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COURT OF APPEAL  
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*Joseph Wayne Palmer Sather v. Sather Ranch Ltd.*  
Appellant's Factum

## COURT OF APPEAL

ON APPEAL FROM the orders of the Honourable Justice Elwood of the Supreme Court of British Columbia pronounced on the 1st day of June 2023 and the 11th day of April 2024

BETWEEN:

**Joseph Wayne Palmer Sather**

Appellant  
Respondent by Cross Appeal  
(Defendant)

AND:

**Sather Ranch Ltd.**

Respondent  
Appellant by Cross Appeal  
(Plaintiff)

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### APPELLANT'S FACTUM

Joseph Wayne Palmer Sather

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### CHRONOLOGY

Date	Event
1939	Sather Ranch founded as a family cattle business by the Appellant Joe Sather's father, Palmer Sather in Penticton, British Columbia.
1939 - 2013	Sather Ranch operates as a sole proprietorship, primarily involving three parcels of land – the Home Ranch, the Grazing Lands and the Crown Range Lands.
1995	Mike Street begins to work on Sather Ranch.
2013	Palmer becomes incapable of managing his affairs and is moved to a care facility.
2013	Sather Ranch Ltd. is incorporated with Joe and Mike as sole shareholders and directors to carry on the operations of Sather Ranch.
March to July 2017	SRL purchases the Home Ranch and Joe and Mike discuss acquisition of the Grazing Lands, owned by Palmer.
July 8, 2017	Joe advises Mike he intends to purchase the Grazing Lands in his own name.
August 25, 2017	Carol Sather, Joe's sister and power of attorney for Palmer executes a Form A to transfer the property to Joe.
October 1, 2017	Joe entered into a lease agreement leasing the Grazing Lands to SRL from October 1, 2017 to September 30, 2018.
October 20, 2017	Palmer dies.
November 7, 2017	Joe caused the Form A transfer to be registered in the Land Title Office, transferring title to the Grazing Lands into his name.
July 17, 2018	Court appoints a receiver and manager over the assets of SRL.
February 11, 2019	This action is commenced by the Receiver on behalf of SRL.
September 21-23, November 24-25, 2022	Summary trial of the action before Mr. Justice Elwood.
June 1, 2023	Reasons for Judgment on liability.
December 14, 2023, January 8, 2024	Continuation of summary trial on remedy.
April 11, 2024	Reasons for Judgment on remedy.

### OPENING STATEMENT

The chambers judge made a reviewable error in concluding that the appellant, Joe Sather (“**Joe**”), breached his fiduciary duty as a director of the respondent corporation Sather Ranch Ltd., (“**SRL**”) when he purchased grazing land owned by his father. SRL was formed to carry on the operations of his father’s family ranch. Joe’s connection to these lands came not from SRL, but through his family; he was set to inherit them with his sister.

The judge concluded that the appellant breached his duty to the company because the appellant usurped a “potential”, as opposed to “ripe” or “mature”, opportunity to purchase those lands from SRL. This was an error of law.

Although the extent to which a business opportunity must be mature to give rise to a claim for breach of corporate opportunity is an unsettled question of law in British Columbia, the judge’s selection and application of a lower standard was legally wrong because it was directionally inconsistent with the Supreme Court of Canada’s jurisprudence and contrary to other established authorities in this province which have declined to impose liability for immature or unripe opportunities.

The law regulating corporate fiduciaries ought to focus on opportunities that are immediately available to the corporation. Imposing a standard of maturity that permits liability for immature and underdeveloped opportunities risks frustrating the purpose of the fiduciary doctrine by creating ill defined duties and the resulting unfairness demonstrated by the circumstances of this case.

Further, the judge made a palpable and overriding error by failing to give effect to his own primary findings of fact, which ought to have led him to the conclusion that the opportunity in issue was an opportunity to “use” the lands as grazing lands, which could be satisfied by a lease, not an outright purchase. Joe fulfilled his fiduciary duties by leasing the lands to the corporation, at no profit to himself, to ensure its interests in use of the land was maintained.

The appeal should be allowed on either ground.

**PART 1 - STATEMENT OF FACTS**

1. This case is about a family ranch run for decades by the appellants' father, Palmer Sather. The operations of the ranch were eventually passed to the respondent company, SRL. SRL was run by its sole shareholders and directors, Mike Street ("**Mike**") and the appellant Joe. This issue is whether the chambers judge was correct in finding that the appellant breached his duty to this closely held family company by purchasing lands once held by his father personally—and in which he ultimately stood to inherit an interest in—rather than in the name of SRL.

2. The following summary is taken directly from the chamber's judge's reasons with the exception of references to the evidence of Carol Sather, Joe's sister and the power of attorney for Palmer's estate, who was entrusted with approval of the sale of the lands at issue.

**A. Background**

3. Sather Ranch was a cattle ranching operation founded by Palmer in 1939.<sup>1</sup> The ranch was a "labour of love". It operated as a family business, with Palmer's brother's Oscar and Rolf Sather involved in the early days, and Palmer's children, Joe and Carol Sather, also working on the ranch.<sup>2</sup>

4. Mike assisted Palmer in the operations of the ranch, beginning in 1995, and took on more tasks as he learned the ranching business.<sup>3</sup>

5. Following deterioration in Palmer's health and capacity, Joe and Mike took on increasing responsibility for the operations of the ranch.<sup>4</sup>

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<sup>1</sup> Appeal Record ("AR"), p. 42, Reasons of Elwood J., issued June 1, 2023 ("Reasons"), at para. 9 and 10.

<sup>2</sup> AR, p. 43, Reasons at para. 11.

<sup>3</sup> AR, p. 44, Reasons at para. 15.

<sup>4</sup> AR, p. 44-45, Reasons at paras. 16-20.

6. The ranching operation involved an annual cycle, where the following lands were used in its operations:

- (a) an 80-acre parcel of land known as the home ranch, which Palmer owned with Oscar (the “**Home Ranch**”);
- (b) a 160-acre parcel of land known as the grazing lands, which Palmer owned in his own name (the “**Grazing Lands**”); and
- (c) approximately 150-acres of Crown range lands over which Palmer held a grazing license (the “**Crown Range Lands**”).<sup>5</sup>

7. Cattle were fed and cared for at the Home Ranch and put out to pasture in either the Grazing Lands or the Crown Range Lands, depending on the time of year.

8. The judge found that a grazing license under the *Range Act*, S.B.C. 2004, c. 71 was essential to the ranch operation.<sup>6</sup>

9. The judge made an express finding of fact that either ownership or a lease by SRL over the Home Ranch and Grazing Lands were essential to maintaining the grazing licence<sup>7</sup>. In other words, legal title to the land was not required to maintain the requisite grazing licence.

10. Upon becoming incapable of managing his affairs, Palmer was moved to a care facility in 2013. Both Joe and Carol held power of attorney for Palmer.<sup>8</sup>

11. On March 21, 2013, SRL was incorporated with Joe and Mike as sole shareholders and directors<sup>9</sup>. Critically, the judge found that the purpose of SRL was to carry on the operations of Sather Ranch, not to develop or sell the ranch properties.<sup>10</sup> This finding

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<sup>5</sup> AR, p. 44, Reasons at paras. 13, 14.

<sup>6</sup> AR, p. 48, Reasons at para. 43.

<sup>7</sup> AR, p. 48 and 49, Reasons at paras. 43 and 46.

<sup>8</sup> AR, p. 45 and 49, Reasons at paras. 21 and 47.

<sup>9</sup> AR, p. 45, Reasons at para. 22.

<sup>10</sup> AR, p. 60, Reasons at para. 105.

meant that the objects of the corporation were satisfied if SRL maintained a lease over the Grazing Lands because that meant it could continue its operations.

12. Carol, as power of attorney for Palmer, transferred the non-land ranch assets (the cattle, vehicles and equipment) to SRL in the spring of 2013.<sup>11</sup>

13. In January 2017, SRL purchased the Home Ranch, which was co-owned by Palmer and Oscar. The offer was accepted by Carol in her capacity as Power of Attorney on Palmer's behalf.<sup>12</sup>

14. The chambers judge found that Joe knew about the Grazing Lands long before he became a director of SRL. The general opportunity to acquire and potentially profit from the Grazing Lands was known to him as a member of the Sather family.<sup>13</sup>

15. In spring 2017, Mike and Joe discussed a plan where SRL would also acquire the Grazing Lands by presenting an appraisal to Carol, and seek her agreement to sell to SRL at a fair value<sup>14</sup>. An independent appraisal of the Grazing Lands provided a valuation of \$115,000.<sup>15</sup>

16. Mike completed and signed an offer on behalf of SRL to purchase the Grazing Lands for \$120,000, which Joe agreed to present to Carol.<sup>16</sup>

17. On April 20, 2017, Joe wrote to Mike, copying Carol and two of Palmer's grandchildren:<sup>17</sup>

Hi Mike  
Sorry for taking so long to get back to you about the Offer on the 160 acres.  
Carol and I talked extensively about the Offer and about my Dad's estate,  
etc. We are not in a rush to sell the 160 acres ... There is some interest

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<sup>11</sup> AR, p. 56-57, Reasons at para. 91.

<sup>12</sup> AR, p. 47, Reasons at paras. 31-32.

<sup>13</sup> AR, p. 67, Reasons at para. 129.

<sup>14</sup> AR, p. 49, Reasons at para. 47.

<sup>15</sup> AR, p. 50, Reasons at para. 52.

<sup>16</sup> AR, p. 50, Reasons at paras 53-54.

<sup>17</sup> AR, p. 51, Reasons at paras. 55-56.

from Danny and Julia to purchase the 160 acres and any of Dad's grandkids would get the first chance to buy the land.

If [the grandchildren] decide not to purchase the land, then it could be sold to Sather Ranch. And, even if the kids did buy the land, it can continue to be used by Sather Ranch Ltd. on the same terms (which would be put in writing). I'll let you know of any decision by the family Mike.

18. On July 1, 2017, Joe provided a further update to Mike indicating that discussions with Carol were ongoing.<sup>18</sup>

19. The judge found that SRL needed Carol's agreement to acquire title to the land and whether that agreement would have been forthcoming was difficult to say.<sup>19</sup>

20. Carol's evidence, which was not referred or analyzed by the trial judge, was that she would consider a purchase by SRL if both the Sather grandchildren and Joe said no.<sup>20</sup>

21. On July 8, 2017, Mike attended a barbeque at Joe's house in Calgary. At the barbeque, Joe told Mike that he intended to purchase the Grazing Lands in his own name<sup>21</sup>. The two men got into an argument, and both stopped providing support to the business shortly thereafter.<sup>22</sup>

22. In July 2017, not long after the BBQ, SRL ceased operating as a viable business.<sup>23</sup>

23. On August 25, Carol executed a Form A transfer as power of attorney for Palmer to transfer the Grazing Lands to Joe for a purchase price of \$120,000.<sup>24</sup>

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<sup>18</sup> AR, p. 52, Reasons at para. 61.

<sup>19</sup> AR, p. 58, Reasons at para. 96.

<sup>20</sup> Appeal Book, p. 2, Affidavit #1 of Carol Sather-Byman made February 15, 2022, para. 6; Transcript of Proceedings, September 23, 2022, Appellant's Transcript Book, pp. 245.

<sup>21</sup> AR, p. 52, Reasons at para. 62.

<sup>22</sup> AR, p. 53, Reasons at para. 69.

<sup>23</sup> AR, p. 53, Reasons at paras. 69-70.

<sup>24</sup> AR, p. 52, Reasons at para. 64.



24. On October 1, Joe entered into a lease agreement leasing the Grazing Lands to SRL.<sup>25</sup> Joe continued to renew the lease with SRL for the Grazing Lands, signing on behalf of SRL each year until 2022.<sup>26</sup>

25. Palmer died on October 20, 2017<sup>27</sup>. Joe and Carol were the beneficiaries to Palmer's estate.<sup>28</sup> In other words, before the events of Joe's purchase of the Grazing Lands, he stood to become a 50% owner of those lands in any event.

26. On November 7, Joe caused the Form A transfer to be registered in the Land Title Office, transferring title to the Grazing Lands into his name<sup>29</sup>. Joe also settled a trust in November 2017 that gave beneficial ownership of the Grazing Lands to his children, Danny and Julia Sather<sup>30</sup>. The trust was found by the chambers judge to be ineffective as legal title was never alienated by Joe.<sup>31</sup>

27. In July 2018, a receiver and manager was appointed for SRL.<sup>32</sup>

#### **B. Reasons of the chambers judge**

28. At trial, the respondent SRL alleged that it was pursuing an opportunity to purchase the Grazing Lands such that it was a "corporate opportunity" within the meaning of *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592 ("**Canaero**") and sought a declaration that Joe breached his fiduciary duty to SRL when he purchased the property in his own name. SRL sought an order that the land vest in the company, so the land could be sold for the benefit of SRL.

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<sup>25</sup> AR, p. 52, Reasons at para. 65.

<sup>26</sup> AR, p. 53, Reasons at para. 74.

<sup>27</sup> AR, p. 52, Reasons at para. 66.

<sup>28</sup> AR, p. 58, Reasons at para. 96.

<sup>29</sup> AR, p. 52, Reasons at para. 67.

<sup>30</sup> AR, p. 52, Reasons at para. 67.

<sup>31</sup> AR, p. 94, Reasons of Elwood J. issued April 11, 2024, at para. 90.

<sup>32</sup> AR, p. 53, Reasons at paras. 69-70.

29. The chambers judge began his analysis of whether Joe breached his fiduciary duty to SRL by summarizing the principles governing the law of corporate opportunity including that a fiduciary owes the duties of loyalty, good faith and avoidance of a conflict of duty and self interest to the beneficiary.<sup>33</sup> The judge referred to the rule in *Canaero* that a fiduciary was forbidden to usurp a “maturing business opportunity that the company was actively pursuing”. The judge referred to a non-exhaustive list of factors identified in *Canaero* for determining whether an opportunity was usurped, including: the nature of the corporate opportunity, its ripeness, its specificity and the director’s or managerial officer’s relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special.

30. The chambers judge found the three factors that figured most prominently from *Canaero* in this case were: (i) the nature of the opportunity and whether it was a corporate opportunity; (ii) the ripeness or maturity of the opportunity and whether SRL was in a position to take advantage of it; and (iii) the knowledge about the opportunity, Joe’s relation to it and how he acquired that knowledge.<sup>34</sup> His analysis on each factor is described below.

(a) *The chambers judge’s analysis of the nature of the opportunity*

31. The chambers judge described the issue of whether the opportunity to acquire the Grazing Lands was a “corporate” one, meaning “any property or business advantage either belonging to the company or for which it has been negotiating”.<sup>35</sup>

32. The chambers judge characterized the opportunity as one to acquire the Grazing Lands from Carol, as Palmer’s power of attorney, for \$120,000, using an appraisal based on a highest and best use of the lands as grazing lands by the individual that owned the grazing rights to the adjacent Crown Range Lands.<sup>36</sup>

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<sup>33</sup> AR, p. 58, Reasons at para. 97.

<sup>34</sup> AR, p. 59, Reasons at para. 100.

<sup>35</sup> AR, p. 60, Reasons at para. 101.

<sup>36</sup> AR, p. 60, Reasons at para. 103.

33. The chambers judge specifically concluded that the opportunity was not an opportunity to acquire and sell the land for a profit, as the corporation was formed to carry on the operations of the ranch. His finding was that the objective of pursuing the opportunity was to keep the ranch together to ensure the long-term viability of the ranching operation and provide a sustainable base from which to expand the size of the herd.<sup>37</sup>

34. Having reviewed authorities which referred to several tests and standards for determining whether an opportunity “belongs” to the corporation, the chambers judge articulated them as follows: (1) the “interest or expectancy” test, which prevents acquisition by corporate officers of the property of a business opportunity in which the corporation has a “beachhead” in the sense of a legal or equitable interest or expectancy growing out of a pre-existing right or relationship; (2) the “line of business” test, which characterizes an opportunity as corporate where involved in an activity intimately or closely associated with the existing or prospective activities of the corporation; and (3) the “fairness” test, which determines the existence of a corporate opportunity by applying standards of what is fair and equitable under the circumstances.<sup>38</sup>

35. In concluded that the opportunity to buy the Grazing Lands on favourable terms belonged to SRL, the chambers judge found that:

- (a) SRL had a “beachhead” or “expectancy” in relation to the Grazing Lands, based on Mike’s relationship with Palmer, SRL’s purchase of the Home Ranch, use of the Grazing Lands for ranching operations and the addition of Joe and Mike’s names to the grazing licence to use the adjoining Crown Range Lands<sup>39</sup>.
- (b) The Grazing Lands were integral to the ranching operations of SRL, but ownership itself was desirable, but not essential.<sup>40</sup>

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<sup>37</sup> AR, p. 60, Reasons at para. 103.

<sup>38</sup> AR, p. 60, Reasons at paras. 106-107.

<sup>39</sup> AR, p. 62-63, Reasons at para. 108.

<sup>40</sup> AR, p. 64, Reasons at para. 114.

36. The chambers judge did not address the fairness test in his analysis.

(b) The chambers judge's analysis of ripeness of the opportunity

37. Joe's position at trial was that the opportunity was not "ripe" because (i) there was no evidence Carol would have agreed to sell to SRL; (ii) and SRL was not in a financial position to buy the Property, with a growing deficit of \$250,000 and no financing in place. Joe relied upon *Consbec Inc. v. Walker*, 2014 BCSC 2070, aff'd 2016 BCCA 114 ("**Consbec**"), where Justice Hyslop, at para. 140, quoted from an Ontario Superior Court of Justice decision, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225, which stated:

By "ripe" I understand the case law to mean that the opportunity available to the corporation is a prize ready for immediate grasping -- not a general course of future conduct which is merely being explored ...

38. The chambers judge adopted a broader standard of maturity, holding that a breach of fiduciary duty can occur when the diverted opportunity is a potential, rather than a fully mature opportunity. After surveying a number of authorities, the chambers judge concluded that "while maturity is a relevant factor, the opportunity need not be so mature that it is a sure thing".<sup>41</sup> The judge relied in particular on the decision of *Pan Pacific Recycling Inc. v. So*, 2006 BCSC 1337, which held that it is a breach of corporate opportunity for a director to avail itself of an opportunity a director had negotiated on behalf of the corporation, even where the corporation itself could not take advantage of the opportunity.<sup>42</sup>

39. Despite observing there was no evidence financing was in place, the chambers judge found that it was a real possibility SRL could have financed the purchase price, and that Carol may have agreed to sell to SRL—ultimately finding that "the opportunity was sufficiently within reach for SRL such that its ripeness militates in favour of finding a breach of fiduciary duty in the circumstances".<sup>43</sup>

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<sup>41</sup> AR, p. 66, Reasons at para. 123.

<sup>42</sup> AR, p. 65, Reasons at para. 118.

<sup>43</sup> AR, p. 67, Reasons at para. 128.

(c) The chambers judge's analysis of how the opportunity was acquired

40. The chamber's judge acknowledged the general opportunity to purchase the Grazing Lands was known to Joe as a member of the Sather family, but the specific opportunity to purchase the Grazing Lands for \$120,000 without probate or transfer fees came about as a result of Joe's involvement in SRL, and the appraisal used to justify the purchase price was obtained by SRL for company purposes.<sup>44</sup>

(d) Conclusion on corporate opportunity

41. The chambers judge concluded that in acquiring the property at the time he did and for the price that he paid, Joe breached his fiduciary duty to SRL by taking advantage of an opportunity either belonging to SRL or for which SRL was negotiating. In so doing, Joe put his personal interest in conflict with his duty to SRL<sup>45</sup>. Yet, having said this, the chambers judge noted three unique factors must also be recognized in this case<sup>46</sup>:

42. First, the corporate opportunity at issue was to acquire the Grazing Lands for the ranch to sustain the herd and maintain the grazing licence over the associated Crown Range Lands; it was not an opportunity to acquire a potential gravel deposit or to resell the property at a profit. The judge stated "the corporate opportunity in this case was not an opportunity for SRL to benefit financially from a resale of the Grazing Lands."<sup>47</sup>

43. Second, Joe entered into a lease with SRL that maintained the status quo and satisfied the conditions of the grazing licence.<sup>48</sup> The judge found that "Joe's acquisition of the Grazing Lands did not itself harm SRL's operations, at least not in the short term".<sup>49</sup>

44. Third, Joe stood to inherit an interest in the Grazing Lands as a beneficiary under Palmer's will if Palmer died before a sale to SRL was concluded.

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<sup>44</sup> AR, p. 67, Reasons at para. 129-130.

<sup>45</sup> AR, p. 69, Reasons at para. 136.

<sup>46</sup> AR, p. 69, Reasons at para. 137.

<sup>47</sup> AR, p. 72, Reasons at para. 151.

<sup>48</sup> AR, p. 69, Reasons at para. 137.

<sup>49</sup> AR, p. 72, Reasons at para. 150.

45. The chambers judge also found it was unclear whether SRL could have even stayed in business if Joe had not purchased the Grazing Lands. On one hand, Joe and Mike may have continued to support the business, and on the other, the financial challenges facing the ranch were significant and may have been made worse by taking on debt to acquire the Grazing Lands.<sup>50</sup>

46. The chambers judge invited further submissions on remedy noting that the facts above may render the remedy of constructive trust sought by the Respondent corporation unjust.

47. The chambers judge awarded equitable compensation assessed at 66% of the fair market value of the Grazing Lands at the date of trial, rather than the constructive trust sought by SRL. The judge's decision on remedy in this case are the subject of a cross appeal by the Respondent.

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<sup>50</sup> AR, p. 71-72, Reasons at paras. 149.

**PART 2 - ERRORS IN JUDGMENT**

48. The chambers judge erred in two ways:
- a. The judge erred by extending the doctrine of corporate opportunity to a potential opportunity, rather than “ripe” opportunities. This led to an erroneous finding of liability in circumstances where there was no finding that the corporation could have fulfilled the opportunity Joe was found liable for misappropriating; and
  - b. The judge erred by mischaracterizing the corporate opportunity as an opportunity to acquire the Grazing Lands for \$120,000, rather than an opportunity to use the Grazing Lands.

### **PART 3 - ARGUMENT**

#### **A. Standard of Review**

49. The question of whether the judge set out the correct test for the usurpation of a corporate opportunity by a director is a question of law reviewable on the standard of correctness.<sup>51</sup>

50. The second ground of appeal engages the question of whether the judge erred by characterizing the nature of the opportunity as one to purchase the Grazing Lands, rather than use the Grazing Lands. This is a question of fact, subject to the palpable and overriding error standard.<sup>52</sup>

#### **B. The chambers judge erred by adopting an overly broad standard of ripeness**

51. The judge erred in law by adopting an overly broad articulation of the requisite “ripeness” of a corporate opportunity.

52. Writing for a unanimous court in *Canaero*, Chief Justice Laskin stated that a director is disqualified from “usurping for himself ... a maturing business opportunity which his company is actively pursuing”<sup>53</sup>. The Chief Justice cautioned that a rigid test of the doctrine would be contrary to the fluid nature of the fiduciary concept. In determining whether a corporate opportunity was misappropriated, the standards of loyalty, good faith and avoidance of a conflict of duty and self interest to which the conduct of a director must conform must be tested by a non exhaustive list of factors. The “ripeness” of the opportunity is among the factors listed in *Canaero*.<sup>54</sup>

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<sup>51</sup> *Housen v. Nikolaisen*, 2002 SCC 33, paras. 8-9.

<sup>52</sup> *Housen v. Nikolaisen*, 2002 SCC 33, paras. 26-29.

<sup>53</sup> *Canaero* at 607.

<sup>54</sup> *Canaero* at 620.



(a) The competing approaches to assessing the ripeness of a corporate opportunity

53. This Court has stated the extent to which a business opportunity must be “ripe” to give rise to a claim for breach of corporate opportunity is an unsettled question of law. In *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, 2009 BCCA 34 (“**Blue Line**”), Justice Newbury wrote that it is “not clear whether the word ‘maturing’ used by the Court in *Canaero* was intended to restrict the scope of the corporate opportunity doctrine to opportunities that are indeed ‘ripe’ or ‘a sure thing’”.<sup>55</sup>

54. There are two divergent lines of authority on the requisite ripeness standard: one holding that liability may arise for opportunities that are mature, and the other extending liability for “potential” rather than mature opportunities.

55. The higher standard of maturity, which Joe asks this Court to adopt, has been followed in a number of decisions in British Columbia, Ontario and Nova Scotia. This approach interprets the corporate opportunity doctrine established in *Canaero* to extend to opportunities which are “ripe” in the sense that they are readily available to the corporation.

56. The leading case supporting this approach in British Columbia is *Consbec*. The underlying action involved a claim against a former employee who departed and set up business in competition to the plaintiff corporation. The trial judge declined to find a particular project, known as Brilliant Dam, which the defendant subsequently bid on was a “ripe” opportunity within the meaning of the principle in *Canaero*. Obtaining environmental permits, design completion and public hearings were a precondition to the announcement of a general contractor—which had not occurred at the time the defendant employee left his employment with the corporation.

57. The trial judge in *Consbec* relied upon the description of a mature business opportunity in *Pizza Pizza Ltd. v. Gillespie*, 1990 CanLII 4023 (ONSC) as “a prize ready

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<sup>55</sup> At para. 59.

for immediate grasping", to be contrasted to a general course of future conduct which is merely being explored. The appeal of the trial judge's decision declining to impose liability for breach of fiduciary duty claim was dismissed by the BCCA, but this point was not taken on appeal.

58. The chambers judge referred to this authority, but did not analyze it in his reasons.

59. British Columbia appellate decisions which pre-date *Consbec* have declined to impose liability where the corporate opportunity in issue was not mature. In *Moore International (Canada) Ltd. v. Carter*, 1984 CanLII 518 (BC CA) ("**Moore**"), no breach of duty was found where the corporation could not avail itself of the opportunity in question, and did nothing further to pursue it once it was clear that was so—the opportunity had come to an end, and was not a "maturing business opportunity".<sup>56</sup> Similarly, in *Mountain-West Resources Ltd. v. Fitzgerald*, 2005 BCCA 48 ("**Mountain Resources**"), the court upheld the decision of the chambers judge declining to renew a writ claiming breach of fiduciary duty where there was no evidence the alleged opportunity was a mature one.

60. The competing line of authority relied upon by the trial judge imposes liability for a potential, rather than a mature opportunity. The trial judge predominantly relied upon *Pan Pacific Recycling Inc v So*, 2006 BCSC 1337, and *Matic et al. v. Waldner et al.*, 2016 MBCA 60, which hold that a breach of fiduciary duty can occur when the diverted opportunity is a potential, rather than a mature opportunity, or one that the corporation is not actively pursuing.

61. A number of Ontario authorities endorse an approach to the maturity of a corporate opportunity as one that is "immediately available to the corporation", but the point has since been contested in a subsequent decision.<sup>57</sup> The Nova Scotia Court of Appeal has also taken a more stringent approach to the question of ripeness, expressly rejecting the

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<sup>56</sup> Paras. 12-15.

<sup>57</sup> *Tracey v. Tracey*, 2012 ONSC 3144; *Donor Gateway Inc. v. Passero*, 2007 CanLII 3677 (ON SC), at para. 12; *Roppovalente v. Danis*, 2020 ONSC 5290; *7688073 Canada Ltd. v. 1841978 Ontario Inc. and Sugar v. Vacuum Metallizing Limited*, 2022 ONSC 4557 at para. 253, aff'd *7688073 Canada Ltd. v. 1841978 Ontario Inc.*, 2024 ONCA 371.

submission that it did not matter whether the corporation could have taken advantage of the opportunity, observing there is no wording in *Canaero* supportive of that interpretation.<sup>58</sup> The fact that the corporation had no funds to fulfill the opportunity weighed against liability.

62. The issue of whether liability can extend to potential opportunities has not been taken up by this Court post-*Blue Line*.

(b) *This Court should adopt an approach that imposes liability for mature opportunities only*

63. The chambers judge erred in law in adopting a broader articulation of the question of maturity which encompasses potential opportunities. Properly understood, *Canaero* applies only to opportunities that are mature and available to the corporation.

64. There are three reasons why the judge's standard of maturity is wrong in law.

65. First, a more stringent standard for maturity is consistent with the core principles underpinning *Canaero* which reflect policy considerations drawn from both England's "strict ethic" approach and America's pragmatic approach to the doctrine. While Canadian corporate opportunity doctrine holds directors to a strict ethic, the standard is different than English caselaw because the Canadian iteration of the doctrine balances the strict ethic with a fact-driven analysis of the opportunity and its context, which is derived from American authorities<sup>59</sup>.

66. The standard proposed by the appellant is faithful to and consistent with *Canaero*.

67. Applying a low standard for maturity leads to an overbroad application of the doctrine. This is contrary to *Canaero*, which specifically directs a contextual inquiry, not in effect, strict liability. Imposing the "potential opportunity" test risks breaches which are

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<sup>58</sup> *Martin v. ALPC Housing Solutions Inc.*, 2020 NSCA 35 at para. 40.

<sup>59</sup> *Canaero* at 608-609 (citing *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All E.R. 378 (H.L.)) and 612-613 (citing *Burg v. Horn* (1967), 380 F. 2d 897), 620; Martin Gelter & Geneviève Helleringer, "Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law" (2018) 15 Berkeley Bus LJ 92 at 119.

divorced from the full context of the situation, contrary to the multi-factorial analysis directed by *Canaero*.

68. *Canaero* specifically directs courts to consider an opportunity's "ripeness" in determining whether a fiduciary is disqualified from capitalizing on a corporate opportunity. The "potential" opportunity test applied by the trial judge overreaches; definitionally, all opportunities are "potential" opportunities.<sup>60</sup> Why specifically enumerate ripeness as a factor if nearly anything the business might do is subject to the opportunity doctrine? The Court's direction in *Canaero* to consider ripeness must be given meaning.

69. A breach of fiduciary duty in circumstances where it is dubious that the corporation could have even taken advantage of the opportunity is punitive and inconsistent with *Canaero*. The fundamental policy goal of fiduciary law—to maintain the integrity of socially and economically valuable or necessary relationships of high trust and confidence essential for society—is not served by a rule that casts a dragnet to capture opportunities that are only opportunities in name only. What corporate interest is protected by finding a breach of fiduciary in absence of an affirmative finding the corporation could have capitalized on the opportunity? Or in this case, where there was an express finding the corporation may not have been able to exist as a going concern had it proceeded? This does not fulfill the policy goals underpinning the fiduciary doctrine, and paradoxically, risks upsetting them.

70. Second, imposing a standard of maturity that permits liability for inchoate and unrealistic opportunities risks frustrating the purpose of the fiduciary doctrine. Professor Rotman cautions that an overly strict interpretation of the doctrine would deter competent individuals from becoming directors, and deny them legitimate opportunities that do not interfere with their corporate duties.<sup>61</sup> Worse, it may cause those who do take on directorial roles to more freely breach the overly broad standard, with some of those

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<sup>60</sup> Oxford English Dictionary defines "opportunity" as "a time, condition, or set of circumstances permitting or favourable to a particular action or purpose".

<sup>61</sup> Leonard I. Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005) ("**Rotman**"), pp. 261, 438-439.

breaches going unenforced and unanswered. This risks rendering fiduciary duties “vacuous”.<sup>62</sup>

71. Third, the “potential opportunity” standard may lead to manifest unfairness. Would-be directors must decide whether they are willing to forgo opportunities falling within a hazily defined, yet undeniably broad, ambit. Worse yet, individuals like Joe may accept a director’s position at closely held corporations without realizing they have essentially signed away opportunities that would otherwise be their own. The fiduciary concept must account for the rights and responsibilities of both the fiduciary and beneficiary.<sup>63</sup> It must also be extraordinarily sensitive to the specific context in which it arises.<sup>64</sup>

72. To give full effect to these considerations, this Court should recognize the fundamental importance of an opportunity’s maturity to the corporate opportunity test. To do otherwise would be to upset the delicate balance between England’s rigid enforcement and America’s practical realities required by *Canaero*. The policy considerations which acknowledge pragmatic realities of contemporary commercial practices, and support a balanced approach to directorial and corporate interests ought to be given effect. A regime that imposes overly onerous duties on fiduciaries cannot succeed, as cautioned by Professor Rotman.<sup>65</sup>

**C. In the alternative, the chambers judge adopted a standard of ripeness that was too strict in the circumstances of this case**

73. Alternatively, should this Court not wish to resolve the competing lines of authority on the question of ripeness, the test of ripeness applied by the trial judge was still too strict in the circumstances of this case.

74. It is also consistent with *Canaero* and the situation specific nature of the fiduciary doctrine to treat the question of ripeness as a continuum to be calibrated based on

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<sup>62</sup> Rotman, p. 261.

<sup>63</sup> Rotman, p. 262.

<sup>64</sup> Rotman, p. 280-281.

<sup>65</sup> Rotman, p. 262.

circumstance. In some cases, a strict standard that requires a ripe opportunity will be appropriate and in others, a broader standard that encompasses potential opportunities may best serve the policy goals of the fiduciary concept. This approach is supported by first principles arising from academic and appellate authority.

75. Fiduciary relationships are inherently situation specific<sup>66</sup>. Professor Rotman states that situation specificity is “the most vital attribute of the fiduciary concept [...] enabl[ing it] to apply its standard of ethics to a wide variety of actors involved in a broad array of circumstances”. Fiduciary duties are not to be presumed to be identical across the spectrum of fiduciary interactions, even though arise from the same principled roots.<sup>67</sup>

76. The context-specific nature of the doctrine of corporate opportunity in particular was emphasized by the Court in *Canaero*, which expressly directs that the inquiry into whether a fiduciary has misappropriated a corporate may require reformulation in new factual situations, with Chief Justice Laskin observing “the particular facts may determine the shape of the principle of decision without setting fixed limits to it.”<sup>68</sup>

77. The specific context of the fiduciary duty owed by Joe called for a higher standard of ripeness, requiring the opportunity to be actually available to the corporation. In contrast to many corporate opportunity cases, the genesis of the opportunity to purchase the Grazing Lands was expressly found to not be derived from the corporation, but Joe’s pre-existing familial interest. This distinction has bite—and the trial judge explicitly acknowledges this, yet fails to give it effect.<sup>69</sup> Had both SRL and Joe not completed the purchase, Joe would have inherited a half interest in the Grazing Lands. Imposing a lower standard of ripeness means that Joe was effectively handcuffed with respect to the Grazing Lands. Any action taken in connection with the estate may have attracted liability. It is an overextension of the fiduciary concept to mandate Joe to relinquish his inheritance

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<sup>66</sup> *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 413-44.

<sup>67</sup> Rotman, p. 280.

<sup>68</sup> *Canaero* at 619.

<sup>69</sup> AR, p. 68, Reason at para. 137(c).

in service of the corporation, in the context of this closely held company that fulfilled a familial purpose.

78. The unique context of this opportunity militates in favour of a higher standard of ripeness than imposed by the trial judge. If that standard is applied, no liability follows, as detailed below.

**D. Conclusion on maturity of the opportunity**

79. If the correct legal standard is applied in this case, which requires the opportunity to be mature in the sense that it is immediately available to the corporation, there could be no finding of liability on the findings of fact made by the trial judge.

80. There are two paths to the standard sought by the appellant. It either arises as a matter of law on the weight of the authority and principle canvassed above, or alternatively ought to have been applied in the circumstances of this case.

81. The correct standard requires a positive finding that the corporation could have fulfilled the opportunity. The chambers judge did not make this finding. While he expressed it was a real possibility Carol may have agreed to sell to SRL, that is contrary to Carol's evidence that Joe and Palmer's grandchildren had a right of first refusal. This was overlooked by the chamber's judge, and is a palpable and overriding error. The opportunity was not ripe because it was not available to SRL—it belonged to the Sather family. It was a theoretical opportunity; an idea at its highest. Where the opportunity is not available, this Court has declined to impose liability<sup>70</sup>.

82. Beyond Carol's evidence, there are other significant caveats that make clear the opportunity was not a ripe one, on application of the proper standard. The judge found that it would be unclear whether SRL could even continue to operate had it purchased the land, given its significant deficit. It also had no financing in place, nor was there clear evidence of available financing.

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<sup>70</sup> *Moore, Mountain Resources*.

83. The appellant acknowledges that ripeness is one factor in a contextual analysis of whether there was a diversion of a corporate opportunity. If this Court accepts that the judge erred in finding the opportunity was “ripe” within the meaning of *Canaero*, the other factors upon which the chambers judge rested his conclusion are insufficient to ground liability.

84. Apart from ripeness, the judge's findings grounding liability are that the opportunity to purchase the land for \$120,000 from SRL was a corporate one, which Joe came to learn of through his role in SRL as a result of Mike obtaining an appraisal at that price. However, if the facts are considered again, through a new lens which does not regard the opportunity as a ripe one, the picture changes—liability on the judge's narrow construction of the opportunity cannot be sustained. If it is not a ripe opportunity, there is no opportunity for the corporation to capitalize on. Through a new lens of land purchase not being a realistic corporate opportunity, it takes on the colour of a family opportunity, which always belonged to Joe.

85. If the judge had correctly applied the standard, the distance between the opportunity and the company would have been too great to ground liability. The chambers' judge's application of an incorrect standard led him to an erroneous finding of breach of duty, and the appeal should be allowed on this basis.

**E. The chambers judge erred by concluding the corporate opportunity was to purchase, rather than use, the Grazing Lands**

86. In the event the Court accepts the trial judge's characterization of the prevailing standard of maturity, the appellant advances a second, and alternative, discrete ground of appeal.

87. The judge made a palpable and overriding error by characterizing the opportunity as one to purchase the Grazing Lands for \$120,000, despite making findings of fact that fundamentally conflict with that conclusion. The corporate opportunity at issue, properly characterized, was use of the Grazing Lands in a manner which ensured viability of the operations of the ranch. This accords with the purpose of the corporation and the opportunity as found by the trial judge.



88. The findings that demonstrate the chambers judge's error in characterizing the opportunity are as follows:

- A. The opportunity "to acquire the Grazing Lands from Carol, as Palmer's power of attorney, for \$120,000, using an appraisal based on a highest and best use of the lands as grazing lands by the individual that owned the grazing rights to the adjacent Crown Range Lands."<sup>71</sup>
- B. The opportunity at issue not an opportunity for SRL to benefit financially from a resale of the Grazing Lands. <sup>72</sup> SRL's was formed to carry on the operations of Sather Ranch, not to develop or sell the ranch properties.<sup>73</sup>
- C. SRL's purpose in pursuing this specific opportunity was to ensure the long-term viability of the ranching operation and provide a sustainable base from which to expand the size of the herd.<sup>74</sup>
- D. Operations could be maintained with a leasehold interest because "[t]he cows could be grazed and the grazing licence could be maintained with a leasehold interest in the Grazing Lands."<sup>75</sup> Ownership [of the Grazing Lands] was desirable, it was not essential.

89. The judge's analysis here reflects an obvious and material error for three reasons.

90. First, casting the opportunity as one to obtain the property for a specific price, but then stating it was not an opportunity to obtain the financial benefits of legal ownership is logically incoherent. Ownership of land necessarily imports the concomitant benefits of legal ownership.

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<sup>71</sup> AR, p. 60, Reasons at para 103.

<sup>72</sup> AR, p. 69, Reasons at para. 137.

<sup>73</sup> AR, p. 60, Reasons at para. 105.

<sup>74</sup> AR, p. 60, Reasons at para. 104.

<sup>75</sup> AR, p. 63, Reasons at para. 110.

91. Second, the finding that the opportunity was not to benefit financially from the sale of the lands is incongruent with the remedy of equitable damages imposed, which does exactly that, despite the chamber's judge' recognition that the rights of legal ownership may result in a "windfall" for some stakeholders and a financial deprivation to Joe and his family.

92. Third, the trial judge does not give any credence to his own finding that the corporation's purpose in pursuing the opportunity was to maintain the ranch and the heard, which was could be fulfilled by a leasehold interest over the Grazing Lands. The corporation's fundamental purpose of using the lands was polluted with the concept of purchase in the course of the judge's analysis of the opportunity doctrine. This leads to an unfair result where Joe honoured his obligations by ensuring the corporation's interests in maintaining its grazing licence were fulfilled. The requisite leasehold interest was in fact granted by Joe, and extended annually. Joe rented it at cost (*i.e.*, covering the property tax).<sup>76</sup> SRL was granted access to the land at a low cost, rather than expending \$120,000 of money it did not have.

93. This overly broad articulation of the opportunity led to an erroneous finding of breach of fiduciary duty in circumstances where he expressly found that Joe maintained the status quo of the corporation and fulfilled the conditions of the grazing licence, which ought to have led to the conclusion that Joe met his fiduciary duty in the circumstances. If the foundational principal that a fiduciary may not "[usurp] for himself ... a maturing business opportunity which his company is actively pursuing" is applied with the opportunity characterized as an opportunity to use the land, there is no breach.

94. Accordingly, Joe's conduct in purchasing the Grazing Lands cannot be characterized as "usurpation" or "diversion" within the meaning of the principle in *Canaero*.

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<sup>76</sup> AR, p. 52, Reasons at para. 65.

**F. Conclusion**

95. The appellant requests that the trial judge's declaration that Joe breached his duty to SRL be set aside. The judge's reasons finding a breach of fiduciary duty cannot be sustained. Applying the correct legal standard to this case results in an exoneration of Joe. The opportunity was subject to a number of meaningful uncertainties. The irreconcilable findings about the nature of the opportunity are equally a basis upon which to allow the appeal.

**PART 4 - NATURE OF ORDER SOUGHT**

96. Joe seeks orders:

- (a) That the appeal be allowed, setting aside the order made at paragraph 155 of the Reasons;
- (b) Costs of the appeal and of proceedings in the court below; and
- (c) Such further and other relief as this court deems just.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 17<sup>th</sup> day of January, 2025.

DocuSigned by:  
  
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Kaleigh F. Milinazzo  
Counsel for the Appellant

## LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
<b>CASES</b>		
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<i>7868073 Canada Ltd. v. 1841978 Ontario Inc.</i> , 2024 ONCA 371	17	FN57
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<i>Donor Gateway Inc. v. Passero</i> , 2007 CanLII 3677 (ON SC)	17	FN57
<i>Hodgkinson v. Simms</i> , [1994] 3 SCR 377	21	FN67
<i>Housen v. Nikolaisen</i> , 2002 SCC 33	15	FN51, FN52
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<i>Martin v. ALPC Housing Solutions Inc.</i> , 2020 NSCA 35	18	FN58
<i>Matic et al. v. Waldner et al.</i> , 2016 MBCA 60	17	60
<i>Moore International (Canada) Ltd. v. Carter</i> , 1984 CanLII 518 (BC CA)	17, 22	59, FN70
<i>Mountain-West Resources Ltd. v. Fitzgerald</i> , 2005 BCCA 48	17, 22	59, FN70
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Martin Gelter & Geneviève Helleringer, "Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law" (2018) 15 Berkeley Bus LJ 92 at p. 119	18	FN59