint Mr. Horton to serve as sole arbitrator of their dispute relating to the Athanasoulis Claim; and

b. bifurcate the Athanasoulis Claim such that the Arbitration shall initially resolve only the liability of YSL (in phase 1). In the event the Arbitrator finds that YSL is liable to Ms. Athanasoulis, the parties agreed to schedule an additional hearing before the Arbitrator to determine the quantum of YSL's liability (in phase 2).

[14] The Sponsor did not receive a copy of the Agreement to Arbitrate at that time and was not privy to its specific terms.

[15] The Proposal Trustee was advised on March 31, 2022 that "[w]e received the decision in the fact finding phase just the other day or so. Arbitrator Horton found an enforceable 20% profit sharing agreement to exist."

[16] A few weeks later, the Proposal Trustee provided the Sponsor an updated budget. With only approximately $210,000 remaining from the original reserve established under s. 10.1 of the Proposal, the Proposal Trustee requested additional net funds of approximately $1.485 million in respect of Administrative Fees and Expenses anticipated to be incurred in connection with the resolution of the remaining three claims and to administer the distributions.

[17] Some limited partners of YSL (the Yonge SL LPs and Chi Long LPs, collectively the "LPs") questioned the Proposal Trustee's handling of certain disputed claims, including the Athanasoulis Claim. The LPs are entitled to any remaining cash in the $30.9 million "Affected Creditors Cash Pool" established by the Sponsor, after proven claims are paid out. That cash pool is only to be used by the Proposal Trustee to satisfy proven claims. Therefore, the determination of the Athanasoulis Claim could impact the LPs' recovery from the Affected Creditors Cash Pool.

[18] At a case conference on May 24, 2022, the LPs asked the court to schedule motions they proposed to bring. Their motions were described at that time to be directed to the Proposal Trustee's authority to arbitrate the Athanasoulis Claim and to determine whether the Athanasoulis' Claim is subordinate to the LPs' entitlements. They also requested that the court order a stay of phase 2 of the Arbitration of the Athanasoulis Claim. At that time, the authority of the Proposal Trustee to enter into the Agreement to Arbitrate was being challenged by at least one of the LPs.

[19] Instead of scheduling that motion, the court urged the parties to work out an arrangement that would allow the LPs' priority claims to be added to, and determined in, the existing Arbitration under an expanded comprehensive arbitration process (the "consolidated arbitration process").[2]

[20] At a further case conference on June 8, 2022, the parties updated the court about their ongoing discussions since the last case conference. The LPs indicated that they would be prepared to have their priority issues determined in a consolidated arbitration process. The Sponsor expressed concerns about the added cost of adding the LPs priority issues into the existing Arbitration process. The Sponsor asked for two conditions: i) that there be an attempt to settle through mediation before embarking upon stage 2 of the Arbitration and/or any consolidated arbitration process, and ii) that the LPs undertake to pay the Proposal Trustee's expenses associated with the next phase of the consolidated arbitration process. The LPs did not agree to either of these conditions.

[21] The court once again urged the parties to continue collaborating and refining the issues for a potential consolidated arbitration process and to try to reach an agreement about the additional cost of this expanded arbitration of all issues, in the face of the alternative of parallel proceedings and the added cost and delay that would ensue if the LPs' proposed motion was scheduled. The court summarized the outstanding issues to be addressed (or not to be addressed) in the context of a potential consolidated arbitration process and some of the terms that were under consideration, as had been identified by the parties at that time, in an endorsement dated June 8, 2022 as follows:

> a. The enforceability of the contract as found by Mr. Horton regarding Ms. Athanasoulis' claim and the quantum of any damages she may have suffered.

[2] This reference to a "potential consolidated arbitration process" is not intended to resolve the dispute between Ms. Athanasoulis (and the Proposal Trustee), on the one hand, and the LPs on the other, about whether they did in fact reach an agreement to consolidate all issues into an arbitration. That issue was not squarely put before the court on this motion.

b. Whether any claim for damages by Ms. Athanasoulis is in the nature of debt or equity.

c. Any claim for damages that the LPs may assert against Ms. Athanasoulis.

d. The Arbitration will not consider any claims between Ms. Athanasoulis and Cresford Capital/Dan Casey.

e. The LPs will reserve their rights with respect to whether Mr. Horton's decision at phase 1 of the Arbitration regarding enforceability is rendered *res judicata*.

f. At the conclusion of the Arbitration the Proposal Trustee will make a determination as to whether Ms. Athanasoulis' claim is provable, will value it and determine its priority.

g. The parties' rights to appeal are preserved under the *BIA*.

The court directed counsel to return for a further case conference on July 29, 2022.

[22] On July 4, 2022 the Sponsor advised that it would be withdrawing funding from the Proposal Trustee. It objected to funding the estimated $1.485 million in additional funding that the Proposal Trustee and indicated would be needed by it and its external counsel to complete the administration of these proceedings.[3]

[23] By the July 29, 2022 case conference, the Sponsor had been provided with a copy of the Arbitration Award and the Agreement to Arbitrate. The parties continued to have differing views on whether the Proposal Sponsor was obligated to fund the Proposal Trustee's fees and expenses for phase 2 of the Arbitration. Accordingly, the Proposal Trustee's funding motion was scheduled.

[24] Although no formal stay was ordered, phase 2 of the Arbitration has not been rescheduled, pending the outcome of this motion, since the Proposal Trustee requires funds to participate in it. The Proposal Trustee and Ms. Athanasoulis anticipate that the phase 2 proceeding contemplated by the Agreement to Arbitrate will require additional fact and expert evidence. The original schedule had set aside two weeks in September, 2022 for phase 2 of the Arbitration, before any consideration of including the LPs' claims.

[25] In the intervening timeframe, the Proposal Trustee and Ms. Athanasoulis did attend a mediation to try to come to a resolution of the Athanasoulis Claim, but that mediation was not successful.

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[3] This estimate assumed that the three remaining disputed claims would be adjudicated in the manner indicated by the Proposal Trustee, with no further procedural motions. Also included in this budget were estimated Administrative Fees and Expenses associated with the phase 2 of the Arbitration. The amount for this portion of the future fees was initially estimated to be approximately $500,000, but that estimate is now approximately $700,000. However, other disputed claims have been resolved such that the overall estimate for future funding that the Proposal Trustee anticipates remains at an estimated $1.485 million.

[26] On October 13, 2022, shortly before the return of this funding motion, the LPs provided a draft notice of motion indicating their intention to bring a motion for declarations that: (a) any claim by Ms. Athanasoulis to the proceeds of the YSL Project under any profit-sharing arrangement is subordinate to their entitlement to such proceeds; and (b) Ms. Athanasoulis' profit-sharing claim is unenforceable against the Debtors. The LPs' assertions are based primarily on alleged representations and promises made to them by Ms. Athanasoulis.

[27] The Proposal Trustee's Notice of Motion on this motion seeks an order declaring that:

a. The Proposal Trustee's Administrative Fees and Expenses have been reasonably incurred.

b. The Sponsor remains bound by the Proposal.

c. The Sponsor is required to fund the Administrative Fees and Expenses of the Proposal Trustee pursuant to the Proposal.

d. The commencement and continuation of Arbitration to determine the Athanasoulis Claim was a valid exercise of the Proposal Trustee's power under the Proposal or the *BIA*.

[28] The Sponsor does not dispute that it remains bound by the Proposal to fund Administrative Fees and Expenses reasonably incurred. It disagrees on whether the Proposal requires it to fund the Proposal Trustee's fees and expenses that will be incurred in respect of phase 2 of the Arbitration.

[29] The court does not technically need to deal with the Proposal Trustee's request for a declaration that its Administrative Fees and Expenses have been reasonably incurred up until now. The Sponsor is no longer seeking to claw-back prior expenses that the Proposal Trustee has already been paid from the initial funding reserve. This includes fees and expenses associated with phase 1 of the Arbitration.

[30] During the hearing, and considering the most up to date positions, the Proposal Trustee re-stated the issues to be decided on this motion:

a. Whether the commencement and continuation of Arbitration to determine the Athanasoulis Claim was a valid exercise of the authority granted to the Proposal Trustee under the Proposal or the *BIA* (the "Jurisdiction Question" below), and therefore are any Administrative Fees and Expenses associated with it reasonably incurred?

b. If not, and in the alternative, is the question of whether the Sponsor is obligated to fund the Administrative Fees and Expenses of the Proposal Trustee and its counsel associated with phase 2 of the Arbitration *res judicata* and has this court already ruled that phase 2 of the Arbitration should proceed in some fashion, either with or without the added issues raised by the LPs?

c. Should there be any other order made at this time regarding the approval of the fees of the Proposal Trustee and its counsel?

d. Should the Sponsor pay the Proposal Trustee's costs of this motion, which are rolled up in its defence of the reasonableness and appropriateness of the Arbitration process?

Analysis

The Positions of the Parties

[31] The focus of the analysis is on the question of whether any Administrative Fees and Expenses associated with completing phase 2 of the Arbitration would be "reasonably incurred," such that the Sponsor is obligated to indemnify the Proposal Trustee for them under s. 11.01 of the Proposal.

[32] The Sponsor argues that the Proposal Trustee should have either allowed or disallowed the Athanasoulis Claim without resorting to arbitration. The Sponsor says the Proposal Trustee should determine and value that claim on its own, with such input from Ms. Athanasoulis and others as it deems appropriate. This process, the Sponsor postulates, could be completed more efficiently and at a significantly lesser cost than through the Arbitration.

[33] The Proposal Trustee argues that, even with the benefit of hindsight, a process outside of the Arbitration resulting in an allowance or disallowance of the Athanasoulis Claim would not necessarily have been more cost effective or timely. It postulates that both parties would have inevitably challenged the Proposal Trustee's decision regarding the determination of the Athanasoulis Claim under s. 37 of the *BIA*. Either Ms. Athanasoulis would appeal a decision against her to the court, or the LPs would further challenge a ruling that favoured Ms. Athanasoulis. The Proposal Trustee believes that these appeals or challenges to the court under s. 37 of the *BIA* would have the potential to involve the same evidentiary input, time and expense as the Arbitration.

[34] The Proposal Trustee likens the Arbitration to the appointment of a claims officer to adjudicate the Athanasoulis Claim and urges the court to permit that process to now run its course through phase 2 of the Arbitration.

[35] The Proposal Trustee also maintains that it was reasonable to have entered into the Agreement to Arbitrate and that it cannot now renege and disallow the Athanasoulis Claim simply because the Sponsor does not like the outcome of phase 1. The Sponsor counters that if the Agreement to Arbitrate, the terms of which it only had full disclosure of in July 2022, improperly delegates to the Arbitrator the Proposal Trustee's responsibility for determining and valuing the Athanasoulis Claim and was entered into without authorization or jurisdiction, then it is invalid *ab initio* and unenforceable.

[36] Ms. Athanasoulis supports the Proposal Trustee's position and adds that she is an innocent third party. Having contracted with the Proposal Trustee for an arbitration in two phases and having herself invested significant time and expense on phase 1, it would be unfair to her to now return to square one for the determination and valuation of her claim.

[37] Ms. Athanasoulis further argues that there is no principled distinction between the jurisdiction to arbitrate phase 1 vs. phase 2 of the Arbitration. She contends that the Sponsor's withdrawal of its objection to paying the fees and expenses for phase 1 is a concession that arbitrating in phase 1 was authorized and within the jurisdiction of the Proposal Trustee, and thus phase 2 must be as well.

[38] The LPs still intend to argue that they are not bound by any findings in the Arbitration or its outcome, and that the Athanasoulis Claim is subordinate to theirs. Neither of those arguments are before the court now. However, should the court find that the Proposal Trustee lacked the authority or jurisdiction to arbitrate the Athanasoulis Claim, that would make their intended motion less complicated and possibly moot, depending on the Proposal Trustee's timing and ultimate determination of the Athanasoulis Claim.

The Issues

A) <u>The Jurisdiction Question</u>

i) Contractual and Statutory Framework

[39] Section 3.02 of the Proposal provides that the Proposal Trustee will assess claims in accordance with s. 135 of the *BIA*.

[40] Section 135 of the *BIA* provides that:

> (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

ii) Relevant Jurisprudence Relied Upon by the Parties

[41] The Sponsor objects to providing additional funding for phase 2 of the Arbitration on the grounds that the Arbitration falls outside the Proposal Trustee's mandate under the Proposal, which is to determine and resolve disputed claims in accordance with s.135 of the *BIA*. The Sponsor maintains that because the Proposal Trustee improperly delegated that decision-making function to the Arbitrator and assumed the role of adversary, rather than the decision-maker, any Administrative Fees and Expenses associated with phase 2 of the Arbitration will not be reasonably incurred.

[42] The Sponsor relies upon the recent decision of this court *In the Matter of the Proposal to Creditors of Conforti Holdings Limited*, 2022 ONSC 3264, leave to appeal refused, 2022 ONCA 651. In *Conforti*, the court declined to relieve a trustee of its responsibility under s. 135 of the *BIA* to determine a particular claim through a single claims process under the supervision of the

Bankruptcy Court and declined to approve the trustee's suggestion that it be determined, instead, by a foreign court.

[43] This court held in *Conforti* that s. 135(1.1) of the *BIA* contains mandatory language that "unambiguously" requires the Proposal Trustee itself to determine and value claims. *Conforti* confirms, at para. 42, that:

> The regime under the *BIA* provides for a summary procedure for (i) determination by the trustee of whether a contingent or unliquidated claim is a provable claim, and, if so, (ii) for the trustee to value it. [...] Insolvency proceedings under the *BIA* are subject to court supervision, and the court is able to give directions for the timely and efficient determination of claims.

[44] This is not the first time a trustee's "mandatory statutory duty to review claims and value unliquidated or contingent claims" has been recognized: see *Asian Concepts Franchising Corporation (Re)*, 2018 BCSC 1022, 62 C.B.R. (6th) 123, at para. 99.

[45] Unlike in *Conforti*, the Proposal Trustee says it is not seeking to dispense with any obligation to determine the Athanasoulis Claim. It says it still intends to go through the motions of that determination but wishes to do so with the benefit of the Arbitrator's decision in phases 1 and 2.

[46] The Proposal Trustee also seeks to distinguish *Conforti* on the grounds that it has a very broad discretion under s. 135 of the *BIA* to obtain or require further evidence in support of a claim and has the power under s. 30 to bring, institute or defend any action or legal proceeding relating to the property of the bankrupt and to compromise any claim made by or against the estate. The Proposal Trustee argues that this permits a trustee to arbitrate a claim; or, at the very least, that this permits the Proposal Trustee to use an arbitration process to assist in the development of the evidence and facts that will be needed to determine and value a claim.

[47] The Proposal Trustee defends the Arbitration process as fair, reasonable and transparent. It emphasizes the importance of its role in ensuring all stakeholder interests are protected (as was envisioned in *Asian Concepts*, at paras. 55-56, 98, for example). The Proposal Trustee's contends that its decision to gather facts in respect of the Athanasoulis Claim by way of Arbitration was a reasonable decision and that it was an appropriate process to achieve a fair determination of the merits of the Athanasoulis Claim because it tested the potentially relevant evidence. It maintains that there is no single correct way to value a claim and that a trustee's decision should be afforded deference: see *Galaxy Sports Inc. (Re)*, 2004 BCCA 284, 29 B.C.L.R. (4th) 362, at paras. 39-43.

iii) The Agreement to Arbitrate – is it Beyond the Scope of s. 135 of the *BIA*?

[48] In theory, the Proposal Trustee does have a broad discretion under s. 135 of the *BIA* that might justify its participation in adversarial proceedings that could inform the eventual determination of claims. The Proposal Trustee seeks to characterize what the Arbitrator was asked to do as a fact finding exercise: to determine whether Ms. Athanasoulis was an employee who was constructively dismissed and whether she had an oral profit sharing agreement. The issue here is

whether the Agreement to Arbitrate in this case—which was not before the court and had not been disclosed to the Sponsor or the LPs until sometime in July, 2022—went beyond a fact finding exercise.

[49] Although no determination need be made on this point, the Proposal Trustee's participation in phase 1 of the Arbitration may have been sound in the sense that the necessary parties and information were before the Arbitrator to enable him to make determinations about the existence of the oral profit sharing agreement and a finding of constructive dismissal. The Proposal Trustee can consider and take into account these inputs from the Arbitration in its determination and valuation of the Athanasoulis Claim.

[50] Since the Sponsor is no longer challenging the right of the Proposal Trustee to be indemnified for the Administrative Fees and Expenses incurred in respect of phase 1 of the Arbitration, the issue now before the court is whether the Proposal Trustee is acting within the scope of s. 135 of the *BIA* by engaging in phase 2 of the Arbitration to determine whether to allow the Athanasoulis Claim, and if so in what amount.

[51] The Proposal Trustee concedes that the Arbitrator's determination of the damages question in phase 2 of the Arbitration would be both informative and probative, and that the Proposal Trustee's determination of the Athanasoulis Claim would be heavily influenced by the Arbitrator's decision. The suggestion that the Proposal Trustee could, after the Arbitration, still determine and value the Athanasoulis Claim in a manner inconsistent with the decision of the Arbitrator on liability and damages is difficult to reconcile with the words of the Agreement to Arbitrate and the intended binding nature of arbitrations under s. 37 of the *Arbitration Act 1991*, S.O. 1991, c. 17.

[52] I find that phase 2 of the Agreement to Arbitrate goes beyond a fact finding exercise. By its very terms, the Agreement to Arbitrate contemplates an eventual ruling from the Arbitrator on "damages" (the quantum of the Debtors' liability) at the end of phase 2. On their face, the terms of the Agreement to Arbitrate contemplate a final adjudication by the Arbitrator. That amounts to an improper delegation to the Arbitrator by the Proposal Trustee of its ultimate responsibility to determine and value the Athanasoulis Claim.

[53] It was suggested that the court would be effectively ordering, or approving, the Proposal Trustee to breach the Agreement to Arbitrate if the Sponsor's position with respect to the funding of phase 2 of the Arbitration is accepted. I do not see it that way. If the Proposal Trustee did not have the authority to agree to phase 2 of the Arbitration as was provided for in the Agreement to Arbitrate because it amounted to an improper delegation of its responsibility to the Arbitrator, then that aspect of the Agreement to Arbitrate is unenforceable as against the Proposal Trustee. Further, as a practical matter, if the Sponsor is not required to fund the Administrative Fees and Expenses associated with phase 2 of the Arbitration, it cannot proceed.

[54] I also do not accept the assertion that just because the Sponsor is no longer challenging its obligation to fund the Proposal Trustee's Administrative Fees and Expenses incurred in connection with phase 1 of the Arbitration, that the court is bound to accept that entering into the Agreement to Arbitrate was a valid exercise of the Proposal Trustee's discretion and a valid delegation of its responsibility to the Arbitrator in all respects, or that the Sponsor is estopped from asserting that

any aspect of the Agreement to Arbitrate exceeded the Proposal Trustee's authority under s. 135 of the *BIA*.

iv) Would the Cost of this Arbitration be a Reasonably Incurred Expense?

[55] One of the other grounds upon which the Sponsor argued that the anticipated Administrative Fees and Expenses for phase 2 of the Arbitration would not be reasonably incurred was because they would be the product of a complex, lengthy and expensive process that is not in keeping with the summary and efficient adjudication of claims envisioned by the *BIA*, especially one that might not have resulted in a final resolution of the Athanasoulis Claim without the willing participation of the LPs,[4] leaving the LPs' priorities and other enforceability issues to be determined through some other process.

[56] Section 135 of the *BIA* is intended to be a summary procedure for the determination of claims, animated by the objectives of speed, economy and informality: see *Conforti*, at para. 43 and *Asian Concepts*, at para. 53.

[57] The decision on the Jurisdiction Question renders it unnecessary to decide whether the anticipated budgeted cost of phase 2 of the Arbitration represents anticipated reasonably incurred Administrative Fees and Expenses that the Sponsor should be required to fund. The court will not order the Sponsor to fund this aspect of the Arbitration that involves the ultimate determination of this claim by someone other than the Proposal Trustee as that would not be a determination of the Athanasoulis Claim in accordance with s. 135 of the *BIA*.

v) Section 135 *BIA* Determination of the Athanasoulis Claim

[58] The Proposal Trustee has identified various aspects of what had been expected to be resolved through the anticipated phase 2 Arbitration that will still require factual inputs and findings for the Proposal Trustee to make its determination of the Athanasoulis Claim. For example, to determine the meaning of "profits" under the oral profit sharing agreement, and when and how they should be calculated, expert valuation evidence may be required. This was part of the justification for the Arbitration process envisioned, and has not been resolved by the court's finding that the process agreed to went too far by improperly delegating the ultimate issue to be decided by the Proposal Trustee to the Arbitrator.

[59] Further, whether the Athanasoulis Claim is a provable claim under s. 135 of the *BIA* depends on whether the claim is in debt or equity, which in turn may require further evidence and inputs from other stakeholders, like the LPs. Not only would the LPs potentially have relevant information, but they also have a direct interest in these determinations.

[60] The Proposal Trustee has the power under s. 135 of the *BIA* to seek additional information and documents from the claimant: see *Urbancorp Cumberland 2 GP Inc.*, 2022 ONSC 2430, at

[4] As previously indicated, there is a dispute about whether the LPs agreed to arbitrate their priority and enforceability challenges to the Athanasoulis Claim. The court was not asked to determine whether the LPs had in fact agreed to arbitrate their issues in the expanded phase 2 of the Arbitration. I do not need to decide this question to decide the funding motion.

paras. 23, 26. It remains open to the Proposal Trustee under s. 135 of the *BIA* to receive and consider expert input from Ms. Athanasoulis and other stakeholders.

[61] The broad discretion afforded to the Proposal Trustee also allows it to seek out its own expert input, as well as information and input from the LPs and other stakeholders in respect of the issues it must decide.

[62] In these circumstances, the Proposal Trustee will need to carry out its responsibilities under s. 135 of the *BIA*, get the factual and other inputs it requires from witnesses, other stakeholders, experts and the like and determine whether the Athanasoulis Claim has been proven and, if so, at what amount it should be valued.

[63] The Proposal Trustee complains that the Sponsor has not spelled out an alternative process to the Arbitration for doing this.

[64] In the absence of any proposed alternative, the Proposal Trustee is entirely unencumbered and may determine its own process for how it wishes to do this, which will be afforded significant deference. According to the Court of Appeal in *Galaxy*, at paras. 39 and 44,

a. the Proposal Trustee is entitled to evaluate the Athanasoulis Claim in accordance with s. 135(1.1) with significant discretion, taking into account factors that may appear in the *BIA*;

b. there is no one "correct" answer to the valuation of the Athanasoulis Claim;

c. the Proposal Trustee's valuation of the Athanasoulis Claim will be scrutinized on a "reasonableness" standard; and

d. the Proposal Trustee can use its knowledge and expertise to consider whether, as a factual matter, the valuation as to the full amount of the Athanasoulis Claim is appropriate.

[65] The Proposal Trustee is concerned that this may lead to *de novo* appeals or challenges (by either Ms. Athanasoulis or the LPs) and could end up being as much or more expensive than the anticipated cost of phase 2 of the Arbitration. There is no crystal ball that can foretell this.

[66] The Sponsor says that it will not micromanage this aspect of the Proposal Trustee's determination of the Athanasoulis Claim. While the Sponsor does not expect that this alternative process will end up costing as much as the current estimate for phase 2 of the Arbitration, it is prepared to accept the possibility that it does. The Sponsor has said it will pay for the Proposal Trustee to develop and follow a process to determine and value the Athanasoulis Claim in accordance with s. 135 of the *BIA*.

[67] The Proposal Trustee must determine how to reasonably determine and value the Athanasoulis Claim in a timely and principled manner. It will be afforded significant deference. All parties agree that it can use the Arbitration Award from phase 1 of the Arbitration and build

on it so that time and effort is not wasted. The goal is not the gold standard of coming up with a process that cannot be challenged.

[68] The Proposal Trustee may choose to invite expert evidence and inputs from Ms. Athanasoulis and then determine if it needs its own expert to review and comment upon what is provided. It may choose to share that plan with the other stakeholders participating in this motion and seek their input. If it chooses to share its plan with the Sponsor and/or other stakeholders, and if the parties require some further direction and assistance from the court, they may arrange a case conference before me.

[69] In any event, the parties will eventually need to come back on a scheduling appointment to determine the sequencing and timing of the LPs' priorities and enforceability motion, but only after that motion (with supporting evidence) has been served and the parties have met and conferred amongst themselves to consider the appropriate timing and sequencing of all that needs to occur.

[70] Whatever process the Proposal Trustee may adopt, the Sponsor remains obligated under the Proposal to indemnify the Proposal Trustee for the Administrative Fees and Expenses reasonably incurred going forward to the final determination of the Athanasoulis Claim.

B) The *Res Judicata* and Estoppel Argument(s)

i) Res Judicata

[71] There can be no finding of *res judicata* with respect to the issues raised on this funding motion regarding the Sponsor's obligation to fund phase 2 of the Arbitration.

[72] The Proposal Trustee and Ms. Athanasoulis argue that Gilmore J. held, at two separate case conferences in May and June 2022, that arbitration was an appropriate way to proceed, and that issue estoppel prevents the court from revisiting this in the context of this funding motion. I disagree.

[73] There are three requirements for invoking issue estoppel: (i) the same question has or could have been decided in a prior proceeding; (ii) the decision giving rise to estoppel is final; and (iii) the parties to the decision giving rise to estoppel are the same as the parties to the subsequent proceeding in which estoppel is claimed: see *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 25. It is the first requirement upon which the *res judicata* argument fails in this case.

[74] The Proposal Trustee argues that the endorsement of Gilmore J. arising out of the June 8, 2022 case conference requires an arbitration of the Athanasoulis Claim because it was stated in the endorsement that the "arbitration must prevail" and the Sponsor never sought to appeal that declaration.

[75] I do not read the June 8, 2022 endorsement as ordering an arbitration. Rather, it was the court's strong preference that the parties agree to expand the Arbitration to address the issues raised by the LPs and avoid a parallel, costly and time consuming motion process to determine the priority

and enforceability issues. I am not aware of any authority upon which the court can order unwilling parties to arbitrate a dispute; that is a matter of private agreement. The court was simply strongly encouraging the parties to make such an agreement, building upon the arbitration process already in place.

[76] Nor do I agree with the implicit suggestion that the same question about the authority of the Proposal Trustee to enter into the Agreement to Arbitrate and to delegate its responsibility for determining and valuing the Athanasoulis Claim to the Arbitrator has been or could have been previously decided by Gilmore J. at the earlier case conferences. Leaving aside the nature of those case conferences and the typical procedural scope of directions from the court, it is clear that is not what Gilmore J. understood to be happening. To the contrary, her June 8, 2022 endorsement records that:

> At the conclusion of the arbitration the Proposal Trustee will make a determination as to whether Ms. Anathasoulis' [*sic*] claim is provable and will value it and determine its priority.

[77] At that time, the court did not have the Agreement to Arbitrate with the full description of the issues being submitted to arbitration and cannot be taken to have made any meaningful assessment as to whether the statement that there was still something left for the Proposal Trustee to determine at the end of the Arbitration was a fair characterization of what had been agreed to. The court did not previously order the parties to arbitrate, nor did it make any finding that phase 2 of the Arbitration could be conducted in a manner consistent with s. 135 of the *BIA*. There is no *res judicata*.

ii) Other Estoppel Considerations

[78] That said, it was prudent of the Sponsor to drop its opposition to the Proposal Trustee's request for approval of the expenses associated with phase 1 of the Arbitration, already incurred and paid. Regardless of the court's determination of the threshold Jurisdiction Question in relation specifically and only to phase 2 of the Arbitration, the Sponsor would have faced other obstacles in attempting to claw back from the Proposal Trustee Administrative Fees and Expenses incurred and paid for out of the initial reserve, including for phase 1 of the Arbitration.

[79] These obstacles would include the Sponsor's inaction and failure to ask any questions or raise any complaint about, or object to phase 1 of the Arbitration proceeding while it was ongoing. However, the Sponsor's concession obviates the need for any ruling on this.

iii) The Timing of Objections and Related Considerations

[80] Ms. Athanasoulis is understandably concerned about having engaged in phase 1 of a two phase arbitration process in good faith and now facing objections to the jurisdiction or authority of the Proposal Trustee to have entered into the Agreement to Arbitrate.

[81] Unfortunately, the Sponsor and the LPs did not have a copy of the Agreement to Arbitrate until July, 2022. Their concerns were raised in a timely manner upon learning more about the scope of the Arbitration and its anticipated cost. The fact that this discovery also coincided with

their learning that the phase 1 outcome favoured Ms. Athanasoulis does not automatically lead to the inference that their objections are disingenuous.

[82] In any event, no one is suggesting that the work done in phase 1 of the Arbitration is lost. It will be one of the inputs that the Proposal Trustee will use to determine and value the Athanasoulis Claim. All parties agree on this.

[83] While I do not go so far as to accept the suggestion by the Sponsor and LPs that Ms. Athanasoulis knowingly took on the risk of this challenge and outcome, the Sponsor and LPs were left out of the process and cannot be precluded from raising the legal objections that have ultimately dictated the outcome of this motion on the Jurisdiction Question, as it relates to phase 2 of the Arbitration.

C) Fee Approvals

[84] Gilmore J.'s endorsement scheduled this funding motion to determine the Proposal Trustee's entitlement to be indemnified for the costs of the Arbitration. The indemnity reimbursements taken up until now from the reserve fund are no longer at issue. The relief sought by the Proposal Trustee for the approval of its past activities and fees might have been warranted if the challenge to entitlement to indemnification for expenses incurred in phase 1 of the Arbitration was still at issue.

[85] However, this is no longer at issue. There is no immediate reason or need to attempt to deal with the broader requests for general approval of the activities and fees of the Proposal Trustee and its counsel.

[86] The Sponsor is right that, in general, such requests should be supported by fee affidavits: see *Jethwani v. Damji*, 2017 ONSC 1702, 46 C.B.R. (6th) 96, at paras. 8-11.

[87] For the same reason, it is also inappropriate to grant the requested charge over all past and future distributions to the Sponsor. This issue was not fully argued and I was not taken to the evidence or authority that I would need to consider to make such an order.

[88] Instead, the Proposal Trustee may now wish to prepare a new budget and request additional reserve funding for the indemnity obligations of the Sponsor. If the Sponsor does not agree to supplement the reserve, the parties can arrange to come back for a case conference for further consideration of the questions of up front funding and/or security for future funding to be provided by the Sponsor.

D) Costs

[89] Despite having found that the contemplated phase 2 of the Arbitration goes beyond the scope of what the Proposal Trustee was authorized to agree to, given the original position of the Sponsor that it was also challenging its obligation to fund expenses for phase 1 and given the added complications introduced by the LPs, I consider it to have been reasonable for the Proposal Trustee to have brought this motion for directions.

[90] The Proposal Trustee's and its counsel's costs of this motion were reasonably incurred as part of the administration of distributions and the resolution of unresolved claims such that those costs should be indemnified by the Sponsor under the s. 11.1 of the Proposal on the basis that they were reasonably incurred Administrative Fees and Expenses.

[91] Ms. Athanasoulis has asked to be awarded some reasonable costs thrown away in the event the Arbitration is not proceeding to phase 2. She spent $300,000 on phase 1 (in line with the Proposal Trustee's disclosed legal costs for phase 1) and had started working with her expert on phase 2. I understand that there was an agreement that each side would bear their own costs of the Arbitration.

[92] I agree that if Ms. Athanasoulis had actually incurred costs thrown away of the Arbitration, that are now wasted, she might be entitled to an award for her trouble: see *Caldwell v. Caldwell*, 2015 ONSC 7715, 70 R.F.L. (7th) 397, at paras. 10-12.

[93] However, given that the phase 1 Arbitration findings will be the factual predicate upon which the determination of her claim will proceed and that it is reasonable to expect that Ms. Athanasoulis will require expert input, regardless of the procedure, to have her claim determined by the Proposal Trustee, I am not convinced that she has suffered any costs thrown away.

[94] The parties are just now pivoting to a different process for the final determination of the Athanasoulis Claim, but the onus is still on her to prove it. It is difficult to see how she has wasted the cost of whatever work she did in furtherance of her quest to persuade the Arbitrator to decide in her favour the same issue that the Proposal Trustee will now take into consideration when determining her claim. All the work should be usable to support the proof of her claim to the Proposal Trustee.

[95] As such, no costs thrown away are awarded to Ms. Athanasoulis.

Final Disposition

[96] The court's decision on each of the issues on this funding motion, as re-stated by the Proposal Trustee, is as follows:

a. The continuation of phase 2 of the Arbitration provided for in the Agreement to Arbitrate the Athanasoulis Claim is not a valid exercise of the authority granted to the Proposal Trustee under the Proposal or s. 135 of the *BIA*. Therefore, the court makes no order requiring the Sponsor to fund (and/or indemnify the Proposal Trustee for) the budgeted Administrative Fees and Expenses associated with phase 2 of the Arbitration (of approximately $700,000).

b. The questions of whether phase 2 of the Arbitration was a procedure that the Proposal Trustee had the jurisdiction to engage in, and the Sponsor's obligation to fund the Administrative Fees and Expenses of the Proposal Trustee associated therewith, are not barred by *res judicata* or any other estoppel or laches.

c. The Sponsor is required to indemnify the Proposal Trustee for all of the reasonably incurred Administrative Fees and Expenses in relation to the determination and valuation of the Athanasoulis Claim, including for phase 1 of the Arbitration and for whatever procedure the Proposal Trustee, in its discretion, determines appropriate to receive the further evidence and positions of Ms. Athanasoulis and other interested stakeholders and any expert inputs deemed necessary.

d. The Proposal Trustee should first determine how it intends to proceed in light of the court's decision on this motion, and may prepare a budget for the anticipated Administrative Fees and Expenses associated with this exercise, or seek indemnification after the fact, as it deems appropriate.

e. If asked to do so and the Sponsor is not prepared to top up the reserve for the funding of the Proposal Trustee's anticipated Administrative Fees and Expenses to complete the determination and valuation of the Athanasoulis Claim, the parties may request a case conference before me so that the court can provide further directions in this regard and any related issues. The parties are directed to confer about these issues before scheduling a case conference so that the appropriate amount of court time is reserved.

f. If the LPs are proceeding with their proposed motion, they shall serve their motion record(s) with supporting evidence and, after that, the parties shall confer about the timetabling and sequencing of those motions and then seek a scheduling appointment (if all agree) or a longer case conference (if all do not agree) for directions, timetabling and a motion hearing date if determined appropriate.

g. There have been no costs demonstrated to have been thrown away as a result of the court's ruling on this motion, and none are awarded.

h. The costs of the Proposal Trustee and its counsel for this motion were reasonably incurred and may be paid out of the remaining reserve fund and/or a claim for reimbursement by the Sponsor for those costs may be made under the Proposal.

[97] This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of the formal issuance and entry of an order.

KIMMEL J.

Date: November 1, 2022

TAB 4

Paul Housen *Appellant*

v.

Rural Municipality of Shellbrook No. 493 *Respondent*

INDEXED AS: HOUSEN *v.* NIKOLAISEN

Neutral citation: 2002 SCC 33.

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Torts — Motor vehicles — Highways — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals — Courts — Standard of appellate review — Whether Court of Appeal properly overturning trial judge's finding of negligence — Standard of review for questions of mixed fact and law.

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N

Paul Housen *Appelant*

c.

Municipalité rurale de Shellbrook nº 493 *Intimée*

RÉPERTORIÉ : HOUSEN *c.* NIKOLAISEN

Référence neutre : 2002 CSC 33.

Nº du greffe : 27826.

2001 : 2 octobre; 2002 : 28 mars.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Délits civils — Véhicules automobiles — Routes — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Droit municipal — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Appels — Tribunaux judiciaires — Norme de contrôle applicable en appel — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — Norme de contrôle applicable à l'égard des questions mixtes de fait et de droit.

L'appelant était passager dans le véhicule conduit par N sur une route rurale située sur le territoire de la

failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck fishtailed a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

The road was maintained by the municipality and was categorized as a non-designated local access road. On such non-designated roads, the municipality makes the decision to post signs if it becomes aware of a hazard, or if there are several accidents at one spot. The municipality had not posted signs on any portion of the road. Between 1978 and 1987, three other accidents were reported in the area to the east of the site of the appellant's accident. The trial judge held that the appellant was 15 percent contributorily negligent in failing to take reasonable precautions for his own safety in accepting a ride from N, and apportioned the remaining joint and several liability 50 percent to N and 35 percent to the municipality. The Court of Appeal overturned the trial judge's finding that the municipality was negligent.

Held (Gonthier, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

municipalité intimée. N a été incapable de prendre un virage serré et il a perdu la maîtrise de son véhicule. L'appelant est devenu quadriplégique à la suite des blessures subies dans l'accident. Les parties ont convenu avant le procès du montant des dommages-intérêts, qui ont été fixés à 2,5 millions de dollars. La question en litige était celle de savoir si la municipalité, N et l'appelant étaient responsables et, dans l'affirmative, dans quelles proportions. Le jour qui a précédé l'accident, N avait assisté à une fête à la résidence des T, non loin de la scène de l'accident. Durant la nuit, il a continué de boire à une autre fête, où il a rencontré l'appelant. Le matin, les deux hommes sont retournés en automobile à la résidence des T, où N a continué de boire, cessant de le faire quelques heures avant de prendre la route dans sa camionnette en compagnie de l'appelant. N n'était pas familier avec le chemin en question, mais il l'avait emprunté à trois reprises au cours des 24 heures qui avaient précédé l'accident pour aller et venir de la résidence des T. À l'approche de l'endroit de l'accident, la distance de visibilité était réduite en raison du rayon de courbure du virage et de la présence de broussailles poussant jusqu'au bord du chemin Une faible pluie tombait lorsque N s'est engagé sur le chemin en quittant la résidence des T. L'arrière de la camionnette a zigzagué à plusieurs reprises avant que le véhicule n'arrive aux abords du virage serré où l'accident est survenu. Selon le témoignage d'un expert, N roulait à une vitesse se situant entre 53 et 65 km/h lorsque le véhicule s'est engagé dans la courbe, soit une vitesse légèrement supérieure à celle à laquelle le virage pouvait être pris en sécurité eu égard aux conditions qui existaient au moment de l'accident.

Le chemin, qui était entretenu par la municipalité, appartenait à la catégorie des voies d'accès locales non désignées. La municipalité installe des panneaux de signalisation sur ces chemins si elle constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Elle n'avait installé aucune signalisation le long de cette portion du chemin. On a signalé trois autres accidents survenus de 1978 à 1987 à l'est du lieu de l'accident dont a été victime l'appelant. La juge de première instance a estimé que l'appelant était responsable de négligence concourante dans une proportion de 15 p. 100, du fait qu'il avait omis de prendre des précautions raisonnables pour assurer sa propre sécurité en acceptant de monter à bord du véhicule de N, et elle a réparti le reste de la responsabilité solidairement entre N (50 p. 100) et la municipalité (35 p. 100). La Cour d'appel a infirmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente.

Arrêt (les juges Gonthier, Bastarache, Binnie et LeBel sont dissidents) : Le pourvoi est accueilli et la décision de la juge de première instance est rétablie.

Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ.: Since an appeal is not a re-trial of a case, consideration must be given to the standard of review applicable to questions that arise on appeal. The standard of review on pure questions of law is one of correctness, and an appellate court is thus free to replace the opinion of the trial judge with its own. Appellate courts require a broad scope of review with respect to matters of law because their primary role is to delineate and refine legal rules and ensure their universal application.

The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing the testimony *viva voce*. The same degree of deference must be paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major et Arbour : Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le pourvoi. La norme de contrôle applicable aux pures questions de droit est celle de la décision correcte et, en conséquence, il est loisible aux cours d'appel de substituer leur opinion à celle des juges de première instance. Les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit pour être en mesure de s'acquitter de leur rôle premier, qui consiste à préciser et à raffiner les règles de droit et à veiller à leur application universelle.

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante ». Une erreur manifeste est une erreur qui est évidente. Les diverses raisons justifiant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous trois principes de base. Premièrement, vu la rareté des ressources dont disposent les tribunaux, le fait de limiter la portée du contrôle judiciaire a pour effet de réduire le nombre, la durée et le coût des appels. Deuxièmement, le respect du principe de la retenue envers les conclusions favorise l'autonomie et l'intégrité du procès. Enfin, ce principe permet de reconnaître l'expertise du juge de première instance et la position avantageuse dans laquelle il se trouve pour tirer des conclusions de fait, étant donné qu'il a l'occasion d'examiner la preuve en profondeur et d'entendre les témoignages de vive voix. Il faut faire preuve du même degré de retenue envers les inférences de fait, car nombre de raisons justifiant de faire preuve de retenue à l'égard des constatations de fait du juge de première instance valent autant pour toutes ses conclusions factuelles. La norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte. Une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle.

Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where the question of mixed fact and law at issue is a finding of negligence, it should be deferred to by appellate courts, in the absence of a legal or palpable and overriding error. Requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury. Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. A determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law, and is thus subject to a standard of palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Here, the municipality's standard of care was to maintain the road in such a reasonable state of repair that those requiring to use it could, exercising ordinary care, travel upon it with safety. The trial judge applied the correct test in determining that the municipality did not meet this standard of care, and her decision should not be overturned absent palpable and overriding error. The trial judge kept the conduct of the ordinary motorist in mind because she stated the correct test at the outset, and discussed implicitly and explicitly the conduct of a reasonable motorist approaching the curve. Further, her apportionment of negligence indicates that she assessed N's conduct against the standard of the ordinary driver as does her use of the term "hidden hazard" and her consideration of the speed at which motorists should have approached the curve.

The Court of Appeal's finding of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising

Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits. Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, il y a lieu de faire preuve de retenue à l'égard de cette conclusion en l'absence d'erreur de droit ou d'erreur manifeste et dominante. Le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys. Si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante. La question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est alors assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit, qui est assujettie à la norme de la décision correcte.

En l'espèce, la norme de diligence à laquelle devait se conformer la municipalité consistait à tenir le chemin dans un état raisonnable d'entretien, de façon que ceux qui devaient l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté cette norme et sa décision ne devrait pas être infirmée en l'absence d'erreur manifeste et dominante. La juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen puisqu'elle a commencé son examen de la norme de diligence en formulant dès le départ le critère approprié, puis elle s'est interrogée, tant explicitement qu'implicitement, sur la façon dont conduirait l'automobiliste raisonnable en s'approchant du virage. De plus, le fait qu'elle a imputé une partie de la responsabilité à N indique qu'elle a évalué sa conduite au regard du critère du conducteur moyen, tout comme l'indique le fait qu'elle a utilisé l'expression « danger caché » et qu'elle s'est demandé à quelle vitesse les automobilistes auraient dû approcher du virage.

La conclusion de la Cour d'appel portant que la juge de première instance avait commis une erreur manifeste et dominante reposait sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, alors que dans les faits

ordinary care could approach the curve at greater than the speed at which it would be safe to negotiate it. This finding was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

The trial judge did not err in finding that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for finding that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

The trial judge's conclusion on the cause of the accident was a finding of fact subject to the palpable and overriding error standard of review. The abstract nature of the inquiry as to whether N would have seen a sign had one been posted before the curve supports deference to the factual findings of the trial judge. The trial judge's factual findings on causation were reasonable and thus should not have been interfered with by the Court of Appeal.

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events. The process of fact-finding involves

elle a estimé qu'il était possible qu'un automobiliste prenant des précautions normales s'approche du virage à une vitesse supérieure à la vitesse sécuritaire pour effectuer la manœuvre. Loin de constituer une erreur manifeste et dominante, cette conclusion découlait d'une évaluation raisonnable et réaliste de l'ensemble de la preuve par la juge de première instance.

La juge de première instance n'a pas commis d'erreur en concluant que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin. Étant donné que, en l'espèce, le danger était une caractéristique permanente du chemin, il était loisible à la juge de première instance d'inférer que le conseiller municipal prudent aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Les accidents survenus antérieurement sur le chemin ne constituent pas une preuve directe permettant de conclure que la municipalité connaissait l'existence du danger particulier en cause, mais ce facteur, conjugué à la connaissance du type de conducteurs utilisant le chemin, aurait dû inciter la municipalité à faire enquête à l'égard du chemin en question, ce qui lui aurait permis de prendre connaissance concrètement de l'existence du danger. Exiger du demandeur qu'il apporte la preuve concrète de la connaissance par la municipalité du mauvais état d'entretien de ses chemins revient à imposer à ce dernier un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

La conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait assujettie à la norme de contrôle de l'« erreur manifeste et dominante ». Le caractère théorique de l'analyse de la question de savoir si N aurait aperçu un panneau de signalisation installé avant la courbe justifie de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance. Les constatations factuelles de cette dernière relativement à la causalité étaient raisonnables et la Cour d'appel n'aurait donc pas dû les modifier.

Les juges Gonthier, Bastarache, Binnie et LeBel (dissidents) : Les conclusions de fait du juge de première instance ne sont pas modifiées en l'absence d'erreur manifeste ou dominante, principalement parce qu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, et qu'il est, de ce fait, plus à même de choisir entre deux versions

not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both findings of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is deficient. An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

divergentes d'un même événement. Le processus de constatation des faits exige non seulement du juge qu'il dégage le nœud factuel de l'affaire, mais également qu'il tire des inférences des faits. Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Des inférences peuvent être rejetées pour d'autres raisons que le fait que le processus qui les a produites est lui-même déficient. Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée, question de droit qui relève autant des cours de première instance que des cours d'appel.

A question of mixed fact and law in this case was whether the municipality knew or should have known of the alleged danger. The trial judge must approach this question having regard to the duties of the ordinary, reasonable and prudent municipal councillor. Even if the trial judge correctly identifies this as the applicable legal standard, he or she may still err in assessing the facts through the lens of that legal standard, a process which invokes a policy-making component. For example, the trial judge must consider whether the fact that accidents had previously occurred on different portions of the road would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the councillor would have been alerted to the previous accident by an accident-reporting system, a normative issue reviewable on a standard of correctness. Not all matters of mixed fact and law are reviewable according to the standard of correctness, but neither should they be accorded deference in every case.

En l'espèce, la question de savoir si la municipalité connaissait ou aurait dû connaître le danger dont on alléguait l'existence était une question mixte de fait et de droit. Le juge de première instance doit examiner cette question eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Même en supposant que le juge de première instance détermine correctement la norme juridique applicable, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique, processus qui implique notamment l'établissement de politiques d'intérêt général. Par exemple, il doit se demander si le fait que des accidents se soient déjà produits à d'autres endroits du chemin alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents, question normative qui est contrôlable selon la norme de la décision correcte. Les questions mixtes de fait et de droit ne sont pas toutes contrôlables suivant cette norme, mais elles ne commandent pas systématiquement une attitude empreinte de retenue.

Section 192 of the *Rural Municipality Act, 1989*, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, la juge de première instance devait se demander si le tronçon du chemin sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. En l'espèce, la juge de première instance a omis de se demander si un tel conducteur aurait pu rouler

occurred. This amounted to an error of law. The duty of the municipality is to keep the road in such a reasonable state of repair that those required to use it may, exercising ordinary care, travel upon it with safety. The duty is a limited one as the municipality is not an insurer of travellers using its streets. Although the trial judge found that the portion of the road where the accident occurred presented drivers with a hidden hazard, there is nothing to indicate that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. Where an error of law has been found, the appellate court has jurisdiction to take the factual findings of the trial judge as they are and to reassess these findings in the context of the appropriate legal test. Here, the portion of the road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the condition of the road in general signalled to the reasonable driver that caution was needed.

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair. She made no finding that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of super-elevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is

en sécurité sur le tronçon en question. Il s'agissait d'une erreur de droit. Les municipalités ont l'obligation de tenir les chemins dans un état raisonnable d'entretien de façon que ceux qui doivent les emprunter puissent, en prenant des précautions normales, y circuler en sécurité. Il s'agit d'une obligation de portée limitée, car les municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues. Bien que la juge de première instance ait conclu que la portion du chemin où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. La cour d'appel qui décèle une erreur de droit a compétence pour reprendre telles quelles les conclusions de fait du juge de première instance et les réévaluer au regard du critère juridique approprié. En l'espèce, la portion du chemin où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général avertissait l'automobiliste raisonnable que la prudence s'imposait.

La juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétendait-on, le chemin. La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le prétendu mauvais état du chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Il répond ensuite à cette question en appréciant les faits de l'espèce dont il est saisi. Dans la présente affaire, la juge de première instance a fait erreur en droit en examinant la question de la connaissance requise du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent et en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a commis une erreur de fait manifeste et dominante en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur ce chemin. La municipalité n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers, puisqu'elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des courbes ou à la présence d'arbres et de végétation en bordure du

a duty to repair. Here, the municipality cannot have been expected to have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

With respect to her conclusions on causation, which are conclusions on matters of fact, the trial judge ignored evidence that N had swerved on the first curve he negotiated prior to the accident, and that he had driven on the road three times in the 18 to 20 hours preceding the accident. She further ignored the significance of the testimony of the forensic alcohol specialist which pointed overwhelmingly to alcohol as the causal factor which led to the accident, and erroneously relied on one statement by him to support her conclusion that a driver at N's level of impairment would have reacted to a warning sign. The finding that the outcome would have been different had N been forewarned of the curve ignores the fact that he already knew the curve was there. The fact that the trial judge referred to some evidence to support her findings on causation does not insulate them from review by this Court. An appellate court is entitled to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

Whatever the approach to the issue of the duty of care, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard.

chemin. La question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, on ne pouvait attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où l'accident est survenu, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière, erreur manifeste en l'absence de quelque élément de preuve indiquant ce qui aurait pu constituer un système raisonnable.

Relativement aux conclusions de la juge de première instance sur le lien de causalité, qui sont des conclusions de fait, celle-ci a fait abstraction de la preuve que le véhicule de N avait fait une embardée dans la première courbe et que ce dernier avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident. La juge de première instance a également omis de tenir compte de l'importance du témoignage du spécialiste judiciaire en matière d'alcool, qui menait irrésistiblement à la conclusion que l'alcool avait été le facteur causal de l'accident, et elle a erronément invoqué une déclaration de celui-ci au soutien de sa conclusion que N aurait réagi à un panneau de signalisation. La conclusion que le résultat aurait été différent si N avait été prévenu de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur le lien de causalité n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. Le tribunal d'appel est habilité à se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse.

Indépendamment de l'approche choisie à l'égard de la question de l'obligation de diligence, il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une modification radicale et irréalisable de la norme actuelle.

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POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan, [2000] 4 W.W.R. 173, 189 Sask. R. 51, 9 M.P.L.R. (3d) 126, 50 M.V.R. (3d) 70, [2000] S.J. No. 58 (QL), 2000 SKCA 12, qui a infirmé une décision de la Cour du Banc de la Reine, [1998] 5 W.W.R. 523, 161 Sask. R. 241, 44 M.P.L.R. (2d) 203, [1997] S.J. No. 759 (QL). Pourvoi accueilli, les juges Gonthier, Bastarache, Binnie et LeBel sont dissidents.

Gary D. Young, *Q.C.*, *Denis I. Quon* and *M. Kim Anderson*, for the appellant.

Michael Morris and *G. L. Gerrand*, *Q.C.*, for the respondent.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ. was delivered by

IACOBUCCI AND MAJOR JJ. —

I. Introduction

A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

Authority for this abounds particularly in appellate courts in Canada and abroad (see *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60). In addition scholars, national and international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751, at p. 780; and the Honourable R. P. Kerans in *Standards of Review Employed by Appellate Courts* (1994); and American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), at pp. 24-25).

The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204, where it was stated:

The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

Gary D. Young, *c.r.*, *Denis I. Quon* et *M. Kim Anderson*, pour l'appelant.

Michael Morris et *G. L. Gerrand*, *c.r.*, pour l'intimée.

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Iacobucci, Major et Arbour rendu par

LES JUGES IACOBUCCI ET MAJOR —

I. Introduction

Il va sans dire qu'une cour d'appel ne devrait modifier les conclusions d'un juge de première instance qu'en cas d'erreur manifeste et dominante. On reformule parfois cette proposition en disant qu'une cour d'appel ne peut réviser la décision du juge de première instance dans les cas où il existait des éléments de preuve qui pouvaient étayer cette décision. 1

Il existe une abondante jurisprudence étayant cette proposition, particulièrement des décisions émanant de cours d'appel, tant au Canada qu'à l'étranger (voir *Gottardo Properties (Dome) Inc. c. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (C.A. Ont.); *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60). En outre, des auteurs, tant à l'échelle nationale qu'internationale, y souscrivent (voir C. A. Wright, « The Doubtful Omniscience of Appellate Courts » (1957), 41 *Minn. L. Rev.* 751, p. 780; l'honorable R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994); et American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), p. 24-25). 2

Le rôle des tribunaux d'appel a été défini de manière judicieuse dans l'arrêt *Underwood c. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), p. 204, où la cour a dit ceci : 3

[TRADUCTION] La cour d'appel ne doit pas juger l'affaire de nouveau, ni substituer son opinion à celle du juge de première instance en fonction de ce qu'elle pense que la preuve démontre, selon son opinion de la prépondérance des probabilités.

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

Quoique cette théorie soit généralement acceptée, elle n'est pas appliquée de manière systématique. Le fondement de cette théorie est aussi valide aujourd'hui qu'il l'était il y a 100 ans. Cette théorie repose sur l'idée que le caractère définitif des décisions est un aspect important du processus judiciaire. Personne ne prétend que les juges des cours d'appel seraient, d'une manière ou d'une autre, plus intelligents que les autres et donc capables d'arriver à un meilleur résultat. Leur rôle n'est pas de rédiger de meilleurs jugements, mais de contrôler les motifs à la lumière des arguments des parties et de la preuve pertinente, puis de confirmer la décision à moins que le juge de première instance n'ait commis une erreur manifeste ayant conduit à un résultat erroné.

5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

Qu'est-ce qu'une erreur manifeste? Le *Trésor de la langue française* (1985) définit ainsi le mot « manifeste » : « . . . Qui est tout à fait évident, qui ne peut être contesté dans sa nature ou son existence. [. . .] *erreur manifeste* » (p. 317). *Le Grand Robert de la langue française* (2e éd. 2001) définit ce mot ainsi : « Dont l'existence ou la nature est évidente. [. . .] Qui est clairement, évidemment tel. [. . .] *Erreur, injustice manifeste* » (p. 1139). Enfin, le *Grand Larousse de la langue française* (1975) donne la définition suivante de « manifeste » : « . . . Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente : *Une erreur manifeste* » (p. 3213).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

L'élément commun de ces définitions est qu'une chose « manifeste » est une chose qui est « évidente ». Si l'on applique ce critère au présent pourvoi, il faut que l'« erreur manifeste et dominante » décelée par le juge Cameron soit évidente pour que la Cour d'appel de la Saskatchewan puisse infirmer la décision de la juge de première instance. Comme nous le verrons plus loin, nous ne croyons pas qu'on a satisfait à ce critère en l'espèce.

II. The Role of the Appellate Court in the Case at Bar

II. Le rôle de la Cour d'appel en l'espèce

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant

Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le présent pourvoi. Nous estimons donc utile d'examiner brièvement

to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. *Standard of Review for Questions of Law*

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.

There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced . . . should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

les normes de contrôle se rapportant à chacune des catégories de questions suivantes : (1) les questions de droit; (2) les questions de fait; (3) les inférences de fait; (4) les questions mixtes de fait et de droit.

A. *La norme de contrôle applicable aux questions de droit*

Dans le cas des pures questions de droit, la règle fondamentale applicable en matière de contrôle des conclusions du juge de première instance est que les cours d'appel ont toute latitude pour substituer leur opinion à celle des juges de première instance. La norme de contrôle applicable à une question de droit est donc celle de la décision correcte : Kerans, *op. cit.*, p. 90.

Au moins deux raisons justifient l'application de la norme de la décision correcte aux questions de droit. Premièrement, le principe de l'universalité impose aux cours d'appel le devoir de veiller à ce que les mêmes règles de droit soient appliquées dans des situations similaires. Notre Cour a reconnu l'importance de ce principe dans *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504, p. 515 :

> [TRADUCTION] Il est fondamental, pour assurer la bonne administration de la justice, que l'autorité des décisions soit scrupuleusement respectée par tous les tribunaux qui sont liées par elles. Sans cette adhésion générale et constante, l'administration de la justice sera désordonnée, le droit deviendra incertain et la confiance dans celui-ci sera ébranlée. Il importe plus que tout que le droit, tel qu'il a été énoncé, [. . .] soit accepté et appliqué comme l'exige notre tradition; et même au risque de nous tromper, tous les juges étant faillibles, nous devons préserver totalement l'intégrité des rapports entre les tribunaux.

Une deuxième raison, connexe, d'appliquer la norme de la décision correcte aux questions de droit tient au rôle qu'on reconnaît aux cours d'appel en matière de création du droit et qu'a souligné Kerans, *op. cit.*, p. 5 :

> [TRADUCTION] Le principe de l'universalité — et le rôle de création du droit qu'il emporte — exige beaucoup du tribunal de révision. Il exige de ce tribunal qu'il fasse preuve d'un certain degré d'expertise dans l'art d'élaborer une règle de droit juste et pratique, expertise qui ne revêt pas une importance aussi cruciale pour le premier tribunal. Dans les affaires où le droit n'est pas fixé, le tribunal de révision élabore des règles de droit applicables tout autant à d'éventuelles affaires qu'à celle dont il est saisi.

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Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. *Standard of Review for Findings of Fact*

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 A fundamental reason for general deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, *supra*, at pp. 10-11, states that:

> If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

12 With respect to findings of fact in particular, in *Gottardo Properties*, *supra*, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

Ainsi, alors que le rôle premier des tribunaux de première instance consiste à résoudre des litiges sur la base des faits dont ils disposent et du droit établi, celui des cours d'appel est de préciser et de raffiner les règles de droit et de veiller à leur application universelle. Pour s'acquitter de ces rôles, les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit.

B. *La norme de contrôle applicable aux questions de fait*

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante » : *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Ingles c. Tutkaluk Construction Ltd.*, [2000] 1 R.C.S. 298, 2000 CSC 12, par. 42; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 57. On cite souvent cette norme, mais rarement les principes justifiant ce degré élevé de retenue. Pour les besoins du présent pourvoi, nous estimons qu'il est utile d'examiner brièvement les diverses considérations de principe qui incitent les cours d'appel à faire preuve d'un degré élevé de retenue à l'égard des conclusions de fait.

L'une des raisons fondamentales de cette retenue générale à l'égard des conclusions des juges de première instance tient à la présomption d'aptitude à juger — présomption selon laquelle les juges de première instance sont tout aussi aptes que les juges d'appel à apporter des solutions justes aux litiges. Kerans, *op. cit.*, dit ceci aux p. 10-11 :

> [TRADUCTION] Si nous nous fions à ces systèmes pour régler les différends, il nous faut présumer que les décisions qu'ils produisent sont justes. La procédure d'appel ne fait en conséquence partie du processus décisionnel que parce que nous reconnaissons que, malgré tous les efforts déployés, des erreurs se produisent. L'appel devrait être l'exception plutôt que la règle, ce qui est d'ailleurs le cas au Canada.

Pour ce qui est des conclusions de fait en particulier, dans *Gottardo Properties*, précité, le juge Laskin de la Cour d'appel de l'Ontario a résumé ainsi les objectifs qui sous-tendent le principe de la retenue judiciaire (au par. 48) :

Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

Similar concerns were expressed by La Forest J. in *Schwartz*, *supra*, at para. 32:

It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. . . . Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R. D. Gibbens, "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at pp. 445-48; *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, at p. 204.

See also in the context of patent litigation, *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 S.C.R. 504, at p. 537.

In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), at pp. 574-75, the United States Supreme Court also listed numerous reasons for deferring to the factual findings of the trial judge:

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate

[TRADUCTION] La retenue est souhaitable pour diverses raisons : pour limiter le nombre et la durée des appels, pour promouvoir l'autonomie et l'intégrité des procédures devant le tribunal de première instance ou la cour des requêtes auxquelles de nombreuses ressources ont été consacrées, pour maintenir la confiance des plaideurs, pour reconnaître la compétence du juge de première instance ou du juge des requêtes, et pour réduire la multiplication inutile des procédures qui n'entraînent aucune amélioration correspondante de la qualité de la justice.

Le juge La Forest a exprimé des préoccupations semblables dans l'arrêt *Schwartz*, précité, par. 32 :

Il est établi depuis longtemps que les cours d'appel doivent faire preuve d'une grande retenue à l'égard des conclusions de fait d'un juge de première instance. La règle se justifie principalement par la situation avantageuse dont bénéficie le juge des faits pour ce qui est d'évaluer la crédibilité des témoignages entendus au procès. [. . .] D'autres préoccupations liées à la politique judiciaire ont par ailleurs été invoquées pour justifier la règle. Une intervention illimitée des cours d'appel ferait augmenter considérablement le nombre et la durée des appels en général. D'importantes ressources sont mises à la disposition des tribunaux de première instance pour qu'ils puissent évaluer les faits. Il faut préserver l'autonomie et l'intégrité du procès en faisant preuve de retenue à l'égard des conclusions de fait des tribunaux de première instance; voir R. D. Gibbens, « Appellate Review of Findings of Fact » (1992), 13 *Adv. Q.* 445, aux pp. 445 à 448; *Fletcher c. Société d'assurance publique du Manitoba*, [1990] 3 R.C.S. 191, à la p. 204.

Voir aussi, dans le contexte d'une poursuite touchant un brevet, *Consolboard Inc. c. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 R.C.S. 504, p. 537.

13

Dans *Anderson c. Bessemer City*, 470 U.S. 564 (1985), p. 574-575, la Cour suprême des États-Unis a aussi dressé une liste de raisons qui justifient de faire preuve de retenue à l'égard des conclusions de fait des juges de première instance :

[TRADUCTION] La raison d'être de la retenue à l'égard des conclusions de fait du juge de première instance ne se limite pas au fait que ce dernier est mieux placé pour statuer sur la crédibilité. Le rôle principal du juge de première instance est de constater les faits, et l'expérience qu'il acquiert en s'acquittant de ce rôle lui confère son expertise à cet égard. Si les cours d'appel refaisaient le travail du juge de première instance, il est fort possible que ces efforts n'amélioreraient que marginalement l'exactitude des conclusions de fait, malgré

their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" . . . For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

14 Further comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q.* 445, at p. 446:

> The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

The corollary to this recognized advantage of trial courts and judges is that appellate courts are not in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

15 In our view, the numerous bases for deferring to the findings of fact of the trial judge which are discussed in the above authorities can be grouped into the following three basic principles.

(1) Limiting the Number, Length and Cost of Appeals

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be

les ressources judiciaires considérables qui devraient être réaffectées à cette fin. En outre, les parties à un appel ont déjà dû consacrer énergies et ressources à convaincre le juge de première instance de la justesse de leur version des faits; ce serait abuser que de leur demander de convaincre trois autres juges en appel. Comme l'a dit notre Cour dans un contexte différent, le procès sur le fond devrait être considéré comme « "l'épreuve principale" [. . .] plutôt que comme un "banc d'essai" ». [. . .] Pour ces motifs, le contrôle des décisions de fait selon la norme de la décision manifestement erronée — et la retenue envers le juge de première instance qu'elle suppose — est la règle, et non l'exception.

D'autres observations sur les avantages dont disposent le juge de première instance ont été formulées par R. D. Gibbens dans « Appellate Review of Findings of Fact » (1991-92), 13 *Advocates' Q.* 445, p. 446 :

> [TRADUCTION] On dit que le juge de première instance possède de l'expertise dans l'évaluation et l'appréciation des faits présentés au procès. Il a également entendu l'affaire au complet. Il a assisté à toute la cause et son jugement final reflète cette connaissance intime de la preuve. Cette connaissance, acquise par le juge au fil des jours, des semaines voire des mois qu'a durés l'affaire, peut se révéler beaucoup plus profonde que celle de la cour d'appel, dont la perception est beaucoup plus limitée et étroite, et souvent déterminée et déformée par les diverses ordonnances et décisions qui sont contestées.

Cet avantage reconnu des tribunaux et des juges de première instance a pour corollaire que les cours d'appel ne sont pas dans une position favorable pour évaluer et apprécier les questions de fait. Les juges des cours d'appel n'examinent que la transcription des témoignages. De plus, les appels ne se prêtent pas à l'examen de dossiers volumineux. Enfin, les appels ont un caractère « focalisateur », en ce qu'ils s'attachent à des questions particulières plutôt qu'à l'ensemble de l'affaire.

À notre avis, ces diverses raisons justifiant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous les trois principes de base suivants.

(1) Réduire le nombre, la durée et le coût des appels

Vu la rareté des ressources dont disposent les tribunaux, il faut encourager l'établissement

encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position

The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

C. *Standard of Review for Inferences of Fact*

We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our

de limites à la portée du contrôle judiciaire. La retenue à l'égard des conclusions de fait du juge de première instance sert cet objectif d'une manière rationnelle. D'importantes ressources sont allouées aux tribunaux de première instance aux fins d'évaluation des faits. Permettre un large contrôle des conclusions factuelles des juges de première instance entraîne une inutile répétition de procédures judiciaires, tout en n'améliorant que peu ou pas le résultat. En outre, de longs appels causent préjudice aux plaideurs moins bien nantis et compromettent l'objectif qui consiste à mettre à leur disposition des recours efficients et efficaces.

(2) Favoriser l'autonomie du procès et son intégrité

17 L'organisation de notre système judiciaire repose sur la présomption que le juge de première instance est qualifié pour trancher l'affaire dont il est saisi et qu'une solution juste et équitable résultera du procès. Des appels fréquents et illimités affaibliraient cette présomption et saperait la confiance du public dans le processus judiciaire. L'appel est l'exception, non la règle.

(3) Reconnaître l'expertise du juge de première instance et sa position avantageuse

18 Le juge de première instance est celui qui est le mieux placé pour tirer des conclusions de fait, parce qu'il a l'occasion d'examiner la preuve en profondeur, d'entendre les témoignages de vive voix et de se familiariser avec l'affaire dans son ensemble. Étant donné que le rôle principal du juge de première instance est d'apprécier et de soupeser d'abondantes quantités d'éléments de preuve, son expertise dans ce domaine et sa connaissance intime du dossier doivent être respectées.

C. *La norme de contrôle applicable aux inférences de fait*

19 Nous estimons nécessaire de nous pencher sur la question de la norme de contrôle appropriée quant aux inférences de fait des juges de première instance, parce que les motifs de notre collègue suggèrent qu'une norme de contrôle moins exigeante peut

view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

20 Our colleague acknowledges that, in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from *Geffen* is the following (*per* Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts . . . . Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. . . .
>
> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence, in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing *Métivier v. Cadorette*, [1977] 1 S.C.R. 371).

This view has been reiterated by this Court on numerous occasions: see *Palsky v. Humphrey*, [1964] S.C.R. 580, at p. 583; *Schwartz*, *supra*, at para. 32; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426, *per* La Forest J.; *Toneguzzo-Norvell*, *supra*. The United States Supreme Court has taken a similar position: see *Anderson*, *supra*, at p. 577.

21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:

être appliquée à cet égard. En toute déférence, nous sommes d'avis que l'application d'une telle norme de contrôle romprait avec la jurisprudence établie de notre Cour en la matière et serait contraire aux principes justifiant le respect d'une attitude empreinte de retenue à l'égard des constatations de fait.

Notre collègue reconnaît que dans l'arrêt *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353, notre Cour a jugé qu'il fallait faire preuve du même degré de retenue à l'égard des inférences de fait du juge de première instance qu'à l'égard de ses constatations de fait. Voici le passage pertinent des motifs de madame le juge Wilson (aux p. 388-389) :

> C'est maintenant un principe bien établi que les constatations de fait d'un juge de première instance, fondées sur la crédibilité des témoins, ne doivent pas être infirmées en appel à moins qu'il ne soit prouvé que le juge de première instance a commis une erreur manifeste et dominante qui a faussé son appréciation des faits [. . .] Même si une constatation de fait ne dépend pas de la crédibilité, notre Cour a pour principe de ne pas intervenir pour réviser les constatations des tribunaux de première instance . . .
>
> Et même dans les cas où une constatation de fait n'est ni liée inextricablement à la crédibilité du témoin ni fondée sur une mauvaise compréhension de la preuve, la règle reste la même : l'examen en appel devrait se limiter aux cas où une erreur manifeste a été commise. C'est pourquoi, dans l'arrêt *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, notre Cour a refusé d'infirmer la conclusion du juge de première instance que certaines marchandises étaient défectueuses, disant, aux pp. 84 et 85, qu'une cour d'appel ne peut à bon droit infirmer une décision de première instance lorsque la seule question en litige porte sur l'interprétation de l'ensemble de la preuve (citant *Métivier c. Cadorette*, [1977] 1 R.C.S. 371).

Notre Cour a réitéré cette opinion à maintes reprises : voir *Palsky c. Humphrey*, [1964] R.C.S. 580, p. 583; *Schwartz*, précité, par. 32; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, p. 426, le juge La Forest; *Toneguzzo-Norvell*, précité. La Cour suprême des États-Unis a adopté une position semblable : voir *Anderson*, précité, p. 577.

Dans son examen de la norme de contrôle applicable aux inférences de fait du juge de première instance, notre collègue dit ce qui suit, au par. 103 :

In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. . . . While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added.]

With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

La cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés. [. . .] Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait. [Nous soulignons.]

En toute déférence, nous estimons que ce passage comporte deux erreurs. Premièrement, selon nous, la norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte.

22 Deuxièmement, nous croyons en toute déférence qu'en faisant une distinction analytique entre les conclusions factuelles et les inférences factuelles, le passage précité pourrait amener les cours d'appel à soupeser la preuve à nouveau et sans raison. Bien que nous partagions l'opinion selon laquelle il est loisible à une cour d'appel de conclure qu'une inférence de fait tirée par le juge de première instance est manifestement erronée, nous tenons toutefois à faire la mise en garde suivante : lorsque des éléments de preuve étayent cette inférence, il sera difficile à une cour d'appel de conclure à l'existence d'une erreur manifeste et dominante. Comme nous l'avons dit précédemment, les tribunaux de première instance sont dans une position avantageuse pour apprécier et soupeser de vastes quantités d'éléments de preuve. Pour tirer une inférence factuelle, le juge de première instance doit passer les faits pertinents au crible, en apprécier la valeur probante et tirer une conclusion factuelle. En conséquence, lorsque cette conclusion est étayée par des éléments de preuve, modifier cette conclusion équivaut à modifier le poids accordé à ces éléments par le juge de première instance.

23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

24 In addition, in distinguishing inferences of fact from findings of fact, our colleague states, at para. 102, that deference to findings of fact is "principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand", a rationale which does not bear on factual inferences. With respect, we disagree with this view. As we state above, there are numerous reasons for showing deference to the factual findings of a trial judge, many of which are equally applicable to all factual conclusions of the trial judge. This was pointed out in *Schwartz*, *supra*. After listing numerous policy concerns justifying a deferential approach to findings of fact, at para. 32 La Forest J. goes on to state:

> This explains why the rule [that appellate courts must treat a trial judge's findings of fact with great deference] applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. [Emphasis added.]

Nous rappelons qu'il n'appartient pas aux cours d'appel de remettre en question le poids attribué aux différents éléments de preuve. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle. La cour d'appel n'est pas habilitée à modifier une conclusion factuelle avec laquelle elle n'est pas d'accord, lorsque ce désaccord résulte d'une divergence d'opinion sur le poids à attribuer aux faits à la base de la conclusion. Comme nous le verrons plus loin, nous estimons en toute déférence que constitue un exemple de ce genre d'intervention inadmissible à l'égard d'une inférence de fait la conclusion de notre collègue selon laquelle la juge de première instance a commis une erreur en prêtant à la municipalité la connaissance du danger dans la présente affaire.

De plus, en établissant une distinction entre les inférences de fait et les conclusions de fait, notre collègue dit, au par. 102, que la retenue à l'égard des secondes « repose principalement sur le fait que, puisqu'il [le juge de première instance] est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix », justification non pertinente dans le cas des inférences de fait. En toute déférence, nous ne partageons pas cette opinion. Comme nous l'avons dit plus tôt, il existe de nombreuses raisons de faire preuve de retenue à l'égard des constatations de fait du juge de première instance, dont plusieurs valent autant pour toutes ses conclusions factuelles. Cette observation a été faite dans l'arrêt *Schwartz*, précité. Après avoir énuméré les nombreuses considérations de politique judiciaire invoquées pour justifier la règle de la retenue à l'égard des constatations de fait, le juge La Forest, au par. 32, ajoute :

> Cela explique pourquoi la règle [selon laquelle les cours d'appel doivent faire preuve d'une grande retenue à l'égard des conclusions de fait des juges de première instance] s'applique non seulement lorsque la crédibilité des témoins est en cause, quoiqu'elle puisse alors s'appliquer plus strictement, mais également à toutes les conclusions de fait tirées par le juge de première instance. [Nous soulignons.]

Recent support for deferring to all factual conclusions of the trial judge is found in *Toneguzzo-Norvell*, *supra.* McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

. . .

I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge. [Emphasis added.]

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge. In our view, this is made clear by the underlined portion of the above passage. The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

Although the trial judge will always be in a distinctly privileged position when it comes to

Notre Cour a récemment donné son appui à la règle de la retenue judiciaire à l'égard de l'ensemble des conclusions factuelles du juge de première instance dans l'arrêt *Toneguzzo-Norvell*, précité. Madame le juge McLachlin (maintenant Juge en chef), qui a rédigé le jugement unanime de notre Cour, a dit ceci, aux p. 121-122 :

Une cour d'appel n'est manifestement pas autorisée à intervenir pour le simple motif qu'elle perçoit la preuve différemment. Il appartient au juge de première instance, et non à la cour d'appel, de tirer des conclusions de fait en matière de preuve.

. . .

Je reconnais que le principe de non-intervention d'une cour d'appel dans les conclusions de fait d'un juge de première instance ne s'applique pas avec la même vigueur aux conclusions tirées de témoignages d'expert contradictoires lorsque la crédibilité de ces derniers n'est pas en cause. Il n'en demeure pas moins que, selon notre système de procès, il appartient essentiellement au juge des faits, en l'espèce le juge de première instance, d'attribuer un poids aux différents éléments de preuve. [Nous soulignons.]

Nous considérons que ces propos du juge McLachlin signifient que, bien que le même degré élevé de retenue s'applique à l'ensemble des décisions factuelles du juge de première instance, lorsqu'une telle conclusion factuelle repose sur l'appréciation de la crédibilité d'un témoin, il faut reconnaître l'énorme avantage dont jouit le juge de première instance à cet égard. Cela ne veut toutefois pas dire qu'une norme de contrôle moins rigoureuse s'applique lorsque la question en jeu ne porte pas sur la crédibilité d'un témoin, ni qu'il n'existe pas de nombreuses considérations de principe justifiant de faire montre de retenue à l'égard de toutes les conclusions factuelles. À notre avis, cela ressort clairement du passage souligné dans l'extrait précité. Le point essentiel est qu'une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue.

Bien que le juge de première instance soit toujours dans une position privilégiée pour apprécier

assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

la crédibilité des témoins, ce n'est pas là le seul domaine où il bénéficie d'un avantage sur les juges des cours d'appel. Parmi les avantages dont jouit le juge de première instance sur le plan des inférences factuelles, mentionnons son expertise relative en matière d'appréciation et d'évaluation de la preuve, de même que la connaissance unique qu'il possède de la preuve souvent abondante produite par les parties. Cette familiarité avec toute la trame factuelle lui est d'une grande utilité lorsque vient le moment de tirer des conclusions de fait. En outre, les considérations relatives au coût, au nombre et à la durée des appels sont tout aussi pertinentes pour ce qui est des inférences de fait que pour ce qui est des conclusions de fait, et justifient l'application aux unes comme aux autres d'une norme empreinte de retenue. En conséquence, nous ne partageons pas l'opinion de notre collègue selon laquelle la raison principale justifiant de faire montre de retenue à l'égard des conclusions de fait est la possibilité qu'a le juge de première instance d'observer les témoins directement. Nous sommes d'avis que le juge de première instance jouit, par rapport aux juges d'appel, de nombreux avantages qui influent sur toutes les conclusions de fait et que, même si ces avantages n'existaient pas, d'autres considérations impérieuses justifient de faire montre de retenue à l'égard des inférences de fait. Par conséquent, nous concluons en soulignant qu'il n'y a qu'une seule et unique norme de contrôle applicable à toutes les conclusions factuelles tirées par le juge de première instance, soit celle de l'erreur manifeste et dominante.

D. *Standard of Review for Questions of Mixed Fact and Law*

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal

D. *La norme de contrôle applicable aux questions mixtes de fait et de droit*

D'entrée de jeu, il importe de distinguer les questions mixtes de fait et de droit des conclusions factuelles (qu'il s'agisse de conclusions directes ou d'inférences). Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits : *Canada (Directeur des enquêtes et des recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35. Par contre, les conclusions ou les inférences de fait exigent que soit tirée une conclusion factuelle d'un ensemble de faits. Tant les questions mixtes de fait et de droit que les questions

or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3) of the *Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1, to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the

de fait exigent souvent du tribunal qu'il tire des inférences; la différence réside dans le caractère — juridique ou factuel — de ces inférences. En raison de cette similitude, on confond parfois les deux catégories de questions. Cette confusion a été soulignée par A. L. Goodhart dans « Appeals on Questions of Fact » (1955), 71 *L.Q.R.* 402, p. 405 :

> [TRADUCTION] La distinction entre [la perception des faits et l'appréciation de ceux-ci] a tendance à être embrouillée parce que nous utilisons la formule « le juge a conclu au fait que le défendeur avait été négligent », alors que ce que nous voulons dire, c'est que « le juge a constaté le fait que le défendeur a commis les actes A et B et, suivant son opinion, il a conclu qu'il n'était pas raisonnable pour ce dernier d'avoir agi ainsi ».

L'affaire qui nous occupe présente des exemples des deux catégories de questions. Pour répondre à la question de savoir si la municipalité aurait dû connaître le danger présenté par le chemin, il faut apprécier les faits à l'origine de l'affaire et tirer des conclusions factuelles relativement à la connaissance de la municipalité. Il faut appliquer à ces conclusions factuelles une norme juridique qui, en l'occurrence, est énoncée au par. 192(3) de la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1. De même, pour pouvoir conclure à la négligence, il faut apprécier les faits essentiels, en tirer des conclusions factuelles puis en dégager une inférence, c'est-à-dire se demander si la municipalité a oui ou non omis de respecter la norme de diligence raisonnable et si elle a, par conséquent, été négligente ou non.

27 Une fois établi que la question examinée exige l'application d'une norme juridique à un ensemble de faits et qu'il s'agit donc d'une question mixte de fait et de droit, il faut alors déterminer quelle est la norme de contrôle appropriée et l'appliquer. Vu les diverses normes de contrôle qui s'appliquent aux questions de droit et aux questions de fait, il est souvent difficile de déterminer celle qui s'applique. Dans l'arrêt *Southam*, précité, par. 39, notre Cour a expliqué comment une erreur touchant une question mixte de fait et de droit peut constituer une pure erreur de droit, assujettie à la norme de la décision correcte :

> . . . si un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les

decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: *Southam*, *supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, at para. 37:

> . . . the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that

faits, il ne prend en considération que A, B, et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Par conséquent, ce qui peut paraître une question mixte de fait et de droit peut, après plus ample examen, se révéler en réalité une pure erreur de droit.

Cependant, lorsque l'erreur ne constitue pas une erreur de droit, une norme de contrôle plus exigeante s'impose. Dans les cas où le juge des faits examine tous les éléments de preuve que le droit lui commande de prendre en considération mais en tire néanmoins une conclusion erronée, il commet alors une erreur mixte de fait et de droit, qui est assujettie à une norme de contrôle plus rigoureuse : *Southam*, précité, par. 41 et 45. Bien que facile à énoncer, cette distinction peut s'avérer difficile à établir en pratique parce que les questions mixtes de fait et de droit s'étalent le long d'un spectre comportant des degrés variables de particularité. Cette difficulté a été soulignée dans l'arrêt *Southam*, par. 37 :

> . . . il arrive que les faits dans certaines affaires soient si particuliers, de fait qu'ils soient si uniques, que les décisions concernant la question de savoir s'ils satisfont aux critères juridiques n'ont pas une grande valeur comme précédents. Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir.

Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, notre

a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84).

Cour a jugé que les cours d'appel devaient faire preuve de retenue à l'égard de la conclusion du juge de première instance. Dans l'arrêt *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, p. 4, le juge Dickson (plus tard Juge en chef) a infirmé la décision de la Cour d'appel de la Colombie-Britannique portant que le juge de première instance avait erronément conclu à la négligence, pour le motif qu'« une cour d'appel commet une erreur lorsqu'elle infirme un jugement de première instance s'il n'y a pas une erreur manifeste et dominante, et si l'interprétation de l'ensemble de la preuve est le seul point en litige » (voir aussi l'arrêt *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, p. 84).

This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

30

Il convient d'appliquer cette norme de contrôle plus exigeante aux conclusions de négligence, étant donné que de telles conclusions peuvent également être tirées par des jurys en première instance. Si la norme applicable était celle de la décision correcte, il s'ensuivrait que les cours d'appel appliqueraient cette norme pour contrôler même des conclusions de négligence tirées par jurys. Actuellement, il n'y a ouverture à un tel contrôle que si le juge du procès a donné des directives erronées au jury sur le droit applicable. Suivant la règle générale, les tribunaux font montre d'une grande retenue envers les conclusions des jurys dans les procès civils pour négligence :

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.
>
> (*McCannell v. McLean*, [1937] S.C.R. 341, at p. 343)

> [TRADUCTION] Le principe pertinent a été énoncé dans bon nombre d'arrêts de notre Cour, à savoir qu'il n'y a pas lieu d'écarter le verdict d'un jury parce qu'il va à l'encontre du poids de la preuve, à moins que le verdict en question ne soit nettement déraisonnable et injuste au point de convaincre le tribunal qu'aucun jury examinant la preuve dans son ensemble et agissant de façon judiciaire n'aurait pu le prononcer.
>
> (*McCannell c. McLean*, [1937] R.C.S. 341, p. 343)

See also *Dube v. Labar*, [1986] 1 S.C.R. 649, at p. 662, and *C.N.R. v. Muller*, [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury rein-

Voir également *Dube c. Labar*, [1986] 1 R.C.S. 649, p. 662, et *C.N.R. c. Muller*, [1934] 1 D.L.R. 768 (C.S.C.). Adopter la norme de la décision correcte aurait pour effet de modifier le droit et de porter atteinte au rôle traditionnel du jury. Par conséquent, le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux

forces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in *Galaske v. O'Donnell*, [1994] 1 S.C.R 670, at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

Galaske, *supra*, is an illustration of the point made in *Southam*, *supra*, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing

fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys.

Toutefois, lorsque le juge du procès conclut erronément à la négligence par suite d'une formulation incorrecte de la norme juridique, cela peut constituer une erreur de droit. Cette distinction a été faite par le juge Cory dans l'arrêt *Galaske c. O'Donnell*, [1994] 1 R.C.S. 670, p. 690-691 :

> La définition de la norme de diligence est une question mixte de droit et de fait. Il incombera habituellement au juge du procès de déterminer, compte tenu des circonstances de l'espèce, ce qui constituerait une conduite raisonnable de la part de la personne raisonnable légendaire placée dans la même situation. Dans certains cas, un simple rappel suffira, tandis que dans d'autres, par exemple lorsqu'un très jeune enfant est passager, le conducteur peut avoir à attacher lui-même la ceinture de sécurité de l'enfant. Cependant, en l'espèce, le conducteur n'a pris aucune mesure pour veiller à ce que l'enfant porte sa ceinture de sécurité. Il s'ensuit que la décision du juge du procès sur la question équivalait à une conclusion qu'aucune obligation n'incombait au conducteur, ce qui constituait une erreur de droit.

L'arrêt *Galaske*, précité, illustre bien l'idée exposée dans l'arrêt *Southam*, précité, selon laquelle il est possible de dégager une pure question de droit de ce qui paraît être une question mixte de fait et de droit. Toutefois, en l'absence d'erreur de droit ou d'une erreur manifeste et dominante, la conclusion de négligence tirée par un juge de première instance ne doit pas être modifiée.

L'analogie qui peut être établie entre les inférences de fait et les questions mixtes de fait et de droit étaye notre conclusion. Comme nous l'avons dit précédemment, dans les deux cas des inférences doivent être tirées des faits à l'origine de l'affaire. La différence dépend de la question de savoir si l'inférence se rapporte à une norme juridique ou non. Parce que le résultat des deux processus est tributaire du poids accordé à la preuve, les diverses considérations de principe justifiant de faire montre de retenue à l'égard des inférences de

deference to the trial judge's inferences of mixed fact and law.

Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]

A good example of this subtle principle can be found in *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, at pp. 515-16. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (pp. 515-16). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an

fait du juge de première instance justifient également, dans une certaine mesure, de faire de même à l'égard de ses inférences mixtes de fait et de droit.

33 Par contre, lorsqu'il peut être établi que la conclusion erronée du juge de première instance découle d'une erreur quant à la norme juridique à appliquer, ce facteur touche au rôle de création du droit de la cour d'appel, et une retenue moins élevée s'impose, conformément à la norme de la décision « correcte ». Notre Cour a apporté cette nuance dans l'arrêt *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, par. 48-49 :

> La question qui consiste « à déterminer si les faits satisfont au critère juridique » est une question mixte de droit et de fait ou, en d'autres termes, « la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait » (*Southam*, par. 35).
>
> Une fois les faits établis sans erreur manifeste et dominante, cette question doit généralement être révisée suivant la norme de la décision correcte puisque la norme de diligence est normative et constitue une question de droit qui relève de la compétence habituelle des tribunaux de première instance et d'appel. [Nous soulignons.]

34 Un bon exemple de ce principe subtil est l'arrêt *Rhône (Le) c. Peter A.B. Widener (Le)*, [1993] 1 R.C.S. 497, p. 515-516. La question en litige dans cette affaire consistait à déterminer si certaines personnes faisaient partie des âmes dirigeantes d'une société. Il s'agit d'une question mixte de droit et de fait. Toutefois, la conclusion erronée des juridictions inférieures était facilement imputable à une erreur de droit qui pouvait être dégagée de la question mixte de droit et de fait. La question de droit ainsi isolable était celle des fonctions que devait remplir une personne pour qu'on puisse à bon droit la considérer comme une « âme dirigeante » de la société (p. 515-516). Le juge Iacobucci s'est exprimé ainsi au nom des juges de la majorité, à la p. 526 :

> En toute déférence, je crois que les juridictions inférieures ont trop insisté sur l'importance de la subdélégation en l'espèce. Le facteur clé qui permet de distinguer les âmes dirigeantes des employés ordinaires est la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale, plutôt que

operational basis, whether at head office or across the sea.

35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

le simple fait de mettre en œuvre ces politiques dans un cadre opérationnel, que ce soit au siège social ou en mer.

En d'autres termes, les juridictions inférieures ont commis une erreur de droit en concluant que la subdélégation était un facteur permettant de qualifier une personne d'« âme dirigeante » d'une société, alors que le facteur juridique applicable à cet égard est en fait « la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale ». Cette formulation erronée du critère juridique approprié (les conditions juridiques requises pour être une « âme dirigeante ») a entaché ou vicié la conclusion factuelle des juridictions inférieures selon laquelle le capitaine Kelch était une âme dirigeante de la société. Comme cette conclusion erronée était imputable à une erreur de droit, un degré moindre de retenue s'imposait et la norme applicable était celle de la décision correcte.

En résumé, la conclusion de négligence que tire le juge de première instance suppose l'application d'une norme juridique à un ensemble de faits et constitue donc une question mixte de fait et de droit. Les questions mixtes de fait et de droit s'étalent le long d'un spectre. Lorsque, par exemple, la conclusion de négligence est entachée d'une erreur imputable à l'application d'une norme incorrecte, à l'omission de tenir compte d'un élément essentiel d'un critère juridique ou à une autre erreur de principe semblable, une telle erreur peut être qualifiée d'erreur de droit et elle est contrôlée suivant la norme de la décision correcte. Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit », assujettie à une norme de contrôle plus rigoureuse. Selon la règle générale énoncée dans l'arrêt *Jaegli Enterprises*, précité, si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante.

In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

III. Application of the Foregoing Principles to this Case: Standard of Care of the Municipality

A. *The Appropriate Standard of Review*

We agree with our colleague that the correct statement of the municipality's standard of care is that found in *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask. C.A.), *per* Martin J.A., at pp. 558-59:

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances; "repair" is a relative term, and hence the facts in one case afford no fixed rule

37 À cet égard, nous ne pouvons en toute déférence pas souscrire à l'opinion de notre collègue lorsqu'il affirme, au par. 106, qu'« [u]ne fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée. Dans bien des cas, l'examen des faits à travers le prisme juridique de la norme de diligence implique l'établissement de politiques d'intérêt général ou la création de règles de droit, rôle qui relève autant des cours de première instance que des cours d'appel ». À notre avis, il est bien établi en droit que la question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe isolable en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit.

III. Application des principes qui précèdent à l'espèce : la norme de diligence applicable à la municipalité

A. *La norme de contrôle appropriée*

38 À l'instar de notre collègue, nous sommes d'avis que la norme de diligence applicable à la municipalité a été convenablement énoncée par le juge Martin dans l'arrêt *Partridge c. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (C.A. Sask.), p. 558-559 :

> [TRADUCTION] L'étendue de l'obligation légale d'entretien qui incombe aux corporations municipales à l'égard des routes qui se trouvent sur leur territoire a été énoncée de diverses façons dans nombre de décisions publiées. Il est toutefois possible de dégager la règle générale suivante de ces décisions : le chemin doit être tenu dans un état raisonnable d'entretien, de façon que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La question de savoir en quoi consiste un état raisonnable d'entretien est une question de fait, qui est fonction de toutes

by which to determine another case where the facts are different . . . .

However, we differ from the views of our colleague in that we find that the trial judge applied the correct test in determining that the municipality did not meet its standard of care, and thus did not commit an error of law of the type mentioned in *Southam*, *supra*. The trial judge applied all the elements of the *Partridge* standard to the facts, and her conclusion that the respondent municipality failed to meet this standard should not be overturned absent palpable and overriding error.

B. *The Trial Judge Did Not Commit an Error of Law*

39 We note that our colleague bases his conclusion that the municipality met its standard of care on his finding that the trial judge neglected to consider the conduct of the ordinary motorist, and thus failed to apply the correct standard of care, an error of law, which justifies his reconsideration of the evidence (para. 114). As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. This was made clear by the recent decision of *Van de Perre*, *supra*, where Bastarache J. says, at para. 15:

. . . omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

les circonstances de l'espèce; le terme « entretien » est une notion relative et, par conséquent, les faits propres à une affaire donnée ne permettent pas de dégager de règle déterminée permettant de trancher une autre affaire présentant des circonstances différentes . . .

Toutefois, contrairement à notre collègue, nous estimons que la juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté la norme de diligence à laquelle elle était tenue, et que la juge n'a donc pas commis une erreur de droit du genre de celle décrite dans l'arrêt *Southam*, précité. La juge de première instance a appliqué aux faits de l'espèce tous les éléments du critère énoncé dans l'arrêt *Partridge*, et sa conclusion que la municipalité défenderesse n'a pas respecté ce critère ne devrait pas être infirmée en l'absence d'erreur manifeste et dominante.

B. *La juge de première instance n'a pas commis d'erreur de droit*

Nous soulignons que notre collègue fonde sa décision que la municipalité a respecté la norme de diligence sur sa conclusion que la juge de première instance a négligé de prendre en compte le comportement de l'automobiliste moyen et n'a donc pas appliqué la bonne norme de diligence, commettant ainsi une erreur de droit le justifiant de réexaminer la preuve (par. 114). Pour les besoins de l'analyse du critère de l'automobiliste moyen ou raisonnable, nous tenons au départ à signaler que l'omission d'examiner en profondeur un facteur pertinent, voire de ne pas l'examiner du tout, n'est pas en soi un fondement suffisant pour justifier une cour d'appel de réexaminer la preuve. Ce principe a été clairement énoncé dans l'arrêt récent *Van de Perre*, précité, où le juge Bastarache a dit ceci, au par. 15 :

. . . des omissions dans les motifs ne signifieront pas nécessairement que la cour d'appel a compétence pour examiner la preuve entendue au procès. Comme le dit l'arrêt *Van Mol (Guardian ad Litem of) c. Ashmore* (1999), 168 D.L.R. (4th) 637 (C.A.C.-B.), autorisation d'appel refusée [2000] 1 R.C.S. vi, une omission ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée. Faute d'une telle conviction rationnelle, la cour d'appel ne peut pas réexaminer la preuve.

In our view, as we will now discuss, there can be no reasoned belief in this case that the trial judge forgot, ignored, or misconceived the question of the ordinary driver. It would thus be an error to engage in a re-assessment of the evidence on this issue.

The fact that the conduct of the ordinary motorist was in the mind of the trial judge from the outset is clear from the fact that she began her standard of care discussion by stating the correct test, quoting the above passage from *Partridge*, *supra*. Absent some clear sign that she subsequently varied her approach, this initial acknowledgment of the correct legal standard is a strong indication that this was the standard she applied. Not only is there no indication that she departed from the stated test, but there are further signs which support the conclusion that the trial judge applied the *Partridge* standard. The first such indication is that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. The second indication is that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Finally, the fact that the trial judge apportioned negligence to Mr. Nikolaisen indicates that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter.

The discussion of the ordinary motorist is found in the passage from the trial judgment immediately following the statement of the requisite standard of care:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

À notre avis, comme nous allons le voir, la présente espèce ne peut faire naître la conviction rationnelle que la juge de première instance a oublié d'examiner la question du conducteur moyen, en a fait abstraction ou l'a mal interprétée. Il serait donc erroné de réexaminer la preuve relative à cette question.

40 Le fait que, dès le départ, la juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen ressort clairement du fait qu'elle a commencé son examen de la norme de diligence en formulant le critère approprié, c'est-à-dire en citant le passage susmentionné de l'arrêt *Partridge*, précité. En l'absence d'indications claires qu'elle a subséquemment modifié sa méthode d'analyse, cette mention initiale de la norme juridique appropriée constitue un indice solide qu'il s'agit bien de la norme qu'elle a appliquée. Non seulement rien n'indique qu'elle s'est écartée du critère énoncé, mais d'autres indices étayent la conclusion qu'elle a appliqué le critère de l'arrêt *Partridge*. Le premier de ces indices est que la juge s'est bel et bien interrogée, tant explicitement qu'implicitement, sur la conduite de l'automobiliste moyen ou raisonnable s'approchant du virage. Le deuxième indice est qu'elle a fait état des témoignages des experts, MM. Anderson et Werner, qui ont tous deux analysé le comportement de l'automobiliste moyen se trouvant dans cette situation. Enfin, le fait que la juge de première instance ait imputé une partie de la responsabilité à M. Nikolaisen indique qu'elle a évalué sa conduite eu égard au critère du conducteur moyen, et qu'elle a donc pris en compte la conduite de ce dernier.

41 On trouve l'analyse relative à l'automobiliste moyen dans cet extrait du jugement de première instance qui suit immédiatement l'énoncé de la norme de diligence requise :

> [TRADUCTION] Le chemin Snake Hill est un chemin à faible débit de circulation. Il est néanmoins entretenu par la M.R. à longueur d'année afin de le garder carrossable. Des résidences permanentes sont situées en bordure de celui-ci. Les fermiers l'utilisent pour accéder à leurs champs et à leur bétail. Des jeunes gens empruntent le chemin Snake Hill pour se rendre à des fêtes, de sorte qu'il est utilisé par des conducteurs qui ne le connaissent pas toujours aussi bien que les résidents de l'endroit.

There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet.

. . . where the existence of that bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Underlining added; italics in original.]

([1998] 5 W.W.R. 523, at paras. 84-86)

42 In our view, this passage indicates that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve. As well, the trial judge referred explicitly to the conduct of a motorist exercising ordinary care: "it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86 (emphasis added)).

Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner. En outre, il s'agit d'un danger qui n'est pas facilement décelable par les usagers du chemin. Il s'agit d'un danger caché. L'endroit où le véhicule de M. Nikolaisen a fait un tonneau est situé sur le tronçon le plus dangereux du chemin Snake Hill. À l'approche de cet endroit, des broussailles réduisent la distance de visibilité de l'automobiliste et l'empêchent de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Bien que des opinions divergentes aient été émises quant à la vitesse *maximale* à laquelle ce virage peut être pris, je suis d'avis que, vu la distance de visibilité réduite, l'existence d'une courbe serrée et l'absence de surélévation du chemin, ce virage ne peut être pris *en sécurité* à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide.

. . . à l'endroit où la présence des broussailles empêche les automobilistes de voir venir un danger comme celui qui existe sur le chemin Snake Hill, il est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux. [Nous soulignons; en italique dans l'original.]

([1998] 5 W.W.R. 523, par. 84-86)

À notre avis, cet extrait indique que la juge de première instance a effectivement pris en compte la façon dont l'automobiliste prenant des précautions normales s'approcherait du virage en question. Qualifier le virage de [TRADUCTION] « danger caché », danger qui « n'est pas facilement décelable par les usagers du chemin », implique que le danger en est un qu'il est impossible de prévoir. Il s'ensuit que, même si l'automobiliste prend des précautions normales, il ne pourra pas réagir à la présence du virage. Par ailleurs, la juge de première instance a explicitement fait état de la conduite de l'automobiliste prenant des précautions normales : [TRADUCTION] « [I]l est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux » (par. 86 (nous soulignons)).

With respect to the speed of a motorist approaching the curve, there is also an indication that the trial judge considered the conduct of an ordinary motorist. First, she stated that she accepted the evidence of Mr. Anderson and Mr. Werner with respect to the finding that the curve constituted a hazard to the public. The evidence given by these experts suggests that between 60 and 80 km/h is a reasonable speed to drive parts of this road, and at that speed, the curve presents a hazard. Their evidence also indicates their general opinion that the curve was a hazardous one. Mr. Anderson refers to the curve being difficult to negotiate at "normal speeds". Also, Mr. Anderson states that "if you're not aware that this curve is there, the sharp course of the curve, and you enter too far into it before you realize that the curve is there, then you have to do a tighter radius than 118 metres in order to get back on track to be able to negotiate the second curve". He also states that "you could be lulled into thinking you've got an 80 kilometres an hour road until you are too far into the tight curve to be able to respond".

43 Relativement à la vitesse à laquelle les automobilistes s'approchent du virage, il existe également un indice confirmant que la juge de première instance a pris en compte la conduite de l'automobiliste moyen. Premièrement, elle a dit qu'elle acceptait les témoignages de MM. Anderson et de Werner en ce qui concerne la conclusion que la courbe constituait un danger pour le public. Leurs témoignages suggèrent qu'une vitesse de 60 à 80 km/h est une vitesse raisonnable à certains endroits de ce chemin et que, à cette vitesse, la courbe constitue un danger. Leurs témoignages indiquent également qu'ils estiment de façon générale que la courbe est dangereuse. De dire M. Anderson, le virage est difficile à prendre à des [TRADUCTION] « vitesses normales ». Il ajoute que, [TRADUCTION] « si on ne connaît pas la présence de ce virage à cet endroit, le caractère prononcé du virage, et qu'on ne s'aperçoit pas qu'il y a un virage avant de s'être déjà engagé trop loin dans celui-ci, il faut tourner dans un rayon inférieur à 118 mètres pour corriger sa trajectoire afin d'être en mesure de prendre le deuxième virage ». Il affirme également qu' [TRADUCTION] « on peut être amené à croire qu'on se trouve sur une route où il est possible de rouler à 80 km/h, jusqu'à ce qu'on soit engagé trop loin dans le virage serré pour être capable de réagir ».

The Court of Appeal found that, given the nature and condition of Snake Hill Road, the contention that this rural road would be taken at 80 km/h by the ordinary motorist was untenable. However, it is clear from the trial judge's reasons that she did not take 80 km/h as the speed at which the ordinary motorist would approach the curve. Instead she found, based on expert evidence, that "this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet" (para. 85 (emphasis in original)). From this finding, coupled with the finding that the curve was hidden and unexpected, the logical conclusion is that the trial judge found that a motorist exercising ordinary care could easily be deceived into approaching the curve at speeds in excess of the safe speed for the curve, and subsequently be taken by surprise. Therefore, the trial judge found that the curve was hazardous to the ordinary

44 La Cour d'appel a jugé que, vu la nature et l'état du chemin Snake Hill, la prétention selon laquelle l'automobiliste moyen roulerait sur cette route rurale à 80 km/h était insoutenable. Toutefois, il ressort clairement des motifs de la juge de première instance qu'elle ne considérait pas que l'automobiliste moyen s'approcherait du virage à 80 km/h. Elle a plutôt conclu, à partir des témoignages des experts, que [TRADUCTION] « ce virage ne peut être pris *en sécurité* à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide » (par. 85 (en italique dans l'original)). De cette constatation, conjuguée à celle que le virage était caché et imprévu, il est logique de conclure que la juge de première instance a estimé que l'automobiliste prenant des précautions normales pouvait aisément être amené à s'approcher du virage à des vitesses supérieures à la vitesse sécuritaire pour le prendre, et se retrouver ensuite pris au dépourvu. La juge de première

motorist and it follows that she applied the correct standard of care.

45 In our respectful view, our colleague errs in agreeing with the Court of Appeal's finding that the trial judge should have addressed the conduct of the ordinary motorist more fully (para. 124). At para. 119, he writes:

> A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question.

And later, he states, "In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road" (para. 125). With respect, requiring the trial judge to have made this specific inquiry in her reasons is inconsistent with *Van de Perre*, *supra*, which makes it clear that an omission or a failure to discuss a factor in depth is not, in and of itself, a basis for interfering with the findings of the trial judge and reweighing the evidence. As we note above, it is clear that although the trial judge may not have conducted an extensive review of this element of the *Partridge* test, she did indeed consider this factor by stating the correct test, then applying this test to the facts.

46 We note that in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses. However, her reliance on the evidence of Mr. Anderson and Mr. Werner is insufficient proof that she "forgot, ignored, or misconceived" the evidence. The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others:

instance a donc conclu que le virage était dangereux pour l'automobiliste moyen et il s'ensuit qu'elle a appliqué la norme de diligence appropriée.

En toute déférence, notre collègue commet une erreur en souscrivant à la conclusion de la Cour d'appel selon laquelle la juge de première instance aurait dû examiner de manière plus approfondie la conduite de l'automobiliste moyen (par. 124). Il écrit ceci, au par. 119 :

> Pour bien appliquer le critère juridique, le juge de première instance doit se poser la question suivante : « Comment un conducteur raisonnable aurait-il roulé sur ce chemin? » Le fait de conclure qu'il existe ou non un danger « caché » ou qu'une courbe est quelque chose d'« intrinsèquement » dangereux ne vide pas la question.

Plus loin, il dit : « À mon avis, la question de savoir comment un conducteur raisonnable aurait roulé sur le chemin Snake Hill nécessitait un examen un peu plus approfondi de la nature du chemin » (par. 125). En toute déférence, considérer que la juge de première instance aurait dû faire cette analyse particulière dans ses motifs est incompatible avec l'arrêt *Van de Perre*, précité, lequel établit clairement que l'omission ou le défaut d'analyser un facteur en profondeur ne constitue pas, en soi, une raison justifiant de modifier les conclusions du juge de première instance et de réexaminer la preuve. Comme nous l'avons dit précédemment, il est clair que, quoique la juge de première instance n'ait peut-être pas fait une analyse approfondie de ce volet du critère énoncé dans l'arrêt *Partridge*, elle a effectivement tenu compte de ce facteur en formulant le critère approprié puis en l'appliquant aux faits de l'espèce.

Nous tenons à souligner que, en s'appuyant sur les témoignages de MM. Anderson et Werner, la juge de première instance a choisi de ne pas fonder sa décision sur les témoignages contradictoires rendus par d'autres témoins. Toutefois, cela ne suffit pas pour établir qu'elle a « oublié, négligé d'examiner ou mal interprété » la preuve. La juge de première instance disposait de l'ensemble du dossier et on peut présumer qu'elle l'a étudié d'un bout à l'autre, en l'absence d'autre indication qu'elle a oublié, négligé d'examiner ou mal interprété la preuve, commettant ainsi une erreur de droit. Le juge de première

Toneguzzo-Norvell, *supra*, at p. 123. Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para. 15). This is in keeping with the narrow scope of review by an appellate court applicable in this case.

instance peut retenir la déposition de certains témoins de préférence à d'autres : *Toneguzzo-Norvell*, précité, p. 123. Le fait pour le juge de première instance de s'appuyer sur certains témoignages plutôt que sur d'autres ne peut à lui seul fournir l'assise d'une « conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre*, précité, par. 15). Cette conclusion est compatible avec la portée restreinte de l'examen qu'il convient de faire en appel dans la présente affaire.

A further indication that the trial judge considered the conduct of an ordinary motorist on Snake Hill Road is her finding that both Mr. Nikolaisen and the municipality breached their duty of care to Mr. Housen, and that the defendant Nikolaisen was 50 percent contributorily negligent. Since a finding of negligence implies a failure to meet the ordinary standard of care, and since Mr. Nikolaisen's negligence related to his driving on the curve, to find that Mr. Nikolaisen's conduct on the curve failed to meet the standard of the ordinary driver implies a consideration of that ordinary driver on the curve. The fact that the trial judge distinguished the conduct of Mr. Nikolaisen in driving negligently on the road from the conduct of the municipality in negligently failing to erect a warning sign is evidence that the trial judge kept the municipality's legal standard clearly in mind in its application to the facts, and that she applied this standard to the ordinary driver, not the negligent driver.

47 Une autre indication que la juge de première instance s'est interrogée sur la façon dont conduit l'automobiliste moyen sur le chemin Snake Hill est sa conclusion que M. Nikolaisen et la municipalité ont tous deux manqué à leur obligation de diligence envers M. Housen, et que le défendeur Nikolaisen était responsable de négligence concourante dans une proportion de 50 p. 100. Comme une conclusion de négligence implique un manquement à la norme de diligence habituelle, et comme la négligence de M. Nikolaisen était liée à sa manière de conduire dans le virage, la conclusion que sa conduite à cet endroit ne respectait pas le critère du conducteur moyen suppose qu'on s'est demandé comment ce conducteur s'approcherait du virage. La distinction qu'a établie la juge de première instance entre la négligence dont a fait preuve M. Nikolaisen lorsqu'il roulait sur le chemin et celle dont la municipalité a fait montre en omettant d'installer un panneau d'avertissement prouve qu'elle n'a pas perdu de vue la norme juridique régissant la municipalité et l'application de cette norme aux faits, et que la juge a appliqué cette norme au conducteur moyen, et non au conducteur négligent.

To summarize, in the course of her reasons, the trial judge first stated the requisite standard of care from *Partridge*, *supra*, relating to the conduct of the ordinary driver. She then applied that standard to the facts referring again to the conduct of the ordinary driver. Finally, in light of her finding that the municipality breached this standard, she apportioned negligence between the driver and the municipality in a way which again entailed a consideration of the

48 En résumé, dans ses motifs la juge de première instance a d'abord énoncé la norme de diligence requise par l'arrêt *Partridge*, précité, relativement à la conduite de l'automobiliste moyen. Elle a ensuite appliqué cette norme aux faits, se reportant encore une fois à la conduite de l'automobiliste moyen. Enfin, vu sa conclusion que la municipalité avait manqué à cette norme de diligence, elle a réparti la responsabilité entre le conducteur

ordinary driver. As such, we are overwhelmingly drawn to the conclusion that the conduct of the ordinary driver was both considered and applied by the trial judge.

49 Thus, we conclude that the trial judge did not commit an error of law with respect to the municipality's standard of care. On this matter, we disagree with the basis for the re-assessment of the evidence undertaken by our colleague (paras. 122-42) and regard this re-assessment to be an unjustified intrusion into the finding of the trial judge that the municipality breached its standard of care. This finding is a question of mixed law and fact which should not be overturned absent a palpable and overriding error. As discussed below, it is our view that no such error exists, as the trial judge conducted a reasonable assessment based on her view of the evidence.

C. *The Trial Judge Did Not Commit A Palpable or Overriding Error*

50 Despite this high standard of review, the Court of Appeal found that a palpable and overriding error was made by the trial judge ([2000] 4 W.W.R. 173, 2000 SKCA 12, at para. 84). With respect, this finding was based on the erroneous presumption that the trial judge accepted 80 km/h as the speed at which an ordinary motorist would approach the curve, a presumption which our colleague also adopts in his reasons (para. 133).

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than

et la municipalité d'une manière qui, une fois de plus, atteste la prise en compte du critère du conducteur moyen. En conséquence, nous en venons irrésistiblement à la conclusion que la juge de première instance a pris en compte et appliqué ce critère.

Par conséquent, nous estimons que la juge de première instance n'a pas commis d'erreur de droit en ce qui concerne la norme de diligence à laquelle était tenue la municipalité. Sur ce point, nous ne souscrivons pas aux raisons sur lesquelles se fondent notre collègue pour réexaminer la preuve (aux par. 122 à 142) et nous considérons ce réexamen comme une intervention injustifiée relativement à la conclusion de la juge de première instance portant que la municipalité a manqué à la norme de diligence à laquelle elle était tenue. Cette conclusion porte sur une question mixte de droit et de fait et elle ne peut pas être infirmée en l'absence d'erreur manifeste et dominante. Comme nous le verrons plus loin, nous sommes d'avis qu'aucune erreur de cette nature n'a été commise, car la juge de première instance a fait une analyse raisonnable, fondée sur son appréciation de la preuve.

C. *La juge de première instance n'a pas commis d'erreur manifeste ou dominante*

Malgré cette norme de contrôle sévère, la Cour d'appel a jugé que la juge de première instance avait commis une erreur manifeste et dominante ([2000] 4 W.W.R. 173, 2000 SKCA 12, par. 84). En toute déférence, cette conclusion repose sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, présomption qu'adopte également notre collègue dans ses motifs (par. 133).

Comme nous l'avons vu plus tôt, la conclusion de la juge de première instance était que l'automobiliste moyen pourrait s'approcher du virage à une vitesse supérieure à 60 km/h sur chaussée sèche, et 50 km/h sur chaussée humide, mais qu'à ces vitesses le virage était dangereux. Cette conclusion n'était pas fondée sur une vitesse précise à laquelle l'automobiliste moyen s'approcherait du virage. La juge de première instance a plutôt estimé que, parce que le virage est caché et plus serré que ce à quoi on

the speed at which it would be safe to negotiate the curve.

As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

In finding a palpable and overriding error, Cameron J.A. relied on the fact that the trial judge adopted the expert evidence of Mr. Anderson and Mr. Werner which was premised on a *de facto* speed limit of 80 km/h taken from *The Highway Traffic Act*, S.S. 1986, c. H-3.1. However, whether or not the experts based their testimony on this limit, the trial judge did not adopt that limit as the speed of the ordinary motorist approaching the curve. Again, the trial judge found that the curve could not be taken safely at greater than 60 km/h dry and 50 km/h wet, and there is evidence in the record to support this finding. For example, Mr. Anderson states:

If you don't anticipate the curve and you get too far into it before you start to do your correction then you can get into trouble even at, probably at 60. Fifty you'd have to be a long ways into it, but certainly at 60 you could.

It is notable too that both Mr. Anderson and Mr. Werner would have recommended installing a sign, warning motorists of the curve, with a posted limit of 50 km/h.

Although clearly the curve could not be negotiated safely at 80 km/h, it could also not be

s'attend normalement, il était possible qu'un automobiliste prenant des précautions normales s'en approche à une vitesse supérieure à la vitesse sécuritaire pour prendre le virage.

52 Comme nous allons le préciser plus loin, nous sommes d'avis que non seulement cette appréciation est-elle loin de constituer une erreur manifeste et dominante, mais elle est une réponse judicieuse et logique eu égard à l'abondance d'éléments de preuve contradictoires. Il serait irréaliste de fixer une quelconque vitesse à laquelle l'automobiliste moyen s'approcherait vraisemblablement du virage. Les conclusions de la juge de première instance à cet égard découlent d'une évaluation raisonnable et réaliste de l'ensemble de la preuve.

53 En concluant à l'existence d'une erreur manifeste et dominante, le juge Cameron de la Cour d'appel s'est appuyé sur le fait que la juge de première instance avait retenu les témoignages d'expert de MM. Anderson et Werner, lesquels étaient fondés sur la vitesse limite *de facto* de 80 km/h prévue par la *Highway Traffic Act*, S.S. 1986, ch. H-3.1. Toutefois, que le témoignage des experts ait été ou non fondé sur cette limite, la juge de première instance n'a pas retenu cette vitesse comme étant celle à laquelle l'automobiliste moyen s'approche du virage. Rappelons que la juge de première instance a estimé qu'il n'était pas possible d'aborder le virage en sécurité à une vitesse supérieure à 60 km/h sur chaussée sèche et 50 km/h sur chaussée humide, et il existe au dossier des éléments étayant cette conclusion. Par exemple, M. Anderson a dit ceci :

[TRADUCTION] Si vous ne prévoyez pas l'arrivée du virage et que vous vous engagez trop loin dans celui-ci avant d'amorcer votre manœuvre correctrice, vous risquez d'avoir des ennuis même à, probablement à 60. À cinquante il faudrait que vous soyez engagé assez loin, mais à 60 vous pourriez certainement en avoir.

Il convient également de signaler que MM. Anderson et Werner auraient tous deux recommandé l'installation d'un panneau avertissant les automobilistes de l'imminence du virage et fixé la vitesse maximale permise à 50 km/h.

54 Le virage ne pouvait manifestement pas être pris en sécurité à 80 km/h, mais il ne pouvait l'être non

negotiated safely at much slower speeds. It should also be noted that the trial judge did not adopt the expert testimony of Mr. Anderson and Mr. Werner in its entirety. She stated: "There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner" (para. 85 (emphasis added)). It cannot be assumed from this that she accepted a *de facto* speed limit of 80 km/h especially when one bears in mind (1) the trial judge's statement of the safe speeds of 50 and 60 km/h, and (2) the fact that both these experts found the road to be unsafe at much lower speeds than 80 km/h.

plus à des vitesses beaucoup plus réduites. Il convient également de souligner que la juge de première instance n'a pas retenu intégralement les témoignages d'expert de MM. Anderson et Werner. Elle a dit : [TRADUCTION] « Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner » (par. 85 (nous soulignons)). Ces propos ne permettent pas de présumer qu'elle acceptait une vitesse limite *de facto* de 80 km/h, particulièrement si l'on se rappelle (1) qu'elle a dit qu'on pouvait rouler en sécurité à des vitesses de 50 et de 60 km/h, et (2) que ces deux experts ont considéré que le chemin n'était pas sûr même à des vitesses bien inférieures à 80 km/h.

55 Given that the trial judge did not base her standard of care analysis on a *de facto* speed limit of 80 km/h, it then follows that the Court of Appeal's finding of a palpable and overriding error cannot stand.

Puisque la juge de première instance n'a pas fondé son analyse de la norme de diligence sur une vitesse limite *de facto* de 80 km/h, il s'ensuit que la conclusion de la Cour d'appel relativement à l'existence d'une erreur manifeste et dominante ne saurait être confirmée.

56 Furthermore, the narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others. As we are of the view that the trial judge committed no error of law in finding that the municipality breached its standard of care, we are also respectfully of the view that our colleague's re-assessment of the evidence on this issue (paras. 129-42) is an unjustified interference with the findings of the trial judge, based on a difference of opinion concerning the inferences to be drawn from the evidence and the proper weight to be placed on different portions of the evidence. For instance, in the opinion of our colleague, based on some portions of the expert evidence, a reasonable driver exercising ordinary care would approach a rural road at 50 km/h or less, because a reasonable driver would have difficulty seeing the sharp radius of the curve and oncoming traffic (para. 129). However, the trial judge, basing her assessment on other portions of the expert evidence, found that the nature of the road was such that a motorist could be

En outre, vu la portée restreinte de la révision en appel, on ne saurait conclure qu'un juge de première instance a négligé d'examiner la preuve, l'a mal interprétée ou est arrivé à des conclusions erronées, simplement parce que le tribunal d'appel tire des inférences divergentes de la preuve et décide d'accorder plus d'importance à certains éléments qu'à d'autres. Étant d'avis que la juge de première instance n'a pas commis d'erreur de droit en concluant que la municipalité avait violé la norme de diligence à laquelle elle était tenue, nous estimons aussi, en toute déférence, que le réexamen de la preuve auquel procède notre collègue sur cette question (aux par. 129 à 142) constitue une intervention injustifiée relativement aux conclusions de la juge de première instance, fondée sur une divergence d'opinions quant aux inférences devant être tirées de la preuve et au poids qu'il convient d'accorder à divers éléments. Par exemple, notre collègue est d'avis, sur la foi de certaines parties des témoignages d'expert, qu'un conducteur raisonnable prenant des précautions normales roulerait sur une route rurale à une vitesse maximale de 50 km/h, parce qu'il aurait de la difficulté à voir que le virage est serré et s'il vient des véhicules en sens inverse (par. 129). Or, se

deceived into believing that the road did not contain a sharp curve and thus would approach the road normally, unaware of the hidden danger.

We are faced in this case with conflicting expert evidence on the issue of the correct speed at which an ordinary motorist would approach the curve on Snake Hill Road. The differing inferences from the evidence drawn by the trial judge and the Court of Appeal amount to a divergence on what weight should be placed on various pieces of conflicting evidence. As noted by our colleague, Mr. Sparks was of the opinion that "[if] you can't see around the corner, then, you know, drivers would have a fairly strong signal . . . that due care and caution would be required". Similar evidence of this nature was given by Mr. Nikolaisen, and indeed even by Mr. Anderson and Mr. Werner. This is contrasted with evidence such as that given by Mr. Anderson and Mr. Werner that a reasonable driver would be "lulled" into thinking that there is an 80 km/h road ahead of him or her.

As noted by McLachlin J. in *Toneguzzo-Norvell*, *supra*, at p. 122 and mentioned above, "the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact". In that case, a unanimous Court found that the Court of Appeal erred in interfering with the trial judge's factual findings, on the basis that it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing (*Toneguzzo-Norvell*, at pp. 122-23). Similarly, in this case, the trial judge's factual findings concerning the proper speed to be used on approaching the curve should not be interfered with. It was open to her to choose to place more weight on certain portions of the evidence of Mr. Anderson and Mr. Werner, where the evidence was conflicting. Her assessment of the proper speed was a reasonable inference based on the evidence and does not reach

fondant sur d'autres parties des témoignages d'expert, la juge de première instance a estimé que la nature du chemin était telle qu'un automobiliste pourrait être amené à croire que le chemin ne comporte pas de virage serré et, de ce fait, à y rouler normalement, sans soupçonner l'existence du danger caché.

57 En l'espèce, nous sommes en présence de témoignages d'expert contradictoires sur la question de la vitesse à laquelle l'automobiliste moyen s'approcherait du virage du chemin Snake Hill. Les inférences différentes que la juge de première instance et la Cour d'appel tirent de la preuve équivalent à une divergence d'opinion quant au poids à accorder à divers éléments de preuve contradictoires. Le témoin Sparks a émis l'opinion suivante, que cite également notre collègue : [TRADUCTION] « [Si] vous ne pouvez voir, de l'autre côté du virage, alors, vous savez, cela devrait envoyer un message clair aux conducteurs [. . .] que l'attention et la prudence s'imposent ». M. Nikolaisen, et même MM. Anderson et Werner ont d'ailleurs témoigné au même effet. Cela contraste avec l'affirmation de MM. Anderson et Werner selon laquelle un conducteur raisonnable serait [TRADUCTION] « amené » à croire qu'il se trouve sur un chemin où l'on peut rouler à 80 km/h.

58 Comme l'a souligné madame le juge McLachlin, à la p. 122 de l'arrêt *Toneguzzo-Norvell*, précité, « selon notre système de procès, il appartient essentiellement au juge des faits [. . .] d'attribuer un poids aux différents éléments de preuve ». Dans cette affaire, notre Cour a conclu à l'unanimité que la Cour d'appel avait commis une erreur en modifiant les conclusions de fait du juge de première instance, au motif qu'il était loisible à celui-ci d'accorder un poids moins grand à certains éléments de preuve et à accepter d'autres éléments contradictoires, qu'il considérait plus convaincants. (*Toneguzzo-Norvell*, p. 122-123). De même, en l'espèce, il n'y a pas lieu de modifier les conclusions de fait de la juge de première instance au sujet de la vitesse à laquelle il faudrait approcher du virage. Il lui était loisible d'accorder plus de poids à certaines parties des témoignages de MM. Anderson et Werner, dans les cas où la preuve était contradictoire. Son

the level of a palpable and overriding error. As such, the trial judge's findings with respect to the standard of care should not be overturned.

IV. Knowledge of the Municipality

59 We agree with our colleague that s. 192(3) of *The Rural Municipality Act*, *1989*, requires the plaintiff to show that the municipality knew or should have known of the disrepair of Snake Hill Road before the municipality can be found to have breached its duty of care under s. 192. We also agree that the evidence of the prior accidents, in and of itself, is insufficient to impute such knowledge to the municipality. However, we find that the trial judge did not err in her finding that the municipality knew or ought to have known of the disrepair.

60 As discussed, the question of whether the municipality knew or should have known of the disrepair of Snake Hill Road is a question of mixed fact and law. The issue is legal in the sense that the municipality is held to a legal standard of knowledge of the nature of the road, and factual in the sense of whether it had the requisite knowledge on the facts of this case. As we state above, absent an isolated error in law or principle, such a finding is subject to the "palpable and overriding" standard of review. In this case, our colleague concludes that the trial judge erred in law by failing to approach the question of knowledge from the perspective of a prudent municipal councillor, and holds that a prudent municipal councillor could not be expected to become aware of the risk posed to the ordinary driver by the hazard in question. He also finds that the trial judge erred in law by failing to recognize that the burden of proving knowledge rested with the plaintiff. With respect, we disagree with these conclusions.

appréciation de la vitesse appropriée constituait une inférence raisonnable, fondée sur la preuve, et elle ne constitue pas une erreur manifeste et dominante. Dans ce contexte, il n'y a pas lieu d'écarter ses conclusions concernant la norme de diligence.

IV. Connaissance de la municipalité

À l'instar de notre collègue, nous estimons que le par. 192(3) de la *Rural Municipality Act, 1989*, oblige le demandeur à démontrer que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill pour qu'il soit possible de conclure qu'elle a manqué à l'obligation de diligence qui lui incombe en vertu de l'art. 192. Nous sommes nous aussi d'avis que la preuve des accidents antérieurs n'est pas, en soi, suffisante pour prêter cette connaissance à la municipalité. Cependant, nous arrivons à la conclusion que la juge de première instance n'a pas commis d'erreur lorsqu'elle a conclu que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin.

Comme nous l'avons vu, la question de savoir si la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill est une question mixte de droit et de fait. Il s'agit, d'une part, d'une question de droit en ce que la municipalité est tenue à une norme juridique qui lui impose de connaître la nature du chemin, et, d'autre part, d'une question de fait en ce qu'il faut déterminer si, eu égard aux faits de l'espèce, elle avait la connaissance requise. Comme nous l'avons dit précédemment, en l'absence d'erreur de droit ou de principe isolable, une telle conclusion est assujettie à la norme de contrôle de l'erreur « manifeste et dominante ». En l'espèce, notre collègue conclut que la juge de première instance a commis une erreur de droit en ne considérant pas la question de la connaissance du point de vue du conseiller municipal prudent, et il estime qu'on ne pouvait s'attendre à ce qu'un conseiller municipal prudent s'aperçoive du risque que le danger en question faisait courir au conducteur moyen. Il est également d'avis que la juge de première instance a commis une erreur de droit en ne reconnaissant pas que la charge de prouver la connaissance incombait au demandeur. En toute déférence, nous ne pouvons souscrire à ces conclusions.

The hazard in question is an unsigned and unexpected sharp curve. In our view, when a hazard is, like this one, a permanent feature of the road which has been found to present a risk to the ordinary driver, it is open to the trial judge to draw an inference, on this basis alone, that a prudent municipal councillor ought to be aware of the hazard. In support of his conclusion on the issue of knowledge, our colleague states that the municipality's knowledge is inextricably linked to the standard of care, and ties his finding on the question of knowledge to his finding that the curve did not present a hazard to the ordinary motorist (para. 149). We agree that the question of knowledge is closely linked to the standard of care, and since we find that the trial judge was correct in holding that the curve presented a hazard to the ordinary motorist, from there it was open to the trial judge to find that the municipality ought to have been aware of this hazard. We further note that as a question of mixed fact and law this finding is subject to the "palpable and overriding" standard of review. On this point, however, we restrict ourselves to situations such as the one at bar where the hazard in question is a permanent feature of the road, as opposed to a temporary hazard which reasonably may not come to the attention of the municipality in time to prevent an accident from occurring.

Le danger en question est une courbe serrée et soudaine, qui n'est annoncée par aucune signalisation. À notre avis, lorsqu'un danger constitue, comme celui-ci qui nous intéresse, une caractéristique permanente qui, a-t-on jugé, présente un risque pour le conducteur moyen, le juge de première instance peut, pour ce seul motif, inférer qu'un conseiller municipal prudent aurait dû connaître l'existence d'un danger. Pour étayer sa conclusion sur la question de la connaissance, notre collègue affirme que la connaissance de la municipalité est intimement liée à celle de la norme de diligence, et il lie sa conclusion sur la connaissance à sa conclusion selon laquelle la courbe ne constituait pas un danger pour l'automobiliste moyen (par. 149). Nous reconnaissons que la question de la connaissance est étroitement liée à celle de la norme de diligence, et, comme nous estimons que la juge de première instance a eu raison de conclure que la courbe présentait un danger pour l'automobiliste moyen, elle pouvait dès lors juger que la municipalité aurait dû connaître ce danger. Soulignons également que cette conclusion visant une question mixte de fait et de droit est assujettie à la norme de contrôle de l'erreur « manifeste et dominante ». Sur ce point, toutefois, nous limitons la portée de notre opinion aux situations analogues à celle qui nous occupe, où le danger constitue une caractéristique permanente du chemin, par opposition à un danger temporaire dont une municipalité pourrait raisonnablement ne pas être informée en temps utile pour empêcher un accident de survenir.

In addition, our colleague relies on the evidence of the lay witnesses, Craig and Toby Thiel, who lived on Snake Hill Road, and who testified that they had not experienced any difficulties with it (para. 149). With respect, we find three problems with this reliance. First, since the curve was found to be a hazard based on its hidden and unexpected nature, relying on the evidence of those who drive the road on a daily basis does not, in our view, assist in determining whether the curve presented a hazard to the ordinary motorist, or whether the municipality ought to have been aware of the hazard. In addition, in finding that the municipality ought to have known of the disrepair, the trial judge clearly chose not to rely on the above evidence. As we state above,

Par ailleurs, notre collègue se fonde sur les dépositions de témoins ordinaires, Craig et Toby Thiel, qui habitaient sur le chemin Snake Hill et qui ont témoigné n'avoir jamais éprouvé de difficulté à conduire à cet endroit (par. 149). En toute déférence, nous estimons que le fait de se fonder sur ces témoignages pose trois problèmes. D'abord, vu la conclusion que la courbe constituait un danger à cause de sa nature cachée et imprévue, ce n'est pas en se basant sur le témoignage de ceux qui empruntent quotidiennement le chemin qu'il est possible, à notre avis, de déterminer si cette courbe présentait un danger pour l'automobiliste moyen, ou si la municipalité aurait dû connaître l'existence du danger. De plus, en concluant que la municipalité

it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court.

63 As well, since the question of knowledge is to be approached from the perspective of a prudent municipal councillor, we find the evidence of lay witnesses to be of little assistance. In *Ryan*, *supra*, at para. 28, Major J. stated that the applicable standard of care is that which "would be expected of an ordinary, reasonable and prudent person in the same circumstances" (emphasis added). Municipal councillors are elected for the purpose of managing the affairs of the municipality. This requires some degree of study and of information gathering, above that of the average citizen of the municipality. Indeed, it may in fact require consultation with experts to properly meet the obligation to be informed. Although municipal councillors are not experts, to equate the "prudent municipal councillor" with the opinion of lay witnesses who live on the road is incorrect in our opinion.

64 It is in this context that we view the following comments of the trial judge, at para. 90:

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

aurait dû connaître le mauvais état du chemin, la juge de première instance a clairement choisi de ne pas se fonder sur les témoignages susmentionnés. Comme nous l'avons dit précédemment, le juge de première instance peut préférer certaines parties de la preuve à d'autres, et, en toute déférence, il n'appartient pas au tribunal d'appel de procéder à nouveau à l'appréciation de la preuve, tâche déjà accomplie par le juge du procès.

Qui plus est, étant donné que la question de la connaissance doit être considérée du point de vue du conseiller municipal prudent, nous estimons que le témoignage des témoins ordinaires est peu utile. Dans l'arrêt *Ryan*, précité, par. 28, le juge Major a dit que la norme de diligence qui s'applique est celle de la personne agissant aussi diligemment que « le ferait une personne ordinaire, raisonnable et prudente placée dans la même situation » (nous soulignons). Les conseillers municipaux sont élus pour gérer les affaires de la municipalité. Pour s'acquitter de cette tâche, il leur faut, dans un cas donné, examiner la situation et recueillir de l'information, faire davantage que ce que fait le simple citoyen de la municipalité. De fait, ils peuvent avoir à consulter des experts pour respecter leur obligation d'être informés. Bien que les conseillers municipaux ne soient pas des experts, il est à notre avis erroné d'assimiler le point de vue du « conseiller municipal prudent » à l'opinion de témoins ordinaires qui habitent sur le chemin.

C'est à la lumière de ce contexte que nous interprétons les commentaires suivants de la juge de première instance (au par. 90) :

> [TRADUCTION] Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que le chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill.

From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

Selon notre interprétation, la juge de première instance a voulu dire que, compte tenu des accidents antérieurs sur ce chemin à faible débit de circulation, de la présence de résidents permanents et du type de conducteurs qui empruntent le chemin, la municipalité n'a pas pris les mesures raisonnables qu'elle aurait dû prendre pour faire en sorte que le chemin Snake Hill ne comporte pas de danger comme celui en cause. À partir de ces éléments, la juge de première instance a inféré que la municipalité aurait dû être informée de la situation sur le chemin Snake Hill et aurait dû faire enquête à cet égard, ce qui lui aurait permis de prendre connaissance de l'existence du danger. Cette inférence factuelle, qui repose sur l'appréciation de la preuve faite par la juge de première instance, était selon nous fondée et loin de constituer l'erreur manifeste et dominante requise par la norme pertinente.

Although we agree with our colleague that the circumstances of the prior accidents in this case do not provide a direct basis for the municipality to have had knowledge of the particular hazard in question, in the view of the trial judge, they should have caused the municipality to investigate Snake Hill Road, which in turn would have resulted in actual knowledge. In this case, far from causing the municipality to investigate, the evidence of Mr. Danger, who had been the municipal administrator for 20 years, was that, until the time of the trial, he was not even aware of the three accidents which had occurred between 1978 and 1987 on Snake Hill Road. As such, we do not find that the trial judge based her conclusion on any perspective other than that of a prudent municipal councillor, and therefore that she did not commit an error of law in this respect. Moreover, we do not find that she imputed knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road. The existence of the prior accidents was simply a factor which caused the trial judge to find that the municipality should have been put on notice with respect to the condition of Snake Hill Road (para. 90).

65 À l'instar de notre collègue, nous estimons que les circonstances des accidents survenus antérieurement, en l'espèce, ne constituent pas une preuve directe que la municipalité aurait dû avoir connaissance du danger particulier en cause, mais, selon la juge de première instance, ces circonstances auraient dû inciter la municipalité à faire enquête à l'égard du chemin Snake Hill, ce qui lui aurait permis de prendre connaissance concrètement du danger. Dans la présente affaire, les accidents antérieurs sont loin d'avoir incité la municipalité à faire enquête. D'ailleurs, M. Danger, administrateur de la municipalité pendant 20 ans, a témoigné que, jusqu'au procès, il n'était même pas au fait des trois accidents survenus entre 1978 et 1987 sur le chemin Snake Hill. En conséquence, nous n'estimons pas que la juge de première instance a fondé sa conclusion sur quelque autre point de vue autre que celui du conseiller municipal prudent, et elle n'a donc pas commis d'erreur de droit à cet égard. De plus, nous sommes d'avis qu'elle n'a pas prêté à la municipalité la connaissance requise sur la base des accidents antérieurs. L'existence de ces accidents ne constituait rien de plus qu'un des éléments qui l'ont amenée à conclure que la municipalité aurait dû être au fait de l'état du chemin Snake Hill (par. 90).

We emphasize that, in our view, the trial judge did not shift the burden of proof to the municipality

66 Nous tenons à souligner que la juge de première instance n'a pas, à notre avis, transféré le fardeau de

on this issue. Once the trial judge found that there was a permanent feature of Snake Hill Road which presented a hazard to the ordinary motorist, it was open to her to draw an inference that the municipality ought to have been aware of the danger. Once such an inference is drawn, then, unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. In our view, this is what the trial judge did in the above passage when she states: "I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing" (para. 90 (emphasis added)). The fact that she drew such an inference is clear from the fact that this statement appears directly after her finding that the municipality ought to have known of the hazard based on the listed factors. Thus, it is our view that the trial judge did not improperly shift the burden of proof onto the municipality in this case.

67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of *The Rural Municipality Act, 1989*. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. Although under s. 192(3) the municipality cannot be held responsible for disrepair of which it could not have known, it is not sufficient for the municipality to wait for an accident to occur before remedying the disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads, as this would make it more difficult for the plaintiff in a motor vehicle accident to prove that the

la preuve à la municipalité sur cette question. Dès lors qu'elle a conclu qu'il existait sur le chemin Snake Hill une caractéristique permanente présentant un danger pour l'automobiliste moyen, il lui était loisible d'inférer que la municipalité aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Selon nous, c'est ce que la juge de première instance a fait dans l'extrait précité lorsqu'elle dit : [TRADUCTION] « Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill » (par. 90 (nous soulignons)). L'existence de cette inférence ressort clairement du fait que le passage précité suit immédiatement la conclusion de la juge de première instance selon laquelle, pour les raisons qu'elle énumère, la municipalité aurait dû connaître l'existence du danger. Par conséquent, nous sommes d'avis que la juge de première instance n'a pas fait erreur et transféré le fardeau de la preuve à la municipalité en l'espèce.

De même, bien que les accidents survenus antérieurement en l'espèce ne constituent pas une preuve solide que la municipalité aurait dû connaître l'existence du danger, la preuve d'accidents antérieurs n'est pas une condition nécessaire pour qu'un tribunal puisse conclure à la violation de l'obligation de diligence prévue par l'art. 192 de la *Rural Municipality Act, 1989*. Si c'était le cas, la première victime d'un accident sur une route négligemment entretenue ne pourrait obtenir réparation, alors que les victimes subséquentes d'accidents survenant dans des circonstances identiques le pourraient. Bien que, au regard du par. 192(3), la municipalité ne puisse être tenue responsable du mauvais état d'une route dont elle n'aurait pu avoir connaissance, elle ne saurait se contenter d'attendre qu'un accident se produise avant de remédier au mauvais état de la route et, si un demandeur n'apporte pas la preuve de l'existence d'accidents antérieurs, soutenir qu'elle n'aurait pu connaître l'existence du danger. Dans cette hypothèse, non seulement imposerait-on à la première victime d'un accident un fardeau de preuve disproportionné, mais on encouragerait aussi

municipality knew or ought to have known of the disrepair.

les municipalités à ne pas recueillir d'informations concernant les accidents survenant sur leurs routes, puisqu'il serait en conséquence plus difficile à la victime d'un accident d'automobile qui intente des poursuites de prouver que la municipalité visée connaissait le mauvais état de la route ou aurait dû le connaître.

Although in this case the trial judge emphasized the prior accidents that the plaintiff did manage to prove, in our view, it is not necessary to rely on these accidents in order to satisfy s. 192(3). For the plaintiff to provide substantial and concrete proof of the municipality's knowledge of the state of disrepair of its roads, is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and in our view, it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

68 Bien que, en l'espèce, la juge de première instance ait souligné les accidents antérieurs dont le demandeur a effectivement prouvé l'existence, nous sommes d'avis qu'il n'est pas nécessaire de s'appuyer sur ces accidents pour satisfaire aux exigences du par. 192(3). Exiger du demandeur qu'il fournisse une preuve substantielle et tangible de la connaissance par la municipalité du mauvais état de ses routes revient à lui imposer un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

To summarize our position on this issue, we do not find that the trial judge erred in law either by failing to approach the question from the perspective of a prudent municipal councillor, or by improperly shifting the burden of proof onto the defendant. As such, it would require a palpable and overriding error in order to overturn her finding that the municipality knew or ought to have known of the hazard, and, in our view, no such error was made.

69 Pour résumer notre position sur cette question, nous ne pouvons conclure que la juge de première instance a commis une erreur de droit soit parce qu'elle aurait omis d'examiner la question du point de vue du conseiller municipal prudent, soit parce qu'elle aurait à tort transféré le fardeau de la preuve à la défenderesse. Par conséquent, il faudrait une erreur manifeste et dominante pour écarter sa conclusion que la municipalité connaissait le danger ou aurait dû le connaître et, selon nous, aucune erreur de cette nature n'a été commise.

V. Causation

We agree with our colleague's statement at para. 159 that the trial judge's conclusions on the cause of the accident was a finding of fact: *Cork v. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.), at p. 407, quoted with approval in *Matthews v. MacLaren* (1969), 4 D.L.R. (3d) 557 (Ont. H.C.), at p. 566. Thus, this finding should not be interfered with absent palpable and overriding error.

V. Lien de causalité

70 Nous faisons nôtres les propos énoncés par notre collègue, au par. 159, selon lesquels la conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait : *Cork c. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.), p. 407; cité et approuvé dans *Matthews c. MacLaren* (1969), 4 D.L.R. (3d) 557 (H.C. Ont.), p. 566. En conséquence, cette conclusion ne doit pas être modifiée en l'absence d'erreur manifeste et dominante.

71 The trial judge based her findings on causation on three points (at para. 101):

> (1) the accident occurred at a dangerous part of the road where a sign warning motorists of the hidden hazard should have been erected;
>
> (2) even if there had been a sign, Mr. Nikolaisen's degree of impairment did increase his risk of not reacting, or reacting inappropriately, to a sign;
>
> (3) even so, Mr. Nikolaisen was not driving recklessly such that one would have expected him to have missed or ignored a warning sign. Moments before, on departing the Thiel residence, he had successfully negotiated a sharp curve which he could see and which was apparent to him.

The trial judge concluded that, on a balance of probabilities, Mr. Nikolaisen would have reacted and possibly avoided an accident, if he had been given advance warning of the curve. However she also found that the accident was partially caused by the conduct of Mr. Nikolaisen, and apportioned fault accordingly, with 50 percent to Mr. Nikolaisen and 35 percent to the Rural Municipality (para. 102).

72 As noted above, this Court has previously held that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect, of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings

La juge de première instance a fondé ses conclusions au sujet du lien de causalité sur trois éléments (au par. 101) :

> (1) l'accident est survenu à un endroit dangereux du chemin, où un panneau de signalisation aurait dû être installé pour avertir les automobilistes du danger caché;
>
> (2) même s'il y avait eu un panneau de signalisation, le degré d'ébriété de M. Nikolaisen avait accru chez lui le risque qu'il ne réagisse pas du tout ou de façon inappropriée à une signalisation;
>
> (3) malgré cela, M. Nikolaisen ne conduisait pas de façon si téméraire qu'il était à prévoir qu'il ne voit pas un panneau de signalisation ou n'en tienne pas compte. Quelques instants plus tôt, à son départ de la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir.

La juge de première instance a estimé que, selon la prépondérance des probabilités, M. Nikolaisen aurait réagi et peut-être évité l'accident si on lui avait signalé à l'avance la présence de la courbe. Toutefois, elle a également conclu que l'accident avait été causé en partie par la conduite de M. Nikolaisen, et elle a réparti la responsabilité en conséquence, soit dans une proportion de 50 p. 100 à M. Nikolaisen et de 35 p. 100 à la municipalité rurale (par. 102).

Comme nous l'avons indiqué précédemment, notre Cour a jugé, dans une autre affaire, qu'« une omission ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre*, précité, par. 15). En l'espèce, les motifs de la juge de première instance n'indiquent pas clairement sur quelles parties des témoignages de M. Laughlin, de Craig et Toby Thiel et de Paul Housen elle s'est appuyée, ni dans quelle mesure elle l'a fait. Cependant, comme nous l'avons dit plus tôt, la juge de première instance disposait de l'ensemble de la preuve et, en l'absence d'autre élément

on this review. This presumption, absent sufficient evidence of misapprehension or neglect, is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: *Toneguzzo-Norvell*, *supra*, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: *Van de Perre*, *supra*, at para. 15.

indiquant que cette omission dans ses motifs résulte du fait qu'elle aurait mal interprété des éléments de la preuve ou négligé d'en examiner certains, nous pouvons présumer qu'elle a examiné l'ensemble de la preuve et que ses conclusions de fait reposaient sur cet examen. En l'absence de preuve établissant de façon suffisante qu'il y a eu mauvaise interprétation d'éléments de preuve ou négligence d'examiner certains de ceux-ci, cette présomption permet de conclure à l'absence d'erreur importante du type de celle requise pour satisfaire au critère de l'erreur « manifeste et dominante ». Nous tenons à rappeler que le juge de première instance peut préférer le témoignage de certains témoins et accorder plus de poids à certaines parties de la preuve qu'à d'autres, particulièrement en présence de preuves contradictoires : *Toneguzzo-Norvell*, précité, p. 122-123. Le simple fait que la juge de première instance n'a pas analysé en profondeur un point donné ou un élément de preuve particulier ne constitue pas un motif suffisant pour justifier l'intervention des tribunaux d'appel : *Van de Perre*, précité, par. 15.

For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay witnesses *de novo*. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.

73 Pour ces motifs, nous n'estimons pas opportun d'examiner à nouveau les dépositions de M. Laughlin et des témoins ordinaires. Comme nous l'avons affirmé précédemment, il n'y a pas lieu de modifier la conclusion de fait de la juge de première instance selon laquelle la courbe présentait un danger caché. Ses conclusions touchant le lien de causalité reposent en partie sur cette conclusion relative à l'existence d'un danger caché nécessitant l'installation d'un panneau d'avertissement. Tout comme ses conclusions relatives à l'existence d'un danger caché, celles touchant le lien de causalité — fondées en partie sur le danger caché — avaient elles aussi des assises dans la preuve.

As for the silence of the trial judge on the evidence of Mr. Laughlin, we observe only that the evidence of Mr. Laughlin appears to be general in nature and thus of limited utility. Mr. Laughlin admitted that he could only provide general comments on the effects of alcohol on motorists, but could not provide specific expertise on the actual effect of alcohol on an individual driver. This is significant, as the level of tolerance of an individual driver plays a key role in determining the actual effect of alcohol on the

74 Pour ce qui est du silence de la juge de première instance concernant le témoignage de M. Laughlin, signalons simplement que ce témoignage paraît être de nature générale et, partant, d'une utilité limitée. M. Laughlin a reconnu qu'il ne pouvait faire que des observations générales quant aux effets de l'alcool sur les automobilistes, et non apporter une expertise particulière sur l'effet concret de l'alcool sur un conducteur donné. Il s'agit d'un point important, puisque le seuil de tolérance d'un conducteur donné

motorist; an experienced drinker, although dangerous, will probably perform better on the road than an inexperienced drinker. It is noteworthy that the trial judge believed the evidence of Mr. Anderson that Mr. Nikolaisen's vehicle was travelling at the relatively slow speed of between 53 to 65 km/h at the time of impact with the embankment. It was also permissible for the trial judge to rely on the evidence of lay witnesses that Mr. Nikolaisen had successfully negotiated an apparently sharp curve moments before the accident, rather than relying on the evidence of Mr. Laughlin, which was of a hypothetical and unspecific nature. Indeed, the hypothetical nature of Mr. Laughlin's evidence reflects the entire inquiry into whether Mr. Nikolaisen would have seen a sign and reacted, or the precise speed that would be taken by a reasonable driver upon approaching the curve. The abstract nature of such inquiries supports deference to the factual findings of the trial judge, and is consistent with the stringent standard imposed by the phrase "palpable and overriding error".

75 Therefore we conclude that the trial judge's factual findings on causation were reasonable and thus do not reach the level of a palpable and overriding error, and therefore should not have been interfered with by the Court of Appeal.

VI. Common Law Duty of Care

76 As we conclude that the municipality is liable under *The Rural Municipality Act, 1989*, we find it unnecessary to consider the existence of a common law duty in this case.

VII. Disposition

77 As we stated at the outset, there are important reasons and principles for appellate courts not to interfere improperly with trial decisions. Applying

joue un rôle essentiel dans la détermination de l'effet concret de l'alcool sur cet automobiliste; bien que dangereuse, la personne qui a l'habitude de boire se débrouillera probablement mieux sur la route qu'une personne qui n'en a pas l'habitude. Il convient de souligner que la juge de première instance a cru le témoignage de M. Anderson selon lequel le véhicule de M. Nikolaisen roulait à une vitesse relativement faible, soit entre 53 et 65 km/h, au moment de l'impact avec le remblai. Il lui était également permis de retenir les dépositions des témoins ordinaires selon lesquelles M. Nikolaisen avait réussi à prendre un virage apparemment serré quelques instants avant l'accident, plutôt que le témoignage de M. Laughlin, lequel était de nature hypothétique et générale. De fait, la nature hypothétique du témoignage de M. Laughlin est représentative de toute l'analyse de la question de savoir si M. Nikolaisen aurait aperçu un panneau de signalisation et aurait réagi en conséquence, ou à quelle vitesse précise un conducteur raisonnable s'approcherait du virage. Le caractère théorique de ces analyses justifie de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance et permet d'affirmer qu'on n'a pas satisfait à la norme rigoureuse imposée par l'expression « erreur manifeste et dominante ».

Par conséquent, nous estimons que les constatations factuelles de la juge de première instance concernant la causalité étaient raisonnables, qu'elles ne constituent donc pas une erreur manifeste et dominante et, partant, que la Cour d'appel n'aurait pas dû les modifier.

VI. Obligation de diligence prévue par la common law

Puisque nous concluons à la responsabilité de la municipalité en vertu de la *Rural Municipality Act, 1989*, nous n'estimons pas nécessaire de nous demander s'il existe en l'espèce une obligation de diligence prévue par la common law.

VII. Dispositif

Comme nous l'avons dit au départ, d'importantes raisons et d'importants principes commandent aux tribunaux d'appel de ne pas modifier indûment

these reasons and principles to this case, we would allow the appeal, set aside the judgment of the Saskatchewan Court of Appeal, and restore the judgment of the trial judge, with costs throughout.

The reasons of Gonthier, Bastarache, Binnie and LeBel JJ. were delivered by

BASTARACHE J. (dissenting) —

I. Introduction

This appeal arises out of a single-vehicle accident which occurred on July 18, 1992, on Snake Hill Road, a rural road located in the Municipality of Shellbrook, Saskatchewan. The appellant, Paul Housen, a passenger in the vehicle, was rendered a quadriplegic by the accident. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling Snake Hill Road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the respondent municipality was negligent. At issue in this appeal is whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. The respondent has also asked this Court to overturn the trial judge's finding that the respondent knew or ought to have known of the alleged disrepair of Snake Hill Road and that the accident was caused in part by the negligence of the respondent. An incidental question is whether a common law duty of care exists alongside the statutory duty imposed on the respondent by s. 192.

les décisions des tribunaux de première instance. Appliquant ces raisons et principes à la présente espèce, nous sommes d'avis d'accueillir le pourvoi, d'infirmer le jugement de la Cour d'appel de la Saskatchewan et de rétablir la décision de la juge de première instance, avec dépens devant toutes les cours.

Version française des motifs des juges Gonthier, Bastarache, Binnie et LeBel rendus par

LE JUGE BASTARACHE (dissident) —

I. Introduction

78 Le présent pourvoi découle d'un accident impliquant un seul véhicule survenu le 18 juillet 1992 sur le chemin Snake Hill, route rurale située dans la municipalité de Shellbrook, en Saskatchewan. L'appelant, Paul Housen, qui était passager dans le véhicule, est devenu quadriplégique à la suite de cet accident. Au procès, la juge a conclu que le conducteur du véhicule, Douglas Nikolaisen, avait fait preuve de négligence en roulant à une vitesse excessive sur le chemin Snake Hill et en conduisant son véhicule pendant que ses facultés étaient affaiblies. La juge de première instance a également estimé que l'intimée, la municipalité de Shellbrook, avait commis une faute en manquant à l'obligation de tenir le chemin dans un état raisonnable d'entretien comme le lui impose l'art. 192 de la loi intitulée la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1. La Cour d'appel a infirmé la décision de la juge de première instance concluant à la négligence de la municipalité intimée. La question en litige dans le présent pourvoi consiste à déterminer si la Cour d'appel avait des motifs suffisants pour modifier la décision du tribunal de première instance. L'intimée demande également à notre Cour d'infirmer les conclusions de la juge de première instance portant que l'intimée connaissait ou aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin Snake Hill, et que l'accident a été causé en partie par sa négligence. Il faut également répondre à la question incidente de savoir si une obligation de diligence de common law coexiste avec l'obligation légale imposée à l'intimée par l'art. 192.

79 I conclude that the Court of Appeal was correct to overturn the trial judge's finding that the respondent was negligent. Though I would not interfere with the trial judge's factual findings on this issue, I find that she erred in law by failing to apply the correct standard of care. I would also overturn the trial judge's conclusions with regard to knowledge and causation. In coming to the conclusion that the respondent knew or should have known of the alleged disrepair of Snake Hill Road, the trial judge erred in law by failing to consider the knowledge requirement from the perspective of a prudent municipal councillor and by failing to be attentive to the fact that the onus of proof was on the appellant. In addition, the trial judge drew an unreasonable inference by imputing knowledge to the respondent on the basis of accidents that occurred on other segments of the road while motorists were travelling in the opposite direction. The trial judge also erred with respect to causation. She misapprehended the evidence before her, drew erroneous conclusions from that evidence and ignored relevant evidence. Finally, I would not interfere with the decision of the courts below to reject the appellant's argument that a common law duty existed. It is unnecessary to impose a common law duty of care where a statutory duty exists. Moreover, the application of common law negligence principles would not affect the outcome in these proceedings.

J'estime que la Cour d'appel a eu raison d'infirmer la conclusion de la juge de première instance selon laquelle la municipalité intimée a été négligente. Je ne modifierais pas les conclusions de fait de la juge de première instance sur cette question, mais je suis d'avis qu'elle a commis une erreur de droit en n'appliquant pas la norme de diligence appropriée. J'infirmerais également ses conclusions en ce qui concerne la question de la connaissance et le lien de causalité. En concluant que l'intimée connaissait ou aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin Snake Hill, la juge de première instance a commis une erreur de droit en n'appréciant pas l'exigence relative à la connaissance du point de vue du conseiller municipal prudent et en ne tenant pas compte du fait que le fardeau de la preuve incombait à l'appelant. De plus, la juge de première instance a tiré une inférence déraisonnable en prêtant à l'intimée la connaissance requise, en raison d'accidents survenus sur d'autres tronçons du chemin alors que des automobilistes circulaient en sens inverse. La juge de première instance a également commis une erreur relativement au lien de causalité. Elle a mal interprété la preuve qui lui était soumise, elle en a tiré des conclusions erronées et elle n'a pas tenu compte d'éléments de preuve pertinents. Enfin, je ne modifierais pas la décision des juridictions inférieures ayant rejeté l'argument de l'appelant selon lequel il existait une obligation de diligence de common law. Il est inutile d'imposer une obligation de common law lorsqu'il existe une obligation légale. Qui plus est, l'application des principes de la common law en matière de négligence n'aurait aucune incidence sur l'issue de la présente instance.

II. Factual Background

80 The sequence of` events which culminated in this tragic accident began to unfold some 19 hours before its occurrence on the afternoon of July 18, 1992. On July 17, Mr. Nikolaisen attended a barbeque at the residence of Craig and Toby Thiel, located on Snake Hill Road. He arrived in the late afternoon and had his first drink of the day at approximately 6:00 p.m. He consumed four or five drinks before leaving the Thiel residence at approximately

II. Les faits

La suite d'événements ayant abouti au tragique accident a commencé quelque 19 heures avant l'accident lui-même, dans l'après-midi du 18 juillet 1992. Le 17 juillet, M. Nikolaisen a participé à un barbecue à la résidence de Craig et Toby Thiel, sur le chemin Snake Hill. Arrivé en fin d'après-midi, il a pris son premier verre de la journée vers 18 h. Il en a pris quatre ou cinq avant de quitter la résidence des Thiel vers 22 h ou 22 h 30. Après avoir passé

10:00 or 10:30 p.m. After returning home for a few hours, Mr. Nikolaisen proceeded to the Sturgeon Lake Jamboree, where he met up with the appellant. At the jamboree, Mr. Nikolaisen consumed eight or nine double rye drinks and several beers. The appellant was also drinking during this event. The appellant and Mr. Nikolaisen partied on the grounds of the jamboree for several hours. At approximately 4:30 a.m., the appellant left the jamboree with Mr. Nikolaisen. After travelling around the back roads for a period of time, they returned to the Thiel residence. It was approximately 8:00 a.m. The appellant and Mr. Nikolaisen had several more drinks over the course of the morning. Mr. Nikolaisen stopped drinking two or three hours before leaving the Thiel residence with the appellant at approximately 2:00 p.m.

quelques heures chez lui, M. Nikolaisen s'est rendu au jamboree de Sturgeon Lake, où il a rencontré l'appelant. Sur les lieux du jamboree, M. Nikolaisen a consommé huit ou neuf ryes doubles et plusieurs bières. L'appelant buvait lui aussi. L'appelant et M. Nikolaisen ont fait la fête sur les lieux du jamboree pendant plusieurs heures. Vers 4 h 30, l'appelant a quitté le jamboree en compagnie de M. Nikolaisen. Après avoir roulé sur des routes de campagne pendant un certain temps, ils sont retournés à la résidence des Thiel. Il était environ 8 h. L'appelant et M. Nikolaisen ont pris plusieurs autres verres au cours de la matinée. M. Nikolaisen a cessé de boire deux ou trois heures avant de quitter la résidence des Thiel en compagnie de l'appelant vers 14 h.

A light rain was falling when the appellant and Mr. Nikolaisen left the Thiel residence, travelling eastbound with Mr. Nikolaisen behind the wheel of a Ford pickup truck. The truck swerved or "fish-tailed" as it turned the corner from the Thiel driveway onto Snake Hill Road. As Mr. Nikolaisen continued on his way over the course of a gentle bend some 300 metres in length, gaining speed to an estimated 65 km/h, the truck again fish-tailed several times. The truck went into a skid as Mr. Nikolaisen approached and entered a sharper right turn. Mr. Nikolaisen steered into the skid but was unable to negotiate the curve. The left rear wheel of the truck contacted an embankment on the left side of the road. The vehicle travelled on the road for approximately 30 metres when the left front wheel contacted and climbed an 18-inch embankment on the left side of the road. This second contact with the embankment caused the truck to enter a 360-degree roll with the passenger side of the roof contacting the ground first.

81 Une faible pluie tombait lorsque l'appelant et M. Nikolaisen ont quitté la résidence des Thiel et pris la route, en direction est, à bord d'une camionnette Ford conduite par M. Nikolaisen. L'arrière de la camionnette a zigzagué lorsque le véhicule a tourné à l'intersection de l'entrée de la résidence des Thiel et du chemin Snake Hill. Alors que M. Nikolaisen prenait un léger virage d'une longueur de quelque 300 mètres, tout en accélérant à 65 km/h environ, l'arrière de sa camionnette a zigzagué à nouveau à plusieurs reprises. La camionnette s'est mise à déraper lorsque M. Nikolaisen a amorcé un virage plus serré vers la droite. Il a donné un coup de volant, mais n'a pas réussi à prendre le virage. La roue arrière gauche de la camionnette a heurté un remblai situé du côté gauche du chemin. Le véhicule a continué sa course sur une distance d'environ 30 mètres, puis sa roue avant gauche est montée sur un remblai de 18 pouces du côté gauche du chemin, après l'avoir heurté. Sous la force du second impact, la camionnette a fait un tonneau complet, le toit du côté du passager touchant le sol en premier.

When the vehicle came to rest, the appellant was unable to feel any sensation. Mr. Nikolaisen climbed out the back window of the vehicle and ran to the Thiel residence for assistance. Police later accompanied Mr. Nikolaisen to the Shellbrook Hospital where a blood sample was taken. Expert testimony estimated Mr. Nikolaisen's blood alcohol level to be

82 Lorsque le véhicule s'est immobilisé, l'appelant n'éprouvait plus aucune sensation. M. Nikolaisen s'est hissé hors du véhicule par la fenêtre arrière et a couru chez les Thiel pour demander de l'aide. Plus tard, la police a accompagné M. Nikolaisen à l'hôpital de Shellbrook, où un échantillon de sang a été prélevé. Le témoignage d'expert a révélé

between 180 and 210 milligrams in 100 millilitres of blood at the time of the accident, well over the legal limits prescribed in *The Highway Traffic Act*, S.S. 1986, c. H-3.1, and the *Criminal Code*, R.S.C. 1985, c. C-46.

83 Mr. Nikolaisen had travelled on Snake Hill Road three times in the 24 hours preceding the accident, but had not driven it on any earlier occasions. The road was about a mile and three quarters in length and was flanked by highways to the north and to the east. Starting at the north end, it ran south for a short distance, dipped between open fields, then curved to the southeast and descended in a southerly loop down and around Snake Hill, past trees, bush and pasture, to the bottom of the valley. There it curved sharply to the southeast as it passed the Thiels' driveway. Once it passed the driveway, it curved gently to the south east for about 300 metres, then curved more distinctly to the south. It was on this stretch that the accident occurred. From that point on, the road crossed a creek, took another curve, then ascended a steep hill to the east, straightened out, and continued east for just over half a mile, past tree-lined fields and another farm site, to an approach to the highway.

84 Snake Hill Road was established in 1923 and was maintained by the respondent municipality for the primary purpose of providing local farmers access to their fields and pastures. It also served as an access road for the two permanent residences and one veterinary clinic located on it. The road at its northernmost end, coming off the highway, is characterized as a "Type C" local access road under the provincial government's scheme of road classification. This means that it is graded, gravelled and elevated above the surrounding land. The portion of the road east of the Thiel residence, on which the accident occurred, is characterized as "Type B" bladed trail, essentially a prairie trail that has been bladed to remove the ruts and to allow it to be driven on. Bladed trails follow the path of least resistance through the surrounding land and are not elevated or gravelled. The

que, au moment de l'accident, l'alcoolémie de M. Nikolaisen se situait entre 180 et 210 milligrammes par 100 milligrammes, taux largement supérieur à la limite permise par la loi intitulée la *Highway Traffic Act*, S.S. 1986 ch. H-3.1, et par le *Code criminel*, L.R.C. 1985, ch. C-46.

M. Nikolaisen avait emprunté le chemin Snake Hill à trois reprises au cours des 24 heures ayant précédé l'accident, mais il n'y avait jamais circulé auparavant. Ce chemin, flanqué de routes au nord et à l'est, fait environ un mille et trois quarts de longueur. À partir de son extrémité nord, il franchit une courte distance en direction sud, traverse des champs, puis tourne vers le sud-est pour ensuite descendre en lacet vers le sud autour du mont Snake Hill, passant devant des arbres, buissons et pâturages, jusqu'au fond de la vallée. De là, il tourne brusquement vers le sud-est devant l'entrée de la résidence des Thiel. Tout de suite après, il tourne doucement vers le sud-est sur une distance d'environ 300 mètres, puis décrit une courbe plus prononcée vers le sud. C'est à cet endroit que l'accident s'est produit. De là, le chemin traverse un ruisseau, tourne encore, puis monte une pente raide vers l'est, se redresse et continue vers l'est sur une distance d'un peu plus d'un demi mille et passe devant des champs bordés d'arbres et une autre ferme, jusqu'à une voie d'accès à la route.

Construit en 1923, le chemin Snake Hill est entretenu par la municipalité intimée dans le but premier de permettre aux fermiers de la région d'accéder à leurs champs et pâturages. Il sert également de voie d'accès à deux résidences permanentes et à une clinique vétérinaire. Le tronçon nord du chemin, dont l'extrémité part de la route, est considéré comme un chemin d'accès local de « type C » selon le système provincial de classification des routes. Cela signifie qu'il est nivelé, gravelé et possède une chaussée surélevée. Le tronçon du chemin situé à l'est de la résidence des Thiel et sur lequel l'accident s'est produit est considéré comme un chemin nivelé de « type B », c'est-à-dire essentiellement un chemin dont les ornières ont été remplies pour le rendre carrossable. Les chemins nivelés suivent le tracé qui présente le moins d'obstacle à travers le terrain environnant et ne sont ni surélevés ni gravelés. La

province of Saskatchewan has some 45,000 kilometres of bladed trails.

According to the provincial scheme of road classification, both bladed trails and local access roads are "non-designated", meaning that they are not subject to the Saskatchewan Rural Development Sign Policy and Standards. On such roads, the council of the rural municipality makes a decision to post signs if it becomes aware of a hazard or if there are several accidents at one specific spot. Three accidents had occurred on Snake Hill Road between 1978 and 1987. All three accidents occurred to the east of the site of the Nikolaisen rollover, with drivers travelling westbound. A fourth accident occurred on Snake Hill Road in 1990 but there was no evidence as to where it occurred. There was no evidence that topography was a factor in any of these accidents. The respondent municipality had not posted signs on any portion of Snake Hill Road.

province de Saskatchewan compte quelque 45 000 kilomètres de chemins nivelés.

85 Selon le système de classification des routes, tant les chemins nivelés que les chemins d'accès local sont [TRADUCTION] « non désignés », c'est-à-dire qu'ils ne sont pas visés par le document intitulé *Saskatchewan Rural Development Sign Policy and Standards* (« Politique et normes de signalisation routière en milieu rural en Saskatchewan »). Le conseil de la municipalité rurale installe des panneaux de signalisation sur ces chemins s'il constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Trois accidents sont survenus sur le chemin Snake Hill de 1978 à 1987. Tous ces accidents se sont produits à l'est de l'endroit où la camionnette de Nikolaisen a fait un tonneau et les véhicules concernés circulaient en direction ouest. Un quatrième accident s'est produit sur le chemin Snake Hill en 1990, mais aucune preuve indiquant l'endroit exact de l'accident n'a été présentée. Rien ne permettait de conclure que la topographie des lieux était à l'origine de l'un ou l'autre de ces accidents. La municipalité intimée n'avait installé aucun panneau signalisateur le long du chemin Snake Hill.

III. Relevant Statutory Provisions

The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1

192(1) Every Council shall keep in a reasonable state of repair all municipal roads, dams and reservoirs and the approaches to them that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the municipal road, dam or reservoir and the locality in which it is situated or through which it passes.

. . .

(2) Where the council fails to carry out its duty imposed by subsections (1) and (1.1), the municipality is, subject to *The Contributory Negligence Act*, civilly liable for all damages sustained by any person by reason of the failure.

III. Les dispositions législatives pertinentes

86 *The Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1

[TRADUCTION]

192(1) Le conseil tient dans un état raisonnable d'entretien tous les chemins municipaux, barrages et réservoirs, ainsi que les accès à ces ouvrages qui ont été construits ou sont fournis par la municipalité ou par toute autre personne avec la permission du conseil ou qui ont été construits ou sont fournis par le gouvernement de la province, eu égard à la nature de l'ouvrage en question et à la localité où il est situé ou qu'il traverse.

. . .

(2) Lorsque le conseil omet de s'acquitter des obligations qui lui incombent en vertu des paragraphes (1) et (1.1), la municipalité est, sous réserve de la *Contributory Negligence Act* [*Loi sur le partage de la responsabilité*], civilement responsable des dommages subis par toute personne à la suite de ce manquement.

(3) Default under subsections (1) and (1.1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the municipal road or other thing mentioned in subsections (1) and (1.1).

The Highway Traffic Act, S.S. 1986, c. H-3.1

33(1) Subject to the other provisions of this Act, no person shall drive a vehicle on a highway:

(a) at a speed greater than 80 kilometres per hour; or

(b) at a speed greater than the maximum speed indicated by any signs that are erected on the highway . . . .

(2) No person shall drive a vehicle on a highway at a speed greater than is reasonable and safe in the circumstances.

44(1) No person shall drive a vehicle on a highway without due care and attention.

(3) En cas d'action reprochant un manquement visé aux paragraphes (1) et (1.1) la responsabilité de la municipalité concernée n'est engagée que si le demandeur établit que cette dernière connaissait ou aurait dû connaître le mauvais état du chemin municipal ou autre ouvrage mentionné aux paragraphes (1) et (1.1).

The Highway Traffic Act, S.S. 1986, ch. H-3.1

[TRADUCTION]

33(1) Sous réserve des autres dispositions de la présente loi, il est interdit de conduire sur une voie publique à une vitesse supérieure, selon le cas :

a) à 80 kilomètres à l'heure;

b) à la vitesse maximale indiquée par la signalisation routière le long de la voie publique en question . . .

(2) Il est interdit de conduire un véhicule sur une voie publique à une vitesse supérieure à celle qui est raisonnable et sécuritaire dans les circonstances.

44(1) Il est interdit de conduire un véhicule sur une voie publique sans faire preuve de la prudence et de l'attention nécessaires.

IV. Judicial History

A. *Saskatchewan Court of Queen's Bench*, [1998] 5 W.W.R. 523

87 Wright J. found the respondent negligent in failing to erect a sign to warn motorists of the sharp right curve on Snake Hill Road, which she characterized as a "hidden hazard". She also found Mr. Nikolaisen negligent in travelling Snake Hill Road at an excessive speed and in operating his vehicle while impaired. The appellant was held to be contributorily negligent in accepting a ride with Mr. Nikolaisen. Fifteen percent of the fault was apportioned to the appellant, and the remainder was apportioned jointly and severally 50 percent to Mr. Nikolaisen and 35 percent to the respondent.

88 Wright J. found that s. 192 of *The Rural Municipality Act, 1989* imposed a statutory duty of care on the respondent toward persons travelling on Snake Hill Road. She then considered whether the respondent met the standard of care as delineated in

IV. L'historique des procédures judiciaires

A. *Cour du Banc de la Reine de la Saskatchewan*, [1998] 5 W.W.R. 523

La juge Wright a conclu que l'intimée avait fait preuve de négligence en omettant d'installer un panneau signalant aux automobilistes l'existence du virage à droite serré sur le chemin Snake Hill, virage qu'elle a qualifié de [TRADUCTION] « danger caché ». Elle a également estimé que M. Nikolaisen avait été négligent en roulant à une vitesse excessive sur le chemin Snake Hill et en conduisant son véhicule pendant qu'il avait les facultés affaiblies. L'appelant a été tenu responsable de négligence concourante parce qu'il avait accepté de monter à bord du véhicule de M. Nikolaisen. La responsabilité a été partagée ainsi : 15 p. 100 à l'appelant, le reste étant réparti solidairement entre M. Nikolaisen (50 p. 100) et l'intimée (35 p. 100).

La juge Wright a d'abord conclu que l'art. 192 de la *Rural Municipality Act, 1989* imposait à l'intimée une obligation légale de diligence envers les personnes circulant sur le chemin Snake Hill. Elle s'est ensuite demandée si l'intimée s'était

s. 192 and the jurisprudence interpreting that section. She referred specifically to *Partridge v. Rural Municipality of Langenberg*, [1929] 3 W.W.R. 555 (Sask. C.A.), in which it was stated at p. 558 that "the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety". She also cited *Shupe v. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627 (Sask. C.A.), at p. 630: "[R]egard must be had to the locality . . . the situation of the road therein, whether required to be used by many or by few; . . . to the number of roads to be kept in repair; to the means at the disposal of the council for that purpose, and the requirements of the public who use the road." Relying on *Galbiati v. City of Regina*, [1972] 2 W.W.R. 40 (Sask. Q.B.), Wright J. observed that although the Act does not mention an obligation to erect warning signs, the general duty of repair nevertheless includes the duty to warn motorists of a hidden hazard.

conformée à la norme de diligence énoncée à l'art. 192 et dans la jurisprudence portant sur l'interprétation de cet article. Elle a fait état, en particulier, de l'arrêt *Partridge c. Rural Municipality of Langenberg*, [1929] 3 W.W.R. 555, dans lequel la Cour d'appel de la Saskatchewan a déclaré, à la p. 558, que [TRADUCTION] « le chemin doit être tenu dans un état raisonnable d'entretien, de façon que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité ». Elle a également cité le passage suivant de l'affaire *Shupe c. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627 (C.A. Sask.), p. 630 : [TRADUCTION] « [I]l faut tenir compte de la localité où est situé le chemin, [. . .] de son emplacement dans celle-ci, se demander s'il sera beaucoup ou peu fréquenté; [. . .] du nombre de chemins à entretenir; des ressources budgétaires dont dispose le conseil à cette fin et des besoins du public qui emprunte ce chemin ». Se fondant sur l'affaire *Galbiati c. City of Regina*, [1972] 2 W.W.R. 40 (B.R. Sask.), la juge Wright a fait observer que, bien que la Loi ne mentionne pas explicitement l'obligation d'installer des panneaux d'avertissement, l'obligation générale d'entretien comporte néanmoins celle de signaler aux automobilistes l'existence d'un danger caché.

Having laid out the relevant case law, Wright J. went on to discuss the character of the road. Relying primarily on the evidence of two experts at trial, Mr. Anderson and Mr. Werner, she found that the sharp right turning curve was a hazard that was not readily apparent to the users of the road. From their testimony she concluded (at para. 85):

89

Après avoir fait état de la jurisprudence pertinente, la juge Wright a poursuivi en examinant la nature du chemin. S'appuyant principalement sur les témoignages donnés par deux experts au procès, MM. Anderson et Werner, elle a conclu que le virage à droite serré constituait un danger que les usagers du chemin ne pouvaient voir aisément. De leurs témoignages, elle a tiré la conclusion suivante (au par. 85) :

It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater

[TRADUCTION] Il s'agit d'un danger caché. L'endroit où le véhicule de M. Nikolaisen a fait un tonneau est situé sur le tronçon le plus dangereux du chemin Snake Hill. À l'approche de cet endroit, des broussailles réduisent la distance de visibilité de l'automobiliste et l'empêchent de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Bien que des opinions divergentes aient été émises quant à la vitesse *maximale* à laquelle ce virage peut être pris, je suis d'avis que, vu la distance de visibilité réduite, l'existence d'une courbe serrée et l'absence de surélévation du chemin, ce

than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet. [Emphasis in original.]

virage ne peut être pris en sécurité à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide. [En italique dans l'original.]

Wright J. then noted that, while it would not be reasonable to expect the respondent to construct the road to a higher standard or to clear all of the bush away, it was reasonable to expect the respondent to erect and maintain a warning or regulatory sign "so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86).

La juge Wright a ensuite précisé que, bien qu'on ne puisse raisonnablement exiger de l'intimée qu'elle construise le chemin selon une norme plus élevée ou qu'elle enlève toutes les broussailles, il était raisonnable de s'attendre à ce qu'elle installe et maintienne un panneau d'avertissement ou de signalisation [TRADUCTION] « afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux » (par. 86).

90 Wright J. then considered s. 192(3) of the Act, which provides that there is no breach of the statutory standard of care unless the municipality knew or should have known of the danger. Wright J. observed that between 1978 and 1990, there were four accidents on Snake Hill Road, three of which occurred "in the same vicinity" as the Nikolaisen rollover, and two of which were reported to the authorities. On the basis of this information, she held that "[i]f the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known" (para. 90). Wright J. also found significant the relatively low volume of traffic on the road, the fact that there were permanent residences on the road, and the fact that the road was frequented by young and perhaps less experienced drivers.

La juge Wright a ensuite analysé le par. 192(3) de la Loi, qui prévoit qu'il n'y a manquement à l'obligation de diligence que si la municipalité connaissait ou aurait dû connaître l'existence du danger. Elle a rappelé que quatre accidents étaient survenus sur le chemin Snake Hill de 1978 à 1990. Trois de ceux-ci se sont produits [TRADUCTION] « aux environs » de l'endroit où le véhicule de M. Nikolaisen a fait un tonneau, et deux ont été signalés aux autorités. Sur la base de cette information, elle a conclu que [TRADUCTION] « [s]i la M.R. [municipalité rurale] ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître » (par. 90). La juge Wright a également accordé de l'importance au débit relativement faible de la circulation sur le chemin, au fait que des résidences permanentes étaient situées en bordure de celui-ci et au fait que le chemin était fréquenté par des conducteurs jeunes et peut-être moins expérimentés.

91 In respect to causation, Wright J. found that it was probable that a warning sign would have enabled Mr. Nikolaisen to take corrective action to maintain control of his vehicle despite the fact of his impairment. She concluded (at para. 101):

En ce qui concerne le lien de causalité, la juge Wright a estimé qu'un panneau de signalisation aurait probablement permis à M. Nikolaisen de prendre des mesures correctives et de conserver la maîtrise de son véhicule, même si ses facultés étaient affaiblies. Elle a aussi tiré la conclusion suivante, au par. 101 :

Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded

[TRADUCTION] Le degré d'ébriété de M. Nikolaisen n'a fait qu'accroître le risque qu'il ne réagisse pas du tout ou encore de façon inappropriée à une signalisation. M. Nikolaisen ne conduisait pas de façon si téméraire qu'il

a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him.

Wright J. also addressed the appellant's argument that the municipality was in breach of a common law duty of care which was not qualified or limited by any of the restrictions set out under s. 192. She held that *Just v. British Columbia*, [1989] 2 S.C.R. 1228, and the line of authority both preceding and following that decision did not apply to the case before her given the existence of the statutory duty of care. She also found that any qualifying words in s. 192 of the Act pertained to the standard of care and did not impose limitations on the statutory duty of care.

B. *Saskatchewan Court of Appeal*, [2000] 4 W.W.R. 173, 2000 SKCA 12

On appeal, Cameron J.A., writing for a unanimous court, dealt primarily with the trial judge's finding that the respondent's failure to place a warning sign or regulatory sign at the site of the accident constituted a breach of its statutory duty of road repair. He did not find it necessary to rule on the issue of causation given his conclusion that the trial judge erred in finding the respondent negligent.

Cameron J.A. characterized the trial judge's conclusion that the respondent had breached the statutory duty of care as a matter of mixed fact and law. He noted that an appellate court is not to interfere with a trial judge's findings of fact unless the judge made a "palpable and overriding error" which affected his or her assessment of the facts. With respect to errors of law, however, Cameron J.A. remarked that the ability of an appellate court to overturn the finding of the trial judge is "largely unbounded". Regarding errors of mixed fact and law, Cameron J.A. noted that these are typically subject to the same standard of review as findings

aurait intentionnellement fait abstraction d'un panneau d'avertissement ou de signalisation. Quelques instants plus tôt, au moment de quitter la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir.

92 La juge Wright s'est également penchée sur l'argument de l'appelant voulant que la municipalité ait manqué à une obligation de diligence de common law qui ne serait pas atténuée ou restreinte par l'une ou l'autre des dispositions de l'art. 192. Elle a estimé que l'arrêt *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228, ainsi que la jurisprudence antérieure et postérieure à cette décision ne s'appliquaient pas à l'affaire dont elle était saisie, vu l'existence de l'obligation légale de diligence. Elle a également jugé que les termes restrictifs de l'art. 192 de la Loi visaient la norme de diligence et n'avaient pas pour effet de limiter la portée de l'obligation légale de diligence.

B. *Cour d'appel de la Saskatchewan*, [2000] 4 W.W.R. 173, 2000 SKCA 12

93 En appel, exprimant la décision unanime de la cour, le juge Cameron s'est attaché principalement à la conclusion de la juge de première instance portant que, en omettant d'installer un panneau d'avertissement ou de signalisation à l'endroit de l'accident, l'intimée avait manqué à son obligation légale d'entretien des routes. Il n'a pas jugé nécessaire de se prononcer sur la question du lien de causalité, vu sa conclusion que la juge de première instance avait commis une erreur en déclarant l'intimée responsable de négligence.

94 Le juge Cameron a qualifié la conclusion de la juge de première instance que l'intimée avait manqué à son obligation légale de diligence de conclusion portant sur une question mixte de fait et de droit. Il a souligné qu'une cour d'appel ne doit pas modifier les conclusions de fait du juge de première instance à moins que ce dernier n'ait commis une « erreur manifeste et dominante » ayant faussé son appréciation des faits. Pour ce qui est des erreurs de droit, toutefois, le juge Cameron a fait remarquer que le pouvoir d'une cour d'appel d'infirmer la conclusion du juge de première instance est [TRADUCTION] « presque illimité ». En ce qui concerne les erreurs

of fact. One exception to this, according to Cameron J.A., occurs where the trial judge identifies the correct legal test, yet fails to apply one branch of that test to the facts at hand. As support for this proposition, Cameron J.A. cited (at para. 41) Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 39:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

95 Turning to the applicable law in this case, Cameron J.A. acknowledged that the standard of care set out in the Act and the jurisprudence interpreting it requires municipalities to post warning signs to warn of hazards that prudent drivers, using ordinary care, would be unlikely to appreciate. Based on the jurisprudence, Cameron J.A. set out (at para. 50) an analytical framework to be used in order to assess if a municipality has breached its duty in this regard. This framework requires the judge:

> 1. To determine the character and state of the road at the time of the accident. This, of course, is a matter of fact that entails an assessment of the material features of the road where the accident occurred, as well as those factors going to the maintenance standard, namely the location, class of road, patterns of use, and so on.
>
> 2. To assess the issue of whether persons requiring to use the road, exercising ordinary car[e], could ordinarily travel upon it safely. This is essentially a reasonable person test, one concerned with how a

mixtes de fait et de droit, le juge Cameron a précisé qu'elles sont normalement assujetties à la même norme de contrôle que les conclusions de fait. Selon le juge Cameron, cette règle générale souffre une exception, qui s'applique dans les cas où, bien que le juge du procès ait retenu le bon critère juridique applicable, il omet d'en appliquer un élément aux faits de l'affaire dont il est saisi. Au soutien de cette affirmation, le juge Cameron a cité, au par. 41, les propos suivants du juge Iacobucci dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 39 :

> [Si] un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les faits, il ne prend en considération que A, B et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Relativement au droit applicable en l'espèce, le juge Cameron a reconnu que la norme de diligence énoncée dans la Loi et dans la jurisprudence portant sur l'interprétation de cette loi exige des municipalités qu'elles installent des panneaux de mise en garde pour signaler les dangers que les conducteurs prudents et prenant des précautions normales ne pourraient vraisemblablement pas mesurer. Se fondant sur la jurisprudence, le juge Cameron a établi, au par. 50, un cadre analytique permettant de déterminer si une municipalité a manqué à son obligation à cet égard. Suivant ce cadre, le juge doit examiner les aspects suivants :

[TRADUCTION]

> 1. Le juge doit déterminer la nature et l'état du chemin au moment de l'accident. Il s'agit, bien sûr, d'une question de fait, qui nécessite une appréciation des caractéristiques physiques du chemin à l'endroit où l'accident s'est produit, ainsi que de tous les facteurs se rapportant à la norme d'entretien, à savoir l'emplacement du chemin, le type de chemin dont il s'agit, les utilisations habituelles de celui-ci, et ainsi de suite.
>
> 2. Il soit se demander si les personnes qui devaient emprunter le chemin pouvaient généralement, en prenant des précautions normales, y circuler en sécurité. Il s'agit essentiellement du critère de la

reasonable driver on that particular road would have conducted himself or herself. It is necessary in taking this step to take account of the various elements noted in the authorities referred to earlier, namely the locality of the road, the character and class of the road, the standard to which the municipality could reasonably have been expected to maintain the road, and so forth. These criteria fall to be balanced in the context of the question: how would a reasonable driver have driven upon this particular road? Since this entails the application of a legal standard to a given set of facts, it constitutes a question of mixed fact and law.

3. To determine either tha[t] the road was in a reasonable state of repair or that it was not, depending upon the assessment made while using the second step. If it is determined that the road was not in a reasonable state of repair, then it becomes necessary to go on to determine whether the municipality knew or should have known of the state of disrepair before imputing liability.

According to Cameron J.A., the trial judge did not err in law by failing to set out the proper legal test. She did, however, make an error in law of the type identified by Iacobucci J. in *Southam*, *supra.* In his view, when applying the law to the facts of the case, the trial judge failed to assess the manner in which a reasonable driver, exercising ordinary care, would ordinarily have driven on the road, and the risk, if any, that the unmarked curve might have posed for the ordinary driver. As noted by Cameron J.A., the trial judge "twice alluded to the matter, but failed to come to grips with it" (para. 57).

Cameron J.A. also found that the trial judge had made a "palpable and overriding" error of fact in determining that the respondent had breached the standard of care. According to Cameron J.A., the trial judge's factual error stemmed from her reliance on the expert testimony of Mr. Werner and Mr. Anderson. Cameron J.A. found that the evidence of both experts was based on the fundamental premise

personne raisonnable, qui sert à déterminer comment se serait comporté un conducteur raisonnable sur ce chemin en particulier. À cette étape, il faut tenir compte des nombreux facteurs énoncés dans la jurisprudence mentionnée précédemment, c'est-à-dire l'emplacement du chemin, la nature et le type du chemin, la norme d'entretien à laquelle on pouvait raisonnablement s'attendre d'une municipalité, et ainsi de suite. Ces facteurs doivent être soupesés dans le contexte de la question suivante : Comment un conducteur raisonnable aurait-il conduit son véhicule sur ce chemin en particulier? Puisque cette question suppose l'application d'une norme juridique à un ensemble donné de faits, elle constitue une question mixte de fait et de droit.

3. Il doit déterminer si le chemin était dans un état raisonnable d'entretien, compte tenu des conclusions tirées à la deuxième étape. S'il est établi que le chemin ne se trouvait pas dans un état raisonnable d'entretien, il faut alors déterminer si la municipalité connaissait ou aurait dû connaître le mauvais état d'entretien avant de conclure à la responsabilité de celle-ci.

96 Selon le juge Cameron, la juge de première instance n'a pas commis d'erreur de droit en ce qui concerne le critère juridique applicable. Elle a cependant commis une erreur de droit du genre de celle exposée par le juge Iacobucci dans l'arrêt *Southam*, précité. À son avis, lorsqu'elle a appliqué le droit aux faits de l'espèce, la juge de première instance a omis, d'une part, de se demander comment un conducteur raisonnable, faisant montre de prudence normale, aurait conduit son véhicule sur ce chemin, et, d'autre part, d'évaluer le risque, s'il en est, que le virage non annoncé aurait pu constituer pour le conducteur moyen. Comme l'a souligné le juge Cameron de la Cour d'appel, la juge de première instance [TRADUCTION] « a évoqué la question à deux reprises, mais elle ne l'a pas abordée » (par. 57).

97 Le juge Cameron a également estimé que la juge de première instance avait commis une erreur de fait « manifeste et dominante » en concluant que l'intimée n'avait pas exercé le degré de diligence requis. Selon le juge Cameron, cette erreur de fait découlait de l'importance accordée par la juge Wright aux témoignages d'experts de MM. Werner et Anderson. À son avis, les témoignages de ces deux experts

that the ordinary driver could be expected to travel the road at a speed of 80 km/h. In his view, this premise was misconceived and unsupported by the evidence.

98 Cameron J.A. concluded that although the trial judge was free to accept the evidence of some witnesses over others, she was not free to accept expert testimony that was based on an erroneous factual premise. According to Cameron J.A., had the trial judge found that a prudent driver, exercising ordinary care for his or her safety, would not ordinarily have driven this section of Snake Hill Road at a speed greater than 60 km/h, then she would have had to conclude that no hidden hazard existed since the curve could be negotiated safely at this speed.

99 Cameron J.A. agreed with the trial judge that a common law duty of care was not applicable in this case. His remarks in this respect are found at para. 44 of his reasons:

> Concerning the duty of care, it might be noted that unlike statutory provisions empowering municipalities to maintain roads, but imposing no duty upon them to do so, the duty in this instance owes its existence to a statute, rather than the neighbourhood principle of the common law: *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.). The duty is readily seen to extend to all who travel upon the roads.

V. Issues

100 A. Did the Court of Appeal properly interfere with the trial judge's finding that the respondent was in breach of its statutory duty of care?

B. Did the trial judge err in finding the respondent knew or should have known of the alleged danger?

C. Did the trial judge err in finding that the accident was caused in part by the respondent's negligence?

reposaient sur la prémisse fondamentale qu'on pouvait s'attendre à ce que le conducteur moyen circule sur le chemin à une vitesse de 80 km/h. Selon lui, cette prémisse était erronée et n'était pas étayée par la preuve.

Le juge Cameron a conclu que, bien qu'il fût loisible à la juge de première instance d'accorder davantage foi à certains témoignages qu'à d'autres, il ne lui était pas loisible de retenir un témoignage d'expert fondé sur une prémisse factuelle erronée. Selon lui, si la juge de première instance avait estimé qu'un conducteur prudent prenant des précautions normales pour assurer sa sécurité n'aurait généralement pas roulé sur cette portion du chemin Snake Hill à plus de 60 km/h, alors elle aurait dû conclure à l'absence de danger caché puisque le virage pouvait être pris en sécurité à cette vitesse.

Le juge Cameron a souscrit à l'opinion de la juge de première instance que l'obligation de diligence de common law ne s'appliquait pas en l'espèce. Il a fait les commentaires suivants à ce sujet, au par. 44 de ses motifs :

> [TRADUCTION] En ce qui concerne l'obligation de diligence, il convient de préciser que, contrairement aux dispositions législatives qui habilitent les municipalités à entretenir les chemins, sans toutefois leur imposer l'obligation de le faire, en l'espèce l'obligation doit son existence à une loi, plutôt qu'au principe de common law fondé sur la proximité : *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228. On saisit immédiatement que l'obligation de diligence existe en faveur de tous ceux qui circulent sur les routes.

V. Les questions en litige

A. La Cour d'appel a-t-elle eu raison de modifier la conclusion de la juge de première instance portant que l'intimée avait manqué à son obligation légale de diligence?

B. La juge de première instance a-t-elle commis une erreur en concluant que l'intimée connaissait ou aurait dû connaître le danger allégué?

C. La juge de première instance a-t-elle commis une erreur en concluant que l'accident a été en partie causé par la négligence de l'intimée?

D. Does a common law duty of care coexist alongside the statutory duty of care?

VI. Analysis

A. *Did the Court of Appeal Properly Interfere with the Decision at Trial?*

(1) The Standard of Review

Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (*Southam*, *supra*, at para. 35).

Of the three categories above, the highest degree of deference is accorded to the trial judge's findings of fact. The Court will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong (*Southam*, *supra*, at para. 60; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, at p. 121). This deference is principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand, and is therefore better able to choose between competing versions of events (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 32). It is however important to recognize that the making of a factual finding often involves more than merely determining the who, what, where and when of the case. The trial judge is very often called upon to draw inferences from the facts that are put before the court. For example, in this case, the trial judge inferred from the fact of accidents having occurred on Snake Hill Road

D. Est-ce qu'une obligation de diligence de common law coexiste avec l'obligation légale de diligence?

VI. L'analyse

A. *La Cour d'appel a-t-elle eu raison de modifier la décision de la juge de première instance?*

(1) La norme de contrôle

101 Bien qu'elles ne soient pas toujours faciles à distinguer, les questions auxquelles doit répondre un tribunal de première instance se classent généralement en trois catégories : les questions de droit, les questions de fait et les questions mixtes de fait et de droit. En résumé, les questions de droit concernent la détermination du critère juridique applicable; les questions de fait portent sur ce qui s'est réellement passé entre les parties et les questions mixtes de fait et de droit consistent à déterminer si les faits satisfont au critère juridique (*Southam*, précité, par. 35).

102 De ces trois catégories, ce sont les conclusions de fait du juge de première instance qui commandent le degré le plus élevé de retenue. La Cour ne modifie les conclusions de fait du juge de première instance que si celui-ci a commis une erreur manifeste ou dominante ou si la conclusion est manifestement erronée (*Southam*, précité, par. 60; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114, p. 121). Cette retenue repose principalement sur le fait que, puisqu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, le juge de première instance est en conséquence plus à même de choisir entre deux versions divergentes d'un même événement (*Schwartz c. Canada*, [1996] 1 R.C.S. 254, par. 32). Cependant, il est important de reconnaître que tirer une conclusion de fait implique souvent davantage que le simple fait de déterminer qui a fait quoi, ainsi que où et quand il l'a fait. Le juge de première instance est très souvent appelé à faire des inférences à partir des faits qui lui sont

that the respondent knew or should have known of the hidden danger.

103 This Court has determined that a trial judge's inferences of fact should be accorded a similar degree of deference as findings of fact (*Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353). In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. I respectfully disagree with the majority's view that inferences can be rejected only where the inference-drawing process itself is deficient: see *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.

An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. My colleagues recognize themselves that a judge is often called upon to make inferences of mixed law and fact (para. 26). While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact.

présentés. En l'espèce, par exemple, la juge de première instance a inféré du fait que des accidents s'étaient produits sur le chemin Snake Hill que l'intimée connaissait ou aurait dû connaître l'existence du danger caché.

Notre Cour a jugé qu'il fallait appliquer aux inférences de fait du juge de première instance le même degré de retenue qu'à ses conclusions de fait (*Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353). La cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés. En toute déférence, je ne partage pas l'opinion de la majorité selon laquelle des inférences ne peuvent être rejetées que dans les cas où le processus qui les a produites est lui-même déficient : voir *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 45 :

> Lorsqu'une cour de justice contrôle les conclusions de fait d'un tribunal administratif ou les inférences qu'il a tirées de la preuve, elle ne peut intervenir que « lorsque les éléments de preuve, perçus de façon raisonnable, ne peuvent étayer les conclusions de fait du tribunal » : *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644, à la p. 669, le juge McLachlin.

Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Mes collègues eux-mêmes reconnaissent qu'un juge est souvent appelé à tirer des inférences mixtes de fait et droit (par. 26). Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait.

My colleagues take issue with the above statement that an appellate court will verify whether the making of an inference can reasonably be supported by the trial judge's findings of fact, a standard which they believe to be less strict than the "palpable and overriding" standard. I do not agree that a less strict standard is implied. In my view there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic.

104 Mes collègues ne sont pas d'accord avec l'énoncé susmentionné — savoir celui portant que la cour d'appel se demande si une inférence peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance — estimant qu'il s'agit d'une norme de contrôle moins exigeante que celle de l'erreur « manifeste et dominante ». Pour ma part, je ne crois pas que cet énoncé implique l'application d'une norme moins exigeante. À mon avis, il n'y a aucune différence entre le fait de conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a constatés, et le fait de conclure que cette inférence n'était pas raisonnablement étayée par ces faits. La distinction est purement sémantique.

By contrast, an appellate court reviews a trial judge's findings on questions of law not merely to determine if they are reasonable, but rather to determine if they are correct; *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 833; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at p. 90. The role of correcting errors of law is a primary function of the appellate court; therefore, that court can and should review the legal determinations of the lower courts for correctness.

105 En revanche, une cour d'appel ne contrôle pas les conclusions tirées par le juge de première instance à l'égard des questions de droit simplement pour déterminer si elles sont raisonnables, mais plutôt pour déterminer si elles sont correctes : *Moge c. Moge*, [1992] 3 R.C.S. 813, p. 833; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), p. 90. Un des rôles principaux d'une cour d'appel consiste à corriger les erreurs de droit et, par conséquent, cette cour peut et doit vérifier si les conclusions juridiques de la juridiction inférieure sont correctes.

In the law of negligence, the question of whether the conduct of the defendant has met the appropriate standard of care is necessarily a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts. As stated by Kerans, *supra*, at p. 103, "[t]he evaluation of facts as meeting or not meeting a legal test is a process that involves law-making. Moreover, it is probably correct to say that *every* new attempt to apply a legal rule to a set of

106 Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est forcément une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée. Dans bien des cas, l'examen des faits à travers le prisme juridique de la norme de diligence implique l'établissement de politiques d'intérêt général ou la création de règles de droit, rôle qui relève autant des cours de première instance que des cours d'appel. Comme l'a dit Kerans, *op. cit.*, p. 103, [TRADUCTION] « [l]'examen de la

facts involves some measure of interpretation of that rule, and thus more law-making" (emphasis in original).

107 In a negligence case, the trial judge is called on to decide whether the conduct of the defendant was reasonable under all the circumstances. While this determination involves questions of fact, it also requires the trial judge to assess what is reasonable. As stated above, in many cases, this will involve a policy-making or "law-setting" role which an appellate court is better situated to undertake (Kerans, *supra*, at pp. 5-10). For example, in this case, the degree of knowledge that the trial judge should have imputed to the reasonably prudent municipal councillor raised the policy consideration of the type of accident-reporting system that a small rural municipality with limited resources should be expected to maintain. This law-setting role was recognized by the United States Supreme Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), at note 17, within the context of an action for defamation:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes — in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact.

question de savoir si les faits satisfont ou non à un critère juridique donné est un processus qui implique une fonction créatrice de droit. Qui plus est, il est probablement exact d'affirmer que *chaque* nouvelle tentative d'appliquer une règle de droit à un ensemble de faits emporte une certaine interprétation de cette règle et, partant, l'élaboration de règles de droit additionnelles » (en italique dans l'original).

Dans une affaire de négligence, le juge de première instance est appelé à décider si la conduite du défendeur était raisonnable eu égard à toutes les circonstances. Bien que la prise de cette décision demande l'examen de questions de fait, elle exige également du juge de première instance qu'il établisse ce qui est raisonnable. Comme il a été mentionné plus tôt, dans bien des cas cette décision implique l'établissement de politiques d'intérêt général ou la « création de règles de droit », rôle qu'une cour d'appel est mieux placée pour remplir (Kerans, *op. cit.*, p. 5 à 10). En l'espèce, par exemple, le degré de connaissance que la juge de première instance aurait dû prêter au conseiller municipal raisonnablement prudent soulevait une considération participant d'une politique d'intérêt général, savoir le genre de système d'information sur les accidents qu'une petite municipalité rurale aux ressources budgétaires limitées est censée tenir. Ce rôle créateur de droit a été reconnu par la Cour suprême des États-Unis dans l'arrêt *Bose Corp. c. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), à la note 17, dans le contexte d'une action en diffamation :

> [TRADUCTION] Une conclusion de fait est, dans certains cas, indissociable des principes qui ont été appliqués pour y arriver. À un point donné, le raisonnement menant à la « constatation d'un fait » cesse d'être l'application des principes ordinaires de logique et d'expérience générale, qui est généralement l'apanage du juge de première instance, pour devenir l'application d'une règle de droit, tâche où le tribunal de révision doit exercer son propre jugement. Cette ligne de démarcation se déplace selon la nature de la règle de droit substantiel en litige. Dans quelques branches du droit, certaines questions largement factuelles soulèvent des enjeux — incidence sur d'éventuelles affaires et le comportement futur — qui sont trop importants pour être confiés en premier et dernier ressort au juge de première instance.

My colleagues assert that the question of whether or not the standard of care was met by the defendant in a negligence case is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law (para. 36). I disagree. In many cases, it will not be possible to "extricate" a purely legal question from the standard of care analysis applicable to negligence, which is a question of mixed fact and law. In addition, while some questions of mixed fact and law may not have "any great precedential value" (*Southam*, *supra*, at para. 37), such questions often necessitate a normative analysis that should be reviewable by an appellate court.

108 Mes collègues affirment que la question de savoir si, dans une affaire de négligence, le défendeur a respecté ou non la norme de diligence appropriée est assujettie au critère de l'erreur manifeste et dominante, sauf si le juge de première instance a clairement commis une erreur de principe isolable relativement à la détermination de la norme à appliquer ou à son application, auquel cas l'erreur peut constituer une erreur de droit (par. 36). Je ne suis pas d'accord. Dans bon nombre de cas, il ne sera pas possible d'« isoler » une question de droit pur de l'analyse de la norme de diligence applicable en matière de négligence, qui est une question mixte de fait et de droit. En outre, bien que certaines questions mixtes de fait et de droit puissent ne pas avoir « une grande valeur comme précédents » (*Southam*, précité, par. 37), ces questions impliquent souvent une analyse normative que devrait pouvoir contrôler une cour d'appel.

Consider again the issue of whether the municipality knew or should have known of the alleged danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality having regard to the duties of the ordinary, reasonable and prudent municipal councillor. If the trial judge applies a different legal standard, such as the reasonable person standard, it is an error of law. Yet even if the trial judge correctly identifies the applicable legal standard, he or she may still err in the process of assessing the facts through the lens of that legal standard. For example, there may exist evidence that an accident had previously occurred on the portion of the road on which the relevant accident occurred. In the course of considering whether or not that fact satisfies the legal test for knowledge the trial judge must make a number of normative assumptions. The trial judge must consider whether the fact that one accident had previously occurred in the same location would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the ordinary, reasonable and prudent councillor would have been alerted to the previous accident by an accident-reporting system. In my view, the question of whether the fact of a previous accident having occurred fulfills the applicable knowledge

109 Revenons maintenant à la question de savoir si la municipalité connaissait ou aurait dû connaître le danger allégué. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de prêter cette connaissance à la municipalité eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Si le juge de première instance applique une autre norme juridique, par exemple celle de la personne raisonnable, il commet une erreur de droit. Cependant, même en supposant que le juge de première instance détermine correctement la norme juridique à appliquer, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique. Par exemple, il peut exister une preuve indiquant qu'un accident s'était déjà produit sur le tronçon de chemin en cause. Le juge de première instance qui se demande si ce fait satisfait ou non au critère juridique applicable à la question de la connaissance doit poser un certain nombre d'hypothèses normatives. Il doit se demander si le fait qu'un accident se soit déjà produit au même endroit alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents. Selon moi, la question de savoir si le fait qu'un accident se soit produit antérieurement

requirement is a question of mixed fact and law and it is artificial to characterize it as anything else. As is apparent from the example given, the question may also raise normative issues which should be reviewable by an appellate court on the correctness standard.

110 I agree with my colleagues that it is not possible to state as a general proposition that all matters of mixed fact and law are reviewable according to the standard of correctness: citing *Southam*, *supra*, at para. 37 (para. 28). I disagree, however, that the dicta in *Southam* establishes that a trial judge's conclusions on questions of mixed fact and law in a negligence action should be accorded deference in every case. This Court in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, a medical negligence case, distinguished *Southam* on the issue of the standard applicable to questions of mixed fact and law where the tribunal has no particular expertise. Gonthier J., writing for a unanimous Court, stated at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. Such is the standard for medical negligence. There is no issue of expertise of a specialized tribunal in a particular field which may go to the determination of facts and be pertinent to defining an appropriate standard and thereby call for some measure of deference by a court of general appeal (*Southam*, *supra*, at para. 45; and *Nova Scotia Pharmaceutical Society*, *supra*, at p. 647).

111 I also disagree with my colleagues that *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, is authority for the proposition that when the question

satisfait à l'exigence de connaissance applicable est une question mixte de fait et de droit, et il serait artificiel de la qualifier autrement. Comme l'indique clairement l'exemple qui précède, cette question peut également soulever des questions normatives que devrait pouvoir contrôler une cour d'appel selon la norme de la décision correcte.

Je partage l'opinion de mes collègues selon laquelle on ne peut poser comme principe général que toutes les questions mixtes de fait et de droit sont assujetties à la norme de la décision correcte : citant *Southam*, précité, par. 37 (par. 28). Cependant, je ne crois pas que l'opinion formulée dans *Southam* signifie que, dans une affaire de négligence, les conclusions du juge de première instance sur des questions mixtes de fait et de droit commandent systématiquement une attitude empreinte de retenue. Dans l'arrêt *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, affaire de négligence médicale, notre Cour a différencié cette affaire de l'arrêt *Southam* sur la question de la norme de contrôle applicable aux questions mixtes de fait et de droit dans les cas où le tribunal ne possède d'expertise particulière. Exposant la décision unanime de la Cour, le juge Gonthier a dit ceci, aux par. 48 et 49 :

> La question qui consiste « à déterminer si les faits satisfont au critère juridique » est une question mixte de droit et de fait ou en d'autres termes, « la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait » (*Southam*, par. 35).
>
> Une fois les faits établis sans erreur manifeste et dominante, cette question doit généralement être révisée suivant la norme de la décision correcte puisque la norme de diligence est normative et constitue une question de droit qui relève de la compétence habituelle des tribunaux de première instance et d'appel. C'est la norme applicable à la négligence médicale. Il n'est pas question de l'expertise d'un tribunal spécialisé dans un domaine particulier, pouvant toucher la détermination des faits et avoir une incidence sur la définition de la norme appropriée et exiger de ce fait une certaine déférence de la part d'une cour générale d'appel (*Southam*, par. 45; *Nova Scotia Pharmaceutical Society*, précité, p. 647).

Je ne peux non plus me ranger à l'avis de mes collègues selon lequel l'arrêt *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, permet d'affirmer

of mixed fact and law at issue is a finding of negligence, that finding should be deferred to by appellate courts. In that case the trial judge found that the conduct of the defendant ski instructor met the standard of care expected of him. Moreover, the trial judge found that the accident would have occurred regardless of what the ski instructor had done (*Taylor v. The Queen in Right of British Columbia* (1978), 95 D.L.R. (3d) 82). Seaton J.A. of the British Columbia Court of Appeal disagreed with the trial judge that the ski instructor had met the applicable standard of care (*Taylor (Guardian ad litem of) v. British Columbia* (1980), 112 D.L.R. (3d) 297). Seaton J.A. recognized nevertheless that the "final question" was whether "the instructor's failure to remain was a cause of the accident" (p. 307). On the issue of causation, a question of fact, Seaton J.A. clearly substituted his opinion for that of the trial judge's without regard to the appropriate standard of review. His concluding remarks on the issue of causation at p. 308 highlight his lack of deference to the trial judge's conclusion on causation:

> On balance, I think that the evidence supports the plaintiffs' claim against the instructor, that his conduct in leaving the plaintiff below the crest was one of the causes of the accident.

This Court, which restored the finding of the trial judge, did not clearly state whether it did so on the basis that the appellate court was wrong to interfere with the trial judge's finding of negligence or whether it did so because the appellate court wrongly interfered with the trial judge's conclusions on causation. The reasons suggest the latter. The only portion of the trial judgment that this Court referred to was the finding on causation. Dickson J. (as he then was) remarks in *Jaegli Enterprises*, *supra*, at p. 4:

> At the end of a nine-day trial Mr. Justice Meredith, the presiding judge, delivered a judgment in which he

que, lorsque la question mixte de fait et de droit en litige est la conclusion de négligence tirée par le juge de première instance, les cours d'appel doivent faire preuve de retenue à l'égard de cette conclusion. Dans cette affaire, le juge de première instance avait conclu que le défendeur, un instructeur de ski, avait respecté la norme de diligence à laquelle il était tenu. Il avait aussi conclu que l'accident serait survenu, indépendamment de la conduite de l'instructeur de ski (*Taylor c. The Queen in Right of British Columbia* (1978), 95 D.L.R. (3d) 82). Le juge Seaton de la Cour d'appel de la Colombie-Britannique a exprimé son désaccord avec la conclusion du juge de première instance que l'instructeur de ski avait respecté la norme de diligence applicable (*Taylor (Guardian ad litem of) c. British Columbia* (1980), 112 D.L.R. (3d) 297). Il a néanmoins reconnu que [TRADUCTION] « l'ultime question » consistait à se demander si « l'omission de l'instructeur de rester près de la demanderesse avait été une cause de l'accident » (p. 307). Sur la question du lien de causalité, qui est une question de fait, le juge Seaton a clairement substitué son opinion à celle du juge de première instance sans tenir compte de la norme de contrôle appropriée. Ses remarques finales sur la question de la causalité, à la p. 308, font ressortir son absence de retenue à l'égard de la conclusion du juge de première instance sur ce point :

> [TRADUCTION] Tout bien considéré, j'estime que la preuve étaye la prétention des demandeurs voulant que la conduite de l'instructeur, qui l'a laissée seule sous la crête de la butte, a été l'une des causes de l'accident.

112 En rétablissant la décision du juge de première instance, notre Cour n'a pas précisé si elle le faisait parce que la cour d'appel avait eu tort de modifier la conclusion de ce dernier sur la négligence ou parce qu'elle avait erronément modifié ses conclusions sur la causalité. Les motifs donnent à penser que la dernière proposition est la bonne. La seule partie du jugement de première instance mentionnée par notre Cour se rapporte à la conclusion sur le lien de causalité. Le juge Dickson (plus tard Juge en chef) a fait les remarques suivantes dans l'arrêt *Jaegli Enterprises*, précité, à la p. 4 :

> À la fin d'un procès de neuf jours, le juge Meredith, qui a présidé le procès, a rendu un jugement dans lequel il a

very carefully considered all of the evidence and concluded that the accident had been caused solely by Larry LaCasse and that the plaintiffs should recover damages, in an amount to be assessed, against LaCasse. The claims against Paul Ankenman, Jaegli Enterprises Limited and the other defendants were dismissed with costs.

113 The Court went on to cite a number of cases, some of which did not involve negligence (see *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78), for the general proposition that "it [is] wrong for an appellate court to set aside a trial judgment where [there is not palpable and overriding error, and] the only point at issue [was] the interpretation of the evidence as a whole" (p. 84). Given that the Court focussed on the issue of causation, a question of fact alone, I do not think that *Jaegli Enterprises* establishes that a finding of negligence by the trial judge should be deferred to by appellate courts. In my view, the Court in *Jaegli Enterprises* merely affirmed the longstanding principle that an appellate court should not interfere with a trial judge's finding of fact absent a palpable and overriding error.

(2) Error of Law in the Reasons of the Court of Queen's Bench

114 The standard of care set out in s. 192 of *The Rural Municipality Act, 1989*, as interpreted within the jurisprudence, required the trial judge to examine whether the portion of Snake Hill Road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Having identified the correct legal test, the trial judge nonetheless failed to ask herself whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. To neglect entirely one branch of a legal test when applying the facts to the test is to misconstrue the law (*Southam*, *supra*, at para. 39). The Saskatchewan Court of Appeal was therefore right to characterize this failure as an error of law and to consider the factual findings made by the trial judge in light of the appropriate legal test.

examiné soigneusement toute la preuve et a conclu que l'accident était imputable uniquement à Larry LaCasse et que les demandeurs pouvaient recouvrer de LaCasse des dommages-intérêts pour un montant à déterminer. Les réclamations contre Paul Ankenman, Jaegli Enterprises Limited et les autres défendeurs ont été rejetées avec dépens.

La Cour a ensuite cité quelques décisions, dont certaines ne traitent pas de négligence (voir *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78), au soutien de la proposition générale qu'« une cour d'appel ne peut à bon droit infirmer une décision de première instance lorsque la seule question en litige porte sur l'interprétation de l'ensemble de la preuve » (p. 84). Étant donné que la Cour s'est attachée à la question du lien de causalité, question de fait seulement, je ne crois pas que l'arrêt *Jaegli Enterprises* établisse que les cours d'appel doivent faire montre de retenue lorsque le juge de première instance conclut à la négligence. À mon avis, dans l'arrêt *Jaegli Enterprises*, la Cour n'a fait que confirmer le principe bien établi portant qu'une cour d'appel ne doit pas modifier une conclusion de fait du juge de première instance en l'absence d'erreur manifeste et dominante.

(2) L'erreur de droit dans les motifs de la Cour du Banc de la Reine

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, telle qu'elle a été interprétée dans la jurisprudence, la juge de première instance devait se demander si le tronçon du chemin Snake Hill sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. Après avoir déterminé quel était le critère juridique applicable, la juge de première instance a toutefois omis de se demander si un tel conducteur aurait pu rouler en sécurité sur le tronçon en question. Le fait d'omettre entièrement une étape d'un critère juridique, dans l'application de celui-ci aux faits de l'espèce, équivaut à mal interpréter le droit (*Southam*, précité, par. 39). Par conséquent, la Cour d'appel de la Saskatchewan a donc eu raison de qualifier cette omission d'erreur de droit et de contrôler les conclusions de fait tirées par la juge de première instance à la lumière du critère juridique approprié.

The long line of jurisprudence interpreting s. 192 of *The Rural Municipality Act, 1989* and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (*Partridge*, *supra*, at p. 558; *Levey v. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (*R. v. Jennings*, [1966] S.C.R. 532, at p. 537; *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884, at p. 892; *Fafard v. City of Quebec* (1917), 39 D.L.R. 717 (S.C.C.), at p. 718). This Court, in *Jennings*, *supra*, interpreting a similar provision under the Ontario *Highway Improvement Act*, R.S.O. 1960, c. 171, remarked at p. 537 that: "[i]t has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety".

115 La jurisprudence de longue date portant sur l'interprétation de l'art. 192 de la *Rural Municipality Act, 1989* et des dispositions qu'il a remplacées établit clairement que les municipalités ont l'obligation de tenir les chemins [TRADUCTION] « dans un état raisonnable d'entretien de façon que ceux qui doivent l[es] emprunter puissent, en prenant des précautions normales, y circuler en sécurité » (*Partridge*, précité, p. 558; *Levey c. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764 (C.A. Sask.), p. 766; *Diebel Estate c. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (B.R.), p. 71 et 72). Plusieurs autres provinces ont adopté des lois établissant une obligation de diligence semblable, et les tribunaux de ces provinces ont interprété cette obligation de la même façon (*R. c. Jennings*, [1966] R.C.S. 532, p. 537; *Comté de Parkland nº 31 c. Stetar*, [1975] 2 R.C.S. 884, p. 892; *Fafard c. City of Quebec* (1917), 39 D.L.R. 717 (C.S.C.), p. 718). Interprétant une disposition similaire de la *Highway Improvement Act* de l'Ontario, R.S.O. 1960, ch. 171, notre Cour a indiqué, dans l'arrêt *Jennings*, précité, p. 537, qu'[TRADUCTION] « [i]l a été décidé à maintes reprises en Ontario que, lorsque l'obligation de maintenir une route en bon état d'entretien est légalement imposée à un organisme, celui-ci doit maintenir la route dans un état permettant à ceux qui l'empruntent en prenant des précautions normales d'y circuler en sécurité ».

There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in *Fafard*, *supra*, at p. 718: "[a] municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety". Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road. The type of error to be guarded against was described by Wetmore C.J. in *Williams v.*

116 Il existe de bonnes raisons de limiter l'obligation d'entretien des routes incombant aux municipalités au respect d'une norme suffisante pour permettre aux conducteurs qui prennent des précautions normales d'y circuler en sécurité. Comme l'a dit notre Cour dans l'arrêt *Fafard*, précité, p. 718 : [TRADUCTION] « [l]es municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues; leur obligation consiste à faire preuve de diligence raisonnable et de maintenir leurs rues dans un état raisonnablement sécuritaire pour la circulation normale des personnes qui prennent des précautions normales en vue d'assurer leur propre sécurité ». En conséquence, les cours d'appel estiment depuis longtemps que le juge de première instance commet une erreur s'il conclut qu'une municipalité

Town of North Battleford (1911), 4 Sask. L.R. 75 (*en banc*), at p. 81:

> The question in an action of this sort, whether or not the road is kept in such repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, is, it seems to me, largely one of fact . . . I would hesitate about setting aside a finding of fact of the trial Judge if he had found the facts necessary for the determination of the case, but he did not so find. He found that the crossing was a "dangerous spot without a light, and that if the utmost care were used no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." He did not consider the question from the standpoint of whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. The mere fact of the crossing being dangerous is not sufficient . . . . [Emphasis added.]

117 From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present. For example, the ordinary driver expects a dirt road to become slippery when wet. By contrast, paved

manque à son obligation du seul fait qu'un danger existe, indépendamment de la question de savoir si ce danger présente ou non un risque pour l'usager ordinaire du chemin. Le genre d'erreur qu'il faut éviter a été décrit ainsi par le juge en chef Wetmore dans l'affaire *Williams c. Town of North Battleford* (1911), 4 Sask. L.R. 75 (*in banco*), p. 81 :

> [TRADUCTION] Il me semble que la question qui se pose dans ce genre d'action — soit celle de savoir si le chemin est tenu dans un état d'entretien tel que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité — est essentiellement une question de fait [. . .] j'hésiterais à écarter une conclusion de fait du juge de première instance s'il avait relevé l'existence des faits nécessaires pour trancher l'affaire, mais il ne l'a pas fait. Il a conclu que l'intersection était « un endroit dangereux non éclairé, et qu'aucun accident ne s'y produirait si on faisait preuve d'une prudence extrême, mais que cet endroit n'était pas tenu dans un état d'entretien propre à rendre improbable un tel accident ». Il n'a pas examiné la question en se demandant si ceux qui doivent emprunter ce chemin peuvent, en prenant des précautions normales, y circuler en sécurité. Le seul fait que l'intersection soit dangereuse n'est pas suffisant . . . [Je souligne.]

Il ressort clairement de la jurisprudence susmentionnée que la simple existence d'un risque ou danger ne fait pas en soi naître pour la municipalité l'obligation d'installer un panneau de signalisation. Même si, à partir des faits, le juge de première instance arrive à la conclusion que l'état du chemin crée effectivement un risque, il doit poursuivre son analyse et se demander si ce risque présente un danger pour le conducteur raisonnable prenant des précautions normales. Le conducteur moyen rencontre souvent des conditions de conduite intrinsèquement dangereuses. Les automobilistes conduisent leur véhicule sur des chaussées glacées ou humides. Ils roulent la nuit sur des chemins de campagne mal éclairés. Ils rencontrent des obstacles comme des bancs de neige et des nids-de-poule. Souvent ces obstacles ne sont pas visibles, car ils sont dissimulés ou « cachés ». Le bon sens suggère que les automobilistes font toutefois preuve d'une certaine prudence en présence de conditions de conduite dangereuses. On n'attend de la municipalité qu'elle prenne des mesures d'avertissement supplémentaires que lorsque l'état du chemin et l'ensemble des

bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.

The appellant in this case argued, at para. 27 of his factum, that the trial judge did, in fact, assess whether a reasonable driver using ordinary care would find the portion of Snake Hill Road on which the accident occurred to pose a risk. He points in particular to the trial judge's comments at paras. 85-86 that:

> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. . . .
>
> . . . where the existence of . . . bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Emphasis added.]

The appellant's argument suggests that the trial judge discharged her duty to apply the facts to the law merely by restating the facts of the case in the language of the legal test. This was not, however, sufficient. Although it is clear from the citation above that the trial judge made a factual finding that the portion of Snake Hill Road on which the accident occurred presented drivers with a hidden hazard, there is nothing in this portion of her reasons to suggest that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. The finding that a hazard, or even that a hidden hazard, exists does not automatically give rise to the conclusion that the reasonable driver exercising ordinary care could not

autres circonstances ne signalent pas au conducteur la possibilité qu'un danger existe. Par exemple, le conducteur moyen s'attend à ce qu'un chemin de terre devienne glissant lorsqu'il est mouillé. À l'opposé, les tabliers de pont asphaltés qui se trouvent sur les routes sont souvent glissants, bien qu'ils paraissent complètement secs. Par conséquent, des panneaux sont installés pour alerter les conducteurs de cette possibilité non apparente.

118 En l'espèce, l'appelant a plaidé, au par. 27 de son mémoire, que la juge de première instance s'était, en fait, demandé si un conducteur raisonnable prenant des précautions normales considérerait que le tronçon du chemin Snake Hill où s'est produit l'accident constitue un risque. Il souligne en particulier les commentaires suivants de la juge de première instance, aux par. 85 et 86 :

> [TRADUCTION] Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner. En outre, il s'agit d'un danger qui n'est pas facilement décelable par les usagers du chemin. Il s'agit d'un danger caché . . .
>
> . . . à l'endroit où la présence des broussailles empêche les automobilistes de voir venir un danger comme celui qui existe sur le chemin Snake Hill, il est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux. [Je souligne.]

119 L'appelant semble prétendre que la juge de première instance s'est acquittée de son devoir d'appliquer le droit aux faits simplement en intégrant les faits de l'espèce à la formulation du critère juridique. Ce n'était toutefois pas suffisant. Bien qu'il ressorte clairement des passages précités que la juge de première instance a, à partir des faits, conclu que la portion du chemin Snake Hill où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien dans cette partie de ses motifs qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. Le fait de conclure à l'existence d'un danger, même caché, n'implique pas forcément que le conducteur

travel through it safely. A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question. My colleagues state that it was open to the trial judge to draw an inference of knowledge of the hazard simply because the sharp curve was a permanent feature of the road (para. 61). Here again, there is nothing in the reasons of the trial judge to suggest that she drew such an inference or to explain how such an inference accorded with the legal requirements concerning the duty of care.

120 Nor did the trial judge consider the question in any other part of her reasons. Her failure to do so becomes all the more apparent when her analysis (or lack thereof) is compared to that in cases in which the courts applied the appropriate method. The Court of Appeal referred to two such cases by way of example. In *Nelson v. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260 (Q.B.), the plaintiff argued that the defendant municipality should have posted signs warning of a ridge in the middle of the road that resulted from the grading of the road by the municipality. The trial judge concluded that if the driver had exercised ordinary care, he could have travelled along the roadway with safety. Instead, he drove too fast and failed to keep an adequate lookout considering the maintenance that was being performed on the road. In *Diebel Estate*, *supra*, the issue was whether the municipality had a duty under s. 192 to post a sign warning motorists that a rural road ended abruptly in a T-intersection. The question of how a reasonable driver exercising ordinary care would have driven on that road was asked and answered by the trial judge in the following passage at p. 74:

His [the expert's] conclusions as to stopping are, however, mathematically arrived at and never having been on

raisonnable prenant des précautions normales ne peut pas y circuler en sécurité. Pour bien appliquer le critère juridique, le juge de première instance doit se poser la question suivante : « Comment un conducteur raisonnable aurait-il roulé sur ce chemin? » Le fait de conclure qu'il existe ou non un danger « caché » ou qu'une courbe est quelque chose d' « intrinsèquement » dangereux ne vide pas la question. Mes collègues affirment que la juge de première instance pouvait inférer la connaissance du danger du seul fait que la courbe serrée constituait une caractéristique permanente du chemin (par. 61). Ici encore, rien dans les motifs de la juge de première instance n'indique qu'elle a tiré une telle inférence ou n'explique en quoi une telle inférence satisfaisait aux conditions juridiques relatives à l'obligation de diligence.

La juge de première instance n'a pas non plus examiné cette question ailleurs dans ses motifs. Son omission à cet égard devient encore plus évidente lorsqu'on compare son analyse (ou son absence d'analyse) à celle des affaires où les tribunaux ont appliqué la bonne démarche. La Cour d'appel a donné comme exemple deux de ces affaires. Dans *Nelson c. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260 (B.R.), le demandeur prétendait que la municipalité défenderesse aurait dû installer des panneaux signalant la présence, au milieu du chemin, d'un sillon résultant de travaux municipaux de nivellement. Le juge de première instance a estimé que, si le conducteur avait pris des précautions normales, il aurait pu rouler en sécurité sur la chaussée. Au lieu de cela, il a roulé trop vite et manqué de vigilance compte tenu des travaux d'entretien qui étaient effectués sur le chemin. Dans *Diebel Estate*, précité, il s'agissait de déterminer si la municipalité avait, en vertu de l'art. 192, l'obligation d'installer un panneau avertissant les automobilistes qu'une route rurale se terminait de façon abrupte à un croisement en T. Le juge de première instance s'est demandé comment un conducteur raisonnable prenant des précautions normales aurait roulé sur ce chemin, et il a répondu ainsi à cette question, à la p. 74 :

[TRADUCTION] Ses conclusions [celles de l'expert] pour ce qui concerne l'arrêt des automobiles découlent

the road, from what was described in the course of the trial, I would think the intersection could be a danger at night to a complete stranger to the area, depending on one's reaction time and the possibility of being confused by what one saw rather than recognizing the T intersection to be just that. On the other hand I would think a complete stranger in the area would be absolutely reckless to drive down a dirt road of the nature of this particular road at night at 80 kilometres per hour. [Emphasis added; emphasis in original deleted.]

The conclusion that Wright J. erred in failing to apply a required aspect of the legal test does not automatically lead to a rejection of her factual findings. This Court's jurisdiction to review questions of law entitles it, where an error of law has been found, to take the factual findings of the trial judge as they are, and to assess these findings anew in the context of the appropriate legal test.

In my view, neither Wright J.'s factual findings nor any other evidence in the record that she might have considered had she asked the appropriate question, support the conclusion that the respondent was in breach of its duty. The portion of Snake Hill Road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the conditions of Snake Hill Road in general and the conditions with which motorists were confronted at the exact location of the accident signalled to the reasonable motorist that caution was needed. Motorists who appropriately acknowledged the presence of the several factors which called for caution would have been able to navigate safely the so-called "hidden hazard" without the benefit of a road sign.

The question of how a reasonable driver exercising ordinary care would have driven on Snake Hill Road necessitates a consideration of the nature and locality of the road. A reasonable motorist will not approach a narrow gravel road in the country in the same way that he or she will approach a paved highway. It is reasonable to expect a motorist to drive more slowly and to pay greater attention to the potential presence of hazards when driving on a

toutefois d'opérations mathématiques et bien que je n'aie jamais emprunté le chemin en question, d'après les descriptions faites au procès, je suis d'avis que le croisement pourrait constituer un danger la nuit pour quelqu'un qui ne connaît absolument pas l'endroit, eu égard à la vitesse de réaction de chacun et à la possibilité que quelqu'un confonde le croisement en T avec quelque chose d'autre. Par ailleurs, j'estime que quelqu'un ne connaissant aucunement l'endroit agirait de façon tout à fait téméraire en roulant à 80 kilomètres à l'heure la nuit sur un chemin de terre comme celui qui nous intéresse. [Je souligne; soulignement dans l'original omis.]

121 Le fait de conclure que la juge Wright a commis une erreur de droit en omettant d'appliquer un élément essentiel du critère juridique n'invalide pas forcément ses conclusions de fait. En effet, la compétence de notre Cour en matière d'examen des questions de droit l'autorise, lorsqu'une telle erreur est décelée, à reprendre telles quelles les conclusions de fait du juge de première instance et à les réévaluer au regard du critère juridique approprié.

122 Selon moi, ni les faits retenus par la juge Wright ni aucun autre élément de preuve au dossier qu'elle aurait pu prendre en considération si elle s'était posé la bonne question n'appuient sa conclusion que l'intimée a manqué à son obligation. La portion du chemin Snake Hill où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général et les conditions auxquelles les automobilistes doivent faire face à l'endroit précis de l'accident avertissent l'automobiliste raisonnable que la prudence s'impose. Les automobilistes sachant reconnaître les divers facteurs qui appellent à la prudence auraient pu franchir le soi-disant [TRADUCTION] « danger caché » sans l'aide d'un panneau de signalisation.

123 Pour savoir comment un conducteur raisonnable prenant des précautions normales aurait conduit son véhicule sur le chemin Snake Hill, il faut tenir compte de la nature du chemin et de la configuration des lieux. Un automobiliste raisonnable ne roulera pas sur une étroite route de campagne gravelée de la même façon que sur une route asphaltée. Il est raisonnable de s'attendre à ce qu'un automobiliste conduise moins vite et soit plus attentif à la présence

road that is of a lower standard, particularly when he or she is unfamiliar with it.

124 While the trial judge in this case made some comments regarding the nature of the road, I agree with the Court of Appeal's findings that "[s]he might have addressed the matter more fully, taking into account more broadly the terrain through which the road passed, the class and designation of the road in the scheme of classification, and so on . . . " (para. 55). Instead, the extent of her analysis of the road was limited to the following comments, found at para. 84 of her reasons:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

125 In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road. The trial judge's analysis focussed almost entirely on the use of the road, without considering the sort of conditions it presented to drivers. It is perhaps not surprising that the trial judge did not engage in this fuller analysis, given that she did not turn her mind to the question of how a reasonable driver would have approached the road. Had she considered this question, she likely would have engaged in the type of assessment that was made by the Court of Appeal at para. 13 of its judgment:

> The road, about 20 feet in width, was classed as "a bladed trail," sometimes referred to as "a land access road," a classification just above that of "prairie trail". As such, it was not built up, nor gravelled, except lightly at one end of it, but simply bladed across the terrain following the path of least resistance. Nor was it in any way signed.

de dangers potentiels sur un chemin de catégorie inférieure, particulièrement s'il n'est pas familier avec celui-ci.

Bien que, en l'espèce, la juge de première instance ait fait certains commentaires sur la nature du chemin, je souscris à la conclusion de la Cour d'appel selon laquelle [TRADUCTION] « [e]lle aurait pu examiner la question de manière plus approfondie, en tenant davantage compte du type de terrain que le chemin traversait, de la nature et de la désignation du chemin selon le système de classification des routes et ainsi de suite . . . » (par. 55). Au lieu de cela, son analyse s'est limitée aux commentaires suivants, au par. 84 de ses motifs :

> [TRADUCTION] Le chemin Snake Hill est un chemin à faible débit de circulation. Il est néanmoins entretenu par la M.R. à longueur d'année afin de le garder carrossable. Des résidences permanentes sont situées en bordure de celui-ci. Les fermiers l'utilisent pour accéder à leurs champs et à leur bétail. Des jeunes gens empruntent le chemin Snake Hill pour se rendre à des fêtes, de sorte qu'il est utilisé par des conducteurs qui ne le connaissent pas toujours aussi bien que les résidents de l'endroit.

À mon avis, la question de savoir comment un conducteur raisonnable aurait roulé sur le chemin Snake Hill nécessitait un examen un peu plus approfondi de la nature du chemin. Dans son analyse, la juge de première instance s'est attachée presque exclusivement à l'utilisation qui est faite du chemin, sans prendre en compte le genre de conditions qu'il présente aux conducteurs. Il n'est peut-être pas surprenant qu'elle ne se soit pas livrée à cette analyse approfondie, puisqu'elle ne s'est pas demandé comment un conducteur raisonnable aurait roulé sur ce chemin. Si elle s'était posé cette question, elle aurait vraisemblablement procédé à une évaluation analogue à celle qu'a faite la Cour d'appel au par. 13 de son jugement :

> [TRADUCTION] Le chemin, d'une largeur de 20 pieds environ, a été qualifié de « chemin nivelé », qu'on appelle aussi parfois « chemin d'accès », soit tout juste une catégorie au-dessus d'un « chemin de prairie ». Comme tel, il n'a été ni renforcé ni revêtu de gravier, sauf légèrement à l'une de ses extrémités, il s'agit tout simplement d'un chemin nivelé à même le terrain, suivant le tracé présentant le mois d'obstacles. On n'y a installé aucune signalisation.

Given the fact that Snake Hill Road is a low standard road, in a category only one or two levels above a prairie trail, one can assume that a reasonable driver exercising ordinary care would approach the road with a certain degree of caution.

Having considered the character of the road in general, and having concluded that by its very nature it warranted a certain degree of caution, it is nonetheless necessary to consider the material features of the road at the point at which the accident occurred. Even on roads which are of a lower standard, a reasonable driver exercising due caution may be caught unaware by a particularly dangerous segment of the road. That was, in fact, the central argument that the appellant put forward in this case. According to the appellant's "dual nature" theory, at para. 8 of his factum, the fact that the curvy portion of Snake Hill Road where the accident occurred was flanked by straight segments of road created a risk that a motorist would be lulled into thinking that the curves could be taken at speeds greater than that at which they could actually be taken.

While it is not clear from her reasons that the trial judge accepted the appellant's "dual nature" theory, it appears that her conclusion that the municipality did not meet the standard of care required by it was based largely on her observation of the material features of the road at the location of the Nikolaisen rollover. Relying on the evidence of two experts, Mr. Anderson and Mr. Werner, she found the portion of the road on which the accident occurred to be a "hazard to the public". In her view, the limited sight distance created by the presence of uncleared bush precluded a motorist from being forewarned of the impending sharp right turn immediately followed by a left turn. Based on expert testimony, she concluded that the curve could not be negotiated at speeds greater than 60 km/h under favourable conditions, or 50 km/h under wet conditions.

Again, I would not reject the trial judge's factual finding that the curve presented motorists with an

Comme le chemin Snake Hill est une route de catégorie inférieure, à peine un ou deux niveaux au-dessus d'un chemin de prairie, on peut présumer qu'un conducteur raisonnable prenant des précautions normales y roulerait avec une certaine prudence.

126 Après avoir examiné la nature générale du chemin et avoir conclu que, du fait de cette nature même, une certaine prudence s'imposait, il faut néanmoins prendre en considération les caractéristiques physiques du chemin à l'endroit où l'accident s'est produit. Même sur des chemins de catégorie inférieure, un conducteur raisonnable prenant des précautions normales pourrait être pris par surprise sur un tronçon particulièrement dangereux. Il s'agit là, en fait, de l'argument central présenté par l'appelant en l'espèce. Selon sa thèse, dite de la « nature hybride » du chemin, au par. 8 de son mémoire, le fait que la courbe où est survenu l'accident se trouve entre des tronçons en ligne droite risquait d'amener les automobilistes à croire que les virages pouvaient être pris à des vitesses supérieures à celles auxquelles ils pouvaient l'être en réalité.

127 Bien que les motifs de la juge de première instance n'indiquent pas clairement si elle a retenu la thèse de la « nature hybride » du chemin, il semble que sa conclusion selon laquelle la municipalité a manqué à son obligation d'entretien ait reposé largement sur son examen des caractéristiques physiques du chemin, à l'endroit où le véhicule de M. Nikolaisen a fait un tonneau. S'appuyant sur les témoignages de deux experts, MM. Anderson et Werner, elle a estimé que la portion du chemin où s'est produit l'accident constituait un [TRADUCTION] « danger pour le public ». Selon elle, le fait que la distance de visibilité ait été réduite par la présence de broussailles empêchait les automobilistes de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Sur la base des témoignages d'experts, elle a conclu que le virage ne pouvait être pris à une vitesse supérieure à 60 km/h dans des conditions favorables, ou 50 km/h sur chaussée humide.

128 Je ne rejetterais pas, je le répète, la conclusion de fait selon laquelle la courbe présentait un risque

inherent hazard. The evidence does not, however, support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety. As I explained earlier, the municipality's duty to repair is implicated only when an objectively hazardous condition exists, and where it is determined that a reasonable driver arriving at the hazard would be unable to provide for his or her own security due to the features of the hazard.

129 I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve. Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.

130 One need only refer to the series of photographs of the portion of Snake Hill Road on which the accident occurred to appreciate the extent to which visual clues existed which would alert a driver to approach the curve with caution (Respondent's Record, vol. II, at pp. 373-76). The photographs, which indicate what the driver would have seen on entering the curve, show the presence of bush extending well into the road. From the photographs, it is clear that a motorist approaching the curve would not fail to appreciate the risk presented by the curve, which is simply that it is impossible to see around it and to gauge what may be coming in the opposite direction. In addition, the danger posed

intrinsèque pour les automobilistes. Toutefois, il n'y a rien dans la preuve qui permette de conclure qu'un conducteur raisonnable prenant des précautions normales aurait été incapable de prendre le virage en sécurité. Comme je l'ai expliqué plus tôt, l'obligation d'entretien des municipalités n'est en cause que lorsqu'il existe une situation objectivement dangereuse et qu'il est établi qu'un conducteur raisonnable s'approchant du danger serait incapable d'assurer sa sécurité en raison des caractéristiques de ce danger.

Je partage l'opinion de la juge de première instance selon laquelle une partie du danger créé par les broussailles se trouvant en bordure de la route tenait au fait qu'un conducteur ne pourrait deviner le rayon de courbure prononcé du virage à droite serré qu'elles dissimulaient. À mon sens, toutefois, le véritable danger intrinsèque de ce tronçon du chemin résidait dans le fait que les broussailles, ainsi que le court rayon de courbure du virage, empêchent les automobilistes circulant en direction est de voir si un véhicule s'approche en sens inverse. Par conséquent, il est très peu probable qu'un conducteur raisonnable prenant des précautions normales approcherait de ce virage à une vitesse supérieure à 50 km/h, vitesse à laquelle la juge de première instance a conclu qu'il était possible de le prendre en sécurité. Étant donné qu'un conducteur raisonnable n'approcherait pas de ce virage à une vitesse supérieure à celle lui permettant de le prendre en sécurité, je conclus que le virage ne constituait pas un risque pour le conducteur raisonnable.

Il suffit d'examiner les photos du tronçon du chemin Snake Hill où l'accident est survenu pour constater à quel point il existait des indices visuels propres à inciter les conducteurs à s'approcher du virage avec prudence (dossier de l'intimée, vol. II, p. 373-376). Les photos, qui montrent ce que voit le conducteur sur le point d'amorcer le virage, laissent voir la présence de broussailles s'avançant considérablement au-dessus du chemin. Il ressort clairement de ces photographies qu'un automobiliste approchant du virage ne manquerait pas pressentir le risque que présente celui-ci, savoir qu'il est tout simplement impossible de voir de l'autre côté de la courbe ce qui peut arriver en sens inverse. De plus,

by the inability to see what is approaching in the opposite direction is somewhat heightened by the fact that this road is used by farm operators. At trial, the risk was described in the following terms by Mr. Sparks, an engineer giving expert testimony:

> . . . if you can't, if you can't see far enough down the road to, you know, if there's somebody that's coming around the corner with a tractor and a cultivator and you can't see around the corner, then, you know, drivers would have a fairly strong signal, in my view, that due care and caution would be required.

The expert testimony relied on by the trial judge does not support a finding that the portion of Snake Hill Road on which the accident occurred would pose a risk to a reasonable driver exercising ordinary care. When asked at trial whether motorists, exercising reasonable care, would enter the curve at a slow speed because they could not see what was coming around the corner, Mr. Werner agreed that he, himself, drove the corner "at a slower speed" and that it would be prudent for a driver to slow down given the limited sight distance. Similarly, Mr. Anderson admitted to having taken the curve at 40-45 km/h the first time he drove it because he "didn't want to get into trouble with it". When asked if the reason he approached the curve at that speed was because he could not see around it, he replied in the affirmative: "[t]hat's why I approached it the way I did."

Perhaps most tellingly, Mr. Nikolaisen himself testified that he could not see if a vehicle was coming in the opposite direction as he approached the curve. The following exchange which occurred during counsel's cross-examination of Mr. Nikolaisen at trial is instructive:

> Q. . . . You told my learned friend, Mr. Logue, that your view of the road was quite limited, that is correct? The view ahead on the road is quite limited, is that right?

le danger que constitue l'incapacité de voir ce qui arrive en sens inverse est d'une certaine manière exacerbé par le fait que le chemin est utilisé par des exploitants agricoles. Au procès, ce risque a été décrit ainsi par M. Sparks, ingénieur, qui témoignait à titre d'expert :

> [TRADUCTION] . . . si vous ne pouvez pas voir, si vous ne pouvez pas voir assez loin sur le chemin pour, vous savez, savoir si quelqu'un arrive en sens inverse avec un tracteur tirant une herse et que vous ne pouvez voir, de l'autre côté du virage, alors, vous savez, cela devrait envoyer un message clair aux conducteurs, selon moi, que l'attention et la prudence s'imposent.

131 Le témoignage d'expert retenu par la juge de première instance n'étaye pas sa conclusion que la portion du chemin Snake Hill où s'est produit l'accident présente un risque pour un conducteur raisonnable prenant des précautions normales. Lorsqu'on lui a demandé si un automobiliste prenant des précautions normales amorcerait le virage à vitesse réduite étant donné qu'il ne peut voir ce qui l'attend au détour du chemin, M. Werner a reconnu que lui-même prend le virage [TRADUCTION] « à vitesse réduite » et qu'il serait prudent que les conducteurs ralentissent en raison de la distance de visibilité limitée. De même, M. Anderson a admis avoir pris le virage à 40-45 km/h la première fois qu'il est passé par là, car il [TRADUCTION] « ne voulait pas se placer dans une situation difficile ». Lorsqu'on lui a demandé s'il avait pris le virage à cette vitesse parce qu'il ne pouvait pas voir ce qui l'attendait, il a répondu par l'affirmative : [TRADUCTION] « [c']est la raison pour laquelle je l'ai approché comme je l'ai fait. »

132 Fait encore plus révélateur peut-être, M. Nikolaisen lui-même a témoigné qu'il ne pouvait pas savoir si un véhicule venait en sens inverse lorsqu'il s'approchait du virage. L'échange suivant, durant le contre-interrogatoire de M. Nikolaisen au procès par l'avocat de la partie adverse, est éclairant :

[TRADUCTION]

> Q. . . . Vous avez dit à mon savant collègue, M. Logue, que votre visibilité était plutôt réduite, est-ce exact? La visibilité sur le chemin est plutôt réduite, n'est-ce pas?

A. As in regards to travelling through the curves, yes, that's right, yeah.

Q. Yes. And you did not know what was coming as you approached the curve, that is correct?

A. That's correct, yes.

Q. There might be a vehicle around that curve coming towards you or someone riding a horse on the road, that is correct?

A. Or a tractor or a cultivator or something, that's right.

Q. Or a tractor or a cultivator. You know as a person raised in rural Saskatchewan that all of those things are possibilities, that is right?

A. That's right, yeah, that is correct.

133 Nor do I accept the appellant's submission that the "dual nature" of the road had the effect of lulling drivers into taking the curve at an inappropriate speed. This theory rests on the assumption that the motorists would drive the straight portions of the road at speeds of up to 80 km/h, leaving them unprepared to negotiate suddenly appearing curves. Yet, while the default speed limit on the road was 80 km/h, there was no evidence to suggest that a reasonable driver would have driven any portion of the road at that speed. While Mr. Werner testified that a driver "would be permitted" to drive at a maximum of 80 km/h, since this was the default (not the posted) speed limit, he later acknowledged that bladed trails in the province are not designed to meet 80 km/h design criteria. I agree with the Court of Appeal that the evidence is that "Snake Hill Road was self-evidently a dirt road or bladed trail" and that it "was obviously not designed to accommodate travel at a general speed of 80 kilometres per hour". As I earlier remarked, the locality of the road and its character and class must be considered when determining whether the reasonable driver would be able to navigate it safely.

R. Lorsqu'on se trouve dans les courbes, oui, c'est exact.

Q. Oui. Et vous ne saviez pas ce qui s'en venait lorsque vous approchiez du virage, est-ce exact?

R. C'est exact, oui.

Q. Il aurait pu y avoir un véhicule venant dans votre direction de l'autre côté de la courbe ou quelqu'un se promenant à cheval sur le chemin, est-ce exact?

R. Ou un tracteur, un cultivateur ou autre chose, c'est vrai.

Q. Ou un tracteur ou un cultivateur. Vous savez, puisque vous avez grandi en milieu rural en Saskatchewan, que toutes ces situations sont autant de possibilités, n'est-ce pas?

R. C'est vrai, oui.

Je ne retiens pas non plus l'argument de l'appelant portant que la « nature hybride » du chemin avait pour effet d'amener les conducteurs à prendre le virage à une vitesse inappropriée. Cette théorie repose sur l'hypothèse que les automobilistes roulent sur les portions en ligne droite du chemin à une vitesse pouvant atteindre 80 km/h, et qu'ils se trouvent en conséquence pris de court lorsqu'ils doivent prendre un virage soudain. Pourtant, bien que la vitesse permise sur le chemin soit 80 km/h, rien dans la preuve n'indiquait qu'un conducteur raisonnable aurait roulé à cette vitesse à quelque endroit du chemin. Après avoir témoigné que les conducteurs [TRADUCTION] « étaient autorisés » à rouler à une vitesse maximale de 80 km/h, cette vitesse étant la vitesse permise par défaut (et non la vitesse affichée), M. Werner a reconnu que les chemins nivelés de la province ne sont pas conçus pour permettre la circulation à une vitesse de 80 km/h. À l'instar de la Cour d'appel, je suis d'avis que la preuve établit que [TRADUCTION] « le chemin Snake Hill était manifestement un chemin de terre ou un chemin nivelé » et qu'il « n'était clairement pas conçu pour permettre une vitesse générale de 80 kilomètres à l'heure ». Comme je l'ai souligné précédemment, la configuration du chemin, de même que sa nature et sa catégorie doivent être prises en considération pour décider si le conducteur raisonnable aurait pu y rouler en sécurité.

Furthermore, the evidence at trial did not suggest that drivers were somehow fooled by the so-called "dual nature" of the road. The following exchange between counsel for the respondent and Mr. Werner at trial is illustrative of how motorists would view the road:

Q. Now, Mr. Werner, would you not agree that the change in the character of this road as you proceeded from east to west was quite obvious?

A. It was straight, and then you came to a hill, and you really didn't know what might lie beyond the hill.

Q. That's right. But I mean, the fact that the road went from being straight and level to suddenly there was a hill and you couldn't see -- you could see from the point of the top of the hill that the road didn't continue in a straight line, couldn't you?

A. Yes, you could, from the top of the hill, it's a very abrupt hill, yes.

Q. And as you proceeded down though the hill it became quite obvious, did it not, that the character of the road changed?

A. Yes, it changed, yes.

Q. Now you were faced with something other than a straight road?

A. M'hm. Yes.

Q. Now you were on -- and at some point along there the surface of the road changed, did it not?

A. Yes.

Q. And, of course, the road was no longer, I use the term built-up to refer to a road that has grade and it has some drainage. As you proceeded from west to east, you realized, you could see, it was obvious that this was not longer a built-up road?

A. It was a road essentially that was cut out of the topography and had no ditches, and there was an abutment or shoulder right to the driving surface. It was different than the first part.

Q. Yes. And all those differences were obvious, were they not?

134

En outre, rien dans la preuve présentée au procès n'indiquait que les conducteurs avaient été trompés de quelque façon par la soi-disant « nature hybride » du chemin. L'échange suivant, entre l'avocat de l'intimée et M. Werner, illustre bien la façon dont les automobilistes perçoivent le chemin :

[TRADUCTION]

Q. Maintenant M. Werner, ne seriez-vous pas d'accord pour dire que le changement dans la nature de ce chemin lorsque vous rouliez d'est en ouest était très évident?

R. On roulait en ligne droite, puis on descendait une colline, et on ne savait vraiment pas ce qui pouvait se trouver de l'autre côté de la colline.

Q. C'est vrai. Mais je veux dire, le fait que le chemin suivait d'abord un tracé horizontal et en ligne droite pour soudainement devenir une colline et que vous ne pouviez pas voir -- vous pouviez voir du haut de la colline que le chemin ne continuait pas en ligne droite, n'est-ce pas?

R. Oui, vous pouviez, du haut de la colline, c'est une colline très abrupte, oui.

Q. Et au fur et à mesure que vous descendiez la colline il devenait assez évident, n'est-ce pas, que la nature du chemin changeait?

R. Oui, ça changeait, oui.

Q. Vous vous trouviez alors devant autre chose qu'un chemin en ligne droite?

R. M'hm. Oui.

Q. Vous étiez maintenant sur -- et à un moment donné la surface du chemin changeait, n'est-ce pas?

R. Oui.

Q. Et, évidemment, le chemin n'était plus, j'utilise le terme aménagé pour désigner un chemin possédant une certaine élévation et qui est dans une certaine mesure drainé. Au fur et à mesure que vous rouliez d'ouest en est, vous constatiez, vous pouviez voir, il était évident, qu'il ne s'agissait plus d'un chemin aménagé?

R. Il s'agit essentiellement d'un chemin tracé suivant la topographie des lieux et sans fossés, et il y avait un accotement à droite du conducteur. C'était différent de la portion précédente.

Q. Oui. Et toutes ces différences étaient évidentes, n'est-ce pas?

A. Well, I -- they were clear, satisfactorily clear to me, yes. [Emphasis added.]

135 Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by a municipality to drivers. Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard.

136 My colleagues assert that the trial judge properly considered all aspects of the applicable legal test, including whether the curve would pose a risk to the reasonable driver exercising ordinary care. They say that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. Secondly, they note that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Thirdly, the fact that the trial judge apportioned negligence to Nikolaisen indicates, in their view, that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter (para. 40).

R. Bien, je -- elles étaient évidentes, suffisamment évidentes pour moi, oui. [Je souligne.]

Bien qu'ils puissent constituer des facteurs concluants dans d'autres affaires, la « nature hybride » du chemin, le rayon de courbure du virage, le revêtement du chemin et l'absence d'élévation n'étayent pas en l'espèce la conclusion de la juge de première instance. Pour répondre à la question de savoir comment un conducteur raisonnable prenant des précautions normales roulerait sur ce chemin, il faut faire appel au bon sens. Il n'était pas nécessaire d'installer un panneau de signalisation en l'espèce, et ce pour la simple raison que n'importe quel conducteur raisonnable aurait réagi aux indices naturels l'invitant à ralentir. Le droit n'oblige pas les municipalités à installer des panneaux signalant aux automobilistes des dangers qui ne font pas courir de risque véritable aux conducteurs prudents. Imposer à la municipalité l'obligation d'installer un panneau dans un cas comme celui qui nous occupe équivaut à modifier la nature de l'obligation qu'ont les municipalités envers les conducteurs. Les municipalités ne sont pas tenues d'aménager des panneaux d'avertissement à l'intention des conducteurs en état d'ébriété et, ainsi, de remédier à leur incapacité de réagir aux indices qui alertent le conducteur moyen de la présence d'un danger.

Mes collègues affirment que la juge de première instance a dûment pris en considération tous les aspects du critère juridique applicable, y compris la question de savoir si la courbe présentait un risque pour le conducteur moyen qui prend des précautions normales. Ils disent que la juge de première instance a effectivement examiné, explicitement et implicitement, la conduite de l'automobiliste moyen ou raisonnable qui s'approche du virage. Ils font ensuite remarquer qu'elle a fait état du témoignage des experts MM. Anderson et Werner, qui ont tous deux analysé la conduite de l'automobiliste moyen se trouvant dans cette situation. Enfin, le fait qu'elle ait imputé une partie de la responsabilité à M. Nikolaisen indique, à leur avis, qu'elle a évalué sa conduite au regard à la norme du conducteur moyen, et qu'elle a donc pris en compte la façon dont ce dernier aurait conduit (par. 40).

I respectfully disagree that it is explicit in the trial judge's reasons that she considered whether the portion of the road on which the accident occurred posed a risk to the ordinary driver exercising reasonable care. As I explained above, the fact that the trial judge restated the legal test in the form of a conclusion in no way suggests that she turned her mind to the issue of whether the ordinary driver would have found the curve to be hazardous.

Nor do I agree that a discussion of the conduct of an ordinary motorist in the situation was somehow "implicit" in the trial judge's reasons. In my view, it is highly problematic to presume that a trial judge made factual findings on a particular issue in the absence of any indication in the reasons as to what those findings were. While a trial judge is presumed to know the law, he or she cannot be presumed to have reached a factual conclusion without some indication in the reasons that he or she did in fact come to that conclusion. If the reviewing court is willing to presume that a trial judge made certain findings based on evidence in the record absent any indication in the reasons that the trial judge actually made those findings, then the reviewing court is precluded from finding that the trial judge misapprehended or neglected evidence.

In my view, my colleagues have throughout their reasons improperly presumed that the trial judge reached certain factual findings based on the evidence despite the fact that those findings were not expressed in her reasons. On the issue of whether the curve presented a risk to the ordinary driver, my colleagues note that "in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses" (para. 46). The problem with this statement is that although the trial judge relied on the evidence of Mr. Anderson and Mr. Werner to conclude that the portion of Snake Hill Road on which the accident occurred was a hazard, it is impossible from her reasons to discern what, if

137 En toute déférence, je ne crois pas qu'il ressorte explicitement des motifs de la juge de première instance qu'elle s'est demandé si la portion du chemin où s'est produit l'accident constituait un risque pour le conducteur raisonnable prenant des précautions normales. Comme je l'ai expliqué précédemment, le fait que la juge de première instance ait reformulé le critère juridique sous forme de conclusion n'indique aucunement qu'elle s'est demandé si le conducteur moyen aurait considéré la courbe comme dangereuse.

138 Je n'estime pas non plus que l'examen de la façon de conduire de l'automobiliste moyen dans cette situation ressorte « implicitement » des motifs de la juge de première instance. À mon avis, il est très problématique de présumer qu'un juge de première instance a tiré des conclusions de fait à l'égard d'une question précise alors qu'il n'y a aucune indication dans ses motifs quant à la nature de ces conclusions. Bien que le juge de première instance soit censé connaître le droit, on ne peut présumer qu'il a tiré à une conclusion factuelle en l'absence d'indication dans ses motifs qu'il est effectivement arrivé à cette conclusion. Si le tribunal de révision est prêt à supposer que le juge de première instance a tiré certaines conclusions, sur la foi de la preuve figurant au dossier, bien que rien dans les motifs n'indique qu'il a vraiment tiré ces conclusions, alors le tribunal de révision ne saurait conclure que le juge de première instance a mal interprété des éléments de preuve ou a négligé d'en tenir compte.

139 À mon avis, tout au long de leurs motifs, mes collègues ont à tort présumé que la juge de première instance était arrivée à certaines conclusions de fait fondées sur la preuve, malgré le fait que ces conclusions ne soient pas formulées dans ses motifs. Quant à la question de savoir si le virage présentait un risque pour le conducteur moyen, mes collègues ont fait remarquer qu'« en s'appuyant sur les témoignages de MM. Anderson et Werner, la juge de première instance a choisi de ne pas fonder sa décision sur les témoignages contradictoires rendus par d'autres témoins » (par. 46). Le problème que pose cet énoncé est que, même si la juge de première instance s'est appuyée sur les témoignages de MM. Anderson et Werner

any, evidence she relied on to reach the conclusion that the curve presented a risk to the ordinary driver exercising reasonable care. In the absence of any indication that she considered this issue, I am not willing to presume that she did.

140 My colleagues similarly presume findings of fact when discussing the knowledge of the municipality. On this issue, they reiterate that "it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court" (para. 62). At para. 64 of their reasons, my colleagues review the findings of the trial judge on the issue of knowledge and conclude that the trial judge "drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question". I think that it is improper to conclude that the trial judge made a finding that the municipality's system of road inspection was inadequate in the absence of any indication in her reasons that she reached this conclusion. My colleagues further suggest that the trial judge did not impute knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road (para. 65). They even state that it was not necessary for the trial judge to rely on the accidents in order to satisfy s. 192(3) (para. 67). This, in my view, is a reinterpretation of the trial judge's findings that stands in direct contradiction to the reasons that were provided by her. The trial judge discusses other factors pertaining to knowledge only to heighten the significance that she attributes to the fact that accidents had previously occurred on other portions of the road (at para. 90):

pour conclure que la portion du chemin Snake Hill où s'est produit l'accident constituait un danger, il est impossible, à partir de ses motifs, de dire si elle s'est appuyée sur un témoignage — et, dans l'affirmative, sur lequel de ceux-ci — pour conclure que la courbe présentait un risque pour le conducteur moyen qui prend des précautions raisonnables. En l'absence de toute indication que la juge de première instance s'est penchée sur cette question, je ne suis pas disposé à présumer qu'elle l'a fait.

De même, mes collègues supposent l'existence de conclusions factuelles dans leur examen de la question de la connaissance incombant à la municipalité. Sur ce point, ils réitèrent que « le juge de première instance peut préférer certaines parties de la preuve à d'autres, et, en toute déférence, il n'appartient pas au tribunal d'appel de procéder à nouveau à l'appréciation de la preuve, tâche déjà accomplie par le juge de procès » (par. 62). Au paragraphe 64 de leurs motifs, mes collègues examinent les conclusions de la juge de première instance sur la question de la connaissance et concluent qu'elle « a inféré que la municipalité aurait dû être informée de la situation sur le chemin à Snake Hill et aurait dû faire enquête à cet égard, ce qui lui aurait permis de prendre connaissance de l'existence du danger ». Je ne crois pas qu'on puisse à juste titre conclure que la juge de première instance est arrivée à la conclusion que le système d'inspection routière de la municipalité était inadéquat, alors que rien dans ses motifs n'indique qu'elle a tiré cette conclusion. Mes collègues estiment en outre que la juge de première instance n'a pas prêté à la municipalité la connaissance requise sur la base des accidents survenus antérieurement sur le chemin Snake Hill (par. 65). Ils disent même qu'il n'était pas nécessaire de s'appuyer sur ces accidents pour satisfaire aux exigences du par. 192(3) (par. 67). À mon avis, ils donnent à ces conclusions une nouvelle interprétation, qui contredit directement les motifs qu'elle a exposés. La juge de première instance examine d'autres facteurs qui touchent à la connaissance requise, uniquement pour souligner l'importance qu'elle accorde au fait que des accidents sont survenus antérieurement ailleurs sur le chemin (au par. 90) :

If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. [Emphasis added.]

My colleagues refer to the decision of *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60, in which I stated that "an omission [in the trial judge's reasons] is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (para. 15). This case is however distinguishable from *Van de Perre*. In *Van de Perre*, the appellate court improperly substituted its own findings of fact for the trial judge's clear factual conclusions on the basis that the trial judge had not considered all of the evidence. By contrast, in this case my colleagues assert that this Court should not interfere with the "findings of the trial judge" even where no findings were made and where such findings must be presumed from the evidence. The trial judge's failure in this case to reach any conclusion on whether the ordinary driver would have found the portion of the road on which the accident occurred hazardous, in my view, gives rise to the reasoned belief that she ignored the evidence on the issue in a way that affected her conclusion.

Finally, I do not agree that the trial judge's conclusion that Mr. Nikolaisen was negligent equates to an assessment of whether a motorist exercising ordinary care would have found the curve on which the accident occurred to be hazardous. It is clear from the trial judge's reasons that she made a factual finding that the curve could be driven safely at 60 km/h in dry conditions and 50 km/h in wet conditions and that Mr. Nikolaisen approached the curve at an

[TRADUCTION] Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que ce chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. [Je souligne.]

141 Mes collègues citent l'arrêt *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60, dans lequel j'ai dit, au par. 15, qu'« une omission [dans les motifs du juge de première instance] ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée ». Cependant, le présent pourvoi peut être distingué de l'affaire *Van de Perre*. Dans cette affaire, la Cour d'appel avait irrégulièrement substitué ses propres conclusions de fait aux conclusions factuelles évidentes du juge de première instance, au motif que celui-ci n'avait pas pris en compte tous les éléments de preuve. Par contraste, dans le présent pourvoi, mes collègues affirment que notre Cour ne doit pas modifier les « conclusions de la juge de première instance », même si aucune conclusion n'a été tirée et s'il faut supposer leur existence à partir de la preuve. En l'espèce, je suis d'avis que l'omission de la juge de première instance de tirer quelque conclusion que ce soit quant à la question de savoir si le conducteur moyen aurait considéré comme dangereux le tronçon du chemin où s'est produit l'accident fait naître la conviction rationnelle que, sur ce point, elle a négligé d'examiner la preuve de telle manière que sa conclusion en a été affectée.

142 Enfin, je ne peux souscrire à l'opinion que la conclusion de la juge de première instance selon laquelle M. Nikolaisen a fait preuve de négligence vaut examen de la question de savoir si l'automobiliste moyen prenant des précautions normales aurait estimé que la courbe où s'est produit l'accident était dangereuse. Il ressort clairement des motifs de la juge de première instance qu'elle a tiré les conclusions de fait suivantes : il était possible de prendre

excessive speed. As earlier stated, what she failed to consider was whether the ordinary driver exercising reasonable care would have approached the curve at a speed at which it could be safely negotiated, or, stated differently, whether the curve posed a real danger to the ordinary driver.

le virage en sécurité à 60 km/h à l'heure sur chaussée sèche et à 50 km/h sur chaussée humide, et M. Nikolaisen s'est approché du virage à une vitesse excessive. Comme je l'ai indiqué plus tôt, elle a omis de se demander si le conducteur moyen qui prend des précautions normales se serait approché du virage à une vitesse qui lui aurait permis de le prendre en sécurité ou, autrement dit, si la courbe présentait un danger réel pour le conducteur moyen.

B. *Did the Trial Judge Err in Finding that the Respondent Municipality Knew or Should Have Known of the Danger Posed by the Municipal Road?*

B. *La juge de première instance a-t-elle commis une erreur en concluant que la municipalité intimée connaissait ou aurait dû connaître le danger que présentait le chemin municipal?*

143 Pursuant to s. 192(3) of *The Rural Municipality Act, 1989*, fault is not to be imputed to the municipality in the absence of proof by the plaintiff that the municipality "knew or should have known of the disrepair".

Conformément au par. 192(3) de la *Rural Municipality Act, 1989*, aucune faute n'est imputée à la municipalité à moins que le demandeur n'établisse que celle-ci « connaissait ou aurait dû connaître le mauvais état du chemin ».

144 The trial judge made no finding that the respondent municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to the respondent on the basis that it should have known of the danger. This is apparent in her findings on knowledge at paras. 89-91 of her reasons:

La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le mauvais état dans lequel se trouvait, prétend-on, le chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. C'est ce qui ressort de ses conclusions à cet égard, aux par. 89 à 91 de ses motifs :

> Breach of the statutory duty of care imposed by section 192 of the *Rural Municipality Act*, *supra*, cannot be imputed to the R.M. unless it knew of or ought to have known of the state of disrepair on Snake Hill Road. Between 1978 and 1990 there were four accidents on Snake Hill Road. Three of these accidents occurred in the same vicinity as the Nikolaisen rollover. The precise location of the fourth accident is unknown. While at least three of these accidents occurred when motorists where travelling in the opposite direction of the Nikolaisen vehicle, they occurred on that portion of Snake Hill Road which is the most dangerous — where the road begins to curve, rather than where it is generally straight and flat. At least two of these accidents were reported to authorities.
>
> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance

> [TRADUCTION] On ne peut reprocher à la municipalité rurale d'avoir manqué à l'obligation légale de diligence imposée par l'art. 192 de la loi intitulée la *Rural Municipality Act*, précitée, que si la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill. De 1978 à 1990, quatre accidents sont survenus sur ce chemin. Trois de ces accidents ont eu lieu dans le même secteur que celui où le véhicule de Nikolaisen a fait un tonneau. On ne connaît pas le lieu précis du quatrième accident. Bien que, dans au moins trois de ces accidents, les automobilistes aient circulé en sens inverse du véhicule de Nikolaisen, les accidents se sont produits dans la partie la plus dangereuse du chemin Snake Hill — là où commencent les courbes, et non dans la partie où le chemin est généralement droit et plat. Au moins deux de ces accidents ont été signalés aux autorités.
>
> Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas

given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

I find that by failing to erect and maintain a warning and regulatory sign on this portion of Snake Hill Road the R.M. has not met the standard of care which is reasonable in the circumstances. Accordingly, it is in breach of its duty of care to motorists generally, and to Mr. Housen in particular. [Emphasis added.]

Whether the municipality should have known of the disrepair (here, the risk posed in the absence of a sign) involves both questions of law and questions of fact. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28). The question is then answered through the trial judge's assessment of the facts of the case.

I find that the trial judge made both errors of law and palpable and overriding errors of fact in determining that the respondent municipality should have known of the alleged state of disrepair. She erred in law by approaching the question of knowledge from the perspective of an expert rather than from the perspective of a prudent municipal councillor. She also erred in law by failing to appreciate that the onus of proving that the municipality knew or should have known of the alleged disrepair remained on the plaintiff throughout. The trial judge clearly erred in fact by drawing the unreasonable inference that the respondent municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of Snake Hill Road.

significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que le chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill.

J'estime que, en omettant d'installer et de maintenir un panneau d'avertissement ou de signalisation dans cette partie du chemin Snake Hill, la M.R. n'a pas satisfait à la norme de diligence qui est raisonnable dans les circonstances. Par conséquent, elle ne s'est pas acquittée de son obligation de diligence à l'égard des automobilistes en général et à l'égard de M. Housen en particulier. [Je souligne.]

145 La question de savoir si la municipalité aurait dû connaître le mauvais état du chemin (en l'occurrence, le risque que présentait l'absence de signalisation) soulève à la fois des questions de droit et des questions de fait. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, au regard des obligations qui incombent au conseiller municipal ordinaire, raisonnable et prudent (*Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 28). Le juge de première instance répond ensuite à la question en appréciant les faits de l'espèce dont il est saisi.

146 J'estime que la juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin. Elle a commis une erreur de droit lorsqu'elle a examiné la question de la connaissance du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent. Elle a commis une autre erreur de droit en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a clairement commis une erreur de fait en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur le chemin Snake Hill.

147 The trial judge's failure to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known is implicit in her reasons. The respondent could not be held, for the purposes of establishing knowledge under the statutory test, to the standard of an expert analysing the curve after the accident. Yet this is precisely what the trial judge did. She relied on the expert evidence of Mr. Anderson and Mr. Werner to reach the conclusion that the curve presented a hidden hazard. She also implicitly accepted that the risk posed by the curve was not one that would be readily apparent to a lay person. This is evident in the portion of her judgment where she accepts as a valid excuse for not filing a timely claim against the respondent the appellant counsel's explanation that he did not believe the respondent to be at fault until expert opinions were obtained. The trial judge stated in this regard: "[i]t was only later when expert opinions were obtained that serious consideration was given to the prospect that the nature of Snake Hill Road might be a factor contributing to the accident" (para. 64). Her failure to consider the risk to the prudent driver is also apparent when one considers that she ignored the evidence concerning the way in which the two experts themselves had approached the dangerous curve (see para. 54 above).

Il ressort implicitement des motifs de la juge de première instance qu'elle n'a pas décidé s'il fallait prêter à la municipalité la connaissance requise en considérant cette question du point de vue du conseiller municipal prudent. Pour trancher la question de la connaissance requise suivant le critère prévu par la loi, l'intimée ne pouvait être tenue aux mêmes normes qu'un spécialiste analysant la courbe après l'accident. Pourtant, c'est exactement ce qu'a fait la juge de première instance. Elle s'est fondée sur les témoignages d'expert donnés par MM. Anderson et Werner pour conclure que la courbe présentait un danger caché. Elle a également reconnu implicitement que le risque visé par la courbe n'était pas un risque facilement décelable par un profane. Cela ressort clairement du passage de son jugement où elle considère comme une excuse valable pour justifier le dépôt tardif de l'action contre l'intimée l'explication de l'avocat de l'appelant selon laquelle il ne croyait pas que l'intimée était dans son tort jusqu'à ce qu'il prenne connaissance des opinions des experts. La juge de première instance a dit ceci à cet égard : [TRADUCTION] « [c]e n'est que plus tard, après avoir obtenu l'opinion des experts, que la possibilité que la nature du chemin Snake Hill puisse avoir été un facteur ayant contribué à l'accident a été sérieusement envisagée » (par. 64). Son omission de s'interroger sur le risque que courrait le conducteur prudent apparaît elle aussi clairement, lorsqu'on considère qu'elle n'a pas tenu compte de la preuve concernant la façon dont les deux experts avaient eux-mêmes pris le virage dangereux (voir le par. 54 qui précède).

148 Had the trial judge considered the question of whether the municipality should have known of the alleged disrepair from the perspective of the prudent municipal councillor, she would necessarily have reached a different conclusion. There was no evidence that the road conditions which existed posed a risk that the respondent should have been aware of. The respondent had no particular reason to inspect that segment of the road for the presence of hazards. It had not received any complaints from motorists respecting the absence of signs on the road, the lack of superelevation on the curves, or the presence of

Si la juge de première instance avait répondu à la question de savoir si la municipalité aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin en se plaçant du point de vue du conseiller municipal prudent, elle serait nécessairement arrivée à une conclusion différente. Il n'y avait aucune preuve établissant que le danger existant créait un risque que l'intimée aurait dû connaître. Cette dernière n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers. Elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des

trees and vegetation which grew up along the sides of the road.

In addition, the question of the respondent's knowledge is linked inextricably to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. The trial judge should not have expected the respondent in this case to have knowledge of the road conditions that existed at the site of the Nikolaisen rollover since that road condition simply did not pose a risk to the reasonable driver. In addition to the evidence that was discussed above in the context of the standard of care, this conclusion is supported by the testimony of the several lay witnesses that testified at trial. Craig Thiel, a resident on the road, testified that he was not aware that Snake Hill Road had a reputation of being a dangerous road, and that he himself had never experienced difficulty with the portion of the road on which the accident occurred. His wife, Toby, also testified that she had experienced no problems with the road.

The trial judge also clearly erred in fact by imputing knowledge to the municipality on the basis of the four accidents that had previously occurred on Snake Hill Road. While her factual findings regarding the accidents themselves have a sound basis in the evidence, these findings simply do not support her conclusion that a prudent municipal councillor ought to have known that a risk existed for the normal prudent driver. As such, the trial judge erred in drawing an unreasonable inference from the evidence that was before her. As stated above, the standard of review for inferences of fact is, above all, one of reasonableness. This is reflected in the following passage from *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491, at pp. 503-4:

. . . "it is a well-known principle that appellate tribunals should not disturb findings of fact made by a trial judge

courbes ou à la présence d'arbres et de végétation en bordure du chemin.

149 En outre, la question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, la juge de première instance n'aurait pas dû attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où le véhicule de M. Nikolaisen a fait un tonneau, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Outre les éléments de preuve examinés précédemment relativement à la norme de diligence, les témoignages de plusieurs témoins ordinaires qui ont déposé au procès étayent cette conclusion. Craig Thiel, qui habite le long de ce chemin, a témoigné qu'il ne savait pas que le chemin Snake Hill avait la réputation d'être dangereux et qu'il n'avait lui-même jamais éprouvé de difficulté à conduire à l'endroit du chemin où est survenu l'accident. Sa conjointe, Toby, a également dit ne pas avoir connu de problème sur ce chemin.

150 La juge de première instance a clairement commis une autre erreur de fait en présumant, sur la foi des quatre accidents survenus auparavant sur le chemin Snake Hill, que la municipalité connaissait l'existence du danger. Bien que ses conclusions de fait relativement aux accidents eux-mêmes soient solidement étayées par la preuve, elles n'appuient tout simplement pas sa conclusion qu'un conseiller municipal prudent aurait dû savoir qu'il existait un risque pour le conducteur prudent. En conséquence, la juge de première instance a fait erreur en tirant une inférence déraisonnable de la preuve qui lui était soumise. Comme il a été indiqué plus tôt, la norme de contrôle applicable aux inférences de fait est, d'abord et avant tout, celle de la décision raisonnable. Les propos suivants du juge Spence dans l'arrêt *Joseph Brant Memorial Hospital c. Koziol*, [1978] 1 R.C.S. 491, p. 503-504, illustrent bien ce principe :

. . . « c'est un principe bien connu que les tribunaux d'appel ne doivent pas remettre en cause les conclusions

if there were credible evidence before him upon which he could reasonably base his conclusion". [Emphasis added.]

151 As I stated above, there was no evidence to suggest that the respondent had actual knowledge that accidents had previously occurred on Snake Hill Road. To the contrary, Mr. Danger, the administrator of the municipality, testified that the first he heard of the accidents was at the trial.

152 Implicit in the trial judge's reasons, then, was the expectation that the municipality should have known about the accidents through an accident-reporting system**.** The appellant put forward that argument explicitly before this Court, placing significant emphasis on the fact that respondent "has no regularized approach to gathering this information, whether from councillors or otherwise". The argument suggests that, had the municipality established a formal system to find out whether accidents had occurred on a given road, it would have known that accidents had occurred on Snake Hill Road and would have taken the appropriate corrective action to ensure that the road was safe for travellers.

153 I find the above argument to be flawed in two important respects. First, the argument that the other accidents on Snake Hill Road were relevant in this case is based on the assumption that there was an obligation on the respondent municipality to have a "regularized" accident-reporting system, and that the informal system that was in place was somehow deficient. In my view, the appellant did not meet its onus to show that the system relied on by the municipality to discharge its obligations under s. 192 of the *The Rural Municipality Act, 1989* was deficient. The evidence shows that, prior to 1988, there was no formal system of accident reporting in place. There was, nonetheless, an informal system whereby the municipal councillors were responsible for finding out if there were road hazards. Information that hazards existed came to the attention of the councillors via complaints, and from their own familiarity

de fait du juge de première instance, s'il existait des témoignages dignes de foi sur lesquels le juge pouvait raisonnablement fonder ses conclusions ». [Je souligne.]

Comme je l'ai mentionné précédemment, il n'y avait aucune preuve indiquant que l'intimée savait concrètement que d'autres accidents étaient survenus auparavant sur le chemin Snake Hill. Au contraire, M. Danger, l'administrateur de la municipalité, a témoigné qu'il avait entendu parler de ces accidents pour la première fois au procès.

Par conséquent, il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière. L'appelant a expressément plaidé cet argument devant notre Cour, insistant fortement sur le fait que l'intimée [TRADUCTION] « ne dispose pas d'un mécanisme structuré de collecte de cette information, que ce soit par l'entremise des conseillers ou d'autres personnes ». Suivant cet argument, on prétend que, si la municipalité avait établi un système officiel lui permettant de savoir si des accidents sont survenus sur une route donnée, elle aurait su que des accidents s'étaient produits sur le chemin Snake Hill et elle aurait pris les mesures correctives appropriées pour faire en sorte que le chemin soit sécuritaire pour les usagers.

J'estime que l'argument susmentionné présente deux lacunes importantes. Premièrement, l'argument selon lequel les autres accidents survenus sur le chemin Snake Hill étaient pertinents en l'espèce repose sur la présomption que la municipalité intimée avait l'obligation d'avoir un système « structuré » d'information sur les accidents, et que le système informel en place était d'une certaine manière déficient. À mon avis, l'appelant ne s'est pas acquitté du fardeau qui lui incombait de démontrer que le système sur lequel la municipalité se fondait pour remplir ses obligations au titre de l'art. 192 de la *Rural Municipality Act, 1989*, était déficient. La preuve établit que, avant 1988, il n'existait pas de système officiel d'information sur les accidents. Il existait néanmoins, un système informel dans le cadre duquel les conseillers municipaux étaient chargés de s'enquérir de l'existence de dangers

with the roads within the township under their jurisdiction. The trial judge made a palpable error in finding that this informal system was deficient in the absence of any evidence of the practice of other municipalities at the time that the accidents occurred and what might have been a reasonable system, particularly given the fact that the rural municipality in question had only six councillors. There is no evidence that a rural municipality of this type requires the sort of sophisticated information-gathering process that may be required in a city, where accidents occur with greater frequency and where it is less likely that word of mouth will suffice to bring hazards to the attention of the councillors.

sur les routes. Les conseillers étaient informés de l'existence de dangers par suite des plaintes qu'ils recevaient et par leur propre expérience des routes situées dans les cantons qu'ils représentaient. La juge de première instance a commis une erreur manifeste en concluant que ce système informel était déficient, alors qu'aucune preuve n'indiquait quelles étaient les pratiques suivies par d'autres municipalités à cet égard au moment des accidents, ni n'expliquait en quoi aurait consisté un système raisonnable, compte tenu particulièrement du fait que la municipalité rurale concernée ne comptait que six conseillers. Il n'y a aucune preuve indiquant qu'une municipalité rurale de ce genre a besoin du genre de mécanisme élaboré de collecte de renseignements dont peut avoir besoin une grande ville, où les accidents sont plus fréquents et où il est peu probable que le bouche à oreille soit suffisant pour porter les dangers à l'attention des conseillers.

The respondent municipality now has a more formalized system of accident reporting. Since 1988, Saskatchewan Highways and Transportation annually provides the municipalities with a listing of all motor vehicle accidents which occur within the municipality and which are reported to the police. While I agree that this system may provide the municipality with a better chance of locating hazards in some circumstances, I do not accept that the adoption of this system is relevant on the facts of this case. Only one accident, which occurred in 1990, was reported to the respondent under this system. The appellant adduced no evidence to suggest that this accident occurred at the same location as the Nikolaisen rollover, or that this accident occurred as a result of the conditions of the road rather than the negligence of the driver.

154 La municipalité intimée possède maintenant un système plus officiel d'information sur les accidents. Depuis 1988, en effet, le ministère de la Voirie et du Transport de la Saskatchewan communique annuellement à chaque municipalité la liste de tous les accidents d'automobile survenus sur son territoire et signalés aux policiers. Bien que ce système puisse, j'en conviens, permettre aux municipalités de mieux repérer les dangers dans certaines circonstances, je ne crois pas que son adoption soit pertinente eu égard aux faits de l'espèce. Un seul accident, survenu en 1990, a été signalé à l'intimée par le truchement de ce système. L'appelant n'a produit aucun élément de preuve indiquant que cet accident est survenu au même endroit que celui où le véhicule de M. Nikolaisen a fait un tonneau, ou qu'il était attribuable à l'état de la route plutôt qu'à la négligence du conducteur.

Secondly, and perhaps more importantly, it was simply illogical for the trial judge to infer from the fact of the earlier accidents that the respondent should have known that the site of the Nikolaisen rollover posed a risk to prudent drivers. The three accidents, which took place in 1978, 1985, and 1987, occurred on different curves, while the vehicles involved were proceeding in the opposite

155 Deuxièmement, élément peut-être plus important encore, il était tout simplement illogique pour la juge de première instance d'inférer de l'existence des accidents antérieurs que l'intimée aurait dû savoir que l'endroit où le véhicule de M. Nikolaisen a fait un tonneau présentait un risque pour les conducteurs prudents. Les trois accidents — qui sont survenus en 1978, 1985 et 1987

direction. The accidents of 1978 and 1987 occurred on the first right-turning curve in the road with the drivers travelling westbound, at the bottom of the hill. The accident in 1985 took place on the next curve in the road with the driver also travelling westbound, again on a different curve from the one where the Nikolaisen rollover took place. If anything, these accidents signal that the municipality should have been concerned with the curves that were, when travelling westbound, to the east of the site of the Nikolaisen rollover. The evidence disclosed no accidents that had occurred at the precise location of the accident that is the subject of this case.

— se sont produits dans des courbes différentes, et les véhicules concernés circulaient en sens inverse. L'accident de 1978 et celui de 1987 ont eu lieu dans le premier virage à droite au pied de la colline, les automobilistes roulant alors en direction ouest. L'accident de 1985 s'est produit dans la deuxième courbe, toujours en direction ouest, encore une fois dans une courbe différente de celle où le véhicule de M. Nikolaisen a fait un tonneau. Si ces accidents indiquent quoi que ce soit, c'est plutôt que la municipalité aurait dû se préoccuper des courbes qui, pour les véhicules circulant en direction ouest, se trouvent à l'est de l'endroit où le véhicule de M. Nikolaisen a fait un tonneau. La preuve n'a révélé aucun accident qui se serait produit à l'endroit précis où est survenu l'accident qui nous intéresse.

156 Furthermore, the mere occurrence of an accident does not in and of itself indicate a duty to post a sign. In many cases, accidents happen not because of the conditions of the road, but rather because of the negligence of the driver. Illustrative in this regard is Mr. Agrey's accident on Snake Hill Road in 1978. Mr. Agrey testified that, just prior to the accident, he had turned his attention away from the road to talk to one of the passengers in the vehicle. Another passenger shouted to him to "look out", but by the time he was alerted it was too late to properly navigate the turn. Mr. Agrey was charged and fined for his carelessness. As was discussed in the context of the standard of care, a municipality is not obligated to make safe the roads for all drivers, regardless of the care and attention that they are exercising when driving. It need only keep roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

Qui plus est, le simple fait qu'un accident se produise n'emporte pas en soi l'obligation d'installer un panneau signalisateur. Dans bien des cas, les accidents surviennent non pas à cause de l'état de la route, mais plutôt à cause de la négligence du conducteur. Un bon exemple de cela est l'accident dont a été victime M. Agrey sur le chemin Snake Hill en 1978. Ce dernier a témoigné que, juste avant l'accident, il avait quitté des yeux la route pour parler à l'un des passagers du véhicule. Un autre passager lui a crié de faire attention, mais il était déjà trop tard pour bien exécuter le virage. Accusé de conduite imprudente, M. Agrey a été déclaré coupable et condamné à une amende. Comme on l'a vu plus tôt, dans le contexte de la norme de diligence, une municipalité n'a pas l'obligation de rendre les chemins sécuritaires pour tous les conducteurs, indépendamment de la prudence et de l'attention avec lesquelles ils conduisent. Elle est seulement tenue de maintenir les chemins dans un état propre à permettre au conducteur raisonnable qui prend des précautions normales d'y circuler en sécurité.

157 In addition to the substantial errors discussed above, I would also note that, in my view, the trial judge was inattentive to the onus of proof on this issue. When reviewing the evidence pertaining to other accidents on Snake Hill Road, the trial judge remarked, at para. 31: "Cst. Forbes does not recall

Outre les erreurs substantielles examinées précédemment, je tiens également à souligner que, selon moi, la juge de première instance ne s'est pas souciée du fardeau de preuve sur cette question. Lorsqu'elle a examiné la preuve relative aux autres accidents survenus sur le chemin Snake Hill, la juge

any other accident on Snake Hill Road during her time at the Shellbrook RCMP Detachment, from 1987 until 1996. Cpl. Healey had heard of one other accident. Forbes and Healey are only two of nine members of the RCMP Detachment at Shellbrook" (emphasis added). By this comment, the trial judge seems to imply that there may have been more accidents on Snake Hill Road that had been reported and that the respondent should have known about this. With all due respect to the trial judge, if there had been accidents other than the ones that were raised at trial, it was up to the appellant to bring evidence of these accidents forward, either by calling the RCMP members to whom they had been reported, or by calling those who were involved in the accidents, or by any other available means. Furthermore, the significance that the trial judge attributed to the other accidents that occurred on Snake Hill Road was dependent on her assumption that the respondent should have had a formal accident-reporting system in place. The respondent did not bear the onus of demonstrating that it was not obliged to have such a system; there was, rather, a positive onus on the appellant to demonstrate that such a system was required and that the informal reporting system was inadequate.

C. *Did the Trial Judge Err in Finding that the Accident was Caused in Part by the Failure of the Respondent Municipality to Erect a Sign Near the Curve?*

The trial judge's findings on causation are found at para. 101 of her judgment, where she states:

I find that this accident occurred as a result of Mr. Nikolaisen entering the curve on Snake Hill Road at a speed slightly in excess of that which would allow successful negotiation. The accident occurred at the most dangerous segment of Snake Hill Road where a warning or regulatory sign should have been erected and maintained to warn motorists of an impending and hidden hazard. Mr. Nikolaisen's degree of impairment only

de première instance a fait les remarques suivantes au par. 31 : [TRADUCTION] « La gendarme Forbes ne se souvient pas de quelque autre accident sur le chemin Snake Hill durant la période où elle était affectée au détachement de la GRC de Shellbrook, de 1987 à 1996. Le caporal Healey avait entendu parler d'un autre accident. Forbes et Healey ne sont que deux des neuf membres du détachement de la GRC à Shellbrook » (je souligne). Par cette remarque, la juge de première instance semble laisser entendre que d'autres accidents sur le chemin Snake Hill ont pu avoir été signalés et que l'intimée aurait dû le savoir. En toute déférence pour la juge de première instance, s'il y avait eu d'autres accidents que ceux qui ont été mentionnés au procès, il appartenait à l'appelant d'en faire la preuve, soit en faisant témoigner les membres de la GRC à qui les accidents avaient été signalés ou encore les personnes en cause dans ces accidents, soit en utilisant tout autre moyen à sa disposition. En outre, l'importance que la juge de première instance a accordée aux autres accidents survenus sur le chemin Snake Hill dépendait du postulat que l'intimée aurait dû posséder un système officiel d'information sur les accidents. L'intimée n'était pas tenue de prouver qu'elle n'avait pas l'obligation de disposer d'un tel système. Il incombait plutôt à l'appelant d'établir que ce genre de système était nécessaire et que le système informel existant était insuffisant.

C. *La juge de première instance a-t-elle commis une erreur en concluant que l'accident avait été causé, en partie, par le défaut de la municipalité intimée d'installer un panneau de signalisation près de la courbe?*

158 Les conclusions de la juge de première instance au sujet du lien de causalité figurent au par. 101 de son jugement, où elle dit ceci :

[TRADUCTION] J'estime que l'accident s'est produit parce que M. Nikolaisen s'est engagé dans le virage sur le chemin Snake Hill à une vitesse légèrement supérieure à celle qui lui aurait permis de réussir la manœuvre. L'accident est survenu dans la portion la plus dangereuse du chemin Snake Hill, à un endroit où un panneau d'avertissement ou de signalisation aurait dû être installé et maintenu pour avertir les automobilistes de

served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him. I am satisfied on a balance of probabilities that had Mr. Nikolaisen been forewarned of the curve, he would have reacted and taken appropriate corrective action such that he would not have lost control of his vehicle when entering the curve.

159 The trial judge's above findings in respect to causation represent conclusions on matters of fact. Consequently, this Court will only interfere if it finds that in coming to these conclusions she made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it (*Toneguzzo-Norvell*, *supra*, at p. 121).

160 In coming to her conclusion on causation, the trial judge made several of the types of errors that this Court referred to in *Toneguzzo-Norvell*. To the extent that the trial judge relied on the evidence of Mr. Laughlin, the only expert to have testified on the issue of causation, I find that she either misunderstood his evidence or drew erroneous conclusions from it. The only other testimony in respect to causation was anecdotal evidence pertaining to Mr. Nikolaisen's level of impairment provided by Craig Thiel, Toby Thiel and Paul Housen. Although their testimonies provided some evidence in respect to causation, for reasons I will discuss, it was not evidence on which the trial judge could reasonably rely. Nor do I find that the trial judge was entitled to rely on evidence that Mr. Nikolaisen successfully negotiated the curve from the Thiel driveway onto Snake Hill Road. The inference that the trial judge drew from this fact was unreasonable and ignored evidence that Mr. Nikolaisen swerved even on this curve. In addition, the trial judge clearly erred by ignoring other relevant evidence in respect to causation, in particular the fact that Mr. Nikolaisen had driven on the

l'imminence d'un danger caché. Le degré d'ébriété de M. Nikolaisen n'a fait qu'accroître le risque qu'il ne réagisse pas du tout ou encore de façon inappropriée à une signalisation. M. Nikolaisen ne conduisait pas de façon si téméraire qu'il aurait intentionnellement fait abstraction d'un panneau d'avertissement ou de signalisation. Quelques instants plus tôt, au moment de quitter la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir. Je suis convaincue, selon la prépondérance des probabilités, que si on avait prévenu M. Nikolaisen de l'existence de la courbe, il aurait réagi et pris des mesures appropriées, qui l'auraient empêché de perdre la maîtrise de son véhicule en s'engageant dans le virage.

Les conclusions susmentionnées de la juge de première instance touchant le lien de causalité sont des conclusions portant sur des questions de fait. Par conséquent, notre Cour n'interviendra que si elle estime que, pour arriver à ses conclusions, la juge a commis une erreur manifeste, n'a pas tenu compte d'un élément de preuve déterminant ou pertinent, a mal compris la preuve ou en a tiré des conclusions erronées (*Toneguzzo-Norvell*, précité, p. 121).

En arrivant à sa conclusion sur le lien de causalité, la juge de première instance a commis plusieurs des erreurs mentionnées par notre Cour dans l'arrêt *Toneguzzo-Norvell*, précité. Dans la mesure où la juge de première instance s'est fondée sur le témoignage de M. Laughlin, le seul expert à avoir témoigné sur la question du lien de causalité, j'estime qu'elle a mal interprété son témoignage ou qu'elle en a tiré des conclusions erronées. Les éléments anecdotiques des témoignages de Craig Thiel, Toby Thiel et Paul Housen concernant le degré d'ébriété de M. Nikolaisen constituent la seule autre preuve testimoniale sur le lien de causalité. Bien que leurs témoignages aient fourni quelques éléments de preuve touchant cette question, il ne s'agit pas, pour des raisons que j'examinerai plus loin, d'éléments sur lesquels la juge de première instance pouvait raisonnablement s'appuyer. Je n'estime pas non plus qu'elle pouvait se fonder sur la preuve que M. Nikolaisen avait réussi à prendre le virage permettant d'accéder au chemin Snake Hill depuis l'entrée des Thiel. L'inférence que la juge de première instance a tirée de ce fait était déraisonnable et faisait abstraction de la preuve selon laquelle

road three times in the 18 to 20 hours preceding the accident.

le véhicule de M. Nikolaisen avait fait une embardée même dans cette courbe. En outre, la juge de première instance a clairement commis une erreur en ne prenant pas en considération d'autres éléments de preuve pertinents concernant le lien de causalité, en particulier le fait que M. Nikolaisen avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident.

I cannot agree with the trial judge that the testimony of Mr. Laughlin, a forensic alcohol specialist employed by the RCMP supports the finding that Mr. Nikolaisen would have reacted to a sign forewarning of the impending right-turning curve on which the accident occurred. The preponderance of Mr. Laughlin's testimony establishes that persons at the level of impairment which Mr. Nikolaisen was found to be at when the accident occurred would be unlikely to react to a warning sign. In addition, Mr. Laughlin's testimony points overwhelmingly to the conclusion that alcohol was the causal factor which led to this accident. The trial judge erred by misapprehending one comment in Mr. Laughlin's testimony and ignoring the significance of his testimony when taken as a whole.

161 Je ne partage pas l'avis de la juge de première instance voulant que le témoignage de M. Laughlin, spécialiste judiciaire en matière d'alcool au service de la GRC, étaye la conclusion que M. Nikolaisen aurait réagi à un panneau lui signalant l'imminence du virage droite où s'est produit l'accident. Le témoignage de M. Laughlin établit de façon prépondérante que des personnes dans un état d'ébriété aussi avancé que celui de M. Nikolaisen au moment de l'accident ne réagiraient vraisemblablement pas à un panneau d'avertissement. De plus, le témoignage de M. Laughlin mène irrésistiblement à la conclusion que l'alcool a été le facteur causal de l'accident. La juge de première instance a commis une erreur à cet égard, car elle a mal interprété un élément de la déposition de M. Laughlin et elle a omis de tenir compte de l'importance de son témoignage, considéré globalement.

Based on blood samples obtained by Constable Forbes approximately three hours after the accident occurred, Mr. Laughlin predicted that Mr. Nikolaisen's blood alcohol level at the time of the accident ranged from 180 to 210 milligrams percent. Mr. Laughlin commented at length on the effect that this level of blood alcohol could be expected to have on a person's ability to drive, testifying:

Well, My Lady, this alcohol level that I've calculated here is a very high alcohol level. The critical mental faculties [that] are important in operating a motor vehicle will be impaired by the alcohol. And any skill that depends on these mental faculties will be affected. These include anticipation, judgment, attention, concentration, the ability to divide attention among two or more areas of interest. Because these are affected to such a degree, it would be unsafe for anybody to operate a motor vehicle with this level of alcohol in their body.

162 À la lumière des échantillons de sang prélevés par la gendarme Forbes environ trois heures après l'accident, M. Laughlin a estimé que, au moment de l'accident, l'alcoolémie de M. Nikolaisen se situait entre 180 et 210 mg par 100 ml de sang. Dans son témoignage, M. Laughlin a commenté en détail l'incidence d'une telle alcoolémie sur la capacité d'une personne de conduire :

[TRADUCTION] Bien, Madame, l'alcoolémie que j'ai calculée en l'espèce est très élevée. Les facultés mentales essentielles qui jouent un rôle important dans la conduite d'un véhicule automobile sont affaiblies par l'alcool. Et toute habileté tributaire de ces facultés mentales est affectée, notamment l'anticipation, le jugement, l'attention, la concentration, la capacité de partager son attention entre deux choses ou plus. Et parce qu'elles sont affectées à ce point, il serait risqué pour quiconque possède un tel taux d'alcool dans son sang de conduire un véhicule automobile.

When asked about his knowledge of research pertaining to the effects of alcohol on the risk of being involved in an automobile accident, Mr. Laughlin had this to say:

> At this level the moderate user of alcohol risk of causing crash is tremendously high, probably 100 times that of a sober driver, or even higher. And in some cases at this level, I've seen scientific literature indicating that the risk of causing a fatal crash is 2 to 300 times that of a sober driver. . . . if an impaired person is an experienced drinker there — it won't be that high. However, there will be an increased risk compared to a sober state. . . . But above 100 milligrams percent, regardless of tolerance, a person will be impaired with respect to driving ability.

Following these comments, Mr. Laughlin discussed the ability of a severely impaired person to react to the presence of a hazard when driving:

> My Lady, I would like to add that the driving task is a demanding one and involves many multi-various tasks occurring at the same time. The hazard for a person under the influence of alcohol is it takes longer to notice a hazard or danger if one should occur; it takes longer to decide what corrective action is appropriate, and it takes longer to execute that decision and the person may tend to make incorrect decisions. So there is increased risk in that process. As well, if the impairment has progressed to the point where the motor skills are affected, the execution of that decision is impaired. So it's not a very graceful attempt at a corrective action. As well, some people tend to make more risks under the influence of alcohol. They do not apply sound reasoning and judgment. They are not able to properly assess the impairment of their driving skills, they are not able to properly assess the risk, not able to properly assess the changing road and weather conditions and adjust for that. But even if they do recognize those as hazards, they may tend to take more risks than a sober driver would.

163 The above comments support the conclusion that the accident occurred as a result of Mr. Nikolaisen's impairment and not as a result of any failure on the part of the respondent. Indeed, when the portions of Mr. Laughlin's testimony that the trial judge relied

Interrogé sur l'état des recherches touchant l'incidence de l'alcool sur le risque d'accident automobile, voici ce qu'a dit M. Laughlin :

> [TRADUCTION] À ce taux-là, le risque qu'une personne qui consomme modérément de l'alcool provoque un accident est extrêmement élevé, probablement 100 fois plus élevé que le conducteur à jeun, ou plus encore. Et dans certains cas, à ce taux-là, j'ai lu des textes scientifiques dans lesquels on indiquait que le risque de provoquer un accident mortel est de 200 à 300 fois plus élevé que celui d'un conducteur à jeun. [. . .] [S]i la personne en état d'ébriété est quelqu'un qui a l'habitude de boire, le risque n'est pas aussi élevé. Cependant, il est plus grand que si la personne avait été à jeun. [. . .] Mais au dessus de 100 mg par 100 ml de sang, peu importe le degré de tolérance à l'alcool, une personne a les facultés affaiblies pour ce qui concerne sa capacité de conduire.

Après avoir fait ces remarques, M. Laughlin a décrit la capacité d'une personne en état d'ébriété avancé de réagir à la présence d'un danger lorsqu'elle conduit.

> [TRADUCTION] Madame, j'aimerais ajouter que conduire un véhicule est une activité exigeante, qui demande d'accomplir une multiplicité de tâches simultanément. Le danger pour la personne qui conduit en état d'ébriété réside dans le fait qu'il lui faut plus de temps pour déceler la présence d'un risque ou d'un danger; il lui faut plus de temps pour décider quelle mesure corrective est requise, et elle prend plus de temps à mettre cette décision à exécution; de plus, une telle personne peut avoir tendance à prendre de mauvaises décisions. Ce processus accroît donc le risque. Aussi, si l'ébriété est avancée au point où les habiletés motrices sont affaiblies, l'exécution de la décision s'en trouve compromise. Il s'ensuit donc une tentative plutôt malhabile de corriger la situation. De plus, certaines personnes tendent à prendre davantage de risques lorsqu'elles sont en état d'ébriété. Elles ne font pas preuve de discernement et de jugement. Elles sont incapables d'évaluer correctement les changements dans l'état de la route et les conditions météorologiques et d'adapter leur conduite en conséquence. Mais même si elles reconnaissent qu'il s'agit effectivement de dangers, elles peuvent avoir tendance à prendre davantage de risques que le conducteur à jeun.

Les remarques qui précèdent étayent la conclusion que l'accident s'est produit en raison de l'état d'ébriété de M. Nikolaisen et non de quelque manquement de la part de l'intimée. De fait, lorsque les extraits du témoignage de M. Laughlin sur lesquels

on are considered in their context, they do not support her conclusion that Mr. Nikolaisen would have been able to react to a sign had one been posted. When asked by counsel whether it was possible for an individual with Mr. Nikolaisen's blood alcohol level to perceive and react to a road sign, Mr. Laughlin responded:

> Yes, it's possible that a person will see and react to it and maybe react properly. It's possible that they will react improperly or may miss it altogether. I think what's key here is that at this level of alcohol, it's more likely that the person under this level of alcohol will either miss the sign or not react properly compared to the sober driver. That the driver with this level of alcohol will make more mistakes than will the sober driver. [Emphasis added.]

In the passage above, it is clear that Mr. Laughlin is merely admitting that anything is possible, while solidly expressing the view that drivers at this level of intoxication are more likely to not react to a sign or other warning. This view is also apparent in the following passage, in which Mr. Laughlin expands on the ability of an intoxicated driver to react to signs and other road conditions:

> What happens with respect to perception under the influence of alcohol is a driver tends to concentrate on the central field of vision, and miss certain indicators on the periphery, that's called tunnel vision. As well, drivers tend to concentrate on the lower part of that central field of view and therefore they don't have a very long preview distance in the course of operating a motor vehicle and looking down the road. And so studies indicate that under the influence of alcohol drivers tend to miss more signs, warnings, indicators, especially those in the peripheral field of view or farther down the road. [Emphasis added.]

In argument before this Court, the appellant emphasized that although Mr. Laughlin was the only expert to testify with respect to causation, lay witnesses testified that Mr. Nikolaisen was not visibly impaired prior to leaving the Thiel residence.

s'est fondée la juge de première instance sont examinés dans leur contexte, ils n'appuient pas la conclusion de cette dernière que M. Nikolaisen aurait été capable de réagir à un panneau de signalisation s'il y en avait eu un. Répondant à la question d'un avocat lui demandant s'il était possible qu'une personne ayant l'alcoolémie de M. Nikolaisen voit un panneau de signalisation et y réagisse, M. Laughlin a dit ceci :

> [TRADUCTION] Oui, il est possible qu'une personne le voit et y réagisse et peut-être qu'elle réagisse adéquatement. Il est possible qu'elle ne réagisse pas adéquatement ou qu'elle ne le voit même pas. J'estime que l'élément fondamental à retenir ici est qu'il est probable que la personne ayant atteint cette alcoolémie ne voit pas le panneau, ou ne réagisse pas adéquatement, comparativement au conducteur à jeun. Que le conducteur avec cette alcoolémie commette plus d'erreurs que le conducteur à jeun. [Je souligne.]

Il est clair, dans le passage qui précède, que M. Laughlin reconnaît simplement que tout est possible, tout en avançant avec conviction qu'il y a une plus forte probabilité que les conducteurs ayant atteint ce degré d'ébriété ne réagissent pas à un panneau de signalisation ou à une autre mesure d'avertissement. Cette opinion ressort également clairement de l'extrait suivant, où il donne des précisions supplémentaires sur la capacité d'une personne en état d'ébriété de réagir aux panneaux de signalisation et à d'autres éléments sur les routes :

> [TRADUCTION] Sur le plan de la perception, le conducteur en état d'ébriété a tendance à se concentrer sur son champ visuel central et à manquer certains indices en périphérie, c'est ce qu'on appelle la vision tubulaire. En outre, les conducteurs ont tendance à se concentrer sur la partie inférieure de ce champ visuel central et, en conséquence, ils ne voient pas très loin devant eux sur la route lorsqu'il sont au volant. Et, par conséquent, les recherches indiquent que les conducteurs en état d'ébriété ont tendance à manquer davantage de panneaux de signalisation, d'avertissements, d'indices, particulièrement ceux situés dans leur champ visuel périphérique ou plus loin sur la route. [Je souligne.]

164 Au cours des plaidoiries devant notre Cour, l'appelant a souligné que, bien que M. Laughlin ait été le seul expert entendu au sujet du lien de causalité, les témoins ordinaires ont attesté que M. Nikolaisen n'avait pas les facultés visiblement

It is not clear from the trial judge's reasons that she relied on testimony to this effect given by Craig Thiel, Toby Thiel and Paul Housen. To the extent that she did rely on such evidence to establish that the accident was caused in part by the respondent's negligence, I find this reliance to be unreasonable. Whereas the lay witnesses in this case were qualified to give their opinion on whether they, as ordinary drivers, could safely negotiate the segment of Snake Hill Road on which the accident occurred, they were not qualified to assess the degree of Mr. Nikolaisen's impairment. The reason for their lack of qualification in this regard was explained by Mr. Laughlin in the following response to counsel's question on whether it is possible to draw a conclusion from the fact that an individual does not exhibit any impairment of their motor skills and speech:

> No, Your Honour, because, My Lady, when you're looking at motor skill impairment or for signs of motor skill impairment, you're looking for signs of intoxication, not impairment. Remember I mentioned that the first components affected by alcohol are cognitive and mental faculties. These are all important in driving. However, it is very difficult when you look at an individual who has been consuming alcohol to tell that they have impaired in attention or divided attention, or concentration, or judgment. So as an indicator of impairment, motor skills are not reliable. And if you think about the *Criminal Code* process, they've been abandoned 30 years ago as a useful indicator of impairment. No longer do we rely on police officers subjective assessment of person's motor skills to determine impairment. [Emphasis added.]

165 It is also clear from the trial judge's reasons that she relied to some extent on evidence that Mr. Nikolaisen successfully negotiated the curve at the point where the driveway to the Thiel residence intersected the road. I agree with the respondent that this fact is simply not relevant. The ability of Mr. Nikolaisen to negotiate this curve does not establish that his driving ability was not impaired. As noted by the respondent, at para. 101 of its factum, he may

affaiblies avant de quitter la résidence des Thiel. Les motifs de la juge de première instance n'indiquent pas clairement si elle s'est appuyée sur les témoignages de Craig Thiel, Toby Thiel et Paul Housen à cet égard. Dans la mesure où elle se serait fondée sur cette preuve pour conclure que l'accident avait été causé en partie par la négligence de l'intimée, j'estime qu'il était déraisonnable de le faire. En l'espèce, bien que compétents pour exprimer leur opinion sur la question de savoir s'ils pourraient, en tant que conducteurs moyens, manœuvrer en toute sécurité sur le tronçon du chemin Snake Hill où l'accident s'est produit, les témoins ordinaires n'étaient pas compétents pour évaluer le degré d'ébriété de M. Nikolaisen. La raison de leur absence de compétence à cet égard a été expliquée en ces termes par M. Laughlin, dans la réponse suivante qu'il a donnée à l'un des avocats qui lui demandait s'il était possible de tirer des conclusions du fait qu'une personne ne démontre ni signe d'affaiblissement de ses habiletés motrices ni problème d'élocution :

> [TRADUCTION] Non, votre Honneur, puisque, Madame, lorsqu'on vérifie s'il y a affaiblissement des habiletés motrices ou des signes de cet affaiblissement, on cherche des indices d'ébriété, et non d'affaiblissement des facultés. Rappelez-vous que j'ai dit que les premières facultés affectées par l'alcool sont les facultés cognitives et mentales. Elles sont toutes importantes lorsqu'il s'agit de conduire un véhicule. Cependant, lorsqu'on examine une personne qui a consommé de l'alcool, il est très difficile de dire si son attention ou sa capacité de diviser son attention, ou si sa concentration ou son jugement sont réduits. En conséquence les habiletés motrices ne sont pas des indices fiables d'affaiblissement des facultés. Et si on pense au processus prévu par le *Code criminel*, on a cessé d'y recourir depuis 30 ans en tant qu'indices utiles de l'affaiblissement des facultés. On ne se fie plus à l'appréciation subjective policier quant aux habiletés motrices d'une personne pour déterminer si les facultés de celle-ci sont affaiblies. [Je souligne.]

Il appert également des motifs de la juge de première instance qu'elle s'est dans une certaine mesure fondée sur la preuve indiquant que M. Nikolaisen avait réussi à prendre le virage à l'intersection de l'entrée de la résidence des Thiel et du chemin Snake Hill. Je partage l'avis de l'intimée selon lequel ce fait n'est tout simplement pas pertinent. La capacité de M. Nikolaisen de prendre ce virage n'établit pas que sa capacité de conduire

have been driving more slowly at this point, or he may simply have been lucky. More importantly, this evidence contributes nothing to the issue of whether or not Mr. Nikolaisen would have reacted to a sign on the curve where the accident occurred, had one been present. There was no sign on the curve one faces upon leaving the driveway, just as there was no sign on the curve where the accident took place.

n'était pas affaiblie. Comme l'a souligné l'intimée, au par. 101 de son mémoire, il a pu réduire sa vitesse à cet endroit, ou simplement avoir eu de la chance. Facteur plus important encore cette preuve n'aide d'aucune façon à déterminer si M. Nikolaisen aurait réagi à un panneau placé à l'approche de la courbe où s'est produit l'accident, si un tel panneau avait existé. Il n'y avait aucun panneau aux abords de la courbe située à la sortie de l'entrée, tout comme il n'y en avait pas aux abords de celle où s'est produit l'accident.

At any rate, the trial judge's reliance on Mr. Nikolaisen's successful negotiation of the curve at the location of the Thiel driveway ignores relevant evidence that he had swerved or "fish-tailed" when leaving the Thiel residence. A reasonable inference to be drawn from this evidence is that while Mr. Nikolaisen was able to negotiate this curve, he did not do so free from difficulty. While this evidence may not be significant in and of itself, it should have been enough to alert the trial judge to the problems inherent in the inference she drew from his ability to navigate this earlier curve.

166 Quoi qu'il en soit, en se fondant sur le fait que M. Nikolaisen avait pris avec succès le virage devant l'entrée des Thiel, la juge de première instance a fait abstraction de l'élément de preuve pertinent indiquant que l'arrière de son véhicule avait zigzagué à son départ de la résidence des Thiel. On peut raisonnablement inférer de cette preuve que, quoique M. Nikolaisen ait été en mesure de prendre ce virage, il n'y est pas parvenu sans difficulté. Bien que cette preuve ne soit pas nécessairement importante en soi, elle aurait dû néanmoins alerter la juge de première instance quant aux problèmes intrinsèques de l'inférence qu'elle tirait de la capacité de M. Nikolaisen de prendre ce premier virage.

In addition to ignoring the relevant evidence of the fish-tail marks, the trial judge failed to consider the relevance of the fact that Mr. Nikolaisen had travelled Snake Hill Road three times in the 18 to 20 hours preceding the accident. In her review of the evidence, she noted at para. 8 of her reasons that: "Mr. Nikolaisen was unfamiliar with Snake Hill Road. While he had in the preceding 24 hours travelled the road three times, only once was in the same direction that he was travelling upon leaving the Thiel residence."

167 En plus de ne pas avoir tenu compte de la preuve pertinente que constituaient les traces des zigzags, la juge de première instance n'a pas considéré pertinent le fait que M. Nikolaisen avait circulé sur le chemin Snake Hill à trois reprises au cours des 18 à 20 heures ayant précédé l'accident. Dans son examen de la preuve, elle a souligné, au par. 8 de ses motifs, que [TRADUCTION] « M. Nikolaisen ne connaissait pas bien le chemin Snake Hill. Bien qu'il ait emprunté ce chemin à trois reprises au cours des 24 heures précédentes, il ne l'a fait qu'une seule fois dans la même direction que celle qu'il a prise en quittant la résidence des Thiel. »

I simply cannot see how the trial judge found accidents which occurred when motorists were travelling in the opposite direction relevant to the issue of the respondent's knowledge of a risk to motorists while at the same time suggesting that the fact that Mr. Nikolaisen had driven the road in the opposite direction twice was irrelevant to the issue of whether

168 Je ne vois tout simplement pas comment la juge de première instance a pu conclure que les accidents qu'ont eu des automobilistes circulant en sens inverse étaient pertinents pour statuer sur la connaissance par l'intimée de l'existence d'un risque d'accident, tout en suggérant du même souffle que le fait que M. Nikolaisen ait roulé à deux reprises

or not he would have recognized that the curve posed a risk or that he would have reacted to a warning sign. This discrepancy aside, I find the fact that Mr. Nikolaisen had travelled Snake Hill Road in the same direction when he left the Thiel residence to go to the Jamboree the evening before the accident highly relevant to the causation issue. The finding that the outcome would have been different had Mr. Nikolaisen been forewarned of the curve ignores the fact that he already knew that the curve was there. I agree with the respondent that the obvious reason Mr. Nikolaisen was unable to safely negotiate the curve on the afternoon of the 18th, despite having negotiated this curve and others without difficulty in the preceding 18 to 20 hours was the combined effect of his drinking, lack of sleep and lack of food.

169 In conclusion on the issue of causation, I wish to clarify that the fact that the trial judge referred to some evidence to support her findings on this issue does not insulate those findings from review by this Court. The standard of review for findings of fact is reasonableness, not absolute deference. Such a standard entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion. The logic of this approach was aptly explained by Kerans, *supra*, in the following passage at p. 44:

> The key to the problem is whether the reviewer is to look merely for "evidence to support" the finding. Some evidence might indeed support the finding, but other evidence may point overwhelmingly the other way. A court might be able to say that reliance on the "some" in the face of the "other" was not what the reasonable trier of fact would do; indeed, it might say that, in all the circumstances it was convinced that to rely on the one in the face of the other was quite unreasonable. To say that "some evidence" is enough, then, without regard to that "other

en sens inverse sur le chemin en question n'était pas pertinent pour déterminer s'il aurait reconnu que la courbe présentait un risque ou s'il aurait réagi à un panneau d'avertissement. Indépendamment de cette contradiction, j'estime que le fait que M. Nikolaisen ait roulé dans la même direction sur le chemin Snake Hill après avoir quitté la résidence des Thiel pour se rendre au jamboree, la veille de l'accident, est fort pertinent en ce qui concerne le lien de causalité. La conclusion que le résultat aurait été différent si une signalisation avait prévenu M. Nikolaisen de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Je souscris à l'opinion de l'intimée que la raison évidente pour laquelle M. Nikolaisen n'a pas réussi à prendre le virage en toute sécurité dans l'après-midi du 18, alors qu'il avait déjà pris ce virage et d'autres sans difficulté au cours des 18 à 20 heures précédentes, était l'effet combiné de sa consommation d'alcool, de son manque de sommeil et du fait qu'il n'avait pas mangé.

Pour conclure sur la question du lien de causalité, j'aimerais préciser que le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur ce point n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. La norme de contrôle applicable aux conclusions de fait est celle de la décision raisonnable et non celle de la retenue absolue. Cette norme permet au tribunal d'appel de se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse. Kerans, *op. cit.*, p. 44, a habilement exposé la logique de cette démarche dans le passage suivant :

> [TRADUCTION] La solution au problème réside dans la réponse à la question de savoir si le tribunal de révision doit simplement se demander s'il existe « des éléments de preuve étayant » la conclusion. Il est possible que certains éléments de preuve étayent effectivement la conclusion alors que d'autres éléments conduisent irrésistiblement à la conclusion inverse. Un tribunal pourrait être en mesure de dire qu'un juge des faits raisonnable ne s'appuierait pas sur « certains » éléments vu l'existence des « autres »; de fait, il pourrait dire que, eu égard à

evidence" is to turn one's back on review for reasonableness.

D. *Did the Courts Below Err in Finding that no Common Law Duty of Care Exists Alongside the Statutory Duty Imposed Under Section 192 of The Rural Municipality Act, 1989?*

The appellant urges this Court to find that a common law duty of care exists alongside the statutory duty of care imposed on the respondent by s. 192 of *The Rural Municipality Act, 1989*. According to the appellant, the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

The courts below rejected the above argument when it was put to them by the appellant. I would not interfere with their ruling on this issue for the reason that it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings.

I agree with the respondent's submissions that in this case, where the legislature has clearly imposed a statutory duty of care on the respondents, it would be redundant and unnecessary to find that a common law duty of care exists. The two-part test to establish a common law duty of care set out in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, simply has no application where the legislature has defined a statutory duty. As was stated by this Court in *Brown*

l'ensemble des circonstances, il est convaincu qu'il était tout à fait déraisonnable de se fonder sur certains éléments compte tenu des autres. En conséquence, affirmer que « certains éléments de preuve » suffisent, sans égard aux « autres éléments », revient à abandonner l'examen du caractère raisonnable.

D. *Les juridictions inférieures ont-elles commis une erreur en concluant qu'aucune obligation de diligence de common law ne coexiste avec l'obligation légale imposée par l'art. 192 de la Rural Municipality Act, 1989?*

170 L'appelant invite notre Cour à conclure qu'une obligation de diligence de common law coexiste avec l'obligation légale de diligence imposée à l'intimée par l'art. 192 de la *Rural Municipality Act, 1989*. Selon l'appelant, l'application de l'obligation de diligence de common law dispenserait la Cour de la nécessité de se demander comment un conducteur raisonnable prenant des précautions normales aurait roulé sur le chemin en cause. L'appelant soutient que la Cour pourrait plutôt appliquer le [TRADUCTION] « critère classique de la conduite raisonnable », lequel, à son avis, l'obligerait à tenir compte des éléments suivants : la probabilité qu'un préjudice connu ou prévisible survienne, la gravité de ce préjudice et le fardeau ou le coût qu'il faudrait assumer pour le prévenir. L'appelant prétend que, suivant ce critère, l'intimée serait tenue responsable.

171 Les juridictions inférieures ont rejeté l'argument susmentionné de l'appelant. Je ne modifierais pas leur décision sur cette question, car il est inutile que notre Cour impose une obligation de diligence de common law lorsqu'il existe clairement une obligation d'origine législative. Quoi qu'il en soit, l'application du critère prévu par la common law ne modifierait pas l'issue de la présente instance.

172 Je souscris à l'argument de l'intimée selon lequel, en l'espèce, il serait redondant et inutile de conclure qu'elle est assujettie à une obligation de diligence de common law alors que le législateur lui a clairement imposé une obligation légale de diligence. Le critère à deux volets énoncé dans l'arrêt *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2, pour statuer sur l'existence d'une obligation de diligence de common law, ne s'applique tout

v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420, at p. 424:

> . . . if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in *Anns v. Merton London Borough Council*, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

All of the authorities cited by the appellant as support for the imposition of an independent common law duty of care can be distinguished from the case at hand on the basis that no statutory duty of care existed (*Just*, *supra*; *Brown*, *supra*; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Ryan*, *supra*).

173 In addition, I find that the outcome in this case would not be different if the case were determined according to ordinary negligence principles. First, were the Court to engage in a common law analysis, it would still look to the statutory standard of care as laid out in *The Rural Municipality Act, 1989*, as interpreted by the case law in order to assess the scope of liability owed by the respondent to the appellant. As this Court stated in *Ryan*, *supra*, at para. 29:

> Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

174 Moreover, even under the common law analysis, this Court would be called upon to question the type of hazards that the respondent, in this case, ought to have foreseen. Whatever the approach, it is only reasonable

simplement pas lorsque le législateur a prescrit l'obligation dans la loi. Comme l'a indiqué notre Cour dans l'arrêt *Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420, p. 424 :

> . . . s'il existait une obligation d'entretien imposée par la loi comme c'est le cas dans certaines provinces, il serait inutile de rechercher une obligation en droit privé en se fondant sur le principe du prochain établi dans l'arrêt *Anns c. Merton London Borough Council*, [1978] A.C. 728. En outre, il est nécessaire d'examiner la dichotomie politique générale-opérations seulement en ce qui concerne la recherche d'une obligation de diligence en droit privé.

Tous les arrêts invoqués par l'appelant pour justifier sa prétention que la municipalité devrait être assujettie à une obligation indépendante de diligence de common law peuvent être distingués de la présente affaire, étant donné qu'il n'existait aucune obligation légale de diligence dans ces affaires (*Just*, précitée; *Brown*, précitée; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Ryan*, précitée).

En outre, j'estime que le résultat serait le même en l'espèce si l'affaire était tranchée d'après les principes ordinaires de la négligence. Tout d'abord, si la Cour faisait l'analyse prévue par la common law, elle appliquerait quand même la norme légale de diligence établie dans la *Rural Municipality Act, 1989*, telle qu'elle a été interprétée par la jurisprudence, pour déterminer l'étendue de la responsabilité de l'intimée envers l'appelant. Comme l'a dit notre Cour dans l'arrêt *Ryan*, précité, par. 29 :

> Cependant, les normes législatives peuvent être hautement pertinentes pour déterminer ce qui constitue une conduite raisonnable dans un cas particulier, et elles peuvent, en fait, rendre raisonnable un acte ou une omission qui, autrement, paraîtrait négligent. En conséquence, les tribunaux peuvent examiner le cadre législatif dans lequel les personnes et les sociétés doivent agir, tout en reconnaissant qu'il est impossible de se soustraire à l'obligation sous-jacente de diligence raisonnable simplement en s'acquittant de ses obligations légales.

De plus, même dans le cadre de l'analyse requise par la common law, notre Cour devrait s'interroger sur le type de dangers que l'intimée aurait dû prévoir en l'espèce. Indépendamment de l'approche choisie,

sonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver.

The courts have long restricted the standard of care under the statutory duty to require municipalities to repair only those hazards which would pose a risk to the reasonable driver exercising ordinary care. Compelling reasons exist to maintain this interpretation. The municipalities within the province of Saskatchewan have some 175,000 kilometres of roads under their care and control, 45,000 kilometres of which fall within the "bladed trail" category. These municipalities, for the most part, do not boast large, permanent staffs with extensive time and budgetary resources. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard. Accordingly, it is a change that I would not be prepared to make.

il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur.

175 Depuis longtemps, les tribunaux limitent l'étendue de la norme de diligence découlant de l'existence d'un devoir légal de diligence à l'obligation pour les municipalités d'éliminer seulement les dangers qui présenteraient un risque pour le conducteur raisonnable prenant des précautions normales. Des raisons impérieuses militent en faveur du maintien de cette interprétation. Les municipalités de la province de la Saskatchewan assument l'entretien et la surveillance de quelque 175 000 kilomètres de route, dont 45 000 kilomètres font partie de la catégorie des « chemins nivelés ». La plupart de ces municipalités ne disposent ni d'effectifs permanents considérables ni de ressources importantes en temps et en argent. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une modification radicale et irréalisable de la norme actuelle. Il s'agit en conséquent d'un changement que je ne serais pas disposé à apporter.

VII. Disposition

In the result, the judgment of the Saskatchewan Court of Appeal is affirmed and the appeal is dismissed with costs.

Appeal allowed with costs, GONTHIER, BASTARACHE, BINNIE *and* LEBEL JJ. *dissenting.*

Solicitors for the appellant: Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.

Solicitors for the respondent: Gerrand Rath Johnson, Regina.

VII. Dispositif

176 En définitive, le jugement de la Cour de l'appel de la Saskatchewan est confirmé et le pourvoi est rejeté avec dépens.

Pourvoi accueilli avec dépens, les juges GONTHIER, BASTARACHE, BINNIE *et* LEBEL *sont dissidents.*

Procureurs de l'appelant : Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.

Procureurs de l'intimée : Gerrand Rath Johnson, Regina.

TAB 5

Ivandaeva Total Image Salon Inc. et al. v. Hlembizky
c.o.b. as Dermocare; Ivandaeva, Third Party

Ivandaev v. Ivandaeva

[Indexed as: Ivandaeva Total Image Salon Inc. v. Hlembizky]

63 O.R. (3d) 769
[2003] O.J. No. 949
Docket No. C38289

Court of Appeal for Ontario
O'Connor A.C.J.O., Laskin and Borins JJ.A.
March 18, 2003

Civil procedure -- Orders -- Motion to set aside -- Sealing order made in matrimonial litigation -- Petitioner in that litigation was plaintiff in commercial litigation -- Defendants in commercial litigation not "persons affected" by sealing order -- Defendants not having right to notice of motion for sealing order under rule 37.07(1) of Rules of Civil Procedure as no proprietary or economic interest of theirs was affected by sealing order -- Defendants not having standing to bring motion under rule 37.14(1) to set aside or vary sealing order -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.07(1), 37.14(1).

The defendants entered into three commercial agreements with the plaintiff and his wife for the purchase of the defendants' business. Before the closing of the agreements, the marriage of the plaintiff and his wife failed. The plaintiff and his company brought three proceedings against the defendants claiming that they were entitled to terminate the agreements and asking for the return of all deposits paid under the agreements. Around the same time, the plaintiff commenced a

petition for divorce and obtained an order in that proceeding sealing the court file pursuant to s. 137(2) of the Courts of Justice Act, R.S.O. 1990, c. C.43. Counsel for the defendants in the commercial litigation became aware of the sealing order, obtained access to the file, which had not been sealed due to an administrative oversight, and made copies of 15 documents. The defendants filed a supplementary affidavit of documents in the commercial litigation stating that they had come into possession of the documents which their lawyer had copied. Counsel for the defendants ultimately returned the documents but took the position that the sealing order was not directed at himself or his clients and that they were not required to comply with it in the absence of an order of a Superior Court judge. The plaintiff moved for an order compelling compliance with the sealing order. The defendants brought a cross-motion under rule 37.14(1)(a) of the Rules of Civil Procedure to set aside the sealing order to the extent that it covered those documents listed in their supplementary affidavit of documents. The cross-motion was dismissed. The motions judge held that the defendants had failed to satisfy her that there had been any change in circumstances since the sealing order was made that would justify setting it aside. She further held that the defendants did not have any right to notice of the motion to seal the matrimonial files. The plaintiff's motion was granted. The defendants appealed both of those orders. [page770]

Held, the appeals should be dismissed.

Rule 37.14(1) of the Rules of Civil Procedure provides that a person who is affected by an order obtained on motion without notice may move to set aside or vary the order. The defendants failed to establish that they were persons "affected by" the sealing order within the meaning of rules 37.07(1) and 37.14(1). Rule 37.14(1) is designed to enable an order to be set aside or varied by those who have, or can acquire, standing under the rule. It does not give standing to non-parties to the proceeding in which the order was obtained, such as the defendants, or possibly to parties to the proceeding who are unable to satisfy the two conditions contained in the rule. Thus, a non-party who desires to set aside or vary an order must show that he or she has a direct interest in doing so, in

the sense of establishing that he or she is affected by the order and that the order was obtained without notice to him or her. The starting point for determining whether the defendants were affected by the sealing order was rule 37.07(1), which provides that a notice of motion "shall be served on any person or party who will be affected by the order sought". The term "affected by" in rule 37.07(1) necessarily includes the same meaning of the term in rule 37.14(1). If the defendants should have received notice of the sealing order motion as persons who would be affected by it, it follows that they had standing under rule 37.14(1)(a) to set it aside. That would be the case if their proprietary or economic interests were affected by the order. The possibility that financial information about the plaintiff, or his companies, contained in the matrimonial court file might have assisted the defendants in their defence of the commercial litigation did not amount to the direct effect on their proprietary or financial interests contemplated by rule 37.07(1) and rule 37.14(1). Moreover, while standing has been found to exist in cases in which the media have complained that their right to freedom of expression as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms has been compromised and in which the principle of open and accessible court proceedings has been invoked, no Charter right of the defendants was infringed by the sealing order. As the defendants were not affected by the sealing order, they did not have standing under rule 37.14(1) to move to set aside or vary it.

Beattie v. Ladouceur (1995), 23 O.R. (3d) 225, 13 R.F.L. (4th) 435 (Gen. Div.); Canada Lumber Co. v. Whatmough (1923), 23 O.W.N. 584 (C.A.); Howland v. Dominion Bank (1893), 22 S.C.R. 130, affg (1892), 15 P.R. 56 (Ont. C.A.); McLean v. Allen (1898), 18 P.R. 255 (Ont. H.C.J.); Palmateer v. Back (1976), 9 O.R. (2d) 693, [1975] I.L.R. 1-677 (H.C.J.); Stanley Canada Inc. v. 683481 Ontario Ltd. (1990), 74 D.L.R. (4th) 528 (Ont. Gen. Div.); Unical Properties v. 784688 Ontario Ltd., [1993] O.J. No. 2039 (Quicklaw) (Gen. Div.); Weinstein v. Weinstein (Litigation Guardian of) (1997), 35 O.R. (3d) 229, 19 E.T.R. (2d) 52, 30 R.F.L. (4th) 116 (Gen. Div.), consd

Other cases referred to

Avery (Re), [1952] O.R. 192, [1952] 2 D.L.R. 413 (C.A.); Broom v. Pepall (1911), 23 O.L.R. 630, 19 O.W.R. 262 (Div. Ct.); National Bank of Canada v. Melnitzer (1991), 5 O.R. (3d) 234, 84 D.L.R. (4th) 315, 2 C.P.C. (3d) 106 (Gen. Div.); Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, 211 D.L.R. (4th) 193, 287 N.R. 203, 93 C.R.R. (2d) 219, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1 (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada); Strazisar v. Canadian Universal Insurance Co. (1981), 21 C.P.C. 51 (Ont. Co. Ct.)

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 2(b)
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137(2)
Judicature Act, 37 Vict., c. 7, s. 536 [page771]

Rules and regulations referred to

Rules of Civil Practice, rules 215, 219
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 7, 16, 37.07(1), 37.14(1)(a), 38.11(1), 42, 44.01(1)

Authorities referred to

Morden, "An Overview of the Rules of Civil Procedure of Ontario" (1984) 5 Adv. Q. 257
Watson, G.D., and C. Perkins, Holmested and Watson: Ontario Civil Procedure, looseleaf (Toronto: Carswell, 2002)
Williston, W.B. and R.J. Rolls, The Law of Civil Procedure, Vol. 1 (Toronto: Butterworths, 1970)

APPEAL by defendants from orders dismissing a motion to set aside an order sealing a file and granting a motion by a plaintiff for an order that the defendants comply with a sealing order.

Mark H. Arnold, for appellants Walter Hlembizky and Audrey

Hlembizky.
M. Michael Title, for respondent Denis Ivandaev.
Michael Krylov, for third party Elena Ivandaeva.

The judgment of the court was delivered by

[1] BORINS J.A.: -- Walter and Audrey Hlembizky ("the Hlembizkys") moved under rule 37.14(1)(a) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to set aside an order of Caswell J. issued under s. 137(2) of the Courts of Justice Act, R.S.O. 1990, c. C.43 sealing the "court file" in Ivandaev v. Ivandaeva, which is a family law proceeding in the Family Law Division of the Superior Court of Justice. In response to the Hlembizkys' motion, Denis Ivandaev moved for an order, inter alia, that the Hlembizkys and their solicitor, Mark Arnold, comply with the order of Caswell J. The motion judge dismissed the Hlembizkys' motion and granted Mr. Ivandaev's motion. The Hlembizkys appeal both of these orders. For the reasons that follow, I would dismiss both appeals.

Background

[2] There is no serious dispute surrounding the events that led up to the motions under appeal. However, they are quite complicated. For the purpose of my reasons, I will limit my review of the background events to those that are required to decide the appeal.

[3] Denis Ivandaev and Elena Ivandaeva ("the Ivandaevs") entered into three commercial agreements with the Hlembizkys. One agreement was for the purchase of the Hlembizkys' spa and [page772] beauty salon business. Another required Mr. Hlembizky to provide consulting services to Mr. Ivandaev. The third required Mrs. Hlembizky to train the Ivandaevs in conducting the businesses. Before the closing of the agreements, the Ivandaevs' marriage failed. As a result, on September 26, 1999, Mr. Ivandaev and his company commenced three separate proceedings against [the] Hlembizkys (the "commercial litigation") claiming that they were entitled to terminate the agreements and asking for the return of all

deposits paid under the agreements.

[4] In addition, sometime in September 1999, a petition for divorce was commenced by Mr. Ivandaev which, as well as claiming a divorce, raised issues of support and child custody. In the course of that proceeding, Mr. Ivandaev moved for certain interim relief, including an order sealing the court file on the ground that it contained "sensitive information" concerning the child and financial information about himself and his company. On the consent of all the parties to the petition, on December 16, 1999, Caswell J. granted an order that contained the following paragraph that is relevant to this appeal:

1. This court orders on consent of the parties, that:

. . . . .

(d) without prejudice to either party, this court file shall be sealed, and the previous divorce action 39403/99 at Brampton shall also be sealed, until further order of the court;

[5] The commercial litigation, which appears to have spawned a multitude of motions, has been case managed by Master Albert. On November 28, 2000, in the course of arguing a motion before Master Albert, Mr. Ivandaev's lawyer, Mr. Title, disclosed the existence of Caswell J.'s sealing order. The Hlembizkys' lawyer, Mr. Arnold, was present at this time.

[6] In November 2001, Mr. Arnold attended the Family Law Division registry. He obtained access to the court file in Ivandaev v. Ivandaeva that was the subject of the sealing order. As a result of an administrative oversight, the file had not been sealed. However, a copy of Caswell J.'s order was in the file. Even though Mr. Arnold had been made aware of the sealing order during the argument of the motion before Master Albert, and notwithstanding that a copy of the order was in the file, Mr. Arnold searched the contents of the file and made copies of 15 documents. On November 22, 2001, the Hlembizkys filed a supplementary affidavit of documents in the commercial

litigation stating that they had come into possession of the documents which Mr. Arnold had copied, which they listed in their affidavit. [page773]

[7] On December 5, 2001, Master Albert ordered that by December 10, 2001 Mr. Arnold was to "provide" Mr. Ivandaev's lawyers with the copies of the documents he had removed from the file. In her endorsement, she noted that Mr. Arnold intended to use these documents "only for purposes of impeaching a witness if inconsistent answers were given at [the commercial] trial". As she did not have jurisdiction to enforce compliance with Caswell J.'s sealing order, she stated that any motion seeking a compliance order was to be made before a Superior Court judge.

[8] In an effort to avoid the necessity of a compliance motion, Mr. Ivandaev's lawyer wrote to Mr. Arnold seeking his voluntary compliance with the sealing order. In his reply, Mr. Arnold returned the documents referred to in the supplementary affidavit of documents. However, he took the position that the sealing order was not "directed at either [himself] or [his] clients". Consequently, he wrote that neither he, nor his clients, were required to comply with it in the absence of an order of a Superior Court judge.

The Motions and the Reasons of the Motion Court Judge

[9] As a result of Mr. Arnold's position, Mr. Ivandaev moved for an order, inter alia: (1) compelling compliance with the sealing order; (2) that the information contained in the supplementary affidavit of documents "not be communicated in any way or referred to in any way by" Mr. Arnold; (3) that Mr. Arnold deliver up all copies of documents referred to in the supplementary affidavit of documents and all copies of any additional documents obtained from the court file; (4) removing Mr. Arnold as solicitor of record for the Hlembizkys.

[10] The motion judge's endorsement in respect to this motion reads as follows:

The documents obtained by Mr. Arnold solicitor for the

> defendants from court files 99 FP252918 FIS and 39403/99 after these files were sealed by the Order of Caswell J. dated December 16, 1999 shall be destroyed. The Supplementary Affidavit of Documents containing these documents shall be struck. No use of any of the information contained in those documents shall be made by either the defendants or their counsel. There is no basis to remove Mr. Arnold as counsel for the defendants.

[11] In response to the Ivandaev's motion, the Hlembizkys brought a cross-motion for an order to strike out para. 1(d) of Caswell J.'s order "to the extent that the Order covers those documents listed in the Supplementary Affidavit of Documents". The cross-motion was brought pursuant to rule 37.14(1)(a), which reads, in part, as follows: [page774]

> 37.14(1) A person who,
>
> (a) is affected by an order obtained on motion without notice;
>
> . . . . .
>
> may move to set aside or vary the order . . .

[12] The motion judge dismissed the cross-motion for the following reasons:

> Motion dismissed. Mr. Arnold has not been able to satisfy me that there has been any change in circumstances since Caswell J. made her Order which would justify setting aside her order. I do not accept that the defendants had any right to notice of the motion to seal the matrimonial files. Costs of this motion and the plaintiffs' motion heard today to the plaintiffs fixed in the amount of $2,500.00 payable forthwith.

Positions of the Parties

[13] The appellants' position is that the motion judge erred in failing to set aside Caswell J.'s sealing order and in

ordering compliance with that order. They offer a number of grounds in support of their position.

[14] As for the dismissal of their motion to set aside the sealing order, they submit that the motion judge erred:

(a) by applying an incorrect test in holding that there was an onus on the Hlembizkys to demonstrate a change in circumstances since the making of the order, whereas the onus rested on the Ivandaevs to demonstrate the necessity of a sealing order.

(b) in holding that the Hlembizkys were not entitled to receive notice of Mr. Ivandaev's motion to seal the matrimonial file.

[15] In addition, the appellants offer a number of reasons why they are persons "affected by" the sealing order within the meaning of rule 37.14(1)(a). For example, they point to a number of examples of information that they extracted from financial data contained in documents found in the matrimonial file that they say contradicts allegations in the Ivandaevs' pleadings in the commercial litigation and in the testimony of Mr. Ivandaev on his examination for discovery. They assert, therefore, that the information obtained from the matrimonial file is relevant to their defence in the commercial litigation. What I understand from these submissions is that the appellants say that they are affected by the sealing order because without the information contained in the sealed file, their defence in the commercial litigation would, or could, somehow be compromised. [page775]

[16] The appellants attack the motion judge's compliance order by asserting that because the court administration had neglected to seal the file as required by the sealing order, the "court file remained accessible to the public". They add that there was no reason that required the Hlembizkys to comply with the order because it was "a direction to the court's administration", and, as such, was not binding on them, "particularly where they had no notice of the order prior to obtaining the documents" that they listed in their

supplementary affidavit of documents.

[17] The respondents' position can be stated briefly. They submit that there is no basis on which this court can interfere with either order made by the motion judge. As the Hlembizkys are strangers to the matrimonial proceeding, they were not persons who were required to be served with Mr. Ivandaev's notice of motion to seal the court file in that proceeding and, therefore, lack locus standi, or standing, to move to have the sealing order set aside. Moreover, as this order applied to any person who sought access to the court file, neither the Hlembizkys, nor their solicitor, are exempt from it.

Analysis

[18] My analysis is focused on the appeal from the motion judge's order dismissing the appellants' appeal from her refusal to set aside or vary the sealing order. This is because the result of this appeal will determine the result of the appeal from the motion judge's compliance order. The resolution of the first appeal depends on the interpretation of rule 37.07(1), which stipulates the persons who must be served with a notice of motion, and rule 37.14(1), which governs the conditions that must prevail before a person has standing to bring a motion under that rule to set aside or vary an order. Therefore, to be successful in their appeal, the appellants must establish that:

(1) They are persons affected by Caswell J.'s sealing order.

(2) The order was obtained on a motion without notice.

(3) The motion judge erred in declining to set aside or vary the order.

[19] As I will explain, it is my opinion that the Hlembizkys have failed to establish that they were persons "affected by" the sealing order within the meaning of rules 37.07(1) and 37.14(1), with the result that the motion judge correctly dismissed their motion to set aside or vary the sealing order. It follows that she was also correct in granting the Ivandaevs'

cross-motion requiring compliance with that order. [page776]

[20] Before commencing my analysis, it will be helpful to reproduce the former Rules of Civil Practice and the current Rules of Civil Procedure relevant to this appeal.

Rules of Practice

215. An application in an action shall be made by motion, and, unless the nature of the application or the circumstances of the case render it impracticable, notice of the motion shall be given to all parties affected by the order sought.

. . . . .

219. A party affected by an ex parte order, or any party who has failed to appear on an application through accident or mistake, or insufficient notice of the application, may move to rescind or vary the order by notice within seven days and returnable before the judge or officer who made the order, or any judge or officer having jurisdiction, within ten days after the order came to his notice.

(Emphasis added)

Rules of Civil Procedure

37.07(1) The notice of motion shall be served on any person or party who will be affected by the order sought, unless these rules provide otherwise.

. . . . .

37.14(1) A person who,

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

. . . . .

38.11(1) A person who is affected by a judgment on an application made without notice or who fails to appear at the hearing of an application through accident, mistake or insufficient notice may move to set aside or vary the judgment, by a notice of motion that is served forthwith after the judgment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

(Emphasis added)

The nature and purpose of rule 37.14(1)

[21] Virtually every common law system contains a code of procedural law that regulates the procedure that governs civil [page777] proceedings from inception to appeal. Among the many functions of a procedural code, the notice-giving function introduces an essential ingredient of due process as a proceeding moves from commencement to appeal. In the context of the Rules of Civil Procedure, for example, Rule 16 requires personal service of every originating process, while providing for an alternative to personal service in appropriate circumstances. Similarly, the requirement of rule 37.07(1) that "any person or party who will be affected by the order" be given notice of the motion seeking the order, introduces an essential ingredient of due process. In this manner, rule 37.07(1) both informs, and defines, the due process purpose of rule 37.14(1) that provides the mechanism for any person, able to satisfy the conditions stipulated by the rule, to obtain an order to set aside or vary an order.

[22] Rule 37.14(1) has a long history. Its predecessor was part of Ontario's procedural rules long before the major revision of 1913. In 1881, rules of court were annexed to the Judicature Act, 37 Vict., c. 7 (Ont.), that made sweeping changes to the administration of justice. Thus, the original precursor to rule 37.14(1) read:

> 536. Any party affected by an ex parte order, except the party issuing the same, may move to rescind or vary the same before the Judge or officer who made the order, or any Judge or officer having jurisdiction, within four days from the time of its coming to his notice, or within such further time as the Court or Judge may allow, and whether it has been acted upon by the party issuing the order or not.

(Emphasis added)

[23] Rule 536 was considered by this court in Howland v. Dominion Bank (1892), 15 P.R. 56 (Ont. C.A.), affd (1893), 22 S.C.R. 130. In the context of a motion under Rule 536 to set aside an ex parte order extending the time for service of a writ of summons, at pp. 63-64 Maclennan J.A. considered both the nature of a Rule 536 motion and the standard of review on appeal from the decision of the court on the motion:

> It was not contended that the orders had been made inadvertently, or that the learned Master had been induced to make them by the use of any improper means, and, but for the recent Rule No. 536, I should have been of the opinion that there was no jurisdiction to do what was done. That Rule, however, enables any party affected by an ex parte order to move against it before the same Judge or officer who made it, within four days after it comes to his notice, or such further time as the Court or Judge may allow. It is confined to ex parte orders, and is silent as to the grounds of the motion. It follows, I think, that the party moving may support his motion by matter which was not before the Judge or officer when the order was made, and that it must be determined, not as a mere appeal from the former order, but as an original substantive application. I think, however,

that the question on such a motion is not alone whether the order ought or ought not to have been made, but also whether, having been made, it should be rescinded or varied. Taking [page778] that to be so, any change in the state of affairs or the position of the parties between the making of the order and the motion against it, is proper to be taken into consideration; and I think I would hardly have rescinded the orders in question, seeing that it was then too late to commence another action.

It is a different question, however, whether we should reverse the action of the learned Master, after it has been, twice affirmed before coming here. After the most careful consideration, I cannot see that the learned Master was so clearly wrong that his order cannot stand, and I therefore agree that the appeal should be dismissed.

(Emphasis added)

[24] A similar view of the nature of a motion to rescind or vary an ex parte order was stated by this court in Re Avery, [1952] O.R. 192, [1952] 2 D.L.R. 413 (C.A.) at p. 201 O.R.:

However, it has been decided that the question open for consideration upon a motion under the provisions of Rule 217 [subsequently, Rule 219] is not alone whether the order ought or ought not to have been made, but also whether, having been made, it should be rescinded or varied.

[25] More recently, former Rule 219 was considered in Strazisar v. Canadian Universal Insurance Co. (1981), 21 C.P.C. 51 at p. 58 (Ont. Co. Ct.), where the court said:

The nature of an application pursuant to R. 219 is stated in Holmested's Judicature Act, 4th ed., at p. 681, and is quoted with approval by Masten J.A. in Fretz v. Lafay, [1939] O.R. 273 at 275 (C.A.):

The motion to rescind or vary may be supported, or opposed, by matter not before the Judge or officer when the order was made. The motion is not an appeal, but is a substantive

> motion, and the question is not alone whether the order should have been made, but whether, having been made, it should, in view of any change in the state of affairs, or positions of the parties, be rescinded: Howland v. Dominion Bank (1892), 15 P.R. 56, at p. 63; Cairns v. Airth (1894), 16 P.R. 100, and Cousins v. Cronk (1897), 17 P.R. 348; Allison v. Breen (1900), 19 P.R. 119, 143.

See, also, W.B. Williston and R.J. Rolls, The Law of Civil Procedure, Vol. 1 (Toronto: Butterworths, 1970), at pp. 470-71.

A person affected by an order

[26] Since the inception of the rule in 1881, access to it has been available to one "affected by" the order which it is sought to rescind, set aside or vary. From 1881 to the introduction of the Rules of Civil Procedure in 1985, the rule provided that it was available to a "party affected by an ex parte order". However, in 1985 "person" replaced "party" in rule 37.14(1). In this regard, I note that in the complementary rule, rule 37.07(1), a notice of motion must be served "on any person or party who will be affected by the order sought" (emphasis added). This raises the [page779] question of whether a party may bring a motion under rule 37.14(1), or whether it is available only to a "person", or whether a person includes a party.

[27] Other than Stanley Canada Inc. v. 683481 Ontario Ltd. (1990), 74 D.L.R. (4th) 528 (Ont. Gen. Div.), the cases that have considered the rule in its different forms do not discuss the meaning of "affected by". However, a review of the cases in which a successful motion has been brought under rule 37.14(1) and rule 38.11(1), which applies to applications, or their predecessors, to set aside or vary an order suggests that the order must be one that directly affects the rights of the moving party in respect to the proprietary or economic interests of the party. In addition, there is another broad group of cases, usually arising from the sealing of a court file, in which the media has complained that its right to freedom of expression as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms has been compromised and in

which the principle of open and accessible court proceedings has been invoked. See, e.g., Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, 211 D.L.R. (4th) 193.

[28] In Stanley, the issue was whether a union and its members had standing under rule 37.14(1)(a) as persons "affected by an order obtained on motion made without notice", to move for an order setting aside an order obtained under rule 44.01(1) by the employer of the union members, Stanley, directing the sheriff to enter the defendant company's premises and to recover a quantity of steel owned by Stanley. At the time of the order, the union was on a legal strike against Stelco Inc., which had manufactured the steel for Stanley, that was stored for Stanley by the corporate defendant.

[29] The union contended that it had standing because the economic impact on Stelco of its picketing had been, and would be, diminished as a result of the rule 44.01(1) order. The union's picketing of the company precluded Stanley from removing its steel from the company's warehouse. The union contended that this represented an economic advantage to it in its strike against Stelco Inc.

[30] McKeown J., at p. 537 D.L.R., held "that the substantial economic advantage to the union members in keeping the steel in the warehouse makes them persons 'affected by an order' under rule 37.14". He also found at p. 539 D.L.R., that the "potential infringement" of its freedom of expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms "qualifies the union members as 'affected by' . . . the master's order".

[31] Stanley was applied in Weinstein v. Weinstein (Litigation Guardian of) (1997), 35 O.R. (3d) 229, 30 R.F.L. (4th) 116 (Gen. Div.). [page780] In that case a wife had settled a trust and provided that on her death the trust assets were to go to her estate, the residue of which had been bequeathed to her grandchildren under her will. Subsequently, her husband applied without notice to the grandchildren for a judgment equalizing the net family assets of himself and his

wife. The application was granted and a judgment was given transferring $2.5 million from the wife's trust to the husband. The grandchildren moved under rule 38.11(1) to set aside the judgment on the ground that they were persons "affected by a judgment on an application made without notice". In setting aside the judgment, Sheard J. held that the grandchildren were "manifestly" persons affected by the judgment and that they should have received notice of the application. Citing Stanley, he rejected the argument that an economic interest in the outcome of a proceeding does not confer standing under rule 38.11(1).

[32] The following cases which have considered whether a stranger to a proceeding was a person affected by an ex parte order, or an order made without notice to him or her, within the meaning of rule 37.14(1) or rule 38.11(1), all determine standing on the ground that the order sought to be set aside or varied affected the moving party's propriety or economic interests:

(1) The administrator of an estate of a deceased person had standing to move to set aside an order appointing an administrator ad litem to represent the estate of the deceased in an action against him commenced before his death: McLean v. Allen (1898), 18 P.R. 255 (Ont. H.C.J.).

(2) A person claiming to be entitled to moneys attached pursuant to a garnishee order obtained with notice to her, was a person affected by the order: Canada Lumber Co. v. Whatmough (1923), 23 O.W.N. 584 (C.A.).

(3) The defendant's motor vehicle insurer was affected by an order renewing a writ of summons because it could be liable to indemnify the plaintiff for any damages recovered from the defendant: Palmateer v. Back (1976), 9 O.R. (2d) 693, [1975] I.L.R. 1-677 (H.C.J.).

(4) A mortgagee's interests as a secured creditor were affected by an order expediting the sale of condominium units and requiring it to discharge its mortgage: Unical Properties v. 784688 Ontario Ltd., [1993] O.J. No. 2039 (Quicklaw)

Gen. Div.).

(5) The Government of Canada was affected by an order in a garnishee proceeding that contemplated that it would [page781] exceed its statutory authority and pay out money in a manner other than as authorized by statute: Beattie v. Ladouceur (1995), 23 O.R. (3d) 225, 13 R.F.L. (4th) 435 (Gen. Div.).

Order obtained on a motion without notice

[33] As I have explained, I have decided this appeal on the ground that the appellants were not "persons" affected by the sealing order. Strictly speaking, therefore, it is unnecessary to consider the other elements of rule 37.14(1). However, to complete my analysis I find it helpful to consider a further element of the rule, even though it does not enter into my decision.

[34] As I have observed, prior to the introduction of the present Rules of Civil Procedure in 1985 the relevant rules contained the term "ex parte order". That term was replaced by "motion without notice" upon the introduction of the present rules. This raises the question of whether the two terms have the same meaning.

[35] The meaning of an ex parte motion was considered in Broom v. Pepall (1911), 23 O.L.R. 630, 19 O.W.R. 262 (Div. Ct.) at p. 634 O.L.R. in the oft-quoted passage from the reasons of Riddell J.:

> The order made in the first instance was not an ex parte order. That term is applied only to such orders as the party obtains without the attendance of the other, without his consent, and solely on his (the applicant's) own shewing. Interim orders for injunction, orders of ne exeat, for production, and the like, may be mentioned -- and many different kinds are well known to the practitioner: some of them are to be found referred to in Muir Mackenzie (1911), pp. 754-755. But an order obtained by one party upon the written consent of another is not an ex parte order, in the

true sense or in the sense of the Rule.

[36] One of the changes to the rules made by the Rules of Civil Procedure was that of style. As pointed out by Mr. Justice Morden, the Chairman of the Special Sub-Committee that prepared the Rules of Civil Procedure, in his seminal article "An Overview of the Rules of Civil Procedure of Ontario" (1984) 5 Adv. Q. 257 at p. 261:

> Style. The general approach is to use the clearest and most direct words and expressions in carrying out the intended policy. One example of this approach is the replacement of Latin terms, such as ad litem, lis pendens, and fieri facias, with plain English. This feature of the rules may be of greater benefit to the neophyte than a member of the cognoscenti.

[37] Thus, in the same way that the term "certificate of pending litigation" (Rule 42) replaced "lis pendens" and the term "litigation guardian" (Rule 7) replaced "guardian ad litem", it would follow that "motion without notice" replaced "ex parte motion". If this is so, it appears that rule 37.14(1)(a) and rule 38.11(1) may [page782] not serve their intended due process function. I say this because both rules would not accord standing to a stranger to a proceeding who is affected by an order obtained by motion or application brought without notice to the stranger, but would grant standing only to a party where an order was obtained without notice to the party, on the reasoning that "motion without notice" has the same meaning as "ex parte motion".

[38] This problem is highlighted when the former rules are compared to the present rules. Both former rules 536 and 219 confer standing on a party affected by an ex parte order. Similarly, former rule 215 requires service of a notice of motion on "all parties affected by the order sought". On the other hand, both rules 37.14(1) and 38.11(1) confer standing on a person affected by an order or judgment obtained without notice, while rule 37.07(1) requires service of a motion on "any person or party who will be affected by the order sought" (emphasis added). In my view, in regard to rules

37.14(1) and 38.11(1) this gives rise to the question: Without notice to whom? To a stranger, being a "person"? To the other party, or parties, in the proceeding in which the order was obtained, which would be the result if an order without notice has the same meaning as ex parte order? Or, to both? From my reading of the cases, courts have not been troubled by this concern as they appear to have read rules 37.14(1) and 38.11(1) as if they read "an order or judgment obtained without notice to the non-party" seeking to set aside or vary the order or judgment impugned. For example, it is apparent from the media cases that the courts have read "an order obtained without notice" to mean without notice to the newspaper, or other media non-party, seeking to set aside a sealing order. See, e.g., National Bank of Canada v. Melnitzer (1991), 5 O.R. (3d) 234, 84 D.L.R. (4th) 315 (Gen. Div.).

[39] Because of the view that I hold with respect to the outcome of this appeal, it is unnecessary to resolve these questions. The better approach may be to refer the relevant rules to the Civil Rules Committee for its review. However, for the assistance of the Committee I would add the following observations.

[40] When the Civil Rules Committee introduced rule 37.14(1) in 1985 and substituted "person" for "party" in former Rule 219, it is reasonable to infer that the Committee intended to broaden the scope of Rule 219 to enable non-parties, as well as parties, to move to set aside or vary an order affecting them. The same may be said about rule 38.11(1). In addition, it is likely that the Committee intended "person" in rule 37.14(1) to include "party", to maintain parity with rule 37.07(1), where the expression "any person or party" is used. If these inferences are correct, the meaning of rule 37.14(1)(a) would confer standing upon any person or party affected [page783] by an order obtained on motion without notice to him or to her. In my view, to read the rule differently would result in an absurdity.

[41] The absurdity can be illustrated in this way. If "person" is read as meaning only a non-party, then a party to [a] proceeding who is affected by an order obtained without

notice to him or to her, or who fails to appear on a motion through accident, mistake or insufficient notice, has no standing under rule 37.14(1). If "motion without notice" is read as "ex parte motion", then a non-party's standing under rule 37.14(1) would be limited to a motion brought without notice to one of the parties to a proceeding.

[42] I doubt that these were the intended results when rule 37.14(1) was introduced in 1985. In this regard, it is helpful to note that in G.D. Watson and C. Perkins, Holmested & Watson: Ontario Civil Procedure, looseleaf (Toronto: Carswell, 2002) at pp. 37-55, in their discussion of rule 37.14(1)(a), the authors consider that its purpose is to permit "a person affected by an order obtained without notice to him or her" to seek to set aside or vary the order. As I observed earlier, the giving of notice to those whose rights may be affected by the result of the motion and affording them the opportunity to participate in the motion, is an essential ingredient of due process. As I have illustrated, as worded the rule does not clearly fulfill its purpose. Of course, it is for the Civil Rules Committee, and not for the court, to rewrite the rule if necessary.

[43] A similar analysis applies to rule 38.11(1), which the Civil Rules Committee may also wish to review.

Conclusion

[44] In summary, rule 37.14(1)(a), under which the appellants moved to set aside Caswell J.'s sealing order, is designed to enable an order to be set aside or varied by those who have, or can acquire, standing under the rule. It does not give standing to non-parties to the proceeding in which the order was obtained, such as the appellants, or possibly to parties to the proceeding, who are unable to satisfy the two conditions contained in the rule. Thus, a non-party who desires to set aside or vary an order must show that he or she has a direct interest in doing so, in the sense of establishing that he or she is affected by the order, and that the order was obtained without notice to him or her. As I have indicated, in the view that I hold of the merits of this appeal, it is sufficient to consider only whether the appellants are affected by the

sealing order.

[45] In my view, the starting point in determining whether the appellants are affected by the sealing order is rule 37.07(1), which provides that a notice of motion "shall be served on any person or party who will be affected by the order sought". I say [page784] this because the term "affected by" in rule 37.07(1) necessarily includes the same meaning of the term in rule 37.14(1). If the appellants should have received notice of the sealing order motion as persons who would be affected by it, it would follow that they have standing under rule 37.14(1)(a) to set it aside.

[46] I am satisfied that the possibility that financial information about Mr. Ivandaev, or his companies, contained in the matrimonial court file might have assisted the appellants in their defence of the commercial litigation, thus requiring service of the notice of motion on the appellants, is far removed from the direct effects on the proprietary or economic interests of a non-party considered in the cases that I have reviewed that have been found sufficient to constitute the non-party a person affected by an order or judgment within the meaning of rules 37.07(1), 37.14(1) and 38.11(1). Although I acknowledge that "affected" is capable of a very large meaning, and it may be said that the information which the appellants' counsel obtained from the sealed file may be of assistance to the appellants in their defence of the commercial litigation, that is not the effect contemplated by the rule. Moreover, it is to be remembered that the broad discovery and production mechanism of the Rules of Civil Procedure is available to the appellants to enable them to obtain from Mr. Ivandaeva information relevant to the commercial litigation.

[47] Nor can it be said that any Charter right of the appellants has been infringed by the sealing order, similar to the Charter rights affected by the sealing orders considered in the media cases.

[48] It follows, therefore, that as the appellants are not affected by the sealing order they did not have standing under rule 37.14(1) to move to set aside or vary the order.

Consequently, the motion judge was correct in her finding that the appellants were not persons upon whom it was necessary to serve the notice of motion requesting an order to seal the court file in Ivandaev v. Ivandaeva.

[49] Having reached this conclusion, it is unnecessary to decide whether the motion judge applied the correct standard of review of Caswell J.'s sealing order under rule 37.14(1)(2), nor is it necessary to interpret "an order obtained on motion without notice".

[50] In addition, I would add that there is a very different category of interest that does not fall within the category of proprietary or economic interest that would constitute a non-party a person affected by an order, thereby requiring that a notice of motion be served upon him or her. I refer, for example, to essentially procedural motions to add a person as a party to a proceeding, to obtain discovery or production from a non-party or to obtain leave to commence a third party claim out of time. Clearly, the appellants do not fall into this category. [page785]

[51] From the foregoing discussion, it also follows that the motion judge was correct in ordering compliance with the sealing order.

Result

[52] For all the above reasons, I would dismiss the appeals with costs. The parties are invited to make written submissions about the scale and amount of costs. The respondents are to file their submissions no later than 15 days after the release of these reasons, and the appellants' submissions are to be filed no later than ten days thereafter.

Appeal dismissed.

TAB 6

CITATION: Stegenga v. Jans, 2021 ONSC 7898
COURT FILE NO.: 16-59247
DATE: 20211213

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Morgan Stegenga, Plaintiff

AND:

Jeffrey Jans, Budget Environmental Disposal Inc., Wesley Pennings, Calibre Concrete Inc. operating as Johns Concrete Forming Inc., Her Majesty the Queen in the Right of the Province of Ontario represented by the Minister of Transportation for the Province of Ontario, The City of Hamilton and Economical Mutual Insurance Company, Defendants

BEFORE: Justice D.A. Broad

COUNSEL: M. Edward Key and Veronica Gorrell for the Defendants Wesley Pennings and Calibre Concrete Inc. operating as Johns Concrete Forming Inc., Defendants/Moving Parties

Marie Sydney, for the Defendant Her Majesty the Queen in the Right of the Province of Ontario represented by the Minister of Transportation for the Province of Ontario, Defendant/Responding Party

HEARD: October 25, 2021

ENDORSEMENT

Motion

[1] The defendants, Wesley Pennings and Calibre Concrete Inc. operating as Johns Concrete Forming Inc., (the "moving parties") have brought a motion for an order:

(a) compelling the Crown to serve a further and better List of Documents; and

(b) compelling the Crown to produce a representative to attend at an examination for discovery.

[2] The Crown takes the position that it is not compellable to provide discovery in any form in a claim under the *PTHIA*.

Threshold Issue

[3] The threshold issue on this motion is whether the defendant Her Majesty the Queen in the Right of the Province of Ontario represented by the Minister of Transportation for the Province of Ontario (the "Crown"), in a claim made against it under the *Public Transportation and Highway Improvement Act*, R.S.O. 1990, c. P.50 (the "*PTHIA*") can be compelled to submit to documentary and oral discovery..

[4] There is an apparent conflict in the jurisprudence on the question of whether the Crown can be compelled to give documentary and oral discovery in a claim under the *PTHIA*. The Court's tasks on the threshold issue are firstly, to determine whether the apparent conflict in the jurisprudence respecting the Crown's discovery obligations can be resolved, and secondly, if the conflict cannot be resolved, to consider and apply the convention respecting horizontal judicial comity and the doctrine of *stare decisis* to determine the issue.

[5] The Court need only go on to determine whether all or part of the discovery sought by the moving parties should be ordered in the circumstances if it is determined, as a matter of law, that the Crown can be compelled to give documentary and oral discovery in an action under the *PTHIA*.

Background

[6] The action arises from a motor vehicle collision in 2011 on Westover Road/Highway 52 near Highway 8 in Hamilton, Ontario. The intersection where the collision occurred was part of a system of intersections in the area known as "Peter's Corners."

[7] The plaintiff, a 14-year-old minor child at the time, was a passenger in a vehicle owned and operated by the defendant Jeffrey Jans. The defendant Wesley Pennings was the driver of the vehicle that collided with the Jans vehicle.

[8] The collision occurred when Jans, after stopping at a full stop sign, pulled into the intersection intending to cross the highway that had an 80 km/h speed limit. The Jans vehicle was struck by the Penning's vehicle travelling on the perpendicular highway.

[9] Jans claimed that he did not see Pennings' vehicle because his view was restricted by the pillar of his vehicle and contended that the angle of the intersection contributed to the other vehicle being hidden behind the pillar.

[10] The plaintiff commenced the action by Statement of Claim issued October 24, 2016.

[11] The plaintiff named the Crown as a defendant pursuant to the *PTHIA* essentially alleging negligent design and traffic control of the intersection. The owners and drivers of the vehicles involved in the collision and named as defendants cross-claimed against the Crown, essentially on the same basis.

[12] Studies and plans for the reconstruction of the complex of intersections known as Peter's Corners existed within the Ministry of Transportation for some time prior to the accident and in November, 2009 a Preliminary Design Report was produced respecting the need for and proposed method of reconstructing the roads and intersections in the area.

[13] The 2009 Report on the intersection indicated that the historical number of collisions at the intersection where the accident occurred fell below the collision threshold for intersection improvements.

[14] Peter's Corners, including the intersection where the collision occurred, were reconstructed into a roundabout by the summer of 2012, approximately six months after the accident.

[15] The 2009 Report and other documents, including maintenance records and Ontario Provincial Police investigation records, were voluntarily disclosed by the Crown prior to examinations for discovery that took place in 2018. Counsel for the Crown at that time made it clear that it was not volunteering any other discovery.

[16] The Crown participated in examinations for discovery of other parties to the action but did not produce a representative for examination.

[17] The motion is supported by the affidavit of Stephen Schenke, counsel for the defendants Jans and Budget Environmental Disposal Inc. Mr. Schenke deposed that he and counsel for the Pennings defendants have jointly retained a road authority expert (the "road expert") who has communicated that he requires additional documents to render his opinions in the case. A list of the additional documents which the road expert requires was provided to counsel for the Crown by letter dated March 22, 2021. In summary, Mr. Schenke deposed that the documents are requested as it is apparent from the documents produced to date that the Crown was aware of problems with the subject intersection prior to February, 2001 and chose not to remediate the problems until the spring of 2012. He says that the reasonableness of that course of action by the Crown will be at issue at trial.

[18] The Crown disputes that the additional documentary production sought by the moving parties is relevant and that the scope of the requested discovery is proportional to the issues in the action.

Legal Framework respecting discovery of the Crown under *PTHIA*

(a) No right of discovery against the Crown at common law

[19] In *Abou-Elmaati v. Canada (Attorney-General)*, 2011 ONCA 95, 104 O.R. (3d) 81, the Court of Appeal confirmed at para. 18 that, at common law, there is no right of pre-trial discovery against the Crown and that in the absence of jurisdiction provided by statute, the Superior Court lacks jurisdiction to compel production from the Crown in a civil proceeding. This principle is often referred to as the Crown prerogative.

(b) Legislation

[20] Section 71 of the *Legislation Act 2006*, S.O. 2006, c. 21, Sched. F. stipulates that 71 "No Act or regulation binds Her Majesty or affects Her Majesty's rights or prerogatives unless it expressly states an intention to do so."

[21] Neither the *Courts of Justice Act* nor the *Rules of Civil Procedure* expressly provide that they bind the Crown.

[22] Pursuant to ss. 33(1) of the *PTHIA* the Ministry of Transportation has an obligation to maintain and keep The King's Highway in repair.

[23] Section. 33(2) of the *PTHIA* provides that, in the case of default by the Ministry to keep The King's Highway in repair, the Crown is liable for all damage sustained by any person by reason of the default.

[24] Section. 33(7) of the *PTHIA* provides that:

> (7) In an action against the Crown under this section, the defendant shall be described as "Her Majesty the Queen in right of the Province of Ontario, represented by the Minister of Transportation for the Province of Ontario" in English or as "Sa Majesté du chef de l'Ontario, représentée par le Ministre des Transports de l'Ontario" in French, and it is not necessary to proceed by petition of right or to procure the fiat of the Lieutenant Governor or the consent of the Attorney General before commencing the action, but every such action may be instituted and carried on and judgment may be given thereon in the same manner as in an action brought by a subject of Her Majesty against another subject.

[25] The *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 (the "*PACA*"), which was in force at the time of commencement of the action in the case at bar, provided at s. 2(1) that:

> "This Act does not affect and is subject to, … the *Public Transportation and Highway Improvement Act*…"

[26] Section 8 of the *PACA* provides as follows with respect to discovery in a proceeding against the Crown:

> In a proceeding against the Crown, the rules of court as to discovery and inspection of documents and examination for discovery apply in the same manner as if the Crown were a corporation, except that,

(a) the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest;

(b) the person who shall attend to be examined for discovery shall be an official designated by the Deputy Attorney General; and

(c) the Crown is not required to deliver an affidavit on production of documents for discovery and inspection, but a list of the documents that the Crown may be required to produce, signed by the Deputy Attorney General, shall be delivered.

(c) Jurisprudence denying a right of discovery against the Crown in respect of claims for non-repair of highways

[27] In *Longo v. Ontario (Minister of Highways)*, [1958] O.J. No. 402, the Court of Appeal dealt with the question of whether or not a plaintiff in an action against the Crown under *The Highway Improvement Act*, S.O. Chap. 43, 1957, *(*the *"HIA")*, which was the predecessor to the *PTHIA*, had the right to examine an officer of the Crown for discovery.

[28] Laidlaw, J.A., writing for the panel, made reference to s. 32(7) of the *HIA*, which was substantially identical to s. 33(7) of the *PTHIA*, including the words "every such action may be instituted and carried on and judgment may be given thereon in the same manner as in an action brought by a subject of Her Majesty against another subject": at para. 2.

[29] Laidlaw J.A. observed that s. 32(7) of the *HIA* is remedial legislation of a procedural character, enabling a party seeking to enforce a claim under the *HIA*, to bring the action in the ordinary courts and in accordance with the ordinary procedure in substitution for proceedings by way of petition of right. However, he held that the provision "does not create a right or remedy of discovery," observing that "if such a right or remedy is to be found it must be found in the Rules of Practice of this Court."

[30] Laidlaw J.A. went on to note at para. 3 that there are two things that bore heavily against the appellant's claim for a right of discovery against the Crown: first, that whenever in other jurisdictions it was sought to give the remedy of discovery to a party as against the

Crown, there was specific provision made for such a remedy; and second, that while the *Proceedings Against the Crown Act* of 1952 had not been declared and brought into force, the observation may be made that by s. 10 of that statute, express provision was made in respect of proceedings against the Crown for examination for discovery of the Crown officer. Laidlaw, J.A. stated "it may be properly concluded that in the absence of an express provision of a like kind to what is found in s. 10 of the *Proceedings against the Crown Act,* that no such examination for discovery from an officer of the Crown can be had."

[31] Laidlaw J.A. concluded that the remedy of discovery against an officer of the Crown is a new, important and far-reaching remedy, with very wide application, and that "in the absence of express provisions creating the remedy now sought by the appellant, I would hold that it does not exist."

[32] The case of *Ratkevicius v. R.* [1966] 2 O.R. 774 (Master) dealt specifically with the interplay between the *HIA* and s. 10 (now s. 8) of the *PACA* on the question of whether a plaintiff in an action under the *HIA* could compel documentary and oral discovery against the Crown. Senior Master Rodger noted at para. 5 the submission of counsel for the Crown that by virtue s. of 2(1) the *PACA* "does not affect and is subject to" a number of statutes including the *HIA*, and that in *Longo* the Court of Appeal held that the *HIA* did not create any right of discovery.

[33] At paragraph 7 Senior Master Rodger concluded that, as the action was brought under the *HIA*, the application seeking discovery against the Crown must be dismissed.

[34] Although it did not deal with an action under the *HIA* or *PTHIA* but rather dealt with an action under *The Motor Vehicle Accident Claims Act,* R.S.O 1990, c. 1970, c. 281, (the "*MVACA*") the case of *Wren v. Ontario (Superintendent of Insurance)*, [1976] O.J. No. 2012 (S.C.) bears on the issue of whether discovery against the Crown may be compelled in an action under the *PTHIA*. This is because the *MVACA* was stipulated to be unaffected by the *PACA* in the same manner as the *PTHIA* is currently by virtue of s. 2(1) of *PACA.*

[35] The plaintiff in *Wren* sought to strike out the statement of defence of the defendant Superintendent of Insurance for failure to attend on an examination for discovery

[36] Cory, J. (as he then was), after, finding that the Superintendent of Insurance was a Crown agent (see para. 15), held as follows at paras. 23-26:

> At common law, there exists a royal prerogative and as a result of it the Crown cannot be compelled to give discovery. Pursuant to the provisions of *The Crown Agency Act*, that prerogative would appear to apply to the Superintendent.
>
> The royal prerogative exists unless it is taken away by clear and precise language of a statute.
>
> *The Proceedings Against the Crown Act*, R.S.O. 1970, c. 365 specifically provides in s. 2 [am. 1973, c. 10, s. 17], that it does not affect *The Motor Vehicle Accident Claims Act*.
>
> It would seem, therefore, that the Legislature specifically provided that the provisions of *The Proceedings Against the Crown Act* were not to be applicable in those actions where the Superintendent was named as defendant.

[37] Cory J. observed that, whereas specific provisions are made in the *PACA* with regard to discovery and production by or on behalf of the Crown, there was no comparable provision providing for production and discovery of the Superintendent of Insurance in the *MVACA*: at para. 27.

[38] At para. 28 he concluded that the Superintendent was not compellable upon an examination for discovery.

[39] In the more recent case of *Cristante v. Grubb*, 2016 ONSC 5029, Mitrow, J. considered the question of whether a claimant against the Crown under the *PTHIA* had a right of discovery against the Crown. Mitrow J. began his analysis with the observation that at common law there was no right of pretrial discovery against the Crown and that the Crown's immunity from the discovery process, described as a royal prerogative, exists unless it is taken away by clear and precise language of the statute (citing *Wren, Longo* and *Abou-Elmaati* as well as s. 71 of the *Legislation Act*).

[40] Mitrow, J. followed *Longo* and held that in third-party claim in the case, which he found had been commenced under *PTHIA* and not under *PACA*, the Crown's participation in the discovery process was a voluntary and not a compellable process: at para. 24. He considered s. 2(1) of *PACA* and rejected the submission of the defendants seeking discovery against the Crown that it was not a foregone conclusion that an action commenced pursuant to *PTHIA* may not also be subject to *PACA*.

[41] Parenthetically, it is noted for completeness that in *Michigan Fruit Co. v R.* [1937] O.W.N. 685 (Master), a case which predated *Longo*, it was held that a claimant under the *HIA* did not have a right of discovery against the Crown. The Master held that there was nothing in s. 5 of the *HIA* then in force (which provided that "but every such action may be instituted and carried on…in the same manner as in an action brought by a subject of His Majesty against another subject") which took away by express words the prerogative of the Crown to refuse production and "it is only where such express words appear that this prerogative can be taken away."

Case granting a right of discovery against the Crown in respect of claims for non-repair of highways

[42] The case of *Taylor v. Mayes*, 2019 ONSC 5651, a decision of Ryan Bell J. was the only case cited by counsel in which it was held that parties advancing a claim against the Crown under the *PTHIA* (in that case defendants who had issued a third-party claim against the Crown alleging a lack of winter maintenance of the highway) were entitled to compel the Crown to submit to documentary and oral discovery.

[43] Counsel did not draw the court's attention to any cases which have followed *Taylor* on the issue, and I have likewise been unable to discover any.

[44] I find that the circumstances in *Taylor* are functionally indistinguishable from those in the case at bar for the purpose of the motion.

[45] Ryan Bell, J. began her analysis in *Taylor* by noting at para. 30, citing *Abou-Elmaati*, that at common law there is no right of pre-trial discovery against the Crown and apart from

the jurisdiction provided by statute, the Superior Court does not have jurisdiction to compel production from the Crown in a civil proceeding,

[46] The Crown submitted, in reliance on *Cristante*, that by virtue of s. 2(1) of *PACA* which provides that it "does not affect and is subject to" the *PTHIA*, there is no right to compel discovery of the Crown in actions commenced under s. 33 of *PTHIA*, and the *PTHIA* cannot be supplemented by *PACA*.

[47] At para. 33 Ryan Bell J. rejected the Crown's submission, finding that its reading of the *PTHIA* was unduly narrow. At para. 35 she distinguished *Longo* on the basis that it was decided before the enactment of *PACA* and particularly s. 8 therein which provides that, with certain qualifications, the rules of court as to discovery applied to the Crown "in the same manner as if the Crown were a corporation." She concluded that, on a plain reading of s. 33(7) of the *PTHIA*, the phrase "carried on in the same manner" includes the discovery obligations to which all parties are subject.

[48] At para. 38 Ryan Bell, J. held that, in applying the normal principles of statutory interpretation to both the *PACA* and the *PTHIA*, s. 33(7) of the *PTHIA* contemplates discovery rights against the Crown in actions commenced against it under that statute.

[49] She added at para. 39 that, while *PACA* is expressly subject to the *PTHIA*, there is no inconsistency between the two statutes on the issue of discovery rights against the Crown and that s. 8 of the *PACA* applies generally to "a proceeding against the Crown" including a proceeding commenced under the *PTHIA*.

Judicial Comity and Stare Decisis

[50] It is recognized at common law that there is a strong convention of horizontal judicial comity. In the case of *Horne v. Horne Estate*, [1986] O.J. No. 243 (H.C.J.) Galligan, J. observed that until the Court of Appeal has had the opportunity to deal with an issue, "it is desirable that there be consistency of decisions among judges" and that "a decision of a court of co-ordinate jurisdiction ought to be followed in the absence of strong reason to the contrary."

[51] Strathy, J. (as he then was) addressed the issue of judicial comity in the case of *R. v. Scarlett*, 2013 ONSC 562 at para. 43 as follows:

> The decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them: see *Hansard Spruce Mills Ltd., Re*, [1954] 4 D.L.R. 590 (B.C. S.C.); *R. v. Northern Electric Co.*, [1955] O.R. 431, [1955] 3 D.L.R. 449 (Ont. H.C.) at para. 31. Reasons to depart from a decision, referred to in *Hansard Spruce Mills Ltd., Re*, include (a) that the validity of the judgment has been affected by subsequent decisions; (b) that the judge overlooked some binding case law or a relevant statute; or (c) that the decision was otherwise made without full consideration. These circumstances could be summed up by saying that the judgment should be followed unless the subsequent judge is satisfied that it was plainly wrong.

[52] In the case at bar I am faced with a sharp divergence in the jurisprudence between a line of cases commencing with the early case of *Michigan Fruit Co.* and continuing with the Court of Appeal decision in *Longo* and other cases following it, in which it has been held that a party advancing a claim against the Crown under *PTHIA* (and its predecessor *HIA*) cannot compel documentary and oral discovery against the Crown, and the most recent reported case considering the issue, *Taylor*, holding that such a claimant may compel such discovery by the Crown.

[53] On the one hand I am subject to the convention of judicial comity providing that I should follow the decision of Ryan Bell J. in *Taylor* unless there is a cogent reason to depart from it. On the other hand, I am bound by the doctrine of *stare decisis* to follow the decision of the Court of Appeal in *Longo* unless I determine it is distinguishable on the ground cited by Ryan Bell, J. in *Taylor*, or on some other ground.

[54] The following observations respecting the doctrine of *stare decisis* made by Steel and Freedman, JJ.A. of the Manitoba Court of Appeal in the case of *R. v. Neves*, 2005 MBCA 112, at para. 90 are important and relevant to the dilemma faced by the Court in the case at bar:

> The principle of *stare decisis* is a bedrock of our judicial system. There is great value in certainty in the law, but there is also, of course, an expectation that the law as expounded by judges will be correct, and certainly not knowingly incorrect, which would result when a decision felt to be wrong is not overruled. The tension when these basic principles are in conflict can be profound.

Determination

[55] I have concluded that I am bound by the Court of Appeal's decision in *Longo* as it has been understood and applied by the subsequent authorities including *Ratkevicius* and *Cristante*.

[56] I am unable to find that *Longo* is distinguishable on the basis found in *Taylor* or on any other ground and I am therefore bound by it.

[57] Ryan Bell, J. distinguished *Longo* on the basis that it was decided before *PACA* came into force.

[58] It is noteworthy that *Wren* appears not to have been cited to Justice Ryan Bell. In *Wren* Cory, J. dealt head-on with the effect of the *PACA* on discovery rights against the Crown and found that it specifically provided in s. 2 that it did not affect the *MVACA* and therefore the provisions of *PACA* respecting discovery against the Crown were not applicable to actions under that Act.

[59] In my view, given that the *PTHIA* and the *MVACA* were both excluded from the application of *PACA*, the analysis is identical in respect of actions commenced under each of these statutes.

[60] Mitrow J. in *Cristante* dealt specifically with the effect of s. 2 of *PACA* and concluded that the Crown could not be compelled to submit to discovery in an action under *PTHIA* by virtue of that section, notwithstanding the *PACA*.

[61] Ryan Bell J. did not specifically distinguish *Cristante* in *Taylor*, nor did she address the principle of judicial comity in relation to it.

[62] Finally, it is noted that, although *PACA* was not in force at the time that *Longo* was decided, the Court of Appeal did make reference to it as an example of a statute that specifically included an express provision for discovery against the Crown, unlike the *HIA* in that case.

[63] I conclude that observance of the doctrine of *stare decision* in relation to *Longo* precludes the application of the convention of judicial comity in relation to *Taylor*. I find, with respect to Ryan Bell J., that there is a cogent reason not to follow *Taylor* in these circumstances.

Disposition

[64] For the foregoing reasons, I find that the moving parties may not compel documentary or oral discovery against the Crown. The motion is therefore dismissed.

Costs

[65] The parties are strongly urged to settle the issue of the costs of the motion.

[66] If the parties are unable to do so, the responding party may make written submissions as to the costs of the motion within 14 days of the release of this Endorsement. The moving parties shall have 10 days after receipt of the responding party's submissions to respond. The written submissions shall not exceed four (4) double-spaced pages exclusive of attachments such as Bills of Costs, Costs Outlines and Offers to Settle. All such written submissions are to be forwarded to me via email to the Trial Coordinator at Brantford, at the same email address as was utilized for the release of this Endorsement.

D.A. Broad, J.

Date: December 13, 2021

TAB 7

CITATION: Apotex Inc. v. Pfizer Ireland Pharmaceuticals, 2021 ONSC 6345
COURT FILE NO.: CV-14-514915
DATE: 20210927

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
APOTEX INC. Plaintiff	*Harry. B. Radomski, Nando De Luca and Jerry Topolski*, lawyers for the Plaintiff
- and -	
PFIZER IRELAND PHARMACEUTICALS, PFIZER INC., PFIZER EXPORT COMPANY, PFIZER GLOBAL SUPPLY, PFIZER OVERSEAS LLC, PFIZER PGM AND PFIZER CANADA ULC Defendants	*Orestes Pasparakis, Daniel Daniele, and David Yi*, lawyers for the Defendants
AND BETWEEN:	
PFIZER CANADA ULC AND PFIZER PRODUCTS INC. Plaintiffs by Counterclaim	*Orestes Pasparakis, Daniel Daniele, and David Yi*, lawyers for the Plaintiffs by Counterclaim
- and -	
APOTEX INC. Defendant by Counterclaim	*Harry. B. Radomski, Nando De Luca and Jerry Topolski*, lawyers for the Defendant by Counterclaim
	HEARD: September 10, 2021

REASONS FOR DECISION

DIAMOND J.:

Overview

[1] In or around mid-May 1994, the defendant Pfizer Island Pharmaceuticals ("Pfizer") applied and ultimately obtained a Canadian Patent No. 2,163,446 (the "446 Patent") for the use of sildenafil citrate in the treatment of erectile dysfunction. Sildenafil citrate is the active ingredient in Viagra, a drug manufactured, marketed and sold by Pfizer for the last few decades.

[2] Pfizer then filed a Form IV listing the 446 Patent on the Health Canada Registrar in relation to Viagra. The plaintiff Apotex Inc. ("Apotex") subsequently sought to market a generic drug version of Viagra in Canada, and served Pfizer with a Notice of Allegation alleging that the 446 Patent was invalid. Litigation ensued in the Federal Court (including similar proceedings brought by other generic drug companies), and Apotex was ultimately successful in obtaining an order invalidating the 446 Patent pursuant to section 60 of the *Patent Act* R.S.C. 1985 c.P4. As a result, and under the terms of the *Patent Act*, Pfizer's 446 Patent was declared and remains void *ab initio*.

[3] Apotex has commenced this proceeding seeking, *inter alia*, treble damages and double costs from Pfizer pursuant to various statutory and common law causes of action (including the provincial *Statute of Monopolies* and the common law torts of conspiracy, unjust enrichment and nuisance). The underlying basis for Apotex's claims is that the steps Pfizer took to obtain, list and enforce its 446 Patent rights were all unlawful and resulted in Pfizer obtaining, operating and benefitting from an illegal monopoly.

[4] Relying upon the recent decision of Justice Schabas in *Apotex Inc. v. Eli Lilly Canada Inc*. 2021 ONSC 1588 (CanLII) (the "*Zyprexa* decision"), Pfizer (on behalf of all defendants) brings a motion seeking summary judgment dismissing this proceeding in its entirety. Of note, Pfizer conceded at the outset of the hearing of its motion that in the event its request for summary judgment was granted, its counterclaim would prove to be moot, and Pfizer would agree to a dismissal of its counterclaim as well.

[5] Pfizer's motion was argued before me during a full day hearing. At the conclusion of the hearing, I took my decision under reserve.

Summary Judgment

[6] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the Court shall grant a summary judgment if the Court is satisfied that "there is no genuine issue requiring a trial with respect to a claim or defence." As a result of the amendments to Rule 20 introduced in 2010, the powers of the Court to grant summary judgment have been enhanced to include, *inter alia*, weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence.

[7] In *Hryniak v. Mauldin* 2014 SCC 7, the Supreme Court of Canada held that on a motion for summary judgment, the Court must first determine whether there is a genuine issue requiring a trial based only upon the record before the Court, without using the fact-

finding powers set out in the 2010 amendments. The Court may only grant summary judgment if there is sufficient evidence to justly and fairly adjudicate the dispute, and if summary judgment would be an affordable, timely and proportionate procedure.

[8] The overarching principle is proportionality. Summary judgment ought to be granted unless the added expense and delay of a trial is necessary for a fair and just adjudication of the case.

[9] As held in *Sanzone v. Schechter* 2016 ONCA 566 (CanLII), only after the moving party discharges its evidentiary burden of proving that there is no genuine issue requiring a trial for resolution does the burden then shift to the responding party to prove that its claim has a real chance of success. The Court must address the threshold question of whether the moving party discharges its evidentiary obligation to put its best foot forward by adducing evidence on the merits.

[10] Nothing in *Hyrniak* or the subsequent jurisprudence displaces the onus upon a party responding to a motion for summary judgment to "lead trump or risk losing." The Court must assume that the parties have put their best foot forward and placed all relevant evidence in the record. If the Court determines that there is a genuine issue requiring a trial, the inquiry does not end there and the analysis proceeds to whether a Court can determine if the need for a trial may be avoided by use of its expanded fact-finding powers.

[11] As recently held by the Court of Appeal for Ontario in *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98 (CanLII), when hearing a motion for summary judgment, the Court must follow the analytical process set out in *Hryniak* and carefully analyze all the evidence relied upon by a responding party in his/her efforts to show the presence of a serious issue requiring a trial. First, the Court must consider whether there is a genuine issue requiring a trial based on the record alone and without utilizing the enhanced fact-finding powers in Rule 20.04 (2.1) of the *Rules of Civil Procedure*.

[12] If the Court finds the presence of a genuine issue requiring a trial on the record alone, then the second question is whether the need for a trial can be avoided by using the said fact-finding powers. In his recent decision *Oxygen Working Capital Corp. v Mouzakitis* 2021 ONSC 1907 (CanLII), Justice Myers posed the following (non-exhaustive) questions for the Court to consider at the second stage:

a) Will making findings of fact on the evidence before the court provide a fair and just result as compared to a mini-trial or a trial?

b) Does the material before the court illuminate the factual issue sufficiently to allow the judge to make findings of fact and credibility?

c) Is there something missing that is needed for basic fairness despite the fact that the parties chose not to put that evidence forward?

d) Do considerations of the litigation as a whole mandate some further process before making factual or credibility findings?

The scheduling of this motion

[13] In his Endorsement released on March 12, 2021, Justice Myers (who is case managing this action) adjourned the trial of this action originally scheduled for 20 days to commence on September 27, 2021, and permitted Pfizer to bring its motion for summary judgment. In coming to his decision, Justice Myers reviewed the then-recently released *Zyprexa* decision and held as follows:

> "It seems to me that the concepts behind the doctrines of *res judicata*, issue estoppel, and abuse of process may be engaged here. If these issues of law have been conclusively decided against Apotex's position, institutional concerns both as to legitimacy and resource allocation take on increased prominence.
>
> ……
>
> Mr. Brodkin submits that on the facts, the case before Schabas J. differed from this case. The patent before Schabas J. had been found to have been valid until the Supreme Court of Canada changed the law and made the patent invalid. There is no or little fault on the patent holder trying to enforce its patent which was valid under the prevailing law at the time. Here, the patent was found to have been invalid on a normal patent law basis. Pfizer failed to adequately disclose its invention and the Supreme Court of Canada likened the situation to someone 'gaming the system'.
>
> I am not deciding the case today. But I am dubious that this is a distinction that makes any difference. First, Schabas J. found expressly that his ruling did not turn on the motive of the patent holder. Moreover, the validity of Pfizer's patent had been upheld all the way up to the Supreme Court of Canada too. Although the *Pfizer* case may not have signaled a major doctrinal shift in the law, both lower courts had upheld the patent until the SCC held it to violate the statute. That must have been a change in the law as seen by the two lower courts.
>
> This is the normal stuff of the law. One challenges a patent and can lose and lose on appeal and then finally win in the SCC. I cannot see that parsing the degree to which the SCC changed the law in invalidating a particular patent could make a difference to the interpretation of whether the generic drug compulsory licensing regulations are a complete code or to the interpretation of the pre-confederation statute.
>
> Finally, and perhaps most significant, I asked Mr. Brodkin whether the factual distinction that he was making could be ascertained simply by

> reading the relevant SCC decisions. He agreed that this was likely the case. So, the factual issue that could arise, is not one that is likely to prevent summary resolution.
>
> Mr. Pasparakis expressly submitted that if the case is resolved summarily on the foregoing bases, there would be major trial savings as it would no longer be necessary for Pfizer to mount defences based on the validity of a different patent that they assert and major accounting issues associated with proof of damages. I take this to mean that the counterclaim will be withdrawn if summary judgment is granted dismissing the claim. If that is not correct and a trial is still required on the counterclaim, counsel are to advise me forthwith.
>
> I am satisfied that in light of the decision by Schabas J. a motion for summary judgment could very well resolve this case much more quickly and cheaply than a 20-day trial. Depending on the outcome, this case might be available to the Court of Appeal with Justice Schabas's case. Inviting a 20-day trial to re-visit questions of law already decided against the plaintiff by this court does not strike me as apt based on the foregoing doctrinal, resource allocation, efficiency, and affordability concerns.
>
> I am not finding that there is no serious issue requiring a trial. But I am four years further along in understanding these cases. Earlier submissions of great factual complexity seem to have been overstated or simply resolved with time. I have much less concern today about the risk of facts overwhelming the judge's ability to resolve the issues summarily. But that will be for the judge who hears the motion to decide."

[14] As found by Justice Myers, the issue for this Court to decide is whether the *Zyprexa* decision renders Apotex's claims in this action as moot. It is therefore necessary to review the underpinning facts and Justice Schabas' legal analysis in the *Zyprexa* decision to assess whether summary judgment ought to be granted in this proceeding.

The *Zyprexa* decision

[15] There is no dispute that the claims advanced by Apotex in the *Zyprexa* case are entirely consistent with the positions it takes in this proceeding, and in a number of other outstanding proceedings it has initiated against drug innovator companies over the last decade. In each of these proceedings, the main thrust of Apotex's argument can be summarized as follows: if a drug innovator company (such as Pfizer) has excluded generic drug manufacturing companies (such as Apotex) out of the market due to a registered patent having subsequently been found invalid and void *ab initio*, Apotex is entitled to resulting common law and statutory damages.

[16] In the *Zyprexa* case, the drug in question was Olanzapine. Eli Lilly Canada Inc. ("Eli Lilly") filed and obtained a patent for Olanzapine, which was marketed by Eli Lilly under the name Zyprexa.

[17] Litigation subsequently ensued between Apotex and Eli Lilly dealing with the alleged invalidity of the Olanzapine patent. Novopharm Limited (another generic drug company) also commenced its own action against Eli Lilly seeking relief similar to what was claimed by Apotex. Ultimately, Eli Lilly's Olanzapine patent was held to be invalid (ie. void *ab initio*).

[18] Apotex then sued Eli Lilly in this Court seeking damages on essentially the same legal theories and causes of action advanced in this proceeding. Eli Lilly brought a motion for summary judgment before Justice Schabas seeking a dismissal of Apotex's claims on two grounds. The first ground, namely that Apotex's action was statute barred by reason of the provisions of the *Limitations Act 2002* S.O. 2002 c.24, was rejected.

[19] However, with respect to the second ground, Justice Schabas found that to the extent Apotex was allegedly kept out of the market for the sale and manufacturer of its generic version of Olanzapine, this exclusion was a result of the operation of the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133 (the "*PM(NOC) Regulations*") and is therefore not actionable. This finding is summarized by Justice Schabas as follows:

> "While I find that the action is not barred by the *Limitations Act, 2002*, I conclude that to the extent Apotex was kept out of the market, this was due to the operation of the *PM(NOC) Regulations* when Lilly was acting lawfully, pursuant to a patent issued in accordance with the *Patent Act.* In invoking the *PM(NOC) Regulations* Lilly relied on an existing patent which was presumed to be valid. Its actions were authorized by law, as Lilly was simply using the regulatory scheme established to address disputes over patents involving pharmaceutical drugs. The *Patent Ac*t and the *PM(NOC) Regulations* reflect a balancing of interests between protecting innovators and the public interest in allowing less expensive drugs to be available to the public. Patent law is "wholly statutory" and the Act and Regulations provide a complete code governing the issuance and use of patents, including available remedies when patents have been infringed and when they have been found to be invalid.
>
> The monopolies claim, in my view, has not merit. When it was enacted almost 400 years ago, the English *Statute of Monopolies* specified that the prohibition on monopolies did not apply to patents for new inventions. This is also the case in the Ontario *Statute of Monopolies*. Further, even if the patent could have authorized an unlawful monopoly, as it has now been declared invalid and void *ab initio*, Lilly is deemed to have never been granted a licence, patent or monopoly that is prohibited by the *Statutes of Monopolies*.

> I also conclude that Lilly has committed no wrongdoing that would give rise to liability under the *Trademarks Ac*t or at common law. Apotex led no evidence to support such claims other than the facts that Lilly sought and obtained a patent for Olanzapine, and then invoked the *PM(NOC) Regulations* as it was entitled to do when it held that patent. Lilly did not engage in any unlawful conspiracy or make any false or misleading statements."

[20] In essence, Justice Schabas found that the scope of each the alleged wrongful acts on the part of Eli Lilly was authorized by the Patent Regime (ie. the *Patent Act* and the *PM(NOC) Regulations*), which operated as a complete code and excluded any additional claims under other statutes and/or at common law.

[21] In addition to dismissing Apotex's action against Eli Lilly by operation of the Patent Regime being a complete code, for completeness of the exercise Justice Schabas also found each of the individual causes of action to be legally untenable.

Is the *Zyprexa* decision binding on this Court?

[22] There is no current appellate authority "on all fours" with the facts of this proceeding (or any of the similar proceedings commenced by Apotex against other drug innovator companies). Apotex has launched an appeal of the *Zyprexa* decision, and this Court understands that the appeal is currently scheduled to be argued in February 2022.

[23] Do the doctrines of *stare decisis* and/or judicial comity require this Court to follow its own prior (albeit recent) decisions? In *Duggan v Durham Region Non-Profit Housing Corporation* 2020 ONCA 788 (CanLII), the Court of Appeal for Ontario held as follows:

> "I would also reject any applicability of the *Carter* decision on *stare decisis* to this case. In *Carter*, at para. 44, the Supreme Court discussed two circumstances where a court would not be bound by *stare decisis*: where a new legal issue is raised or 'where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate.' In this case, the *Bondy-Rafael* decision interpreting the same rule was decided after the *Hryniak* case in the Supreme Court. There was no basis for the courts below to ignore the doctrine of *stare decisis*.
>
> The doctrine of *stare decisis* makes an important contribution to the cost-effective and efficient management of litigation by ensuring that a legal issue, including the interpretation of a legislative provision, regulation or rule, once decided, is not relitigated in the next case. In my view, the courts below erred in law by failing to treat the *Bondy-Rafael* case as binding."

[24] As held in *Allergan Inc. v. Canada (Minister of Health)* 2021 FCA 308 (CanLII), the principle of judicial comity dictates that a decision by a court of the same jurisdiction is persuasive and should be given considerable weight. A court of the same jurisdiction should

only depart from a prior decision "where a judge is convinced that the prior decision is wrong and can advance cogent reasons in support of this view."

[25] In *R. v. Scarlett* 2013 ONSC 562 (CanLII), Justice Strathy (as he then was) held as follows:

> "The decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them: see *Re Hansard Spruce Mills Ltd.*, 1954 CanLII 253 (BC SC), [1954] 4 D.L.R. 590 (S.C.); *R. v. Northern Electric Co. Ltd.*, 1955 CanLII 392 (ON SC), [1955] O.R. 431, [1955] 3 D.L.R. 449 (H.C.) at para. 31. Reasons to depart from a decision, referred to in *Hansard Spruce Mills*, include (a) that the validity of the judgment has been affected by subsequent decisions; (b) that the judge overlooked some binding case law or a relevant statute; or (c) that the decision was otherwise made without full consideration. These circumstances could be summed up by saying that the judgment should be followed unless the subsequent judge is satisfied that it was plainly wrong."

[26] Apotex takes the position in resisting Pfizer's motion for summary judgment that the *Zyprexa* decision, including Justice Schabas' analysis of the Patent Regime being a complete code, is "manifestly wrong", and thus the *Zyprexa* decision should not be followed as a matter of judicial comity.

[27] In assessing Justice Schabas' finding that the Patent Regime operates as a complete code, I do not find the presence of any "change in circumstances" or "evidence that fundamentally shifts the parameters of the debate" in the case before me. The issue, squarely argued by Apotex, is whether this Court can arrive at the conclusion that the *Zyprexa* decision is clearly wrong. It is not enough to find that this Court would have come to a different, or slightly different, conclusion. The application of judicial comity requires that this Court be convinced that the *Zyprexa* decision is clearly wrong.

Is the *Zyprexa* decision clearly wrong?

[28] I have read Justice Schabas' legal and factual analysis in detail. I cannot conclude that the *Zyprexa* decision is clearly wrong, and on the contrary I agree with it.

[29] Patent rights are entirely a creature of statute. The Patent Regime does not confer rights to consumers, and in my view these supposedly missing rights do not imply that common law causes of action can "fill in" any such gap.

[30] The Patent Regime explicitly authorizes all of the actions undertaken by Pfizer in applying for and ultimately obtaining the 446 Patent. It is the provisions of the Patent Regime itself that precluded Apotex from competing with Pfizer through the development and sale of generic drugs, and not by reason of any alleged wrongful act or omission on the part of Pfizer.

[31] While Apotex argues that Justice Schabas' analysis exposes that he considered the patent to be "voidable" and not void *ab initio*, I do not share that view for the reasons discussed below. The salient jurisprudence relied upon by Apotex consists of several Rule 21 motions to strike, where only patently unmeritorious causes of action are ever weeded out, and typically with leave to amend granted even if they are. Those decisions do not embark upon a fulsome evidentiary and legal analysis of the merits of whether the Patent Regime operates as a complete code thereby excluding Apotex's right to pursue any other statutory or common law causes of action and/or remedies.

[32] I echo Justice Schabas' reliance upon the British Columbia Court of Appeal's decision in *Low v. Pfizer Canada Inc*. 2014 BCCA 506 which held as follows:

> "The Patent Regulatory Regime involves a balancing of interests through the implementation of legislative policy choices. As the Court stated in *Teva v. Pfizer Canada Inc.*, [2012 SCC 60] the patent system is based on a *quid pro quo*. It provides an incentive for disclosing a new invention in the form of a limited monopoly, such that society can benefit from that knowledge. In the context of patented medicines, the notice of compliance system acts as an accountability mechanism. In *Apotex Inc. v. Eli Lilly Canada Inc.*, the Federal Court of Appeal described the *PM(NOC) Regulations* (and s. 8 in particular) as 'an attempt to strike a balance between the need for patent protection on the one hand and the timely entry of lower priced drugs on the market, on the other' (at para. 18). In my view, it is not for this Court to upset the balance that Parliament has struck by expanding the scope of available remedies."

[33] The Patent Regine provides specific remedies where a patent is subsequently found to be invalid. Parliament clearly considered the consequences of a finding of an invalid patent. Damages are available under section 8 of the *PM(NOC) Regulations*, but Apotex cannot claim the benefit of that section on the facts of this case. Such a result does not displace the conclusion that the Patent Regime operates as a complete code.

[34] I agree with Justice Schabas that to permit Apotex's claims to run outside the Patent Regime would effectively disrupt the regime itself. As put in the *Zyprexa* decision, "exposing a party to liability for damages simply because it successfully obtained a patent and exercised its rights based on its presumptive validity would remove one of the key benefits of the patent regime, which exists to foster and encourage innovation by protecting inventions for the benefit of the inventor for a limited period of time.

[35] Apotex maintains, as it did in the *Zyprexa* decision, that Pfizer's actions in applying for and ultimately registering the 446 Patent without adequately and/or properly disclosing its invention was rooted in an improper motive and carried out in bad faith. Not only was Pfizer's application to list the 446 Patent on the register authorized by the Patent Regime, the 446 Patent was presumed to be valid at all times until it was set aside, and the *PN(NOC) Regulations* entitled Pfizer to explicitly rely upon that presumption of validity. Pfizer relies,

properly in my view, upon the following comments of the Court of Appeal for Ontario in *Harris v. GlaxoSmithKline Inc.* 2010 ONCA 872 (CanLII):

> "The motion judge agreed with GSK's submissions on this issue. At para. 86 of his reasons, he stated:
>
> > 'The resort to a NOC Proceeding is a part of the ordinary competition between innovators and generic manufacturers. The case law establishes that provided that there are no unlawful acts, an ordinary commercial transaction with the predominant purpose of advancing one's own economic interests does not constitute a conspiracy even though a party or a third party may suffer an economic loss. (Authorities omitted) And, at para. 89:
> >
> > GSK is not a public authority, a non-government organization, a charity, or a not-for-profit organization. It is a business enterprise with the purposeful activity of making money, which activity is not wrongdoing. As alleged in Ms. Harris' statement of claim, all of GSK predominate purposes are connected to GSK advancing its own self-interest by making money, which is normal and a norm for for-profit enterprises. In my opinion, it is plain and obvious that Ms. Harris cannot establish an intent to injure simply from the fact that GSK continued to make money from her and from others by acting in its own self interest and availing itself of the statutory rights under s. 6 of the NOC Regulations to protect existing patents while exposing itself to the attendant statutory liability under s. 8 of the NOC Regulations.'
>
> I agree with those statements by the motion judge and would simply add that even if GSK acted with bad intentions in bringing the NOC Proceedings, as Fleming points out, at para. 31 above, 'there can be no liability when the defendant merely employs regular legal process to its proper conclusion'."

[36] There is no evidence in the record before me that Pfizer took any steps other than employing the regular legal process set out in the Patent Regime to its conclusion. Ultimately, the 446 Patent was held to be invalid. That, in and of itself, does not render any of Pfizer's actions unlawful or improper, even if the patent is held to be void *ab initio*.

[37] A patentee is granted rights which it may assert during the period that a patent is presumed to be valid. Apotex submits that Pfizer cannot be legally justified in asserting the 446 Patent as any such justification could only exist if the 446 Patent was valid, and since it was declared to be void *ab initio*, it was thus "never valid" in law. This argument appears to be circular. The 446 Patent was not "always and/or retroactively invalid" or wrongful. As Justice Schabas found, the declaration of a patent to be void *ab initio* "does not rewrite

history" and "does not retrospectively make a patentee liable for acts that it had a right to take while the patent was extent". In my view, this reasoning is sound. To hold otherwise would render the presumption of the validity - created by operation of law - to be of no force and effect.

[38] I thus do not find Justice Schabas' legal and factual analysis to be manifestly wrong. As such, and applying the *Zyprexa* decision to the facts of this case, Apotex's claims cannot succeed and Pfizer's motion for summary judgment is granted.

[39] It may be that the Court of Appeal for Ontario comes to a different conclusion when the appeal of the *Zyprexa* decision is heard and released. Until then, and for the reasons expressed above, judicial comity requires Apotex's claims to fail.

[40] Apotex's claims, and Pfizer's counterclaims, are dismissed.

Final Matters

[41] As I agree with Justice Schabas that the Patent Regime operates as a complete code, all of Apotex's causes of action raised in this proceeding must be dismissed. However, for completeness of the exercise, I wish to briefly address the two additional common law causes of action advanced by Apotex in this proceeding which were not raised against Eli Lilly in the *Zyprexa* decision: unjust enrichment and nuisance.

[42] It is trite to state that the elements of unjust enrichments are threefold: (a) an enrichment to the defendant, (b) a corresponding deprivation to the plaintiffs, and (c) the lack of a juristic reason for the enrichment.

[43] There is no causal connection between Pfizer's alleged enrichment and Apotex's alleged deprivation, as there was no "transfer of wealth" from Apotex to Pfizer. Apotex did not contribute anything to Pfizer's development of sildenafil citrate. More importantly, in addition to acting as a complete code, the Patent Regime is by definition a juristic reason justifying any potential enrichment on the part of Pfizer. How can Pfizer have unlawfully profited or benefited from any patent that was bestowed the presumption of validity by operation of law?

[44] With respect to Apotex's claim for nuisance, it alleges that the Pfizer's unlawful maintenance of the 446 Patent interfered with Apotex's ability to put their manufacturing facilities to their "optimal use", namely the manufacturing and sale of sildenafil citrate.

[45] Whether Apotex is pursuing the tort of private or public nuisance, both claims must fail. The tort of nuisance addresses conflicting disputes between property owners. There is nothing alleged to have been done on the part of Pfizer that substantially interferes with Apotex's use and enjoyment of its property. The right to manufacture generic drugs is not a land right. Further, Apotex's alleged inability to manufacture and sell one drug is clearly not a "substantial interference" with its overall operation.

[46] Accordingly, these additional causes of action are dismissed on their merits in addition to being precluded by reason of the Patent Regime being a complete code.

Costs

[47] I would urge the parties to exert the necessary efforts to try and resolve the costs of this motion and the action. If such efforts prove unsuccessful, they may serve and file written costs submissions, totaling no more than five pages including a Costs Outline, in accordance with the following schedule:

a) Pfizer may serve and file its written costs submissions within ten business days of the release of these Reasons; and

b) Apotex may serve and file its responding written costs submissions within ten business days of the receipt of the Pfizer's written costs submissions.

Diamond J.

Released: September 27, 2021

CITATION: Apotex Inc. v. Pfizer Ireland Pharmaceuticals, 2021 ONSC 6345
COURT FILE NO.: CV-14-514915
DATE: 20210927

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

APOTEX INC.

Plaintiff

– and –

PFIZER IRELAND PHARMACEUTICALS, PFIZER INC., PFIZER EXPORT COMPANY, PFIZER GLOBAL SUPPLY, PFIZER OVERSEAS LLC, PFIZER PGM AND PFIZER CANADA ULC

Defendants

AND BETWEEN:

PFIZER CANADA ULC AND PFIZER PRODUCTS INC.

Plaintiffs by Counterclaim

-and-

APOTEX INC.

Defendant by Counterclaim

REASONS FOR DECISION

Mr. Justice Diamond

Released: September 27, 2021

TAB 8

In the Court of Appeal of Alberta

Citation: Transamerica Commercial Finance Corporation, Canada v. Royal Bank of Canada, 1993 ABCA 215

Date: 19930607
Docket: 13613
Registry: Calgary

Between:

Transamerica Commercial Finance Corporation, Canada

Appellant
(Petitioner)

- and -

Royal Bank of Canada

Not a Party to this Appeal
(Petitioner)

- and -

Computercorp Systems Inc., RPL Business Computer Solutions Ltd., J.A. Professional Computer Centre of Manitoba Ltd., FWL Professional Computer Centre of Edmonton Ltd., RPL Professional Computer Centre of Calgary Ltd., Newmar Resources Inc., 665441 Ontario Limited, Humana Training Centres Inc. and 398839 Alberta Inc.

Respondents

And Between:

Transamerica Commercial Finance Corporation, Canada

Appellant
(Plaintiff)

- and -

Computercorp Systems Inc., RPL Business Computer Solutions Ltd., J.A. Professional Computer Centre of Manitoba Ltd., FWL Professional Computer Centre of Edmonton Ltd., RPL Professional Computer Centre of Calgary Ltd., Newmar Resources Inc., 665441 Ontario Limited and 398839 Alberta Inc.

Defendants

And Between:

Royal Bank of Canada

Plaintiff

- and -

Computercorp Systems Inc., RPL Business Computer Solutions Ltd., J.A. Professional Computer Centre of Manitoba Ltd., FWL Professional Computer Centre of Edmonton Ltd., RPL Professional Computer Centre of Calgary Ltd., Newmar Resources Inc. and Humana Training Centres Inc.

Defendants

The Court:

The Honourable Mr. Justice McClung
The Honourable Mr. Justice Kerans
The Honourable Madam Justice Rawlins

Memorandum of Judgment

COUNSEL:

R. Stevens (for TransAmerica)

J. G. Hanley (for Robert Lloyd and Pamela Lloyd - not parties to appeal)

F. R. Dearlove (for trustee in bankruptcy - not party to appeal)

MEMORANDUM OF JUDGMENT

THE COURT:

[1] This is an appeal from an Order in Queen's Bench granting leave to Robert Lloyd and Pamela Lloyd to cause a statement of claim to be issued in the name of the plaintiff corporation, a bankrupt. Mr. J. G. Hanley is their counsel. Mr. Dearlove appeared for the trustee in bankruptcy. One of the ironies of this case is that none of these three is a party to the appeal, although the real lis is between them.

[2] The difficulty is that the proposed plaintiff is an undischarged bankrupt. Despite the fact that the proposed claim is for several million dollars, the trustee in bankruptcy, after consultation with the inspectors, refused to prosecute it. The simple and sole reason was that,

although the bankrupt owes millions, it has almost no assets, and in any event not enough to secure to the trustee its potential litigation costs.

[3] The Lloyds are directors and shareholders of the bankrupt. They are of the view that Transamerica, who precipitated the bankruptcy and put in the receiver when it called a huge debt owed to it, was in breach of its obligations to the bankrupt. If successful in the suit, the Lloyds say the bankrupt will win from Transamerica enough to pay all its debts as well as his lost investment in the company, if not more. They are sufficiently confident of the outcome that he will undertake personally to underwrite the cost of the suit at no risk to other claimants. He asked in return only that his claim as a shareholder be given priority over the claims of creditors. The learned chambers judge accepted this offer, and granted leave to "bring an action in the name of Computercorp Systems Inc.". The judge also ordered that "all costs of this lawsuit will be borne entirely" by the Lloyds, and not the proposed plaintiff, and that any fruits of the litigation, after payment of costs, "shall go … to satisfy the claims of …" the Lloyds.

[4] Transamerica appeals. It argues firstly that a judge in bankruptcy has no power to make an order permitting a third party the carriage of a suit in the name of the bankrupt. As the principal creditor in the bankruptcy, it also protests what it says is an illegal re-ordering of the priorities established by the Bankruptcy Act. R.S.C. 1985, c. B-3.

[5] We shall first deal with the power to make the order. It is unusual. This is not a case where, at discharge, the trustee re-assigns a cause of action. Nor is it a case where the shareholder attempts, during bankruptcy, a derivative action. Nor is this a case where a bankrupt, during the bankruptcy, attempts itself to sue. Cases dealing with those situations have no application. Nor is it quite the same as a case where, under s.38, the bankruptcy judge grants leave to a creditor to sue when the trustee will not. The Lloyds are not creditors.

[6] The learned chambers judge found the power to make the order in s.37 of the Act. It provides:

> Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[7] We have not been persuaded to put any unnecessary limit on the powers of a Court under s.37. That wide residual power permits a bankruptcy judge to do justice in special

cases. We reject the argument that he lacked the statutory authority to make the order under review.

[8] The next question is whether this was a supportable exercise of those powers.

[9] The judge made an order for Lloyd somewhat analagous to the order a judge is explicitly authorized by s.38 to make for a creditor in similar circumstances. S.38 provides

> (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of the bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> (2) On an order under subsection (1) being made the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject matter of the proceeding, including any document in support thereof.
>
> (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

[10] One weakness in the analogy is that the order under appeal does not compel an assignment of the cause of action to the shareholder, which is the rule when s.38 is invoked. Instead it is left in the name of the bankrupt, and Lloyd merely is permitted to "bring" it. We are uncertain who now has title to the cause of action. By one reading of the order, Lloyd merely has carriage of the trustee's suit. The cause of action remains vested in the trustee as provided in s.71 (2) of the Act. Nor is it clear that Lloyd and the trustee both agree about this, and that is a recipe for future strife. For example, counsel for the trustee took the position before us that the order did not authorize Lloyd to compromise or settle the claim. What did it authorize him to do? Who is to defend counterclaims, for example? Can the trustee from time to time demand an accounting of the steps being, or to be, taken? Can he step in later and re-take the suit? We foresee many areas of potential controversy between Lloyd and the trustee as the suit progresses.

[11] But the critical difficulty with the analogy is that no notice was given to other creditors. To this day, it is not clear they know that the judge transferred away from them at least some of the fruit of the litigation. They were entitled to notice. It is no answer to that to say it was a better deal than any other offer. They should decide, or at least have a chance to

be heard on the point. That is why s.38 requires notice to creditors. It is at least equally vital that they know of a proposed assignment to a shareholder.

[12] This said, we reject the suggestion for Transamerica that a judge, in exercise of the powers in s.37, cannot assign some of the fruits of litigation as consideration for an "angel" who offers financial support where he is under no obligation to do so and where otherwise the suit will not proceed for lack of funds in the bankrupt's estate.

[13] Nevertheless, these issues have not been adequately canvassed. In fact, counsel for the trustee did not appear on the appeal until we invited him to do so. We did so after it was said for Lloyd that the trustee implicitly consented to the order, and counsel for Transamerica responded that, if that were so, it, as a principal creditor of the bankrupt, would demand some form of accounting from the trustee.

[14] We think this matter should not have proceeded, at least with respect to the disposition of the fruits of the litigation, without notice to the other creditors. On that basis, we allow the appeal and return the matter to Queen's Bench, within which the concern expressed in these reasons can be addressed..

[15] This is hardly a victory for Transamerica. These questions arise between the Lloyds and the trustee, and them and other claimants in the bankruptcy. They have nothing to do with Transamerica as a potential defendant. It simply raises them in an attempt to stop the suit. We think costs of the appeal should be in the cause.

[16] In fairness to the chambers judge, the trustee did not take a position on any of these issues. Although the application for relief was correctly brought with the trustee as respondent, Transamerica intervened to oppose. Having decided that it could not undertake to pursue the litigation, the trustee did not want to obstruct the Lloyds in the face of that opposition. Its counsel sought leave to withdraw. In the result, the trustee did not participate when the judge considered how to divide the fruits of the litigation.

[17] We have given consideration whether at least to affirm the order about the "bringing" of the suit by the Lloyds. We shall not do so, because we think at the very least it requires clarification and amplification. We also urge counsel to consider, as an alternative, a suit carried by the trustee under terms of a court-approved support agreement with the Lloyds.

DATED at, CALGARY, Alberta,
this 7th day of June,
A.D. 1993

TAB 9

CITATION: David Brook (Re), 2016 ONSC 6277
COMMERCIAL LIST COURT FILE NO.: CV-15-11006-00CL
BANKRUPTCY COURT FILE NO. 32-1774278
DATE: 20161123

SUPERIOR COURT OF JUSTICE – ONTARIO
IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY OF DAVID BROOK, OF THE CITY OF MISSISSAUGA, IN THE REGIONAL MUNICIPALITY OF PEEL, IN THE PROVINCE OF ONTARIO

RE: GLOBAL ROYALTIES LIMITED AND BENCHMARK CONVERSION INTERNATIONAL LIMITED O/A BCI, Plaintiff

AND:

DAVID BROOK, ANNA BROOK, 2323593 ONTARIO INC., GEOFFREY BLACK aka GEOFF BLACK, GRIFFIN & HIGHBURY INC., DARIO BERIC aka DARIO BERIC – MASKAREL, DIKRAN KHATCHERIAN aka DIKO KHATCHERIAN aka DANNY MATAR, LESLIE FROHLINGER aka LES FROHLINGER, DIVERSITY WEALTH MANAGEMENT INC. and DIVERSITY WEALTH MANAGEMENT HOLDINGS INC. and BDO CANADA LIMITED IN ITS CAPACITY AS TRUSTEE OF THE ESTATE OF THE BANKRUPT DAVID BROOK, Defendants

AND BETWEEN:

DAVID BROOK, Plaintiff by Counterclaim

AND:

GLOBAL ROYALTIES LIMITED AND BENCHMARK CONVERSION INTERNATIONAL LIMITED O/A BCI, BRANDON HALL, CHRISTINE HALL and CASH INTERNATIONL INC.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Harvey Stone*, for the Moving Parties, Global Royalties Limited and Benchmark Conversion International Limited,

Jules Berman, for the Respondent, BDO Canada Limited.

Frank Bennett, for the Bankrupt, David Brook

HEARD: October 7, 2016

ENDORSEMENT

[1] The moving parties, Global Royalties Limited ("Global"), Benchmark Conversion International o/a BCI ("BCI"), Brandon Hall ("Brandon"), Christine Hall ("Christine") and Cash International Inc. ("Cash") (collectively, the "Moving Parties"), seek an order under section 37 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") setting aside the assignments dated May 6, 2016 of certain causes of action to the bankrupt David Brook ("Brook") by BDO Canada Limited, the trustee in bankruptcy of Brook (the "Trustee"), and directing a tender or auction process for the sale of such causes of action.

Factual Background

[2] David Brook was an independent contractor with Global from 2002 to 2008, then an employee for one year, and then an independent contractor again until January 16, 2015. After that date, Brook was an employee of BCI until it terminated his employment on March 23, 2015.

[3] Brook filed a proposal under the BIA on July 31, 2013. The proposal was rejected by his creditors and he was assigned into bankruptcy on February 27, 2015 under the BIA. In his statement of affairs, Brook declared liabilities totaling $1,722,321.59 and assets of $20,392.10. He did not declare any liability to either Global or BCI. As of June 27, 2016, the Trustee had received and admitted eleven unsecured claims totaling $2,010,214. The Canada Revenue Agency (the "CRA") is the largest creditor, having claims totaling $1,906,534, which is 94.8% of the proven unsecured claims. None of the Moving Parties has filed a proof of claim in Brook's bankruptcy. The creditors declined to appoint an inspector in the bankruptcy.

[4] On June 23, 2015, Global and BCI issued a statement of claim (the "Statement of Claim") against Brook and others alleging that Brook misappropriated clients and sales belonging to Global and/or BCI. They claim damages of $1 million. Brook served a defence, counterclaim and third party claim in the action on May 25, 2016 (the "Defence, Counterclaim and Third Party Claim").

[5] In Brook's Defence, he denies the allegations in the Statement of Claim. In his Counterclaim and Third Party Claim, among other things, Brook alleges that Brandon, the principal of both Global and BCI, made profits from 2001 to 2009 which Global or Brandon were obligated to share with Brook pursuant to an oral agreement between Brandon and Brook. Brook alleges that these profits were made pursuant to a scheme under which invoices of a particular supplier to Global were increased by 25% and the increased amount was paid by the supplier to Christine or Cash. These claims in the Counterclaim and Third Party Claim are herein referred to as the "Causes of Action".

[6] In connection with the preparation of the Defence, Counterclaim, and Third Party Claim, Brook negotiated a purchase of the Causes of Action from the Trustee. The Trustee and Brook reached an arrangement under which Brook would pay $15,000 in two equal installments over

one year and the parties would share any net proceeds after legal expenses on the basis of 2/3 to the Trustee and 1/3 to Brook.

[7] The documentation giving effect to this agreement was executed on May 6, 2016. Subsequently, further documentation was executed, back-dated to May 6, 2016, to correct the omission in the original assignment documentation of an assignment of the Causes of Action asserted against Christine and Cash, and to confirm the 2/3:1/3 sharing of the proceeds of such Causes of Action. The documentation giving effect to the foregoing is herein referred to collectively as the "Assignments".

[8] In the absence of an inspector, the Trustee communicated with, and obtained the written approval of the CRA, as the largest creditor of the bankrupt's estate, to the agreement with Brook. The Trustee did not, however, contact any other potential purchasers of the Causes of Action, including the Moving Parties. It also did not conduct a public tender or auction process.

[9] In an affidavit sworn on July 10, 2016 in this proceeding, Christine says that, if the Trustee had contacted her or Cash to discuss the Causes of Action and any potential settlement of the claims against them, she would have been prepared to enter into negotiations to settle "any and all claims that the Trustee had in the within action." She also says that, if the Assignments were set aside by the Court on this motion, she or Cash are prepared to pay $50,000 to acquire the Causes of Action. In a further affidavit sworn the same day, Brandon makes essentially the same statements.

Analysis and Conclusions

The Issue

[10] Section 37 of the BIA reads as follows:

> Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[11] The Moving Parties say that they are aggrieved parties. The Moving Parties submit that the Court should set aside the Assignments principally for the following reasons:

(1) The Trustee did not attempt to market the Causes of Action to anyone other than Brook;

(2) The transaction was improvident as the Moving Parties are prepared to pay $50,000 for an assignment of the Causes of Action;

(3) The private sale process unfairly disregarded the rights of the seven creditors of Brook's estate who had no knowledge of the sale; and

(4) A tender or bidding process is a fair process that will maximize the value for the benefit of all creditors.

Analysis and Conclusions

[12] In order to succeed on this motion, the Moving Parties must demonstrate that they are "aggrieved parties" for the purposes of section 37 of the BIA and that the Court should exercise its discretion under that provision. I will address each issue separately.

Are the Moving Parties Aggrieved Persons?

[13] The BIA does not define the word "aggrieved". The cases regarding the definition of an "aggrieved person" establish that it is necessary for a claimant to demonstrate that it was deprived of a legal right or was otherwise wrongfully deprived of something.

[14] In a decision involving section 37 of the BIA, *Liu v. Sung*, (1989), 72 C.B.R. (N.S.) 224, 1989 CanLII 2822 (B.C.S.C.), the court held, at para. 12, as follows:

> In order to have status, the applicants must be found to be persons who are aggrieved by the decision of the Trustee in refusing to take action under s. 225 of the Company Act. The word "aggrieved" is not defined in the *Bankruptcy Act*. In the *Oxford Universal Dictionary*, 3rd ed., it is defined as "injuriously affected". Counsel for the Trustee has cited the definition made by James L.J. in *RE Sidebotham; Ex Parte Sidebotham* (1880) 14 Ch. B. 458 at 465:
>
> > But the words 'person aggrieved' do not mean a person who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

[15] A similar statement is found in *Re Pachal's Beverages Ltd*., (1969), 7 D.L.R. (3d.) 113, at para. 14 (S.K.C.A.) as follows:

> While s. 15 [currently section 37] gives to the court a wide discretionary power: *Imperial Bank of Canada v. Barber* (1921), 50 O.L.R. 380, 1 C.B.R. 485, and *Re Hancock, Ex parte Spraggett*, [1952] O.R. 121, 32 C.B.R. 96 (C.A.), that power must be judicially exercised. To obtain relief under this section, the onus rests upon the applicant to show that it has been aggrieved by the decision of the trustee, or has suffered damage or prejudice as a result of the trustee's action: *Re Gareau (English & Scotch Woollen Co.), Ex parte Joseph Bros.* (1922), 3 C.B.R. 76 (Que.).

[16] I will first address the position of Brandon, Christine, and Cash (collectively, the "Third Parties") and then address the position of Global and BCI.

The Third Parties

[17] In this case, the execution of the Assignments did not wrongfully deprive the Third Parties of anything to which they are legally entitled, or prejudice them in respect of any legal rights they may otherwise have been entitled to assert. As strangers to the bankruptcy, they have no legitimate right to require that the Trustee dispose of the assets of the estate in any particular manner. Further, as parties to the litigation, the decision of the Trustee does not affect their ability to defend themselves against the allegations constituted by the Causes of Action.

[18] Accordingly, I do not see any basis upon which the Third Parties have standing to bring this motion under section 37 of the BIA. If, however, I have erred in reaching this conclusion, the further conclusions reached below in respect of Global and BCI would also apply to the Third Parties.

Global and BCI

[19] In this proceeding, Global and BCI wear two hats. They are contingent creditors of the estate in respect of the claims asserted in their Statement of Claim and they are defendants to the Defence, Counterclaim, and Third Party Claim. It is not entirely clear in which capacity they say they are aggrieved.

[20] Insofar as they say that they aggrieved in their capacities as creditors of the estate, I am not persuaded that they are aggrieved parties for two reasons.

[21] First, given the state of the litigation commenced by Global and BCI, and the assertion of the Causes of Action by way of offset, it is not possible to make any assessment of the likelihood that these parties have a viable claim against the estate. To the extent the Global and BCI claims against Brook have no merit or are offset by the Causes of Action, Global and BCI would have no contingent claims against the estate. In such circumstances, the Moving Parties would have no standing in this proceeding.

[22] Second, even if they are to be treated as creditors of the estate, I do not think that Global and BCI have established that they have suffered a material loss or prejudice in such capacity.

[23] Global and BCI have chosen not to file any proof of claim in the bankruptcy. This is understandable given the negligible assets in the estate. The Moving Parties have pursued the action with a view to obtaining a judgment that survives bankruptcy, rather than with any expectation of receiving a distribution from the estate. Given the absence of any claim of Global or BCI in the bankruptcy, however, neither party has any current right to any distribution out of the Bankrupt's estate. On this basis, I do not think that either party can assert that it is an aggrieved party.

[24] More significantly, even if they had an entitlement to participate in any distribution from the estate, and even if their proposal of $50,000 for the Causes of Action were accepted, neither Global nor BCI has any realistic expectation of any distribution other than possibly a distribution of negligible value.

[25] The real prejudice that Global and BCI have suffered is the loss of the possibility of preventing Brook from asserting his defence to their claims and asserting the Causes of Action, with the attendant costs. However, for the reasons set out above in respect of the Third Parties, insofar as they say that they are aggrieved as parties to the litigation, they have no standing on this motion. If the Moving Parties wish to protect themselves against legal costs which they regard as improper, they must avail themselves of the protections afforded under the *Rules of Civil Procedure* or deal directly with Brook.

Conclusion

[26] Based on the foregoing, none of the Moving Parties is an "aggrieved" person for the purposes of section 37 of the BIA. On this basis, the motion must be dismissed. It is therefore unnecessary to consider whether the Trustee's decision was unreasonable for the purposes of that provision. I have, however, set out in my views on this issue in case I have erred in reaching the conclusions above.

Was the Decision of the Trustee Unreasonable?

[27] The Trustee argues that, even if the Moving Parties are aggrieved persons for the purposes of section 37 of the BIA, the Court should not exercise its discretion under that provision to grant the relief sought on this motion. The Trustee argues that its decision to execute the Assignments was reasonable in the circumstances.

[28] The principles governing an action under section 37 have been set out in *Re Pachal's Beverages Ltd*., at para. 14, as quoted earlier in this decision.

[29] In the absence of any inspector for the estate, s. 30(3) of the BIA grants the Trustee the authority to sell the Causes of Action in any manner it thinks advisable. There is no statutory requirement obliging the Trustee to engage in any particular sales process and, in particular, no obligation to engage in an auction, public or otherwise. On the other hand, section 30(3) does not remove the obligations of the Trustee under the BIA in respect of the sale or other disposition of the assets of Brook, as Brook as appears to argue.

[30] Accordingly, as creditors of the estate of Brook, the Moving Parties had a legitimate expectation that, in exercising its powers under section 30(3) of the BIA to dispose of any assets of the estate, the Trustee would act reasonably, honestly, in good faith and for the benefit of Brook's estate generally.

[31] In this case, there is no basis for concluding that the Trustee's actions constituted an abuse of power. As mentioned, the Trustee had the authority to dispose of the Causes of Action

pursuant to section 30(3) of the BIA. There is also no suggestion of fraudulent activity on the part of the Trustee.

[32] Further, while the Moving Parties complain of the lack or delay of disclosure of the Assignments, these complaints do not establish bad faith on the part of the Trustee. In this regard, it is relevant that the first communication of the Moving Parties with respect to the Causes of Action did not occur until after Brook served his Defence, Counterclaim and Third Party Claim on them. As the Assignments had already been executed by that time, the Trustee did not withhold any information that it was requested to provide to the Moving Parties. Any delay in providing the amended Assignments is not significant given that the amendments were made solely for the purpose of giving effect to the original intention of the parties to assign to Brook all of his Causes of Action.

[33] The issue on this motion is therefore whether the Moving Parties have demonstrated that the actions of the Trustee were unreasonable from the perspective of the good of the estate generally. This involves a consideration of both the process that was followed by the Trustee and the substantive reasonableness of the Trustee's decision to assign the Causes of Action to Brook, which I will address in turn.

Did the Process Adopted by the Trustee Comply with its Obligations?

[34] The Causes of Action had not been asserted prior to the bankruptcy. Accordingly, they were assets of the estate which the Trustee was entitled to assert by commencing a new action against the Moving Parties. However, the Trustee had neither the money to commence any such action nor the ability to assess the relative merits of Brook's assertions. Accordingly, it was necessary to sell or assign the Causes of Action to Brook or a third party.

[35] The Trustee believed that a public sale of the Causes of Action was impracticable. The Moving Parties suggest that it was at least theoretically possible that third parties might be interested in purchasing the Causes of Action if a public auction or tender process were conducted. I do not think that is reasonable in the particular circumstances.

[36] The Causes of Action were not reduced to writing at the time of the Assignment, at which time the Moving Parties say that a public sales process should have been conducted. In addition, any party pursuing the Causes of Action would have needed the active involvement of Brook. Therefore, Brook had an effective veto over any third party purchase of the Causes of Action. In order to bid for the Causes of Action, Brook had to find a third party to finance the purchase as he was unable to do so himself. Whether or not that party is his wife is not relevant for present purposes. It is, however, relevant that he can be assumed to have canvassed the possible options available to him and made his choice. On this basis, I do not think that there is any realistic possibility of a third party bidder for the Causes of Action.

[37] Accordingly, the procedural issue on this motion is whether the Trustee was required to give the Moving Parties an opportunity to bid on the Causes of Action.

[38] The Causes of Action assert that Brandon and Global acted fraudulently in respect of their dealings with Brook and perhaps in respect of their dealings with the supplier to Global. The Trustee says that it considered that it would be unseemly for the Trustee to offer the Causes of Action to the Moving Parties, given that it would, in effect, be offering the Moving Parties the right to prevent the assertion of potentially valid fraud claims of a bankrupt. I will return to this consideration at the end of this Endorsement.

[39] The Trustee says that it proceeded instead on the basis that it should remain neutral between the parties regarding their respective assertions of fraud against each other. To this end, the Trustee believed it was reasonable to allow Brook to pursue the Causes of Action, subject to negotiation of an agreement it considered to be reasonable for the sale price of the Causes of Action. It considered this action to be the counterpart of its earlier decision not to object to a motion of Global and Bell to lift the stay under the BIA to prosecute the action. Brook vigorously opposed that motion in a number of proceedings without any success, with the result that he has significant unpaid costs awards against him arising out of those proceedings.

[40] On this motion, both parties, in effect, rely on *Re Hoque* (1996), 38 C.B.R. (3rd) 133 (N.S.C.A.). The circumstances in that decision were, however, different from the present circumstances in a number of respects. In that decision, a creditor brought an action under section 37 seeking to set aside an agreement that had been entered into with a bankrupt in connection with his discharge.

[41] Among other things, it was clear in *Hoque* that the creditor had been aware of the possible claim against it for some time before the agreement was entered into and had taken no action to indicate its interest in purchasing the claims. The court of appeal upheld the motion court decision finding the actions of the trustee to be reasonable on two grounds, at para 51:

> In summary, on the principal issue, I would dismiss the appeal on two grounds. The trial judge did not err in concluding on the facts that the trustee acted reasonably, and in the interests of the creditors generally, notwithstanding the failure to ask Montreal Trust if it would like to bid to acquire the lawsuit; and, secondly, it would be unjust in the circumstances to grant the relief sought by Montreal Trust as Dr. Hoque was entitled to have the agreement he made with the trustee finalized; in short, it would not be a judicial exercise of the power given the court by s. 37 of the *Act*. To grant the relief sought, even if it were concluded that the trustee acted unreasonably, would also offend the integrity of the bankruptcy process.

[42] In reaching its decision on the first ground, the court stated the following, at para. 50:

> The decision in *Pachal's Beverages* (supra) is relevant as it makes clear that the burden of proof is on the applicant to show that the trustee's decision was unreasonable and not on the trustee to show that it was right. In the absence of evidence to prove that, as a general practice, trustees in bankruptcy offer to sell causes of action which the bankrupt may have to the potential defendants in those

> lawsuits who also happen to be creditors of the bankrupt, it is difficult to conclude that the trustee's conduct in this instance was a failure to meet the acceptable standards for a trustee in realizing on assets of the bankrupt.

[43] The Moving Parties say that all the reported cases on the sale of causes of action, at least in Ontario, indicate that a trustee in bankruptcy is required to conduct a public tender or auction process or, at a minimum, offer the causes of action to the other party to the litigation. They say in effect that, if a trustee fails to do so, its actions are *per se* unreasonable. The Moving Parties argue that the Trustee's failure to conduct such a process should therefore invalidate the Assignments. I do not agree for the following reasons.

[44] First, while the Moving Parties have presented a number of cases in which a trustee in bankruptcy conducted a public sales process for causes of action, the case law does not establish an absolute requirement for such a process. Each case must be examined on its own terms.

[45] In this case, for the reasons set out above, it was not realistic to contemplate a public sales process to attract third party bidders. The only issue is whether the Trustee was required to offer the Causes of Action to the Moving Parties as the other parties to the litigation. The case law also does not establish an absolute requirement that a trustee offer causes of action to the other party to litigation or proposed litigation.

[46] More generally, a public auction or tender process is not an end in itself. It is one means, but not the only means, by which a trustee in bankruptcy satisfies itself that it has obtained fair market value for the assets of the bankrupt. What constitutes a sales process that results in a maximization of value for creditors will depend upon the nature of the assets being sold. Apart from the Trustee's failure to conduct a public sales process, the Moving Parties have no evidence to support a finding that the sales process adopted by the Trustee was unreasonable.

[47] Accordingly, I do not accept the Moving Parties' argument that the Trustee's decision was unreasonable solely on the basis of the process followed by the Trustee. The real issue for the Court on this motion is whether the Trustee's decision was unreasonable as a substantive matter.

Was the Trustee's Decision Substantively Reasonable?

[48] The Moving Parties also argue that the Trustee's execution of the Assignment was unreasonable as a substantive matter. In particular, they argue that, in the absence of an auction or other tender process in which they are able to participate, the Trustee cannot demonstrate that it has maximized the sales proceeds for the assets.

[49] In this regard, I accept that, to the extent that a trustee does not include a possible purchaser in a sales process, it runs the risk that the sales process may subsequently be challenged if the third party who was not provided with an opportunity to bid is prepared to commit to a materially better offer. In such circumstances, the willingness of the third party to make a superior offer may be evidence that the trustee has failed to obtain fair market value for the assets.

[50] However, for the following reasons, I do not agree that, in the present circumstances, the Court must find that the trustee's actions were unreasonable because of its decision not to conduct an auction or other tender process

[51] The Moving Parties have the onus of proving that the Trustee's action was unreasonable. In this case, as discussed above, the only other possible bidder for the Causes of Action would be one or more of the Moving Parties. Moreover, they have made their offer of $50,000 known to the Court in their motion materials. It is therefore possible to assess the reasonableness of the Trustee's action based on a comparison of the respective offers of Brook and the Moving Parties. Put another way, it is possible to make a determination regarding the fair market value of the Causes of Action given that the only likely offers in the market are before the Court.

[52] In this case, the offer of Brook, which the Trustee accepted, and the offer of the Moving Parties are not directly comparable. As mentioned, the Moving Parties are prepared to offer a fixed sum of $50,000 while Brook offered $15,000, representing $35,000 less than the Moving Parties, and a 2/3 sharing of any successful result in the litigation. The issue for the Court is whether the Moving Parties' offer demonstrates that the Trustee failed to maximize the value received for the Causes of Action and that the Trustee's actions were therefore unreasonable.

[53] The Court cannot, and more importantly, the Trustee could not, assess the merits of the Causes of Action. However, it is possible to make the following observations regarding the offers.

[54] First, while there is no obligation under the arrangements with Brook that he pursue the Causes of Action, Brook would have a very real incentive to assert the Causes of Action by way of offset to the extent that the claims of Global and BVI have merit and are being pursued. In such circumstances, Brook will have an incentive to assert the Causes of Action to prevent a judgment against him that will survive bankruptcy. There is, therefore, an inherent dynamic that is likely to ensure that the Causes of Action are asserted to the extent they are meaningful.

[55] Second, if the Causes of Action are not pursued or are determined to have no merit, the recovery to the estate will be modest under each of the offers. In such circumstances, under the agreement with Brook, the recovery will be limited to $15,000. Under the offer of the Moving Parties, the estate would have recovered $35,000 more. However, given the extent of the proven claims of the estate, even before inclusion of the claims of the Moving Parties, such additional recovery would permit, at best, a negligible distribution to the creditors of the estate.

[56] Third, if on the other hand, the Causes of Action are determined to have merit, there is considerable upside to the creditors. The sharing arrangement would be expected to recover substantially more than the additional $35,000 offered by the Moving Parties. More importantly, the sharing arrangement has the potential to recover a sufficient amount to permit a meaningful distribution to the creditors of the estate.

[57] It is not possible to assign a probability to the latter scenario given the inability of the Trustee to assess the merits of the Causes of Action. However, unless the Causes of Action are clearly without merit, it is not unreasonable to conclude that the potential upside of the

arrangement with Brook by virtue of the sharing arrangements is of greater value to the creditors than the fixed payment offered by the Moving Parties. In more formal terms, it is reasonable to conclude, as a matter of traditional financial analysis, that the "option" value of the arrangement with Brooks was superior from a financial point of view to the offer that the Moving Parties are prepared to make.

[58] On this analysis, the Moving Parties' offer is not a superior offer from a financial perspective to the arrangement with Brook. There is, therefore, no evidence before the Court that the Trustee failed to obtain fair market value for the Causes of Action.

[59] I would note that there is also some independent confirmation of the analysis set out above in the form of the approval of the CRA to the arrangement with Brook, even though the CRA did not have the offer of the Moving Parties before it at the time that it approved that arrangement. As the creditor holding approximately 95% of the proven claims against the estate, the CRA had the preponderant interest in maximizing the value received by the Trustee for the Causes of Action. It would have been aware of the possibility of offering the claims to the Moving Parties. The fact that the CRA was prepared to approve the agreement with Brook is confirmation that any offer that provided solely for a fixed amount of cash that would permit at best a negligible distribution to creditors would be perceived by the creditors as inferior to an offer that included a 2/3 sharing arrangement.

[60] As mentioned above, the Trustee has provided a further justification for its decision based on the nature of the Causes of Action. It says that, in cases such as the present where causes of action to be assigned are based on alleged fraudulent conduct of a party and the trustee is not in a position to assess the merits of the causes of action, it is inappropriate or "unseemly" for a trustee in bankruptcy to conduct an auction between the alleged perpetrator of the fraud and the alleged victim who is bankrupt.

[61] While the Moving Parties suggest that Strathy J. (as he then was) suggested otherwise in *Cal-Jet Performance Inc. (Re)*, 2010 ONSC 3394 (S.Ct.), in that case, the defendant made an offer to settle in respect of an action that was outstanding at the date of the assignment in bankruptcy. The issue was therefore raised in the very different context of another bidder attempting to exclude the offer of settlement made by a defendant in order to acquire the cause of action at the lowest possible price. For these reasons, I do not think that *Cal-Jet* is a helpful precedent in the present context.

[62] I am inclined to agree with the Trustee that, at least in the circumstances where causes of action are first asserted only after the commencement of bankruptcy proceedings and are not capable of assessment, it is at least open to a trustee in bankruptcy to say that it does not think it proper to market fraud claims to an alleged fraudster. However, I have found that the decision of the Trustee was reasonable on the basis of the absence of a superior financial offer. It is therefore unnecessary to determine this issue and, accordingly, I decline to do so. I also note that the Moving Parties deny the alleged fraudulent conduct on their part and the Court is not making any determination on this issue in reaching its conclusions herein nor is it taking any such allegations into consideration in reaching such conclusions.

Conclusion

[63] Based on the foregoing, the motion of the Moving Parties is dismissed.

Wilton-Siegel J.

Date: November 23, 2016

COURT OF APPEAL FOR ONTARIO

CITATION: Global Royalties Limited v. Brook, 2016 ONCA 50
DATE: 20160118
DOCKET: M45801 (C61241)

Strathy C.J.O. (In Chambers)

BETWEEN

Global Royalties Limited and Benchmark Conversion International Limited o/a BCI

Plaintiffs (Respondents)

and

David Brook, Anna Brook, 2323593 Ontario Inc., Geoffrey Black a.k.a. Geoff Black, Griffin & Highbury Inc., Dario Beric a.k.a. Dario Beric-Maskarel, Dikran Khatcherian a.k.a. Diko Khatcherian a.k.a. Danny Matar, Leslie Frohlinger a.k.a. Les Frohlinger, Diversity Wealth Management Inc. and Diversity Wealth Management Holdings Inc.

Defendants (Appellant)

Harvey Stone, for the respondents

Frank Bennett, for the appellant

Heard: December 8 and 17, 2015

Motions for a declaration that the appellant has no right to appeal the order of Justice Michael A. Penny of the Superior Court of Justice, dated October 13, 2015, with reasons reported at 2015 ONSC 6277, under s. 193(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) and for leave to appeal that order under s. 193(e) of the *BIA*.

Strathy C.J.O.:

[1] The appellant seeks to appeal an order lifting the stay of proceedings provided him by s. 69.3 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-

3 (*BIA*). In my view, he has no right of appeal to this court under s. 193(b) of the *BIA* and should not be granted leave to appeal under s. 193(e).

A. BACKGROUND

[2] The appellant was deemed bankrupt on February 27, 2015 after his failed proposal.

[3] The respondents brought this action in June 2015. The statement of claim alleges that the appellant, a former employee, breached his fiduciary duties to them. He did so, they say, by establishing a competing business with the co-defendants, stealing propriety information from the respondents, and diverting their sales and revenues to himself and the co-defendants.

[4] The statement of claim seeks damages, injunctive relief and declaratory relief. The claim alleges breaches of duty before and after the date of bankruptcy.

[5] The appellant took the position that the action was invalid because, as an undischarged bankrupt, the proceedings against him were stayed by s. 69.3 of the *BIA*.

B. THE ORDER OF THE SUPERIOR COURT

[6] The respondents brought a motion for the following relief: (a) a declaration that s. 69.3 of the *BIA* did not apply to stay the claims for injunctive and declaratory relief, or the claims for damages from the appellant's post-bankruptcy conduct, because they are not claims provable in bankruptcy; and (b) an order

under s. 69.4 of the *BIA* lifting the stay of proceedings for the damages claimed against the appellant for his pre-bankruptcy conduct.

[7] The trustee in bankruptcy did not oppose the relief sought.

[8] The motion judge granted the motion.

[9] The motion judge agreed that the claims arising after the date of bankruptcy and the claims for injunctive and declaratory relief were not stayed by s. 69.3. That is because they were not claims provable in bankruptcy under s. 121 of the *BIA*. He therefore found there was no need for an order lifting the stay for those claims.

[10] On the claims relating to the appellant's pre-bankruptcy conduct, the motion judge found there were "sound reasons" to lift the stay, relying on *Re Ma* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). He rejected the appellant's claim that lifting the stay would interfere with the proper administration of the bankrupt estate. He therefore lifted the stay, but clarified that the enforcement of any judgment for damages for pre-bankruptcy conduct would remain stayed until further order. I will explain his reasons below.

[11] The appellant served a notice of appeal. He claimed he had a right to appeal under s. 193(b) of the *BIA*, but also sought leave to appeal, if necessary, under s. 193(e).

C. THE MOTIONS IN THIS COURT

[12] Each party brought a motion in this court.

[13] The first was brought by the respondent for an order that the appellant had no appeal as of right pursuant to s. 193(b) and that the stay under s. 195 of the *BIA* did not apply.

[14] The second, which only arose if the first motion was granted, was brought by the appellant for leave to appeal pursuant to s. 193(e).

[15] I heard the motions on separate dates – granting the first and dismissing the second. I will discuss them separately.

(1) Appeal under s. 193(b)

[16] This motion was heard on December 8, 2015. At the conclusion of oral argument I granted the motion, declaring that the appellant had no right of appeal under s. 193(b), with reason to follow. These are those reasons.

[17] A judge of this court has jurisdiction to make an order directing that the appellant does not have a right to appeal pursuant to s. 193(b) of the *BIA*: see *Re Robson Estate* (2002), 33 C.B.R. (4th) 86 (Ont. C.A. [In Chambers]).

[18] Subsection 193(b) provides that an appeal lies to this court "if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings." There is no dispute that the governing authorities are those set out

in L.W. Houlden, G.B. Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada,* loose-leaf (2015-Rel. 4), 4th ed. revised (Toronto: Carswell, 2013), vol. 3 at para. I-59. Those authorities were recently discussed by the Court of Appeal for British Columbia in *Wong v. Luu,* 2013 BCCA 547, 10 C.B.R. (6th) 318 (In Chambers), at paras. 15-19.

[19] The governing authorities stress that s. 193(b) concerns "real disputes" likely to affect other cases raising the same or similar issues in the same bankruptcy proceedings: see e.g. *Wong v. Luu,* at para. 21; *Lemay v. Lamarre* (1934), 16 C.B.R. 189 (Que. C.A.).

[20] Here, the appellant submitted that the crossclaims against him by the co-defendants raise similar issues of whether the stay of proceedings under the *BIA* ought to be lifted.

[21] In my view, this is a matter of pure speculation. Although counsel for the co-defendants was given notice of the motion to lift the stay, he did not appear on the motion and expressly disclaimed any intention to respond.

[22] In addition, the statement of defence and crossclaim pleads the relationship between the co-defendants and the appellant took place after the bankruptcy. It seems arguable then that the stay would not apply to the crossclaim in any event.

[23] Moreover, none of the grounds of appeal set out in the notice of appeal provide a basis to conclude that the order below would impact related cases in the bankruptcy.

[24] I was therefore unable to find that the decision under appeal would "likely" affect another case raising the same or similar issues in the appellant's bankruptcy proceeding. I granted the motion and declared that the appellant does not have a right to appeal to this court under s. 193(b) of the *BIA*.

[25] The motion for leave to appeal under s. 193(e) was then directed to proceed before me on December 17, 2015.

(2) Leave to appeal

[26] The test for leave to appeal under s. 193(e) was set out in *Business Development Bank of Canada v. Pine Tree Resorts*, 2013 ONCA 282, 115 O.R. (3d) 617 (In Chambers). In that case, at para. 29, Blair J.A. noted that granting leave under s. 193(e) is discretionary and must be exercised in a flexible and contextual way. The prevailing considerations are whether the proposed appeal

> (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole
>
> (b) is *prima facie* meritorious, and
>
> (c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

[27] The appellant's proposed appeal challenges the motion judge's lifting of the stay under s. 69.4 of the *BIA*. That section provides that a creditor who is affected by the stay under s. 69.3 may apply to the court for a declaration that the stay no longer operates against it. The court may make that declaration if satisfied that the creditor is likely to be materially prejudiced by the stay or that it is equitable on other grounds to do so. The governing authority, and that relied on by the motion judge, is *Re Ma*.

[28] The appellant's core argument in support of his leave application is that the test in *Re Ma* requires clarification. He submits that *Re Ma*'s requirement of "sound reasons" to lift the stay must include an analysis of the merits of the creditor's claim. To the extent *Re Ma* leaves this question uncertain, he says, the test requires clarification.

[29] If granted leave, the appellant will argue that the motion judge failed to engage in any analysis of the merits of the respondent's claim. Instead, he focussed on the allegations in the pleading without examining the underlying evidence. The appellant further argues that the motion judge also failed to make adverse findings from the respondent's representative's failure to answer questions on examination.

[30] The appellant says that this was unfair to him because it exposed him to potentially frivolous litigation outside the bankruptcy, without a preliminary

showing that the claim had merit. Without some sort of hard look at the case, he says, a plaintiff could meet the test by simply dressing up a pleading with allegations of fraud, adding multiple parties and pleading a complex cause of action.

[31] The appellant says that this issue is a matter of general importance in bankruptcy and insolvency, his appeal has merit and granting leave to appeal would not interfere with the administration of the bankruptcy.

[32] As I mentioned earlier, the motion judge relied on *Re Ma*. He noted that in that case the bankrupt defendant had argued that the creditor seeking to lift the stay had to establish a *prima facie* case on the merits. The Court of Appeal held otherwise. The motion judge addressed this point at paras. 18-19:

> In *Re Ma* the Court of Appeal for Ontario upheld the decision of the registrar lifting the stay to permit the TD Bank to continue an action against the bankrupt. The bankrupt argued that the creditor had to establish a *prima facie* case on the merits by providing evidence of the facts giving rise to the proposed claim. The registrar held that the test to be applied is whether the type of claim which the creditor seeks to advance against the bankrupt is the type of claim that should be allowed to proceed. She held that it was not the function of the court on a motion to lift the stay to embark upon a scrutiny of the merits of the proposed action.
>
> The Court of Appeal pointed out that lifting the statutory stay is far from a routine matter. The Court of Appeal affirmed, however, that there was no obligation on the part of the moving party to establish a *prima facie* case on the basis of evidence. The gloss on the previous law provided by the Court of Appeal in *Re Ma* is that the

> court is not precluded from *any* consideration of the merits where relevant to the issue of whether there are "sound reasons" for lifting the stay. The court used the example that, if the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

[33] The motion judge then considered what a creditor must show to establish "sound reasons" for material prejudice or other equitable grounds under s. 69.4 of the *BIA*. The grounds identified by the plaintiffs in this case were the following: (i) actions against the bankrupt for a debt for which a discharge would not be a defence (s. 178); (ii) actions of sufficient complexity to make the summary procedure under s. 135 of the *BIA* inappropriate; and (iii) actions in which the bankrupt is a necessary party for the complete adjudication of matters at issue involving other parties: see *Re Advocate Mines Ltd.* (1984), 52 C.B.R. (N.S.) 277 (Ont. S.C. [Reg.]).

[34] The motion judge noted that fraud, misappropriation, and fraudulent misrepresentation had been alleged in the pleading. He referred to the observation of Morawetz J. in *Re Ieluzzi*, 2012 ONSC 1474, 88 C.B.R. (5th) 215, that "the moving creditor need only plead specific facts which show that there are sound reasons to lift the stay, such as a set of facts which, if believed, would fall within the ambit of s. 178(1)(d)." He said that while the appellant[1] complained, as

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[1] The motion judge referred to the appellant/defendant as "the plaintiff", but in context it is clearly a typographical error.

he does here, that the allegations were unproven, "[t]hat, however, is clearly not the test."

[35] In my view, it has been settled law in this province, for at least 20 years, that on a motion to lift the stay the bankruptcy court is not required to look into the merits of the action: see *Re Francisco* (1995), 32 C.B.R. (3d) 29 (Ont. Gen. Div.), at para. 1, aff'd (1996), 40 C.B.R. (3d) 77 (C.A.), referred to with approval in *Re Ma.* As this court noted in *Re Ma,* at para. 3, this does not mean that the merits of the action can never be relevant. If, for example, the defendant wishes to argue that the action is frivolous, vexatious, or otherwise has little prospect of success, it may well adduce evidence to that effect.

[36] I do not find that the proposed appeal raises an issue of general importance in bankruptcy and insolvency matters. Nor has the appellant satisfied me that the proposed appeal is *prima facie* meritorious. I, therefore, deny the appellant leave to appeal.

D. CONCLUSION AND ORDER

[37] For these reasons, the appellant has no right of appeal and the motion for leave to appeal is dismissed. Costs of both motions shall be payable to the respondents and fixed at $13,750.00, inclusive of all applicable taxes and disbursements.

G.R. Strathy C.J.O.

TAB 10

Citation:	In the Matter of the Proposal of New Home Warranty of British Columbia Inc. 2001 BCSC 1160	Date: Docket: Registry:	20010807 190882 VA99 Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA
(IN BANKRUPTCY)

BETWEEN:

IN THE MATTER OF THE PROPOSAL OF NEW HOME WARRANTY OF BRITISH COLUMBIA INC.

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE DILLON

(IN CHAMBERS)

Counsel for KPMG Inc., Trustee under the proposal of New Home Warranty of British Columbia Inc.	William C. Kaplan, Q.C. and Peter Rubin
Counsel for IBNR Claimants	John I. McLean
Counsel for James Thomson	John J. Bateman
Counsel for Province of British Columbia as *amicus curiae*	R. Butler
Date and Place of Hearing/Trial:	July 4, 2001 Vancouver, BC

[1] The trustee in the bankruptcy of New Home Warranty of British Columbia Inc., KPMG Inc., has applied for an order approving KPMG Inc. entering into an agreement with the Province of British Columbia which provides for financial support to allow KPMG Inc. to identify any claims involving New Home Warranty's directors, officers, employees, agents, professional advisors or related corporations. James Thomson, a former director of New Home Warranty of British Columbia Inc., seeks standing before this court to have the agreement declared null and void.

[2] By way of background to this application, the report of the Barrett Commission of inquiry into condominium construction in British Columbia identified in March 2000 a number of financial transactions involving New Home Warranty of British Columbia Inc. ("NHW") that it recommended should be subject to further review. Certain of these transactions related to the directors of NHW. KPMG Inc. ("the trustee") is presently in the process under the bankruptcy of liquidating NHW's assets so that the proceeds can be distributed to the warranty claimants of NHW. Part of that process involves deciding whether to investigate and pursue claims available to NHW, including potential claims against the directors. The amended proposal in bankruptcy authorizes the inspectors under

the proposal to conduct investigations into the history and financial affairs of NHW and into possible claims against former directors of NHW as the inspectors and trustee consider appropriate and reasonable and to make recommendations to the trustee concerning suing or releasing the directors from claims that could be advanced. The trustee is granted the right to sue or release the directors after consultation and investigation with the inspectors. It was, therefore, always contemplated that the trustee would investigate any claims against the directors and the directors were aware of this at the time of filing of the proposal.

[3] Following the release of the Barrett Commission report, the trustee discussed with the Province of British Columbia (“the Province”) funding of such investigations to identify claims that had a reasonable prospect of success. As a result, the trustee and the Province agreed that the Province would provide maximum funding of $90,000 for the trustee “ to identify claims against or financial transactions or dealings involving NHW’s directors, officers, employees, agents, professional advisors, or related corporations (“Specific Matters”) that may have a reasonable chance of increasing the amount of money available for distribution under the NHW Proposal, including those identified by the Barrett Commission

and those which have been the subject of KPMG's preliminary review;…". The agreement included an independent review and report concerning the provision of services to NHW by KPMG Inc. before filing of the Intention to Make a Proposal, a potential conflict that led to the requirement that the court and inspectors under the bankruptcy approve the agreement. The full text of the agreement and its schedules was before the court as exhibit "A" to the affidavit of Robert Rusko, vice-president of KPMG in charge of the NHW bankruptcy, sworn April 20, 2001 ("the agreement"). The inspectors have approved the agreement and informed the court that these are matters that the inspectors would have had the trustee investigate in any event. The agreement simply provides funding for those investigations so that there is more money available at the end of the day for warranty claimants. This is clearly in the best interest of the creditors of the estate. It is a term of the agreement that the trustee retains sole and absolute discretion on whether to investigate any specific claim and whether to pursue realization on such claim. The only discretion reserved to the Province is whether it will assist in the funding of that process.

[4] James Thomson is a former director of NHW and was the authorized signatory to the amended proposal that included

authorization for the trustee to investigate potential claims against directors and the right of the trustee to pursue or release such claims. Mr. Thomson now applies pursuant to section 37 of the ***Bankruptcy and Insolvency Act,*** R.S.C. 1985, c.B-3 as an aggrieved person for an order that the agreement between the trustee and the Province be declared null and void. In so doing, Mr. Thomson does not suggest that the trustee should not investigate potential claims against directors. He says, however, that through the funding agreement, the government has inserted itself into the bankruptcy process and assumed responsibilities that are solely within the discretion of the trustee. This essentially extends the inquiry process for purely political reasons. The former director maintains that this action amounts to maintenance and that the trustee has no authority to enter into the transaction. It should be noted that Mr. Thomson pursues this position solely as a director and not as a creditor of NHW.

[5] The first issue is whether a former director has standing as a person aggrieved within the meaning of section 37 of the ***Bankruptcy and Insolvency Act*** to challenge a decision by the trustee in bankruptcy to enter into an agreement to accept funding for an investigation. Section 37 states:

> **37. Appeal to court against trustee** – Where the bankrupt or any of the creditors or any other person is aggrieved by an act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[6] The 1880 definition of "person aggrieved" from ***Re Sidebotham; Ex parte Sidebotham*** (1880), 14 Ch.D. 458 at 465 was adopted by the British Columbia Supreme Court **in *Liu v. Sung*** (1989), 72 C.B.R. 224 at 229 (B.C.S.C.) as follows:

> But the words "person aggrieved" do not mean a person who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

In ***Liu v. Sung***, *supra*, the action of the trustee had deprived the applicants of a right of derivative action under section 225 of the *Company Act.* This was sufficient to constitute the former director and shareholder applicants as aggrieved persons under section 37.

[7] In ***Calford v. Royal Bank*** (1998), 7 C.B.R. (4th) 94 at 96 (Ont.H.C.), the court considered the meaning of "aggrieved person" in section 37 in the context of the Royal Bank complaining about the conduct of a trustee in assigning a

right of action against the Royal Bank back to the bankrupt when it became apparent to the trustee that there was no benefit to be gained in pursuing the action. In recognizing that "any other person…aggrieved" is to be given broad interpretation, the court approved of the interpretation from ***Re Sidebotham*** , *supra* and ***Liu v. Sung***, *supra*. that required the sufferance of a legal grievance or wrongful deprivation or refusal. The Royal Bank had not been wrongfully deprived or wrongfully refused something by the trustee, nor had it suffered a legal grievance. It had no standing to interfere with the trustee's administration of the estate particularly where there was no excess of power, fraud or lack of bona fides and the conduct was reasonable from the standpoint of the good of the estate.

[8] The decision of a trustee must affect the rights of those who have a claim with respect to the estate before the jurisdiction of the court under section 37 will be invoked (***General Motors of Canada Ltd. v. Hoffer Estate*** (1994), 29 C.B.R. (3d) 163 at 166 (Man. C.A.)). Someone with no interest in the money or the dispute is not an aggrieved person because he has not been deprived of anything nor has his title been wrongfully affected (***Nesterenko (syndic) v. Banque Royale du Canada,*** [1998] A.Q. no.53, para 41 (Que.C.A.). The Quebec

Court of Appeal reiterated that courts will not interfere with the trustee's administration of the estate under the supervision of inspectors unless there is an excess of power, fraud, lack of bona fides, or unless the act is unreasonable from the standpoint of the good of the estate. However, the court retains wide residual discretion to do justice in special cases (***Transamerica Commercial Finance Corp. v. Computercorp Systems Inc.*** (1993), 20 C.B.R. (3d) 96 at 99 (Alta. C.A.)).

[9] There is no allegation of fraud or bad faith here. Nor is it suggested that the conduct of the trustee is not in the interest of the estate. I reject the suggestion that the agreement deprives the trustee of sole discretion to decide whether to investigate or pursue a potential claim. The trustee accepted funding to pursue investigation from the Province who had no obligation to do so when the costs of such investigation would have otherwise taken funds from the estate. There is no promise to give consideration for the Province's action. Whether this constitutes maintenance can be argued when and if the trustee commences an action against the directors. The trustee is not engaged in faultfinding but is merely conducting an investigation.

[10] The decision by the trustee to accept government funding for an investigation into possible claims against directors does not constitute a decision that gives rise to a legal grievance by the directors, nor does it wrongfully deprive the directors of anything. Mr. Thomson does not have standing under section 37 to challenge this decision.

[11] There is no good reason shown why a trustee cannot accept such funding. A dictum from ***Transamerica Commercial Finance Corp. v. Computercorp Systems Inc.,*** *supra* at 100, appears to support this conclusion. The agreement is specifically constructed so that the trustee maintains discretion as trustee to investigate and pursue or not.

[12] The application of Mr. Thomson is dismissed. An order is made approving the trustee entering into the agreement with the Province to allow financial support.

"J.R. Dillon, J."
The Honourable Madam Justice J.R. Dillon

TAB 11

1989 CarswellBC 327
British Columbia Supreme Court

Liu v. Sung

1989 CarswellBC 327, [1989] B.C.J. No. 111, 14 A.C.W.S. (3d) 4, 72 C.B.R. (N.S.) 224

Re WORLD VIEW TELEVISION LIMITED; LIU et al. v. SUNG et al.

Anderson J. [in Chambers]

Heard: September 21, 1988
Judgment: February 2, 1989
Docket: Vancouver No. A882134

Counsel: *J.N. Laxton, Q.C.*, and *D.K. Pidgeon*, for petitioners.
H.J. Grey, Q.C., and *P.T. McGivern*, for respondents Donald Sel — man, Wolrige Mahon Ltd. and World View Television Limited.
R.H. Guile, Q.C., for other respondents.

***Anderson J*:**

1 This is one of a number of matters which have been before the courts dealing with the propriety of the acts of certain of the directors of World View Television Limited in the creation of a debenture by that company, as well as in the acts leading up the bankruptcy of the company and the ultimate sale of its assets.

2 In May 1988 the defendants, in an action brought against them by the plaintiffs (who are the same parties as the respondents and petitioners respectively herein), were successful in a motion before Sheppard L.J.S.C. that the plaintiffs' action should be struck out. Reasons for judgment on that motion were filed on 9th June 1988 [69 C.B.R. (N.S.) 43, 27 B.C.L.R. (2d) 191, 39 B.L.R. 236] and 30th June 1988 [ante, p. 000].

3 The nature of the action before Sheppard L.J.S.C. is essentially the same as the matter now before me and was succinctly set out in his judgment of 9th June as follows [p. 45 (C.B.R.)]:

> 4 The plaintiffs allege that they held 50 per cent of the equity shares in World View but that the defendants, other than the defendants World View, Wolrige and Selman, were the directors of World View. For ease of reference I will refer to these defendants as the directors. The plaintiffs further allege that the directors granted themselves a debenture for $350,000 advanced $50,000 to World View under that debenture, then as debentureholders called that loan, then as directors refused to meet the demand, thus putting World View in breach of the debenture. As debentureholders, the directors appointed Wolrige as receiver-manager of World View and a few months later, as directors, assigned World View into bankruptcy and appointed Wolrige as the Trustee in Bankruptcy. Selman is the president of Wolrige.
> 5 The plaintiffs further claim that Wolrige, as trustee in bankruptcy, acting through Selman, sold the assets of World View to the directors for $1,000,000. The plaintiffs say that this procedure effectively took away their 50 per cent interest in World View and its assets and constituted a scheme to wrest control of World View from the plaintiffs and destroy World View.

6 The petitioners now apply to the court for the following:

7 In para. 1(a), the petitioners seek a declaration that the debenture be set aside as fraudulent under the Fraudulent Preference Act, the Fraudulent Conveyance Act or the Company Act. Such declarations have already been made. In *India Films Overseas Ltd. v. Keefer Invt. Inc.* (1984), 55 C.B.R. (N.S.) 154 at 159 (B.C.S.C.), Cowan L.J.S.C. (as he then was) held that the debenture

was made with fraudulent intent and was set aside as against a trade creditor. In *Liu v. Keefer Invt. Inc.* B.C.S.C., Vancouver No. 201084, 9th December 1987 (not yet reported), van der Hoop L.J.S.C. agreed with Cowan L.J.S.C. and also found that the debenture had been created in contravention of ss. 144, 145 and 146 of the Company Act. In the result, he declared that the debenture was void under the Fraudulent Preference Act, the Fraudulent Conveyance Act, the Bankruptcy Act and the Company Act. On appeal from the decision of van der Hoop L.J.S.C. (B.C.C.A., Vancouver No. CA 008601, 11th October 1988 (not yet reported)), Lambert J.A. concluded that on the basis of ss. 144, 145 and 146 of the Company Act "the resolution approving the debenture is void and the debenture itself is unauthorized and void". Esson J.A. found that the debenture "was a fraudulent conveyance and thus void under one or all of the Bankruptcy Act, the Fraudulent Preference Act and the Fraudulent Conveyance Act". Southin J.A., however, agreed with Lambert J.A. and expressed doubts as to whether there was fraud. She was "inclined to the view that if the scheme was [fraudulent], the correct method of attack upon it was by derivative action on behalf of the company under the Company Act". In view of these decisions, there is no need now for the declaration sought.

8 In para. 1(b), the petitioners seek a declaration that the sale of World View Television's assets be set aside. If such a declaration could be made within the framework of the proposed action, it could relate to only the tangible assets of World View. I understand, however, that the principal asset of the company was its licence to broadcast granted by the C.R.T.C., and it would appear, therefore, that the Federal Court would have jurisdiction in that regard.

9 In para. 1(c), the petitioners seek damages from the proposed defendants for tortious acts. In the proceeding before Sheppard L.J.S.C., he concluded, relying on the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189, that the wrongful acts alleged were wrongs against the company and the company alone was entitled to take any action in that regard.

10 In paras. 1(d) and (e), the petitioners seek a declaration regarding the disposition of the shares of Cathay International Television Inc. and an accounting of the profits of Cathay and its shareholders. My brother Sheppard has already dealt with these matters, and he has concluded that if these remedies are available, they are not available to the individual petitioners, but only to World View.

11 In para. 1(f), the petitioners seek punitive and exemplary damages. My comments in this regard are the same as those in respect of para. 1(c).

12 The principal thrust of the petitioner's application, however, was made with regard to para. 2, in which they seek leave for a derivative action to be brought under s. 225 of the Company Act.

13 The relevant portions of s. 225 are as follows:

> 14 225. (1) A member or director of a company may, with leave of the court, bring an action in the name and on behalf of the company
>
> (*a*) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself; or
>
> (*b*) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (*a*),
>
> whether the right, duty or obligation arises under this Act or otherwise ...
>
> 15 (3) A member or director may, on notice to the company, apply to the court for the leave referred to in subsection (1) or (2) and, if
>
> 16 (*a*) he has made reasonable efforts to cause the directors of the company to commence or diligently prosecute or defend the action;
>
> 17 (*b*) he is acting in good faith;
>
> 18 (*c*) it is prima facie in the interests of the company that the action be brought or defended ...

19 The petitioners as individuals propose to bring an action against the respondents as directors and shareholders of World View and others, alleging certain wrongful acts as a result of which they have suffered loss. But, as in the previous action, they are confronted at once with the rule in *Foss v. Harbottle*, supra, namely, that as the company and its shareholders are separate entities, only the company can sue for wrongs done to it. In the previous action, my brother Sheppard ruled that the wrongful

acts alleged were wrongs committed against the company and not against the individual plaintiffs [pp. 46-47 (C.B.R.)]: "The damages alleged were suffered originally by the company and the damages allegedly suffered by the plaintiffs were suffered by them indirectly as shareholders of the company."

20 On the face of it, however, a derivative action under s. 225 of the Company Act does not avoid this problem. Under the section, leave may be granted to bring an action "in the name and on behalf of the company". World View Television, however, is in bankruptcy, and as such it has no status to commence or pursue an action in its own name. Whatever rights the company had have now vested in the trustee.

21 The trustee, however, was requested by the petitioners to take a derivative action under s. 225 on behalf of the company. He has refused to do so. He gave two reasons for his refusal, first, that there were no funds to pay for such an action, and secondly, that such an action would have little or no prospect of success and that he was in a better position than the court to make such a determination. In the light of the other judicial pronouncements already made, his refusal, on the face of it, appears presumptuous.

22 In the result, the petitioners now seek relief under s. 37 of the Bankruptcy Act:

> 23 37. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

24 The trustee opposes this application. It is submitted on his behalf that this section does not specifically clothe the court with the authority to compel the trustee to take any proceedings. This, of course, is true. However, the court is given the discretion to reverse a decision of the trustee, in this case his refusal to commence and carry on a derivative action under s. 225 of the Company Act. The court is also authorized to "make such order in the premises as it thinks just". In my view, if the court considers it proper to reverse the decision complained of, it must also have the authority to order that the appropriate proceedings be taken.

25 It is also submitted on behalf of the trustee that the named petitioners have no status to apply for relief under s. 37 of the Bankruptcy Act. In this matter neither the bankrupt nor a creditor is applying. In order to have status, the applicants must be found to be persons who are aggrieved by the decision of the trustee in refusing to take action under s. 225 of the Company Act. The word "aggrieved" is not defined in the Bankruptcy Act. In the Oxford Universal Dictionary, 3rd ed., it is defined as "injuriously affected". Counsel for the trustee has cited the definition made by James L.J. in *Re Sidebotham; Ex parte Sidebotham* (1880), 14 Ch. D. 458 at 465:

> 26 But the words "person aggrieved" do not mean a person who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

27 In my view, the phrase must be broadly interpreted, and this is in keeping with the words of James L.R. The decision of the trustee has deprived the applicants, for and on behalf of the company, of the opportunity to seek redress in this action for the alleged tortious conduct of the other respondents. I agree that they may be able to seek redress in a differently framed action, but that should not prevent them from doing so now. In a technical sense, it is true that if there has been any loss, it has been suffered by the company. However, the action which the petitioners ask the trustee to commence will be taken "in the name and on behalf of the company".

28 In the result, I reverse the decision of the trustee and direct and order that the trustee forthwith bring or continue an action pursuant to the provisions of s. 225(1)(*b*) of the Company Act in the name and on behalf of the company to claim damages for any breach of duty or obligation on the part of those directors of World View named as respondents in this petition.

29 In view of my conclusions, I do not feel it necessary to deal with the provisions of s. 20 or s. 215 of the Bankruptcy Act.

30 The costs of and incidental to this application will be costs in the cause.

Application granted.

TAB 12

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***American Bullion Minerals Ltd. (Re),*** 2007 BCSC 1083

Date: 20070801
Docket: B061351
Registry: Vancouver

In Bankruptcy

In the Matter of the Bankruptcy

of American Bullion Minerals Ltd.

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for D. Manning & Associates:	Alan A. Frydenlund Scott H. Stephens
Counsel for Marinus Jellema and Lawrence Newton:	Robert James King
Date and Place of Hearing:	July 6, 2007 Vancouver, B.C

[1] D. Manning & Associates Ltd. (the "Trustee") was appointed the Trustee in bankruptcy of American Bullion Minerals Ltd. ("ABML") pursuant to a receiving order pronounced August 18, 2006 in response to the petition of bcMetals Corporation ("bcMetals"). Messrs. Marinus Jellema and Lawrence Newton, who are minority shareholders of ABML, applied by notice of motion dated April 2, 2007, for an order that the receiving order in bankruptcy be annulled, rescinded, set aside, vacated, varied or stayed.

[2] By notice of motion filed June 11, 2007, the Trustee applies for an order that the Jellema/Newton application be struck on the ground that they have no standing to pursue the application under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

[3] I will describe the background to the applications but no part of the description shall be taken as a finding of fact in relation to the substance of the application to annul.

[4] ABML is a public company whose shares were traded on the Toronto Stock Exchange until the British Columbia Securities Commission issued a cease trading order on May 29, 2001. As the controlling shareholder owning 52.31% of the company’s issued shares, bcMetals caused one Mr. Sujir to be appointed the sole director of ABML. He resigned on August 18, 2006, when the bankruptcy order was granted.

[5] Messrs. Jellema and Newton allege that ABML is the owner of a 30% interest in copper and gold deposits known as the Red Chris Claims in north eastern British

Columbia. The majority interest in the property is owned by Red Chris Ltd., a wholly-owned subsidiary of bcMetals. It is proposed that the property will be developed by a joint venture involving the bcMetals interests and a Chinese investor.

[6] The value of the Red Chris Claims is disputed. Messrs. Jellema and Newton claim that bcMetals has publicly represented that the value ranges from approximately $46 million to $691 million.

[7] Messrs. Jellema and Newton allege that bcMetals has used, or has attempted to use, its position as the majority shareholder to divest ABML of its interest in the Red Chris Claims and the mining venture at less than fair market value. They say that bcMetals petitioned ABML into bankruptcy so that the Trustee would be able to sell substantially all of ABML's assets to the bcMetals group without need of a shareholders' special resolution. They allege that bcMetals misrepresented the financial position of ABML and the value of its interest in the Red Chris Claims and the mining venture in order to obtain the receiving order.

[8] On this application, I need not be concerned with the question of whether any of the Jellema and Newton allegations are well-founded. The only concern is whether Messrs. Jellema and Newton, who are minority shareholders of ABML but not creditors of that company, have standing to apply to annul the bankruptcy.

[9] Sections 181(1) and 187(5) of the *BIA* provide as follows:

> 181(1) If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

> 187(5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

[10] Section 181(1) does not identify those eligible to make an application to annul. The Trustee says that s. 181 has been interpreted to restrict the persons who may apply to annul the bankruptcy to the trustee, the petitioning creditor, or other creditors. Messrs. Jellema and Newton say that while those are classes of persons whose reliance on s. 181(1) has been endorsed, the section contains no words that compel such a limited interpretation. They claim that, in appropriate circumstances, other persons, including minority shareholders, may apply to annul a bankruptcy.

[11] In *Cicco v. 609940 Ontario Inc. (Trustee of)* (1985), 57 C.B.R. (N.S.) 137 [1985] O.J. No. 1753 (S.C.) (QL), Henry J. sitting as a judge of the Ontario High Court of Justice in Bankruptcy, entertained an application brought by a shareholder for an order that an assignment in bankruptcy was a nullity. The question of standing was not addressed. The application was dismissed on its merits.

[12] In *Mahood v. High Country Holdings Inc.* (1996), 43 C.B.R. (3d) 267, [1996] B.C.J. No. 2408 (S.C.) (QL), Thackray J. as he then was, sitting as a judge of this court in a bankruptcy proceeding, dismissed the trustee's application for a declaration that an assignment in bankruptcy was valid. Parties who were shareholders but not creditors of the company claimed that the assignment was invalid.

[13] The shareholders' application to annul the bankruptcy arose in the context of their petition seeking a declaration that the affairs of several companies, other than

the bankrupt, had been conducted in a manner that was oppressive of them. No opposition was taken to the shareholders' application for orders rescinding the resolutions of directors that resulted in the assignment of the companies into bankruptcy.

[14] While the case provides authority for the proposition that shareholders have the capacity to seek revocation of a corporate resolution assigning a company into bankruptcy, it does not deal with the question of whether shareholders can challenge an order obtained on the petition of a creditor, such as bcMetals, which is also the majority shareholder of the alleged bankrupt.

[15] In support of its application to deny Messrs. Jellema and Newton standing to bring an application to annul, the Trustee cites three decisions in which a court has stated that standing to apply to annul a bankruptcy order is limited.

[16] In *Re Develox Industries Ltd.,* [1970] 3 O.R. 199 (S.C.), 12 D.L.R. (3d) 579, the bankrupt's landlord applied to annul the bankruptcy because the assignment had caused his claim which enjoyed priority before the bankruptcy to be subordinated to the claim of a chattel mortgagee. In oral reasons, Houlden J., a highly respected bankruptcy judge, wrote as follows of the landlord's standing to make the application:

> In view of the disposition which I propose to make of this application, I do not have to give a definite answer to [the question of standing]. However, it would seem to me that the application to rescind or annul a receiving order should be by the debtor, the petitioning creditor or the trustee. In my view, to permit any creditor to bring such an application would be an abuse to the process of the Court. For the purpose of this

> application I will assume that the landlord has the necessary status to ask that the receiving order be annulled or rescinded.

[17] The learned judge dismissed the landlord's application on the merits.

[18] In *Re Drozdzik* (1993), 18 C.B.R. (3d) 283, at 286-287, 46 R.F.L. (3d) 403 (B.C.S.C.), a spouse applied to annul her husband's bankruptcy. Newbury J., as she then was, said the following with respect to the application:

> The gist of Ms. Nash's argument in connection with the annulment application is that if Mrs. Drozdzik is ultimately successful in showing that her husband carried out fraudulent conveyances which resulted in his being "unable" to pay his debts, then his bankruptcy (into which he was petitioned by the Federal Business Development Bank) will have been proven unnecessary and should be annulled. Further, she says, if Mrs. Drozdzik is ultimately successful in proving at trial that she is entitled to a share of the assets which are the subject of the fraudulent conveyance action, and in proving those assets were conveyed fraudulently, the bankruptcy will stand as a "fraud" on the Court and justice will not have been done. At the Chambers hearing before me in December, she cited the decision of the Court of Appeal in *Henfry Sampson Belair Ltd. v. Manolescu* (1985) 58 C.B.R. 181, in which an annulment of bankruptcy was granted to the wife of a man who had assigned himself into bankruptcy in contravention of a Court order enjoining him from transferring or disposing of any of his assets. The bankruptcy was said to have been an abuse of process and an annulment was ordered. The wife's standing under s. 38 was not mentioned in the Court's judgment.
>
> Mr. Koo on behalf of the Trustee in Bankruptcy, and Ms. Ferris on behalf of the F.B.D.B., argue that Ms. Nash's argument is purely speculative, that there is no evidence whatsoever that would support a *prima facie* case for the "trial" of a "bankruptcy action" for annulment, and that this Court, per Coultas, J. as well as Oppal, J. (in oral reasons which have not yet been released) has decided that Mrs. Drozdzik does not have standing to participate as a creditor in the bankruptcy proceedings. Mr. Koo also argues on the authority of *Re Develox Industries Limited* (1970) 14 C.B.R. 132 (Ont. S.C.), *Re Strocen* (1990) 4 C.B.R. (3d) 209 (Sask. Q.B.) and *Re Plante* (1992) 13 C.B.R. (3rd) 40 (Ont. C.J.) that a person seeking to annul a bankruptcy under s. 181 must at least be a "creditor", if not the creditor who petitioned the bankruptcy into bankruptcy, as suggested by Houlden, J. in *Develox*.

> Lastly, in response to the argument based on *Manolescu*, Mr. Koo and Ms. Farris point out that the case of a fraudulent bankrupt who assigns himself into bankruptcy is very different from that of a bankrupt who is petitioned into bankruptcy by an arm's length creditor when he fails to pay his debts as they fall due. Again, they contend that there is no evidence of any wrongdoing on the part of F.B.D.B., the petitioning creditor, that would support an annulment application, and that such an application is a pre-requisite to the motion made under Rule 5(8) for the trial thereof at the same time as the others.
>
> I agree with both these arguments and am aware of no case in which a bankruptcy petition filed by a ***creditor acting properly and bona fide*** has been annulled by reason of improper or even fraudulent conduct on the part of the bankrupt. *Manolescu, supra*, and others I have located on point - *Re Good* (1991) 4 C.B.R. (3d) 12 (Ont. C.J.) and *Re Louis & Peter Co.* (1988) 67 C.B.R. 176 (Ont. S.C.) - are all cases dealing with a bankrupt who, in petitioning himself into bankruptcy, perpetrated an abuse of process.
>
> [emphasis added]

[19] Finally, in *Re Gaffney*, 2007 BCCA 182, the Court of Appeal addressed the question of whether the estranged husband of the bankrupt who had been discharged from bankruptcy by court order could bring an application to retrospectively annul the bankruptcy. Newbury J.A. addressed the concern as follows at paras. 25-27:

> [25] Section 181(1) of the *BIA* grants the bankruptcy court power to annul a bankruptcy, but does not specify who may bring an application. Rule 88 alludes to the possibility of the application being made by “a person other than the bankrupt”, but does not provide categories of such persons. It has been held in a number of cases (for example, see *Re Develox Industries Limited* (1970) 14 C.B.R. 132 (Ont. S.J.) and *Re Drozdzik* (1993) 18 C.B.R. (3d) 283 (B.C.S.C.), lve refused (1993) 26 C.B.R. (3d) 53 (B.C.C.A.)) that to seek annulment of an assignment into bankruptcy, the applicant should be the trustee or a creditor of the bankrupt. Mr. Gaffney has never taken the position that he is a creditor, or sought standing as a creditor. If he is arguing for a type of public interest standing, I am not aware of any authority that suggests that members of the public should have standing to annul, although the ‘interests of the public’ may be a valid consideration where annulment of an assignment is sought.

> [26] Spouses of bankrupts have in some situations been able to challenge an assignment into bankruptcy. In *Henfrey Samson Belair Ltd. v. Manolescu* (1985) 69 B.C.L.R. 216 (C.A.), the wife of the bankrupt was successful in annulling the assignment into bankruptcy. Certain features, however, distinguish the present case from that one. First, the assignment in *Henfrey* was contrary to a previously made restraining order. Here, no such order was in place. Secondly, in *Henfrey* the assets of the bankrupt were vested in the trustee as a result of the assignment. Here, in contrast, the title to the property has been returned to Mrs. Gaffney following the discharge. Mr. Gaffney has not shown how the annulment could possibly advance his interest in these circumstances. If his application succeeded and the annulment were granted, the effect, according to s. 181(2) of the *BIA*, would be to return the property to the bankrupt, subject any court-ordered appointment and conditions. This has already been achieved through the discharge process. The principal difference is that s. 178(2) discharges the bankrupt from all "claims provable in bankruptcy". This does not prejudice Mr. Gaffney, since, as I have already noted, he did not assert a claim as a creditor in the bankruptcy proceedings. To the extent that his claims against Mrs. Gaffney do not fit the definition of "claims provable" in s. 121, they survive her discharge.
>
> [27] I conclude there is no merit, nor any practical benefit, to the proposed appeal.

[20] I do not construe the decisions cited by the Trustee to compel the conclusion that s. 181(1), which contains no limiting words, prohibits a minority shareholder from ever applying for an order to annul a bankruptcy. While the trustee, the debtor, and creditors, including the petitioning creditor, have the most direct interest in the bankruptcy proceeding and there is, accordingly, some appeal to the argument that those persons and none other have standing to attempt to annul the bankruptcy, I see no reason why a shareholder should not be permitted to contest the validity of a bankruptcy in appropriate circumstances. In my opinion, appropriate circumstances include those in which the petitioning creditor is also the majority shareholder of the

bankrupt, and the substance of the minority's claim is that the bankruptcy process is being used for improper purposes.

[21] I do not accept the Trustee's claim that Messrs. Jellema and Newton will not be adversely affected by the bankruptcy because the sale of the ABML assets in the course of the bankruptcy will be made for value and, in the event that proceeds exceed the value of the provable claims of creditors, the minority shareholders will receive their share of the excess on dissolution of the company. A sale in a bankruptcy may not yield full value. Moreover, the minority shareholders have a statutory right under the *Business Corporations Act*, S.B.C. 2002, c.57, to attempt to restrain the sale by defeating a special resolution, and a statutory right to pursue dissent proceedings in the event the sale of assets is approved by the required majority, notwithstanding the minority's opposition to it. Those rights are of greater benefit to minority shareholders than are any residual rights in the bankrupt's estate.

[22] In other circumstances, the *BIA* permits aggrieved persons to apply for relief. Section 37 permits a bankrupt, a creditor, or other aggrieved person to apply for an order reversing or modifying the act or decision of a trustee in the course of a bankruptcy. The section does not stipulate who may or should be characterized as an aggrieved person. The phrase is capable of describing a shareholder, including a minority shareholder. If such persons have standing to apply under s. 37, they should be afforded comparable rights under the far broader, and more generally worded, s. 181(1).

[23] The Trustee's application to deny standing to Messrs. Jellema and Newton to apply to annul the bankruptcy is dismissed.

"Pitfield J."

TAB 13

Industrial Wood & Allied Workers of Canada, Local 700 *Appellant/Respondent on cross-appeal*

v.

GMAC Commercial Credit Corporation — Canada *Respondent/Appellant on cross-appeal*

and

T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., the Interim Receiver and Trustee in Bankruptcy of T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc., and TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (a successor to Tri-Line Expressways Ltd. and TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. and 606966 British Columbia Ltd. *Respondents*

Indexed as: GMAC Commercial Credit Corp. — Canada *v.* T.C.T. Logistics Inc.

Neutral citation: 2006 SCC 35.

File No.: 30391.

2005: November 16; 2006: July 27.

Present: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Major J. took no part in the judgment.

Syndicat des travailleurs de l'industrie du bois et leurs alliés, section locale 700 *Appelant/Intimé au pourvoi incident*

c.

Société de crédit commercial GMAC — Canada *Intimée/Appelante au pourvoi incident*

et

T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., séquestre intérimaire et syndic de faillite de T.C.T. Logistics Inc. et T.C.T. Warehousing Logistics Inc., et TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (successeur de Tri-Line Expressways Ltd. et de TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. et 606966 British Columbia Ltd. *Intimées*

Répertorié : Société de crédit commercial GMAC — Canada *c.* T.C.T. Logistics Inc.

Référence neutre : 2006 CSC 35.

N° du greffe : 30391.

2005 : 16 novembre; 2006 : 27 juillet.

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 L'ONTARIO

* Le juge Major n'a pas pris part au jugement.

Bankruptcy and insolvency — Bankruptcy court — Jurisdiction — Whether bankruptcy judge lacks jurisdiction to determine whether interim receiver is successor employer under provincial labour relations legislation — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 47, 72(1).

Bankruptcy and insolvency — Procedure — Action against interim receiver — Bankruptcy legislation precluding proceedings against interim receiver without leave of court — Union seeking leave to bring "successor employer" application against interim receiver — Whether Mancini test applicable — Whether test different when dispute relates to receiver's obligations to debtors' employees represented by union — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 215.

The company TCT became insolvent and its largest secured creditor applied for an order appointing an interim receiver. The order appointing KPMG states that the receiver's employment-related actions could not be considered those of a "successor employer", and prohibits proceedings being taken against the interim receiver unless the court grants leave. After TCT was assigned in bankruptcy, KPMG sold most of the assets of the warehousing business to a new company. All unionized employees at the Toronto warehouse were terminated by KPMG, but some of them were later hired by the new company. Except for a change in location, the only major difference between TCT's operations and those of the new company was the absence of the union as representative of TCT's former employees.

The union applied to the Ontario Labour Relations Board seeking, in particular, a declaration that, as a successor employer to TCT or KPMG, the new company was bound by the collective agreement pursuant to s. 69 of the *Labour Relations Act, 1995* ("*LRA*"). After a stay was granted on the basis that s. 215 of the *Bankruptcy and Insolvency Act* ("*BIA*") precludes proceedings against an interim receiver or trustee without leave of the court, the union sought the necessary court approval. The bankruptcy judge amended the paragraph relating to the "successor employer" protection in the order appointing the interim receiver, but denied leave. The Court of Appeal unanimously concluded that only the labour board had jurisdiction

Faillite et insolvabilité — Tribunal de faillite — Compétence — Les juges de faillite sont-ils incompétents pour décider si un séquestre intérimaire est un employeur successeur pour l'application des lois provinciales sur les relations de travail? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 47, 72(1).

Faillite et insolvabilité — Procédure — Action contre un séquestre intérimaire — Disposition législative sur la faillite interdisant l'engagement de procédures contre un séquestre intérimaire sans autorisation judiciaire préalable — Permission demandée par un syndicat en vue d'être autorisé à déposer contre un séquestre intérimaire une requête touchant le statut d'« employeur successeur » — Le critère énoncé dans l'arrêt Mancini est-il applicable? — Un critère différent s'applique-t-il lorsque le litige a trait aux obligations du séquestre envers les employés syndiqués du débiteur? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 215.

La société TCT est devenue insolvable et le principal créancier garanti de celle-ci a demandé la nomination d'un séquestre intérimaire. L'ordonnance portant nomination de KPMG précisait que les mesures prises par le séquestre intérimaire en matière d'emploi ne pouvaient être considérées comme celles d'un « employeur successeur » et interdisait l'engagement de procédures contre le séquestre intérimaire, sauf avec l'autorisation de la cour. Après cession des biens de TCT au profit des créanciers, KPMG a vendu la plupart des éléments d'actif de l'entreprise d'entreposage à une société nouvellement formée. KPMG a mis fin à l'emploi de tous les employés syndiqués de l'entrepôt de Toronto, mais certains d'entre eux ont été réembauchés subséquemment par la nouvelle société. Exception faite du nouvel emplacement des activités, la seule différence importante dans l'exploitation de l'entreprise par TCT et par la nouvelle société était l'absence du syndicat comme représentant des anciens employés de TCT.

Le syndicat a présenté à la Commission des relations de travail de l'Ontario une requête dans laquelle il sollicitait notamment une déclaration portant que, en tant qu'employeur succédant à TCT ou KPMG, la nouvelle société était liée par la convention collective conformément à l'art. 69 de la *Loi de 1995 sur les relations de travail* (« *LRT* »). Après que sa requête eût été suspendue pour le motif que l'art. 215 de la *Loi sur la faillite et l'insolvabilité* (« *LFI* ») interdit l'introduction d'actions contre un séquestre intérimaire ou un syndic de faillite sans la permission du tribunal, le syndicat a demandé cette permission. Le juge a modifié le paragraphe relatif à la protection touchant le statut d'« employeur successeur » dans l'ordonnance nommant le

to determine who was a successor employer, but divided over the test under s. 215 for granting leave to bring successor employer applications. The majority was of the view that the traditional *Mancini* test represented too low a threshold when the proposed proceedings were successor employer applications, and that other factors should be considered to take account to a greater extent of the impact of such litigation on the bankruptcy process. Accordingly, the majority set aside the bankruptcy judge's refusal to grant leave and remitted the leave application back to him for reconsideration based on the enhanced enumerated factors. The union appealed the Court of Appeal's order denying leave, and the secured creditor cross-appealed on the issue of the bankruptcy judge's jurisdiction.

Held (Deschamps J. dissenting on the appeal): The appeal should be allowed and the cross-appeal dismissed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.: The bankruptcy court does not have jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *LRA*. The powers given to the bankruptcy court under s. 47(2) *BIA* are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes. Further, s. 72(1) *BIA* declares that unless there is a conflict, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the Act. The right to seek a successor employer declaration pursuant to the *LRA* does not conflict with the bankruptcy court's authority under s. 47(2). If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all rights. Explicit language would be required before such a sweeping power could be attached to s. 47. [4] [43-51]

The bankruptcy judge erred in not granting leave to the union to bring a successor employer application against the interim receiver. Under the *Mancini* test, the threshold for granting leave under s. 215 *BIA* is not

séquestre intérimaire, mais il a refusé la permission demandée. La Cour d'appel a conclu à l'unanimité que seule la Commission avait compétence pour se prononcer sur le statut d'employeur successeur, mais elle s'est divisée sur le critère applicable pour décider, en vertu de l'art. 215 *LFI*, s'il y a lieu d'accorder ou non la permission de présenter une demande concernant le statut d'employeur successeur. La majorité a estimé que le critère traditionnel formulé dans *Mancini* n'était pas assez exigeant lorsqu'il s'agissait d'instances relatives au statut d'employeur successeur et qu'il fallait considérer d'autres facteurs pour tenir davantage compte des conséquences de telles demandes en justice sur le processus de faillite. La majorité a en conséquence annulé le refus du juge d'accorder la permission et lui a renvoyé la demande pour qu'il la réexamine en fonction des facteurs additionnels énumérés. Le syndicat se pourvoit contre l'ordonnance de la Cour d'appel qui lui a refusé la permission d'engager des procédures, et le créancier garanti a formé un appel incident sur la question de la compétence du juge de faillite.

Arrêt (la juge Deschamps est dissidente quant au pourvoi principal) : Le pourvoi principal est accueilli et le pourvoi incident est rejeté.

La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Fish, Abella et Charron : Le tribunal de faillite n'a pas le pouvoir de décider si un séquestre intérimaire est un employeur successeur au sens de la *LRT*. Le paragraphe 47(2) *LFI* accorde au tribunal de faillite le pouvoir d'enjoindre au séquestre intérimaire de faire certaines choses. Cette disposition n'a pas pour effet d'habiliter — ni explicitement ni implicitement — le tribunal de faillite à rendre des jugements déclaratoires unilatéraux sur les droits de tiers en fonction d'autres régimes législatifs. En outre, le par. 72(1) *LFI* énonce que celle-ci n'a pas pour effet d'abroger des dispositions législatives non incompatibles avec elle se rapportant à la propriété et aux droits civils, ces dispositions étant réputées s'y ajouter. Le droit de demander une déclaration touchant le statut d'employeur successeur conformément à la *LRT*, n'est pas incompatible avec le pouvoir que le par. 47(2) accorde au tribunal de faillite. Si l'article 47 pouvait recevoir une interprétation assez large pour permettre de porter atteinte à tous les droits qui, bien que protégés par la loi, gênent le processus de faillite, il pourrait être invoqué pour éteindre tout droit. Il faudrait un texte explicite pour que l'art. 47 confère un pouvoir aussi étendu. [4] [43-51]

Le juge de faillite a fait erreur en refusant d'accorder au syndicat la permission de présenter contre le séquestre intérimaire une demande relative à la qualité d'employeur successeur. Le critère énoncé dans *Mancini* à

a high one. The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. If the evidence discloses a *prima facie* case, leave should be granted. The focus of the inquiry is not a determination of the merits. The threshold of the *Mancini* test strikes the appropriate balance between the protection of trustees and receivers from frivolous suits, while preserving to the maximum extent possible the rights of creditors and others as against a trustee or receiver. As a result, *Mancini* is consistent with the requirement that there be explicit statutory language before the *BIA* is interpreted so as to deprive persons of rights conferred under provincial law. Where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly. In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers. There is no reason to create a more stringent test to be applied only to claims by employees represented by unions. To impose a higher s. 215 threshold in a case involving a labour board issue is to read into the *BIA* a lower tolerance for the rights of employees represented by unions than for other creditors. Nothing in the Act suggests this dichotomy. Finally, the *Mancini* test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. In this case, since it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed. [7] [55-61] [67-72] [80]

Per Deschamps J. (dissenting on the appeal): A judge who must decide whether to grant leave to bring proceedings against a trustee under s. 215 *BIA* must determine the actual scope of the remedy being sought, identify potential conflicts and tailor the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the *BIA*. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law and the judge must therefore deny leave to bring them. [154]

l'égard des demandes de permission fondées sur l'art. 215 *LFI* n'est pas très exigeant. Pour l'application de cette disposition, il s'agit de déterminer si la preuve étaye la cause d'action invoquée. S'il existe une preuve *prima facie*, la permission demandée doit être accordée. Cet examen n'a pas pour objet de trancher la question au fond. Le critère énoncé dans *Mancini* établit un juste équilibre entre, d'une part, la protection des syndics et des séquestres contre les poursuites frivoles, et, d'autre part, la protection — dans la plus large mesure possible — des droits des créanciers et autres intéressés contre les décisions et les actes des syndics et des séquestres. En ce sens, l'arrêt *Mancini* est compatible avec l'exigence selon laquelle il faut une disposition législative explicite pour que la *LFI* puisse être interprétée de manière à priver une personne de droits conférés par une province. Lorsque le législateur a voulu protéger les syndics ou les séquestres contre certains recours, il l'a fait explicitement. En l'absence de dispositions expresses de ce genre, le tribunal de faillite ne devrait pas convertir la procédure d'autorisation établie à l'art. 215 en mesure de protection générale en faveur des auxiliaires de justice désignés par les tribunaux. Il n'existe aucune raison de créer un critère plus exigeant, qui s'appliquerait uniquement aux recours des employés syndiqués. Resserrer le critère d'application de l'art. 215 lorsque le litige porte sur une question relevant d'une commission des relations de travail équivaut à reconnaître à la *LFI*, par interprétation, une sensibilité moins grande envers les droits des employés syndiqués qu'envers ceux des autres créanciers. Rien dans cette loi ne suggère une telle distinction. Enfin, le critère de l'arrêt *Mancini* ne restreint nullement les mesures de protection que le législateur a jugé nécessaires d'établir pour préserver la capacité des syndics et des séquestres de s'acquitter de leurs fonctions avec souplesse et efficacité. En l'espèce, comme il est impossible d'affirmer que la demande du syndicat est frivole ou n'est appuyée d'aucune preuve, celui-ci doit être autorisé à la présenter. [7] [55-61] [67-72] [80]

La juge Deschamps (dissidente quant au pourvoi principal) : Le juge appelé à décider s'il y a lieu d'accorder la permission de poursuivre un syndic en vertu de l'art. 215 *LFI* doit évaluer concrètement la portée du recours recherché, identifier les conflits potentiels et moduler l'autorisation de façon à éviter qu'une poursuite fondée sur le droit provincial n'ait pour effet d'entraver l'exécution des devoirs et responsabilités imposés au syndic par la *LFI*. Comme le droit constitutionnel ne tolère pas les conflits de compétence, une poursuite entraînant un conflit constitutionnel n'a pas de fondement juridique et le juge doit alors refuser la permission demandée. [154]

The decision to continue operating the business is central to the trustee's role under the *BIA* and, in principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. The provisions of the *BIA* that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by the *BIA*. The successor employer declaration is not free of pitfalls when it applies to a trustee. The effect of such a declaration is that the trustee becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. Although it is common ground that the *LRA* confers the exclusive power to decide who is a "successor employer" on the Ontario Labour Relations Board, the *LRA* cannot frustrate the purpose of the *BIA*. It is therefore important to strike a balance between the trustee's duties and immunities under the *BIA* and the employees' rights under the *LRA*. In the event of conflict, the parties must refer to constitutional principles. Courts that hear disputes relating to the difficulty of applying federal and provincial statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government. Where conflict is unavoidable, however, the federal statute is paramount to the provincial statute. Hence the importance of the screening mechanism of s. 215 *BIA*, which serves the purpose of ensuring that provincial and federal statutes do not conflict with each other. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts. [91] [101] [103] [111-112] [116-117] [123] [127-128]

Although the criteria established in *Mancini* for applying s. 215 are easy to apply to a simple action in damages based on wrongdoing by the trustee, they must, in other cases, be tailored to the specific nature of each application for leave. The judge must assess the nature and scope of the proceeding in light of the evidence. This review does not have the effect of giving special or different treatment to successor employer declarations. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and make provision for conflicts. By ensuring that the conclusions being sought do not impair the application of the *BIA* and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits

La décision de continuer les activités de l'entreprise est au cœur de la mission confiée au syndic par la *LFI* et, en principe, le syndic ne doit pas être assujetti à des obligations qui entravent le règlement de la faillite. Les dispositions de la *LFI* protégeant le syndic contre les poursuites indiquent clairement l'intention du Parlement de lui accorder la marge de manœuvre dont il a besoin pour accomplir les devoirs que lui impose la *LFI*. La déclaration attribuant la qualité d'employeur successeur n'est pas sans créer d'embûches lorsqu'elle vise un syndic. Une telle déclaration a pour effet de faire du syndic une partie liée par la convention collective et de le rendre responsable de toutes les obligations y afférentes, y compris celles qui incombaient à l'ancien employeur avant le transfert de l'entreprise. Bien qu'il soit admis que la *LRT* confère à la Commission des relations de travail de l'Ontario le pouvoir exclusif de décider qui est « employeur successeur », la *LRT* ne saurait entraver la réalisation de l'objet de la *LFI*. Il est donc important d'identifier le point d'équilibre entre les devoirs et immunités du syndic en vertu de la *LFI* et les droits reconnus aux employés par la *LRT*. En cas de conflit, les parties doivent se reporter aux règles constitutionnelles. Les tribunaux saisis de contestations portant sur la difficulté d'appliquer concurremment des lois fédérales et provinciales doivent tenter de concilier l'application de ces lois de façon à respecter les champs de compétence respectifs des deux ordres de gouvernement. Cependant, lorsque le conflit est inévitable, la loi fédérale a prépondérance sur la loi provinciale. De là l'importance du mécanisme de filtrage de l'art. 215 *LFI* qui sert de mesure de contrôle permettant d'éviter que des lois provinciale et fédérale n'entrent en conflit l'une avec l'autre. Comme la faillite d'une entreprise met en cause les intérêts de tous les créanciers et non pas seulement ceux des employés, le juge de la cour de faillite est dans une meilleure position pour évaluer les intérêts en cause et prévenir les conflits. **[91] [101] [103] [111-112]** [116-117] [123] [127-128]

D'application facile lorsqu'il s'agit d'une simple poursuite en dommages-intérêts fondée sur la faute du syndic, les critères d'application de l'art. 215 énoncés dans l'arrêt *Mancini* doivent, dans les autres cas, être adaptés à la nature particulière de chaque demande. Le juge doit évaluer la nature et la portée du recours à la lumière de la preuve. Cet examen n'a pas pour effet d'accorder un traitement particulier ou différent aux déclarations attribuant la qualité d'employeur successeur. Dans l'examen du sérieux de la cause d'action, le juge de faillite doit être vigilant et prévoir les conflits. En s'assurant que les conclusions recherchées n'entravent pas l'application de la *LFI* et, au besoin, en limitant la portée d'une poursuite fondée sur une loi provinciale,

the federal statute and provincial legislation to be applied simultaneously. A judge who denies leave to bring proceedings merely avoids a conflict by relying on the paramountcy doctrine in a preventive manner. However, the bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits. The judge's first task is to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy. The judge will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 *BIA*, which makes express provision for the application of provincial legislation that is compatible with the federal statute. [124] [135] [143-153]

In the instant case, the unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the *BIA*. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. [162] [166]

Cases Cited

By Abella J.

Applied: *Mancini (Bankrupt) v. Falconi* (1993), 61 O.A.C. 332; **referred to:** *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, aff'd (2004), 46 C.B.R. (4th) 126; *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3; *Randfield v. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075; *In re Diehl v. Carritt* (1907), 15 O.L.R. 202; *Danny's Cabaret Ltd. v. Horner*, [1980] B.C.J. No. 1293 (QL); *Virden Credit Union Ltd. v. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113; *RoyNat Inc. v. Allan* (1988), 61 Alta. L.R. (2d) 165; *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 14 C.B.R. (3d) 233; *Toronto Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6; *Nicholas v. Anderson* (1996), 40 C.B.R. (3d) 32; *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9;

le juge de faillite permet l'application simultanée de la loi fédérale et des lois provinciales. Le juge qui refuse d'autoriser une poursuite ne fait qu'éviter le conflit en recourant de façon préventive à la doctrine de la prépondérance. Le juge de faillite doit toutefois prendre garde de ne pas se substituer au tribunal qui statuera sur le fond. La tâche première du juge consiste à s'interroger sur l'effet concret de la demande et non sur quelque effet diffus de celle-ci sur l'administration de la faillite. Seule une entrave réelle au travail du syndic justifie de limiter la portée du recours ou de refuser la permission d'intenter celui-ci. Une approche trop axée sur la flexibilité requise par le syndic dans sa gestion risquerait d'amener trop facilement à conclure à l'existence d'un conflit et serait peu respectueuse de l'art. 72 *LFI* qui prévoit expressément l'application des lois provinciales compatibles avec la loi fédérale. [124] [135] [143-153]

Dans la présente affaire, les conclusions sans réserve sollicitées par le syndicat sont susceptibles d'entraîner des conflits directs avec l'application de la *LFI*. Ni les faits consignés au dossier ni les positions avancées par les parties ne permettent à notre Cour de procéder à l'examen auquel la Cour supérieure doit se livrer. Le renvoi du dossier s'impose donc non seulement pour l'évaluation du dossier sous l'angle constitutionnel, mais aussi pour l'examen du sérieux de la cause d'action et du caractère suffisant de la preuve. [162] [166]

Jurisprudence

Citée par la juge Abella

Arrêt appliqué : *Mancini (Bankrupt) c. Falconi* (1993), 61 O.A.C. 332; **arrêts mentionnés :** *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641; *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21; *Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146, 2002 CSC 31; *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, conf. par (2004), 46 C.B.R. (4th) 126; *Crystalline Investments Ltd. c. Domgroup Ltd.*, [2004] 1 R.C.S. 60, 2004 CSC 3; *Randfield c. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075; *In re Diehl c. Carritt* (1907), 15 O.L.R. 202; *Danny's Cabaret Ltd. c. Horner*, [1980] B.C.J. No. 1293 (QL); *Virden Credit Union Ltd. c. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113; *RoyNat Inc. c. Allan* (1988), 61 Alta. L.R. (2d) 165; *B.N.R. Holdings Ltd. c. Royal Bank* (1992), 14 C.B.R. (3d) 233; *Toronto Dominion Bank c. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6; *Nicholas c. Anderson* (1996),

Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688; *Vanderwoude v. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 195; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

By Deschamps J. (dissenting on the appeal)

Ex parte James, In re Condon (1874), L.R. 9 Ch. App. 609; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160; *L'Heureux (Syndic de)*, [1999] R.J.Q. 945; *Caisse populaire de Pontbriand v. Domaine St-Martin Ltée*, [1992] R.D.I. 417; *Azco Mining Inc. v. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392; *Re Reed* (1980), 34 C.B.R. (N.S.) 83; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. May/June 397; *Adam v. Daniel Roy Ltée*, [1983] 1 S.C.R. 683; *Man of Aran* (1974), 6 L.A.C. (2d) 238; *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96; *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126; *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138; *Radio CJYQ-930 Ltd.* (1978), 34 di 617; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, 2005 SCC 52; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92; *Alamo Linen Rentals Ltd. v. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38; 40 C.B.R. (3d) 32; *Burton c. Kideckel* (1999), 13 C.B.R. (4th) 9; *Society of Composers, Authors and Music Publishers of Canada c. Armitage* (2000), 50 O.R. (3d) 688; *Vanderwoude c. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 195; *Sam Lévy & Associés Inc. c. Azco Mining Inc.*, [2001] 3 R.C.S. 978, 2001 CSC 92; *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701.

Citée par la juge Deschamps (dissidente quant au pourvoi principal)

Ex parte James, In re Condon (1874), L.R. 9 Ch. App. 609; *Parsons c. Sovereign Bank of Canada*, [1913] A.C. 160; *L'Heureux (Syndic de)*, [1999] R.J.Q. 945; *Caisse populaire de Pontbriand c. Domaine St-Martin Ltée*, [1992] R.D.I. 417; *Azco Mining Inc. c. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392; *Re Reed* (1980), 34 C.B.R. (N.S.) 83; *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. May/June 397; *Adam c. Daniel Roy Ltée*, [1983] 1 R.C.S. 683; *Man of Aran* (1974), 6 L.A.C. (2d) 238; *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96; *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126; *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138; *Radio CJYQ-930 Ltd.* (1978), 34 di 617; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Hodge c. The Queen* (1883), 9 App. Cas. 117; *Renvoi relatif à la Loi sur l'assurance-emploi (Can.), art. 22 et 23*, [2005] 2 R.C.S. 669, 2005 CSC 56; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Law Society of British Columbia c. Mangat*, [2001] 3 R.C.S. 113, 2001 CSC 67; *Rothmans, Benson & Hedges Inc. c. Saskatchewan*, [2005] 1 R.C.S. 188, 2005 CSC 13; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, [2005] 2 R.C.S. 564, 2005 CSC 52; *Tranchemontagne c. Ontario (Directeur du Programme ontarien de soutien aux personnes handicapées)*, [2006] 1 R.C.S. 513, 2006 CSC 14; *Sam Lévy & Associés Inc. c. Azco Mining Inc.*, [2001] 3 R.C.S. 978, 2001 CSC 92; *Alamo Linen Rentals Ltd. c. Spicer*

Beatty Limited Partnership (Re) (1991), 1 O.R. (3d) 636; *Chastan Ventures Ltd., Re* (1993), 23 C.B.R. (3d) 115; *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208; *McKyes, Re*, 1996 CarswellQue 2575; *Nicholas v. Anderson* (1998), 5 C.B.R. (4th) 256; *Gallo v. Beber* (1998), 7 C.B.R. (4th) 170; *Kearney v. Feldman*, [1998] O.J. No. 5109 (QL); *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160; *Mann v. KPMG Inc.* (2000), 197 Sask. R. 181, 2000 SKQB 460; *Vanderwoude v. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127; *Caswan Environmental Services Inc., Re* (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77; *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL); *MacLean v. Morash* (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani v. Devgan*, [2005] O.J. No. 2868 (QL); *105497 Ontario Inc. v. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122; *477470 Alberta Ltd., Re* (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430; *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28; *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, aff'd (2004), 46 C.B.R. (4th) 126; *Mancini (Bankrupt) v. Falconi* (1989), 76 C.B.R. (N.S.) 90, aff'd (1993), 61 O.A.C. 332; *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] Q.J. No. 264 (QL).

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Feldman, MacPherson and Cronk JJ.A.) (2004), 71 O.R. (3d) 54, 238 D.L.R. (4th) 677, 185 O.A.C. 138, 48 C.B.R. (4th) 256, [2004] O.J. No. 1353 (QL), setting aside a decision of Ground J. (2003), 42 C.B.R. (4th) 221, [2003] O.J. No. 1603 (QL). Appeal allowed, Deschamps J. dissenting. Cross-appeal dismissed.

Stephen Wahl and *Andrew J. Hatnay*, for the appellant/respondent on cross-appeal.

Orestes Pasparakis and *Susan E. Rothfels*, for the respondent/appellant on cross-appeal.

Benjamin Zarnett and *Frederick L. Myers*, for the respondent KPMG Inc.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ. was delivered by

ABELLA J. — Bankruptcy suspends the economic independence of an enterprise or individual. No longer can operational choices be made by the owner of a business. These become instead the responsibility of the receiver or trustee appointed by the court to salvage as much of the business's financial remains as possible for the benefit of creditors.

Carter, Donald D., Geoffrey England, Brian Etherington and Gilles Trudeau. *Labour Law in Canada*, 5th ed. The Hague : Kluwer Law International, 2002.

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Ontario (les juges Feldman, MacPherson et Cronk) (2004), 71 O.R. (3d) 54, 238 D.L.R. (4th) 677, 185 O.A.C. 138, 48 C.B.R. (4th) 256, [2004] O.J. No. 1353 (QL), qui a infirmé une décision du juge Ground (2003), 42 C.B.R. (4th) 221, [2003] O.J. No. 1603 (QL). Pourvoi accueilli, la juge Deschamps est dissidente. Pourvoi incident rejeté.

Stephen Wahl et *Andrew J. Hatnay*, pour l'appelant/intimé au pourvoi incident.

Orestes Pasparakis et *Susan E. Rothfels*, pour l'intimée/appelante au pourvoi incident.

Benjamin Zarnett et *Frederick L. Myers*, pour l'intimée KPMG Inc.

Version française du jugement de la juge en chef McLachlin et des juges Bastarache, Binnie, LeBel, Fish, Abella et Charron rendu par

LA JUGE ABELLA — La faillite suspend l'indépendance financière d'une entreprise ou d'un particulier. Le propriétaire d'une entreprise ne peut plus prendre de décisions touchant l'exploitation de celle-ci. Ces décisions deviennent alors la responsabilité du séquestre ou du syndic, lequel est nommé par le tribunal pour sauver tout ce qu'il peut des restes de l'entreprise au profit des créanciers. 1

2 Those creditors include unionized employees. The issue in this appeal is the extent to which the rights of those employees must yield to the overall objective in a bankruptcy of maximizing the ability of creditors to minimize their losses. In particular, the issue is whether those employees are entitled to the same access to a remedy as other stakeholders who attempt to impugn a receiver's or trustee's conduct.

Ces créanciers peuvent comprendre des employés syndiqués. Le présent pourvoi soulève la question de savoir dans quelle mesure les droits de ces employés doivent céder le pas devant l'objectif global du processus de faillite, à savoir maximiser la capacité des créanciers de réduire leurs pertes au minimum. Plus particulièrement, la Cour doit décider si ces employés disposent du même droit de recours que les autres intéressés pour contester la conduite du séquestre ou du syndic.

3 The analysis engages both the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A.

Cette analyse fait intervenir tant la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3, que la loi ontarienne intitulée *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A.

4 Three provisions of the *Bankruptcy and Insolvency Act* are engaged by the circumstances of this case. The first is s. 47, authorizing a judge to appoint and supervise an interim receiver to take possession and control of, or otherwise deal with the debtor's property. The second is s. 215, which immunizes the conduct of receivers and trustees from lawsuits unless prior judicial authorization is obtained. The third is s. 72(1), declaring that unless there is a conflict with the Act, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the federal *Bankruptcy and Insolvency Act*.

Les faits en cause nécessitent l'examen de trois dispositions de la *Loi sur la faillite et l'insolvabilité* : l'art. 47, qui autorise un juge à nommer un séquestre intérimaire et à lui enjoindre de prendre possession des biens du débiteur, d'exercer un contrôle sur eux et de prendre toute autre mesure indiquée; l'art. 215, qui met les séquestres et syndics à l'abri de poursuites intentées sans autorisation judiciaire préalable; le par. 72(1), qui énonce que la *Loi sur la faillite et l'insolvabilité* n'a pas pour effet d'abroger des dispositions législatives non incompatibles avec elle se rapportant à la propriété et aux droits civils, lesquelles sont réputées s'y ajouter.

5 The relevant provisions of the *Labour Relations Act, 1995* are ss. 69(2), 69(12), 114(1) and 116, the combined effect of which is to give to the Ontario Labour Relations Board exclusive and final authority to determine whether a financial transaction constitutes a sale of a business, thereby triggering the obligation, as a "successor employer", to honour any collective agreements of the acquired business.

Les dispositions pertinentes de la *Loi de 1995 sur les relations de travail* sont les par. 69(2), 69(12) et 114(1) et l'art. 116 qui, ensemble, ont pour effet de conférer à la Commission des relations de travail de l'Ontario (la « Commission ») le pouvoir exclusif de rendre une décision ayant force de chose jugée sur la question de savoir si une opération constitue la vente d'une entreprise, imposant à l'acquéreur, en tant qu'« employeur successeur » l'obligation de respecter les conventions collectives liant l'entreprise qu'il a acquise.

6 The issue which animates the interpretive interplay between these provisions is whether to endorse the current judicial approach set out in *Mancini (Bankrupt) v. Falconi* (1993), 61 O.A.C. 332 (C.A.), to determinations under s. 215 of the *Bankruptcy*

Il s'agit, par l'interprétation de ces dispositions interreliées, d'établir s'il y a lieu d'entériner la position jurisprudentielle actuelle, exposée dans l'arrêt *Mancini (Bankrupt) c. Falconi* (1993), 61 O.A.C. 332 (C.A.), à l'égard des décisions rendues sous le

and Insolvency Act granting or withholding permission to sue a receiver or trustee.

For over a decade, the reigning test for mediating between the protection from litigation for those administering a bankrupt estate, and the right to sue them for this very administration, has been the one set out in *Mancini*. In essence, the three principles summarized in *Mancini* preclude frivolous, vexatious or manifestly unmeritorious claims from proceeding. For the reasons that follow, unlike the majority in the Court of Appeal, I see no reason to dethrone it and create a higher test to be applied only to claims by employees represented by unions.

I. Background

The bankrupt, T.C.T. Logistics Inc., was one of a number of related companies (collectively "TCT") operating a trucking, freight brokerage and warehousing business of high-tech goods in Canada and the United States. TCT operated its warehouse business from several sites, one of which was in Toronto.

Forty-two employees at the Toronto warehouse were represented by the Industrial Wood & Allied Workers of Canada, Local 700 ("Union"). On their behalf, the Union entered into a collective agreement with TCT. The term of the agreement was from May 1, 2000 until April 30, 2004.

During the course of the collective agreement, TCT became insolvent. GMAC Commercial Credit Corporation — Canada ("GMAC"), TCT's largest secured creditor, applied under s. 47 of the *Bankruptcy and Insolvency Act* for an order appointing KPMG Inc. ("KPMG") as interim receiver. The Union was not given notice of this application.

The order was made on January 24, 2002. It provides for the termination of all employees

régime de l'art. 215 de la *Loi sur la faillite et l'insolvabilité* en matière d'autorisation de poursuivre un séquestre ou un syndic.

7 Pendant plus d'une décennie, c'est le critère établi dans *Mancini* qui a présidé à la conciliation, d'une part, de la protection des personnes chargées d'administrer l'actif des faillis contre les poursuites, et, d'autre part, du droit de poursuivre ces personnes relativement à cette même administration. Essentiellement, les trois principes résumés dans *Mancini* empêchent les instances frivoles, vexatoires ou manifestement non fondées d'aller de l'avant. Contrairement à la majorité de la Cour d'appel, et pour les motifs exposés ci-après, je ne vois aucune raison d'écarter ce critère et d'en créer un autre plus exigeant, qui s'appliquerait uniquement aux recours des employés syndiqués.

I. Contexte

8 La faillie, T.C.T. Logistics Inc., faisait partie d'un groupe de sociétés liées (collectivement « TCT ») qui exploitait une entreprise de camionnage, de courtage, de fret et d'entreposage en rapport avec des marchandises de haute technologie au Canada et aux États-Unis. TCT exploitait plusieurs entrepôts, dont un à Toronto.

9 La Section locale 700 du Syndicat des travailleurs de l'industrie du bois et leurs alliés (le « Syndicat ») représentait 42 employés de l'entrepôt de Toronto. Le Syndicat avait conclu en leur nom une convention collective avec TCT pour la période allant du 1er mai 2000 au 30 avril 2004.

10 TCT est devenue insolvable pendant cette période. La Société de crédit commercial GMAC — Canada (« GMAC »), principale créancière garantie de TCT, a demandé en vertu de l'art. 47 de la *Loi sur la faillite et l'insolvabilité* une ordonnance portant nomination de KPMG Inc. (« KPMG ») comme séquestre intérimaire. Le Syndicat n'a pas été avisé de cette demande.

11 L'ordonnance, qui a été rendue le 24 janvier 2002, précisait que l'emploi de tous les employés

"effective immediately", but it also gives KPMG authority to hire or fire any of TCT's employees.

12 The order explicitly states that KPMG's employment-related actions could not be considered those of a "successor employer". The order also prohibits proceedings being taken against the interim receiver unless the court grants leave, and then only if KPMG's solicitor/client costs in such proceedings are secured by court order.

13 The provision at the heart of this litigation is para. 15 of the order, the central provision insulating KPMG from a successor employer designation and more elaborately protecting it from employment obligations arising under either provincial or federal legislation. It states:

EMPLOYEES

. . .

15. THIS COURT ORDERS that the employment of employees of the Debtors, including employees on maternity leave, disability leave and all other forms of approved absence is hereby terminated effective immediately prior to the appointment of the Receiver. Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the Receiver is not and shall not be deemed or considered to be a successor employer, related employer, sponsor or payer with respect to any of the employees of any of the Debtors or any former employees within the meaning of the *Labour Relations Act* (Ontario), the *Employment Standards Act* (Ontario), the *Pension Benefits Act* (Ontario), *Canada Labour Code*, *Pension Benefits Standards Act* (Canada) or any other provincial, federal, or municipal legislation or common law governing employment or labour standards, (the "Labour

prenait fin [TRADUCTION] « immédiatement », mais donnait également à KPMG le pouvoir d'embaucher ou de congédier tout employé de TCT.

L'ordonnance indiquait expressément que les mesures prises par KPMG en matière d'emploi ne pouvaient être considérées comme celles d'un « employeur successeur ». Elle interdisait aussi que soit engagée contre le séquestre intérimaire quelque procédure que ce soit, sauf avec l'autorisation de la cour et, même là, uniquement à la condition que le paiement des dépens procureur-client de KPMG dans le cadre d'une telle procédure soit garanti au moyen d'une ordonnance judiciaire.

La mesure formant le nœud du présent litige est le par. 15 de l'ordonnance. Il s'agit de la principale disposition protégeant KPMG contre toute désignation à titre d'« employeur successeur » et, de manière plus précise, contre les obligations en matière d'emploi découlant de lois fédérales ou provinciales. Cette disposition prévoit ce qui suit :

[TRADUCTION]

EMPLOYÉS

. . .

15. LA COUR ORDONNE que l'emploi des employés des débiteurs, y compris des employés absents en congé de maternité, en congé d'invalidité ou pour toute autre cause d'absence approuvée, prenne fin immédiatement avant la nomination du séquestre. Malgré la nomination du séquestre ou l'exercice de l'un quelconque des pouvoirs et attributions prévus par la présente ordonnance ou encore l'embauche ou le recours aux services de toute personne par le séquestre en rapport avec sa nomination et l'exercice de ses pouvoirs et attributions, le séquestre n'est pas et ne saurait être réputé ou considéré employeur successeur, employeur lié, promoteur d'un régime de retraite ou payeur à l'égard d'un employé ou ancien employé des débiteurs, au sens de la *Loi sur les relations de travail* (Ontario), de la *Loi sur les normes d'emploi* (Ontario), de la *Loi sur les régimes de retraite* (Ontario), du *Code canadien du travail*, de la *Loi sur les normes de prestation de pension* (Canada), de toute autre mesure législative fédérale, provinciale ou municipale ou règles de common law régissant l'emploi ou les normes de

Laws") or any other statue [*sic*], regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between any of the Debtors and any of their present or former employees, or otherwise. In particular, the Receiver shall not be liable to any of the employees of any of the Debtors for any wages (as "wages" are defined in the *Employment Standards Act* (Ontario)), including severance pay, termination pay and vacation pay, except for such wages as the Receiver may specifically agree to pay. The Receiver shall not be liable for an [*sic*] contribution or other payment to any pension or benefit fund.

travail (les « lois sur le travail ») ou de toute autre mesure législative ou réglementaire ou règle de droit ou d'equity, ou de quelque convention collective ou autre contrat liant l'un ou l'autre des débiteurs et l'un quelconque de leurs employés, anciens ou actuels. Plus particulièrement, le séquestre n'assume aucune responsabilité envers les employés des débiteurs pour les salaires (au sens de la *Loi sur les normes d'emploi* (Ontario)), ce qui comprend l'indemnité de cessation d'emploi, l'indemnité de licenciement et l'indemnité de vacances, exception faite des salaires que le séquestre peut expressément consentir à verser. Le séquestre n'assume aucune responsabilité relativement à quelque contribution ou autre paiement à un fonds de retraite ou une caisse de retraite.

Paragraph 14 of the order is also relevant:

14 Le paragraphe 14 de l'ordonnance est pertinent lui aussi :

THIS COURT ORDERS AND DECLARES that nothing in this Order shall constitute the Receiver as the employer of the employees of any of the Debtors and further orders and declares that the appointment of the Receiver will not constitute a sale of the business of any of the Debtors.

[TRADUCTION] LA COUR ORDONNE ET DÉCLARE que la présente ordonnance n'a pas pour effet de faire du séquestre l'employeur des employés de l'un ou l'autre des débiteurs, et que la nomination du séquestre ne constitue pas la vente de l'entreprise de l'un ou l'autre des débiteurs.

15 Pursuant to a further order, KPMG was directed to file an assignment in bankruptcy on behalf of TCT and the related companies. The assignment was filed on February 25, 2002. KPMG was appointed trustee in bankruptcy.

Une ordonnance subséquente a enjoint à KPMG de procéder à une cession de biens au nom de TCT et des sociétés liées. La cession a été déposée le 25 février 2002. KPMG a été nommée syndic de faillite.

16 KPMG did not give notice to TCT's employees before it had obtained the January 24 order permitting it to terminate their employment. The Union, upon learning about the order, wrote to TCT and KPMG on February 1, 2002 advising them that, in its view, any collective bargaining rights under the Ontario *Labour Relations Act, 1995* remained "operative and in full force and effect".

KPMG n'a donné aucun avis aux employés de TCT avant d'avoir obtenu l'ordonnance du 24 janvier l'autorisant à mettre fin aux emplois. En apprenant l'existence de l'ordonnance, le Syndicat a écrit à TCT et à KPMG le 1er février 2002, leur disant qu'à son avis tous les droits de négociation collective prévus par la *Loi de 1995 sur les relations de travail* de l'Ontario demeuraient [TRADUCTION] « en vigueur et continuaient de produire tous leurs effets ».

17 KPMG met with the employees on February 25, advising them that the business would be continuing in order to evaluate potential sales of the warehousing business. KPMG asked the employees for their loyalty and support "to allow us to maximize the enterprise value for all stakeholders".

KPMG a rencontré les employés le 25 février et les a informés qu'elle continuerait l'exploitation de l'entreprise afin d'évaluer les possibilités de vente du secteur de l'entreposage. Elle a fait appel à leur loyauté et à leur appui pour lui [TRADUCTION] « permettre de maximiser la valeur de l'entreprise pour le bénéfice de tous les intéressés ».

18 Subsequently, because of the rapid deterioration of the warehousing business, KPMG sought to sell it as a going concern as quickly as possible. On April 12, KPMG agreed to sell most of the assets of the warehousing business to Spectrum Supply Chain Solutions Inc., a newly formed company.

19 On April 16, KPMG informed the employees about the Spectrum deal and of its intention to seek court approval two days later. An order approving the transaction was obtained on April 18. The closing was scheduled to take place on April 19, 2002.

20 The leasehold interest in the Toronto warehouse was not one of the assets Spectrum purchased. As a result, KPMG decided to wind down its operations and disclaim the lease. It asked Spectrum to manage this process from April 19 until May 23, the date by which KPMG was obliged to vacate the Toronto premises. The resulting management agreement between Spectrum and KPMG entitled Spectrum to any revenues earned during that period in exchange for incurring the costs of winding down the Toronto operation.

21 All unionized employees at the Toronto warehouse were terminated by KPMG on May 9. Some of them were later hired by Spectrum. These hirings were not in accordance with the Union's seniority list.

22 As a result, the Union applied to the Ontario Labour Relations Board on May 13, seeking the following relief under the Ontario *Labour Relations Act, 1995*:

- a declaration that Spectrum was the successor employer to TCT and/or KPMG, and, accordingly, bound by the Union's collective agreement with TCT (under s. 69 of the Act);
- a declaration that TCT and Spectrum were a single employer for labour relations purposes (under s. 1(4) of the Act);
- a declaration of unfair labour practices against TCT and/or KPMG and Spectrum for

Par la suite, comme l'entreprise d'entreposage se dégradait rapidement, KPMG a cherché à la vendre le plus promptement possible comme entreprise en exploitation. Le 12 avril, KPMG a accepté de vendre la plupart des éléments d'actif de l'entreprise d'entreposage à Spectrum Supply Chain Solutions Inc., société nouvellement formée.

Le 16 avril, KPMG a informé les employés de l'entente avec Spectrum et de son intention de demander l'approbation du tribunal deux jours plus tard. Une ordonnance approuvant la transaction a été rendue le 18 avril. L'entente devait être signée le 19 avril 2002.

Le droit de tenure à bail afférent à l'entrepôt de Toronto ne faisait pas partie des éléments d'actif acquis par Spectrum. KPMG a donc décidé de liquider les opérations et de renoncer au bail. Elle a demandé à Spectrum de gérer ce processus du 19 avril au 23 mai, date à laquelle KPMG était tenue de quitter les locaux de Toronto. L'accord de gestion conclu en ce sens par Spectrum et KPMG accordait à Spectrum les revenus réalisés pendant cette période en contrepartie des frais faits par cette dernière pour liquider l'entreprise de Toronto.

KPMG a mis fin à l'emploi de tous les employés syndiqués de Toronto le 9 mai. Spectrum a subséquemment réembauché certains d'entre eux, mais sans suivre la liste d'ancienneté établie par le Syndicat.

Le 13 mai, le Syndicat a en conséquence présenté à la Commission une requête fondée sur la *Loi de 1995 sur les relations de travail* provinciale afin d'obtenir :

- une déclaration portant que Spectrum avait succédé comme employeur à TCT ou KPMG et qu'elle était donc liée par la convention collective conclue avec TCT (art. 69 de la Loi);
- une déclaration portant que TCT et Spectrum constituaient un seul employeur relativement aux relations de travail (par. 1(4) de la Loi);
- une déclaration portant que TCT ou KPMG et Spectrum s'étaient livrées à des pratiques

entering into an agreement discriminating against unionized employees and eliminating the Union in Spectrum's workforce (under s. 96 of the Act); and

- an order certifying the Union as the exclusive bargaining agent for Spectrum's employees.

The underlying premise of the Union's application to the Ontario Labour Relations Board was that Spectrum was incorporated for the sole purpose of acquiring TCT's warehousing business and had colluded with KPMG to operate TCT's business at a different location under substantially the same management. Except for the new location, the only major difference between TCT's operations and those of Spectrum was the absence of the Union. The president of Spectrum had been the vice-president, Warehousing and Logistics, of TCT; several of the warehousing managers of TCT became managers of Spectrum; and Spectrum set up the warehousing operations in its new Toronto location with essentially the same customers as TCT.

Relying primarily on s. 215 of the *Bankruptcy and Insolvency Act* which prevents proceedings against an interim receiver or trustee in bankruptcy without leave of the court, KPMG obtained a stay of the Union's application from the Ontario Labour Relations Board.

The Union accordingly sought the necessary court approval. In its motion to the bankruptcy judge, it asked for the deletion of those portions of the January 24 order which had declared KPMG's conduct incapable of scrutiny under federal or provincial labour and employment legislation. It also sought to strike the security for costs provision.

The bankruptcy judge agreed that the costs requirement was unduly onerous and deleted it ((2003), 42 C.B.R. (4th) 221). He declined, however, to delete that part of the order declaring that the

déloyales de travail en concluant une entente discriminatoire à l'endroit des employés syndiqués et en éliminant le Syndicat de la main-d'œuvre de Spectrum (art. 96 de la Loi);

- une ordonnance accréditant le Syndicat à titre d'agent négociateur exclusif des employés de Spectrum.

23 Dans sa requête à la Commission, le Syndicat prétend fondamentalement que Spectrum a été constituée en personne morale à seule fin d'acquérir l'entreprise d'entreposage de TCT et a conclu avec KPMG un arrangement collusoire en vue d'exploiter l'entreprise de TCT à un autre endroit mais substantiellement sous la même direction. Exception faite du nouvel emplacement, la seule différence importante dans l'exploitation de l'entreprise par TCT et par Spectrum était l'absence du Syndicat. Le président de Spectrum était l'ancien vice-président à l'entreposage et à la logistique de TCT, plusieurs des gestionnaires d'entrepôt de TCT étaient devenus gestionnaires pour Spectrum et l'entreprise d'entreposage installée dans de nouveaux locaux à Toronto par Spectrum desservait essentiellement les mêmes clients que TCT.

24 Invoquant principalement l'art. 215 de la *Loi sur la faillite et l'insolvabilité*, lequel interdit l'introduction d'actions contre un séquestre intérimaire ou un syndic de faillite sans la permission du tribunal, KPMG a obtenu de la Commission la suspension de la requête présentée par le Syndicat.

25 Le Syndicat s'est donc adressé aux tribunaux pour obtenir la permission nécessaire. Dans sa requête au juge de faillite, il a demandé la radiation des dispositions de l'ordonnance du 24 janvier qui mettaient la conduite de KPMG à l'abri de tout examen sous le régime des lois fédérales ou provinciales en matière de travail et d'emploi. Il a de plus sollicité la radiation de la disposition relative au cautionnement pour dépens.

26 Le juge de faillite a reconnu que l'exigence relative au cautionnement était indûment onéreuse et l'a supprimée ((2003), 42 C.B.R. (4th) 221). Il a toutefois refusé de radier la disposition de l'ordonnance

interim receiver could not be found to be a "successor employer" under the *Labour Relations Act, 1995.*

27 In the course of his analysis, the bankruptcy judge made a number of observations. Since interim receivership orders are designed to enhance the value of the bankrupt estate as much as possible, and since this objective may sometimes best be realized by continuing the operation of a debtor's business pending a sale, the court was entitled to consider the policy implications of exposing interim receivers or trustees to the risk of being successor employers. Moreover, eliminating the risk of an obligation that might otherwise accrue from continuing a business as a going concern offers employees the possibility of employment with a subsequent purchaser.

28 The bankruptcy judge concluded that it would be unduly burdensome on an interim receiver, and incompatible with its duties, to impose the requirements flowing from a successor employer designation on a receiver engaged in such temporary and limited employment relationships.

29 However, applying the "ancillary" or "necessarily incidental" doctrine crafted by Dickson C.J. in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (refined by Iacobucci J. in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, and by LeBel J. in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31), the bankruptcy judge concluded that the "successor employer provisions" of the order were only "sufficiently integrated" with the legislative scheme of the *Bankruptcy and Insolvency Act* if the interim receiver was carrying on the bankrupt's business for the purpose of an orderly liquidation of the bankrupt's assets or of effecting a sale of the bankrupt's business as a going concern. He relied on Farley J.'s distinction in *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146 (Ont. S.C.J.),

portant que le séquestre intérimaire ne pouvait être considéré comme « employeur successeur » pour l'application de la *Loi de 1995 sur les relations de travail*.

Dans son analyse, le juge de faillite a fait certaines observations. Comme les ordonnances désignant un séquestre intérimaire visent à accroître le plus possible la valeur de l'actif du failli, et que la réalisation de cet objectif peut parfois exiger la poursuite de l'exploitation de l'entreprise du débiteur jusqu'à sa vente, le tribunal était admis à prendre en compte les conséquences que pourrait avoir le fait d'exposer les séquestres intérimaires ou les syndics au risque qu'ils soient considérés comme des employeurs successeurs. Il a en outre souligné que le fait d'écarter le risque pour le syndic ou le séquestre d'avoir à assumer des obligations qu'entraînerait autrement la poursuite des activités d'une entreprise offre aux employés la possibilité de travailler pour un acquéreur subséquent.

Le juge de faillite a conclu que, vu la nature temporaire et limitée des relations d'emploi, il serait trop onéreux pour le séquestre intérimaire — et de surcroît incompatible avec ses fonctions — de lui imposer les exigences accompagnant l'attribution de la qualité d'employeur successeur.

Toutefois, appliquant la doctrine de la « compétence accessoire » ou de l'effet « nécessairement accessoire » formulée par le juge en chef Dickson dans *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641 (puis précisée par le juge Iacobucci dans *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21, et par le juge LeBel dans *Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146, 2002 CSC 31), le juge de faillite a statué que les [TRADUCTION] « dispositions relatives à l'employeur successeur » de l'ordonnance n'étaient « suffisamment intégrées » au régime législatif de la *Loi sur la faillite et l'insolvabilité* que si le séquestre intérimaire exploitait l'entreprise du failli afin de procéder à la liquidation ordonnée des éléments d'actif de celui-ci ou

between a receiver (or trustee) acting "*qua* realizer" of the assets and acting "*qua* employer". When acting "*qua* realizer", the receiver was entitled to immunity from successor employer provisions.

The bankruptcy judge accordingly amended para. 15 of the order by adding language clarifying that the "successor employer" protection was only valid if KPMG was acting "*qua* realizer" and its conduct was for the purpose of preserving, protecting or liquidating the debtor's assets. The specific language added to the second sentence of para. 15 was:

for the purpose of preserving, protecting and realizing upon the assets of the Debtors by effecting a sale or sales of the assets or of the business of the Debtors as a going concern or otherwise or for the purpose of effecting an orderly liquidation of the assets of the Debtors.

Since in his view KPMG was carrying on the business as a going concern for these very purposes and acting "*qua* realizer", it was therefore entitled to the protection stipulated in the January 24 order.

Turning to s. 215 of the *Bankruptcy and Insolvency Act*, the bankruptcy judge denied the Union leave to bring proceedings against KPMG at the Ontario Labour Relations Board. Since he had concluded that the provisions of the order in relation to KPMG's status as a successor employer were valid as amended, he saw no basis on which leave should be granted to bring a proceeding seeking relief contrary to the terms of the order.

On appeal by the Union to the Court of Appeal, there were two issues:

- Did the bankruptcy judge have jurisdiction under s. 47(2) of the *Bankruptcy and Insolvency*

de vendre l'entreprise comme entreprise en exploitation. Il s'est appuyé sur la distinction établie par le juge Farley dans *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146 (C.S.J. Ont.), entre un séquestre (ou syndic) qui agit « en tant que liquidateur » et un séquestre (ou syndic) qui agit « en tant qu'employeur ». Le premier a le droit d'être soustrait à l'application des dispositions relatives à l'employeur successeur.

30 Le juge de faillite a donc modifié le par. 15 de l'ordonnance en précisant que la protection accordée à KPMG contre la désignation d'« employeur successeur » n'était valide que si cette dernière agissait « en tant que liquidateur » et que les mesures qu'elle prenait tendaient à sauvegarder, protéger ou liquider l'actif du débiteur. Le passage qu'il a ajouté à la deuxième phrase du par. 15 est rédigé comme suit :

[TRADUCTION] dans le but de sauvegarder, de protéger et de réaliser l'actif des débiteurs au moyen de la vente des éléments d'actif ou de l'entreprise des débiteurs comme entreprise en exploitation ou autrement, ou dans le but de procéder à la liquidation ordonnée de l'actif des débiteurs.

Étant d'avis que KPMG exploitait l'entreprise précisément dans ce but et qu'elle agissait « en tant que liquidateur », le juge de faillite a statué qu'elle avait droit à la protection prévue par l'ordonnance du 24 janvier.

31 Le juge de faillite a refusé au Syndicat, en vertu de l'art. 215 de la *Loi sur la faillite et l'insolvabilité*, la permission d'intenter des procédures contre KPMG devant la Commission. Comme il avait conclu que, telles qu'elles avaient été modifiées, les dispositions de l'ordonnance se rapportant à la qualité de KPMG en tant qu'employeur successeur étaient valides, il a estimé que rien ne justifiait d'autoriser un recours allant à l'encontre des modalités de l'ordonnance.

32 L'appel formé par le Syndicat devant la Cour d'appel soulevait les deux questions suivantes :

- Le juge de faillite avait-il compétence, en vertu du par. 47(2) de la *Loi sur la faillite et*

Act to make declarations about successorship?

- Did he err in the exercise of his discretion by denying leave under s. 215 of the Act?

33 The Court of Appeal unanimously concluded that only the labour board had jurisdiction to determine who was a successor employer ((2004), 71 O.R. (3d) 54). Section 47(2) of the *Bankruptcy and Insolvency Act* did not confer on the bankruptcy judge the jurisdiction to make declarations on this issue or to otherwise immunize KPMG from such potential declarations by the labour board. Writing for the court on this issue, Feldman J.A. observed that the federal *Bankruptcy and Insolvency Act* itself explicitly states in s. 72(1) that only provincial laws which conflict with the *Bankruptcy and Insolvency Act* can be abrogated. She did not find in s. 47(2) the authority to declare whether actions taken by KPMG make it a successor employer. Accordingly, she saw no conflict between the authority given to the bankruptcy court under s. 47(2) to supervise an interim receiver, and the successor rights provisions in s. 69(12) of the *Labour Relations Act, 1995*, making a paramountcy analysis unnecessary. As a result, in her view the provincial laws conferring this exclusive jurisdiction on the labour board were unaffected by the *Bankruptcy and Insolvency Act*.

34 Since the bankruptcy judge had no jurisdiction to make *any* determination relating to successor employer status, the distinction he drew in para. 15 of his January 24 order protecting the interim receiver only when it was acting "*qua* realizer" and not "*qua* employer" of the assets was immaterial.

35 On this basis, the Court of Appeal further amended para. 15 deleting the bankruptcy judge's "*qua* realizer" addition, and adding the following two passages:

l'insolvabilité, pour se prononcer sur le statut d'employeur successeur?

- A-t-il exercé son pouvoir discrétionnaire de façon erronée en refusant la permission visée à l'art. 215 de la Loi?

La Cour d'appel a conclu à l'unanimité que seule la Commission avait compétence pour se prononcer sur le statut d'employeur successeur ((2004), 71 O.R. (3d) 54). Le paragraphe 47(2) de la *Loi sur la faillite et l'insolvabilité* n'habilitait pas le juge de faillite à rendre un jugement déclaratoire sur ce point ou à mettre KPMG à l'abri d'une possible déclaration de la Commission portant que KPMG avait ce statut. Rendant jugement pour la cour sur ce point, la juge Feldman a fait remarquer que la *Loi sur la faillite et l'insolvabilité* elle-même énonce expressément, au par. 72(1), que seules les dispositions provinciales incompatibles peuvent être abrogées. Elle n'a rien vu au par. 47(2) qui habilite à déclarer que des mesures prises par KPMG puissent faire de celle-ci un employeur successeur. Par conséquent, elle n'a relevé aucun conflit entre, d'une part, le pouvoir reconnu au juge de faillite par le par. 47(2) de contrôler les actes du séquestre intérimaire et, d'autre part, les dispositions relatives au statut de successeur visées au par. 69(12) de la *Loi de 1995 sur les relations de travail*, ce qui éliminait la nécessité de procéder à l'analyse fondée sur la doctrine de la prépondérance. Elle a donc conclu que la *Loi sur la faillite et l'insolvabilité* était sans effet sur les dispositions législatives provinciales attribuant compétence exclusive à la Commission.

Comme le juge de faillite n'avait pas compétence pour prononcer *quelque décision que ce soit* concernant le statut d'employeur successeur, la distinction qu'il avait établie au par. 15 de l'ordonnance du 24 janvier et qui ne protégeait le séquestre intérimaire que dans la mesure où il agissait « en tant que liquidateur » et non quand il agissait « en tant qu'employeur » devenait sans objet.

Sur ce fondement, la Cour d'appel a modifié à son tour le par. 15 de l'ordonnance, supprimant le passage ajouté par le juge de faillite relativement aux mesures prises en vue de la réalisation de l'actif et ajoutant les deux passages suivants :

. . . unless and until an order is made by the OLRB, upon leave of this court under s. 215 of the BIA, declaring the interim receiver a successor employer to the debtors, and subject to the specific terms of any such order, the interim receiver is not obliged to make any payment as a successor employer . . . . For clarification, the parties have agreed that if any such amounts become payable by the interim receiver as a successor employer, in no event is the interim receiver to be liable for any amount that either became due or accrued prior to the date of its appointment.

[TRADUCTION] . . . tant que la Commission des relations de travail de l'Ontario n'aura pas rendu d'ordonnance, dans le cadre d'un recours permis par notre cour sous le régime de l'art. 215 de la LFI, déclarant que le séquestre intérimaire succède aux débiteurs à titre d'employeur et, sous réserve des modalités précises d'une telle ordonnance, le séquestre intérimaire n'est pas obligé d'effectuer quelque paiement que ce soit en tant qu'employeur successeur [. . .] Pour plus de clarté, les parties sont convenues que si le séquestre intérimaire doit effectuer de tels paiements à titre de successeur de l'employeur, il ne peut en aucun cas être tenu responsable à l'égard d'une somme due ou exigible avant la date de sa nomination.

The court divided, however, on the bankruptcy judge's approach to and resolution of the Union's application for leave to bring labour board proceedings. The disagreement was over the test under s. 215 of the *Bankruptcy and Insolvency Act* for granting leave to bring successor employer applications. Feldman J.A., whose analysis was endorsed in separate concurring reasons by Cronk J.A., was of the view that the traditional *Mancini* test represented too low a threshold when the proposed proceedings were successor employer applications. In her view, an approach was required that took more account of the impact of such litigation on the bankruptcy process.

36 Toutefois, la Cour d'appel s'est divisée quant à l'analyse et à la solution du juge de faillite relativement à la demande présentée par le Syndicat en vue d'être autorisé à intenter des procédures devant la Commission. Les juges ont différé d'avis sur le critère applicable pour accorder ou non, en vertu de l'art. 215 de la *Loi sur la faillite et l'insolvabilité*, la permission de présenter des demandes concernant le statut d'employeur successeur. La juge Feldman, à l'analyse de laquelle a souscrit la juge Cronk dans des motifs concourants, a estimé que le critère traditionnel formulé dans *Mancini* n'était pas assez exigeant lorsqu'il s'agissait d'instances relatives au statut d'employeur successeur. À son avis, il fallait un critère tenant davantage compte des conséquences de telles demandes en justice sur le processus de faillite.

The revised test proposed by Feldman J.A. added factors such as the complexity of the receivership; the availability of suitable purchasers; the potential duration of the receiver's operation of the business pending a sale; any arrangements the receiver has made with the Union to accommodate the employees; the likelihood that a subsequent purchaser will be declared a successor employer bound by the obligations under the collective agreement; and the timeliness of the labour board hearing relative to the receiver's temporary operation and ultimate sale of the business.

37 Le nouveau critère proposé par la juge Feldman ajoutait des facteurs comme la complexité du mandat du séquestre, l'existence d'acquéreurs acceptables, la durée possible de l'exploitation de l'entreprise par le séquestre en attendant une vente, tout arrangement pris par le séquestre avec le Syndicat pour prendre en compte la situation des employés, la probabilité qu'un acquéreur soit déclaré employeur successeur lié par les obligations découlant de la convention collective et la possibilité que l'audience de la Commission ait lieu en temps utile vu la nature provisoire de l'administration du séquestre et la vente de l'entreprise.

Feldman J.A. concluded that the bankruptcy judge was obliged not to determine the issue itself, but to determine whether a *prima facie* case of

38 La juge Feldman a conclu que le juge de faillite avait l'obligation, non pas de trancher la question comme telle, mais plutôt de déterminer si le statut

successor employer status had been made out, and, based on the factors she enumerated, to decide whether to grant leave. She accordingly set aside his refusal to grant leave and remitted the leave application back to him for reconsideration based on her enumerated factors.

d'employeur successeur avait été établi *prima facie* et, eu égard aux facteurs susmentionnés, de décider s'il y avait lieu d'accorder la permission demandée. Elle a donc annulé le refus du juge d'accorder la permission et lui a renvoyé l'affaire pour qu'il la réexamine en fonction des facteurs qu'elle avait énumérés.

39 In dissent, MacPherson J.A. saw no basis for erecting a higher threshold for granting leave when the application was for successor employer applications. Other creditors' applications for leave to bring proceedings under s. 215 are usually determined in accordance with the *Mancini* test, the applicability of which had been consistently upheld by the Ontario Court of Appeal, most recently in *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126. In his view, by formulating what he characterized as a "more vague and more elaborate" (para. 111) test uniquely for successor employer leave applications, the majority was inviting a bankruptcy court to do indirectly through s. 215 what it had decided, correctly in his view, could not be done under s. 47(2), namely, insulate the receiver from successor employer determinations.

Dans sa dissidence, le juge MacPherson a indiqué qu'il ne voyait aucune raison de resserrer le critère lorsque l'autorisation demandée visait des procédures portant sur le statut d'employeur successeur. Les demandes d'autorisation fondées sur l'art. 215 présentées par d'autres créanciers sont généralement tranchées par application du critère de l'arrêt *Mancini*, dont la Cour d'appel de l'Ontario a invariablement reconnu l'applicabilité, la décision la plus récente à cet égard étant *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126. À son avis, en formulant — uniquement à l'égard des autorisations de recours portant sur le statut d'employeur successeur — un critère qu'il a qualifié de [TRADUCTION] « plus vague et plus poussé » (par. 111), les juges majoritaires invitaient le tribunal de faillite à faire indirectement, en vertu de l'art. 215, la chose même que, suivant ce qu'ils avaient par ailleurs décidé, et ce, à juste titre selon lui, le par. 47(2) interdisait de faire, c'est-à-dire mettre le séquestre à l'abri de décisions portant sur le statut d'employeur successeur.

40 Applying the test in *Mancini*, MacPherson J.A. concluded that the bankruptcy judge had erred in refusing to grant leave to the Union to bring successor employer and unfair labour practice proceedings against KPMG. His remedy, accordingly, would have been to grant leave to the Union to proceed with its application before the labour board.

Le juge MacPherson a appliqué le critère de l'arrêt *Mancini* et, concluant que le juge de faillite avait à tort refusé d'autoriser le Syndicat à poursuivre KPMG sur le fondement du statut d'employeur successeur et de pratiques déloyales de travail, il a indiqué qu'il aurait donné au Syndicat la permission de présenter sa requête à la Commission.

41 The Union appealed the Court of Appeal's order denying leave to bring its successorship proceedings before the labour board, and disputed the majority's conclusion that the *Mancini* test set too low a bar for granting leave to bring proceedings before the labour board. The Union also sought to have the Court of Appeal's amended version of para. 15 set aside to the extent that it continues to

Le Syndicat se pourvoit contre l'ordonnance de la Cour d'appel qui lui a refusé l'autorisation de saisir la Commission d'un recours portant sur le statut d'employeur successeur et il conteste la conclusion des juges majoritaires selon laquelle le critère de l'arrêt *Mancini* n'était pas assez rigoureux lorsqu'il s'agissait de décider d'accorder ou non l'autorisation d'engager des instances devant

make declarations with respect to successorship rights.

GMAC cross-appealed the Court of Appeal's amendments to para. 15, taking issue with the court's unanimous conclusion that a bankruptcy judge lacks jurisdiction to declare whether a receiver is a successor employer under the *Labour Relations Act, 1995*.

II. Analysis

A. *Can a Bankruptcy Court Judge Determine Successor Rights Issues?*

The first issue decided by the Court of Appeal, and raised in the cross-appeal, relates to whether the bankruptcy court has jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *Labour Relations Act, 1995*. The unanimous conclusion of the Court of Appeal was that it had no such jurisdiction. I agree.

The bankruptcy court's authority to supervise the interim receiver is found in s. 47(2) of the *Bankruptcy and Insolvency Act*, which states:

> **47.** . . .
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (*a*) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (*b*) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (*c*) take such other action as the court considers advisable.

These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended.

la Commission. Il a également demandé la radiation du par. 15 modifié par la Cour d'appel, dans la mesure où celui-ci comporte encore des déclarations relatives au statut d'employeur successeur.

42 GMAC a formé un appel incident relativement à la modification du par. 15 par la Cour d'appel, contestant la conclusion unanime de celle-ci selon laquelle les juges de faillite n'ont pas compétence pour décider si un séquestre intérimaire est un employeur successeur pour l'application de la *Loi de 1995 sur les relations de travail*.

II. Analyse

A. *Le juge de faillite peut-il trancher des questions touchant le statut d'employeur successeur?*

43 La première question qu'a tranchée la Cour d'appel et qui est soulevée dans l'appel incident concerne le pouvoir du tribunal de faillite de décider si un séquestre intérimaire est un employeur successeur au sens de la *Loi de 1995 sur les relations de travail*. La Cour d'appel a conclu à l'unanimité que le tribunal de faillite ne possède pas ce pouvoir. Je suis du même avis.

44 Le pouvoir du tribunal de faillite de contrôler l'action du séquestre intérimaire est prévu au par. 47(2) de la *Loi sur la faillite et l'insolvabilité*, qui est rédigé ainsi :

> **47.** . . .
>
> (2) Le tribunal peut enjoindre au séquestre intérimaire :
>
> *a*) de prendre possession de tout ou partie des biens du débiteur mentionnés dans la nomination;
>
> *b*) d'exercer sur ces biens ainsi que sur les affaires du débiteur le degré de contrôle que le tribunal estime indiqué;
>
> *c*) de prendre toute autre mesure qu'il estime indiquée.

45 Bien qu'ils soient assez souples pour permettre une vaste gamme de mesures en rapport avec la prise en charge, la gestion et l'aliénation éventuelle des biens du débiteur, ces paramètres

The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

46 Any doubt about whether s. 47(2) was intended to dispense such jurisdictional largesse vanishes when it is read in conjunction with s. 72(1) of the *Bankruptcy and Insolvency Act*, which states:

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

47 The effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*. The right in issue here is the right found in s. 69 of the Ontario *Labour Relations Act, 1995* to seek a declaration that a subsequent employer is bound by the employment obligations found in the collective agreements of its predecessor. I agree with Feldman J.A. who concluded:

. . . the first half of [s. 72] clearly states that the *BIA* will not abrogate or supercede any provincial law unless that law is in conflict with the *BIA*. The language of s. 47(2) of the *BIA* does not conflict with the successor employer sections of the *LRA* and therefore does not abrogate or supercede that Act. [para. 30]

48 Section 114(1) of the *Labour Relations Act, 1995* states:

législatifs n'ont pas une portée illimitée. Le paragraphe 47(2) accorde au tribunal de faillite le pouvoir d'enjoindre au séquestre intérimaire de faire certaines choses. Cette disposition n'a pas pour effet d'habiliter — ni explicitement ni implicitement — le tribunal de faillite à rendre des jugements déclaratoires unilatéraux sur les droits de tiers en fonction d'autres régimes législatifs.

Enfin, s'il subsiste encore quelque doute que le par. 47(2) pourrait avoir eu pour but d'attribuer des pouvoirs aussi larges, ce doute est dissipé lorsqu'on lit cette disposition en corrélation avec le par. 72(1) de la *Loi sur la faillite et l'insolvabilité*, lequel prévoit ce qui suit :

72. (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

Suivant cette disposition, la *Loi sur la faillite et l'insolvabilité* n'a pas pour effet d'éteindre des droits garantis par la loi, sauf si ces droits sont incompatibles avec la *Loi sur la faillite et l'insolvabilité*. En l'espèce, il s'agit du droit de demander, sur le fondement de l'art. 69 de la *Loi de 1995 sur les relations de travail* de l'Ontario, un jugement déclarant qu'un employeur subséquent est lié par les obligations en matière d'emploi prévues par les conventions collectives signées par son prédécesseur. Je souscris à la conclusion suivante de la juge Feldman :

[TRADUCTION] . . . la première moitié de [l'art. 72] énonce clairement que la *LFI* n'a pas pour effet d'abroger ou de remplacer une règle de droit provinciale sauf si celle-ci est incompatible avec la *LFI*. Il n'y a pas d'incompatibilité entre le libellé du par. 47(2) de la *LFI* et les dispositions de la *LRT* concernant le successeur de l'employeur, et, par conséquent, ce paragraphe n'a pas pour effet d'abroger ou de remplacer cette dernière Loi. [par. 30]

Le paragraphe 114(1) de la *Loi de 1995 sur les relations de travail* dispose ainsi :

114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

114. (1) La Commission a compétence exclusive pour exercer les pouvoirs que lui confère la présente loi ou qui lui sont conférés en vertu de celle-ci et trancher toutes les questions de fait ou de droit soulevées à l'occasion d'une affaire qui lui est soumise. Ses décisions ont force de chose jugée. Toutefois, la Commission peut à l'occasion, si elle estime que la mesure est opportune, réviser, modifier ou annuler ses propres décisions, ordonnances, directives ou déclarations.

This means the labour board has exclusive jurisdiction to make a successor employer determination. It is difficult to see how the right to seek such a declaration conflicts in any way with the bankruptcy court's authority under s. 47(2) to direct and supervise the interim receiver's effective management of the debtor's assets.

49 Cela signifie que la Commission a compétence exclusive pour se prononcer sur le statut d'employeur successeur. Il est difficile de voir en quoi le droit de demander une déclaration sur cette question serait incompatible avec le pouvoir que le par. 47(2) accorde au tribunal de faillite de diriger et superviser l'administration efficace de l'actif du débiteur par le séquestre intérimaire.

Trustees, receivers and the specialized courts by which they are supervised, are entitled to a measure of deference consistent with their undisputed expertise in the effective management of a bankruptcy. Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the *Bankruptcy and Insolvency Act*.

50 Il convient de faire preuve, envers les syndics et les séquestres ainsi qu'envers les tribunaux spécialisés qui les supervisent, du degré de déférence correspondant à leur expertise incontestée en matière de gestion efficace des faillites. Il va de soi que la souplesse est indispensable pour solutionner les problèmes que pose une faillite donnée. Toutefois, la protection de cette souplesse au moyen de dispositions standard immunisant ces intervenants contre l'engagement de procédures les visant dépasse le pouvoir thérapeutique de la *Loi sur la faillite et l'insolvabilité*.

If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(*c*). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72. As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3:

51 Si l'article 47 pouvait recevoir une interprétation assez large pour permettre de porter atteinte à tous les droits qui, bien que protégés par la loi, gênent le processus de faillite, il pourrait être invoqué pour éteindre tous les droits en matière d'emploi si le tribunal de faillite estimait qu'il s'agit d'une mesure « indiquée » aux termes de l'al. 47(2)*c*). Pour que l'art. 47 confère un pouvoir aussi étendu, en dépit de l'existence de l'art. 72 protégeant les droits civils d'origine provinciale, il faudrait un texte explicite. Comme l'a indiqué le juge Major dans l'arrêt *Crystalline Investments Ltd. c. Domgroup Ltd.*, [2004] 1 R.C.S. 60, 2004 CSC 3 :

. . . explicit statutory language is required to divest persons of rights they otherwise enjoy at law. . . . [S]o long as the doctrine of paramountcy is not triggered,

. . . il faut une disposition législative explicite pour priver une personne de droits dont elle jouit par ailleurs en droit. [. . .] [T]ant que la doctrine de la primauté des

federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

lois fédérales n'entre pas en jeu, on ne saurait utiliser des procédures en matière de faillite et d'insolvabilité régies par le droit fédéral pour écarter des droits de propriété et autres droits civils régis par le droit provincial. [par. 43]

The language of s. 47(2) falls well short of this standard. The bankruptcy court can undoubtedly mandate employment-related conduct by the receiver, but as s. 47(2) of the *Bankruptcy and Insolvency Act* is presently worded, the court cannot, on its own, abrogate the right to seek relief at the labour board.

Le texte du par. 47(2) est loin de satisfaire à cette condition. Le tribunal de faillite peut indubitablement donner au séquestre des instructions en matière d'emploi, mais, compte tenu du libellé actuel du par. 47(2) de la *Loi sur la faillite et l'insolvabilité*, le tribunal n'est pas habilité à abroger de son propre chef le droit de présenter une demande à une commission des relations de travail.

52 Accordingly, the Court of Appeal was correct to conclude that the bankruptcy judge had no jurisdiction to make a declaration about or immunize the receiver from successor employer liability. To the extent that any provision of the order does so, including the amendments added by the Court of Appeal, they should be set aside.

Par conséquent, la Cour d'appel a eu raison de conclure que le juge de faillite n'avait pas compétence pour statuer sur la responsabilité du séquestre en tant qu'employeur successeur ni pour le mettre à l'abri de cette responsabilité. Dans la mesure où quelque élément de l'ordonnance, y compris les modifications apportées par la Cour d'appel, a cet effet, il y a lieu de supprimer cet élément.

B. *Is a Unique Test Required Under Section 215 for Leave to Bring Successor Rights Applications?*

B. *L'application de l'art. 215 requiert-elle un critère particulier pour les demandes d'autorisation touchant au statut d'employeur successeur?*

53 Having concluded that the bankruptcy judge has no jurisdiction either to make a determination as to the receiver's status as a successor employer, or to immunize it from such a determination by the labour board, the remaining issue is whether to set aside the bankruptcy judge's refusal to permit the Union remedial access to the Ontario Labour Relations Board.

Vu la conclusion que le juge de faillite n'a compétence ni pour décider si le séquestre a le statut d'employeur successeur ni pour le protéger contre une décision de cette nature de la Commission, il reste à se demander s'il faut infirmer la décision du juge de faillite de refuser au Syndicat la permission de s'adresser à la Commission.

54 The debate between the parties is over the extent of the bankruptcy court's discretion when leave is sought by a union to bring a successor employer application against the receiver or trustee. This shifts the focus to s. 215 of the *Bankruptcy and Insolvency Act*, which states:

La question en litige concerne la portée du pouvoir discrétionnaire du tribunal de faillite lorsqu'un syndicat requiert la permission de présenter contre le séquestre ou le syndic une demande relative à la qualité d'employeur successeur. La disposition pertinente de la *Loi sur la faillite et l'insolvabilité* est alors l'art. 215, qui énonce ce qui suit :

215. Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any

215. Sauf avec la permission du tribunal, aucune action n'est recevable contre le surintendant, un séquestre officiel, un séquestre intérimaire ou un syndic

report made under, or any action taken pursuant to, this Act.

For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact. As L. W. Houlden, G. B. Morawetz and J. Sarra stated in *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 3, at p. 7-118.2:

> The court will not refuse leave unless there is no foundation for the claim or the claim is frivolous and vexatious . . . .

Essentially, unless the claim is without merit, the gate to a litigated determination has usually been opened under s. 215 and its statutory predecessors: see *Randfield v. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075, at p. 1077, *per* Turner L.J. (". . . it is not, as I apprehend, according to the course of the Court, to refuse liberty to try a right which is claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim"); *In re Diehl v. Carritt* (1907), 15 O.L.R. 202 (H.C.J.), at p. 204; *Danny's Cabaret Ltd. v. Horner*, [1980] B.C.J. No. 1293 (QL) (C.A.); *Virden Credit Union Ltd. v. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84 (Man. Q.B.), at p. 90; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113 (Ont. C.A.); *RoyNat Inc. v. Allan* (1988), 61 Alta. L.R. (2d) 165 (Q.B.); *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 14 C.B.R. (3d) 233 (B.C.S.C.); *Toronto Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6 (Ont. Ct. (Gen. Div.)), at para. 7; *Nicholas v. Anderson* (1996), 40 C.B.R. (3d) 32 (Ont. Ct. (Gen. Div.)), at paras. 13-15; *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9 (Ont. S.C.J.), at para. 13; *Society of Composers, Authors and Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (C.A.), at para. 2; *Vanderwoude v. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 195, at para. 22; *Bennett on Bankruptcy* (8th ed. 2005), at pp. 416-17; *Bennett on Receiverships* (2nd ed. 1999), at p. 223; and Houlden, Morawetz and Sarra, at p. 7-118.2.

relativement à tout rapport fait ou toute mesure prise conformément à la présente loi.

55 Depuis près de 150 ans, la jurisprudence et la doctrine considèrent unanimement que le critère applicable en matière d'autorisation de poursuivre un séquestre ou un syndic n'est pas très exigeant et qu'il vise à protéger ceux-ci seulement contre les actions frivoles, vexatoires ou dépourvues de fondement factuel. Comme l'ont affirmé L. W. Houlden, G. B. Morawetz et J. Sarra dans *Bankruptcy and Insolvency Law of Canada* (3e éd. (feuilles mobiles)), vol. 3, p. 7-118.2 :

> [TRADUCTION] Le tribunal ne refusera pas la permission demandée à moins que l'action soit sans fondement ou qu'elle soit frivole ou vexatoire . . .

56 Essentiellement, sauf si l'action était sans fondement, celle-ci a généralement été autorisée en vertu de l'art. 215 et des dispositions qui l'ont précédé : voir *Randfield c. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075, p. 1077, le lord juge Turner ([TRADUCTION] « . . . il n'appartient selon moi, pas au tribunal de refuser la liberté de faire valoir un droit à l'encontre d'un séquestre, à moins que l'action n'ait manifestement aucun fondement »); *In re Diehl c. Carritt* (1907), 15 O.L.R. 202 (H.C.J.), p. 204; *Danny's Cabaret Ltd. c. Horner*, [1980] B.C.J. No. 1293 (QL) (C.A.); *Virden Credit Union Ltd. c. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84 (B.R. Man.), p. 90; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113 (C.A. Ont.); *RoyNat Inc. c. Allan* (1988), 61 Alta. L.R. (2d) 165 (B.R.); *B.N.R. Holdings Ltd. c. Royal Bank* (1992), 14 C.B.R. (3d) 233 (C.S.C.-B.); *Toronto Dominion Bank c. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6 (C. Ont. (Div. gén.)), par. 7; *Nicholas c. Anderson* (1996), 40 C.B.R. (3d) 32 (C. Ont. (Div. gén.)), par. 13-15; *Burton c. Kideckel* (1999), 13 C.B.R. (4th) 9 (C.S.J. Ont.), par. 13; *Society of Composers, Authors and Music Publishers of Canada c. Armitage* (2000), 50 O.R. (3d) 688 (C.A.), par. 2; *Vanderwoude c. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 195, par. 22; *Bennett on Bankruptcy* (8e éd. 2005), p. 416-417; *Bennett on Receiverships* (2e éd. 1999), p. 223, et Houlden, Morawetz et Sarra, p. 7-118.2.

57 In the leading case of *Mancini*, the Court of Appeal summarized the accepted principles as being the following:

> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
>
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
>
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

58 The court in *Mancini* explained that the duty of the trustee is to protect both the creditors and the public interest in the proper administration of the bankrupt estate. The gatekeeping purpose of the leave requirement, therefore, in light of this duty, is to prevent the trustee or receiver "from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action" (para. 17) so that the bankruptcy process is not made unworkable. On the other hand, it ensures that legitimate claims can be advanced.

59 The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. As Blair J. observed in *Nicholas*:

> The question . . . is whether, in the circumstances of this case, the facts in support of the proposed claim have been disclosed by sufficient affidavit evidence to ensure the claim's proper factual foundation, having regard to the policy of requiring leave in order to protect a trustee from claims which have no basis in fact. [para. 16]

In other words, the evidence must disclose a *prima facie* case.

Dans *Mancini*, l'arrêt-clé sur la question, la Cour d'appel a résumé ainsi les principes reconnus :

> [TRADUCTION]
>
> 1. La permission de poursuivre un syndic ne devrait pas être accordée si l'action est frivole ou vexatoire. Des actions manifestement non fondées ne devraient pas être autorisées.
>
> 2. Il ne faudrait pas permettre la poursuite d'une instance si la preuve soumise à l'appui de la requête, y compris la version préliminaire de la déclaration envisagée, ne révèle pas de cause d'action opposable au syndic. La preuve, qui est habituellement présentée par affidavit, doit faire état des faits allégués à l'appui des conclusions recherchées.
>
> 3. Le tribunal n'a pas à se prononcer sur le bien-fondé de l'action avant d'accorder la permission demandée. [Références omises; par. 7.]

Dans *Mancini*, la Cour d'appel a expliqué que le syndic a le mandat de protéger à la fois les créanciers et l'intérêt du public dans l'administration ordonnée de l'actif du failli. Compte tenu de ce mandat, l'obligation d'obtenir une permission a donc pour but d'éviter au syndic ou au séquestre d'avoir [TRADUCTION] « à se défendre contre des actions qui sont frivoles ou vexatoires, ou qui ne révèlent aucune cause d'action » (par. 17), de façon que le processus de faillite ne soit pas paralysé. En revanche, cette obligation garantit que les actions légitimes peuvent être intentées.

Pour l'application de l'art. 215, il faut déterminer si la preuve étaye la cause d'action invoquée. Comme l'a fait remarquer le juge Blair dans *Nicholas* :

> [TRADUCTION] La question [. . .] consiste à déterminer si, dans les circonstances en cause, une preuve par affidavit suffisante étaye les faits allégués au soutien de l'action envisagée, afin de s'assurer du bien-fondé factuel de l'action, vu la règle qui requiert l'obtention d'une autorisation dans le but de protéger le syndic contre les demandes dépourvues de fondement factuel. [par. 16]

Autrement dit, il doit exister une preuve *prima facie*.

Although the *Mancini* test calls for an investigation into whether the proposed litigation discloses a cause of action, the focus of that inquiry is not a determination of the merits. This is a particularly important observation in circumstances where exclusive jurisdiction to decide the legal questions raised in the proceedings resides elsewhere. As the court said in *Mancini*, at para. 16 "[o]n a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under [the predecessor of s. 215] must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action." See also *Society of Composers, Authors and Music Publishers of Canada*, at para. 2.

60 Bien que le critère établi dans *Mancini* exige que le tribunal se demande si la poursuite envisagée révèle une cause d'action, cet examen n'a pas pour objet de trancher la question au fond. Cette observation est particulièrement importante lorsqu'un autre tribunal a compétence exclusive pour statuer sur les questions juridiques soulevées par l'instance. Comme l'a signalé la Cour d'appel dans *Mancini*, par. 16, [TRADUCTION] « [s]ur une échelle qui va de l'absence totale de preuve à une preuve qui est concluante, la preuve nécessaire pour fonder une ordonnance en vertu de [la disposition antérieure à l'art. 215] doit être suffisante pour établir l'existence d'un fondement factuel à l'égard de l'action envisagée, et pour établir que cette action révèle une cause d'action. » Voir aussi l'arrêt *Society of Composers, Authors and Music Publishers of Canada*, par. 2.

This threshold strikes the appropriate balance between the protection of trustees and receivers from the distraction and delay inherent in frivolous or merely tactical suits, and the preservation to the maximum extent possible of the rights of creditors and others as against a trustee or receiver. In this way, *Mancini* is consistent with *Crystalline*'s requirement that there be "explicit statutory language" (para. 43) before the *Bankruptcy and Insolvency Act* is interpreted so as to deprive persons of rights conferred under provincial law.

61 Ce critère établit un juste équilibre entre, d'une part, la protection des syndics et des séquestres contre les dérangements et délais inhérents aux poursuites frivoles ou intentées pour des raisons purement tactiques, et, d'autre part, la protection — dans la plus large mesure possible — des droits des créanciers et autres intéressés contre les décisions et les actes des syndics et des séquestres. En ce sens, l'arrêt *Mancini* est compatible avec l'exigence énoncée dans *Crystalline* selon laquelle il faut « une disposition législative explicite » (par. 43) pour que la *Loi sur la faillite et l'insolvabilité* puisse être interprétée de manière à priver une personne de droits conférés par une province.

The approach proposed by the majority in the Court of Appeal would require that courts consider the effect of the proposed proceeding on, among other considerations, the potential for interference with the maximization of stakeholder value. With respect, the result of the application of this higher threshold would necessarily bar some meritorious cases on the basis that other stakeholders would be better off. To allow bankruptcy courts to use the leave requirement in s. 215 to pick and choose between stakeholders' claims on the basis of a standard which, as MacPherson J.A. noted, at para. 111, is both "more vague and more elaborate" than that set out in *Mancini*, would be a profound

62 L'analyse suggérée par les juges majoritaires de la Cour d'appel obligerait les tribunaux à examiner l'effet de l'instance proposée au regard de diverses considérations, notamment la possibilité qu'elle entrave la maximisation de la valeur de l'actif au profit des divers intéressés. En toute déférence, l'application de ce critère plus exigeant aurait nécessairement pour conséquence d'empêcher l'introduction d'actions qui méritent d'être instruites, au motif qu'une telle décision serait plus avantageuse pour certains intéressés. Permettre aux tribunaux de faillite d'utiliser l'obligation d'obtenir une permission prévue à l'art. 215 pour choisir entre les réclamations des personnes intéressées en se

departure from the principles in *Crystalline*. The integrity and efficiency of the bankruptcy process are sufficiently advanced by directing bankruptcy courts to deny leave to frivolous and merely tactical suits.

63 A more interventionist approach is premised on the "single control" theory of bankruptcy litigation. In *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92, a case dealing with the enforceability of bankruptcy court orders across Canada, Binnie J. described the goal of a single court controlling all aspects of a bankruptcy, including litigation, as being "the expeditious, efficient and economical clean-up of the aftermath of a financial collapse" (para. 27). The benefits of avoiding multiple proceedings in multiple provinces underlay the decision. But, as Binnie J. also observed, "[s]ingle control is not necessarily inconsistent with transferring particular disputes elsewhere" (para. 76).

64 "[T]ransferring particular disputes elsewhere" is all that is done when leave under s. 215 is granted. Moreover, I note that the "transfer" in the instant case consists only of permitting the tribunal vested with exclusive jurisdiction over the matter to ultimately decide it. It is one thing to avoid permitting provincial enforcement schemes to defeat legitimate bankruptcy orders, as was held in *Sam Lévy*, it is another to use the bankruptcy process to defeat legitimate assertions of provincially granted rights, including labour and employment rights over which the bankruptcy court has no jurisdiction. The *Mancini* test is not, in short, inconsistent with "single control".

fondant sur une norme qui, comme l'a souligné le juge MacPherson de la Cour d'appel au par. 111, est à la fois [TRADUCTION] « plus vague et plus poussée » que celle énoncée dans *Mancini* constituerait une importante dérogation aux principes formulés dans l'arrêt *Crystalline*. Il suffit, pour assurer l'intégrité et l'efficacité du processus de faillite, que l'on demande aux tribunaux de faillite de ne pas autoriser les poursuites frivoles ou intentées pour des raisons purement tactiques.

Le recours à une démarche plus interventionniste repose sur la théorie du « contrôle unique » des litiges en matière de faillite. Dans *Sam Lévy & Associés Inc. c. Azco Mining Inc.*, [2001] 3 R.C.S. 978, 2001 CSC 92, où il était question du caractère exécutoire, partout au Canada, des ordonnances du tribunal de faillite, le juge Binnie a signalé que le recours à un tribunal unique qui contrôle tous les aspects d'une faillite, y compris les litiges, a pour objectif « la gestion expéditive, efficace et économique des retombées d'un effondrement financier » (par. 27). La décision repose sur les avantages qui découlent du fait d'éviter l'instruction de multiples procédures dans plusieurs provinces. Or, comme l'a fait remarquer le juge Binnie, « [l]e contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts » (par. 76).

« [L]e renvoi de litiges particuliers à d'autres ressorts » est tout ce qui est accompli lorsque la permission visée à l'art. 215 est accordée. De plus, je souligne qu'en l'espèce le « renvoi » revient uniquement à autoriser le tribunal à trancher, en bout de ligne, une affaire sur laquelle il a par ailleurs compétence exclusive. C'est une chose d'éviter que les régimes d'exécution provinciaux permettent de déroger aux ordonnances légitimes rendues en matière de faillite, comme il a été décidé dans *Sam Lévy*. Par contre, c'en est une autre d'utiliser le processus de faillite pour faire obstacle à la revendication légitime de droits reconnus par une province, y compris des droits en matière de travail et d'emploi qui ne sont pas du ressort du tribunal de faillite. Bref, le critère énoncé dans *Mancini* n'est pas incompatible avec celui du « contrôle unique ».

Ultimately, the appropriate test under s. 215 of the *Bankruptcy and Insolvency Act* remains a question of statutory interpretation, and the Act itself provides important context for the resolution of that question. I think it is instructive that s. 37 of the *Bankruptcy and Insolvency Act* provides that when the bankrupt, any creditor, or any other person is aggrieved by an act or decision of a trustee or receiver in the administration of the bankrupt estate, he or she may apply to the bankruptcy court. The court may then reverse, modify or confirm the act or decision complained of, making such order as it thinks just. No leave is required under s. 37.

Sections 37 and 215 have been called alternative means of proceeding against a trustee or receiver: see *Virden Credit Union*, at pp. 89-90. The difference, of course, is that under s. 215, permission can be sought to seek a remedy elsewhere than in the bankruptcy court, and certain claims will be beyond the jurisdiction of the bankruptcy court under s. 37. Nevertheless, many actions that may be brought with leave under s. 215 may also be heard in the bankruptcy court on a s. 37 application. What is instructive about s. 37, however, is that it demonstrates that Parliament did not consider it appropriate to immunize court-appointed officers from litigation.

On the other hand, where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly, as in s. 14.06(1.2) (trustee immune from certain liabilities arising from continuing the debtor's business or the employment of the debtor's employees); s. 14.06(4) (trustee immune in certain circumstances from environmental liabilities); s. 41(8) (discharge of liability of trustee upon discharge of trustee); ss. 50(9) and 50.4(5) (trustee not liable for detrimental reliance on cash-flow statements if the trustee reviews the statements reasonably and in good faith); s. 80 (trustee not liable for losses resulting from seizure of

65 En définitive, le critère approprié pour l'application de l'art. 215 de la *Loi sur la faillite et l'insolvabilité* demeure une question d'interprétation législative, et la Loi elle-même fournit un contexte important pour résoudre cette question. Je trouve révélateur que la *Loi sur la faillite et l'insolvabilité* prévoie, à l'art. 37, que lorsqu'un acte ou une décision d'un syndic ou d'un séquestre relativement à l'administration de l'actif du failli lèse ce dernier, un créancier ou toute autre personne, l'intéressé peut s'adresser au tribunal de faillite. Ce tribunal peut alors infirmer, modifier ou confirmer l'acte ou la décision qui fait l'objet de la plainte et rendre l'ordonnance qu'il juge équitable. L'article 37 n'exige aucune permission.

66 Les articles 37 et 215 ont été considérés comme deux façons différentes de contester les décisions d'un syndic ou d'un séquestre : voir *Virden Credit Union*, p. 89-90. La différence réside bien sûr dans le fait qu'il est possible, en vertu de l'art. 215, de demander la permission d'engager un recours devant un tribunal autre que le tribunal de faillite, et que certaines actions échapperont à la compétence accordée au tribunal de faillite par l'art. 37. Néanmoins, de nombreux recours pouvant être intentés sur autorisation en vertu de l'art. 215 peuvent également être soumis au tribunal de faillite en application de l'art. 37. Toutefois, l'intérêt de cette dernière disposition est qu'elle démontre que le législateur n'a pas jugé indiqué de mettre à l'abri des poursuites les auxiliaires de justice nommés par les tribunaux.

67 En revanche, lorsque le législateur a voulu protéger les syndics ou les séquestres contre certains recours, il l'a fait explicitement, par exemple : par. 14.06(1.2) (immunité à l'égard de certaines réclamations conférées au syndic qui continue l'exploitation de l'entreprise du débiteur ou lui succède comme employeur); par. 14.06(4) (protection du syndic dans certaines circonstances contre les ordonnances en matière environnementale); par. 41(8) (exonération de responsabilité par suite de la libération); par. 50(9) et 50.4(5) (protection du syndic contre la responsabilité pour préjudice subi par un tiers qui s'est fié à l'état de l'évolution de l'encaisse, lorsque l'état a été examiné avec

property); s. 148(3) (no action for a dividend lies against a trustee); s. 171(6) (trustee not liable for reasonable and good faith statement of opinion as to the probable cause of the bankruptcy); s. 197(3) (trustee not liable for costs of a proceeding); s. 251 (no action against a receiver for loss resulting from notice of the receiver's appointment); and s. 252 (no action against a receiver for failure to comply with the Act where the receiver reasonably believed the debtor was not insolvent).

soin et bonne foi); art. 80 (exonération de responsabilité du syndic à l'égard de pertes découlant de la saisie de biens); par. 148(3) (aucun droit d'action en recouvrement de dividende); par. 171(6) (protection du syndic contre la responsabilité découlant d'une déclaration raisonnable faite de bonne foi sur la cause probable de la faillite); par. 197(3) (exclusion de responsabilité personnelle en matière de frais de justice); art. 251 (protection du séquestre contre les actions fondées sur un préjudice découlant de l'envoi de l'avis de sa nomination); art. 252 (moyen de défense accordé au séquestre qui aurait contrevenu à la Loi s'il avait des motifs raisonnables de croire que le débiteur n'était pas insolvable).

68 In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers.

En l'absence de dispositions expresses de ce genre, le tribunal de faillite ne devrait pas convertir la procédure d'autorisation établie à l'art. 215 en mesure de protection générale des auxiliaires de justice désignés par les tribunaux.

69 The issue then becomes whether there is some reason why the long-standing principles governing the granting of leave should be different when the dispute relates to the receiver's obligations to the debtors' employees represented by a union.

Il faut alors se demander pour quelle raison les principes établis de longue date qui régissent l'obtention de la permission devraient différer lorsque le litige a trait aux obligations du séquestre envers les employés syndiqués du débiteur.

70 The argument for a higher, more elaborate threshold advanced by the majority in the Court of Appeal is to enhance the receiver's ability to decide how and when to sell the assets, free from the fear of subsequent scrutiny for labour relations violations. The *Mancini* test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. If the argument is that the receiver should be protected from the threat of litigation by the Union because of its inevitable cost, delay and inconvenience, then no creditor should ever be granted leave to sue. No litigation is without delay, cost and inconvenience. But Parliament has nonetheless decided, through s. 215, that the bankruptcy court should, in its discretion, permit litigation against court-appointed officers. It has made no distinction between unions and other

Les juges majoritaires de la Cour d'appel ont estimé qu'il fallait appliquer un critère plus exigeant et plus poussé afin d'accroître la capacité du séquestre de décider quand et comment il entend vendre l'actif du débiteur, sans craindre qu'on lui reproche plus tard d'avoir contrevenu aux règles en matière de relations de travail. Le critère de l'arrêt *Mancini* ne restreint nullement les mesures de protection que le législateur a jugé nécessaires d'établir pour préserver la capacité des syndics et des séquestres de s'acquitter de leurs fonctions avec souplesse et efficacité. Si l'on prétend qu'il y a lieu de protéger le séquestre contre les risques de poursuites par le Syndicat en raison des coûts, délais et inconvénients inévitables qu'elles occasionnent, il faudrait alors refuser à tout créancier la permission d'intenter des poursuites. Toute action en justice engendre des coûts, des délais et des inconvénients. Le législateur a tout de même décidé, en édictant

creditors in granting this discretionary authority and none should be imputed.

l'art. 215, que le tribunal de faillite devait posséder le pouvoir discrétionnaire de permettre l'engagement de poursuites contre des auxiliaires de justice nommés par les tribunaux. En accordant ce pouvoir discrétionnaire, il n'a pas fait de distinction entre les syndicats et d'autres créanciers, et il n'y a pas lieu de présumer qu'une telle distinction existe.

To impose a higher s. 215 threshold when it is a labour board issue is to read into the *Bankruptcy and Insolvency Act* a lower tolerance for the rights of employees represented by unions than for other creditors. I see nothing in the Act that suggests this dichotomy.

71 Resserrer le critère d'application de l'art. 215 lorsque le litige porte sur une question relevant d'une commission des relations de travail équivaut à reconnaître à la *Loi sur la faillite et l'insolvabilité*, par interprétation, une sensibilité moins grande envers les droits des employés syndiqués qu'envers ceux des autres créanciers. Je ne vois rien dans la Loi qui suggère une telle distinction.

A hierarchical approach to s. 215 which makes it significantly more difficult for a successorship case to obtain leave would unduly give trustees and receivers more protection from being answerable to the court for possible misconduct related to potential breaches of labour relations, and offers unique and enhanced protection for trustees who violate labour rights. It is, moreover, an approach that undermines the protection of rights endorsed by this Court in *Crystalline*. As Borins J.A. of the Ontario Court of Appeal observed in *Royal Crest*:

72 Le fait d'appliquer l'art. 215 d'une manière hiérarchique, qui rendrait considérablement plus difficile l'obtention de la permission pour les demandes touchant le statut d'employeur successeur, aurait pour effet d'accorder indûment aux syndics et aux séquestres une protection accrue contre les poursuites fondées sur de possibles fautes reliées à la violation des règles touchant les relations de travail et offrirait aux syndics qui contreviennent aux lois en la matière une protection supplémentaire exceptionnelle. Une telle conception irait de plus à l'encontre de la protection des droits reconnus par notre Cour dans l'arrêt *Crystalline*. Comme l'a signalé le juge Borins de la Cour d'appel de l'Ontario dans l'arrêt *Royal Crest* :

> While the important role performed by bankruptcy trustees is deserving of protection, the rights of labour unions to pursue legitimate issues on behalf of their members must also be respected. [para. 70]

> [TRADUCTION] Bien que le rôle important que jouent les syndics mérite d'être protégé, le droit des syndicats de défendre les intérêts légitimes de leurs membres doit lui aussi être respecté. [par. 70]

The Court of Appeal unanimously — and correctly — reached the conclusion that the bankruptcy court cannot make declarations about, or immunize court-appointed officers from accountability for contraventions of applicable labour relations laws. Yet, the majority's proposed threshold for leave under s. 215 would not only upset the balance in the Act between the gate-keeper function of the bankruptcy court and protected property and civil rights, it would create a real risk that s. 215 would become a *de facto* means by which the

73 La Cour d'appel a à l'unanimité — et à juste titre — conclu que le tribunal de faillite n'est pas habilité à rendre de jugement déclaratoire sur la responsabilité des auxiliaires de la justice désignés par les tribunaux à l'égard de contraventions aux lois applicables en matière de relations de travail, ni à protéger ceux-ci contre une telle responsabilité. Pourtant, le critère proposé par la majorité à l'égard des demandes de permission fondées sur l'art. 215 aurait non seulement pour effet de rompre l'équilibre établi par la Loi entre le rôle de

bankruptcy court could make such declarations, and, contrary to *Mancini*, effectively decide the issue on its merits. That is what happened at first instance in this case. As MacPherson J.A. observed in his dissent:

> In short, and with respect, my colleague introduces through the side door of s. 215 (a leave provision, not a provision conferring authority on the receiver) precisely what she correctly does not permit the receiver to do through the front door of s. 47(2). [para. 115]

74 Section 215 is not designed to protect the trustee from well-founded litigation. It is designed to afford protection from claims for which there is no factual foundation. All major stakeholders, on a plain reading of the statute, have been given similar access for remedying alleged grievances against the trustee under ss. 37 and 215. Absent a statutory intention to the contrary, this symmetry should continue, whatever the identity of the stakeholder. There is no reason to depart from it when what is sought is relief from the labour board rather than from a bankruptcy judge.

75 That brings us to the proposed action in this case, namely a successor rights application before the labour board. Various provincial statutes provide that the successor employer is bound by the collective agreement and required to recognize the exclusive representation of the employees by their union. The statutes declare that the collective agreement is binding if the business has been sold or otherwise transferred to the successor until the tribunal otherwise declares.

76 In *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, Wilson J., in her dissenting reasons, explained that the purpose of the "successor rights"

gardien du tribunal de faillite et la protection de la propriété et des droits civils, mais aussi de faire naître le risque réel que l'art. 215 permette *de facto* au tribunal de faillite de rendre de tels jugements déclaratoires et, contrairement au principe formulé dans l'arrêt *Mancini*, de trancher concrètement la question au fond. C'est ce qui s'est produit en première instance dans la présente affaire. Comme l'a indiqué le juge MacPherson dans ses motifs dissidents :

> [TRADUCTION] Bref, et cela dit en toute déférence, par l'art. 215 (qui est une disposition d'autorisation, et non une disposition conférant quelque pouvoir au séquestre), ma collègue permet indirectement à ce dernier de faire exactement ce qu'elle lui refuse, à juste titre d'ailleurs, de faire en vertu du par. 47(2). [par. 115]

L'article 215 n'a pas pour objet de protéger le syndic contre des actions en justice légitimes, mais bien contre les poursuites qui ne reposent sur aucun fondement factuel. Une simple lecture du texte de loi montre que les art. 37 et 215 offrent à tous les principaux intéressés la même possibilité de faire valoir un grief contre le syndic. En l'absence de toute intention contraire du législateur dans la loi, il faut maintenir cette symétrie, quel que soit l'intéressé. Rien ne justifie que l'on y déroge lorsque la réparation recherchée est du ressort d'une commission des relations de travail plutôt que d'un juge de faillite.

Cela nous amène à l'action envisagée en l'espèce, à savoir la présentation d'une requête à la Commission touchant le statut d'employeur successeur. Diverses lois provinciales disposent que l'employeur successeur est lié par les conventions collectives et tenu de reconnaître le syndicat comme représentant exclusif des employés. Ces lois déclarent que la convention collective continue de s'appliquer si l'entreprise a été vendue ou autrement transférée au successeur, jusqu'à déclaration contraire du tribunal compétent.

Dans *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644, la juge Wilson a expliqué, dans ses motifs dissidents, que les dispositions des

provisions in labour legislation is "to prevent the loss of union protection by employees whose company's business is sold or transferred" (p. 652). A successor employer is defined in s. 69(2) of the Ontario *Labour Relations Act, 1995* as someone who acquires a business by sale or transfer from an employer and is bound by any existing collective agreements until the Ontario Labour Relations Board rules otherwise.

lois sur le travail relatives au « statut d'employeur successeur » visaient à « empêcher la perte de l[a] protection syndicale par les employés d'une société dont l'entreprise est vendue ou transférée » (p. 652). Un employeur successeur est défini au par. 69(2) de la *Loi de 1995 sur les relations de travail* de l'Ontario comme étant une personne qui acquiert une entreprise par suite de sa vente ou de son transfert par un employeur et qui est liée par les conventions collectives existantes jusqu'à déclaration contraire de la Commission.

To be found to be a successor employer, as McLachlin J. noted for the majority in *Lester*, a labour board must first determine whether a discernable part of the business was disposed of. This requires an examination of "the nature of the predecessor business, and the nature of the successor business" (p. 676) to determine whether the business of the predecessor is being performed by the successor. Relevant factors include the work covered by the terms of the collective agreement, the type of assets transferred, whether employees are transferred, and whether there is continuity of management or of the work performed. In each case, as McLachlin J. pointed out, the labour relations board must determine "if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor" (p. 677).

77 S'exprimant au nom de la majorité de la Cour dans l'arrêt *Lester*, la juge McLachlin a indiqué que, pour conclure qu'une personne est employeur successeur, une commission des relations de travail doit d'abord déterminer si une partie identifiable de l'entreprise a été aliénée, ce qui exige un examen de « la nature de l'entreprise du prédécesseur ainsi que [de] la nature de l'entreprise du successeur » (p. 676) afin d'établir si l'entreprise du prédécesseur est exploitée par le successeur. Les facteurs pertinents à l'égard de cet examen sont notamment la nature des travaux visés par la convention collective, la sorte d'actif qui a été transféré, la question de savoir si des employés ont été transférés et s'il y a continuité dans la direction ou les travaux accomplis. Dans chaque cas, comme l'a signalé la juge McLachlin, la commission doit déterminer « si, dans le contexte commercial où s'est produit l'opération, on peut raisonnablement affirmer, compte tenu des facteurs en jeu, que l'entreprise ou une partie de l'entreprise a été transférée du prédécesseur au successeur » (p. 677).

KPMG and GMAC make a number of arguments directed specifically at the obstacles to the Union's successorship claim, including a constitutional paramountcy argument relating to the effect of a successor employer declaration on the priority scheme in the *Bankruptcy and Insolvency Act*. These are matters for the labour board's consideration. They are not germane to whether leave should be granted. And I appreciate the majority of the Court of Appeal's concern that the possibility of subsequent labour relations scrutiny may have an impact on a receiver's decision about how best to maximize stakeholder value. But again, this

78 KPMG et GMAC ont invoqué un certain nombre d'arguments portant expressément sur les obstacles à la requête du Syndicat relative à la qualité de successeur, notamment un argument constitutionnel fondé sur la doctrine de la prépondérance et concernant l'effet, sur l'ordre de priorité prévu dans la *Loi sur la faillite et l'insolvabilité*, d'une déclaration reconnaissant la qualité d'employeur successeur. Il s'agit là de questions que la Commission doit examiner. Elles ne sont pas pertinentes à l'égard de la décision d'accorder ou non la permission d'intenter une action. Je comprends que les juges majoritaires de la Cour d'appel aient craint que la possibilité

goes not to whether leave should be granted, but is a consideration in deciding the merits of the successor rights application. Issues of successorship are within the exclusive jurisdiction of the labour relations board. The labour board has been given exclusive responsibility for deciding these issues because the provincial legislature has confidence in its ability to do so in the public interest, based not only on the expectations of employees, but on those of employers as well.

d'une instance devant la Commission influe sur la décision du séquestre quant à la meilleure façon de maximiser la valeur de l'actif au profit des intéressés. Une fois encore cependant, cette considération n'intervient pas dans la décision d'accorder ou non la permission demandée, mais plutôt dans l'examen au fond de la requête relative à la qualité d'employeur successeur. Ces questions relèvent de la compétence exclusive de la Commission. Le législateur provincial lui a conféré la responsabilité exclusive de trancher ces questions, parce qu'il l'a jugée apte à statuer sur ces questions dans l'intérêt public, eu égard non seulement aux attentes des employés mais également à celles des employeurs.

79 In this case, the Union sought to argue before the Ontario Labour Relations Board that the interim receiver became the employer of the employees after its appointment when it decided to employ them in order to continue operating the warehouse. As an employer, it would be obliged to abide by the collective agreement and applicable labour and employment statutes. The Union alleged it failed to do so by, among other acts, manipulating the sale agreement so that the Union was ousted from the purchaser's workforce.

En l'espèce, le Syndicat a voulu faire valoir devant la Commission que le séquestre intérimaire était devenu l'employeur, après sa nomination, lorsqu'il a décidé d'avoir recours aux employés pour continuer à exploiter l'entrepôt. En sa qualité d'employeur, il serait tenu de respecter la convention collective et les dispositions législatives applicables en matière d'emploi et de travail. Selon le Syndicat, il s'est soustrait à cette obligation, notamment en manipulant l'acte de vente de telle sorte que le Syndicat soit exclu de la main-d'œuvre de l'acquéreur.

80 It is by no means clear how the Board will deal with a particular successorship issue, since the outcome will be determined by the facts. But where, as here, it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed.

Il est difficile de prévoir la décision de la Commission sur une question donnée touchant la qualité d'employeur successeur, car chaque situation dépendra des faits qui lui sont propres. Toutefois, comme en l'espèce il est impossible d'affirmer que la demande du Syndicat est frivole ou n'est appuyée d'aucune preuve, celui-ci doit être autorisé à la présenter.

81 A postscript: No notice of the motion appointing an interim receiver was given to the Union, the exclusive bargaining agent of the employees. I appreciate that what happened in this case is not uncommon: receivers routinely seek an *ex parte* order from the bankruptcy judge with a draft order agreed upon by the debtor corporation and major creditors. Unions, as in this case, receive no notice, thereby losing the opportunity at the earliest possible stage to participate in the formulation of the plan for dealing with the debtor's assets. Notice is

Un dernier point : aucun avis de la requête sollicitant la nomination d'un séquestre intérimaire n'a été donné au Syndicat, l'agent négociateur exclusif des employés. Je suis consciente que cette façon de faire n'est pas rare : les séquestres présentent couramment aux juges de faillite une demande d'ordonnance *ex parte* accompagnée d'un projet d'ordonnance sur lequel l'entreprise débitrice et les principaux créanciers se sont entendus. Comme ce fut le cas en l'espèce, les syndicats ne reçoivent aucun avis, perdant ainsi dès le départ la possibilité de participer à

no guarantee either of cooperation or resolution, but, arguably, a union shut out of the process early will eventually, like any major creditor, likely seek to protect its interests. As Iacobucci J. observed in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701:

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result . . . . [para. 95]

While advance negotiations with unions on important decisions may not eliminate a subsequent claim for successor employer liability, they could potentially yield a greater possibility for resolution than ignoring them would. Optimally, advance discussions about the impact on employees if the business is continued will lead to compromise rather than litigation.

This would have resulted, in this case, in the immediate integration of a significantly affected party into the development and supervision of the orderly, fair and effective management of the insolvency process. It would not, of course, necessarily have avoided a multiplicity of proceedings. Nor would it have guaranteed the Union's blessing of the proposed methodology for preserving and realizing the assets. But it would have, at the very least, ensured that its legitimate concerns were factored into the planning at an early enough stage, thereby possibly avoiding later proceedings such as those which arose in this case.

III. Disposition

I would allow the appeal with costs throughout, grant leave to the Union to bring its proceeding

l'établissement du plan de gestion de l'actif du débiteur. Bien que l'avis ne garantisse ni la coopération ni une solution, il est néanmoins possible de soutenir qu'un syndicat exclu dès le départ du processus cherchera tôt ou tard, comme tout autre créancier important, à protéger ses intérêts. Comme l'a fait remarquer le juge Iacobucci dans l'arrêt *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701 :

> Le moment où il y a rupture de la relation entre l'employeur et l'employé est celui où l'employé est le plus vulnérable et a donc le plus besoin de protection. Pour reconnaître ce besoin, le droit devrait encourager les comportements qui réduisent au minimum le préjudice et le bouleversement (tant économique que personnel) qui résultent . . . [par. 95]

82 Même si la tenue de négociations préalables avec un syndicat sur des décisions importantes n'empêche pas nécessairement la présentation subséquente d'un recours fondé sur la responsabilité du successeur de l'employeur, de telles négociations peuvent quand même offrir plus de chance de parvenir à une solution que si le syndicat est maintenu à l'écart. Idéalement, des discussions préalables au sujet des effets de la poursuite des activités de l'entreprise sur les employés entraîneront un compromis plutôt qu'un litige.

83 En l'espèce, une telle mesure aurait eu pour effet d'associer d'entrée de jeu au déroulement et à la supervision de l'administration ordonnée, équitable et efficace du processus de faillite une partie nettement concernée par ce processus. Bien sûr, cela n'aurait pas nécessairement permis d'éviter une multiplicité de procédures. Cela n'aurait pas non plus assuré l'approbation par le Syndicat de la méthode proposée pour préserver et réaliser l'actif. Mais, à tout le moins, une telle démarche aurait fait en sorte que les préoccupations légitimes du Syndicat soient prises en compte suffisamment tôt dans le processus, évitant possiblement de ce fait des recours ultérieurs, comme ceux intentés dans la présente affaire.

III. Dispositif

84 Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'accorder au syndicat la

before the labour board, and set aside those parts of the order that make a declaration about, or immunize the receiver from, successor employer liability. I would dismiss the cross-appeal with costs.

English version of the reasons delivered by

85 DESCHAMPS J. (dissenting on the appeal) — What factors guide a bankruptcy judge when hearing an application for leave to bring proceedings against a trustee? That is the main issue in this case. To resolve it, however, the Court must consider the limits on the application of provincial law in bankruptcy matters. For the reasons that follow, I am of the view that a judge who decides an application under s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), must do so in a manner consistent with federal and provincial heads of power so as to avoid any constitutional conflicts. I would therefore affirm the Court of Appeal's judgment ((2004), 71 O.R. (3d) 54) remitting the case to the Superior Court of Justice for reconsideration in light of the principles set out below.

86 I have read the reasons of Abella J. She concludes (at para. 78) that it is the Ontario Labour Relations Board ("OLRB") that must decide the constitutional question. In my view, the *BIA* provides for a step that is specifically designed to avoid any constitutional conflicts, and the administrative tribunal should not be allowed to make an unconstitutional declaration. Thus, we disagree as to the forum that should hear and determine the conflict issue. A superior court judge presiding over a bankruptcy case acts as a specialized tribunal. He or she is very familiar with the duties and responsibilities of trustees and serves as the initial jurisdiction to which someone wanting to bring proceedings against a trustee must apply. I propose that the application for leave to bring proceedings pursuant to s. 215 *BIA* be analysed based on the actual effect of the proceedings on the duties and responsibilities of the trustee as set out in the *BIA*. Such an analysis is the only way to

permission de soumettre sa requête à la Commission et d'annuler les éléments de l'ordonnance concernant la responsabilité du séquestre en tant que successeur de l'employeur ou lui accordant l'immunité contre cette responsabilité. Je suis d'avis de rejeter le pourvoi incident avec dépens.

Les motifs suivants ont été rendus par

LA JUGE DESCHAMPS (dissidente quant au pourvoi principal) — Quels facteurs guident le juge de faillite saisi d'une requête sollicitant la permission de poursuivre un syndic? Telle est la principale question en litige. Cette question amène cependant la Cour à se pencher sur les limites de l'application du droit provincial dans le contexte d'une faillite. Pour les motifs qui suivent, je suis d'avis que le juge appelé à statuer sur une requête fondée sur l'art. 215 de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), doit assurer le respect des compétences législatives fédérales et provinciales, de façon à éviter tout conflit constitutionnel. Je confirmerais donc le jugement de la Cour d'appel ((2004), 71 O.R. (3d) 54) qui renvoie le dossier à la Cour supérieure de justice pour réexamen à la lumière des principes exposés ci-dessous.

J'ai pris connaissance de l'opinion de la juge Abella. Elle conclut (par. 78) que c'est la Commission des relations de travail de l'Ontario (« CRTO ») qui doit trancher la question constitutionnelle. Pour ma part, j'estime que la *LFI* prévoit une étape qui permet justement d'éviter tout conflit constitutionnel et que le tribunal administratif ne peut être autorisé à prononcer une déclaration inconstitutionnelle. Nous sommes donc divisées sur l'identité de la juridiction devant laquelle la question du conflit doit être débattue. Les juges des cours supérieures qui siègent en faillite agissent comme tribunal spécialisé. Ils connaissent les devoirs et responsabilités du syndic. Ils constituent le premier guichet auquel doit s'adresser la personne qui veut poursuivre le syndic. Je propose une analyse des demandes de permission de poursuivre fondées sur l'art. 215 *LFI* qui s'attache à l'effet concret des poursuites sur les devoirs et responsabilités du syndic aux termes de la *LFI*. Seule

guarantee compliance with the principles of constitutional law.

In order to assess the areas of conflict between the *BIA* and the provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A ("*LRA*"), concerning successor employers, it will be helpful to begin by briefly reviewing the trustee's role in the context of the 1992 reform of the bankruptcy scheme. I will then discuss the effect of successor employer declarations made by the OLRB before turning to the constitutional principles applicable in the event of conflict. I will conclude by identifying the specific criteria for avoiding conflicts and then making a few comments on the case before the Court.

1. Powers and Responsibilities of the Trustee

1.1 *Role of the Trustee*

Viewed generally, the administration of a bankruptcy is straightforward. The trustee receives the assets in one hand, then settles any claims with the other using the proceeds of realization of the assets. In concrete terms, the trustee, in performing these functions, plays an active role in the liquidation of the bankrupt's estate. The trustee's duties and responsibilities are explicitly governed by the *BIA*. The bankrupt's property vests in the trustee (s. 71). The trustee's powers with respect to the property are set out in the *BIA* (ss. 30 and 31). Subject to the rights of secured creditors and certain other exceptions, the remedies of all the creditors are stayed (s. 69.1). The *BIA* also governs the nature of provable claims and the claims procedure (s. 121). A trustee who carries on the bankrupt's business or continues the employment of the bankrupt's employees is not personally liable for any claims arising before the bankruptcy (s. 14.06(1.2)). However, trustees are authorized to settle such claims out of the assets vested in them (s. 67) by distributing the proceeds of realization of the assets in accordance with the *BIA*, based on the priority of payment for which that Act provides (ss. 136 to 147).

The trustee is, first and foremost, an officer of the court:

une telle analyse garantit le respect des règles du droit constitutionnel.

87 Afin de pouvoir évaluer les zones de conflit entre la *LFI* et les dispositions de la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A (« *LRT* »), concernant la succession à titre d'employeur, il est utile, d'abord, de faire un survol du rôle du syndic dans le contexte de la réforme de 1992 du régime de la faillite. J'examinerai ensuite l'effet de la déclaration d'employeur par la CRTO, puis les règles constitutionnelles applicables en cas de conflit. Enfin, je terminerai en dégageant les critères propres à éviter les conflits et en formulant quelques commentaires sur le dossier dont la Cour est saisie.

1. Pouvoirs et responsabilités du syndic

1.1 *Rôle du syndic*

88 Considérée globalement, l'administration d'une faillite se fait selon une règle simple. Le syndic reçoit les actifs d'une main, puis de l'autre il règle les réclamations au moyen du produit de la réalisation de ces actifs. De façon concrète, ces fonctions se traduisent par un rôle actif du syndic dans la liquidation du patrimoine du failli. Les devoirs et responsabilités du syndic sont régis explicitement par la *LFI*. Les biens du failli lui sont dévolus (art. 71). Ses pouvoirs à l'égard de ces biens sont prévus par la *LFI* (art. 30 et 31). Sous réserve des droits des créanciers garantis et de quelques exceptions, les recours de tous les créanciers sont suspendus (art. 69.1). La *LFI* régit aussi la nature des réclamations prouvables de même que la procédure de réclamation (art. 121). Le syndic qui continue l'exploitation de l'entreprise du failli ou lui succède comme employeur n'est personnellement responsable d'aucune réclamation antérieure à la faillite (par. 14.06(1.2)). Il est cependant autorisé à les régler sur les actifs qui lui sont dévolus (art. 67), en répartissant le produit de leur réalisation conformément à la *LFI* et en suivant l'ordre de priorité établi par celle-ci (art. 136 à 147).

89 Le syndic est, avant tout, un auxiliaire de justice :

. . . and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors.

(*Ex parte James, In re Condon* (1874), L.R. 9 Ch. App. 609, at p. 614)

90 The basis for the trustee's long-recognized role as an officer of the court is found in s. 16(4) *BIA*; under the *BIA*, the trustee has the same status as the interim receiver: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (H.L.), at p. 167; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 1, at C§10 and C§44. This status obliges the trustee to act equitably and prudently, to cooperate with the court and, in a more general manner, to contribute to the proper administration of justice (*L'Heureux (Syndic de)*, [1999] R.J.Q. 945 (C.A.), at p. 949; *Caisse populaire de Pontbriand v. Domaine St-Martin Ltée*, [1992] R.D.I. 417 (C.A.); *Azco Mining Inc. v. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392 (C.A.); *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.); J. Auger and A. Bohémier, "The Status of the Trustee in Bankruptcy" (2003), 37 *R.J.T.* 57, at pp. 99-100).

91 The *BIA* protects trustees while they are acting as officers of the court and exercising the powers conferred upon them by law. A trustee is not personally bound by the bankrupt's obligations. In addition to being protected by the provisions that confer immunity upon them (ss. 14.06(1.2), (2) and (4), 50(9) and 50.4(5)), trustees benefit from the screening of the proceedings provided for in s. 215, which is central to the litigation in the case at bar. The provisions that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by the *BIA*.

92 It is also interesting to note that similar protections exist for monitors appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11.7(4) and 11.8(1), (3) and (5), and liquidators acting pursuant to the *Winding-up*

[TRADUCTION] . . . et le tribunal le considère comme son auxiliaire, chargé de conserver l'argent qui lui est confié afin qu'il puisse être réparti équitablement entre les créanciers.

(*Ex parte James, In re Condon* (1874), L.R. 9 Ch. App. 609, p. 614)

Le rôle d'auxiliaire de justice, qui est depuis longtemps reconnu par la jurisprudence, prend sa source dans le par. 16(4) *LFI*; la *LFI* confère au syndic un statut identique à celui du séquestre intérimaire : *Parsons c. Sovereign Bank of Canada*, [1913] A.C. 160 (H.L.), p. 167; L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (3e éd. (feuilles mobiles)), vol. 1, C§10 et C§44. Ce statut impose au syndic d'agir avec équité et prudence, de collaborer avec le tribunal et, plus généralement, de concourir à la saine administration de la justice (*L'Heureux (Syndic de)*, [1999] R.J.Q. 945 (C.A.), p. 949; *Caisse populaire de Pontbriand c. Domaine St-Martin Ltée*, [1992] R.D.I. 417 (C.A.); *Azco Mining Inc. c. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392 (C.A.); *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (C.A. Ont.); J. Auger et A. Bohémier, « The Status of the Trustee in Bankruptcy » (2003), 37 *R.J.T.* 57, p. 99-100).

La *LFI* protège le syndic lorsqu'il agit comme auxiliaire de justice et qu'il exerce les pouvoirs qui lui sont conférés par la loi. Il n'est pas tenu personnellement aux obligations du failli. En plus d'être protégé par les dispositions lui conférant une immunité (par. 14.06(1.2), (2) et (4), 50(9) et 50.4(5)), le syndic bénéficie du mécanisme de filtrage des poursuites que prévoit l'art. 215 et sur lequel repose tout le litige dans la présente affaire. Les dispositions protégeant le syndic contre les poursuites indiquent clairement l'intention du Parlement d'accorder au syndic la marge de manœuvre dont il a besoin pour accomplir les devoirs que lui impose la *LFI*.

Il est d'ailleurs intéressant de constater que le contrôleur d'un arrangement nommé en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, par. 11.7(4) et 11.8(1), (3) et (5), ainsi que le liquidateur agissant

and Restructuring Act, R.S.C. 1985, c. W-11, ss. 35.1 and 76(2).

1.2 *1992 Reform*

The rules governing bankruptcy changed considerably with the coming into force of the 1992 reform. The most striking change was the priority given to the reorganization of companies, as opposed to the interruption of business. D. C. A. Tay comments as follows on the significance of the *BIA*'s new thrust:

> The main impact of the *BIA* is to change the thrust of Canada's bankruptcy legislation from liquidation to rehabilitation. Whereas the old Act dealt primarily with who gets what from the remains of the bankrupt's estate, the *BIA* tries to provide more ways for an insolvent debtor to stay alive and to restructure and reorganize its affairs.

(*Implications of the New Bankruptcy and Insolvency Act* (1993), article VI, "The *Bankruptcy and Insolvency Act*: Striking a Balance Between the Rights of the Debtor and its Creditors", at p. 2)

This change is fundamental, and it unquestionably constitutes one of the main objectives behind the reform. Its effect, in concrete terms, in the case at bar is that the trustee was obliged to facilitate the sale of a going concern rather than to cease operations and liquidate the assets. The objective of continuing operations is a factor that must be incorporated into the constitutional analysis when considering whether a provincial statute frustrates the purpose of the *BIA*.

The trustee's duties and responsibilities as a public officer permeate these new functions. The trustee has been transformed from a mere liquidator into an agent of financial restructuring. If trustees are responsible for ensuring that businesses survive and that jobs are preserved, then it follows that they must manage the businesses until purchasers can be found. The trustee's management role is essentially a temporary one. Although the length of

aux termes de la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, ch. W-11, art. 35.1 et par. 76(2), bénéficient de protections similaires.

1.2 *Réforme de 1992*

93 Les règles régissant la faillite ont été considérablement modifiées par l'entrée en vigueur de la réforme de 1992. Le changement le plus marquant est la priorité donnée à la réorganisation des entreprises plutôt qu'à l'interruption des affaires. L'auteur D. C. A. Tay signale l'importance de la nouvelle orientation imprimée par la loi :

> [TRADUCTION] La *LFI* a pour principale conséquence que la législation canadienne en matière de faillite est désormais axée non plus sur la liquidation, mais sur la réhabilitation. Alors que l'ancienne loi régissait essentiellement la détermination du partage des biens du failli entre les créanciers, la *LFI* tend à offrir au débiteur insolvable un plus grand nombre de moyens d'éviter la faillite et de restructurer et réorganiser ses affaires.

(*Implications of the New Bankruptcy and Insolvency Act* (1993), article VI, « The *Bankruptcy and Insolvency Act* : Striking a Balance Between the Rights of the Debtor and its Creditors », p. 2)

94 Il s'agit d'un changement fondamental, qui constitue sans nul doute l'un des principaux objectifs ayant motivé la réforme. Dans le présent dossier, cela signifie concrètement que le syndic devait favoriser la vente d'une entreprise en exploitation plutôt que l'interruption des activités et la liquidation de l'actif démembré. L'objectif de maintien des activités est un élément qui doit être intégré à l'analyse constitutionnelle lorsqu'il s'agit de déterminer si une loi provinciale fait obstacle à la réalisation de l'objet de la *LFI*.

95 Les devoirs et responsabilités du syndic à titre d'auxiliaire de justice imprègnent ses nouvelles fonctions. De simple liquidateur, le syndic est devenu réorganisateur financier. S'il doit voir à la survie de l'entreprise et préserver les emplois, il s'ensuit qu'il doit la gérer, le temps de trouver un acquéreur. La gestion du syndic est essentiellement temporaire. Bien que la durée de son administration puisse varier selon la nature de l'entreprise et

the trustee's administration may vary depending on the nature of the business and the economic conditions at the time, the trustee serves essentially as a bridge in maintaining or reorganizing the business before handing it over to a purchaser.

96 It is clear from this crucial role of the trustee that bankruptcy inevitably has consequences for labour relations, which is why it is important to review the interrelationship of the rules of bankruptcy and those of labour relations, more specifically those applicable to the successor employer declaration.

2. Purpose and Effect of the Successor Employer Declaration

2.1 *Purpose of the Declaration*

97 Every Canadian legislature has enacted a provision pursuant to which employees' union protection remains in effect should the business they work for be transferred. The Ontario provision that is relevant to the instant case reads as follows:

> **69.** . . .
>
> (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

98 Without this protection, employees could, although still working at the same jobs, albeit for a new employer, be stripped of the rights their union had negotiated on their behalf.

99 In *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R.

les conditions économiques du moment, le syndic sert essentiellement de pont lorsqu'il maintient ou réorganise l'entreprise avant de la remettre à un acquéreur.

À la lumière de ce rôle crucial du syndic, on comprend qu'une faillite entraîne inévitablement des conséquences sur les relations de travail au sein de l'entreprise, d'où l'importance d'examiner l'interrelation entre les règles de la faillite et les relations de travail, plus spécifiquement la déclaration attribuant la qualité d'employeur successeur.

2. But et effet de la déclaration attribuant la qualité d'employeur successeur

2.1 *But de la déclaration*

Tous les législateurs canadiens ont adopté une disposition permettant aux employés de conserver la protection syndicale en cas de transfert de l'entreprise pour laquelle ils travaillent. La disposition ontarienne pertinente en l'espèce est rédigée ainsi :

> **69.** . . .
>
> (2) Si l'employeur qui est lié par une convention collective ou qui y est partie vend son entreprise, la personne à qui l'entreprise a été vendue est, jusqu'à déclaration contraire de la Commission, également lié [*sic*] par la convention collective comme s'il [*sic*] en était partie. Si l'employeur vend son entreprise alors qu'il est partie à une requête en accréditation ou en révocation du droit de négocier en cours devant la Commission, la personne à qui l'entreprise a été vendue est, jusqu'à déclaration contraire de la Commission, également l'employeur aux fins de la requête.

Sans cette protection, les employés pourraient dans les faits continuer à occuper le même emploi chez un nouvel employeur, mais en étant privés des droits que leur syndicat avait négociés en leur faveur.

Dans *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale*

644, McLachlin J., as she then was, explained the purpose of the successor employer declaration as follows:

> The basic aim of such provisions is to prevent employees from losing union protection when a business is sold or transferred or when changes are made to the corporate structure of a business. . . . [p. 671]

Numerous factors are taken into consideration when establishing whether the purchaser of a business has succeeded to the vendor as employer. To determine whether the business has been transferred, the usual practice is to ask whether sufficient significant elements of its assets have been sold to the purchaser and assess the degree of continuity in the business's operations. Each case turns on its own facts, and no single factor is determinative. The decision maker may compare both the human aspects (employee know-how, management system, licences, patents, goodwill) and physical aspects (tangible assets of the business, equipment, land, location) of the assigned business with those of the new one to decide whether there has been a sale. The decision maker also determines whether the constituent parts of the business have been transferred as a whole that is sufficiently coherent for the transfer to be equivalent to the sale of the business as a "functional economic vehicle" and for the survival of the rights arising out of collective bargaining to be justified (*Lester*, at p. 676; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197 (Ont.), at p. 208; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. May/June 397, at pp. 415-16; G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at pp. 8-4 to 8-23).

2.2 *Effect of the Declaration*

The effect of a declaration by the OLRB that an entity has succeeded to another as an employer is that the entity in respect of which the declaration is made becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. The new employer becomes personally liable for the predecessor employer's

740, [1990] 3 R.C.S. 644, la juge McLachlin, maintenant Juge en chef, met en relief le but de la déclaration de successeur à titre d'employeur :

> Le but fondamental de ces dispositions est d'empêcher que des employés ne perdent leur protection syndicale lorsqu'une entreprise est vendue ou transférée ou lorsque des modifications sont apportées à la structure d'une entreprise. . . [p. 671]

100 De nombreux critères sont utilisés pour déterminer si l'acquéreur à qui l'entreprise a été transférée succède à son vendeur à titre d'employeur. Afin de décider s'il y a eu transfert de l'entreprise, on se demande généralement si suffisamment d'éléments importants de l'actif de cette entreprise ont été vendus à l'acquéreur et on évalue le degré de continuité des activités associées à cette entreprise. Chaque situation est un cas d'espèce et aucun critère n'est déterminant. Le décideur peut considérer autant l'aspect humain (savoir-faire des employés, système de gestion, licences, brevets, achalandage) que l'aspect physique (actif matériel de l'entreprise, équipement, terrain, emplacement) de l'entreprise cédée et de la nouvelle entreprise afin de conclure ou non à une vente. Le décideur vérifie aussi si les éléments composant l'entreprise sont transmis comme un tout suffisamment cohérent pour équivaloir à la vente de l'entreprise en tant que « véhicule économique fonctionnel » et justifier la survie des droits découlant de la négociation collective (*Lester*, p. 676; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197 (Ont.), p. 208; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. May/June 397, p. 415-416; G. W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), p. 8-4 à 8-23).

2.2 *Effet de la déclaration*

101 Une déclaration par la CRTO qu'une entité succède à une autre à titre d'employeur a pour effet de faire de l'entité visée par cette déclaration une partie liée par la convention collective et de la rendre responsable de toutes les obligations y afférentes, y compris celles qui incombaient à l'ancien employeur avant le transfert de l'entreprise. Le nouvel employeur devient personnellement responsable tant des dettes de l'employeur précédent

debts, as well as for any violations of the collective agreement occurring before the sale. For example, the successor may be bound by an arbitration award against the predecessor and be forced to assume responsibility for unfair labour practices. Generally speaking, the successor is personally liable to perform the predecessor's obligations (*Adam v. Daniel Roy Ltée*, [1983] 1 S.C.R. 683, at pp. 694-95; *Man of Aran* (1974), 6 L.A.C. (2d) 238 (Ont.); *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96 (Ont.); *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126 (B.C.); *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138 (Ont. H.C.J.); *Radio CJYQ-930 Ltd.* (1978), 34 di 617; Adams, at pp. 8-38.2 to 8-39; D. D. Carter, G. England, B. Etherington and G. Trudeau, *Labour Law in Canada* (5th ed. 2002), at pp. 280-81).

102 Although protecting employees upon the sale of a business is straightforward in the context of the transfer of obligations to the purchaser, a number of questions are raised when the issue arises in a situation involving a trustee. The difficulties faced by trustees are exacerbated by a lack of uniformity both in labour relations legislation across Canada and in the case law relating to that legislation (Adams, at pp. 8-4 *et seq.* and 8-39 *et seq.*).

103 It is common ground that the *LRA* confers the exclusive power to decide who is a "successor employer" on the OLRB. However, since the Ontario statute cannot frustrate the purpose of the *BIA*, it is necessary to determine to what extent a declaration that a trustee is a successor employer is compatible with the *BIA*.

3. Conflicts Between the *BIA* and the *LRA*

104 I have already discussed the effect of a successor employer declaration made under the *LRA*. Section 69(2) *LRA* provides that the purchaser of the business is bound by the obligations of the employer-vendor who signed the collective agreement as if the purchaser had been a party to that agreement. I

que des violations de la convention collective survenues avant la vente. Il peut, par exemple, être lié par une sentence arbitrale prononcée contre l'employeur précédent et devoir assumer la responsabilité découlant de pratiques de travail déloyales. De façon générale, il est personnellement tenu de respecter les obligations de l'employeur précédent (*Adam c. Daniel Roy Ltée*, [1983] 1 R.C.S. 683, p. 694-695; *Man of Aran* (1974), 6 L.A.C. (2d) 238 (Ont.); *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96 (Ont.); *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126 (C.-B.); *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138 (H.C.J. Ont.); *Radio CJYQ-930 Ltd.* (1978), 34 di 617; Adams, p. 8-38.2 à 8-39; D. D. Carter, G. England, B. Etherington et G. Trudeau, *Labour Law in Canada* (5e éd. 2002), p. 280-281).

Si la protection des employés, lors de la vente d'une entreprise, se conçoit facilement dans le contexte du transfert des obligations à l'acquéreur, cela ne va pas toutefois sans soulever plusieurs questions lorsqu'il s'agit d'appliquer cette notion à la situation du syndic. Les difficultés avec lesquelles le syndic doit composer sont accrues du fait que les lois sur les relations de travail ne sont pas uniformes à travers le Canada, pas plus d'ailleurs que la jurisprudence sur celles-ci (Adams, p. 8-4 et suiv.; p. 8-39 et suiv.).

Il est admis que la *LRT* confère à la CRTO le pouvoir exclusif de décider qui est « employeur successeur ». Cependant, comme la loi ontarienne ne saurait entraver la réalisation de l'objet de la *LFI*, il est nécessaire de déterminer dans quelle mesure une déclaration attribuant à un syndic la qualité d'employeur successeur est compatible avec la *LFI*.

3. Conflits entre la *LFI* et la *LRT*

J'ai déjà souligné l'effet d'une déclaration attribuant la qualité d'employeur successeur prononcée en vertu de la *LRT*. Selon le par. 69(2) *LRT*, l'acquéreur de l'entreprise est lié par les obligations de l'employeur-vendeur qui avait signé la convention collective, comme s'il était partie à celle-ci.

also mentioned above that a declaration that a trustee is an employer within the meaning of the *LRA* would raise a number of questions. Even a cursory review brings a number of conflicts to light.

J'ai aussi mentionné plus haut que, si un syndic est déclaré employeur au sens de la *LRT*, cette déclaration n'est pas sans soulever plusieurs questions. En fait, un examen, même sommaire, permet de faire ressortir plusieurs conflits.

The most obvious conflict results from claims for unpaid wages. The effect of a successor employer declaration is that the person to whom it applies is liable for the obligations of the employer who signed the collective agreement. The new "employer", the trustee in the case at bar, would be liable for all wages left unpaid by the bankrupt. This obligation is in direct conflict with two provisions of the *BIA*.

105 Le conflit le plus flagrant résulte des réclamations pour salaire impayé. Une déclaration attribuant la qualité d'employeur successeur rend la personne qui en fait l'objet responsable des obligations de l'employeur qui a signé la convention collective. Le nouvel « employeur », ici le syndic, serait responsable de tous les salaires impayés par le failli. Cette obligation entre en conflit direct avec deux dispositions de la *LFI*.

The first is s. 14.06(1.2), which explicitly provides as follows:

106 La première est le par. 14.06(1.2), qui énonce explicitement ce qui suit :

(1.2) Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.

(1.2) Par dérogation au droit fédéral et provincial, le syndic qui, ès qualités, continue l'exploitation de l'entreprise du débiteur ou succède à celui-ci comme employeur est dégagé de toute responsabilité personnelle découlant de toute réclamation contre le débiteur ou liée à l'obligation de celui-ci de payer une somme si la réclamation est antérieure à sa nomination ou découle de celle-ci.

As the declaration binds the trustee to perform all the obligations of the employer who signed the collective agreement, its effect is to impose on this officer of the court a personal liability from which he or she is explicitly exempted by s. 14.06(1.2).

La déclaration assujettissant le syndic à toutes les obligations de l'employeur qui a signé la convention collective a pour effet d'imposer à cet auxiliaire de justice une responsabilité personnelle dont il est explicitement dégagé par le par. 14.06(1.2).

The second incompatible provision is s. 136(1)(*d*), which gives priority to claims of the bankrupt's employees for up to six months' back pay, to a maximum of $2,000 per employee. Any claims in excess of this amount are treated as ordinary claims and paid rateably (s. 141). If the trustee is considered to be an employer, he or she must pay the employees' claims in full, which is inconsistent with the *BIA*. This is another situation in which there is a direct conflict because it is impossible to comply with both the *BIA* and the *LRA*. Although not all bankrupt employers accumulate debts for back pay in excess of the limits provided for in the *BIA*, when one does, the bankruptcy court cannot unconditionally allow a union

107 La deuxième disposition incompatible est l'al. 136(1)*d*), qui donne priorité aux créances des employés du failli pour les arriérés de salaire d'au plus six mois, jusqu'à concurrence de 2 000 $ par employé. Toute créance excédentaire est traitée comme une réclamation ordinaire et acquittée au prorata des réclamations (art. 141). Si le syndic est considéré comme un employeur, il doit alors payer la réclamation des employés au complet, ce qui est incompatible avec la *LFI*. Il s'agit ici aussi d'un conflit direct résultant d'une impossibilité de se conformer à la fois à la *LFI* et à la *LRT*. Toutefois, tous les employeurs faillis n'accumulent pas des arriérés excédant les limites prévues par la *LFI*. Lorsqu'ils accumulent de tels arriérés, la cour de

to request that the trustee be declared the bankrupt's successor.

108 Another conflict may arise in situations similar to the one in *Adam v. Daniel Roy Ltée*. In that case, the new employer was ordered to reinstate and indemnify an employee who had been dismissed by the predecessor employer because of her union activities. Such a decision, if applied to a trustee, would require the trustee to reinstate an employee even though the bankruptcy had, in principle, terminated his or her employment (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27).

109 Other conflict situations are more subtle. One example is where a trustee must continue operating a business with only a few remaining employees. Procedures relating to lay-offs or to relocation may impose constraints that are incompatible with reorganization for bankruptcy purposes.

110 A final conflict results from the fact that the successor employer declaration is not time-limited. In the case of an actual purchaser, this poses no problems. In principle, the transfer of the business, like the declaration, is final. The same is not true in the case of a trustee, since the trustee, as an officer of the court, is entitled to be discharged once the administration of the assets has been completed (s. 41(2) *BIA*). An unconditional declaration would make the trustee an employer even though the reorganization has been completed and the trustee has been discharged by the bankruptcy court.

111 The above examples clearly illustrate that the successor employer declaration is not free of pitfalls when it applies to a trustee who must discharge his or her duties in accordance with the *BIA*. If in my first example it is clearly impossible to apply the two statutes concurrently, a situation in which the trustee could be held personally liable for debts of the bankrupt connected with the collective agreement would just as obviously frustrate the purpose

faillite ne peut, sans réserve, autoriser un syndicat à demander que le syndic soit déclaré successeur du failli.

Un autre conflit peut résulter d'une situation analogue à celle qui s'est produite dans l'arrêt *Adam c. Daniel Roy Ltée*. Dans cette affaire, le nouvel employeur a été condamné à réintégrer et à indemniser une employée congédiée pour activités syndicales par l'employeur précédent. Appliquée au syndic, une telle décision signifierait que celui-ci devrait réintégrer une employée, alors que la faillite a, en principe, mis fin à l'emploi de celle-ci (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27).

D'autres situations conflictuelles sont plus subtiles. C'est le cas par exemple lorsque le syndic doit assurer la continuité de l'entreprise en ne recourant qu'à quelques employés seulement. La procédure de mise à pied ou de déplacement peut imposer des contraintes incompatibles avec la réorganisation pour les besoins de la faillite.

Enfin, un autre conflit résulte du fait que la déclaration attribuant la qualité d'employeur successeur n'est pas limitée dans le temps. Lorsqu'il s'agit du véritable acquéreur, l'absence de délai ne présente pas de difficultés. Le transfert de l'entreprise, comme la déclaration, ont en principe un caractère définitif. Il en va autrement dans le cas du syndic, puisque, en tant qu'auxiliaire de justice, il a le droit d'être libéré lorsque l'administration de l'actif est terminée (par. 41(2) *LFI*). Une déclaration non assortie de réserves fera du syndic un employeur, et ce, malgré la fin de la réorganisation et sa libération comme syndic par la cour de faillite.

Ces exemples illustrent clairement que la déclaration attribuant la qualité d'employeur successeur n'est pas sans créer d'embûches lorsqu'elle vise un syndic qui doit exercer ses fonctions conformément à la *LFI*. Si mon premier exemple constitue un cas patent d'impossibilité d'application concurrente des deux lois, l'hypothèse de la responsabilité personnelle pour les dettes du failli se rapportant à la convention collective est un cas tout aussi

of the *BIA*. As Feldman J.A. stated in the instant case:

> These bankruptcy considerations are critically important where an interim receiver could be declared a successor employer of the debtor if it carries on the debtor's business in order to sell it as a going concern. Whether to carry on the business is one of the most significant decisions that the receiver must make. That decision affects the entire direction of the bankruptcy and its outcome and, importantly, the ability of the receiver to maximize the value of the bankrupt's estate for the benefit of the affected stakeholders. [para. 53]

The decision to continue operating the business is central to the trustee's role under the *BIA*. This role cannot be disregarded. The parties must strike a balance between the trustee's duties and immunities under the *BIA* and the employees' rights under the *LRA*. In the event of conflict, the parties must refer to constitutional principles. A brief review of the relevant doctrines is therefore in order.

4. Double Aspect and Paramountcy Doctrines

Conflicts of legislative powers are not tolerated in constitutional law. A number of doctrines have been developed to ensure that federal and provincial powers are respected. Two of them are relevant here: double aspect and paramountcy. The doctrine of paramountcy has been considered in a number of this Court's decisions dealing specifically with bankruptcy, and it would be helpful to summarize those decisions.

4.1 *Double Aspect Doctrine*

Provincial legislatures have jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867* (the "Constitution"). The regulation of conditions of employment falls under this head of power. No one is questioning the constitutionality either of the *LRA* as a whole or of s. 69(2). As for Parliament, it has jurisdiction over bankruptcy and insolvency under s. 91(21) of the Constitution, and neither its jurisdiction nor the

évident d'entrave à la réalisation de l'objet de la *LFI*. Comme le dit la juge Feldman de la Cour d'appel dans la présente affaire :

> [TRADUCTION] Ces considérations relatives à la faillite sont de toute première importance lorsqu'un séquestre intérimaire pourrait être déclaré employeur successeur du débiteur, s'il exploite l'entreprise du débiteur en vue de la vendre à titre d'entreprise en activité. La décision d'exploiter ou non l'entreprise est une des plus importantes que doit prendre le séquestre. Elle a des incidences sur l'ensemble du déroulement de la faillite et sur l'issue de celle-ci, et, chose importante, sur la capacité du séquestre de maximiser la valeur de l'actif du failli au bénéfice de tous les intéressés. [par. 53]

112 La décision de continuer les activités de l'entreprise est au cœur de la mission confiée au syndic par la *LFI*. Cette mission ne peut être occultée. Les parties doivent identifier le point d'équilibre entre les devoirs et immunités du syndic en vertu de la *LFI* et les droits reconnus aux employés par la *LRT*. En cas de conflit, les parties doivent se reporter aux règles constitutionnelles. Il est donc opportun de faire un bref rappel des doctrines pertinentes.

4. Doctrines du double aspect et de la prépondérance

113 Le droit constitutionnel ne tolère pas le conflit de compétences législatives. Plusieurs doctrines ont été élaborées pour assurer le respect des compétences fédérales et provinciales. Deux d'entre elles sont pertinentes en l'espèce, le double aspect et la prépondérance. Cette dernière a fait l'objet de plusieurs arrêts de la Cour dans le contexte particulier de la faillite et il sera utile d'en rappeler les grandes lignes.

4.1 *La théorie du double aspect*

114 Les législateurs provinciaux ont compétence sur la propriété et les droits civils en vertu du par. 92(13) de la *Loi constitutionnelle de 1867* (la « Constitution »). La réglementation des conditions de travail relève de ce pouvoir. Ni la validité constitutionnelle de l'ensemble de la *LRT* ni celle du par. 69(2) ne sont remises en question. Par ailleurs, la compétence du Parlement à l'égard de la faillite et de l'insolvabilité repose sur le par. 91(21)

provisions granting powers and immunities to trustees are being contested. Thus, each of these statutes, in its own field, is within the jurisdiction of the level of government that enacted it.

115 When effect is given to federal and provincial statutes, they can often be applied concurrently. The Privy Council recognized this possibility at a very early stage:

> . . . subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

(*Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 130)

Thus, when trustees manage businesses while searching for a buyer, they derive their powers from the *BIA*, which is within federal jurisdiction. However, they are not exempt from the application of all provincial legislation. The *BIA* even makes express provision for the application of compatible provincial legislation relating to property and civil rights. Section 72(1) reaffirms the applicability of laws that are not in conflict with the *BIA*:

> **72**. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

A trustee who operates a business must satisfy a large number of requirements. For example, he or she may neither fail to collect source deductions from employees' pay nor violate minimum labour standards.

116 As a result, because of the division of legislative powers between the levels of government, trustees are subject to a large number of provincial statutes. Courts that hear disputes relating to the difficulty of applying federal and provincial

de la Constitution et n'est pas non plus contestée, pas plus du reste que les dispositions conférant des pouvoirs ou immunités au syndic. Il s'agit donc de deux lois relevant, chacune dans son domaine, de la compétence du niveau de gouvernement qui l'a adoptée.

Lorsque des lois fédérales et provinciales sont mises en œuvre, elles peuvent souvent être appliquées concurremment. Le Conseil privé a très tôt reconnu cette possibilité :

> [TRADUCTION] . . . des matières qui, sous un aspect donné et pour un objet précis, relèvent de l'art. 92 peuvent, sous un autre aspect et pour un objet différent, relever de l'art. 91.

(*Hodge c. The Queen* (1883), 9 App. Cas. 117, p. 130)

Ainsi, lorsque le syndic gère une entreprise le temps de trouver un acheteur, il tire ses pouvoirs de la *LFI*, qui est de compétence fédérale. Il n'est toutefois pas exempté de l'application de l'ensemble des lois provinciales. La *LFI* prévoit même explicitement l'application des règles provinciales compatibles concernant la propriété et les droits civils. Le paragraphe 72(1) réaffirme le maintien des lois non incompatibles :

> **72.** (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

Le syndic qui exploite une entreprise est assujetti à un grand nombre d'exigences à cet égard. Par exemple, il ne pourrait omettre de prélever les retenues à la source des salaires des employés ou déroger aux normes minimales du travail.

En raison du partage des pouvoirs législatifs entre les niveaux de gouvernement, le syndic est donc assujetti à un grand nombre de lois provinciales. Les tribunaux saisis de contestations portant sur la difficulté d'appliquer concurremment

statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government: *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56. Where conflict is unavoidable, another doctrine may apply, namely, paramountcy.

4.2 *Paramountcy Doctrine*

The paramountcy of federal laws over provincial laws in the event of conflict is a doctrine that was established long ago: W. R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 *McGill L.J.* 185. Conflicts that will trigger recourse to this doctrine may occur where it is impossible to apply a federal statute and a provincial statute simultaneously (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191), but may also occur where the application of a provincial statute frustrates the legislative purpose of a federal one: *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, and *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 12.

While this principle is easily stated, it is not always easy to apply, as can be seen from the numerous cases on this subject.

4.3 *Specific Context of Bankruptcy*

The *BIA* and the *LRA* are not necessarily incompatible. While it is important to acknowledge potential conflicts, it is just as important to ensure that the paramountcy doctrine is not interpreted in a way that makes it impossible to apply provincial provisions in respect of aspects that are compatible with the federal statute. The double aspect doctrine is as important as the doctrine of paramountcy. Courts must ensure that the balance struck by the Constitution is respected and that each level of government can exercise its jurisdiction fully when this can be done without impeding action by the other level.

des lois fédérales et provinciales doivent tenter de concilier l'application de ces lois de façon à respecter les champs de compétence respectifs des deux ordres de gouvernement : *Renvoi relatif à la Loi sur l'assurance-emploi (Can.), art. 22 et 23*, [2005] 2 R.C.S. 669, 2005 CSC 56. Lorsque le conflit est inévitable, une autre doctrine peut être pertinente, celle de la prépondérance.

4.2 *La doctrine de la prépondérance*

117 La prépondérance des lois fédérales sur les lois provinciales en cas de conflit est une doctrine établie de longue date : W. R. Lederman, « The Concurrent Operation of Federal and Provincial Laws in Canada » (1963), 9 *McGill L.J.* 185. Un conflit propre à déclencher le recours à cette doctrine peut résulter de l'impossibilité d'appliquer simultanément une loi fédérale et une loi provinciale : *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191, mais peut aussi naître du fait que l'application de la loi provinciale entrave la réalisation de l'objet de la loi fédérale : *Law Society of British Columbia c. Mangat*, [2001] 3 R.C.S. 113, 2001 CSC 67, et *Rothmans, Benson & Hedges Inc. c. Saskatchewan*, [2005] 1 R.C.S. 188, 2005 CSC 13, par. 12.

118 S'il est facile d'énoncer ce principe, son application n'est pas toujours aisée, comme en font foi les nombreux litiges sur la question.

4.3 *Contexte particulier de la faillite*

119 La *LFI* et la *LRT* ne sont pas d'emblée incompatibles. S'il est important de reconnaître les conflits potentiels, il est tout aussi important de faire en sorte que la doctrine de la prépondérance ne soit pas interprétée de façon à empêcher l'application des dispositions provinciales pour les aspects qui sont compatibles avec la loi fédérale. La théorie du double aspect revêt une importance tout aussi grande que celle de la prépondérance. Les tribunaux doivent s'assurer que l'équilibre prévu par la Constitution est respecté et que chaque niveau de gouvernement peut exercer pleinement ses compétences lorsque cela peut se faire sans entraver l'action de l'autre niveau.

120 In several important judgments on the subject of bankruptcy, this Court has considered the relationship between bankruptcy legislation and various aspects of provincial property law: *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, and *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, 2005 SCC 52.

121 In *Husky Oil*, Gonthier J., writing for the majority, summarized the principles that can serve as a basis for a "consistent and general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements" (para. 31). He not only noted that provinces may not *directly* affect priorities under the *Bankruptcy Act*, but also stated propositions that permit the paramountcy doctrine to be applied where provincial legislation *indirectly* conflicts with the *BIA* (paras. 32 (quoting A. J. Roman and M. J. Sweatman, "The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. Bar Rev.* 77, at pp. 78-79) and 39):

(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;

(2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;

(3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; . . .

En matière de faillite, plusieurs arrêts importants de la Cour étudient les rapports entre la législation relative à la faillite et divers aspects du droit provincial régissant la propriété : *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, et *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, [2005] 2 R.C.S. 564, 2005 CSC 52.

Dans *Husky Oil*, le juge Gonthier, qui s'exprimait pour la majorité, résume les principes permettant de formuler une « philosophie cohérente et générale quant aux objets du régime fédéral de la faillite et au lien qu'il a avec les dispositions provinciales en matière de droit des biens » (par. 31). Non seulement rappelle-t-il que les provinces ne peuvent modifier *directement* l'ordre de priorité établi par la *Loi sur la faillite*, mais il énonce aussi les propositions qui permettent d'appliquer la théorie de la prépondérance là où une loi provinciale entre en conflit *indirectement* avec la *LFI* (par. 32 (citant A. J. Roman et M. J. Sweatman, « The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act : The War is Over » (1992), 71 *R. du B. can.* 77, p. 78-79) et 39) :

(1) les provinces ne peuvent ni créer des priorités entre les créanciers ni modifier le plan de répartition en matière de faillite, prévu au par. 136(1) de la Loi sur la faillite;

(2) bien qu'une loi provinciale puisse validement modifier l'ordre de priorité dans un contexte autre que celui d'une faillite, dès qu'il y a faillite, c'est le par. 136(1) de la Loi sur la faillite qui détermine le statut et l'ordre de priorité des réclamations qui y sont visées expressément;

(3) si les provinces pouvaient créer leur propre ordre de priorité ou modifier celui établi en vertu de la Loi sur la faillite, cela aurait pour effet d'inciter à l'établissement, en matière de faillite, d'un plan de répartition différent d'une province à l'autre, ce qui est inacceptable;

(4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act[;]

. . .

(5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;

(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the *effect* of provincial legislation is to do so. [Emphasis in original.]

Although the propositions enunciated in *Husky Oil* relate more specifically to conflicts between provincial statutes and the scheme of distribution established in the *BIA*, they have a scope that extends beyond that specific context, and they demonstrate how the paramountcy doctrine applies in the context of bankruptcy.

In principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. However, all the conflicts to which I have alluded will not occur every time the OLRB makes a successor employer declaration. On the one hand, it may be that in the particular circumstances of a case, the trustee's conduct is inconsistent with the role entrusted to him or her by the *BIA*; on the other hand, the OLRB may make a partial declaration if the union does not require the transfer of all the former employer's obligations. The case at bar is a good example of the latter situation. The union argues that it is not seeking a declaration of liability for debts owed before the appointment of the receiver. While this clarification is helpful, it does not avert every potential conflict.

(4) en matière de faillite, des expressions comme « créancier garanti », lorsqu'elles sont définies dans la Loi sur la faillite, doivent être interprétées selon la définition que leur donne le législateur fédéral et non celle que leur donnent les législatures provinciales. Les provinces ne peuvent modifier la façon dont ces expressions sont définies aux fins de la Loi sur la faillite[;]

. . .

(5) pour déterminer le lien qui existe entre une loi provinciale et la *Loi sur la faillite*, il ne faut pas que la forme du droit créé par la province l'emporte sur le fond. Les provinces n'ont pas le droit de faire indirectement ce qui leur est interdit de faire directement;

(6) pour que la loi provinciale soit inapplicable, il n'est pas nécessaire que la province ait eu l'intention d'empiéter sur la compétence fédérale exclusive en matière de faillite et d'être en conflit avec la *Loi sur la faillite*. Il suffit que la loi provinciale ait cet *effet*. [Souligné dans l'original.]

122 Même si les propositions énoncées dans *Husky Oil* traitent plus particulièrement des conflits entre les lois provinciales et le plan de répartition établi par la *LFI*, elles ont une portée qui déborde ce cadre spécifique et servent à démontrer comment la doctrine de la prépondérance s'applique dans le contexte de la faillite.

123 En principe, le syndic ne doit pas être assujetti à des obligations qui entravent le règlement de la faillite. Tous les conflits auxquels j'ai fait allusion ne se produiront cependant pas à chaque fois que la CRTO prononce une déclaration attribuant la qualité d'employeur successeur. D'une part, les circonstances particulières d'une affaire peuvent révéler une conduite du syndic qui se démarque du rôle qui lui est confié par la *LFI* et, d'autre part, la CRTO peut prononcer une déclaration partielle lorsque le syndicat ne requiert pas le transfert de toutes les obligations de l'ancien employeur. La présente affaire est un bon exemple de ce dernier cas. Le syndicat plaide qu'il ne cherche pas à obtenir une déclaration de responsabilité pour les dettes dues avant la nomination du séquestre. Cette précision est utile, mais elle n'écarte pas tous les conflits potentiels.

124 The Superior Court plays a decisive role in identifying potential conflicts and must not authorize proceedings that could give rise to a conflict. A judge who denies leave to bring proceedings does not declare the provincial provision to be of no force or effect; he or she merely avoids the conflict by relying on the paramountcy doctrine in a preventive manner, hence the importance of the screening mechanism of s. 215 *BIA*.

5. Section 215 *BIA*

5.1 *Purpose of Section 215 BIA*

125 As I mentioned earlier, Parliament's intent to give trustees flexibility in administering bankruptcies is evident in the immunities provided for in the *BIA*. Section 215 plays an important role in protecting trustees, because a superior court must, in applying it, screen proceedings that could be brought against them. It reads as follows:

215. Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

126 My colleague Abella J. objects to incorporating factors related to the special nature of a declaration that a trustee is an employer into the criteria for applying s. 215 *BIA*. To do so would in her view be to create a special and exceptional test for such a declaration. I myself see it as an incorporation of constitutional principles and an adjustment to new dimensions of the remedies that may be authorized against trustees.

127 Like Feldman and Cronk JJ.A., I am of the opinion that s. 215 acts as a screening mechanism for the purpose of ensuring that provincial and federal statutes do not conflict with each other. The bankruptcy judge acts as a specialized tribunal. Not only is the bankruptcy judge responsible for applying the federal statute, which must take precedence over provincial legislation in the event of

La Cour supérieure joue un rôle déterminant dans l'identification des conflits potentiels et elle ne doit pas autoriser une poursuite qui risque de créer un conflit. Le juge qui refuse d'autoriser une poursuite ne déclare pas nulle ou inopérante la disposition provinciale, il ne fait qu'éviter le conflit en recourant de façon préventive à la doctrine de la prépondérance. De là l'importance du mécanisme de filtrage de l'art. 215 *LFI*.

5. L'article 215 *LFI*

5.1 *Le but de l'art. 215 LFI*

J'ai dit plus tôt que l'intention du Parlement de faire bénéficier le syndic d'une marge de manœuvre dans l'administration de la faillite ressort des immunités prévues par la *LFI*. L'article 215 joue un rôle important dans la protection accordée au syndic, parce qu'en application de celui-ci une cour supérieure doit filtrer les poursuites susceptibles d'être intentées contre lui. Cette disposition est rédigée ainsi :

215. Sauf avec la permission du tribunal, aucune action n'est recevable contre le surintendant, un séquestre officiel, un séquestre intérimaire ou un syndic relativement à tout rapport fait ou toute mesure prise conformément à la présente loi.

Ma collègue la juge Abella s'oppose à l'intégration, dans les critères d'application de l'art. 215 *LFI*, de facteurs qui prendraient en considération la nature particulière d'une déclaration attribuant au syndic la qualité d'employeur. Elle y voit la création d'un test particulier et exceptionnel à l'égard de cette déclaration. J'y vois plutôt l'incorporation des règles constitutionnelles et une adaptation aux nouvelles dimensions des recours pouvant être autorisés contre un syndic.

À l'instar des juges Feldman et Cronk, je suis d'avis que l'art. 215 agit comme mécanisme de contrôle permettant d'éviter que des lois provinciale et fédérale n'entrent en conflit l'une avec l'autre. Le juge de faillite agit à titre de tribunal spécialisé. Non seulement est-il chargé d'appliquer la loi fédérale, laquelle doit primer sur les lois provinciales en cas de conflit, mais il est aussi le premier à être

conflict, but he or she is also the first person before whom the issue of the potential conflict is raised and the only one in a position to assess all the interests at stake. It is the bankruptcy judge who must decide all issues relating to the application of the *BIA*.

In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14, the Court recognized the central role of the first court or tribunal to which a claimant applies. That case required a decision as to which of two administrative tribunals should decide an issue relating to human rights. In the case at bar, the choice is between the Superior Court and an administrative tribunal, the OLRB, and, what is more, it involves a constitutional question. In light of the Superior Court's expertise in bankruptcy matters and in matters relating to the Constitution, there is all the more reason to choose the Superior Court instead of the administrative tribunal. The bankruptcy court must be permitted to play its central role in full before the tribunal external to the bankruptcy considers the application against the trustee: *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92. In contrast, the OLRB specializes in labour relations, and its mission is to apply the *LRA* and, more specifically in the case at bar, s. 69(2), the purpose of which is to protect employees. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts.

I agree with my colleague Abella J. that the trustee is not immunized by the *BIA*. There are two sections that provide for supervision of the trustee's activities: ss. 37 and 215. Section 37 allows any interested person to apply to the bankruptcy court to have it confirm, reverse or modify an act or decision of a trustee that is the subject of a complaint. This remedy is not conditional on first obtaining leave and it sometimes constitutes an alternative remedy to s. 215 *BIA*. What distinguishes s. 37 from s. 215 is that the latter allows proceedings to be brought in a court or tribunal *other* than the

saisi de la question du conflit potentiel et est le seul qui soit en mesure d'évaluer l'ensemble des intérêts en jeu. Il est celui qui sera chargé de tous les aspects de l'application de la *LFI*.

128 Dans *Tranchemontagne c. Ontario (Directeur du Programme ontarien de soutien aux personnes handicapées)*, [2006] 1 R.C.S. 513, 2006 CSC 14, la Cour a reconnu le rôle central du premier tribunal auquel un réclamant s'adresse. Dans cette affaire, il s'agissait de décider lequel de deux organismes administratifs devait décider d'une question touchant les droits de la personne. En l'espèce, le choix oppose la Cour supérieure et un tribunal administratif, la CRTO, et concerne de surcroît une question constitutionnelle. Vu l'expertise de la Cour supérieure en matière de faillite et en matière constitutionnelle, le choix doit, à plus forte raison, s'arrêter sur celle-ci plutôt que sur le tribunal administratif. Il faut laisser la cour de faillite jouer pleinement son rôle central avant que le tribunal externe à la faillite soit saisi de la demande contre le syndic : *Sam Lévy & Associés Inc. c. Azco Mining Inc.*, [2001] 3 R.C.S. 978, 2001 CSC 92. Par contraste, la CRTO est spécialisée dans les relations de travail et a comme mission d'appliquer la *LRT* et, plus particulièrement ici, le par. 69(2), qui a pour but de protéger les employés. Comme la faillite d'une entreprise met en cause les intérêts de tous les créanciers et non pas seulement ceux des employés, le juge de faillite est dans une meilleure position pour évaluer les intérêts en cause et prévenir les conflits.

129 D'ailleurs, je suis d'accord avec ma collègue la juge Abella lorsqu'elle dit que le syndic n'est pas immunisé par la *LFI*. Deux dispositions pourvoient au contrôle de l'activité du syndic : les art. 37 et 215. L'article 37 permet à tout intéressé de s'adresser à la cour de faillite pour lui demander de confirmer, d'infirmer ou de modifier un acte ou une décision du syndic qui fait l'objet d'une plainte. Ce recours ne requiert pas de permission préalable et constitue parfois un recours alternatif à l'art. 215 *LFI*. Ce qui distingue l'art. 37 de l'art. 215 est que cette dernière disposition permet d'intenter un recours

bankruptcy court and that it requires leave. Leave is required here because Parliament intended that the bankruptcy court have control over the proceedings. The other court or tribunal is not one that specializes in bankruptcy matters.

devant un tribunal *autre* que la cour de faillite et qu'une permission est requise. Cette permission est requise parce que le Parlement a voulu que la cour de faillite exerce un contrôle sur les poursuites qui sont intentées. L'autre tribunal n'est pas un tribunal spécialisé en matière de faillite.

130 The vast majority of the decisions based on s. 215 are from cases involving alleged wrongdoing by a trustee: *Alamo Linen Rentals Ltd. v. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38 (Ont. Prov. Ct.); *Beatty Limited Partnership (Re)* (1991), 1 O.R. (3d) 636 (Gen. Div.); *Chastan Ventures Ltd., Re* (1993), 23 C.B.R. (3d) 115 (B.C.S.C.); *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208 (Q.B.); *McKyes, Re*, 1996 CarswellQue 2575 (Sup. Ct.); *Nicholas v. Anderson* (1998), 5 C.B.R. (4th) 256 (Ont. C.A.); *Gallo v. Beber* (1998), 7 C.B.R. (4th) 170 (Ont. C.A.); *Kearney v. Feldman*, [1998] O.J. No. 5109 (QL) (Gen. Div.); *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9 (Ont. S.C.J.); *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160 (Ont. C.A.); *Mann v. KPMG Inc.* (2000), 197 Sask. R. 181, 2000 SKQB 460; *Vanderwoude v. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127 (Ont. C.A.); *Caswan Environmental Services Inc., Re* (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77 (Ont. S.C.J.); *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL) (S.C.J.); *MacLean v. Morash* (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani v. Devgan*, [2005] O.J. No. 2868 (QL) (S.C.J.); *105497 Ontario Inc. v. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122 (Ont. S.C.J.); and *477470 Alberta Ltd., Re* (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430.

La vaste majorité des décisions fondées sur l'art. 215 concernent des cas où une faute est reprochée au syndic : *Alamo Linen Rentals Ltd. c. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38 (C. prov. Ont.); *Beatty Limited Partnership (Re)* (1991), 1 O.R. (3d) 636 (Div. gén.); *Chastan Ventures Ltd., Re* (1993), 23 C.B.R. (3d) 115 (C.S.C.-B.); *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208 (B.R.); *McKyes, Re*, 1996 CarswellQue 2575 (C.S.); *Nicholas c. Anderson* (1998), 5 C.B.R. (4th) 256 (C.A. Ont.); *Gallo c. Beber* (1998), 7 C.B.R. (4th) 170 (C.A. Ont.); *Kearney c. Feldman*, [1998] O.J. No. 5109 (QL) (Div. gén.); *Burton c. Kideckel* (1999), 13 C.B.R. (4th) 9 (C.S.J. Ont.); *Society of Composers, Authors & Music Publishers of Canada c. Armitage* (2000), 20 C.B.R. (4th) 160 (C.A. Ont.); *Mann c. KPMG Inc.* (2000), 197 Sask. R. 181, 2000 SKQB 460; *Vanderwoude c. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127 (C.A. Ont.); *Caswan Environmental Services Inc., Re* (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77 (C.S.J. Ont.); *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL) (C.S.J.); *MacLean c. Morash* (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani c. Devgan*, [2005] O.J. No. 2868 (QL) (C.S.J.); *105497 Ontario Inc. c. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122 (C.S.J. Ont.), et *477470 Alberta Ltd., Re* (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430.

131 The courts have hesitated to grant leave to bring proceedings against a trustee for the purpose of obtaining a declaration that the trustee is a successor employer. The instant case exemplifies this, but the Court of Appeal is not alone in this respect: *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28 (Ont. Ct. (Gen. Div.)).

Par ailleurs, le tribunal se montre réticent à accorder une permission lorsqu'il s'agit de poursuivre le syndic pour faire déclarer qu'il succède à titre d'employeur successeur. La présente affaire l'illustre, mais la Cour d'appel ne faisait pas cavalier seul : *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28 (C. Ont. (Div. gén.)).

With the evolution of administrative law and the growing number of specialized tribunals, s. 215 is now used for a much wider variety of purposes than before. I agree with what Feldman J.A. said on this subject:

> In cases to date dealing with leave under s. 215 of the *BIA*, such as *Mancini*, where the issue has been trustee wrongdoing, factors relating to the bankruptcy court's control over the process have not arisen. In such cases, if leave is granted, the trustee will hire a lawyer to defend it in court, and the trustee will proceed to carry out its duties conducting the receivership or bankruptcy. [para. 54]

Applications for leave based on grounds other than negligence or refusal by the trustee to discharge his or her duties are thus a fairly recent occurrence. It is quite clear from the few reported cases that bankruptcy judges are desirous of preserving the trustee's flexibility and that they ensure that proceedings brought before the other court or tribunal do not impede action by the trustee. For instance, in *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, the Ontario Superior Court dismissed a union's motion for leave to apply to the OLRB on the following basis:

> There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E&Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning *qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities. [para. 29]

On an appeal from that judgment ((2004), 46 C.B.R. (4th) 126, at para. 27), the Ontario Court of Appeal explicitly approved the Superior Court's approach, although it noted the constraints inherent in the bankruptcy context:

> A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose

132 Avec le développement du droit administratif et la multiplication des tribunaux spécialisés, l'art. 215 est maintenant utilisé à des fins beaucoup plus variées qu'auparavant. J'approuve à ce sujet ce que dit la juge Feldman de la Cour d'appel :

> [TRADUCTION] Dans les décisions rendues jusqu'ici au sujet de la permission exigée à l'art. 215 de la *LFI*, par exemple *Mancini*, et où le litige portait sur une faute du syndic, il n'était pas question de facteurs touchant au contrôle exercé par le tribunal de faillite sur le processus. Dans de tels cas, si la permission est accordée, le syndic retient les services d'un avocat pour se défendre devant le tribunal, et il peut continuer à accomplir ses fonctions relatives à la mise sous séquestre ou à la faillite. [par. 54]

133 Les demandes de permission fondées sur des moyens autres que la négligence ou le refus du syndic de remplir les devoirs de sa charge sont donc une réalité assez récente. Les quelques cas répertoriés montrent bien que les juges de faillite sont soucieux de préserver la marge de manœuvre du syndic et s'assurent que les poursuites intentées devant l'autre tribunal n'entravent pas l'action du syndic. Ainsi, dans *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, la Cour supérieure de l'Ontario a rejeté, pour les motifs suivants, la requête du syndicat demandant la permission de s'adresser à la CRTO :

> [TRADUCTION] Il n'a pas été allégué — et encore moins prouvé — qu'en l'espèce le syndic (même si E&Y Inc. était considéré en sa qualité de séquestre intérimaire) a traîné les pieds ou le fera. La requête incidente de permission présentée par le SCFP est rejetée, sans préjudice de la possibilité que soit soumise ultérieurement une requête semblable sur une base factuelle appropriée, laquelle devrait à mon avis démontrer que le syndic a cessé d'agir avec diligence en tant que liquidateur pour jouer principalement le rôle d'employeur. [par. 29]

En appel de ce jugement ((2004), 46 C.B.R. (4th) 126, par. 27), la Cour d'appel de l'Ontario appuie explicitement l'approche adoptée par la Cour supérieure, tout en rappelant les contraintes inhérentes au contexte de la faillite :

> [TRADUCTION] Une faillite est une catastrophe. Une entreprise a échoué; dans biens des cas, elle ne survivra pas. Les créanciers, qui de bonne foi lui ont fourni des

substantial sums of money. Employees of the bankrupt company instantly lose their jobs.

The bankruptcy judge is thrown into the middle of the disaster. The judge will need to make important decisions that will affect the future of the company, creditors and employees. The qualities of a good bankruptcy judge are therefore expertise, sensitivity and speed.

. . .

The trustee has many responsibilities — to the estate it is managing, to creditors and to the court. Where, as here, a trustee in bankruptcy seeks to hire former employees of the bankrupt company, the trustee also has a responsibility to those employees. The trustee's decision to bring a motion on the first day of its trusteeship seeking a declaration that it not be deemed a successor employer "for any purpose whatsoever" was, in the bankruptcy judge's view, premature. Accordingly, he dismissed the motion. The trustee does not appeal this component of his decision.

Equally, the appellants' cross-motion, understandable perhaps because of the trustee's motion, was also, arguably, misconceived. The first day of a bankruptcy is hardly "business as usual" for anyone, including the employees. The relationship between the trustee and the employees of the bankrupt company cannot be resolved instantly. Care, sensitivity, negotiation and at least some time will be necessary before an appropriate relationship can be set in place. The bankruptcy judge regarded the union's cross-motion as premature as well. Accordingly, he dismissed it, but without foreclosing the possibility that such a motion could succeed once the parties, at a minimum, had explored the establishment of an appropriate employment relationship. Again, I see no basis for interfering with the bankruptcy judge's exercise of discretion in this regard. [paras. 21, 22, 31 and 32]

134 Thus, the purpose of ss. 37 and 215 is not to immunize the trustee against legitimate proceedings, but to permit the trustee's administration to be supervised without impeding it. Facilitating a form of supervision by the bankruptcy court supports the trustee's role. The *BIA* establishes a scheme under which the effectiveness of the trustee's administration can be taken into account without shielding

biens et des services, risquent de perdre des sommes importantes. Les employés de la société en faillite perdent immédiatement leur emploi.

Le juge siégeant en matière de faillite est plongé au cœur de cette catastrophe. Il lui faudra prendre des décisions importantes qui auront une incidence sur l'avenir de la société, de ses créanciers et de ses employés. Les qualités d'un bon juge de faillite sont par conséquent l'expertise, la sensibilité et la rapidité.

. . .

Le syndic a de nombreuses obligations — envers le patrimoine qu'il a pour mission de gérer, envers les créanciers et envers le tribunal. Lorsque, comme en l'espèce, un syndic de faillite souhaite engager d'anciens employés de la société faillie, il a également une obligation envers ces employés. La décision du syndic de présenter, le jour même où il a commencé à exercer sa fonction, une requête demandant au tribunal de déclarer qu'il ne devait pas être considéré, « pour quelque fin que ce soit », comme un employeur successeur était, de l'avis du juge de faillite, prématurée. Ce dernier a donc rejeté cette requête. Le syndic n'interjette pas appel de ce volet de la décision.

De même, la requête incidente des appelants, compréhensible sans doute vu la requête du syndic, était dans un sens elle aussi mal fondée. La première journée d'une faillite ne constitue certainement pas une « journée comme les autres » pour quiconque, y compris les employés. La relation entre le syndic et les employés de la société en faillite ne peut être résolue instantanément. Il faudra de l'attention, de la sensibilité, de la négociation et au moins un certain temps pour qu'une relation appropriée puisse s'établir. Le juge de faillite a estimé que la requête incidente du syndicat était elle aussi prématurée. Il l'a par conséquent rejetée, mais sans exclure la possibilité qu'une telle requête puisse être accueillie une fois que les parties auraient, à tout le moins, exploré l'établissement d'une relation d'emploi appropriée. Là encore, il n'existe selon moi aucune raison d'intervenir à l'encontre de l'exercice par le juge de son pouvoir discrétionnaire à ce sujet. [par. 21, 22, 31 et 32]

Le but des art. 37 et 215 n'est donc pas d'immuniser le syndic contre des poursuites légitimes, mais de permettre la supervision de son administration sans toutefois l'entraver. Favoriser l'exercice d'un contrôle par la cour de faillite appuie le rôle du syndic. La *LFI* met en place un régime qui permet de tenir compte de l'efficacité de l'administration du syndic tout en ne soustrayant pas le syndic au

the trustee from the courts' power of supervision. Section 215 does not indicate what criteria must be met. The flexibility afforded by Parliament permits the bankruptcy court to adapt to new realities, including successor employer declarations.

pouvoir de surveillance des tribunaux. L'article 215 n'énonce pas les critères d'application. La flexibilité laissée par le Parlement permet à la cour de faillite de s'adapter aux nouvelles réalités, y compris une déclaration attribuant la qualité d'employeur successeur.

5.2 *Criteria for Granting Leave*

Mancini (Bankrupt) v. Falconi (1993), 61 O.A.C. 332 (C.A.), is often cited as the source of the analysis that the judge must conduct. Although the criteria established in that case are easy to apply to a simple claim against a trustee for breach of his or her duties, they must be tailored to the specific nature of each application for leave.

5.2 *Les critères d'autorisation*

135 L'affaire *Mancini (Bankrupt) c. Falconi* (1993), 61 O.A.C. 332 (C.A.), est souvent citée comme étant celle qui a établi l'analyse qui s'impose au juge. D'application facile lorsqu'il s'agit d'une simple réclamation contre un syndic pour contravention à ses devoirs, les critères qui y sont énoncés doivent cependant être adaptés à la nature particulière de chaque demande.

5.2.1 *Mancini* and the Sufficiency of the Evidence

There is a need to demystify the analysis developed in *Mancini*. In that case, the moving parties applied for leave to commence an action by way of counterclaim for damages against a trustee. They alleged that the trustee's proceeding constituted an abuse of process and that the trustee had organized a criminal prosecution. The moving parties thus accused the trustee of wrongdoing and asked for an award of damages against the trustee personally. This was not a proceeding likely to impair the application of the *BIA*. The judge did not need to consider the effect the proceeding might have in this regard. However, the Court of Appeal clearly differentiated between two matters a judge must consider on an application for leave under s. 215: the seriousness of the cause of action and the sufficiency of the evidence. On the seriousness of the cause of action, the Court of Appeal in *Mancini* did not set out the applicable analysis, but simply summarized the case law.

5.2.1 L'affaire *Mancini* et la suffisance de la preuve

136 Il y a lieu de démythifier l'analyse élaborée dans l'arrêt *Mancini*. Dans cette affaire, les parties requérantes demandaient la permission d'intenter contre un syndic une action incidente en dommages-intérêts. Elles prétendaient que le syndic avait commis un abus de procédures et organisé une poursuite criminelle. Les requérants reprochaient donc au syndic des actes qu'ils estimaient fautifs et réclamaient une condamnation pécuniaire personnelle contre celui-ci. Il ne s'agissait pas d'une poursuite susceptible d'entraver l'application de la *LFI*. Le juge n'avait pas à s'interroger sur l'effet que la poursuite pouvait avoir à cet égard. La Cour d'appel a cependant distingué clairement deux questions auxquelles doit répondre le juge saisi d'une demande d'autorisation présentée en vertu de l'art. 215 : le sérieux de la cause d'action et la suffisance de la preuve. Relativement au sérieux de la cause d'action, la Cour d'appel n'a pas établi l'analyse applicable dans *Mancini*, mais a simplement résumé l'état de la jurisprudence.

In my view, the most interesting aspect of that case was the court's discussion about the standard of proof. Moreover, that was the main issue in the case. The Court of Appeal wrote the following:

137 L'aspect le plus intéressant de cette affaire est, à mon avis, l'examen de la norme de preuve qui y est fait. Il s'agissait d'ailleurs de la principale question en litige. La Cour d'appel a écrit :

In considering whether leave should be granted under s. 186 [now s. 215] of the *Bankruptcy Act* to commence an action against the trustee, the motions court judge was required to consider the evidence, very generally reviewed above, in the context of the counterclaim sought to be made against the trustee. The issue is not whether the evidence on the s. 186 motion discloses the existence of a cause of action against the trustee, but rather whether the evidence provides the required support for the cause of action sought to be asserted by way of the appellants' counterclaim. Thus, it is necessary to examine the claims that the appellants sought to make against the trustee.

. . .

The appellants submit that the motions court judge erred in holding that the evidence filed in support of their motion under s. 186 of the *Bankruptcy Act* must be sufficient to establish a factual foundation for the claim that the appellants propose to make against the trustee. The appellants submit that the test under s. 186 requires no more than some evidence providing a factual foundation for the claim they seek to assert. In my opinion, the motions court judge was correct in reaching the conclusion he did on this issue. On a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under s. 186 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.

The sufficiency of the evidence must be measured in the context of the purpose of s. 186 which, as stated earlier, is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action. As I have previously noted, the evidence on a motion under s. 186 does not have to be sufficient to enable the motions court judge to make a final assessment of the merits of the claim sought to be made, but it must be sufficient to address the issues that I have identified, having in mind the objectives of s. 186. [Emphasis added; paras. 12, 16 and 17.]

138 In saying this, the Court of Appeal was affirming the decision of the trial judge ((1989), 76 C.B.R. (N.S.) 90), who had adopted a clear formulation of what evidence would be sufficient for leave to be granted to bring proceedings against a trustee:

[TRADUCTION] Pour décider s'il y avait lieu de permettre, en vertu de l'art. 186 [maintenant art. 215] de la *Loi sur la faillite*, qu'une action soit engagée contre le syndic, le juge des requêtes devait tenir compte de la preuve, décrite à très grands traits ci-dessus, dans le contexte de la demande reconventionnelle qu'on voulait déposer contre le syndic. Il s'agit de déterminer, non pas si la preuve produite à l'appui de la requête fondée sur l'art. 186 révèle l'existence d'une cause d'action contre le syndic, mais si la preuve étaye suffisamment la cause d'action invoquée dans la demande reconventionnelle des appelants. Il est par conséquent nécessaire d'examiner les prétentions que les appelants souhaitent formuler contre le syndic.

. . .

Les appelants soutiennent que le juge des requêtes a fait erreur en statuant que la preuve produite à l'appui de leur requête fondée sur l'art. 186 de la *Loi sur la faillite* doit être suffisante pour établir un fondement factuel à l'action qu'ils entendent intenter contre le syndic. Les appelants soutiennent que le critère prévu par l'art. 186 exige seulement la présentation de quelques éléments de preuve donnant un fondement factuel à l'action qu'ils souhaitent intenter. Selon moi, le juge des requêtes a eu raison de conclure comme il l'a fait. Sur une échelle qui va de l'absence totale de preuve à une preuve qui est concluante, la preuve nécessaire pour fonder une ordonnance en vertu de l'art. 186 doit être suffisante pour établir l'existence d'un fondement factuel à l'égard de l'action envisagée, et pour établir que cette action révèle une cause d'action.

C'est dans le contexte de l'objectif visé par l'art. 186 qu'il faut déterminer si la preuve est suffisante. Cet objectif, comme nous l'avons vu, consiste à éviter que le syndic ait à se défendre contre des actions qui sont frivoles ou vexatoires, ou qui ne révèlent aucune cause d'action. Comme je l'ai souligné plus tôt, il n'est pas nécessaire que la preuve à l'appui d'une requête fondée sur l'art. 186 soit suffisante pour permettre au juge des requêtes de statuer de façon définitive sur le fond de l'action qu'on veut intenter; cependant, elle doit être suffisante pour qu'il soit possible de répondre aux questions que j'ai signalées, en ayant à l'esprit les objectifs de l'art. 186. [Je souligne; par. 12, 16 et 17.]

La Cour d'appel confirmait par là la décision du juge de première instance ((1989), 76 C.B.R. (N.S.) 90), qui avait adopté une formulation claire de ce qu'est une preuve suffisante pour qu'une poursuite contre un syndic soit autorisée :

Because the decision requires an exercise of discretion, the Court must make a more thorough enquiry than when considering whether or not a claim, *as a matter of law*, discloses a cause of action. In considering whether a claim discloses *a cause of action*, the Court presumes the allegations in the claim to be true to determine whether those allegations can provide the basis for a remedy. On a section 186 application, the Court must consider whether there is *evidence* of a factual basis for the proposed claim. The policy of section 186 is to protect the Trustee from claims which have no basis in fact. Ensuring a proper factual foundation for a proposed claim requires that the alleged facts must be disclosed by sufficient affidavit evidence. Facts are not allegations merely to be accepted at face value. [pp. 93-94]

[TRADUCTION] Comme la décision suppose l'exercice d'un pouvoir discrétionnaire, le tribunal doit effectuer un examen plus approfondi que lorsqu'il s'agit de déterminer si une déclaration, *en droit*, révèle une cause d'action. Lorsqu'il doit décider si, oui ou non, une déclaration révèle *une cause d'action*, le tribunal tient pour avérées les allégations faites dans la déclaration afin de déterminer si elles peuvent constituer le fondement d'un recours. Dans le cas d'une requête fondée sur l'art. 186, le tribunal doit se demander s'il existe dans la *preuve* un fondement factuel pour l'action envisagée. L'article 186 vise à protéger le syndic contre des actions sans fondement factuel. Si on veut s'assurer que l'action envisagée repose sur un fondement factuel approprié, il faut que les faits allégués soient révélés par une preuve par affidavit suffisante. Les faits ne sont pas des allégations qu'il faut tout bonnement accepter telles quelles. [p. 93-94]

If *Mancini* can be considered to have laid down a threshold or test of some sort, I would say that the test relates to the standard of proof required for the bankruptcy court to grant leave to bring proceedings.

139 Si l'affaire *Mancini* peut être considérée comme ayant formulé un quelconque seuil ou critère, je dirais que c'est à l'égard de la norme de preuve requise pour que la cour de faillite accorde la permission de poursuivre.

With regard to the sufficiency of the evidence, *Mancini* thus makes it clear that the judge to whom an application for leave is made under s. 215 cannot accept vague allegations. The allegations must be supported by the evidence. The judge does not have to be convinced that the action is well founded, since he or she is not the trier of fact. However, the judge must ensure that there is sufficient factual evidence, whether in the form of affidavits or exhibits, to support the allegations. To do this, the judge must review the evidence. In ordinary usage, the standard of proof in civil proceedings is often characterized as requiring either proof on the balance of probabilities or *prima facie* evidence. The threshold under s. 215 is not the trial judge's threshold of proof on the balance of probabilities, but *prima facie* evidence.

140 Pour ce qui est de la suffisance de la preuve, cet arrêt précise donc que le juge à qui une demande de permission est présentée en vertu de l'art. 215 ne peut pas se contenter de vagues allégations. La preuve doit justifier les allégations. Le juge n'a pas besoin d'être convaincu du bien-fondé de la poursuite, puisqu'il n'est pas lui-même juge du fond. Il doit cependant s'assurer qu'une preuve factuelle suffisante soutient les allégations, soit par des affirmations sous serment, soit par la production de pièces. Pour ce faire, le juge doit examiner la preuve. Dans le langage usuel, l'intensité de la norme de preuve au civil est souvent qualifiée soit de prépondérante, soit de *prima facie*. Le seuil requis par l'art. 215 n'est pas celui auquel est tenu le juge du fond, à savoir la prépondérance de la preuve, mais la preuve *prima facie*.

Unlike in *Mancini*, what is in issue in the case at bar is not the question *of fact* of the sufficiency of the evidence, but the question *of law* that is considered at the stage of the review of the seriousness of the cause of action.

141 À la différence de l'affaire *Mancini*, le débat ne porte pas en l'espèce sur la question *de fait* qu'est la suffisance de la preuve, mais plutôt sur la question *de droit* qui est étudiée à l'étape de l'examen du sérieux de la cause d'action.

5.2.2 Seriousness of the Cause of Action

142 The review of the seriousness of the cause of action must be adapted to the nature of the proceedings the applicant intends to bring. If, as in *Mancini* and the majority of the cases submitted to the courts until quite recently, a monetary award is all that is sought, the proceedings do not prevent the trustee from carrying out his or her duties or impose a burden on the trustee that is incompatible with the *BIA*.

143 However, bankruptcy judges clearly cannot grant leave to bring proceedings that are incompatible with the *BIA*. Thus, a bankruptcy judge could not authorize proceedings aimed at holding a trustee liable where the *BIA* immunizes trustees against the liability in question, as in the case of environmental damage. Since a full defence is available to the trustee pursuant to s. 14.06(2) and (4), such proceedings could not be characterized as serious or, in the words used in *Mancini*, "not frivolous". When a proceeding is not a simple action in damages based on wrongdoing by the trustee, the judge must therefore assess the nature and scope of the proceeding in light of the evidence.

144 Thus, in proceedings in which the OLRB is asked to declare that a trustee has succeeded to the bankrupt as employer, the review by the bankruptcy judge enables the judge to identify the union's actual objective in making this request. This makes it possible for the bankruptcy judge to reconcile the employees' interests with those of anyone else who has interests in the bankruptcy.

145 The judge's review does not have the effect of giving special or different treatment to successor employer declarations. Regardless of the reason the judge gives for granting leave to bring proceedings, the general context of the bankruptcy remains relevant. The judge must play an active role, anticipate the consequences of the proceedings, and limit their scope if need be. Screening the proceedings in this way is in fact what the trial judge did when he amended the order appointing

5.2.2 Le sérieux de la cause d'action

L'examen du sérieux de la cause d'action doit être modulé suivant la nature de la poursuite que le demandeur cherche à intenter. S'il s'agit d'une simple réclamation pécuniaire, comme dans *Mancini* ou dans la majorité des affaires soumises aux tribunaux jusqu'à tout récemment, la poursuite n'empêche pas le syndic d'accomplir ses devoirs et ne lui impose pas un fardeau incompatible avec la *LFI*.

Il est cependant clair que le juge de faillite ne peut accorder la permission d'intenter un recours incompatible avec la *LFI*. Il ne pourrait autoriser une poursuite ayant pour but d'imposer au syndic une responsabilité contre laquelle celui-ci est immunisé par la *LFI*, en matière de dommages environnementaux par exemple. Comme le syndic bénéficie, en vertu des par. 14.06(2) et (4) d'une défense complète, une telle poursuite ne saurait être qualifiée de sérieuse ou, selon l'expression utilisée dans *Mancini*, de [TRADUCTION] « non frivole ». Lorsque le recours n'est pas une simple poursuite en dommages-intérêts fondée sur une faute du syndic, le juge doit en conséquence évaluer la nature et la portée du recours à la lumière de la preuve.

Ainsi, dans le cas d'une poursuite demandant à la CRTO de déclarer qu'un syndic succède au failli comme employeur, l'examen que fait le juge de faillite lui permet de déterminer l'objectif réel que poursuit le syndicat en présentant cette demande. Ce faisant, le juge de faillite peut concilier les intérêts des employés avec ceux des autres intéressés dans la faillite.

L'examen fait par le juge n'a pas pour effet d'accorder un traitement particulier ou différent aux déclarations attribuant la qualité d'employeur successeur. Quel que soit le motif pour lequel un juge autorise une poursuite, le contexte général de la faillite demeure pertinent. Le juge doit jouer un rôle dynamique, anticiper les conséquences de la poursuite et en limiter la portée, au besoin. Ce filtrage des recours est d'ailleurs l'exercice auquel s'est livré le juge de première instance lorsqu'il a

the receiver so as to limit the protection of the receiver to acts it carried out in the context of the liquidation of the property. This limitation should be qualified if, for example, the issue concerns the rate of wages paid by the trustee. The process engaged in by the trial judge is nevertheless an example of what bankruptcy judges can be required to do on a regular basis in the course of their interactions with the parties. They can tailor the leave they grant to the specific needs of each case. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and must deal with conflicts that could impair the application of the *BIA*.

modifié l'ordonnance de nomination du séquestre pour limiter la protection dont jouit le séquestre aux gestes que pose celui-ci dans le contexte de la liquidation des biens. Cette limitation mérite d'être nuancée, par exemple si le débat touche au taux des salaires payés par le syndic. L'exercice auquel s'est livré le juge de première instance constitue cependant un exemple de ce que les juges de faillite peuvent être appelés à accomplir de façon routinière dans leur interaction avec les parties. Ils peuvent ajuster leur autorisation en fonction des besoins spécifiques de chaque dossier. Dans l'examen du sérieux de la cause d'action, le juge de faillite doit être vigilant et parer aux conflits qui seraient susceptibles d'entraver l'application de la *LFI*.

In the case at bar, Feldman J.A. concluded that an operational conflict results each time a bankruptcy judge denies leave to bring proceedings under s. 69(2) *LRA*:

> Because the denial of leave under s. 215 of the *BIA* can be used by the bankruptcy court in appropriate circumstances to preclude the OLRB from exercising its exclusive jurisdiction to declare a person a successor employer, it is in operational conflict with s. 69 of *LRA* when such leave is denied. When that occurs, s. 72(1) of the *BIA* is engaged, with the result that s. 69(12) of the *LRA* is superceded by s. 215 of the *BIA*. [para. 69]

146 Dans la présente affaire, la juge Feldman de la Cour d'appel conclut qu'il y a conflit d'application chaque fois que le juge de faillite refuse la permission d'intenter le recours visé au par. 69(2) *LRT* :

> [TRADUCTION] Étant donné que le tribunal de faillite peut, lorsque les circonstances le justifient, refuser une demande de permission fondée sur l'art. 215 de la *LFI* et ainsi empêcher la CRTO de déclarer, en vertu de sa compétence exclusive en la matière, qu'une personne est employeur successeur, il y a en conséquence incompatibilité d'application entre cette disposition et l'art. 69 de la *LRT* en cas de refus de la permission demandée. En pareil cas, le par. 72(1) de la *LFI* entre alors en jeu, avec pour conséquence que l'art. 215 de la *LFI* l'emporte sur le par. 69(12) de la *LRT*. [par. 69]

I myself would present this idea from a positive perspective. Judges who exercise their jurisdiction under s. 215 are in a position to avoid operational conflicts. By ensuring that the conclusions being sought do not impair the application of the *BIA* and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits the federal statute and provincial legislation to be applied simultaneously.

147 Je présenterais plutôt cette idée sous une perspective positive. Le juge qui exerce sa compétence en vertu de l'art. 215 est en mesure d'éviter le conflit d'application. En s'assurant que les conclusions recherchées n'entravent pas l'application de la *LFI* et, au besoin, en limitant la portée d'une poursuite fondée sur une loi provinciale, les juges de faillite permettent l'application simultanée de la loi fédérale et des lois provinciales.

If the union seeks only to maintain wage rates, the proceedings can be limited to that purpose. Similarly, the problem of the period during which the declaration will be effective can be resolved by specifying that the trustee's liability will terminate when the business is transferred to the purchaser.

148 Si le syndicat ne cherche qu'à assurer le maintien du taux de salaire, la poursuite peut être limitée à cet objet. De même, le problème de la période de validité de la déclaration peut être résolu en précisant que la responsabilité du syndic prend fin lors de la transmission de l'entreprise à l'acquéreur.

149 Some cases, such as those involving seniority, may be difficult to evaluate. The issues in such cases will turn on the specific facts of each bankruptcy situation and will sometimes require an assessment of the overall impact of the proceedings.

150 Feldman J.A. mentioned the following factors:

> The factors that the bankruptcy court applies on a s. 215 application will relate to both procedural and substantive aspects of the process. Some important factors will include: the timing of the application, the complexity of the receivership and the demands on the receiver as it carries out its obligations, the potential duration of the period that the receiver intends to operate the business before it can be sold (normally as brief as possible), the availability of potential purchasers and their financial strength, and the likelihood that a purchaser will be declared a successor employer and assume all of the obligations under the collective agreement. This latter factor may be particularly important because it will give practical assurance to the union that all of the terms of the collective agreement will be honoured and the employees protected. Another key factor is the practicality of proceeding before the OLRB and the timeliness of a hearing before that tribunal in the context of the proposed temporary operation of the business and its sale. [para. 58]

These factors could be applied incorrectly. They inevitably overlap with those that will determine the decision on the merits. The bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits.

151 Using the factors proposed by Feldman J.A. entails a second risk. These factors do not expressly mention the employees' rights. The trustee represents the interests of all the creditors, including the employees. The proposed factors must therefore be resituated in the context of the exercise of a remedy that necessarily implies constraints relating to the rights of all the creditors. They cannot serve to allow the trustee to evade the application of a statute that, although it may create a constraint, does not hinder the trustee's

Plusieurs cas peuvent être difficiles à évaluer, par exemple le respect de l'ancienneté. De telles questions dépendront des faits propres à chaque faillite et exigeront parfois une évaluation globale de l'incidence de la poursuite.

La juge Feldman de la Cour d'appel mentionne les critères suivants :

> [TRADUCTION] Les facteurs appliqués par le tribunal de faillite pour statuer sur une demande présentée en vertu de l'art. 215 concernent tant des aspects procéduraux que des aspects substantiels du processus. Parmi les facteurs importants, mentionnons : le moment où la requête est présentée, la complexité de la mise sous séquestre et les contraintes auxquelles fait face le séquestre dans l'exécution de ses obligations, la durée possible de la période pendant laquelle le séquestre a l'intention d'exploiter l'entreprise avant qu'elle puisse être vendue (cette période est normalement la plus brève possible), l'existence d'acquéreurs possibles et leur solidité financière et la probabilité qu'un acquéreur soit déclaré employeur successeur et assume la totalité des obligations découlant de la convention collective. Ce dernier facteur peut s'avérer particulièrement important, parce qu'il donnera au syndicat l'assurance concrète que toutes les clauses de la convention collective seront respectées et que les salariés seront protégés. Un autre facteur clé est l'utilité de la procédure devant la CRTO et la possibilité que l'audience devant ce tribunal administratif puisse avoir lieu en temps opportun dans le contexte de l'exploitation temporaire de l'entreprise et de la vente proposées. [par. 58]

Ces critères risquent d'être mal appliqués. Ils chevauchent inévitablement ceux qui dicteront la décision sur le fond. Le juge de faillite doit prendre garde de ne pas se substituer au tribunal qui statuera sur le fond.

L'utilisation des critères suggérés par la juge Feldman comporte un deuxième danger. Les critères ne font pas mention explicitement des droits des employés. Or, le syndic représente les intérêts de tous les créanciers, y compris les employés. Les critères suggérés doivent donc être replacés dans le contexte de l'exercice d'un recours qui implique nécessairement des contraintes concernant les droits de tous les créanciers. Ils ne peuvent pas être utilisés pour permettre au syndic d'esquiver l'application d'une loi qui crée peut-être une contrainte,

work. Judges must therefore bear in mind that they will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. The judge's first task is therefore to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy.

Employees' wage rates are one example of a constraint related to the application of the collective agreement that does not ordinarily hinder the trustee's work. Trustees who retain employees' services do not necessarily have the right to reduce their wages. Consequently, if a union seeks a declaration that a trustee is the bankrupt's successor for the sole purpose of maintaining wage rates, and if the interests of the parties cannot be reconciled at the hearing before the bankruptcy court, then leave should normally be granted. An order that a monitor pay recalled employees in accordance with the terms of the collective agreement has been made in the context of the *Companies' Creditors Arrangement Act*. Such an order does not generally lead to conflict with the duties of a liquidator or a trustee: *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] Q.J. No. 264 (QL) (C.A.).

Moreover, the review before the bankruptcy judge of the consequences of a declaration is likely to make the parties aware of their respective interests and create an atmosphere conducive to the respect of everyone's rights. When considering the application, the judge must therefore bear in mind all the interests at stake and accept that every constraint does not necessarily hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 *BIA*.

To sum up, a judge who must decide whether to grant leave to bring proceedings against a trustee must determine the actual scope of the remedy being sought, identify potential conflicts and tailor

mais ne constitue pas une entrave à son travail. Le juge doit donc conserver à l'esprit que seule une entrave réelle justifie de limiter la portée du recours ou de refuser la permission d'intenter celui-ci. Sa tâche première consiste donc à s'interroger sur l'effet concret de la demande et non sur quelque effet diffus de celle-ci sur l'administration de la faillite.

152 Le taux des salaires versés aux employés est un exemple de contrainte liée à l'application de la convention collective qui ne constitue pas habituellement une entrave au travail du syndic. Lorsqu'un syndic retient les services d'employés, il n'a pas nécessairement le droit de réduire leur salaire. En conséquence, si un syndicat veut faire déclarer un syndic successeur du failli dans le seul but de maintenir le taux des salaires et que l'audience devant la cour de faillite ne permet pas de concilier les intérêts des parties, la permission devrait normalement être accordée. Une ordonnance obligeant le contrôleur à payer les employés rappelés selon les termes prévus à la convention collective a été prononcée dans le contexte de la *Loi sur les arrangements avec les créanciers des compagnies*. Une telle ordonnance n'entraîne généralement pas de conflit avec les devoirs d'un liquidateur ou d'un syndic : *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*, [2003] R.J.Q. 420 (C.A.).

153 L'examen des conséquences d'une déclaration devant le juge de faillite est d'ailleurs de nature à sensibiliser les parties à leurs intérêts respectifs et à créer une atmosphère propice au respect des droits de tous. Le juge doit donc aborder la demande en ayant à l'esprit tous les intérêts en jeu et en acceptant que toute contrainte ne constitue pas nécessairement une entrave au travail du syndic. Une approche trop axée sur la flexibilité requise par le syndic dans sa gestion risquerait d'amener trop facilement à conclure à l'existence d'un conflit et serait peu respectueuse de l'art. 72 *LFI*.

154 En résumé, le juge appelé à décider s'il y a lieu d'accorder la permission de poursuivre un syndic doit évaluer concrètement la portée du recours recherché, identifier les conflits potentiels

the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the *BIA*. Determining the scope of the remedy is part of the review of the cause of action. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law. The judge must tailor the leave. If the conflict cannot be avoided in this way, then leave to bring the proceedings must be denied.

et moduler l'autorisation de façon à éviter qu'une poursuite fondée sur le droit provincial n'ait pour effet d'entraver l'exécution des devoirs et responsabilités imposés au syndic par la *LFI*. La détermination de la portée du recours fait partie de l'évaluation de la cause d'action. Comme le droit constitutionnel ne tolère pas les conflits de compétence, une poursuite entraînant un conflit constitutionnel n'a pas de fondement juridique. Le juge doit moduler la permission de poursuivre. Si une telle modulation ne permet pas d'éviter le conflit, il doit alors refuser la permission demandée.

6. Application to the Case at Bar

6. Application à l'espèce

155 My colleague Abella J. concludes that leave to bring proceedings should be granted. I myself believe that the case should be reconsidered by the Superior Court. The union has not stated its objective other than to say that the proceedings do not concern debts incurred prior to the trustee's appointment, but this is insufficient to eliminate every potential conflict of jurisdiction, and it is also insufficient for us to substitute our assessment for that of the trial judge.

Ma collègue la juge Abella conclut que la permission de poursuivre doit être accordée. J'estime pour ma part que le dossier doit être réévalué par la Cour supérieure. L'objectif poursuivi par le syndicat n'est pas précisé, sinon pour dire que la poursuite ne vise pas les dettes antérieures à la nomination. Cette information ne permet pas d'éliminer tous les conflits de compétence potentiels et ne saurait nous autoriser à substituer notre appréciation à celle du juge de première instance.

156 To appreciate the nature of the analysis the bankruptcy judge must carry out, it will be helpful to set out the facts of the case.

Pour apprécier la nature de l'analyse que le juge de faillite doit faire, il est utile d'exposer les faits de l'affaire.

157 On January 18, 2002, the respondent GMAC Commercial Credit Corporation — Canada ("GMAC"), the principal creditor of the respondents T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc. ("T.C.T."), was informed that T.C.T. had artificially inflated its accounts receivable and had obtained advances from GMAC that exceeded the value of its security by $21 million. On January 24, 2002, at GMAC's request, the Ontario Superior Court appointed KPMG Inc. as interim receiver of T.C.T.'s property. The appointment order provided that no proceedings could be commenced against KPMG without leave of the Superior Court. The order also stated that KPMG would not be considered to have succeeded to T.C.T. as employer. On February 25, 2002, T.C.T. made an assignment in bankruptcy. KPMG was appointed trustee in bankruptcy. As of the date of the bankruptcy, T.C.T. was

Le 18 janvier 2002, l'intimée Société de crédit commercial GMAC — Canada (« GMAC »), principale créancière des intimées T.C.T. Logistics Inc. et T.C.T. Warehousing Logistics Inc. (« T.C.T. »), est informée que T.C.T. a gonflé artificiellement ses comptes à recevoir et a obtenu de GMAC des avances dépassant de 21 millions de dollars la valeur des garanties. Le 24 janvier 2002, à la demande de GMAC, la Cour supérieure de l'Ontario nomme l'intimée KPMG Inc. à titre de séquestre intérimaire aux biens de T.C.T. L'ordonnance de nomination prévoit qu'aucune procédure ne peut être intentée contre KPMG sans la permission de la Cour supérieure. L'ordonnance précise aussi que KPMG ne sera pas considérée comme ayant succédé à T.C.T. à titre d'employeur. Le 25 février 2002, T.C.T. fait cession de ses biens. KPMG est nommée syndic à la faillite. Au moment de la

operating a brokerage, logistics, trucking and warehousing business in Canada and the United States. The sale of the business was considered urgent (refusal by GMAC to advance additional funds, trucks located across Canada and the U.S., perishable goods still in transit or in warehouses, storage of property at risk, etc.).

T.C.T. had 1,357 employees across Canada, including unionized employees represented by 13 different unions. There were 225 employees in the warehousing division, which included warehouses located in Edmonton, Calgary and Toronto. The operation of these warehouses was subject to collective agreements covering 78 employees, including the 42 employees in the Toronto warehouse, who were represented by the appellant, Industrial Wood & Allied Workers of Canada, Local 700 (the "union"). On April 12, 2002, KPMG reached an agreement with Spectrum Supply Chain Solutions Inc. ("Spectrum") under which Spectrum would buy certain specified assets of T.C.T.'s warehouses. The letter of intent initially signed by Spectrum and KPMG provided that Spectrum would operate the warehouses and continue to employ most of the employees. After evaluating the assets, however, Spectrum decided that two of the warehouses were of no interest to it, including the one in Toronto, which was considered to be in disrepair. The final agreement provided that the employees would be terminated and that the lease of the Toronto warehouse would not be assigned to Spectrum. On April 16, 2002, the Toronto employees were informed of the agreement with Spectrum and were also informed that KPMG would be applying to the Superior Court for approval of the agreement on April 18, 2002. The Toronto warehouse was closed on May 23, 2002.

On May 13, 2002, the union filed two applications with the OLRB in which KPMG was named as a responding party. The purpose of the first was to have Spectrum declared to be the successor employer to T.C.T. and KPMG under s. 69(2) *LRA*. The second was a complaint of unfair labour practices. KPMG contested the applications, submitting that all proceedings were stayed pursuant to the appointment order and the *BIA* and that the

faillite, T.C.T. exploite au Canada et aux États-Unis une entreprise de courtage, logistique, transport et entreposage. La vente de l'entreprise est considérée urgente (refus de GMAC d'avancer des fonds additionnels, camions dispersés à travers le Canada et les États-Unis, biens périssables en transit ou en entreposage, garde des biens à risque, etc.).

158 T.C.T. emploie 1 357 employés à travers le Canada, y compris des employés syndiqués représentés par 13 syndicats différents. Deux cent vingt-cinq employés travaillent dans la division de l'entreposage qui comprend des entrepôts situés à Edmonton, Calgary et Toronto. Les activités de ces entrepôts sont encadrées par des conventions collectives visant 78 employés, dont les 42 employés de l'entrepôt de Toronto, qui sont représentés par l'appelant, Syndicat des travailleurs de l'industrie du bois et leurs alliés, section locale 700 (le « syndicat »). Le 12 avril 2002, KPMG conclut avec Spectrum Supply Chain Solutions Inc. (« Spectrum ») une entente suivant laquelle Spectrum achète certains actifs spécifiques des entrepôts de T.C.T. La lettre d'entente initialement signée par Spectrum et KPMG prévoit que Spectrum exploitera les entrepôts et maintiendra la plupart des emplois. Toutefois, à la suite de l'examen des actifs, Spectrum estime que deux des entrepôts ne présentent aucun intérêt, dont celui de Toronto, qui est jugé délabré. L'entente finale prévoit que les employés sont licenciés et que Spectrum ne se porte pas cessionnaire du bail de l'entrepôt de Toronto. Le 16 avril 2002, les employés de Toronto sont informés de l'entente avec Spectrum et du fait que, le 18 avril 2002, KPMG demandera à la Cour supérieure de l'approuver. L'entrepôt de Toronto est fermé le 23 mai 2002.

159 Le 13 mai 2002, le syndicat présente à la CRTO deux requêtes dans lesquelles KPMG est désignée comme intimée. La première vise à faire déclarer Spectrum employeur succédant à T.C.T. et à KPMG suivant le par. 69(2) *LRT*. La deuxième est une plainte pour pratiques de travail déloyales. KPMG conteste les requêtes, plaidant que toute procédure est suspendue en vertu de l'ordonnance de nomination et de la *LFI* et que le syndicat n'a pas demandé

union had not applied to the Superior Court for leave, as required by the appointment order and by s. 215 *BIA*. On August 27, 2002, the OLRB ruled in the trustee's favour and stayed the hearing of the applications.

160 The proceedings in the Superior Court concerned only KPMG. The union's application to have Spectrum recognized as the successor to T.C.T. with respect to its obligations as an employer was not in issue.

161 The reasons given by Ground J. of the Superior Court on the merits of the remedy the union sought to exercise were clear ((2003), 42 C.B.R. (4th) 221). Ground J. concluded that the trustee had merely acted as a liquidator and should not, as such, be declared the bankrupt's successor. He did not consider the actual objective being pursued by the union or the possibility of limiting the scope of the proceedings that could be brought before the OLRB. Moreover, it is impossible to determine whether he considered these proceedings to be frivolous or to have no chance of succeeding or whether he felt that the evidence did not *prima facie* support the union's cause of action. In any event, the judge analysed the merits of the case as if he himself was the trier of fact.

162 One observation is necessary here. The unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the *BIA*. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The union and GMAC do not agree on the scope of the successor employer declaration sought by the union in the instant case. The union does not seek to place a time limit on the declaration that the receiver and trustee is a successor employer. Nor has it stated if it is seeking a monetary award or the reinstatement of all unionized employees in the context of the unfair labour practices complaint. Does the dispute concern only wages or does it also relate to transfers and terminations of staff? Other issues could be raised by the parties, who are familiar with all aspects of the case. Not only is it necessary to assess the

la permission de la Cour supérieure comme l'exigent l'ordonnance de nomination et l'art. 215 *LFI*. Le 27 août 2002, la CRTO donne raison au syndic et suspend l'audition des requêtes.

Devant la Cour supérieure, le débat ne concerne que KPMG. La requête du syndicat visant à faire reconnaître Spectrum comme employeur succédant aux obligations de T.C.T. n'est aucunement en cause.

Le juge Ground, de la Cour supérieure, livre clairement son opinion sur le fond du recours que le syndicat veut exercer ((2003), 42 C.B.R. (4th) 221). Il conclut que le syndic n'a agi que comme liquidateur et que, en tant que tel, il ne doit pas être déclaré successeur du failli. Il ne s'interroge pas sur l'objectif concret recherché par le syndicat ou sur la possibilité de réduire la portée du recours qui pourrait être exercé devant la CRTO. De plus, il est impossible de déterminer s'il considère être en présence d'un cas de recours frivole ou n'ayant aucune chance de succès, ou s'il estime que la preuve ne soutient pas *prima facie* la cause d'action du syndicat. Quoiqu'il en soit, le juge analyse le fond du dossier comme s'il en était lui-même saisi.

Un constat s'impose. Les conclusions sans réserve sollicitées par le syndicat sont susceptibles d'entraîner des conflits directs avec l'application de la *LFI*. Ni les faits consignés au dossier ni les positions avancées par les parties ne permettent à la Cour de procéder à l'examen auquel la Cour supérieure doit se livrer. Le syndicat et GMAC ne s'entendent pas sur la portée de la déclaration attribuant la qualité d'employeur successeur recherchée en l'espèce par le syndicat. Le syndicat ne cherche pas à limiter dans le temps la déclaration attribuant au séquestre et au syndic la qualité d'employeur successeur. Il ne précise pas s'il sollicite une condamnation pécuniaire ou le réengagement de tous les syndiqués dans le contexte de la poursuite pour pratiques de travail déloyales. Le litige porte-t-il seulement sur les salaires ou aussi sur les déplacements de personnel et les licenciements? D'autres questions pourraient être soulevées par

sufficiency of the evidence, but the uncertainty surrounding the scope of the proceedings and the union's actual objective prevents the Court, incontrovertibly in my view, from granting the union the leave it seeks and that was denied by the judge of the Superior Court.

les parties, qui connaissent le dossier sous tous ses aspects. Non seulement y a-t-il lieu de vérifier la suffisance de la preuve, mais l'incertitude quant à la portée des recours et à l'objectif réel poursuivi par le syndicat empêche, péremptoirement selon moi, la Cour d'accorder au syndicat la permission qu'il demande et que le juge de la Cour supérieure a refusée.

7. Conclusion

7. Conclusion

The analytical approaches of the Court of Appeal and the Superior Court had the effect of avoiding a constitutional conflict, but they could block legitimate actions. Even in their role as liquidators, trustees are often required to conform to obligations imposed on them by provincial legislation. Not every constraint inherent in a proceeding for a successor employer declaration is liable to hinder the administration of the bankruptcy. The criteria proposed by the Superior Court and the Court of Appeal are therefore too demanding.

163 Les analyses faites par la Cour d'appel et la Cour supérieure avaient pour effet d'éviter le conflit constitutionnel, mais pouvaient bloquer des recours légitimes. Même dans son rôle de liquidateur, le syndic est souvent tenu de se conformer à des obligations qui lui sont imposées par des lois provinciales. Toutes les contraintes inhérentes à une poursuite en vue d'obtenir une déclaration attribuant la qualité de successeur à titre d'employeur ne sont pas susceptibles d'entraver l'administration de la faillite. Les critères suggérés par la Cour supérieure et par la Cour d'appel sont en conséquence trop exigeants.

I propose instead to incorporate into s. 215 a review designed to prevent constitutional conflicts. Under this approach, the paramountcy doctrine would apply only where the third party's proposed action would hinder the application of the *BIA*.

164 Je préconise plutôt d'incorporer à l'art. 215 un examen visant à prévenir les conflits constitutionnels. Cette approche limiterait l'application de la doctrine de la prépondérance aux seuls cas où le recours que le tiers veut exercer entrave la mise en œuvre de la *LFI*.

Furthermore, I believe that this Court should not supplant the Superior Court to assess the cause of action and the sufficiency of the evidence. In the review required by s. 215, the trier of fact has an active role to play. It is the trier of fact who must conduct the review.

165 Par ailleurs, je crois que notre Cour ne devrait pas se substituer à la Cour supérieure dans l'évaluation de la cause d'action et de la suffisance de la preuve. L'évaluation requise par l'art. 215 amène le juge des faits à jouer un rôle actif. C'est à lui qu'il revient d'évaluer le dossier.

The Court of Appeal ordered that the case be remitted to the Superior Court. That was a sound decision. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. The Superior Court did not conduct this more complete review. The Court of Appeal's disposition should accordingly be confirmed.

166 La Cour d'appel a ordonné le renvoi du dossier à la Cour supérieure. Cette décision était judicieuse. Le renvoi du dossier s'impose donc non seulement pour l'évaluation du dossier sous l'angle constitutionnel, mais aussi pour l'examen du sérieux de la cause d'action et de la suffisance de la preuve. Cet exercice plus complet n'a pas été fait par la Cour supérieure. Le dispositif de la Cour d'appel devrait donc être confirmé.

167 For these reasons, I would dismiss the appeal and the cross-appeal.

Appeal allowed with costs, DESCHAMPS J. *dissenting. Cross-appeal dismissed with costs.*

Solicitors for the appellant/respondent on cross-appeal: Koskie Minsky, Toronto.

Solicitors for the respondent/appellant on cross-appeal: Ogilvy Renault, Toronto.

Solicitors for the respondent KPMG Inc.: Goodmans, Toronto.

Pour ces motifs, je suis d'avis de rejeter les appels principal et incident.

Pourvoi accueilli avec dépens, la juge DESCHAMPS *est dissidente. Pourvoi incident rejeté avec dépens.*

Procureurs de l'appelant/intimé au pourvoi incident : Koskie Minsky, Toronto.

Procureurs de l'intimée/appelante au pourvoi incident : Ogilvy Renault, Toronto.

Procureurs de l'intimée KPMG Inc. : Goodmans, Toronto.

TAB 14

Supreme Court of Ontario in Bankruptcy

Citation: PR Engineering Ltd. v. Clarke, Henning & Hahn Ltd.
Date: 1990-04-11

Steele J.

Counsel:
Aubrey E. Kauffman, for applicant.
Miles D. O'Reilly, Q.C., for respondent.

[1] STEELE J.:—This is an application under s. 215 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 (the Act), for an order granting leave to commence an action in the Supreme Court of Ontario against the respondent trustee. The respondent is the trustee in bankruptcy of Golden Shield Resources Ltd. The application is opposed by the respondent on the basis that any such claim should be made in the bankruptcy court under s. 37 of the Act.

[2] It is alleged that the trustee agreed to sell certain equipment belonging to the bankrupt to the moving party and that the trustee subsequently reneged on its agreement on the basis that it did not have authority from the inspectors to enter into the agreement. The moving party states that it has a valid claim as against the trustee for damages for breach of contract or for damages for breach of warranty or authority. It would appear that the proposed claim is not frivolous or vexatious.

[3] Section 37 of the Act provides as follows:

> *Appeal to court against trustee*
>
> 37. Where the bankrupt or any of the creditors or any other person is aggrieved by an act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[4] The claimant is clearly "any other person" and the act complained of is clearly an act of the trustee.

[5] I was referred to the decision in *Johnstone Fabricators Ltd. v. Canadian Credit Men's Trust Ass'n Ltd.* (1964), 47 W.W.R. 513, 7 C.B.R. (N.S.) 22, in which a similar type of action was dealt with in the Supreme Court of British Columbia. The question of whether leave had been granted or not was not discussed. Therefore, it did not deal directly with the present issue. I have been referred to no cases in which it has been held that there is no jurisdiction in the bankruptcy court to deal with a matter such as this. Alternatively, I was referred to the decisions in *Re Wescan Plastics Ltd.; Lutz Electric Ltd. v. Hudson* (1981), 34 A.R. 614, 40 C.B.R. (N.S.) 170 (Q.B.); *Re Lemontzis, Lemontzis & Lemontzis; Morris v. Pfeiffer & Pfeiffer Inc.* (1983), 57 C.B.R. (N.S.) 274 (Que. S.C.); and *Re Pelee Motor Inn Ltd. (No. 2)* (1979), 30 C.B.R. 216 (Ont. H.C.J.). All of these cases indicate that there is jurisdiction in the bankruptcy court to deal with such matters. In all these cases leave to commence an action in the superior

courts was refused, although the *Pelee* decision related to an application for leave *nunc pro tunc.*

[6] In my opinion, ss. 37 and 215 are alternative remedies. The Act is a commercial statute and the scheme set out thereunder is summary in nature. Generally speaking, proceedings in the bankruptcy court are more expeditious than in the regular courts. An improper act of the trustee can affect the entire administration of the estate, and delay in such administration can delay payment of creditors. Wherever possible, matters relating to the administration of the bankrupt estate should be dealt with in the bankruptcy court. There may be instances where this is not possible, such as a case where the trustee is only one of several proposed defendants and the act of the trustee is merely one of the improper allegations in the proposed action. In that case, it would be open to bring an application under s. 215 of the Act for leave to commence the action in the regular courts. This should be considered an exception to the general rule, rather than the normal rule. Where the allegation relates entirely to the acts of the trustee within the Act, generally it would be inappropriate to grant leave to commence an action in the regular course. The appropriate remedy is for the moving party to apply for a trial of an issue within the bankruptcy court. There is no such application for a trial of an issue before me at the present time and therefore I do not deal with it.

[7] For these reasons the application is dismissed. There being no prior reported Ontario decision refusing leave, there will be no costs.

[8] Application dismissed.

TAB 15

CITATION: Murphy v. Sally Creek Environs Corporation, 2010 ONCA 312
DATE: 20100503
DOCKET: C50130

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Juriansz and Rouleau JJ.A.

In the Matter of the Bankruptcy of Sally Creek
Environs Corporation of the City of Brantford
in the County of Brant in the Province of Ontario

BETWEEN

(f) Robert Murphy, A. Robert Murphy Architect Incorporated
and Gray Wave Resources Inc.

Appellants

and

Edward White & Associates Inc. in its capacity as
Trustee-in-Bankruptcy of Sally Creek Environs Corporation

Respondent

Bobby H. Sachdeva and Michael Nowina, for the appellants

Ronald N. Robertson and R. Graham Phoenix, for the respondent

Heard: October 27, 2009

On appeal from the order of Justice Ruth E. Mesbur of the Superior Court of Justice, dated February 19, 2009, with reasons reported at 2009 CarswellOnt 7608.

Juriansz & Rouleau JJ.A.:

[1] This is an appeal from the decision of the Superior Court of Justice (Commercial List) varying the registrar's order on the taxation motion of the final Statement of Receipts and Disbursements ("SRD") of the Trustee in the bankruptcy of Sally Creek Environs Corporation ("Sally Creek").

[2] The Trustee's application to the registrar for approval of its fees, receipts and disbursements was vigorously and successfully opposed by the appellants, referred to collectively as "the Murphy Group", an unsecured creditor of Sally Creek. The registrar was scathingly critical of the Trustee and reduced his fees, disallowed significant disbursements and awarded solicitor client costs against the Trustee personally. The registrar's decision left the Trustee with $1 of income and more than $478,760.11 in personal liabilities.

[3] The Superior Court judge, sitting in the Superior Court of Justice, Commercial List, ("commercial court judge") upheld some of the registrar's specific fee reductions and disallowances, but set aside others. As well, she set aside the registrar's costs award. The commercial court judge's decision left the Trustee with net income of $59,934.83 resulting from taxed fees in the amount of $87,664.44 and one disallowed disbursement of $27,729.61. The commercial court judge awarded the Trustee party and party costs of the appeal before her in the amount of $55,000 all inclusive.

[4] Although many issues were dealt with in the courts below, the appellants take issue only with the commercial court judge's dispositions on three matters: the bills of costs of the estate solicitor, the fees of the Trustee, and costs of the SRD hearing.

[5] We would allow the appeal in large measure by reinstating many of the registrar's findings but varying several of his dispositions. We would fix the Trustee's fees in the amount of $49,464.44, allow $100,000 and disallow $106,547.02 of the estate solicitor's fees, and restore in part the registrar's order that the Trustee pay the costs of the SRD hearing personally. The portion of the costs payable by the Trustee personally are on a solicitor and client scale. The balance of the costs, to be paid out of the estate, are on a party and party scale. With respect to the appeals before the Superior Court and this court, we would make no costs award as, overall, each party has had mixed success. Finally, the Trustee will be entitled to recover one half of his legal costs of the two appeals from the estate.

FACTS

[6] The decisions of the Registrar in Bankruptcy and the commercial court judge provide a detailed description of the facts of this long and acrimonious dispute. We summarize below only the facts that are relevant to this appeal.

1. The Sally Creek Project and its Bankruptcy

[7] The appellants, A. Robert Murphy ("Murphy"), A. Robert Murphy Architect Incorporated, and Gray Wave Resources Inc., have been known collectively as the Murphy Group throughout these proceedings. The Murphy Group was the largest unsecured creditor of the estate of Sally Creek Environs Corporation (Sally Creek), which owned land that it planned to develop into a retirement community and seniors' complex. The purchase of the land was funded through a mortgage held by other

shareholders in Sally Creek, including several companies controlled by Ralph Rodgers, that have been referred to as the Rodgers Group in these proceedings.

[8] Murphy signed an exclusive contract with Sally Creek to provide architectural services for the project. The contract gave the Murphy Group a 20 per cent interest in Sally Creek. It also provided that Murphy would be entitled to approximately $2.5 million should he waive his exclusive right to provide architectural services.

[9] In late 2002, the mortgage on the land owned by Sally Creek became due. As the project was facing financial difficulties, Ralph Rodgers called a meeting of the directors to seek a resolution to quit claim Sally Creek's interest in the land to the mortgagees. Apparently concerned that this would mean the loss of a unique and lucrative project, Murphy executed a plan to wrest control of Sally Creek from the Rodgers Group by successfully ousting a majority of the board of directors. Having gained control of Sally Creek, Murphy, in his capacity as President of A. Robert Murphy Architect Incorporated, sent a letter to himself, as President of Sally Creek, pursuant to which he waived his exclusivity clause. Sally Creek thus owed A. Robert Murphy Architect Incorporated approximately $2.5 million.

[10] Murphy caused Sally Creek to make an assignment in bankruptcy on January 10, 2003. He appears to have intended to purchase the Sally Creek lands from the estate and continue the development project himself. Murphy had the company of his then friend, Edward White of Edward White & Associates Inc., appointed as Sally Creek's Trustee in

bankruptcy. In these reasons we do not distinguish between Edward White and his company and refer to both as the "Trustee".

[11] The Murphy Group's claims, the largest of which was the $2,583,432 damages claim arising out of the architectural services contract, amounted to approximately 80 per cent of the unsecured claims of the estate. The Trustee obtained two legal opinions regarding the Murphy Group claims, both of which held that they were valid for voting purposes.

[12] The first meeting of creditors was held on January 29, 2003. With its majority voting rights, the Murphy Group was able to have three persons it selected appointed as the inspectors. According to the Trustee, following the creditors' meeting the inspectors met briefly and approved the retainer of William J. Meyer as estate solicitor.

[13] The Sally Creek property was the only significant asset of the estate. In the spring of 2003, the Trustee sold the property for $7,155,000 to a third party known as the Sierra Group. The sale price satisfied the mortgage debt, with $2,596,894.96 remaining in the estate for distribution among unsecured creditors. The sale followed a contested tender and court approved sale in which the Murphy Group was an unsuccessful bidder. The Murphy Group's bid was rejected for technical deficiencies. It contested the sale, eventually losing an appeal to this court: *Sally Creek Environs Corp. (Re)*, [2003] O.J. No. 3374. Murray Page represented the estate in that litigation. His retainer, and what actions it authorized, is a central issue in the present dispute.

2. Dispute over the Murphy Group's Claim and Arbitration

[14] As noted above, the Trustee had found the Murphy Group's claims to be valid. However, in February 2003, the Rodgers Group took the position that the Murphy Group's large unsecured claim was not a valid one. It therefore indicated it would bring a motion under s. 135(5) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), to expunge or reduce the Murphy Group's proof of claim or to annul the bankruptcy. Pursuant to such a motion, the Rodgers Group would have borne the burden of proving that the Murphy Group claims were invalid or should be reduced despite the Trustee's approval.

[15] The relationships between Murphy and the Trustee and between the Trustee and the inspectors had become strained during the contested sale of the Sally Creek lands. The Trustee had come to the conclusion that at least two of the inspectors were simply acting as proxies for the Murphy Group, and so believed he was justified in acting without their approval and at times contrary to their express wishes.

[16] Upon reading the Rodgers Group's motion materials, Page came to the conclusion that the best way to settle the issue, along with certain other questions, was through arbitration. On July 23, 2003, Page wrote a letter to counsel for the Murphy Group in which he claimed to have been authorized by the Trustee to disallow the Murphy Group's claims. The Trustee's disallowance of its claims would have meant that the Murphy Group would bear the burden of proving the validity of its claims in a hearing *de novo* pursuant to s. 135(4) of the *BIA*. As noted, if the claims were allowed the Rodgers Group would have to contest them under s. 135(5) and would bear the

burden of proving that the Murphy Group claims were invalid. Both the Trustee and Page admitted under cross-examination at the SRD hearing that the Trustee had no intention of disallowing the claims as he believed them to be valid. The registrar found that Page's repeated threat to do so was intended to pressure the Murphy Group to arbitrate its dispute with the Rodgers Group. Furthermore, the registrar found that the issuance of these threats was beyond the scope of Page's retainer and contrary to the express instructions of the inspectors.

[17] Nevertheless, the threat was effective and the Murphy Group agreed to arbitrate. However, the inspectors made clear to the Trustee that the estate should not participate in the arbitration. Seeing this as unjustified meddling by the Murphy Group, the Trustee ignored the inspectors' instructions.

[18] The arbitration took place in 2004. The Arbitrator found that the majority of the Murphy Group claims were valid, but made certain reductions to them. Page, representing the Trustee, participated in the arbitration process. In what the registrar describes as a "bizarre set of circumstances", the Trustee gave evidence of his belief that the Murphy Group claims were valid, while his counsel Page argued that they were not.

3. Professional Complaints

[19] The Murphy Group was unhappy with the reduction in its claims and felt that the Trustee and his counsel had taken sides against it. Thereafter the Murphy Group began a concerted campaign of complaints to various regulatory bodies alleging serious wrongdoing and mismanagement by the Trustee. These included complaints submitted to

the Office of the Superintendant of Bankruptcy (OSB), the Canadian Association of Insolvency and Restructuring Professionals (CAIRP), and the Institute of Chartered Accountants of Ontario (ICAO). These complaints did not lead to any disciplinary action, aside from the ICAO reprimanding the Trustee in camera.

4. The Registrar's Decision

a. Fees

[20] The Trustee sought $240,000 in fees for his management of the estate together with disbursements. The registrar taxed his fees in the amount of $1 and disallowed or reduced many of the disbursements he claimed.

[21] First, the registrar disallowed $69,000 in fees, finding there was "absolutely no description of the work performed".

[22] Next, the registrar disallowed $23,660 in fees for time spent in relation to the defence of the Trustee against the professional complaints that the Murphy Group had filed. The registrar rejected the Trustee's rationalization for his failure to obtain the Inspectors' authorization for these fees and expenses. If the Inspectors were the "handmaidens" of the Murphy Group as the Trustee asserted, he should have applied to the court rather than going ahead and spending Estate funds without oversight.

[23] If the lack of authorization was not an adequate basis for disallowing these amounts, the Trustee's conduct was. Ordinarily, the registrar recognized, these amounts would be allowed if the professional bodies determined the complaints to be unfounded, as they had in this case. However, the registrar found on the evidence before him that the

Trustee had misled or lied to the professional bodies, and the results might have been different had he been truthful. So, despite the resolution of the complaints largely in favour of the Trustee, the registrar refused to exercise his discretion to permit the Trustee to recoup the money expended to defend his professional reputation.

[24] The registrar further reduced the Trustee's fees by $23,200 for time claimed where the dockets involved duplications or were otherwise questionable; by $8,136.41 for his failure to collect an outstanding debt owed to the estate (the "Farm Show receivable"); and by $51,539.15 for interest that would have accrued had the Trustee invested the proceeds from the land sale in a higher interest bearing account as opposed to a simple chequing account.

[25] With respect to the Farm Show receivable, we would note that the registrar found that, with interest, it cost the estate $8,136.41. However, both the registrar and the Superior Court Judge use the figure $7,650 in their calculations. We have assumed that this was an oversight and use the former figure in our calculations throughout.

[26] These disallowances totalled $175,535.56, leaving the Trustee with claimed fees in the amount of $64, 464.44.

[27] The registrar then turned his attention to the disbursements made by the Trustee.

b. Disbursements

[28] The registrar disallowed or significantly reduced the disbursements for which the Trustee sought reimbursement.

[29] The only disbursement currently under appeal is the account of Murray Page, who (as mentioned above) acted as estate solicitor in the sale of the Sally Creek lands. Page's bills of costs, totalling $206,547.22, were not supported by any dockets. Page testified his dockets had been destroyed. In any event, the registrar found that most of the fees charged by Page related to matters for which he was not properly retained. These included the following:

> [H]is machinations in foisting an arbitration upon the Murphy Group; assisting the Rodgers Group in their efforts to expunge the Murphy claims; attending the arbitration when the inspectors had expressly told the Trustee that it and its counsel should stay out of the arbitration; assisting White to respond to the professional complaints, and billing the Estate for same; and generally conducting himself as if this was his own personal litigation file.

[30] The registrar found that Page had been retained to represent the Estate in connection with the court approval of the sale of the Sally Creek property, the subsequent appeal, and to complete the sale. He allowed $20,000 for these services. He disallowed the remaining $186,547.22 of Page's bills of costs.

[31] The registrar also disallowed several other disbursements. Although these disallowances are not being appealed, they are relevant to our considerations below and thus worth noting. He disallowed a bill for $27,729.61 for the legal services of Fraser Milner Casgrain in connection with defending the Trustee against professional complaints brought by the Murphy Group because it had not been approved by the inspectors and, had the Trustee not been untruthful in those proceedings, their outcome might have been different. The Trustee also submitted two bills of costs of William

Meyer, the original estate solicitor, which had previously been taxed and paid. The registrar found that the Trustee had retained Mr. Meyer without proper authorization by the inspectors, and so allowed his fees only up to the date of the first meeting of creditors. Of the $103,517.47 claimed, the registrar allowed $20,832 as a disbursement to the Estate.

[32] The Trustee also sought a reimbursement in the amount of $51,598.08. It was not clear to the registrar whether this was the arbitration fee, the costs of the Trustee and Page, or both. The registrar found that, regardless of the answer to this question, the amount was not a proper disbursement to the Estate. In addition, the registrar ordered the Trustee to reimburse the nonaligned creditors, who represented approximately 10 per cent of the claims, pro rata for any arbitration disbursement made from the Estate.

[33] Having disallowed or reduced these disbursements, the registrar returned to the matter of the Trustee's fees and the question whether they should be further reduced because of his misconduct.

c. Reduction of Fees Due to Misconduct

[34] The registrar reduced the Trustee's fees to $1 because of his misconduct, to protect the integrity of the insolvency system and to send "a clear message" to others "that this kind of conduct absolutely will not be tolerated by this Court". He itemized the Trustee's misconduct in the following paragraphs in his decision:

> 65 The Trustee, and White, have lied to regulatory bodies about the conduct of this Estate.

66 The Trustee has failed to follow the instructions of the inspectors by participating in, and permitting Page to participate in, the arbitration.

67 The Trustee has failed to properly convene and minute meetings of the inspectors. This is both a breach of its statutory duties, and has resulted in activities being carried out which were not, in fact, authorized.

68 The Trustee, having allowed the Murphy claims, then permitted or encouraged Page to expend time, and cost others time and money, in responding to or dealing with, attempts to coerce an arbitration.

69 The Trustee, in so doing, has permitted its good name and office to be attached to what can only be characterized as the waging of a vendetta against Murphy, or at the very least, a shallow and misguided attempt to run up professional fees in the file.

70 The Trustee, according to the evidence of White, has tried to shield its actions behind those of Page. White very often raised the fact of Page being senior counsel as his response to why certain things were done or not done in the administration of the Estate.

71 The Trustee embarked upon a course of action to sell the major, if not only, Estate asset, without inspector approval.

72 The Trustee purposely declined to put a motion to the inspectors, in August, 2003, to confirm the retainer of Page, as he knew or believed that they would, instead, terminate Page's relationship with the Estate.

73 The Trustee has allowed itself, through White, to become the pawn of a solicitor, and declined to exercise its own judgement, contrary to the letter and spirit of the BIA. For example, White testified that he did not rein in Page on the letter regarding the draft Disallowances. Neither did White explain why he permitted Page to keep the Estate involved in the determination of the Murphy claims, and not let the 135 motion run its course, as instructed by the inspectors.

> 74 The Trustee failed in its duty to properly invest the proceeds of the property sale, and then misled counsel as to when those proceeds were actually invested.
>
> 75 The Trustee failed to get in the Farm Show receipt, and permitted Page to keep it for years without accounting to the Estate for it.
>
> 76 The Trustee, according to the evidence of Murphy which I accept for the reasons above, threatened Murphy by telling him that he (White) was surprised that Murphy's solicitor had not taken Murphy aside and explained what happens to creditors who oppose trustees.
>
> 77 The Trustee, in purporting to charge the Estate for professional time, and legal costs to defend itself and White, has demonstrated a willingness to prefer its own interests over those of the creditors whom it is charged with protecting.
>
> 78 The Trustee has failed in its obligations by not properly checking the accounts of professionals rendered to the Estate. For example, the $8,000.00 error in the Page Bill of Costs.
>
> 79 The Trustee failed in its duty to provide sufficient information to the inspectors to do their jobs when he declined to advise them on the taxation process, or draft minutes of meetings in accordance with their wishes.
>
> 80 The Trustee failed in its duty to the creditors in failing to bring the appropriate motion or motions to Court if White truly felt that the inspectors were refusing to act properly, or were being merely the handmaidens of Murphy, to the detriment of the other creditors.

[35] Citing Farley J.'s remark at page 9 of *Confederation Treasury Services Ltd. (Re)* (1995), 37 C.B.R. (3d) 237 (Ont. Ct. J. (Gen. Div.)) that "[t]he trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate," the registrar reduced the Trustee's fees to $1.

d. Costs of the SRD Hearing

[36] The registrar decided that costs should be taxed on a solicitor and client basis and that the Trustee should not be indemnified from the estate for these costs. The registrar recognized that in so doing, he departed from the statutory presumptions set out in ss. 197(2) and (3) of the *BIA*.

[37] In determining the scale of costs, the registrar considered that the Murphy Group had been overwhelmingly successful in its objection to the Trustee's SRD, and that, as a matter of policy, the participation of creditors in the insolvency process was to be encouraged. He reasoned that not allowing costs to the Murphy Group, and not allowing them on a solicitor and client scale, would "discourage creditors from performing their very necessary and proper role of trustee oversight in insolvency matters." He noted that the Murphy Group's action resulted in nearly $500,000 in additional funds being available for the estate to distribute, and that they had expended $200,000 of their own money on the hearing. In the registrar's view, no creditor would bring such a challenge and benefit the estate in this way without the expectation of solicitor and client costs if successful. This view was based on the fact that creditors who attack the integrity of a Trustee and are unable to maintain their allegation face a serious risk of having solicitor and client costs awarded against them. Therefore, the registrar concluded that costs should be fixed on the solicitor and client scale.

[38] Turning to the question of whether the Trustee should be reimbursed from the estate for the costs award made against him, the registrar began by observing that a

trustee must act fairly and even-handedly, keeping in mind its role as an officer of the court and the duties it owes to all creditors, even those opposing it in the SRD hearing. In presenting its SRD for taxation, a trustee implicitly announces to the court and the creditors that it has reviewed its work and the amounts it seeks are proper and allowable.

[39] Here, the Trustee had not provided proper dockets with descriptors of his work; had admitted to the missing Farm Show receivable only after several days of hearing; had claimed to have invested $2 million of proceeds from the sale of land for a year and only admitted that he had not after several days under cross-examination; had required the Murphy Group to call an expert from the Royal Bank to prove relevant interest rates; and had failed to fulfil undertakings from a pre-hearing conference to provide his staff's day timers to fill in the missing descriptors. These were but some examples of conduct that lengthened the hearing and increased the costs of the Murphy Group.

[40] Importantly, the registrar went on to find that the Trustee's inappropriate conduct was directed against the Murphy Group specifically and was a continuation of the "scorched earth" approach it had taken to the administration of the estate. Observing that this misconduct went to "the heart of the administration of the estate", the registrar found that the Trustee should not be reimbursed for the costs awarded to the Murphy Group. He added the observation that, as the Murphy Group was the single largest creditor, "to indemnify the Trustee would be to do so, to the extent of some 81 per cent, with the Murphy Group's own money."

e. Summary

[41] The Trustee claimed $240,000 in fees for its administration of the estate; the registrar allowed $1 in fees. Of the Trustee's claimed disbursements of $206,547.22 for Page's fees as estate solicitor, $103,517.47 for Meyer's fees as estate solicitor, and $27,729.61 for the services of Fraser Milner Casgrain in defending the Trustee against various professional complaints, the registrar allowed $20,000 for Page's bills of costs and $20,832 for Meyer's bills of costs, and disallowed Fraser Milner Casgrain's bill. This resulted in the Trustee not being reimbursed for $296,962.30 in legal fees that had been paid. The registrar's further order that the Trustee reimburse the creditors on a pro rata basis for the fees associated with the arbitration was not quantified.

[42] When the registrar's award of $181,798.81 in costs against the Trustee is taken into account, the registrar's disposition of the SRD hearing left the Trustee with $1 in income and more than $478,761.11 in personal liabilities.

5. The Commercial Court Judge's Decision

[43] Recognizing that the proceeding before her was an appeal and not a hearing *de novo*, the commercial court judge allowed the Trustee's appeal in large part.

a. Retainer of Estate Solicitors and Solicitors' Accounts

[44] The commercial court judge reversed the majority of the registrar's disallowances, but upheld his decision to disallow the account of Fraser Milner Casgrain.

[45] With respect to Page's bills of costs, she found that Page's bills of costs had been approved by the inspectors and taxed by the court prior to the SRD hearing, and that no appeal had been taken. (As will be noted below, not all of Page's bills of costs were

approved by the inspectors before being taxed.) Relying on *Chastan Ventures Ltd. (Re)*, 2007 BCSC 975, she found that by disallowing these accounts, the registrar had essentially allowed the Murphy Group to appeal the taxation of the bills after the statutory limitation period and to a court without jurisdiction to vary them. Therefore, she allowed all the taxed bills of costs of Page in the amount of $206,547.22.

[46] The commercial court judge reversed the registrar's decision on Meyer's bills of costs for similar reasons. In contrast, she agreed with the registrar that the Trustee had not obtained the inspectors' approval to retain Fraser Milner Casgrain to defend him before the various professional bodies and so disallowed its $27,729.61 bill. Her decisions regarding Meyer's bills and those of Fraser Milner Casgrain are not under appeal.

[47] With respect to the costs of arbitration, the commercial court judge found that the arbitrator was entitled to make a costs award that was binding on the parties and that it was beyond the jurisdiction of the registrar to vary that award. The commercial court judge's decision to overturn the registrar's order that the Trustee reimburse the non-aligned creditors for the costs of the arbitration is not being appealed. However, we note that the appellants do argue that the commercial court judge erred by interfering with the registrar's finding that the Trustee's participation in the arbitration against the will of the inspectors was misconduct that should be taken into consideration in reducing the Trustee's fees.

b. Fees

[48] The commercial court judge agreed with the registrar that $69.000 of the Trustee's claimed fees that were entirely unsupported by dockets and descriptions of work should be disallowed. The calculations the commercial court judge used indicate that she allowed the $23,200 in fees that the registrar had disallowed because of questionable dockets. She did not discuss the questionable dockets and gave no reason for her disagreement with the registrar.

[49] The commercial court judge agreed with the registrar that the Trustee's fees for defending himself against the complaints filed with professional bodies by the Murphy Group should be disallowed because he had not obtained the inspectors' approval to incur such fees. She also upheld the registrar's finding that the Trustee's fees should be reduced by $51,539.15 for the loss to the estate stemming from his failures to earn interest by investing the proceeds from the sale of the Sally Creek lands and by $7,650[1] for his failure to collect the Farm Show receivable.

[50] The commercial court judge's specific reductions to the Trustee's fees totaled $152,335.56 leaving claimed fees in the amount of $87,664.44.

c. Further Reduction Due To Misconduct

[51] The commercial court judge then turned to the question of whether the Trustee's fees should be reduced further because of his misconduct. She found that the registrar

[1] As noted above, the commercial court judge, like the registrar, used the $7650 figure. However, we will proceed on the assumption that this was an oversight and use the figure of $8,136.41.

supported his reduction of the Trustee's fees to $1 by making several findings of misconduct that were beyond his jurisdiction.

[52] First, she stated that the Registrar's finding that the Trustee had lied to regulatory bodies could not stand. The regulatory bodies had investigated the Murphy Group's complaints including those of perjury and had found no wrongdoing. The Murphy Group could have applied for judicial review of the decisions of the regulatory bodies but chose not to. She found it was beyond the registrar's jurisdiction to make findings about what occurred in another forum and then to suggest that the regulatory bodies would have come to a different conclusion had they been given access to the same evidence that he had. On the same reasoning, the commercial court judge held that the registrar acted outside his statutory authority by finding that the Trustee breached his statutory duties by failing to properly convene meetings of the inspectors and to carry out their instructions.

[53] The commercial court judge also disagreed with some of the registrar's findings of fact. She found that the registrar's finding that the Trustee had failed to properly control Page and had allowed him to "coerce" the Murphy Group into arbitration was unreasonable. She pointed out that the Murphy Group was represented throughout by counsel, and that the endorsement of Swinton J. dated September 29, 2003 noted that all parties were considering arbitration at that time. She added that even if the Trustee had failed to control counsel appropriately, participation in the arbitration did not cause any harm to the estate.

[54] The commercial court judge pointed out that the registrar had already reduced the Trustee's fees by the amount of the losses to the estate caused by the Trustee's failure to properly invest the proceeds of the property sale and to collect the Farm Show receivable. Therefore, she held it was an error for him to rely on these failings as additional examples of the Trustee's misconduct that warranted a further reduction of his fees. She characterized this as "double counting".

[55] Except for these specific matters, the commercial court judge agreed with the registrar that the Trustee had mismanaged the estate in significant ways and had engaged in conduct that was both unprofessional and sloppy. He had followed a pattern of failing to obtain proper instructions from the inspectors and failing to seek the direction of the court where he was unable to obtain such instructions from the inspectors. Looking at the circumstances in their totality, she observed that the Trustee "was clearly unable to manage appropriately the conflict between himself and counsel for the estate on the one hand, and the inspectors on the other." She added that the "conflict was exacerbated by the continued involvement of the Murphy Group's counsel in the background (and foreground) – a situation the Trustee seemed incapable of controlling."

[56] However, the commercial court judge found the registrar had erred in principle by further reducing the Trustee's fees to $1. She noted that in no previous case had a Trustee's fees been reduced by more than 50 per cent and found that the registrar erred by departing from this "benchmark". As well, the registrar had imposed a punitive result and had failed to address what fair compensation would have been for the administration

of the estate given that the Trustee sold the estate's major asset for over $7 million, and achieved a recovery of $0.69 on the dollar for the unsecured creditors.

[57] The commercial court judge reasoned that since the Trustee's fees had already been reduced by $152,335.56, representing 63 per cent of the claimed fees, no further reduction was warranted. The commercial court judge found that a reduction of the Trustee's fees from $240,000 to $87,664.44 was more than ample to send the message that this kind of conduct would not be condoned by the court.

d. Costs of the Taxation

[58] The commercial court judge set aside the award of solicitor client costs and replaced it with an award of party and party costs, which she found amounted to $141,718.75. Given the Murphy Group had achieved only mixed success at the SRD hearing, she awarded it only $90,000 in costs. She went on to hold that the registrar should not have made the Trustee personally liable for the costs award.

[59] While the *BIA* gave the registrar discretion to determine costs, the exercise of that discretion should be informed by s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and r. 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to which the registrar did not refer.

[60] She stated that the registrar's finding that the Murphy Group had a reasonable expectation of solicitor and client costs was "simply wrong in law". She recited the registrar's finding that neither side had "succeeded in coming even close to setting out the

conduct of the Trustee which lengthened or exacerbated the SRD taxation hearing itself" and described that finding as sufficient to determine that solicitor and client costs were not warranted.

[61] The commercial court judge noted that the registrar had accepted the Murphy Group's argument that the Trustee's conduct in the administration of the estate necessitated a 14 day hearing and that the Trustee should therefore bear the costs of that hearing. However, she did not accept that this was a finding of fact and did not accept it as a proper basis for imposing solicitor client costs.

[62] She found that the registrar's inference that the Trustee's conduct in the hearing was a continuation of a "scorched earth" approach taken to the administration of the estate in general was unsupportable and criticized his reliance on various examples of misconduct in the administration of the estate to justify his order that the Trustee bear the costs personally. Noting that the Trustee had already suffered the consequences of his misconduct through various deductions to his fees, the commercial court judge found that the registrar was essentially punishing the Trustee a second time for the same misconduct. She set aside the registrar's order and replaced it with an order that the costs of the taxation be paid out of the estate.

e. Summary

[63] The commercial court judge thus varied the registrar's award in the following ways. She fixed the Trustee's fees, taxed at $1 by the registrar, at $87,664.44. Page's bills of costs, which the registrar set at $20,000, she allowed in the full amount of

$206,547.02. She allowed Meyer's bills of costs, which the registrar had allowed at $20,832, at $103,517.47. She did not disturb the registrar's disallowance of the $27,729.61 bill of Fraser Milner Casgrain for defending the Trustee before the various professional bodies. She overturned the registrar's costs award and replaced it with an award for party and party costs in the amount of $90,000 payable from the estate.

[64] The commercial court judge's disposition left the Trustee with net income of $59,934.83 resulting from taxed fees in the amount of $87,664.44 and the disallowed $27,729.61 bill of Fraser Milner Casgrain that the Trustee had to pay personally.

[65] Finally, the commercial court judge awarded the Trustee party and party costs of the appeal before her in the amount of $55,000 all inclusive.

ISSUES

[66] The appellants raise four issues:

i. Whether the commercial court judge applied the correct standard of review;

ii. Whether the commercial court judge erred in allowing Page's fees;

iii. Whether the commercial court judge erred in varying the registrar's decision regarding the Trustee's fees;

iv. Whether the commercial court judge erred in varying the registrar's decision regarding costs;

v. Whether the Trustee is entitled to costs of the appeals before the Superior Court and this court; and

vi. Whether the Trustee is entitled to be

reimbursed for his own legal costs before the Superior Court and this court.

ANALYSIS

1. Standard of Review

[67] As this is the second level of appeal, two standards of review must be addressed. The first is the standard governing the commercial court judge's review of the registrar's decision. The second is the standard applicable to this court's review of the Superior Court decision.

[68] The parties agreed before this court that the applicable standard that governs the commercial court judge's review of the registrar's decision is that set out by the Supreme Court in the case of *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. All findings of fact by the registrar are deserving of deference unless he made a "palpable and overriding error". Questions of law and matters of principle are reviewed on the standard of correctness. The standard on mixed questions of fact and law lies along a spectrum. At one end, the palpable and overriding error standard applies to questions that primarily involve fact-finding or the making of factual inferences. At the other, where there is an error in characterizing or considering the proper legal standard to be applied, the standard is correctness.

[69] It is worth noting that in *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at para. 56, the Supreme Court has made clear that the term "palpable and overriding" , though "elegant and expressive" was not intended to displace the earlier formulations of "unreasonableness", "clearly wrong", or "unsupported by the evidence".

[70] Great deference must be accorded to the exercise of discretion, such as where the decision maker chooses from among a range of available alternatives. In order to interfere with a discretionary determination, the reviewing court must first find that "the registrar erred in principle or in law or failed to take into account a proper factor or took into account an improper factor, which led to a wrong conclusion": *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* (2006), 79 O.R. (3d) 241 (C.A.), at para. 48. Where there has been such an error in the making of a discretionary decision, the reviewing court may exercise the discretion afresh.

[71] In this case, the decision of the amount by which the Trustee's fees should be reduced because of misconduct is an exercise of discretion. While decisions of registrars are not subject to judicial review as they are decisions of the court, the appeal court should not lose sight of the fact that the *BIA*, in particular s. 192(1), grants registrars significant authority and broad discretion to apply their expertise in overseeing the bankruptcy process. As the commercial court judge noted at para. 80 of her reasons, "[c]learly, the Registrar's expertise in taxing trustees' fees is a significant factor, particularly taking into account the totality of the evidence."

[72] On the further appeal to this court, the same standard of review applies though we must keep in mind that the decision under appeal is that of the commercial court judge and not that of the registrar. An error by the commercial court judge in adhering to the correct standard in reviewing the registrar's decision is an error of law. In our view, the commercial court judge committed such errors, as we explain in the sections below.

2. Disbursements for Estate Solicitor's Bills of Costs

[73] The SRD included four accounts rendered by Page for work allegedly done for the estate. The first account covers the period from April 20, 2003 to October 24, 2003. It is in the amount of $120,813.38, primarily for work related to the first meetings of creditors and inspectors, including an opinion as to the validity of the Murphy Group claims, the sale of the Sally Creek lands and subsequent litigation at the Superior Court and this court. This bill was signed by all three inspectors and taxed on October 30, 2003. The second bill covers the period from October 24, 2003 to January 31, 2004 and was taxed on June 15, 2004. It is in the amount of $21,809.20 and includes entries for drafting a disallowance of the Murphy Group claim, preparing for hearings regarding the dispute between the Murphy and Rodgers Groups, and contesting a motion to exclude the Trustee from participating in the arbitration. The third bill, taxed in the amount of $57,000, covers the period from February 1, 2004 to December 1, 2004. This bill includes numerous entries related to the arbitration as well as the drafting of minutes and obtaining an order dispensing with inspector approval of bills of costs. Finally, the fourth bill, covering December 1, 2004 to May 3, 2005 is in the amount of $6,924.64 and is primarily concerned with amendments to the arbitration award and preparation for the Trustee's SRD hearing. The final three bills were taxed without the inspectors' approval. The Trustee obtained an order dispensing with this requirement on July 12, 2004. However, we note that the order was obtained nearly a month after the second bill of costs was taxed without inspector approval.

[74] The registrar found that Page had been retained only for the limited purpose of completing the sale of the estate's real estate pursuant to the bid of the Sierra Group, including litigation and an appeal relating to that sale. Retaining Page for this was necessary because a conflict of interest prevented the estate's solicitor, William Meyer, from acting on the transaction and in the court proceedings regarding this bid. The registrar found, however, that Page had carried out a considerable amount of unauthorized work, had presented at least one account containing a significant arithmetic error, had destroyed all of his dockets despite the Trustee having been put on notice that they would be required and generally had acted with arrogance or greed in an attempt to run up his fees.

[75] Given the difficulties the registrar had in segregating and valuing those portions of the work for which Page had been properly retained, the registrar relied on his experience in other taxations to estimate a reasonable and appropriate fee. As a result, he allowed only $20,000, inclusive of disbursements and GST, and disallowed the balance of Page's accounts.

[76] On appeal, the commercial court judge found that the registrar had erred in law in reducing Page's accounts from the $206,547.22 claimed to $20,000. She indicated that Page's accounts had all been approved by the inspectors, taxed without condition by the court pursuant to s. 192(1)(i) of the *BIA* and paid by the Trustee. In her view, because of the inspector's approval and the taxation by the court, the registrar had no authority to disallow any portion of those accounts. By doing so, the registrar was, in effect,

overturning an earlier court ruling pursuant to which the accounts had been found to be proper disbursements of the estate. In so holding, she referenced and relied on r. 22 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368. This rule provides that a taxed bill of costs has the same effect as a judgment of the court and may be enforced in the same manner as a judgment.

[77] In this court, the appellants submit that the commercial court judge erred in her interpretation of the *BIA*. The fact that a solicitor has taxed his account pursuant to s. 192(1)(i) and can then recover the amount taxed does not mean that a creditor of the estate is thereby prevented from objecting to the trustee's SRD as provided in s. 152(6) of the *BIA*. In this sense, the appellants argue that this court should not follow the decision of a registrar of the British Columbia Supreme Court in *Chastan Ventures*, wherein it was decided that a registrar taxing the trustee's SRD does not have jurisdiction to vary a bill of costs previously taxed.

[78] The respondent submits that the commercial court judge was correct. Absent an appeal, once the account of a solicitor is taxed and allowed pursuant to s. 192(1)(i) of the BIA, the trustee is bound to pay the account and it cannot later be disallowed as a proper disbursement of the estate. The respondent further argues that, even if the registrar had the authority to disallow the account as a proper disbursement of the estate, he erred in doing so. In his analysis, the registrar gave little or no weight to the fact that at least one of the accounts had been approved by the inspectors and that all of the accounts had been

taxed by the court. In these circumstances, he erred in reducing the accounts or, in the alternative, in reducing them to the extent that he did.

[79] For the reasons that follow, we would set aside the commercial court judge's decision on this issue. We would find, contrary to the decision in *Chastan Ventures*, that a registrar taxing a trustee's SRD is not precluded from considering whether the bankrupt estate is required to pay a previously taxed solicitor's bill of costs. In our view, however, the reduction made by the registrar was excessive and we would set the appropriate amount of the Trustee's disbursements for the Page accounts at $100,000 in lieu of the $20,000 allowed by the Registrar.

a. The Proper Interpretation of s. 152 of the BIA

[80] The first issue to be addressed is whether a registrar hearing an application for the taxation of a trustee's SRD that has been objected to pursuant to s. 152(6) has the authority to disallow a disbursement for a solicitor's account that has already been taxed by another registrar pursuant to s. 192(1)(i). The commercial court judge was of the view that the registrar did not have such authority. The issue does not, however, appear to have been raised before the registrar and it was not, therefore, addressed by him.

[81] Section 30(1)(e) of the *BIA* provides that a trustee can retain counsel "to take any proceeding or do any business that may be sanctioned by the inspectors." Section 192(1)(i) provides that a registrar can tax or fix costs and pass accounts. The taxation of bills of costs for legal services is governed by rr. 18-25 of the *General Rules*. The registrar will only agree to tax a bill of costs if the trustee is represented or signs a

declaration stating that the trustee has examined the bill, that the services were duly authorized and rendered, and that the charges were reasonable (r. 20). The registrar must then determine whether the services were duly rendered, accounted for and authorized and whether the charges are reasonable (r. 21). The taxation of a solicitor's bill of costs by a registrar may be appealed within 10 days (r. 25(1)). Once a bill is taxed, r. 22 of the *BIA* provides that the bill "has the same effect as a judgment of the court and may be enforced in the same manner as a judgment".

[82] Section 152 sets out the procedure for the taxation of the trustee's SRD. The trustee first prepares a report and sends it to the inspectors. Once they have approved the report[2], it is sent to the Superintendent, who is given the opportunity to comment on it (ss. 152(3) and (4)). After it is taxed by a registrar, the trustee then sends a final notice to every creditor, the registrar, the Superintendent and the bankrupt (s. 152(5)). Those who wish to object must provide written notice of their intention to do so within 10 days (s. 152(6)). The s. 152 process, therefore, involves creditors and others who would not necessarily have been aware of or involved in the taxation of the solicitor's account pursuant to s. 192(1)(i) and rr. 18-25. Indeed, the s. 152 process will often be the creditors' first opportunity to challenge the trustee's disbursements: see Houlden, Morawetz and Sarra, *The 2009 Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomson Carswell, 2009), at pp. 737.

[2] We would note that in the present case, the Trustee did not obtain inspector approval of the SRD, but rather included a comment that, "[t]he Inspectors, all of whom were nominated by a creditor at the first meeting of creditors have declined to either approve or disapprove of this Statement of Receipts and Disbursements stating that they were uncertain as to whether the fees of the Trustee and the counsel representing him with respect to the various complaints should be borne by the Bankrupt Estate..."

[83] It is apparent, therefore, that the taxation of a solicitor's bill of costs pursuant to s. 192(1)(i) and rr. 18-25 is separate and distinct from the taxation of the trustee's SRD pursuant to s. 152(6). Indeed, the two appear to form a two-step process. Section 192(1)(i) describes a process that will often not involve creditors. The registrar will generally rely on the trustee's assertion that the work being billed for was properly authorized and carried out. It follows, therefore, that as between the trustee and the solicitor the work set out in the account is determined to have been authorized and the amount properly charged.

[84] In our view, however, the s. 192(1)(i) taxation is not determinative of the issue to be addressed when a trustee presents his SRD for approval pursuant to s. 152(6). The purpose of the SRD hearing is to determine whether the disbursements incurred by the trustee on behalf of the estate were proper and should be paid by the estate and, ultimately, the creditors. Section 152(6) therefore allows creditors the opportunity to challenge the trustee's disbursements and there is no language in that section that limits the types of disbursements that can be challenged. Thus, s. 152(6) allows creditors to challenge any disbursement, including taxed solicitors' accounts. A s. 152(6) challenge does not, as found by the commercial court judge, constitute a collateral attack on another registrar's finding under s. 192(1)(i). Insofar as these two processes create certain redundancies, such overlap is intended to provide appropriate scrutiny of the trustee's management of the estate.

[85] This said, although the taxation of an account and the SRD hearing are distinct, the two processes are not totally unrelated. In our view, the two steps in the process should work in harmony so as to ensure that the interests of all affected parties are fairly considered while at the same time avoiding repetition and unnecessary expense.

[86] By the time a solicitor's bill of costs is presented at an SRD hearing, it will normally have been scrutinized by both the court and the inspectors. When a solicitor's account has been taxed by the court, a registrar will have assessed the reasonableness of the account and, based on the representations of the trustee, determined that the work was approved and the amounts charged were reasonable. In addition, the inspectors will normally have approved the solicitor's retainer as well as approving of the solicitor's accounts in advance of their being paid. It is important to keep in mind the role of the inspectors in giving such approval. They represent the creditors throughout the administration of the estate and when they approve of disbursements they do so on behalf of the creditors. Thus, at an SRD hearing, there should be a presumption that a previously taxed bill of costs should be paid by the estate provided that the services covered by the bill had been authorized by the inspectors and the inspectors had approved the bill before taxation.

[87] As a result, the scope of a s. 152(6) review of a disbursement for a taxed solicitor's account will, of necessity, be quite narrow. In essence, the court will decide whether there is reason to look behind the trustee's approval, the inspectors' approval (if any), and the court's previous taxation of the account and whether, in the circumstances,

the trustee should be prevented from claiming all or part of the account as a disbursement of the estate.

[88] In our view, therefore, the commercial court judge erred when she concluded that the registrar did not have jurisdiction to vary the bills of costs because, pursuant to r. 22, once taxed they had the same effect as a court order and could be enforced as such. Once the bills of costs were taxed, the solicitor could recover them. In fact, by the time the SRD hearing took place before the registrar, Page's legal accounts had been taxed and paid out of the estate. The decision the registrar was called upon to make was not whether the solicitor would be permitted to collect but whether the Trustee would be able to claim the payments as disbursements of the estate.

[89] Furthermore, given the registrar's findings of fact, this is one of those rare cases where he was entitled to look behind the approval of the Trustee and inspectors and the previous taxation of the court. As found by the registrar, much of the work carried out by Page was, to the knowledge of the Trustee, not authorized by the inspectors. In fact, some of the work was carried out in the face of express opposition by the inspectors. In this context, it was open to conclude that it was necessary to look behind the previous taxation of Page's bills of costs, as well as the approval of the Trustee and the inspectors as the s. 152(6) hearing was, in practical terms, the first opportunity creditors had to challenge the propriety of the Trustee's retainer of Page.

[90] We would note that the Trustee was well aware of the need to justify having incurred these costs. In cross-examination the Trustee conceded that the taxation of

Page's accounts pursuant to s. 192(1)(i) did not insulate these expenses from a challenge by creditors at a s. 152(6) hearing. This concession was correct and, no doubt, explains why the Trustee did not argue to the contrary before the registrar.

b. The Appropriate Adjustment to Page's Bills of Costs

[91] Having concluded that it was within the registrar's jurisdiction to consider whether Page's bills of costs were proper disbursements despite having been taxed pursuant to s. 192(1)(i), we turn to the respondent's alternative argument, that the registrar erred in applying excessive reductions to the accounts. The commercial court judge did not address this argument as she rested her decision exclusively on her interpretation of ss. 192 and 152.

[92] The registrar determined that a reduction of the Page accounts to $20,000 was appropriate. In reaching this conclusion, the registrar made no reference to the inspectors' approval of the first bill, the order dispensing with inspector approval of the other bills, or the fact that all of the bills had already been taxed. Nor did he address the effect, if any, of these factors on his decision to reduce or disallow the bills. In our view, the registrar ought to have addressed these questions.

[93] Given that the bills were approved in different ways and that each contained descriptions of different tasks performed, the registrar ought to have considered each bill separately. The first bill was approved by all three inspectors and taxed by the court. The second bill was taxed, but never approved by the inspectors. The third and fourth

bills were taxed without inspector approval pursuant to a court order dispensing with this requirement. We turn now to an examination of each.

i) First Bill: Inspector Approval and Taxation

[94] The first of Page's bills was approved and signed by the inspectors prior to being submitted to the s. 192 taxation. Two issues need to be addressed: Whether the registrar could look behind the inspectors' approval and, if so, the appropriate adjustment, if any, to be made to the bill.

[95] As noted earlier, inspector approval is required before a trustee can retain the services of a solicitor. The inspectors' approval of a retainer does not, however, give carte blanche to the trustee to involve the solicitor in any and all matters pertaining to the bankrupt estate. This is made clear by the wording of s. 30(1)(e) which authorizes the trustee to "employ a barrister or solicitor…to take any proceedings or do any business that may be sanctioned by the inspectors." It is well established that where a trustee hires a solicitor or undertakes litigation without the approval of the inspectors, he can be held personally liable for the costs and may be prevented from being reimbursed from the estate: see *The 2009 Annotated Bankruptcy and Insolvency Act* at pp. 898 and 103-104. A solicitor's retainer is thus usually limited to providing the services that have been approved by the inspectors. If, as in the present case, the inspectors make it clear that they do not wish the solicitor to be involved in certain matters, the trustee will normally be expected to respect such limits. If he does not, he does so at his peril.

[96] The appellants submit that the registrar's failure to specifically address inspector approval and the taxation of the bill in his reasons is of no moment. As noted by the appellants, the Trustee admitted in cross-examination that he did not instruct the inspectors on their rights and obligations with respect to such bills. As a result, in the appellants' view, the inspectors would not have understood that they could have refused to approve the bills if they were of the view that the accounts included unauthorized work. Thus, their approval is of little or no value.

[97] The respondents argue that there is little in the record or reasons that would justify looking behind the inspectors' approval of the account. We disagree. Having concluded that the inspectors had not been properly instructed as to their roles and duties where some of the work covered by this account was not within the scope of the retainer approved by the inspectors and was contrary to the wishes of the inspectors, the registrar was entitled to look behind their approval. Because Page's dockets had been destroyed, the registrar was unable to breakdown the charges in the account into authorized and unauthorized work. He therefore relied on his experience and decided that $20,000 was a reasonable charge for the work carried out to complete the sale of the property. A detailed analysis was not possible due to the absence of dockets. Although there are entries for work that the registrar found was never authorized, on our review of the narrative of that account, the majority of the time billed for appears to have been spent on authorized tasks, including the sale of the Sally Creek lands and representing the estate in litigation related to that sale.

[98] The fact that the account was taxed creates a presumption that the amount of time spent on given tasks and the amount charged for this time were reasonable. Nothing in the record suggests that they were not. Indeed, the registrar took no issue with these amounts, but rather based his reduction on his finding that many of the tasks had not been authorized. Accepting these amounts to be reasonable and considering that the bulk of the work detailed in the first bill of costs was approved, the registrar's reduction to all of the Page accounts from a total of $206,547.22 to $20,000 to account for unauthorized work was, in our view, unreasonable. In our view, the value of the authorized work should be set at $100,000 inclusive of disbursements and GST. The bulk of the authorized work was encompassed in the first bill and, as a result, we would adjust the first bill, taxed at $120,813.38, and allow $100,000 inclusive of disbursements and GST.

ii) Second Bill: Lack of Inspector Approval Before Taxation

[99] As noted above, the second bill of costs was taxed on June 15, 2004 in the amount of $21,809. From the record, it appears that this bill was taxed without inspector approval and before the July 12, 2004 Superior Court order dispensing with this requirement. Given these facts, the registrar's finding that Page had a limited retainer, that most if not all of the work carried out by Page during the period covered by this account was contrary to the instructions of the inspectors, and that the accounts were unsupported by dockets, we see no basis to allow any amount for this bill. To the extent that a small portion of the work billed for in this account was approved, it has been included in the $100,000 we would allow for the first bill.

iii) The Third and Fourth Bills: Order Dispensing With Inspector Approval

[100] The final two bills of costs were taxed without having been signed by the inspectors as the Trustee had applied for and obtained an order dispensing with the need for inspector approval. The Trustee was entitled to bring such a motion. However, the affidavit filed in support of the order dispensing with inspector approval stated only that the order was required because, after being presented with the second bill of costs, "the inspectors refused to approve the same and gave no reasons." While it is correct that the inspectors did not respond to the Trustee's request to approve the second bill of costs, the Trustee was aware that the inspectors opposed Page's involvement in the arbitration. The affidavit did not disclose that opposition to the court.

[101] It would have been preferable for the registrar to address the fact that the accounts were taxed and that an order had been obtained dispensing with inspector approval. However, given the circumstances in which this order was obtained, the registrar's findings of fact with respect to most if not all of the work having been carried out without inspector approval, and the lack of dockets in support of these bills, the registrar was, in our view, entitled to look behind the findings of the previous taxation. Based on the record before him, the registrar was entitled to disallow these two bills in their entirety. To the extent that a small portion of the work in these bills was approved, it has been included in the $100,000 we would allow for the first bill.

iv) Issue Estoppel

[102] In its submissions, the respondent directed the court to correspondence between the Murphy Group's solicitor and Page respecting the third and fourth bills of costs. In this correspondence the respondent submits that the appellants' solicitor, in effect, settled the amount of the last two bills of costs. As part of that settlement, Page reduced the amount of these two accounts by $25,056. In exchange, the Murphy Group agreed not to challenge the taxation of these accounts at the s. 192(1)(i) hearing. The respondent argues that, in light of this settlement, the appellants were topped from challenging the appropriateness of these accounts at the s. 152(6) hearing.

[103] We disagree. The settlement was between the Murphy Group and Page. It allowed Page to have the last two bills of costs taxed without opposition from the Murphy Group in exchange for providing an affidavit acknowledging that he and the Trustee were aware that Page's participation in the arbitration was directly contrary to the inspectors' instructions. The settlement was thus based on the Murphy Group's position that the Trustee had instructed Page to perform the work in question, but that the Trustee had acted contrary to the instructions of the inspectors in doing so. Although the Murphy Group was aware of the taxation and, in a sense, participated through their agreement with Page, it was apparent to the parties that the Murphy Group would later be disputing the Trustee's authorization and considered the SRD hearing the appropriate forum to do so. In these circumstances, we see no conflict between this settlement, which allowed Page to have his bills of costs taxed, and the Murphy Group's later challenge to these

same fees at the SRD hearing, which sought to prevent the Trustee from claiming them as a proper disbursement of the estate.

3. Estate Trustee's Fees

[104] The commercial court judge varied the registrar's award regarding fees in two significant respects. First, she did not deduct the $23,200 in "questionable" dockets that the registrar disallowed. Second, she overturned the registrar's decision to make a further reduction in the Trustee's fees to $1. We address each in turn.

a. Questionable Dockets

[105] As noted, the registrar deducted $23,200 from the Trustee's claimed fees because of questionable dockets. He explained that the questionable dockets contained duplication and otherwise claimed for work which ought not to be compensated. He cited as an example the Trustee's claim to have spent 22 hours to put together a four page tender document from precedents. He found that the Trustee had failed to provide direct evidence to support any of the claimed work, and indicated his inclination to disallow them entirely. However, the Murphy Group requested that only $23,200 be disallowed as "it is clear that some work was done".

[106] The registrar's finding that $23,200 of the Trustee's claimed fees were based on "questionable dockets" was largely one of fact. The commercial court judge could not interfere with the disallowance of these fees without first finding that he had erred in making that finding of fact. However, she gave no reason for refusing to accept the

registrar's disallowance of this amount. The registrar's disallowance of $23,200 for fees based on "questionable dockets" must be restored.

[107] This results in a net balance of claimed fees of $64,464.44 rather than the $87,664.44 used by the commercial court judge in her calculations.

b. Reduction of the Trustee's Fees to $1

[108] The commercial court judge recognized that the registrar's decision to reduce the Trustee's fees for misconduct in the exercise of his statutory powers was a discretionary decision. She found that the registrar committed errors of principle in exercising that discretion. Specifically, she found that the registrar had departed from a 50 per cent benchmark established by jurisprudence, that he had taken a punitive approach to the reductions, that he made factual determinations beyond his jurisdiction, that he mischaracterized the Murphy Group's participation in the arbitration and that he had "double counted" reductions already factored into the Trustee's fees.

[109] We agree that the registrar committed certain errors of principle that entitled the commercial court judge to vary his decision. However, we conclude also that the commercial court judge herself committed errors of principle that affected her calculation of the appropriate fees.

i) Factors to be Considered

[110] Before analyzing the decisions below, we note that the general principles to be considered in determining a trustee's fees were described by Henry J. in *Hess (Re)* (1997), 23 C.B.R. (N.S.) 77 (Ont. S.C.), and recapitulated by Lax J. in *Nelson (Re)* (2006), 24 C.B.R. (5th) 40 (Ont S.C.), at para. 21 as follows:

> a) to allow the trustee a fair compensation for his services;
> b) to prevent unjustifiable payments for fees to the detriment of the estate and the creditors; and
> c) to encourage, rather than to discourage, efficient, conscientious administration of the bankrupt estate for the benefit of the creditors and, so far as the public is concerned, in the interests of the proper carrying out of the principles and objectives of the [*BIA*].

[111] We read this passage together with s. 152 of the *BIA* as allowing the registrar a wide discretion to set the appropriate amount of a trustee's fees. There is no dispute that this includes the authority to reduce a trustee's fees for specific acts of misconduct that have cost the estate quantifiable amounts. This ensures that the trustee will not receive "unjustifiable payments for fees to the detriment of the estate and the creditors." In our view, it is also within the jurisdiction of the registrar to reduce a trustee's fees further in appropriate cases. This further reduction of a trustee's fees advances the third principle set out in *Nelson*.

[112] Although consideration of the public interest in the proper carrying out of the principles and objectives of the *BIA* is a valid objective of such reductions, it is not the role of the registrar to punish trustees for misconduct. Rather, the reduction is made in

recognition of the fact that, through his misconduct, the trustee has not acted in a way that merits collection of his fees in their full amount. In such situations, for the court to allow the trustee his fees in their entirety would be to endorse his conduct. A further reduction also helps uphold the principles and objectives of the *BIA* by expressing the court's displeasure with the conduct in question: see *Nelson* at para. 23.

v) The 50 per cent Benchmark

[113] The commercial court judge erred in ruling that the cases establish a "benchmark" of 50 per cent as the upper limit by which a trustee's fees can be reduced. It is true that in the few previous cases on point the trustee's fees have not been reduced by more than half because of misconduct and mismanagement. However, bankrupt estates differ widely in size and complexity and the range of potential trustee misconduct is simply too wide to make the adoption of such a rigid standard sensible. The size of the estates and the quantum of trustee fees in the previous cases were much smaller. A 50 per cent reduction in fees in a small estate may not amount to much, but in a large estate its financial impact will be greater.

[114] Rather than introducing a benchmark, we consider it sufficient to keep in mind the three established general principles guiding the fixing of a trustee's fees described in *Hess* and *Nelson*.

vi) Punitive Sanction

[115] We agree with the commercial court judge that the registrar lapsed into a punitive approach. For example, his reference to the criminal law concepts of "the elements of both specific deterrence and general deterrence" suggests that the registrar viewed this further reduction in fees as being akin to a criminal sanction. Combined with the extreme nature of the reduction, this suggests that his aim was punitive and not geared toward a balancing of the factors outlined in *Nelson*. Although the reference to the public's interest in the principles and objectives of the *BIA* is quite similar to criminal concepts of deterrence and denunciation, the analysis is nonetheless distinct in that its primary goal is to ensure just and adequate compensation for the work done by the Trustee.

vii) The Registrar's Jurisdiction and Collateral Attacks

[116] We do not agree that the registrar exceeded his jurisdiction by revisiting questions that had already been determined by professional regulatory bodies acting on the Murphy Group's complaints. In ruling as she did, the commercial court judge appears to have had in mind the principle that it is an abuse of process to re-litigate an issue already determined in another forum. The principle, however, has exceptions as Arbour J. explained in *Toronto (City) v. CUPE, Local 79*, [2003] 3 S.C.R. 77. At para. 52 of her reasons, Arbour J. set out three instances where re-litigation is permissible because it enhances rather than detracts from the integrity of the judicial system. These are:

i. when the first proceeding is tainted by fraud or dishonesty;

ii. when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or

iii. when fairness dictates that the original result should not be binding in the new context.

[117] The registrar found that the earlier findings of the professional bodies had been obtained by dishonesty and that the Trustee had contradicted his statements to those bodies in his testimony at the SRD hearing. Therefore, he was not bound by the findings made by the professional bodies and it was open to him to reach different conclusions on the different evidence that was before him. The commercial court judge could not therefore interfere with the registrar's conclusions without first finding that he had erred in concluding that the Trustee had lied to the professional regulatory bodies. She did not make such a finding and so erred by setting aside the registrar's conclusions.

viii) Coercion of the Murphy Group

[118] We disagree with the commercial court judge's conclusion that the Trustee's coercion of the Murphy Group into arbitration and his participation in the arbitration should not be viewed as misconduct. That conclusion was based principally on the fact that the Murphy Group had counsel throughout and the arbitrator had ruled that the Trustee should participate in the arbitration. The record clearly supports the registrar's finding that the Trustee abused his statutory authority by allowing Page to threaten to disallow the Murphy Group's claims despite believing them to be valid and, in fact, having already approved them. The threat was an admitted tactical ploy to persuade the Murphy group to agree to arbitration. It is reasonable to assume that legal counsel

ensured that the Murphy Group appreciated it would bear the burden of proof if the threat was carried out. The registrar found, and the record establishes, that the Trustee and his counsel were intent on participating in the arbitration from the outset; that they did so with full knowledge that they were proceeding against the wishes of the inspectors; that they executed the arbitration agreement; that they opposed the motion of the Murphy Group that the Trustee not participate; that "Page was successful in obtaining a ruling" that he participate; and that Page's participation far exceeded the scope of what was required by the arbitrator's ruling. The commercial court judge had no basis for overturning the registrar's findings of fact on this issue.

ix) Double Counting

[119] We do agree with the commercial court judge that the registrar erred by "double counting" certain instances of misconduct of the Trustee. The clearest examples of this are the Trustee's failure to properly invest the sale proceeds and his failure to collect the Farm Show receivable. The registrar reduced the Trustee's fees by the amounts lost to the Estate as a result of these failings and then cited them as examples of misconduct that warranted further reduction of his fees.

[120] In any event, double counting and the commercial court judge's other criticisms of the findings of misconduct by the registrar are not of great consequence in this case. In the final analysis, the commercial court judge did conclude that "the Registrar quite properly made sufficient other findings of misconduct on the part of the Trustee to justify reducing the Trustee's fees on account of these failings". An example of serious

additional misconduct found by the registrar is that the Trustee had threatened Murphy by telling him that he was surprised that his solicitor had not taken him aside and explained what happens to creditors who oppose trustees. This misconduct did not result in quantifiable detriment to the estate, but strikes at the core of the credibility and integrity of the bankruptcy process. The commercial court judge was correct to find that the registrar had made sufficient other findings of misconduct to justify reducing the Trustee's fees further.

[121] Although she concluded that the registrar had made such findings, the commercial court judge made no further reduction. After so concluding, it was not open to her to conclude that the registrar erred in making further reductions for this additional misconduct.

x) Appropriate Further Reduction

[122] Given that both the registrar and the commercial court judge committed errors in principle, it falls to us to determine the amount of the further reduction.

[123] Determining fair compensation for the Trustee's services must surely begin with the quantum of fees legitimately claimed. On the findings of the registrar, $69,000 and $23,200 of the Trustee's claimed fees were either entirely unsupported or inadequately supported by dockets. These amounts should not be regarded as representing legitimate fees in the subsequent calculations. Hence, the starting point for measuring the impact of the specific reductions made to the Trustee's fees, the amount of fees legitimately recorded, is $147,800, not the figure of $240,000 used by the commercial court judge.

[124] We note, as the commercial court judge pointed out, that the Trustee did complete the administration of the estate, successfully selling the estate's major asset and achieving a significant recovery for the unsecured creditors. Additional fees would have been properly incurred had the Trustee taken the steps suggested by the registrar, such as applying to the court to proceed without the inspectors' approval or having the dispute between the Murphy and Rodgers Groups determined under s. 135(5) of the *BIA*. The fees that would have been earned for the proper administration of this estate with its warring creditors are an important factor in determining the Trustee's fees.

[125] In preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that has cost the estate quantifiable amounts. The specific reductions to the Trustee's fees for particular instances of misconduct total $83,335.56, leaving the Trustee with a net claim for fees of $64,464.44 to which the further reduction must be applied. In considering a further reduction, the court should bear in mind the disbursements properly disallowed, for which the Trustee will be personally responsible. These total $134,276.63.

[126] A pivotal factor to consider in applying a further reduction in this case is the degree and extent of the Trustee's misconduct as described by the registrar, and the harm he caused to the Estate, the Murphy Group, and the integrity of the bankruptcy process in general.

[127] Finally, we keep in mind that the discretion to reduce fees is that of the registrar and we attempt to reflect the decision he would have made had he acted on the proper principles. He considered that a reduction was required.

[128] We would make a further reduction of $15,000 and fix the Trustee's fees in the amount of $49,464.44. This reduction is a considerable amount of money from any perspective and a heavy burden on this Trustee, who is already encumbered by disbursements for which he is quite rightly not being reimbursed. In the circumstances of this case, a reduction of $15,000 ensures that the Trustee will not be compensated for his misconduct, upholds the principles of the bankruptcy system, and communicates the court's displeasure with his actions while recognizing that an estate of substantial value was administered.

4. Costs of the SRD Hearing

[129] The appellants submit that the commercial court judge erred in setting aside the registrar's award of solicitor and client costs against the Trustee personally. This raises two issues: whether the Trustee ought to be entitled to recover costs from the estate and the appropriate scale of such costs.

a. Reimbursement from the Estate

[130] The registrar determined that the Trustee should not be able to recover the costs awarded to the appellants from the estate. He referenced certain conduct by the Trustee throughout the course of the hearing which, in his view, was inappropriate given the Trustee's role as an officer of the court and which lengthened the proceeding. In so

doing, he referred to the Trustee's "scorched earth" approach and made the following finding:

> [T]he Trustee brought such an approach to bear at the taxation hearing in the misguided belief that it would be safeguarded from any direct costs for such an approach, and that cannot be countenanced. I find that the evidence to support my inference of misconduct in the conducting of the taxation hearing by the Trustee may be found in a recollection of the attempts made by [the Trustee] on his cross-examination to avoid admission of even the most painfully obvious truths about insolvency and estate administration. Those alone increased the costs of the hearing, and are indicative of a darker agendum of the Trustee in respect of [the appellants].

[131] The registrar went on to find that it "would be manifestly unfair to saddle any creditors with the costs incurred in this matter by the objecting creditors. Given the fact that the [appellants are] the single largest creditor, to indemnify the Trustee would be to do so, to the extent of some 81 per cent, with [the appellants'] own money."

[132] The commercial court judge set aside the registrar's decision on this issue on the basis that the inference drawn by the registrar to the effect that the Trustee employed a "scorched earth" approach at the SRD hearing was not available on the record before him. In her view, the registrar was, in effect, re-punishing the Trustee for his handling of the estate. She saw no reason to depart from the presumptive statutory right of the Trustee to be indemnified out of the estate.

[133] The respondent submits that the commercial court judge was correct and that the registrar was in fact re-punishing the Trustee. Further, the statutory presumption of indemnification should only be displaced when the Trustee is guilty of misconduct in bringing the proceeding itself. In the present case, the Trustee could not be faulted for

being involved in the SRD hearing as he was required, by statute, to bring his accounts before the court for approval.

[134] The appellants submit that the registrar took note of the statutory presumption and recognized that he ought not to punish the Trustee twice for the same misconduct. In the appellants' submission, the commercial court judge erred in overturning the registrar. There was ample basis for the registrar's finding that the Trustee adopted a "scorched earth" policy at the SRD hearing. In addition, having found that the Trustee had failed in its duty as an officer of the court and extended the length of the SRD hearing by his conduct, the registrar was justified in exercising his discretion to order that the Trustee not be indemnified by the estate for the costs awarded against him.

[135] In our view, the registrar's inference that the Trustee employed a scorched earth approach at the SRD hearing was available on this record and ought not to have been set aside as "unsupportable" by the commercial court judge. Further, the registrar was alive to the danger of re-punishing the Trustee for his handling of the estate. As we read his reasons, the registrar's decision is based on two different but related factors.

[136] First, the registrar determined that the Trustee's inappropriate conduct was "directed at or against" the appellants and that this "same mindset was present in the trustee's approach to the hearing". The Trustee acted in this way in the belief and expectation that the Murphy Group, principal beneficiaries of the estate, would ultimately bear the costs. A review of the Trustee's conduct at the hearing and a reading of the

transcript of the SRD hearing provide ample support for the registrar's finding in this regard.

[137] Second, the conduct of the Trustee at the hearing was far removed from his obligation, as an officer of the court, to make full and frank disclosure. At the hearing, he sought recovery of costs and fees that he knew had not been properly incurred and his unjustified denials at the hearing only served to lengthen the proceeding and increase the costs.

[138] We acknowledge that proceedings where the trustee is made personally liable for the payment of costs are rare and usually involve the bringing of unnecessary proceedings or bringing proceedings without authority: see *Revere Electric Inc. (Re)* (1993), 13 O.R. (3d) 637 (Ont. Ct. J. (Gen. Div.)) and *Greenstreet Management Inc. (Re)*, [2008] 41 C.B.R. (5th) 86 (Ont. S.C.). This stands to reason. In bringing necessary proceedings, the Trustee is simply carrying out his statutory duties and defending the interests of the estate. He should not therefore be held personally liable for costs, unless it is found that those proceedings were in fact contrary to the interests of the estate.

[139] In an SRD hearing, however, the trustee is in a peculiar position. The proceeding is required by statute but, to some extent, the trustee is advancing his own financial interests and not those of the estate. It can be, in some cases or with respect to some issues, an adversarial hearing between one or more creditors and the trustee. A consideration of whether to reimburse a trustee for the costs of such a hearing must take into account this dual nature of the SRD hearing. A trustee must not be punished for

simply carrying out a statutory duty, but in carrying out this duty he is still bound by his duty to the court and must not be permitted to use such a proceeding to advance his own interests at the cost of the estate and, ultimately, the creditors who oppose him.

[140] Although we conclude that the registrar's findings were supported in the record, the registrar ought, in our view, to have given appropriate weight to the fact that the hearing was mandated by the *BIA*. The *BIA* required that the Trustee prepare and submit an SRD and, when challenged, appear at the hearing to justify the disbursements and his fees.

[141] In a sense, the costs arising from the SRD hearing in this case can be viewed as falling into one of two categories. One category includes the costs that would of necessity arise from the hearing as mandated by the statute. The second category includes costs that arise from the part of the proceeding that the registrar found was unnecessary and improperly pursued by the Trustee in breach of his duty to the court, wherein the Trustee sought recovery of inappropriate fees and disbursements and acted in furtherance of his "scorched earth policy" against the appellants. Viewing the costs associated with the hearing in this way, the appropriate disposition is to permit the Trustee to be indemnified for the portion of the costs which arose out of necessity, but deny reimbursement for those costs incurred as a result of what the registrar termed the Trustee's "scorched earth policy" in pursuit of his own interests. In our view, such an approach will only be appropriate in exceptional cases. Indeed, it will be both unnecessary and undesirable for registrars to attempt to parse out the costs of SRD

hearings in this way in all but the most extreme cases. In the present case, however, the findings of misconduct by the Trustee are such that it would be unfair to the creditors to have to indemnify the Trustee for the whole of the costs award.

[142] How then should we determine the portion of the costs award made against the Trustee to be paid by the estate? This was a substantial estate and an SRD hearing would necessarily take time. It is impossible to determine this figure with precision. From our review of the proceedings it is fair to say that a substantial part of the hearing dealt with issues addressed in the normal course of an SRD hearing. As well, there was, to some extent, time taken up by the appellants during cross-examination pursuing issues on which they were unsuccessful and repeatedly returning to lines of questioning in a manner that reflected the obvious animosity of the appellants toward the Trustee and Page. Taking this as well as the findings of the registrar into account, we are of the view that 50 per cent of the costs of the SRD hearing can fairly be attributed to trustee misconduct. The other 50 per cent we would attribute to what we would term the statutorily provided component of the hearing. As a result, we would limit the Trustee's recovery from the estate of costs awarded against him to this latter 50 per cent.

b. The Scale of Costs

[143] The registrar awarded the appellants solicitor and client costs fixed in the amount of $181,789.81. On appeal, the commercial court judge set aside the award, substituting an award of party and party costs for a portion of the proceeding fixed at $90,000.

[144] The appellants submit that the commercial court judge should not have interfered with the scale of costs. Discretionary cost awards ought not to be lightly interfered with and, in their view, there was ample basis for the award in this case. The registrar found that the Trustee had lied, had misled the court and had failed to fulfill his duties as a trustee. Further, the conduct of the Trustee both before and during the SRD hearing increased the cost and length of the proceeding.

[145] The appellants argue that, as an officer of the court, the Trustee has an absolute duty to make full and frank disclosure of what occurred in the administration of the estate. He clearly did not do so, preferring to claim inappropriate amounts, prevaricate in his testimony, lie and mislead the court. As a result, an award of solicitor and client costs was warranted.

[146] The appellants also submit that the registrar was correct in finding that awarding solicitor and client costs advances an important policy goal, that of encouraging creditor participation in the bankruptcy. As the registrar noted, had the appellants' allegations concerning trustee misconduct not been proven, the appellants may well have had to pay solicitor and client costs. In these circumstances, the reasonable expectation of both parties should be that, if the allegations are proven, the appellants would receive solicitor and client costs just as they would be required to pay such costs if they were unable to substantiate the allegations made.

[147] The respondent submits that the commercial court judge was correct in setting aside the award. As found by the commercial court judge, the registrar erred in his

analysis of the costs issue. He made no reference to the *Courts of Justice Act*, the *Rules of Civil Procedure* and the well-established case law respecting the award of solicitor and client costs. Nor did the registrar consider the established principle that solicitor and client costs ought to be awarded only where there has been "reprehensible, scandalous or outrageous conduct": see *Young v. Young*, [1993] 4 S.C.R. 3. Further, the respondent argues that s. 197(2) of the *BIA* creates a statutory presumption that costs will be on a party and party scale. Nothing in the conduct of the Trustee warrants displacing this statutory presumption.

[148] We agree, in part, with the appellant. We note that s. 197 of the *BIA* grants a very broad discretion on the court to award costs. Section 197(1) states that, subject to the *BIA* and the *General Rules*, "the costs of and incidental to any proceedings in court under this Act are in the discretion of the court." Subsections (2) and (3) create presumptions for party and party costs to be paid from the estate unless the court orders otherwise. In our view, this wide discretion allows the court to balance the myriad factors and diverse interests at play in bankruptcy proceedings.

[149] We agree with the respondents that, in exercising this discretion, registrars and courts have often been guided by the *Rules of Civil Procedure*, the *Courts of Justice Act* and the case law flowing from them. Rule 3 of the *General Rules* states: "In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules." Provincial rules of procedure thus perform a gap filling

function in the interpretation and application of the *General Rules*. With respect to costs, reference to the *Rules of Civil Procedure* has been made in determining whether an appellant should post security for costs of an appeal (*Towers Marts & Properties Ltd. (Re)*, [1968] 1 O.R. 605 (S.C.)) and the effect of an offer to settle on a costs award (*Baltman v. Coopers & Lybrand Ltd.* (1997), 47 C.B.R. (3d) 121 (Ont. Ct. J. (Gen. Div.)).

[150] In the present case, although reference to the *Rules of Civil Procedure* or *Courts of Justice Act* may have been helpful, the Supreme Court's clear direction in *Young v. Young* governs. As noted above, this case held that solicitor and client costs are to be awarded only in the rarest of occasions. Although not decided in the bankruptcy context, that case laid out broad principles that we would apply to the present case.

[151] In our view, the registrar's findings of misconduct by the Trustee were sufficient to meet the threshold established in *Young v. Young*. As noted, although the SRD hearing was, in essence, a dispute over money between the principal creditor and the Trustee, this does not diminish the duties that the court and the estate's creditors were owed by the Trustee, nor the high standards of conduct that both were entitled to expect of him. The registrar's findings with respect to the Trustee's conduct were very critical. These findings, and the registrar's exercise of discretion with respect to costs, were entitled to deference by the commercial court judge. His finding that, given his conduct, the Trustee ought to pay solicitor and client costs should not have been interfered with.

[152] In making his costs award and deciding not to allow the Trustee to be indemnified, the registrar noted the injustice of awarding solicitor and client costs against

the Trustee, only to have those costs reimbursed to him from the estate. To do so would, ultimately, sanction only creditors other than the Murphy Group for the Trustee's conduct and would see the Murphy Group, as the major creditors, funding the bulk of the Trustee's costs out of its share of the estate. On the other hand, half of the expenses incurred at the hearing were necessary and would have been paid from the estate in the normal course. In order to balance these factors, we find that the 50 per cent of the costs to be paid by the Trustee are to be calculated on a solicitor and client basis, whereas the 50 per cent of the costs for which he is to be reimbursed are to be calculated on a party and party basis.

[153] In reaching this conclusion we have considered the registrar's comment that the policy consideration of encouraging creditor participation in bankruptcy proceedings justifies the award of costs on a solicitor and client scale. Assuming without deciding that this could potentially be a valid reason to award costs on a solicitor and client scale, we do not believe that this consideration applies in a case such as this one. Given the Murphy Group's financial interests in the estate, they had ample incentive to oppose the Trustee at the SRD hearing. As the registrar noted, this opposition resulted in a net benefit to the estate which ultimately benefitted the Murphy Group as the major creditor.

[154] The registrar calculated solicitor and client costs at $181,789.81. The commercial court judge calculated party and party costs at $141,718.75. We would therefore award the Murphy Group $90,894.91 in costs for which the Trustee will not be reimbursed from the estate, and $70,859.38 in costs for which the Trustee will be reimbursed from the

estate. The end result is that the Murphy Group is awarded a total of $161,754.29, a substantial amount that reflects their success at the SRD, holds the Trustee accountable for his behavior at that hearing, and ensures that the estate will pay only those costs that would normally be associated with an SRD hearing.

[155] We would reiterate that this admittedly unusual costs disposition is a product of the unusual facts of this case. The vast majority of cost awards arising from SRD hearings have and will continue to follow the statutory presumptions of party and party costs paid from the estate. However, the facts of this case dictate the need for a unique solution that balances the need to reimburse the Murphy Group, sanction the Trustee's conduct at the hearing, and protect the non-aligned creditors.

5. Costs before the Superior Court and the Court of Appeal

[156] The commercial court judge awarded costs of the hearing before her to the respondent fixed in the amount of $55,000. The appellants submit that this award should be reversed and, in addition, the respondent should be denied indemnification from the Estate.

[157] In our view, it can reasonably be said that the end result of the appeals before the commercial court judge and this court is a divided success. Although we have varied several findings of the commercial court judge, at the end of the day the Trustee is nonetheless in a better position than he had been after the registrar's decision at the SRD hearing. On balance, the result of the two appeals considered together is a mix of success for each party. In these circumstances we consider it appropriate that the parties bear

their own costs in both proceedings. The costs award of the commercial court judge of $60,000 to the Trustee is set aside and there shall be no costs awarded to either party for this appeal.

6. Reimbursement of the Trustee's Legal Costs From the Estate

[158] The commercial court judge's order awarding the Trustee $55,000 in costs against the Murphy Group provided that the Trustee be allowed to recover the balance of his costs from the Estate. The Trustee submits that the presumption that he is entitled to recover his costs of the appeal to the Superior Court and this court from the estate should be applied. The Murphy Group, however, submits that the Trustee should not be entitled to recover his costs from the estate as it would, despite our order that neither the Trustee nor the Murphy Group receive costs, mean that the Murphy Group as principal creditors of the estate will effectively pay approximately 80 per cent of those costs.

[159] In our view, the reasoning that led the court to require the Trustee to pay 50 per cent of the Murphy Group's costs personally applies to the recovery of his own costs from the Estate. Considering the registrar's findings of misconduct and our decision to award neither party costs, it is appropriate, in our view, that some of the costs incurred by the Trustee not be recovered from the estate. To do otherwise would be to penalize the creditors for the Trustee's misconduct.

[160] As to the portion that can be recovered, one might argue that, but for the misconduct, there would have been no appeals. This, however, must be balanced by the fact that the Trustee was fully entitled to bring the appeals and, as noted earlier, the

Trustee has, in some respects, been successful. As a result, we would apply the same 50 per cent measure and would allow the Trustee to recover from the estate 50 per cent of the costs he incurred before the Superior Court and this court.

CONCLUSION

[161] In conclusion, we would vary the commercial court judge's order to provide that:

(a) the Trustee's remuneration for the administration of the estate be fixed at $49,464.44;

(b) the appropriate disbursements to be attributed to the estate in respect of the legal accounts of Page, Arnold be fixed at $100,000, inclusive of disbursements and GST;

© the appellants receive one half of their party and party costs before the registrar, fixed at $70,859.38, to be paid from the estate;

(d) the appellants receive one half of their solicitor and client costs before the registrar, fixed at $90,894.91, to be paid by the Trustee personally;

(e) there be no order as to costs for the proceeding before the Superior Court or this court; and

(f) the respondent to be entitled to reimbursement from the estate of 50 per cent of his costs for the proceedings before the Superior Court and this court.

"R.G. Juriansz J.A."
"Paul Rouleau J.A."
"I agree D. O'Connor A.C.J.O."

RELEASED: May 03, 2010

TAB 16

1993 CarswellOnt 193
Ontario Court of Justice (General Division)

Canadian Imperial Bank of Commerce v. 433616 Ontario Inc.

1993 CarswellOnt 193, 17 C.B.R. (3d) 160, 38 A.C.W.S. (3d) 1086

CANADIAN IMPERIAL BANK OF COMMERCE v. 433616 ONTARIO INC., KIMINCO ACCEPTANCE CO. LTD. and COULTER FINANCIAL CORPORATION

McWilliam J.

Judgment: February 23, 1993
Docket: Doc. 13737/89

Counsel: *William J. Simpson, Q.C.*, for plaintiff.
James L. MacGillivray, for defendant.

***McWilliam J.*:**

1 The applicants are corporate and individual claimants whose proofs of claim have been disallowed by a trustee in bankruptcy. They seek an order pursuant to s. 135(4) of the *Bankruptcy Act* setting aside the notices of disallowance delivered by the trustee to them.

2 Section 135(4) provides:

> The disallowance referred to in subsection (2) is final and conclusive unless, within thirty days after the service or mailing of the notice or such further time as the court may on application made within the same thirty days allow, the claimant appeals to the court in accordance with the General Rules from the trustee's decision.

3 Section 135(2) provides:

> Where the trustee considers a claimant is not entitled to rank on the estate of the bankrupt, or is not entitled to rank for the full amount of his claim, or if directed by a resolution passed at any meeting of creditors or inspectors, he may disallow the claim in whole or in part, and in that case shall give to the claimant a notice of disallowance, and the notice shall contain the reasons for disallowance.

4 The claims of the corporate applicant (166404 Canada Inc.) and the individual claimant (Ron Miller) were disallowed by notice pursuant to s. 135(4) on the same day (January 5, 1990) and for identical reasons. These were:

> 1. 166404 Canada Inc. (or Ron Bell as the case may be) is not a creditor of Kiminco Acceptance Co. Ltd.
>
> 2. 166404 Canada Inc. (or Ron Bell, etc) is a creditor in a proposal filed by Mr. Glen L. Coulter. This proposal was approved by the creditors on November 24, 1989 and by the court on December 6, 1989. This claim is based upon the balance outstanding after applying anticipated dividends in the proposals. By acceptance of the proposal of Glen L. Coulter, the creditors have accepted the anticipated dividend as settlement of their claims. (Brackets added.)

5 In general terms the corporate applicant and its director Ron Miller say they had maintained a practice of providing funds to Glen Coulter who was the sole shareholder of Kiminco Acceptance Corporation for many years. The purpose of these advances was to invest in mortgages with Kiminco. Two of them were for almost $1,000,000. The applicants maintain that Coulter, acting for Kiminco, accepted the funds and gave back promissory notes. These notes were to be surrendered when an assignment of

mortgage was received or the funds were returned on demand. The surrender of notes was a "theoretical" obligation since it never happened (Miller, cross-examination, p. 139). Mr. Miller said in cross-examination (p. 15) this practice began in June, 1988. Before 1988 he had a dozen mortgage transactions with Mr. Coulter. There is no question that Coulter controlled Kiminco, and could bind that firm. The only issue is was he so dealing with Mr. Miller from June, 1988 onward.

6 On his cross-examination Mr. Miller said on April 30, 1991:

> • Mr. Simpson: Unless I'm missing something, are we looking at a proof of claim for Ron Miller Realty Ltd. that you're talking about?
>
> • Mr. MacGillivray: Yes.
>
> • Mr. Simpson: Well obviously there was another proof of claim. This was not, as I said, pursued. But there were other accepted claims in the Coulter bankruptcy for both Ron Miller and the numbered company. Isn't that correct?
>
> • THE WITNESS: Yes, we were assigned or we were designated as a Glen Coulter creditor in spite of our protests.
>
> **By Mr. Macgillivray:**
>
> • Question: Right.
>
> • Answer: So that we claimed against Glen Coulter at the time that he went bankrupt, as a creditor, to secure ourselves. At a later date we secured whatever the balance would have been against Kiminco as well. But I presume it was without prejudice.
>
> • Question: This was done by your lawyer?
>
> • Answer: Yes.
>
> • Question: Well did you claim in — well you did claim in the bankruptcy of Coulter for some of the same amounts that are being claimed against Kiminco. Right? You've got some out of Coulter and now you're looking for the balance against Kiminco. Is —
>
> • Answer: Right.
>
> • Question: — that basically it?
>
> • Answer: Right.

7 As early as September 6, 1989 the trustee wrote to Mr. Miller, and noted:

> We had to, to some extent, traced (sic) the deposits of your funds in certain instances and based upon this review advised that, based on cursory information, we could not directly establish the purchase of mortgages from your funds and that there were no mortgages administered or managed by Kiminco in your name.

8 In the Discovery of Eldon Caton, on behalf of the trustee, he said the criteria the trustee used to accept a person as a Kiminco creditor was "in most instances they were creditors that Kiminco already had records of on their own corporate books; for example, employees or stationary suppliers" (sic).

9 The discovery continues (p. 30, Q. 136):

> **By Mr. Simpson**
>
> • Question: I'm sorry?

> • Answer: An example would be employees, suppliers. And as a matter of fact that's generally, I think without exception, the entire undisputed claims that were admitted were from employees, suppliers.
>
> • Question: Is it your understanding that there were no investors who were considered to be Kiminco creditors?
>
> • Answer: That's my understanding, yes.

10 The trustee's position is that there is no evidence to support Mr. Miller's allegations that his money was to be put into mortgages; the notes Mr. Coulter gave are in his personal capacity, and no mortgage agreements were found between either Coulter or Kiminco and Mr. Miller and/or his company 166404 Canada Inc.; and, finally, employees and members of the Coulter companies do not recall Mr. Miller providing funds to Mr. Coulter for mortgages. Mr. Miller confirms he dealt only with Coulter. The purpose of the advances was for short-term investments by Mr. Coulter, not mortgages. Consequently when Mr. Miller claimed in both bankruptcies, i.e. Glen Coulter personally, and Kiminco Acceptance the trustee decided that he could not claim in both. When Mr. Miller's claims were accepted in the Proposal of Glen Coulter, and the creditors generally approved that proposal, the trustee's original position was that he no longer had a claim for those same monies against Kiminco, that is for the balance of the funds he did not get in the personal bankruptcy. The following excerpt sets out another of the trustee's positions (p. 65, Q. 297):

> • Question: Now the thing that I'm a little concerned or a little confused about is that you seem to — it seemed to be significant to you that at all times the personal bank account of Mr. Coulter was in an overdraft position. Is that correct?
>
> • Answer: Yes.
>
> • Question: And why is that significant to you?
>
> • Answer: Well I understand that the special meaning of the word "trace" is that you can't trace trust funds past an overdrawn bank account.

11 Mr. Caton did agree, however, that it would be possible to "see what cheques were written following the infusion of money into ... Coulter's personal bank account?"

12 Mr. Simpson objects to evidence from the cross-examination of Mr. Coulter in another action being considered in these proceedings. The pleadings in that action filed herein convince me that the issues are so closely intertwined that I ought to allow the trustee of use this evidence. In any event, the only point I take from it is that Mr. Coulter says that the funds were not advanced to him for mortgage investments.

13 By December 2, 1991 Mr. MacGillivray wrote to Mr. Simpson and said:

> We will not maintain our position taken on Mr. Caton's examination that once the proposal in the Glen Coulter bankruptcy was accepted it extinguished the claim of Ron Miller and his numbered company insofar as it related to any claim against Kiminco Acceptance.

14 Nevertheless earlier in his letter Mr. MacGillivray said at paragraph 6:

> It is the trustee's position that investors of Kiminco do not have claims provable in the proposal of Kiminco on account of their investment. The acceptance of the proposals of Kiminco, C.F.C., Glen Coulter, G.I.C. Investments and of the Compromise Distribution Scheme formed a court approved contract binding on the Kiminco investors.

15 It seems there were three other persons left holding promissory notes like Mr. Miller, and they were all categorized as coming within the personal bankruptcy of Glen Coulter.

Law

16 Under s. 135(1) of the *Bankruptcy Act* the trustee is under a duty to examined every proof of claim and the grounds for it. The trustee may require further evidence in support of the proof of claim. Such evidence must be satisfactory that the debt is a valid debt since not even a judgment recovered against the bankrupt, or covenant given or account stated by him deprives the trustee of his right to make such enquiries. He is entitled to go behind such forms to get at the truth; it is unnecessary for him to show fraud or collusion: *Re Van Laun; Ex Parte Chatterton*, [1907] 2 K.B. 23 (C.A.). The trustee must take into account the effect upon other creditors in exercising his discretion: *Re Cohen* (1956), 36 C.B.R. 21 (Alta. C.A.).

17 In *Bankruptcy and Insolvency Law of Canada*, Houlden and Morawetz, 3rd ed., G§69, 5-92 and 5-93, the authors say:

> It would seem that the onus should be on the claimant to prove his claim, and if he fails to do so on the balance of probabilities, the court should dismiss the appeal ... In disallowing a claim, a trustee should not act inequitably: *Re Waltson Properties Ltd. (No. 2)* (1977), 24 C.B.R. (N.S.) 212, affirmed 28 C.B.R. (N.S.) 269 which was affirmed (1979), 30 C.B.R. (N.S.) 112 (Ont. C.A.).
>
> A creditor is not restricted to filing only one proof of claim. He may file a second proof of claim if it does not deal with matters contained in the first proof which were dealt with on their merits: *Atlas Accept. Corp. v. Franklin* (1978), 27 C.B.R. (N.S.) 220 (Man. C.A.).

18 I have read all the transcripts filed, and the factums filed cover the main factual points emerging from the transcripts.

19 There does not appear to be any documentary evidence to support Mr. Miller's position, and the notes are clear and unambiguous in themselves. Mr. Coulter denies any such agreement. Kiminco investors generally signed mortgage participation agreements. The cheques signed over to Coulter were often third party cheques to Mr. Miller, and add nothing to prove the agreement. These were the es sential facts which the trustee had to weigh. I am unable to find the trustee acted inequitably in dismissing Mr. Miller's claim based on the claim that he was an investor in Kiminco. The trustee acted equitably and evenhanded since there were were no investors in Kiminco whose claims were adopted. In the circumstances the amendment of the claim is rendered moot in my view since there was no factual basis to claim the original excess. I hasten to add that all the issues raised in action 15701/90 are not rendered moot by this decision. In the result the motion under section 135(4) of the *Bankruptcy Act* is denied. If there is any basis on which costs should not follow the event, I can be spoken to. I may say the lis between the parties did not exhibit such ferocity as to explain why the applicant's notice of motion has one style of cause and the respondents' documents a completely different one. Undoubtedly such things are sent to puzzle bench and bar, and for which we must remain grateful, reminding us, as they must, of the humility to which we should more often aspire. Perhaps as a compromise, counsel can come up with the best elements of both before the order is issued!

Motion dismissed.

TAB 17

Ontario Superior Court of Justice
Karataglidis (Re)
Date: 2003-07-24
Docket: 31-268286

Durval Martins for Zissis Dragatsikis / Moving Party

Christos Papadopoulos for Bankrupt / Moving Party

Atoosa Mahdavian for George Sdrakas / Respondent

Deputy Registrar Nettie:

[1] This matter was heard before me on the eleven days set out above. It was a motion by Zissis Dragatsikis ("Zissis") to expunge the two proofs of claim submitted by the respondent, George Sdrakas ("George"), which had been allowed by the Trustee. These were the January 25, 1996, claim for $75,000.00, and the November 6, 1997, claim. I will refer to these as the S1 and S2 claims, respectively.

[2] There was also a motion by Konstantinos Karataglidis (the "Bankrupt") to expunge not only S1 and S2, but also for relief with respect to two claims submitted by Zissis which had been allowed by the Trustee. These were the December 21, 1992, claim in the amount of $85,000.00 and the November 6, 1997, claim. I will refer to these as the D1 and D2 claims, respectively. The relief sought with respect to Dl was to reduce its quantum to $80,000.00. The relief sought with respect to D2 was to expunge it.

[3] The present Trustee did not appear on the motion. The present Trustee is not the trustee which allowed S1, S2, Dl, and D2. The former trustee also did not appear on the motion.

[4] Part way through September 6, 2002, being the second day of what was then thought to be a three day motion, the parties settled the issues relating to S2, Dl, and D2. I made a consent Order that day expunging S2 and D2, without leave to re-file, I also made an Order dismissing the balance of the Bankrupt's motion, as against Zissis, in effect permitting Dl to stand unreduced at $85,000.00. The Order was on consent. This left only the motions by Zissis and the Bankrupt to expunge S1.

Issues

[5] Before turning to a consideration of the evidence and the facts, it is appropriate to consider the issues.

[6] The first issue is that of burden. Who has the burden on the motion, and what standard must be met in discharging that burden? All three counsel agreed, as do I, that the moving parties have the burden of proving that George does not have a provable claim in the bankruptcy. There was not, however, agreement as to the standard of discharging that burden.

[7] Counsel for George argues that the standard is one of beyond a reasonable doubt. Messrs. Martins and Papadopoulos argue that the standard is one of a balance of probabilities. Counsel directed me to three cases in support of their positions: *Browne, Re,* [1960] 2 All E.R. 625 (Eng. Ch. Div.); *Purdy, Re,* 1997 CarswellBC 2623 (B.C. S.C. [In Chambers]); and *Marsuba Holdings Ltd., Re,* 1998 CarswellBC 2792 (B.C. Master).

[8] *Browne* holds that the correct standard of proof is one of beyond a reasonable doubt. With respect, I do not agree, but find that *Marsuba Holdings Ltd.* correctly sets out the burden and standard of proof. *Marsuba Holdings Ltd.* recognizes, as do I, that while the higher standard of proof might exist in some cases, it is limited to the unusual circumstances such as in *Browne.* Although in the case at bar, there is an alleged similarity to *Browne,* that the passage of time allowed by the moving parties has caused the unavailability of documents, I do not find that allegation to have been proved. The allegation is that George could have obtained a copy of the missing cheque if the motion had been brought sooner. However, George's own evidence was that he asked his bank for a copy of the $60,000.00 cheque by which his loan was advanced, throughout the relevant time period, both before and after the motion was brought. The evidence suggested, and I find, that George could have done nothing different, even if the motion to expunge had been brought earlier. Accordingly, I find that, based on *Marsuba Holdings Ltd.,* the correct standard of proof to apply to the burden in the case at bar is that of a balance of probabilities.

[9] The other issue raised related to estoppel. George submits that in allowing him to join in the s. 38 proceedings, and waiting until after the litigation relating to the Greek property was concluded to move to expunge his proofs of claim, estoppel must serve to protect him. However, this argument would only apply to the motion by Zissis, as the Bankrupt was no part of the permitting of George to prove his claim, and join Zissis in the s. 38 proceeding. Additionally, it should be noted that s. 135(5) of the BIA does not impose a time limitation on a motion to expunge. In any event, for reasons which will become clear, I need not deal with this issue.

Facts and Analysis

[10] S1 was a proof of claim admitted by the then Trustee, submitted by George for $75,000.00. George alleges that the amount is the amount due at the date of bankruptcy, being December 4, 1992, for the principal balance of his $60,000.00 loan to the Bankrupt, plus interest or a bonus of $15,000.00. There is no real dispute by the Bankrupt, and little by Zissis, that George was owed $75,000.00 at the date of bankruptcy. The dispute is over who owed the money. George maintains in his affidavit evidence, which, as with most of the witnesses, was his evidence in chief, and on oral cross-examination, that he loaned the money to the Bankrupt, personally. The Bankrupt, and Zissis, argue that the loan was to the Bankrupt's company, and that the Bankrupt had no personal liability on the loan. Clearly, if the Bankrupt was personally liable on the debt to George, then the claim is properly admitted and ought not be expunged.

[11] The problem, as is, of course, so often the case in these types of matters, is that in reviewing the evidence, it is clear that all of the witnesses, with the notable exception of Mr. Stanoulis, have contradicted themselves, or given incredible testimony. Sometimes it has been over points which really do not matter, but, in any event, this goes to the witnesses' overall credibility. This was candidly admitted by Mr. Papadopoulos in his closing submissions. Understandably, the principals involved are operating under an imperfect knowledge of business law, and the English language. This, together with the huge personal import of the outcome of the matter, the amounts in question being considerable to the parties, is a recipe for contradiction and colouring of evidence.

[12] I have thoroughly reviewed all of the evidence, and there were nine days of oral testimony together with numerous affidavits, transcripts, and exhibits. I have also carefully reviewed and considered the demeanour of all of the witnesses and my assessment of their credibility. At the end of it, I am left with certain conclusions.

[13] Zissis has no knowledge as to whether or not S1 was a loan to the Bankrupt, and therefore properly allowed, or a loan to the Bankrupt's company, or an unwritten personal guarantee, and hence unenforceable, according to the *Statute of Frauds.* Zissis' position is that he permitted George to share the expenses of pursuing the Kastoria property, and continually asked George to evidence S1 by providing a copy of the cheque to the Bankrupt. Oddly enough, it seems that Zissis would have accepted the fact of the $15,000.00 bonus being due, if the cheque was produced for the principal advance of $60,000.00. I believe this is because, as Zissis testified, he believed George loaned

money to the Bankrupt, but wanted to see the evidence of it. As can be seen from Zissis' motion record, and his evidence on cross, he is of the view that this proceeding is about compelling George to evidence his claim. However, that is not the burden here. Zissis must prove, on the balance of probabilities, that S1 is not a provable claim. I find that he has not met this burden.

[14] Zissis has evidenced that he repeatedly asked George for a copy of the cheque. I accept his evidence to that effect, and find it to be bolstered by the repeated requests by George of his bank for a copy of the cheque. I conclude that George kept searching for the cheque because Zissis kept asking to see it. However, what of this? While it is true to say that George has failed to produce the cheque, and George says this is due to Zissis' delay in bringing the motion, which I reject, it is also true that no evidence was led by either Zissis or the Bankrupt to show that the cheque was not deposited or negotiated by the Bankrupt, as would have been the case if it was payable to him, as George repeatedly asserts it was. As no evidence was led by Zissis or the Bankrupt that evidence with respect to the Bankrupt's bank records was not available, unlike the evidence regarding George's account records, it is appropriate to, and I do, draw an adverse inference on the point. Asking for the cheque, and its failure to be produced, in the face of George's evidence, which I accept, that his loan was to the Bankrupt, and not to his company, is not evidence on a balance of probabilities that S1 is not a provable claim and should be expunged.

[15] I have considered that only three people know what the terms of the S1 loan were. They are: George, the Bankrupt, and George's brother-in-law, Galanis.

[16] George says the loan was to the Bankrupt, and I find his evidence to be credible. Even when I consider his evidence that the cheque might possibly be payable to the Bankrupt's company, I have to also consider both his testimony that the payee was irrelevant (which is entirely possible in commercial reality), and the Bankrupt's wildly inconsistent answers on cross wherein he denies he owes money on any of the four claims herein, yet has consented to Dl remaining unreduced. The Bankrupt was also quite incredible on the topic of his various companies, and from his testimony, it was all too clear that he was engaged in a scheme to constantly change the names of his businesses slightly and just ahead of his creditors. I reject the Bankrupt's evidence that the loan was not to him but to his company. Again, the Bankrupt offered no financial records of his own or any company to support this. Neither was any explanation offered for the absence of

those records. I, again, draw an adverse inference on the point, and find that the loan from George to the Bankrupt was to him personally, and not to his company.

[17] The third person which the evidence indicates was involved in the loan to the Bankrupt was Galanis. As I rejected the tender by Ms. Mahdavian of an affidavit from Galanis, as the opposing parties could not cross-examine him on it, we are left to wonder what he had to say on the terms of the S1 loan. Without his evidence, the point falls to be decided on the evidence of George and the Bankrupt, and having carefully reviewed it, and having had the benefit of observing the demeanour of both witnesses throughout, I can but conclude that the S1 loan was personal to the Bankrupt, or, at the very least, that Zissis and the Bankrupt have failed to tip the balance of probabilities to persuade me on that basis that the loan was otherwise. George, after all, does have the procedural advantage of the claim having been admitted, and being otherwise valid.

[18] Having found that both Zissis and the Bankrupt have failed to demonstrate on a balance of probabilities that S1 ought not to have been admitted and should, therefore, be expunged, I need not decide the issue of estoppel and delay raised by Ms. Mahdavian on behalf of her client.

Conclusion

[19] In conclusion, the motions by Zissis and the Bankrupt to expunge S1 are dismissed. As time was running short, I did not have any opportunity to hear from counsel on the topic of costs. If counsel cannot agree on costs, then the matter should be brought on before the Registrar.

Motion dismissed.

TAB 18

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Temple Consulting Group Ltd. v. Abakhan & Associates Inc.,* 2011 BCCA 540

Date: 20111212
Docket: CA039498

In Bankruptcy and Insolvency
In the Matter of the Bankruptcy of
Steven B. Friedland and Western Liquid Funding Inc.

Between:

Temple Consulting Group Ltd.

Appellant
(Claimant)

And

Abakhan & Associates Inc., in its capacity as Trustee of the Estates of Steven B. Friedland and Western Liquid Funding Inc.

Respondent
(Trustee)

Before: The Honourable Madam Justice Saunders
(In Chambers)

On appeal from: Supreme Court of British Columbia, November 10, 2011
(*Friedland (Re)*, 2011 BCSC 1557, Vancouver Registry B101439)

Oral Reasons for Judgment

Counsel for the Appellant: M.T. Kruger

No one appearing on behalf of the Respondent:

Place and Date of Hearing: Vancouver, British Columbia
December 12, 2011

Place and Date of Judgment: Vancouver, British Columbia
December 12, 2011

[1] **SAUNDERS J.A.**: Temple Consulting Group Ltd. (“Temple”) is seeking directions as to whether leave to appeal is required to appeal the order of Mr. Justice Pearlman pronounced on November 10, 2011. If I conclude that leave to appeal is required, they seek leave in addition. Counsel for the respondent does not oppose the appeal going forward – the only question is whether it does so with leave or as of right.

[2] The issue on the proposed appeal is the interpretation of s. 135(4) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and the *Bankruptcy and Insolvency General Rules*, C.R.C., c-368. Mr. Justice Pearlman concluded that a notice of appeal must be both filed and served within 30 days after service of a trustee’s notice of disallowance of claim. He held further that failure to comply with the requirement was not a procedural defect that could be cured by the Court, and that the defect operated to deprive the Court of jurisdiction to hear the appeal.

[3] The issues arise from a secured debt. Temple is the assignee of that debt in the amount of $500,000 claimed by Skeena Contracting Ltd. in the bankruptcy of Mr. Friedland. On April 29, 2011, Temple filed its proof of claim, claiming the secured debt plus interest. On July 18, 2011, the Trustee disallowed that security with the Notice of Disallowance communicated by way of an email. There was some correspondence exchanged. On August 17, 2011, counsel for Temple emailed copies of affidavits and the Notice of Application (Notice of Appeal from Trustee’s Disallowance of Claim) to counsel for the Trustee. The Notice of Appeal, however, was not filed until August 18, 2011, when it, along with the supporting affidavits, was filed. The copies of the filed materials were delivered to counsel for the Trustee by email on August 19, 2011.

[4] Thus, we have a very tight timeline and it turns out that the Notice of Appeal and supporting affidavits were filed one day late. Mr. Justice Pearlman concluded, as I have said, that late filing deprived him of jurisdiction to deal with the matter.

[5] Thus in the nearer look, the appeal concerns a limitation period problem, but the consequence is that a claim in bankruptcy of $500,000 is not allowed to be advanced further than it has been.

[6] The matter of leave to appeal is determined by s. 193 of the *Bankruptcy and Insolvency Act*:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (*a*) if the point at issue involves future rights;
>
> ...
>
> (*c*) if the property involved in the appeal exceeds in value ten thousand dollars.

[7] Counsel for Temple advances the proposition that leave is not required because it fits within both s.s. (a) and (c). In my view, this matter does not come within s.s. (a). The only aspect which could be a future right is simply the right to appeal. That is not, in my view, the type of right being discussed in s. 193 which deals with property and property rights. The question then is whether the proposed appeal comes within s.s. (c). On this there is a case to which Ms. Kruger refers, *Re Roman Catholic Episcopal Corp. of St. George's* , 2007 NLCA 17, a decision of Chief Justice Wells (in Chambers). It is somewhat close to this case. In paras. 24 and 25, Chief Justice Wells said:

> [24] With respect to the argument of the Trustee that it is entitled to appeal as a matter of right because the property involved exceeds in value $10,000.00, counsel for the four respondents argues that the decision of the bankruptcy judge is procedural only and does not involve any sum of money. He submits that the bankruptcy judge made no determination as to entitlement of any of the respondents and, therefore, the issue in the appeal is only as to procedure. He also argues that there was no "property in peril" in the decision of the bankruptcy judge, and for that reason also, paragraph (c) is inapplicable.
>
> [25] On examination of the actual words of paragraph (c), I am unable to accept either of the arguments of counsel for the four respondents. Admittedly there was no "property in peril" but, in my view, the statute does not require a prospective appellant to establish property to have been in peril in the decision intended to be appealed. In **Fallis et al. v. United Fuel Investments Ltd.**, [1962 CanLII 96 (SCC)], [1962] S.C.R. 771, the Court was considering a similar phrase in the **Winding-up Act**, R.S.C. 1952, c. 296. The phrase was: "An appeal, if the amount involved therein exceeds two

> thousand dollars, lies by leave of a judge …". There, the Court referred to and followed its approach in an earlier decision, **Orpen v. Roberts et al.**,[1925 CanLII 2 (SCC)], [1925] S.C.R. 364. The Court in **Orpen** was quoted as concluding that:
>
> > … the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss – and therefore the amount or value in controversy – exceeds $2,000.
> >
> > [Emphasis added]

[8] While that decision is not binding upon me, I consider the reasoning in it persuasive and, although not exactly the same point before me, is a guide to the decision that should be made here. It seems to me that this is a matter that comes within s. 193(c) in that the end result of all the jurisdictional wrangling and limitation period wrangling is to deprive Temple of its ability to pursue its claim which clearly exceeds $10,000.

[9] Accordingly, I conclude that leave to appeal is not required. If, however, I am in error in that conclusion, it seems to me that the interpretation of the section relied upon by Mr. Justice Pearlman is a viable appeal. It is an important question to the practice and to the community, and it comes within the criteria for leave to appeal. Had I not concluded that leave is not required, I would, in any event, have granted leave to appeal. All of which is to say, the appeal may proceed.

"The Honourable Madam Justice Saunders"

TAB 19

Date: 20070306
Docket: 07/07
Citation: 2007 NLCA 17

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

IN THE MATTER OF THE AMENDED PROPOSAL
OF THE ROMAN CATHOLIC EPISCOPAL CORPORATION
OF ST. GEORGE'S, AN INSOLVENT

BETWEEN:

ERNST & YOUNG INC., AS TRUSTEE
PURSUANT TO THE AMENDED PROPOSAL
OF THE ROMAN CATHOLIC EPISCOPAL
CORPORATION OF ST. GEORGE'S
INTENDED APPELLANT

AND:

JOHN DOE - 49 – GBS
INTENDED
FIRST RESPONDENT

AND:

JOHN DOE – 51 – GBS
INTENDED
SECOND RESPONDENT

AND:

JOHN DOE – 48 – GBS
INTENDED
THIRD RESPONDENT

AND:

JOHN DOE – 50 – GBS INTENDED
FOURTH RESPONDENT

Before: Wells, C.J.N.L.
Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division 20050111521

Application Heard: March 6, 2007
Decision Rendered: March 6, 2007
Reasons for Oral Decision Filed: March 14, 2007

Counsel for the Intended Appellant: John Stringer, Q.C. and Ms. Stacey O'Dea
Counsel for the Intended First, Second, Third and Fourth Respondents:
Mr. Harry Mugford

REASONS FOR ORAL DECISION

Wells, C.J.N.L.:

[1] The appellant (the Trustee) seeks to appeal a decision of a judge of the Trial Division sitting in bankruptcy. That decision reversed an earlier determination the Trustee made in the course of administering a proposal (the Proposal) made by the Roman Catholic Episcopal Corporation of St. George's (the Corporation) and approved by the bankruptcy judge pursuant to the provisions of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3 (the **Act**).

[2] The Trustee relies on section 193 of the **Act** which provides as follows:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;

> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[3] Rule 31(2) of the **Bankruptcy and Insolvency General Rules**, C.R.C. 1978, c. 368 (the **General Rules**) provides that:

> Where an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

The notice filed by the Trustee gives notice that the Trustee,

> … pursuant to paragraph 193(a)(c) or alternatively paragraph 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (BIA), appeals, and if necessary, seeks leave to appeal the decision of the Honourable Justice Faour delivered on the 18th day of January, 2007 …

Background Facts

[4] As a result of being held liable in the case of some claims, and having a total of some four dozen claims made against it, for damages arising out of alleged sexual abuse, the Corporation made a proposal pursuant to the **Act**. During the course of proceedings it was amended and, as amended, was accepted by the parties as the Proposal. It establishes four classes of creditors, as follows:

> Class 1: All Creditors of the Corporation known to the Corporation as of the Court Approval Date, whose Claims against the Corporation arose prior to the Filing Date as a result of the sexual abuse of such Creditor by priests, employees, or agents of the Corporation or any other person where the Corporation is either directly or vicariously liable for such Claims;
>
> Class 2: All regular trade creditors, Preferred Creditors, Crown Claim Creditors and Secured Creditors of the Corporation;
>
> Class 3: All Creditors of the Corporation [agreeing] to postpone their Claims to the Claims of the Class 1, Class 2 and Class 4 Creditors …
>
> Class 4: All Unknown Creditors who the Corporation becomes aware of after the Court Approval Date whose Claims against the Corporation arose prior to the Filing Date as a result of the sexual abuse of such Creditor by priests, employees or agent of the Corporation or any other person where the Corporation is either directly or vicariously liable for such Claims. Such Unknown Creditors shall file Proofs of Claim with the Trustee not later than two months following the last

> advertising date set out in the Unknown Creditor identification process described in Article 12.1 herein, otherwise, their claims shall be barred and they shall not be entitled to participate in any distributions hereunder …

The Proposal also provided that Class 4 creditors would not vote because, by definition, at the time of voting they would be unknown to the Corporation.

[5] The Proposal put in place an alternate dispute resolution process, (ADR Process) for determination of all claims based on sexual abuse in respect of which liability has not previously been determined. It also requires the realization of all the assets of the Corporation and immediate payment of all Class 2 creditors, after bankruptcy court approval of the Proposal. With the exception of an amount set aside for certain specified purposes of the Corporation, the Proposal provides that 95% of the remaining proceeds of asset realization be placed in a Class 1 creditors trust fund, and the remaining 5% in a Class 4 creditors trust fund. With respect to the Class 4 creditors trust fund it also provides that:

> … Should no claims be received from Class 4 Creditors pursuant to the Unknown Creditors identification process described in Article 12.1 herein, or should such Claims not exceed the Class 4 Creditors' Trust Fund, then any balance remaining in such Class 4 Creditors' Trust Fund shall be first transferred to the Class 1 Creditors' Trust Fund, to the limit of the Class 1 Creditor's Trust Fund Total, and second to fund any Class 3 Creditors' Claims, and third, to be returned to the Corporation.
>
> [Emphasis added]

[6] The "Unknown Creditor's identification process" referred to in the foregoing excerpt is that set out in the Proposal. It provides for identification of potential Class 4 creditors through a course of newspaper advertising over a stated period of time. It also established a date after which no further claims could be made (the Claims Bar Date). With respect to finality of potential claims, the Proposal provides that:

> The effect of this Proposal shall be to fully and forever satisfy and extinguish the Claims of all Creditors, as against the Corporation, upon performance of the proposal. Any Creditor who has not submitted a Proof of Claim pursuant to the terms hereof, with[in] the time limit set out herein, or whose Proof of Claim has been disallowed, and such Creditor has not appealed such disallowance, shall not be entitled to any distribution hereunder and such Creditor shall be forever barred from asserting such Claims. … Nothing in the Release or this Proposal shall impair the ability of a Class 1 or Class 4 Creditor to pursue an action against the

> Corporation, with leave of the Court and with the prior consent of the Corporation, to obtain a final money judgement [sic] in respect of damages for which the Corporation is liable but no such judgement [sic] shall alter the entitlement of any Class 1 or Class 4 Creditor to payment in respect [of] his Claim under this Proposal. It is acknowledged that for Class 1 Creditors the amount of such damages may not equal the amount reflected in Schedule "A" hereto.
>
> [Emphasis added]

[7] The Proposal was approved at a meeting of all identified creditors. Of the Class 1 creditors 42, representing claims of more than $14,000,000.00, voted in favour and one creditor, representing a claim of $2,500,000.00, voted against it. One hundred percent of the Class 2 and Class 3 creditors voted in favour of the Proposal. The Proposal was approved by the bankruptcy judge.

[8] All parties are agreed that the Claims Bar Date is March 15, 2006. The Trustee received proofs of claim from two of the four respondents on March 29, 2006, one other on April 26, 2006 and the fourth on May 5, 2006. Each of the four claimed $500,000.00 damages for alleged sexual abuse of them by a priest. The Trustee rejected all four because they had not been presented by the Claims Bar Date. The four respondents appealed to the bankruptcy judge.

Decision of the bankruptcy judge now sought to be appealed

[9] The bankruptcy judge noted the authority conferred by subsection 135(4) of the **Act** "to deal with the actions of the trustee". He also noted the authority conferred by section 37 "to confirm, reverse or modify the act or decision complained of". With respect to the manner in which he should exercise his jurisdiction, the bankruptcy judge decided:

> [20] Whether I should view this as an appeal where my task would be to determine whether the trustee made an error of law in disallowing the claims, or approve a late claim *nunc pro tunc*, or with retroactive effect, the effect is the same. Either the claims may be made, or they were out of time. I prefer the approach which would permit me to deal with the substantive issue of whether the claims ought to be considered rather than rule on whether the trustee has made an error at law. My preference is to take the approach that I should not let the procedures chosen by the applicants dictate the outcome of the proceeding, but deal with the substantive effect of filing the claims after the claims bar date. In taking this approach it may be necessary to consider that the application to set aside the trustee's decision is in reality an application to give leave *nunc pro tunc* to the applicants to file their claims after the deadline. I'm satisfied that whether

> or not I find an error of law I can deal with the substance of whether it's appropriate to permit these claims to be made rather than focus this proceeding on whether there was an error of law in the decision to disallow.

However, later in his reasons, he also observed that:

> [50] I do want to say that I do not believe the trustee could have acted differently. The trustee was obligated to follow the terms of the proposal. The proposal created a deadline and gave him no discretion to vary it. The Court in its role of supervision of the process can authorize a variation of these terms.

[10] The bankruptcy judge stated that he had to "consider two approaches taken in Canada on the question of delay in these circumstances". He identified one approach as being that approved by the Alberta Court of Appeal in **Enron Canada Corp. v. National-Oilwell Canada Ltd.** (2000), 193 D.L.R. (4th) 314, 2000 ABCA 285 (referred to by the bankruptcy judge as **Re Blue Range Resources**). That decision set out four factors to be considered in deciding whether to allow late claims. They are: (1) if inadvertence is involved, did the claimant act in good faith; (2) any relevant prejudice that might be caused by permitting the claim; (3) can any relevant prejudice be alleviated; and (4) if relevant prejudice cannot be alleviated, are there other factors which would permit late filing.

[11] The alternative approach identified by the bankruptcy judge is that which he described as being exemplified in the case of **Re Noma Co.**, [2004] O.J. No. 4914 (Sup. Ct. J.) (QL). That approach, the bankruptcy judge concluded, would "place emphasis on the contractual nature of the proposal and the inherent unfairness which would result if a late creditor could prejudice the delicate balance between the corporation and the creditors who were part of the arrangement."

[12] Ultimately, the bankruptcy judge chose the approach set out in **Enron Canada Corp**. On application, of the factors identified in that case, to the facts of this case, the bankruptcy judge decided the four additional claims should be accepted by the Trustee for determination through the ADR Process established under the Proposal, notwithstanding that they were filed after Claims Bar Date. It is that decision which the Trustee seeks to appeal.

[13] At the conclusion of the hearing I directed that an appeal as of right existed and, if I were wrong in so concluding, I would grant leave to appeal. I also indicated I would file a fuller expression of my reasons for so deciding. What follows are those reasons.

Is there an appeal as of right and, if not, should leave to appeal be granted?

[14] At the hearing before me, the Trustee argued that it was entitled to appeal as of right by virtue of paragraphs (a) and (c) of section 193. In the alternative, the Trustee argued that if it was not entitled to appeal as of right then leave should be granted pursuant to paragraph (e) of section 193. Counsel for the respondents argued that the decision of the bankruptcy judge was purely a procedural one and there was no basis for appeal, as of right, under any one of paragraphs (a) to (d) of section 193. He also argued that the bankruptcy judge made no error in following **Enron Canada Corp**., and exercising his discretion as he did. Therefore, he submitted, there was no basis for granting leave to appeal under paragraph (e) of section 193.

[15] There was one aspect of the interpretation of section 193 which the parties did not specifically address. While it cannot alter the substantive outcome of this application, I have to consider it because it impacts the approach to be taken in deciding the application. That aspect is the question of whether I should consider, first, whether there is a right of appeal or, first, whether leave should be granted. That also leads to a question of whether, if it is determined that there is an appeal as of right, the question of leave can or should also be determined. There are inconsistent, if not conflicting, decisions, one from this Court, relating to these matters.

[16] In **Kenco Developments Ltd. v. Miller Contracting Ltd.** (1984), 53 C.B.R. (N.S.) 297] (B.C.C.A.), Macdonald J.A. followed an earlier decision of that court (**Bank of British Columbia v. First National Investments Ltd.** (1980), 34 C.B.R. (N.S.) 282) in which an application for leave was dismissed "because the material showed that the subject of the proceedings was substantially in excess of $500 in value". Justice Macdonald then observed:

> If such is the case leave should not be given. Leave should only be given in any other case, that is, a case not falling within provisions *(a)* to *(d)* inclusive.

[17] In **Robert Davies McNeill v. Roe, Hoops & Wong** (1996), 39 C.B.R. (3rd) 147, 20 B.C.L.R. (3d) 274 (B.C.C.A.), Finch J.A., as he then was, held it was not necessary to decide whether leave to appeal should have been granted because there was an appeal as of right. He noted, but did not discuss, the above quoted conclusion of Macdonald J.A. in **Kenco Developments**.

[18] In **Nautical Data International Inc., Re** (2005)**,** 250 Nfld. & P.E.I.R. 201, 2005 NLCA 62, Welsh J.A., in an application for leave to appeal from a decision of a judge sitting in bankruptcy, decided:

> [8] For the reasons which follow, I have concluded that leave to appeal should be granted. Accordingly, it is unnecessary to consider the application of section 193(a) or (c).

[19] That is a markedly different approach than that taken by the judges of the British Columbia Court of Appeal. While I can understand the thinking leading to the conclusion of Macdonald J.A. in **Kenco Developments**, I can see nothing in the **Act** that would require that leave be given only "in a case not falling within the provisions of (a) to (d) inclusive". In my view, the approach of Welsh J.A., in **Nautical Data**, is an equally valid approach and not inconsistent with any provision of the statute.

[20] As a practical matter, as this case will demonstrate, it may be in the interest of all parties, and the courts, that a judge be able to take either approach and, in an appropriate case, also make a decision in the alternative. It may well be that an appeal court, upon hearing the fuller argument and considering the whole of the record during the course of an appeal, might conclude that the decision of an applications judge, that an appeal as of right existed, was not sound. In that circumstance, even though the facts of the case may be such that leave to appeal would have been given, the appeal could be dismissed on the basis that there was no jurisdiction to hear it, because there was no appeal as of right and leave had not been obtained. In **Re 518494 Ontario Limited (Petrochem)** (1985), 57 C.B.R. (N.S.) 272 (Ont. C.A.) Houlden J.A. decided:

> In this case the appellant combined its notice of appeal and application for leave as required by R. 49(2); but, instead of applying to a single judge for leave, it brought its application, for leave and its appeal before a full panel of this Court. This was wrong. The appellant should first have moved before a single judge for leave. It is only if leave to appeal is granted that the appellant can proceed with its appeal. …

[21] I can find nothing in the **Act** that would prevent a judge, hearing an application for leave combined with a notice of appeal as Rule 31(2) of the **General Rules** requires, from coming to a conclusion that an appeal exists as a matter of right under one or more of paragraphs (a) to (d) of section 193, while also making a decision, in the alternative, as to whether or not, in that particular case, leave ought to be granted. In fact, for the reason set out

above, it seems to me that that would be the most efficient way to approach such an application. Accordingly, I propose to deal with the application in this case in that manner.

Appeal as of right

[22] With respect to the argument of the Trustee that it has an appeal as of right under paragraph (a), I have not been satisfied that this appeal involves future rights. I come to that conclusion after considering the views expressed in **Re Kostiuk** (2006), 24 C.B.R. (5th) 160, 2006 BCCA 371, **McKay v. Cameron** 2002 ABCA 183; and **Elias v. Hutchinson** (1981), 37 C.B.R. (N.S.) 149, 121 D.L.R. (3d) 95 (Alta. C.A.). I would adopt the conclusion to be drawn from those cases that, "A present right exists presently; a future right is inchoate in that while it does not now exist, it may arise in the future". A current allegation on existing facts, although for some reason procedurally blocked, is an existing claim. It cannot be said to involve future rights. Future rights are rights which may come into existence in the future but are not yet in existence. While the claims of the four respondents have not yet been proven, they are allegations based on existing facts. The right to assert claims in respect of those allegations are rights that now exist. If it were otherwise they could not now be asserted. Therefore, no right of appeal can be asserted by the Trustee, pursuant to paragraph (a), as the point in issue does not involve future rights.

[23] During the hearing I raised with counsel the question of whether there might be a right to appeal under paragraph (b) on the basis that the decision is likely to affect claims of a similar nature in the bankruptcy proceedings, i.e. the claims of the Class 1 creditors. As counsel for the Trustee is not relying on paragraph (b), I will make no determination. I mention it simply to ensure that this decision is not taken to be an acknowledgement by the Court that, in the circumstances of this case, the Class 1 claims were considered not to be "cases of a similar nature in the bankruptcy proceedings."

[24] With respect to the argument of the Trustee that it is entitled to appeal as a matter of right because the property involved exceeds in value $10,000.00, counsel for the four respondents argues that the decision of the bankruptcy judge is procedural only and does not involve any sum of money. He submits that the bankruptcy judge made no determination as to entitlement of any of the respondents and, therefore, the issue in the appeal is only as to procedure. He also argues that there was no "property in peril"

in the decision of the bankruptcy judge, and for that reason also, paragraph (c) is inapplicable.

[25] On examination of the actual words of paragraph (c), I am unable to accept either of the arguments of counsel for the four respondents. Admittedly there was no "property in peril" but, in my view, the statute does not require a prospective appellant to establish property to have been in peril in the decision intended to be appealed. In **Fallis et al. v. United Fuel Investments Ltd.**, [1962] S.C.R. 771, the Court was considering a similar phrase in the **Winding-up Act**, R.S.C. 1952, c. 296. The phrase was: "An appeal, if the amount involved therein exceeds two thousand dollars, lies by leave of a judge …". There, the Court referred to and followed its approach in an earlier decision, **Orpen v. Roberts et al.**, [1925] S.C.R. 364. The Court in **Orpen** was quoted as concluding that:

> … the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss – and therefore the amount or value in controversy – exceeds $2,000.
>
> [Emphasis added]

[26] Finch J.A. applied the **Fallis** decision in interpreting section 193(c) in **McNeill**. He adopted the test underlined in the above excerpt from **Fallis**. He also noted that it had been adopted by other judges of the British Columbia Court of Appeal, and drew attention to the fact that section 2 of the **Act** defines "property" as including money.

[27] Relying on that definition, and applying the test adopted in **Fallis**, I can only conclude that "the loss which the refusal of a right of appeal would entail" in this case is clearly more than $10,000.00. From the point of view of Class 1 creditors, Class 3 creditors, and the Corporation, the loss is potentially $2,000,000.00. The Proposal, as noted above, provides that any funds in the Class 4 creditors trust fund not required for Class 4 creditors are to be available: first, for the Class 1 creditors; second, for the Class 3 creditors; and any residue for the Corporation. Unquestionably, refusal of a right of appeal potentially involves their interests in a significant sum of money. The Trustee is obligated to protect the interests of those parties to the Proposal, in the assets realized. In my view, therefore, the Trustee has a right of appeal pursuant to paragraph (c) of section 193.

Leave to appeal

[28] The Trustee has asked that, if I conclude that there is no appeal as a matter of right then, in the alternative, I grant leave to appeal. Having decided that there is an appeal as of right, it is not, strictly speaking, necessary for me to decide the question of leave. However, I have also to be concerned about efficient use of court time and efficient conclusion of proceedings for the benefit of all parties. There remains the possibility that the panel of this Court that ultimately hears the appeal may come to a conclusion that there is no appeal as a matter of right. For the reasons expressed above I consider it prudent, especially where the four respondents have so strongly contested the Trustee's claim to an appeal as of right, and where the issue of leave has been fully argued, that I consider, as an alternative, whether or not leave to appeal should be granted.

[29] As noted above, the bankruptcy judge recognized the possibility of two different approaches to his review of the decision of the Trustee. He chose not to consider whether the Trustee had made an error in law. In fact, he acknowledged that the Trustee had no alternative but to decide as he did. Instead, the bankruptcy judge chose to decide, himself, the substantive issue that was before the Trustee. He also recognized that there were two lines of authority with respect to the approach to be taken in deciding the substantive issue of whether to permit or reject the late claims of the four respondents. He chose to follow the approach **Enron Canada Corp**. instead of giving priority to the contractual nature of the Proposal and its overwhelming acceptance at a meeting of the creditors. In the process he wrote:

> [33] In considering all the arguments I reviewed the cases submitted. It is hard to find cases directly on point as the circumstances reflect different situations. First, virtually all of the cases reflect commercial creditors, and not the kind of creditors we have in this case. Second, none of the cases cited dealt with a proposal that contemplated unknown creditors and established a process for dealing with them as this one did.
>
> [Emphasis added]

[30] The circumstances referred to in the preceding paragraph satisfies me that my discretion, as to whether to grant or refuse leave to appeal, should be exercised in favour of granting the Trustee leave to appeal. Clearly, there is an arguable case on appeal. The issues which the bankruptcy judge identified as being before him are of importance to the parties in this case and appellate court guidance on the issues would be of benefit to bankruptcy

and insolvency practice generally. As well, as the bankruptcy judge noted, the circumstances of this case are different than the usual bankruptcy and insolvency cases, and none of the authorities he was considering dealt with a proposal that contemplated unknown creditors and established a process for dealing with them as this one did. In these circumstances, even if I am in error in concluding that there is an appeal as of right under paragraph (c) of section 193, I would grant leave to appeal under paragraph (e).

[31] Accordingly, it is ordered that:

(a) The Trustee is entitled to appeal as of right pursuant to paragraph 193(c);

(b) in the event that the court hearing the appeal concludes otherwise, leave to appeal is granted pursuant to paragraph 193(e); and

(c) costs are in the cause.

C.K. Wells, C.J.N.L.

TAB 20

Business Development Bank of Canada v. Pine Tree Resorts Inc. et al. [Indexed as: Business Development Bank of Canada v. Pine Tree Resorts Inc.]

Ontario Reports

Court of Appeal for Ontario,

Blair J.A. (in Chambers)

April 29, 2013

115 O.R. (3d) 617 | 2013 ONCA 282

Case Summary

Bankruptcy and insolvency — Practice and procedure — Appeals — Second mortgagee appealing order granting first mortgagee's application for appointment of receiver over mortgagor's assets — Second mortgagee wishing to exercise its rights under s. 22 of Mortgages Act — Leave to appeal required as appeal did not fall within s. 193(a) or s. 193(c) of Bankruptcy and Insolvency Act ("BIA") — Test for leave to appeal under s. 193(e) of BIA being whether proposed appeal raises issue of general importance to practice in bankruptcy/ insolvency matters or to administration of justice generally, is prima facie meritorious and would not unduly hinder progress of bankruptcy/insolvency proceedings — Proposed appeal not satisfying those criteria — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 — Mortgages Act, R.S.O. 1990, c. M.40, s. 22.

BDC held security for the money owed to it by Pine Tree by way of a first mortgage and general security agreements. Romspen was the second mortgagee. Both mortgages were in default. Romspen wished to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act* to put BDC's mortgage in good standing and take over the sale of the property. It proposed to pay all arrears of principal and interest, together with BDC's costs, expenses and outstanding realty taxes, but did not propose to repay HST arrears, which constituted a default under the BDC security documents. BDC applied successfully for the appointment of a receiver over the Pine Tree's assets. Pine Tree and Romspen sought to appeal that order. Romspen intended to argue that it was entitled to exercise its [page618] rights under s. 22 of the *Mortgages Act* as the arrears of HST did not jeopardize BDC's security because they were a subsequent encumbrance, and therefore it was not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22.

Held, leave to appeal should be denied.

Leave to appeal under s. 193(*e*) of the *Bankruptcy and Insolvency Act* was required. The appeal did not involve "future rights" within the meaning of s. 193(*a*). Section 193(*c*) did not apply as an order appointing a receiver did not bring into play the value of the property. In determining whether to grant leave to appeal under s. 193(*e*), the court will look to whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly

hinder the progress of the bankruptcy/ insolvency proceedings. In this case, the application judge's considerations were entitled to great deference and, in any event, were purely factual and case-specific and did not give rise to any matters of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole. Moreover, Romspen's s. 22 argument was not *prima facie* meritorious. Finally, all parties agreed that the property in question had to be sold, and there was a need for the sale to proceed expeditiously. Interfering with the timeliness of that process could potentially impact on the success of the sale. Leave to appeal should not be granted.

Baker (Re) (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580, 83 O.A.C. 351, 31 C.B.R. (3d) 184, 53 A.C.W.S. (3d) 933 (C.A., in Chambers); *Fiber Connections Inc. v. SVCM Capital Ltd*., [2005] O.J. No. 1845, 198 O.A.C. 27, 10 C.B.R. (5th) 201, 139 A.C.W.S. (3d) 10 (C.A., in Chambers); *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc*., [2003] O.J. No. 5761 (C.A., in Chambers); *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp*., [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.); *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395, 30 C.B.R. (3d) 90, 52 A.C.W.S. (3d) 957 (C.A., in Chambers), **consd**

Other cases referred to

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of), [1997] A.J. No. 869, 206 A.R. 295, 48 C.B.R. (3d) 171, 73 A.C.W.S. (3d) 727 (C.A., in Chambers); *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 1999 ABCA 255, 244 A.R. 103, 12 C.B.R. (4th) 186; *Century Services Inc. v. Brooklin Concrete Products Inc*. (March 11, 2005), Court File No. M32275, Catzman J.A. (Ont. C.A., in Chambers); *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A., in Chambers); *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135, 71 O.A.C. 56, 25 C.B.R. (3d) 210, 47 A.C.W.S. (3d) 242 (C.A., in Chambers); *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.); *Theodore Daniels Ltd. v. Income Trust Co*. (1982), 37 O.R. (2d) 316, [1982] O.J. No. 3315, 135 D.L.R. (3d) 76, 25 R.P.R. 97 (C.A.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 [as am.], (*a*), (*c*), (*e*)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.]

Mortgages Act, R.S.O. 1990, c. M.40, s. 22, (1) [page619]

APPEAL from an order appointing a receiver.

Milton A. Davis, for appellants Pine Tree Resorts Inc. and 1212360 Ontario Limited.

David Preger, for appellant Romspen Investment Corporation.

Harvey Chaiton, for respondent Business Development Bank of Canada.

Endorsement of **BLAIR J.A.** (in Chambers): —

Overview

[1] On April 2, 2013, Justice Mesbur granted the application of Business Development Bank of Canada ("BDC") for the appointment of a receiver over the assets of the respondents, Pine Tree Resorts Inc. and 1212360 Ontario Limited (together, "Pine Tree"). Pine Tree owns and operates the Delawana Inn in Honey Harbour, Ontario.

[2] Pine Tree and the second mortgagee, Romspen Investment Corporation ("Romspen"), seek to appeal from Mesbur J.'s order. At the heart of this motion is whether the order should be stayed pending the appeal if there is an appeal. Collateral issues include whether the appeal is as of right under s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). If the answer to that question is yes, should the automatic stay be lifted? If leave to appeal is required, should it be granted and, if so, should the order be stayed pending the disposition of the appeal?

[3] For the reasons that follow, I conclude that the appeal is not as of right, that leave to appeal is required and that in the circumstances here leave ought not to be granted. It is therefore unnecessary to deal with the specific question of whether a stay should be ordered pending appeal.

Background and Facts

[4] BDC is owed approximately $2.6 million by Pine Tree and holds first security for that indebtedness by way of a mortgage on the Delawana Inn lands and, additionally, by way of general security agreements covering both land and chattels. Romspen is the second mortgagee. Its mortgage, too, is in default. Romspen is owed approximately $4.3 million.

[5] The inn has been in financial difficulties for several years and finally, after a number of negotiated extensions and forbearances, BDC demanded payment under both the mortgage and the general security agreements. [page620]

[6] Under its security documents, BDC is contractually entitled to the appointment of a receiver. Instead of appointing a private receiver, however, BDC chose to apply for a court-appointed receiver. Romspen chose to initiate power of sale proceedings but, at the time the order was made, was not in a position to proceed with the sale because three days remained under the period prescribed in the notice of power of sale for redemption.

[7] Pine Tree and Romspen opposed BDC's application. That said, all parties agree the property must be sold immediately. Pine Tree does not have the financial ability to keep the inn operating. In essence, the dispute is over which secured creditor will have control over the sale of the property and which plan for sale will be implemented.

[8] Pine Tree supports Romspen's plan because it involves re-opening the inn for the upcoming summer season and attempting to sell the property on a going-concern basis. BDC

rejects this option as unrealistic because it views the inn's operations as being an irretrievably losing proposition.

[9] Romspen argued before the application judge -- and argues here as well -- that it was entitled to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act*, R.S.O. 1990, c. M.40 to put BDC's mortgage in good standing and take over the sale of the property. It proposes to put the mortgage in good standing by paying all arrears of principal and interest, together with all of BDC's costs, expenses and outstanding realty taxes. However, it does not propose to repay approximately $250,000 in HST arrears. Those arrears constitute a default under the BDC security documents.

[10] In seeking to appeal the order, Romspen and Pine Tree assert a number of grounds relating to the exercise of the application judge's discretion in granting the receivership order, but the centrepiece of their legal argument on appeal concerns the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*. They submit that the arrears of HST do not jeopardize BDC's security in any way because they are a subsequent encumbrance, and therefore it is not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22. Whether that view is correct is the question of law they wish to have determined on appeal.

[11] On behalf of BDC, Mr. Chaiton submits that there is nothing in s. 22 that permits a subsequent mortgagee to exercise its s. 22 rights unless it brings the prior mortgage into good standing, which involves both paying the amount due under the [page621] mortgage and -- where there are unperformed covenants -- performing those covenants as well.

Is Leave to Appeal Necessary?

[12] In my view, there is no automatic right to appeal from an order appointing a receiver: see *Century Services Inc. v. Brooklin Concrete Products Inc.* (March 11, 2005), Court File No. M32275, Catzman J.A. (Ont. C.A., in Chambers); *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*, [1997] A.J. No. 869, 206 A.R. 295 (C.A., in Chambers).

[13] The portions of s. 193 of the *BIA* relied upon by Romspen and Pine Tree are the following:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
> (*a*) if the point at issue involves future rights;
>
> . . . . .
>
> *(c)* if the property involved in the appeal exceeds in value ten thousand dollars;
>
> . . . . .
>
> *(e)* in any other case by leave of a judge of the Court of Appeal.

[14] Neither (*a*) nor (*c*) applies in these circumstances, in my view. I will address whether leave to appeal should be granted later in these reasons.

[15] "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.), at para. 17. See, also, *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 1845, 10 C.B.R. (5th) 201 (C.A., in Chambers).

[16] Here, Romspen's legal rights are its right to exercise its power of sale remedy and its right to put the first mortgage in good standing under s. 22 of the *Mortgages Act*. The first crystallized on the default under the Romspen mortgage, the second on the default under the BDC mortgage. Both rights were therefore triggered before the order of Mesbur J. They were at best rights presently existing but exercisable in the future.

[17] Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(*c*). As [page622] noted by the Manitoba Court of Appeal in *Dominion Foundry Co.*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

[18] In my view, leave to appeal is required in the circumstances of this case.

Should Leave to Appeal Be Granted?

The test

[19] In *Fiber Connections Inc.*, Armstrong J.A. (in Chambers) reviewed extensively the jurisprudence surrounding the test to be applied for granting leave to appeal under s. 193(*e*). As he noted, at para. 15, there is some confusion as to what that test is. Two articulations of the test have emerged, and each has its support in the case law.

[20] One formulation is that set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.). It asks the following questions:

(i) Is the point appealed of significance to the practice as a whole?

(ii) Is the point raised of significance in the action itself?

(iii) Is the appeal *prima facie* meritorious?

(iv) Will the appeal unduly hinder the progress of the action?

[21] These are the criteria generally applied when considering whether to grant leave to appeal from orders made in restructuring proceedings under the *Companies' Creditors*

Arrangement Act, R.S.C. 1985, c. C-36 ("*CCAA*"), although their application has not been confined to those types of cases.

[22] A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395 (C.A., in Chambers), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or [page623] (c) involves an obvious error, causing prejudice for which there is no remedy.

[23] Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(*e*) of the *BIA*: see, in addition to *R.J. Nicol*, for example, *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135 (C.A., in Chambers); and *Century Services Inc.*

[24] This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol* approach by considering such factors as whether there is an arguable case for appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (C.A., in Chambers); and *Baker (Re)*, (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580 (C.A., in Chambers). These factors echo the criteria set out in *Power Consolidated.*

[25] In *Baker (Re)*, Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded, at p. 381 O.R., that the *R.J. Nicol* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol* and the *Power Consolidated* criteria -- without apparently distinguishing between them -- as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

[26] Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this court.

[27] I take from this brief review of the jurisprudence that, while judges of this court have tended to favour the *R.J. Nicol* test in the past, there has been a movement towards a more expansive and flexible approach more recently -- one that incorporates the *Power Consolidated* notions of overall importance to [page624] the practice area in question or the administration of justice as well as some consideration of the merits.

[28] That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

[29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(*e*) is discretionary and must be exercised in a flexible and contextual way, the

following are the prevailing considerations in my view. The court will look to whether the proposed appeal

(a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address;

(b) is *prima facie* meritorious, and

(c) would unduly hinder the progress of the bankruptcy/ insolvency proceedings.

[30] It is apparent these considerations bear close resemblance to the *Power Consolidated* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/ insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

[31] I have not referred specifically to the three *R.J. Nicol* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power or (c) involves an obvious error causing prejudice for which there is no remedy will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker* and by Armstrong J.A. in *Fiber Connections*. In my [page625] view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol* factors into the test.

[32] As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

[33] The *Power Consolidated* criteria are the criteria applied by this court in determining whether leave to appeal should be granted in restructuring cases under the *CCAA*: see *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A., in Chambers), Feldman J.A., at para. 15; and *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 244 A.R. 103 (C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both *CCAA* and *BIA* insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the test in the circumstances

[34] I am not prepared to grant leave to appeal on the basis of the foregoing criteria in the circumstances of this case.

[35] First, Romspen and Pine Tree raise a number of grounds relating to the exercise of the application judge's discretion. These include her consideration and treatment of: the relative expenses involved in BDC's and Romspen's plans for the sale of the property; the impact of shutting down the inn on employees and others and upon the potential sale prospects of the property; and her concern for "the usual unsecured creditors". These discretionary considerations are all entitled to great deference and, in any event, are purely factual and case-specific, and do not give rise to any matters of general significance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

[36] I would not grant leave to appeal on those grounds.

[37] The legal issue raised by Romspen is this: did the application judge err by relying on a covenant default that could not prejudice BDC or erode its first-ranking security as the basis for her conclusion that Romspen had not complied with the requirements for the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*? The basis for that submission [page626] is the argument that the outstanding HST arrears -- although a default in the observance of a covenant under the BDC mortgage -- could not in any circumstances constitute a claim that would have priority over BDC's security, and therefore Romspen, as a subsequent mortgagee, is not required to cure the default by performing that covenant in order to be able to exercise its s. 22 rights.

[38] I have serious reservations about the likelihood of success of this submission on appeal.

[39] Romspen relies upon the jurisprudence of this court establishing that a mortgagor -- and therefore, a subsequent mortgagee -- is entitled as of right, upon tendering the arrears or performing the covenant in default, to be relieved of the consequence of default: see *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316, [1982] O.J. No. 3315 (C.A.). The problem is that Romspen has not offered to put the BDC mortgage in good standing, but has only offered to do so partially. It proposes to leave unperformed a $250,000 covenant -- payment of the outstanding HST arrears.

[40] For Romspen to succeed on appeal would require a very creative interpretation of s. 22 of the *Mortgages Act*,[1] and one that would potentially create an undesirable element of uncertainty in the field of mortgage enforcement, because no one would know which covenants could be left unperformed and which could not, without litigating the issue in each case. [page627]

[41] I am not persuaded that the s. 22 point crosses the *prima facie* meritorious threshold. In any event, given my serious reservations about the merits, that factor together with the need for a timely sale process leads me to conclude that leave to appeal ought not to be granted.

[42] Interfering with the timeliness of that process could potentially impact on the success of the sale. All parties agree the property must be sold. They only differ over who will conduct the sale and how it will be done. The application judge considered the alternative plans at length, and her decision to accept the BDC plan was not dependent on her rejection of Romspen's s. 22 argument.

[43] There is some need for the sale to proceed expeditiously. The experienced application judge chose between BDC's and Romspen's two proposals and favoured that of BDC. Any further delay resulting from an appeal could well impact the potential sale, since the inn is a seasonal business that only operates in the warm months of the year and those warm months are fast approaching.

[44] For the foregoing reasons, I decline to grant leave to appeal.

Disposition

[45] There is no appeal as of right from the receivership order granted by Mesbur J. under s. 193 of the *BIA*. Leave to appeal is required, but Romspen and Pine Tree have not met the test for leave to be granted in these circumstances. The motions of Romspen and Pine Tree are therefore dismissed. It follows that the receivership order is not stayed and that BDC's motion, to the extent it is necessary to deal with it, is successful.

[46] No order as to costs is required, since I am advised that BDC is entitled to add the costs of this proceeding to its debt under the mortgage.

Application dismissed.

Notes

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1 Section 22(1) provides:

> 22(1) Despite any agreement to the contrary, *where default has occurred* in making any payment of principal or interest due under a mortgage or *in the observance of any covenant in a mortgage* and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,
>
> (*a*) at any time before sale under the mortgage: or
>
> *(b)* before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,
>
> *the mortgagor may perform such covenant* or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.
>
> (Emphasis added)

It is not disputed that a subsequent mortgagee is a "mortgagor" for purposes of this provision.

End of Document

TAB 21

Bankruptcy and Insolvency Law of Canada, 4th Edition § 2:132

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part I. The Bankruptcy and Insolvency Act

Chapter 2. Part I Administrative Officials

XIV. Section 37

§ 2:132. Actions Against the Trustee—Who May Bring the Application

An application under s. 37 can be brought by: (a) the bankrupt; (b) a creditor; or (c) any other person aggrieved.

The words "any other person is aggrieved" must be broadly interpreted. They do not mean a person who is disappointed in respect of a benefit that he or she might have received if some other order had been made. A "person aggrieved" is a person who has suffered a legal grievance, a person against whom a decision has been pronounced by the trustee that has wrongfully deprived him or her of something, or wrongfully affected his or her title to something: Re Sidebotham (1880), 14 Ch.D. 458 at 465; Liu v. Sung (1989), 72 C.B.R. (N.S.) 224 (B.C. S.C.). To come within s. 37, a person must have been prejudicially affected in some way by actions of the trustee: Calford v. Royal Bank (1998), 7 C.B.R. (4th) 94, 1998 CarswellOnt 5114 (Ont. Gen. Div.).

In A.G. of The Gambia v. Jie, [1961] A.C. 617 (P.C.), Lord Denning said at p. 634: "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because [an act or decision] has been made which prejudicially affects his interests."

In order to bring an application under s. 37, the applicant must put material before the court, which shows that he or she has been aggrieved by actions of the trustee, and if no such material is put before the court, the application will be dismissed: Cirillo v. Royal Bank (1996), 39 C.B.R. (3d) 22, 1996 CarswellOnt 1332 (Ont. Gen. Div.).

Where a trustee agrees to sell assets to a purchaser and then reneges on the agreement, the purchaser comes within the words "any other person aggrieved" in s. 37: PR Engineering Ltd. v. Clarke, Henning & Hahn Ltd. (1990), 79 C.B.R. (N.S.) 172, 1990 CarswellOnt 183 (Ont. H.C.).

A shareholder of a bankrupt company who wishes the trustee to bring an action with respect to a claim that, if valid, would be property of the bankrupt estate, and the trustee refuses because there are insufficient funds in the estate, is a person aggrieved: Transamerica Commercial Finance Corp., Canada v. Computercorp Systems Inc., 20 C.B.R. (3d) 96, 10 Alta. L.R. (3d) 337, [1993] 7 W.W.R. 495 (*sub nom. Computercorp Systems Inc. (Bankrupt), Re*) 141 A.R. 237, 46 W.A.C. 237, 1993 CarswellAlta 418.

Where the aggrieved party is content that all the fruits of a proposed action should be paid to the trustee in bankruptcy, there is no need to give notice to creditors of the s. 37 application: Re Redipac Recycling Corp. (1998), 9 C.B.R. (4th) 291, 1998 CarswellOnt 4402 (Ont. Gen. Div.).

A secured creditor can bring an application under s. 37: Re Sechart Fisheries Ltd., 10 C.B.R. 565, [1929] 2 W.W.R. 413, [1929] 4 D.L.R. 536 (B.C. S.C.).

Although the bankrupt can bring an application under s. 37, he or she has no right under this power to interfere in the day-to-day administration of the estate. Canadian courts do not appear to have placed any restriction on the right of the bankrupt to bring an application under s. 37. In Re Van Damme (1924), 5 C.B.R. 225, 37 Que. K.B. 242 (C.A.), the bankrupt was allowed to bring an application under s. 37 to attack a fraudulent sale of the assets by the trustee to an inspector. See also Re Stefaniuk (2001), 27 C.B.R. (4th) 162, 2001 SKQB 308, 210 Sask. R. 157, 2001 CarswellSask 505 (Sask. Q.B.).

Where a cause of action has vested in a trustee in bankruptcy and the trustee, with the consent of the creditors has sold the cause of action, the court will not, provided there is no fraud and the trustee and creditors are acting *bona fide*, permit the bankrupt to bring an application under s. 37 to challenge the sale: Caskey (Trustee of) v. Guardian Insurance Co. of Canada (1999), 180 D.L.R. (4th) 727, 14 C.B.R. (4th) 45, 1999 CarswellAlta 926 (Alta. Q.B.).

Where a trustee agreed to accept government funding to investigate possible claims against directors of a bankrupt corporation, a director is not a person aggrieved, since the director was not deprived of anything by the decision of the trustee: Re New Home Warranty of British Columbia Inc. (2001), 27 C.B.R. (4th) 308, 2001 BCSC 1160, 91 B.C.L.R. (3d) 384, 2001 CarswellBC 1713 (B.C.S.C. [In Chambers]).

A trustee assigned certain causes of action to a bankrupt. Moving parties brought a motion pursuant to s. 37 of the *BIA* to set aside the assignment and direct an auction process for the sale of the causes of action. The Ontario Superior Court of Justice dismissed the motion on the basis that none of the moving parties was an "aggrieved person" for purposes of s. 37. Justice Wilton-Siegel held that the trustee's decision to enter into the assignment was reasonable on the basis of the absence of a superior financial offer and not procedurally unfair, and thus even if the moving parties could come within the definition of s. 37, the court would not exercise its discretion to grant the relief sought. The Court held that the trustee was entitled to costs of the motion on a substantial indemnity basis as none of the moving parties were entitled to bring the motion and their submissions engaged the integrity of the trustee. The bankrupt's motion for costs was dismissed; while the bankrupt was entitled to participate if he chose, the issue before the court was the validity of the trustee's action, and the bankrupt's involvement was not necessary and did not add anything to the argument of the trustee: Re David Brook, 2017 CarswellOnt 14279, 52 C.B.R. (6th) 110, 2017 ONSC 4918 (Ont. S.C.J. [Commercial List]).

IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Court File No.: BK-21-02734090-0031
Court of Appeal No. COA-22-CV-0451

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