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COURT FILE NUMBER	1901 - 01772
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	**AMX REAL ESTATE INC. and JOSEPH SATHER**
DEFENDANTS	**MICHAEL STREET, 0882126 B.C. LTD., BOUNDARY MACHINE LTD., MARIELLE BRULE, PROFECTUS FINANCIAL INC. and SATHER RANCH LTD.**
DOCUMENT	**BENCH BRIEF OF THE APPLICANT, C. CHEVELDAVE & ASSOCIATES LTD., IN ITS CAPACITY AS COURT-APPOINTED RECEIVER OF THE DEFENDANT, SATHER RANCH LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	LAWSON LUNDELL LLP 1100, 225 – 6th Avenue SW Calgary, AB T2P 1N2 Lawyer: Alexis Teasdale Phone Number: (403) 218-7564 Fax Number: (403) 269-9494 E-mail Address: ateasdale@lawsonlundell.com

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APPLICATION BEFORE THE HONOURABLE MR. JUSTICE P.R. JEFFREY

MARCH 18, 2021 AT 10:00 AM ON THE COMMERCIAL LIST

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I. INTRODUCTION

1. This brief is filed on behalf of the Applicant, C. Cheveldave & Associates Ltd., in its capacity as Court-appointed receiver of the Defendant, Sather Ranch Ltd. (the **Receiver**), in support of its Notice of Application filed March 8, 2021 (**Application**).

2. This Application arises in the context of two court proceedings that involve some common issues of fact and law, one commenced in this Court, and another commenced in the British Columbia Supreme Court, namely:

   (a) Alberta Court of Queen's Bench Court File No. 1901-01772 (**this Action**); and

   (b) Supreme Court of British Columbia (the **BC Court**) Action No. S1913131 (the **Receivership Proceedings**).

3. Both of these proceedings involve, in part, the question of whether the Defendants, Michael Street, 0882126 B.C. Ltd., Boundary Machine Ltd., Marielle Brule, and Profectus Financial Ltd. (collectively, the **Street Defendants**) have legitimate debt claims against Sather Ranch.

4. In this Action, one of the allegations made by the Plaintiffs is that the certain of the Street Defendants created more than $800,000 of false indebtedness of Sather Ranch in their favour, by increasing spending, purportedly retaining the services of their related companies, and otherwise incurring inflated costs and debts.

5. In the Receivership Proceedings, the BC Court has ordered a claims process, which, among other things, directs that related party claims are to be determined by a summary trial process or arbitration. The Receiver expects that the Street Defendants, who are considered related party creditors for the purposes of the claims process, will prove claims for debts they allege are owed to them by Sather Ranch, which claims are expected to overlap with the debt underlying certain allegations made by the Plaintiffs in this Action.

6. In the hearing at which the claims process was approved, the Honourable Mr. Justice Walker of the BC Court expressed concern about the potential for inconsistent factual findings between the claims process and this Action, and the possibility that the facts underlying the Street Defendants' alleged debt claims would be litigated more than once. In light of these concerns,

Justice Walker ordered that the Receivership Order and the Claims Process Order be subject to recognition by this Honourable Court.

7. The Receiver recognizes Justice Walker's concerns. It would clearly create difficulties in the administration of the claims process, and in the Receiver's pursuit of this Action on behalf of Sather Ranch, if the BC Court and this Honourable Court were to make different or contradictory findings about the legitimacy of the same alleged debt claims in the context of the different proceedings before each of them.

8. The Receiver therefore brings this Application in order to avoid a multiplicity of proceedings involving identical and/or closely related issues of fact and law, and to reduce the risk of inconsistent findings or results as between the claims process in the Receivership Proceedings and this Action.

9. The Receiver is also seeking an order that Sather Ranch to be named as a plaintiff in this Action, acting by its Court-appointed receiver. Although Sather Ranch is named as a defendant, the Plaintiffs' intention, as disclosed in the pleadings, is to commence and prosecute a derivative action on its behalf. Many of the causes of action pleaded are for wrongs done to Sather Ranch, and not to the Plaintiffs in their individual capacities. A derivative action is unnecessary now, as the Receiver is authorized and empowered to manage and direct Sather Ranch's claims in this Action.

10. Further, this Action is an asset of the receivership estate of Sather Ranch, insofar as it comprises claims belonging to Sather Ranch. Therefore, it is just and appropriate that Sather Ranch, by the Receiver, pursue its claims in this Action on its own behalf.

11. There are three aspects to the relief sought by the Receiver:

(a) An order recognizing the orders granted in the Receivership Proceedings in Alberta.

(b) Orders, pursuant to rules 1.2, 1.3, and 1.4 and s. 8 of the *Judicature Act* directing that:

(i) Sather Ranch be named as a plaintiff rather than as a defendant in this Action; and

(ii) the Plaintiffs, AMX Real Estate Inc. and Joseph Sather, to provide particulars of their individual and independent causes of action against the Street Defendants, and the relief sought by them in their individual capacities, within 30 days of the date of this Order.

(c) In the alternative to (b), above, an order declaring the Receiver to be a complainant within the meaning of section 239(b)(iv) of the Alberta *Business Corporations Act*[1] (the ***ABCA***) for the purpose of allowing the Receiver to bring an application under sections 240 and 241 of the *ABCA*, if deemed necessary and appropriate by the Receiver.

12. If granted, the effect of the orders sought by the Receiver will be to: a) determine the common issues of fact and law in this Action and the Receivership Proceedings in a just, effective, and efficient way, without the risk of judicial inconsistency; and b) ensure the Receiver, on behalf of Sather Ranch, has an opportunity to pursue, manage and direct the claims of Sather Ranch in this Action following the summary determination of common issues of fact and law in the Receivership Proceedings.

II. FACTS

A. The Parties to this Action

13. A copy of the Statement of Claim filed in this Action is attached as Appendix "A" to this Brief for ease of reference.

14. Sather Ranch, which is named as a defendant in this Action, is an Alberta corporation that is extra-provincially registered in British Columbia. It carries on business in both Alberta and British Columbia.[2] It was incorporated in Alberta on March 21, 2013.

15. The directors of Sather Ranch are Joseph Sather (**Joseph**) and Michael Street (**Michael**). Joseph is a Plaintiff in this Action; Michael is a defendant.

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[1] RSA 2000, c B-9 [**TAB 1**].
[2] Affidavit of C. Cheveldave, filed March 8, 2021 (**Cheveldave Affidavit)** at para 9.

16. The shareholders of Sather Ranch are 0882126 B.C. Ltd. (**088**) and AMX Real Estate Inc. (**AMX**), each of which owns 50% of the shares of Sather Ranch. AMX is a plaintiff in this Action, while 088 is a defendant.

17. The Statement of Claim in this Action states that Sather Ranch is named as a necessary party to this Action[3] and seeks, among other relief, an order "granting leave for the Plaintiffs to amend the within Claim to name Sather Ranch as a Plaintiff rather than as a Defendant, in order to commence and prosecute a derivative action."[4]

18. The relationship among the remaining Street Defendants, according to the Statement of Claim, is as follows:

(a) Michael is the sole director and shareholder of Boundary Machine Ltd. (**Boundary**)[5] and 088;[6]

(b) Marielle Brule (**Marielle**) is Michael's partner or common law spouse and a Chartered Professional Accountant;[7] and

(c) Marielle is the sole director and shareholder of Profectus.[8]

B. The Receivership Proceedings

The First Receivership Order and the Receivership Order

19. Since July 2018, Sather Ranch has been the subject of receivership proceedings in British Columbia. On July 17, 2018 an order was pronounced by the British Columbia Supreme Court appointing G. Moroso & Associates Inc. (**Moroso**) as receiver and manager of Sather Ranch (the **First Receivership Order**).[9]

20. On November 21, 2019, an order was pronounced by the Honourable Mr. Justice Walker of the British Columbia Supreme Court (the **Receivership Order**), appointing the Receiver as

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[3] Statement of Claim at para 3. A copy of the Statement of Claim is attached as Schedule "A" to this brief.
[4] Statement of Claim at paras 3 and 64.
[5] This entity is named as Boundary Machine Ltd. in this Action, but the Receiver's records show its legal name as Boundary Machine Inc.
[6] Statement of Claim at paras 7 – 8.
[7] Statement of Claim at para 9.
[8] Statement of Claim at para 10.
[9] Cheveldave Affidavit at para 6.

receiver and manager over the assets, undertakings, and property (the **Property**) of Sather Ranch.[10] The Receivership Order was made pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (***BIA***)[11] and section 39 of the *Law and Equity Act*, RSBC 1996, c 253 (***LEA***).

21. Paragraph 40 of the Receivership Order directed Moroso to seek its discharge. Accordingly, Moroso obtained an order for its discharge as receiver on October 28, 2020.[12]

22. The Receivership Order also provides, among other things, that the Receiver is empowered and authorized to:

(a) initiate, manage and direct all legal proceedings now pending or hereafter pending (including appeals or applications for judicial review) in respect of [Sather Ranch], the Property or the Receiver, including initiating, prosecuting, continuing, defending, settling or compromising the proceedings;[13] and

(b) apply to any court, wherever located, for recognition of the Receivership Order and for assistance in carrying out the terms of the Receivership Order.[14]

The Claims Process Order

23. On January 14, 2021, the Honourable Justice Walker pronounced a further order in the Receivership Proceedings, which approved a claims process for dealing with claims against Sather Ranch (the **Claims Process Order**).[15]

24. The Claims Process Order provides for two separate processes (referred to collectively in this Brief as the **Claims Process**), one for claims of "Arm's Length Creditors," and one for claims of "Related Party Creditors," the latter category being defined to include the Plaintiffs and the Street Defendants.[16]

25. Related Party Creditors must prove their claims through an application to the BC Court, on notice to all other Related Party Creditors. Such applications must be made before the claims bar

[10] Cheveldave Affidavit at para 3.
[11] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [**TAB 2**].
[12] Cheveldave Affidavit at para 6.
[13] See para 2(j) of the Receivership Order, attached as Exhibit "A" to the Cheveldave Affidavit.
[14] See para 37 of the Receivership Order, attached as Exhibit "A" to the Cheveldave Affidavit.
[15] Cheveldave Affidavit at para 10.
[16] Claims Process Order, para 1(u), attached as Exhibit "E" to the Cheveldave Affidavit.

date of March 31, 2021 (the **Claims Bar Date**) and respondents must file their response materials within 21 days after the Claims Bar Date. Reply affidavits are due 30 days after the Claims Bar Date. The Claims Process Order then provides for procedural and substantive hearings at which disputed Related Party Claims will be determined.

26. The Plaintiffs' allegations in this Action include that Michael, Marielle, and 088 created over $800,000 of bogus indebtedness of Sather Ranch in their favour, by (among other things) increasing spending, purportedly retaining the services of their related companies, Boundary and Profectus, charging to Sather Ranch certain unauthorized costs, and otherwise incurring inflated costs and debts, for which they created false financial statements and other corporate records.

27. The Receiver expects that the Street Defendants will prove claims for debt against Sather Ranch as Related Party Creditors under the Claims Process Order. The Receiver expects that the Street Defendants' claims for debt in the claims process will overlap with the debt claims underlying the Plaintiffs' allegations of false indebtedness in this Action.

28. During the hearing of the Receiver's application for the Claims Process Order, the BC Court expressed concern about the potential for inconsistent factual findings being made in the Claims Process and this Action, and the possibility that the facts underlying the Street Defendants' debt claims against Sather Ranch would be litigated more than once. For these reasons, the BC Court made the Claims Process Order subject to recognition by this Honourable Court.

29. Specifically, paragraph 22 of the Claims Process Order contemplates the recognition of the Claims Process Order and the Receivership Order by this Honourable Court, and provides that:[17]

> (a) subject to this Honourable Court’s recognition of the Receivership Order and the Claims Process Order, the Claims Process does not affect any claims which may be advanced by any Related Party against another Related Party Creditor, except to the extent any damages, compensation, indemnity or contribution is sought against Sather Ranch; and

[17] Capitalized terms in this paragraph have the meaning given to them in the Claims Process Order.

(b) all Claims brought against Sather Ranch are subject to and governed by the Claims Process Order, and must be proved in the Claims Process established by the Claims Process Order, failing which they will be barred.

C. The Claims in this Action

30. The Statement of Claim in this Action was filed on February 7, 2019, in breach of the stay of proceedings in place under the First Receivership Order, to avoid a limitations issue.[18] The Plaintiffs agreed to take no further steps in this Action, in light of the stay of proceedings in place under the First Receivership Order, which was continued under the Receivership Order.[19]

31. As stated, one of the allegations made in this Action is that the Street Defendants acted in concert to manufacture debts owed by Sather Ranch in their favour. The Statement of Claim further alleges that these debts were created in order to force a sale of Sather Ranch and use these false debts to credit bid for the assets of Sather Ranch.

32. In general, the Statement of Claim filed in this Action raises allegations on behalf of the Plaintiffs apart from their claims as shareholders or beneficial owners of Sather Ranch. However, as pleaded, these claims and the associated relief sought are indistinguishable from the claims brought on behalf and for the benefit of Sather Ranch.

III. ISSUES FOR DETERMINATION

33. The following questions and issues are before this Honourable Court for determination:

(a) Should this Honourable Court grant an order recognizing the Receivership Order and Claims Process Order for the purposes of this Action?

(b) Should this Honourable Court grant an order pursuant to rules 1.2 and 1.4 of the *Rules* directing that Sather Ranch be made a plaintiff in this Action, together with certain ancillary relief?

(c) If this Honourable Court declines to grant the order contemplated by (b), above, should this Honourable Court grant an order declaring the Receiver to be a

[18] Cheveldave Affidavit at para 7.
[19] Cheveldave Affidavit at para 7.

"complainant" within the meaning of section 239(b)(iv) of the *ABCA*, for the purpose of allowing the Receiver to apply for relief under sections 240 and 241 of the *ABCA*, if deemed necessary and appropriate by the Receiver?

IV. LAW & ARGUMENT

A. This Honourable Court should recognize the Receivership Order and Claims Process Order

34. As described above, the BC Court has directed the Receiver to apply for an order recognizing the Receivership Order and the Claims Process Order in Alberta. This direction arose due to Justice Walker's concerns about the potential for inconsistent findings to be made as between this Action and the Receivership Proceedings, and the possibility that the alleged debt claims of the Street Defendants could be litigated twice.

35. This Honourable Court has jurisdiction pursuant to the Receivership Order, the Claims Process Order, section 243 of the *BIA*,[20] and section 8 of the *Judicature Act*[21] to grant an order recognizing the Receivership Order and the Claims Process Order.

36. Reflecting Justice Walker's concern, paragraph 22 of the Claims Process Order contemplates the recognition of the Claims Process Order and the Receivership Order by this Honourable Court, and provides that:

(a) subject to this Honourable Court's recognition of the Receivership Order and the Claims Process Order, the Claims Process does not affect any claims which may be advanced by any Related Party against another Related Party,[22] except to the extent any damages, compensation, indemnity or contribution is sought <u>against</u> Sather Ranch; and

(b) all Claims brought against Sather Ranch are subject to and governed by the Claims Process Order, and must be proved in the Claims Process established by the Claims Process Order, failing which they will be barred.

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[20] *BIA*, s 243 [**TAB 2].**
[21] RSA 2000, c J-2 (the ***Judicature Act***) [**TAB 3**].
[22] **Related Party** is defined in the Claims Process Order to include AMX, Michael Street, 0882126 B.C. Ltd., Boundary Machine Inc., Marielle Brule, and Profectus Financial Inc.

37. In addition, the Receivership Order and the Claims Process Order each include the following provision:

> [The British Columbia Supreme Court] requests the aid, recognition and assistance of any court…having jurisdiction, wherever located, to give effect to [the Receivership Order and the Claims Process Order] and to assist the Receiver and its agents in carrying out the terms of [the Receivership Order and the Claims Process Order]. All such courts…are respectfully requested to make such orders and provide such assistance to the Receiver, as an officer of [the British Columbia Supreme Court], as may be necessary or desirable to give effect to [the Receivership Order and the Claims Process Order] or to assist the Receiver and its agents in carrying out the terms of [the Receivership Order and the Claims Process Order].[23]

38. The Receivership Order further provides that the Receiver is authorized and empowered to apply to any court, wherever located, for recognition of the Receivership Order and for assistance in carrying out the terms of the Receivership Order.[24]

39. The Receiver was appointed pursuant to section 243 of the *BIA*, which grants authority to the court to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to courts in multiple jurisdictions for the appointment of a receiver.[25] The Receiver's appointment therefore extends over Sather Ranch's Property in Alberta, including claims made on behalf of Sather Ranch in this Action.

40. Finally, section 8 of the *Judicature Act* provides this Court with "broad general jurisdiction,"[26] with the express purpose of avoiding a multiplicity of proceedings:

> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all

[23] Receivership Order attached as Exhibit "A" to Cheveldave Affidavit; Claims Process Order attached as Exhibit "E" to Cheveldave Affidavit.
[24] Cheveldave Affidavit at para 5, referring to para 2(j) of the Receivership Order attached as Exhibit "A".
[25] Houlden & Morawetz, "Bankruptcy and Insolvency Law of Canada" (4th ed.) L§2 [**TAB 4**].
[26] *Canadian Western Bank v 702348 Alberta Ltd*., 2010 ABCA 227 at para 23 [**TAB 5**].

> multiplicity of legal proceedings concerning those matters avoided.[27]
>
> [Emphasis added]

41. In *Price Waterhouse Ltd. v Paribas Bank of Canada*, which was decided before section 243 of the *BIA* came into force, the Nova Scotia Supreme Court considered the policy against a multiplicity of proceedings in deciding to recognize a receivership order granted in Ontario.[28] The Court's comments about the importance of avoiding a multiplicity of proceedings in the context of a receivership are instructive:

> 16 Moreover, the policy against multiple proceedings reflected in our rules and in such doctrines as *forum non conveniens* rests upon the considerations that the court should avoid expensive duplicate applications and avoid the risk of conflicting judicial decisions: see discussion in *Jak v. Société Nationale Industrielle Aérospatiale* (1987), 108 N.R. 380 (P.C.) and *Rohm & Haas Co. v. N.L. Chem Canada Inc.* (1989), 27 C.I.P.R. 105, 28 C.P.R. (3d) 504, 31 F.T.R. 67 (Jerome A.C.J.). These considerations apply in the case of interprovincial receiverships. A policy of seeking efficient, expeditious and inexpensive interprovincial commercial activity supports the recognition of the orders of other provinces and the restriction to one jurisdiction of potentially contentious issues such as the approval of sales or the passing of accounts.[29]
>
> [Emphasis added]

42. To the extent that claims for debt asserted by the Street Defendants in the Claims Process overlap with the debts underlying the Plaintiffs' allegations in this Action, recognizing the Claims Process Order in this Action will ensure the factual basis for those alleged debt claims are determined only once, in the Claims Process. This will preclude the possibility of conflicting factual findings being made as between the Claims Process and this Action, and will promote efficient, expeditious, and inexpensive interprovincial commercial activity.

43. The recognition of the Receivership Order and Claims Process Order in Alberta is not strictly necessary because the Receiver already has the authority to act as a receiver in Alberta for the reasons already discussed. However, the recognition of the Receivership Order and the Claims

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[27] *Judicature Act*, at section 8 [**TAB 3**].
[28] *Price Waterhouse Ltd. v Paribas Bank of Canada,* 1992 CarswellNS 43 (***Paribas Bank***) [**TAB 6**]
[29] *Paribas Bank* at para 16 [**TAB 6**].

Process Order in the context of this Action is necessary to ensure that decisions made in the Claims Process about the validity of any debt claims asserted by the Street Defendants will bind this Court for the purposes of this Action.

B. This Honourable Court should direct that Sather Ranch be named as a Plaintiff in this Action and grant ancillary relief in order to clarify Sather Ranch's claims

i. Sather Ranch is a proper Plaintiff in this Action

44. The Receiver requests an order that Sather Ranch be named as a plaintiff in this Action, instead of as a defendant. This Honourable Court has jurisdiction to grant the relief sought pursuant to rules 1.2 and 1.4 of the *Rules*, section 8 of the *Judicature Act* and rule 1.3 of the *Rules*.

45. Rule 1.2(1) sets out the purpose of the *Rules*: to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.[30] The stated intention of the *Rules* in rule 1.2(2) is that they be used, *inter alia*, to identify the real issues in dispute and to facilitate the quickest means of resolving a claim at the least expense.[31] Rule 1.2(3)(a) specifically contemplates parties making applications to achieve this stated intention.

46. Rule 1.2 is not merely aspirational. In *C(L) v Alberta*, the plaintiffs brought an application pursuant to rule 1.2 seeking direction from the Court to "identify the real issues in dispute so that the case can proceed efficiently."[32] The Court considered as a threshold issue whether a stand-alone application could be made under rule 1.2(3) and held as follows:

> 77 The clear wording of the Rule itself contemplates an application being made to "identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense". There is no timeframe set out in Rule 1.2. Rule 1.2(3) would appear to make the existence of an action the only pre-condition to making an application, although in my view, it would be premature for an application to be made if the parties have not first made an effort among themselves to identify the issues in dispute and to determine the quickest way of resolving the dispute at the least expense.
>
> 78 Rule 1.2(3) contemplates that both substantive and procedural matters be addressed: the issues to be resolved presumably relate to

[30] *Rules*, rule 1.2(1) [**TAB 7**].
[31] *Rules*, rule 1.2(2) [**TAB 7**].
[32] 2011 ABQB 12 at para 1 (***C(L)***) [**TAB 8**].

> the elements of the plaintiff's claims and the defendant's defences.
> …

47. The Court concluded that a stand-alone application can be made pursuant to rule 1.2.[33]

48. Rules 1.4(1) and 1.4(2)(c) of the *Rules* provide a mechanism by which the Court can implement and advance the purpose and intention of the *Rules* set out in rule 1.2:

> 1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.
>
> 1.4(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:
>
> […]
>
> (c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;
>
> […]
>
> (e) impose terms, conditions and time limits;
>
> (f) give consent, permission or approval;
>
> (g) give advice…providing guidance, making suggestions and making recommendations;[34]
>
> […]

49. An order allowing Sather Ranch to be named as a plaintiff in this Action will fulfill the purpose of the *Rules* by facilitating a means by which the Action can be: (a) fairly and justly resolved; and (b) in a timely and cost-effective way.

50. First, such an order will allow the fair and just determination of the claims set out in the Statement of Claim to the extent that those claims belong to Sather Ranch, and therefore, to its receivership estate. Specifically, the Statement of Claim includes numerous allegations that the

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[33] *C(L)* at paras 74 – 79 [**TAB 8**].
[34] *Rules*, rules 1.4(1) and 1.4(2)(c) [**TAB 7**].

Street Defendants breached duties they owed to Sather Ranch, giving rise to damages and other relief in favour of Sather Ranch.

51. An action for wrongs done to a corporation cannot be brought by an individual shareholder. If an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action.[35] Because this Action contemplates that the Plaintiffs will seek derivative relief, and in light of the Plaintiffs' allegations of oppression, the Receiver infers that Michael, being one of Sather Ranch's two directors, declined to authorize Sather Ranch to bring this Action.

52. However, now that the Receiver is appointed, a derivative action is unnecessary. This Action can be prosecuted by the corporation itself, through the Receiver, in whom the authority of the directors to commence an action is Sather Ranch's name is vested.[36]

53. Further, any causes of action pleaded in the Statement of Claim that constitute claims on behalf of Sather Ranch are Property under the Receiver's control,[37] and the Receiver has authority to manage and direct all legal proceedings pending in respect of Sather Ranch or the Property, including prosecuting, continuing, defending, settling and compromising the proceedings.[38]

54. An order directing that Sather Ranch be named as a plaintiff instead of a defendant in this Action would allow Sather Ranch to prosecute any actionable wrongs against it in the manner already contemplated by the pleadings, without the need for leave to commence a derivative action. This is a fair, just, and efficient result.

55. Second, the order sought will allow for the matters at issue in this Action to be determined in a timely and cost effective way because there will be no need for Sather Ranch to commence and prosecute a separate action regarding the matters already alleged in the Statement of Claim.

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[35] *Hercules Management Ltd. v Ernst & Young*, [1997] 2 SCR 165 at para 59 [**TAB 9**].
[36] *Bank of Montreal v. Northguard Holdings Ltd*., 1989 CarswellMan 23 at para 20 (***Northguard***) ["In the case of a court-appointed receiver, the order of appointment usually vests the authority to commence actions on behalf of the company in the receiver and, impliedly at least, divests the directors of this authority."] [**TAB 10**].
[37] Receivership Order, paras 1 and 2, attached as Exhibit "A" to Cheveldave Affidavit.
[38] Receivership Order, para 2(j), attached as Exhibit "A" to Cheveldave Affidavit.

56. This Honourable Court also has jurisdiction to grant the relief sought pursuant to section 8 of the *Judicature Act*[39] and rule 1.3.[40]

57. The Alberta Court of Appeal has confirmed that

> ... Section 8 of the *Judicature Act* directs that the court has a general jurisdiction to grant any remedy so as to avoid, if at all possible, multiple proceedings and to ensure that all matters between the parties are completely determined....[41]

58. The Court's authority under section 8 of the *Judicature Act* has been described as a power to "grant any appropriate remedy that is appropriate in the discrete circumstances of a case."[42]

59. Rule 1.3 sets out the general authority of the Court to provide remedies and specifically states that the Court has authority to grant any relief referred to in the *Judicature Act* or under the *Rules*.[43]

60. The relief sought by the Receiver meets the stated objective of section 8 of the *Judicature Act* of avoiding a multiplicity of proceedings. Requiring the Receiver to commence a separate action for the wrongs committed to Sather Ranch would add unnecessary complexity to the litigation. Further, it is likely any action commenced by the Receiver would be joined with this Action, as it would involve common questions of law or fact and would arise out of the same series of occurrences or transactions.[44]

61. It is just and appropriate that the Receiver be in control of Sather Ranch's role in this Action because Sather Ranch's claims in this Action are an asset of the corporation, and because the right to bring an action in Sather Ranch's name is now vested in the Receiver, as the powers of the directors in that regard are suspended while the Receivership Order is in force.[45]

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[39] *Judicature Act* at section 8 [**TAB 3**].
[40] *Rules*, rule 1.3 [**TAB 7**].
[41] *Gramaglia v Alberta (Minister of Government Services)*, 2007 ABCA 93 at para 39 [**TAB 11**].
[42] *Pyrrha Design Inc v Plum and Posey Inc.*, 2016 ABCA 12 at paras 8 – 10 [**TAB 12**].
[43] *Rules*, rule 1.3 [**TAB 7**].
[44] *Rules*, rule 3.72 **[TAB 7**].
[45] *Northguard* at para 20 [**TAB 10**]. See also the comments of the Alberta Court of Queen's Bench in respect of *Northguard* in *Matco Captial Ltd. v Interex Oilfield Services Ltd.*, 2008 ABQB 295 at paras 15 – 19 [**TAB 13**].

62. For the reasons set out above, the Court has the authority to grant the relief sought, and in doing so, will achieve the purpose and intention of the *Rules*, avoid multiple proceedings, and ensure that all matters between the parties to this Action are completely determined.

ii. ***Need for Particulars of the Plaintiffs' Claims***

63. If Sather Ranch if is made a plaintiff, it intends to exercise its right to amend its Statement of Claim after the Claims Process is complete under rule 3.62, which allows a party to amend its own pleading without leave prior to the close of pleadings, in order to narrow, broaden, or further particularize the nature of the claims made on behalf of Sather Ranch, based on the determinations made in the Claims Process.

64. The Statement of Claim is couched both as an action claiming relief on behalf of and for Sather Ranch, and as an oppression remedy claim by AMX and Joseph, who claim relief for infringement of their personal rights as shareholders.

65. The ancillary relief directing the plaintiffs AMX and Joseph to provide particulars is necessary to clarify which portions of the Action relate to relief sought on behalf and for the benefit of Sather Ranch, as distinct from relief sought on behalf and for the benefit of the Plaintiffs in their individual capacities, the Receiver seeks an order directing the Plaintiffs to provide particulars of their individual claims.

66. This relief will also assist the Receiver in amending the Statement of Claim after the Claims Process is complete, as the particulars will provide clarity as to which portions of the Action can be prosecuted by Joseph Sather and AMX without the involvement of Sather Ranch.

67. If granted, the order sought by the Receiver would be in keeping with rules 1.2 and 1.4, as it would provide clarity to what claims remain in the Action aside from the claims advanced by Sather Ranch. This clarity would promote the efficient and cost effective resolution of the Action. For the sake of expediency, the Receiver requests that the Court require the particulars to be provided within 30 days of this order.

C. Alternative Relief under the *Business Corporations Act*

68. If this Honourable Court is not prepared to grant an order naming Sather Ranch as a plaintiff rather than a defendant, the Receiver seeks alternative relief pursuant to section 239 of

the *ABCA*.[46] Specifically, the Receiver seeks an order declaring that it is a "complainant" within the meaning of section 239(b)(iv) of the *ABCA*, so that the Receiver may, if it deems it to be necessary and appropriate, apply for relief under sections 240 and 241 of the *ABCA*.

69. Under section 240(1)(b) of the *ABCA*, a "complainant" may apply to the Court for permission to intervene in an action to which a corporation is a party, for the purpose of prosecuting or defending the action on behalf of the corporation.[47]

70. A "complainant" is defined in section 239(b)(iv) of the *ABCA* to include "any other person who, in the discretion of the Court, is a proper person to make an application under [Part 19 of the *ABCA*]."[48] Part 19 of the *ABCA* includes both derivative actions and oppression claims.

71. The meaning of the term "proper person" in section 239(b)(iv) was considered by the Alberta Court of Queen's Bench in *First Edmonton Place Ltd. v. 315888 Alberta Ltd*. in the context of an oppression remedy claim brought on behalf of a creditor.[49] In that decision, McDonald J. (as he then was) addressed the interpretation of section 231(b)(iii) (now s.239(b)(iv)) of the *ABCA*:

> 50 Under s. 231(b)(iii), a person may be a "complainant" if he is a person "who, in the discretion of the Court, is a proper person to make an application under this Part."
>
> 51 This is not so much a definition as a grant to the court of a broad power <u>to do justice and equity in the circumstances of a particular case</u>, where <u>a person who otherwise would not be a "complainant" ought to be permitted to bring an action under either s. 232 or s. 234 to right a wrong done to the corporation which would not otherwise be righted</u>, or to obtain compensation himself or itself where his or its interests have suffered from oppression by the majority controlling the corporation or have been unfairly prejudiced or unfairly disregarded, and the applicant is a "security holder, creditor, director or officer".[50]
>
> [<u>Emphasis added</u>]

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[46] *ABCA* at section 239 [**TAB 1**].
[47] *ABCA* at section 240 [**TAB 1**].
[48] *ABCA* at section 239(b)(iv) [**TAB 1**].
[49] (1988), 60 Alta. L.R. (2d) 122 (Alta. Q.B.) (***First Edmonton***) [**TAB 14**]. This decision was reversed on unrelated grounds on appeal in 1989 ABCA 274 [**TAB 15**].
[50] *First Edmonton* at para 51 – 52 [**TAB 14**].

72. Justice McDonald further noted that "the circumstances where a person who is not a security holder…or a director or an officer should be recognized as 'a proper person to make an application' must show that justice and equity clearly dictate such a result."[51]

73. Finally, Justice McDonald held that a "proper person" under section 239(b)(iv) is "a person who could reasonably be entrusted with the responsibility of advancing the interests of the corporation by seeking a remedy to right the wrong allegedly done to the corporation."[52]

74. Justice McDonald's comments were cited with approval by the Court of Queen's Bench in the more recent decision of *Zimmer v DenHollander*."[53]

75. In *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, the Alberta Court of Appeal found that a trustee in bankruptcy could qualify as a "complainant" within the context of an oppression action.[54] Similarly, a monitor appointed under the *Companies' Creditors Arrangement Act* was found to qualify, subject to the requirement of exceptional circumstances, as a "proper person" under section 238(d) of the *Canada Business Corporations Act*,[55] which is identical to section 239(b)(iv) of the *ABCA*.[56] These decisions demonstrate that a court-appointed officer, appointed to represent the creditors or to oversee the restructuring of a corporation, can qualify as a "complainant" in appropriate circumstances.

76. The Receiver submits that, as an officer of the court and a person with obligations to act in the interests of Sather Ranch and its creditors, it can be trusted with the responsibility of advancing the interests of Sather Ranch by seeking a remedy in this Action to right any wrongs done to Sather Ranch. In fact, that is precisely what paragraph 2(j) of the Receivership Order already authorizes and empowers it to do.

77. Justice and equity also dictate that the Receiver be recognized as a "proper person" to make an application for relief under sections 240 and 241 of the *ABCA*. The Receiver has the power and

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[51] *First Edmonton* at para 52 [**TAB 14**].
[52] *First Edmonton* at para 53 [**TAB 14**].
[53] *Zimmer v DenHollander*, 2004 ABQB 493 at para 23 [**TAB 16**].
[54] *PricewaterhouseCoopers Inc. v Perpetual Energy Inc*., 2021 ABCA 16 at paras 120 – 135 [**TAB 17**].
[55] *Canada Business Corporations Act*, RSC 1985, c C-44 at s. 238(d) [**TAB 18**].
[56] *Ernst & Young Inc. v Essar Global Fund Limited*, 2017 ONCA 1014 at paras 111 – 127 [**TAB 19**].

authority to manage and direct any litigation involving Sather Ranch. It is fair and just to give effect to this power by recognizing the Receiver as a complainant.

78. For the reasons set out above, the Receiver submits that this Honourable Court has the authority to declare it to be a "complainant" under s. 239(b)(iv) of the *ABCA*.

V. CONCLUSION

79. Each of the orders sought by the Receiver is intended to clarify and streamline the resolution of the interconnected claims in this Action and in the Receivership Proceedings. The relief sought will avoid a multiplicity of proceedings and the associated potential for judicial inconsistency, and will give effect to the Receivership Order and the intention of the Plaintiffs in this Action that Sather Ranch be a plaintiff in this Action, rather than a defendant.

80. If granted, the relief sought will reduce the likelihood of overlapping or contradictory decisions, and will provide all parties involved with certainty as to the timing and process by which the claims are likely to be resolved.

VI. RELIEF SOUGHT

81. The Receiver requests that the relief set out at paragraphs 10 – 13 of the Application be granted, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON MARCH 8, 2021

LAWSON LUNDELL LLP

Per: 

Alexis Teasdale
Counsel for the Applicants, Sather Ranch Ltd. by its Court Appointed Receiver and Manager, C. Cheveldare & Associates Ltd.

SCHEDULE

A. Statement of Claim

LIST OF AUTHORITIES

1. *Business Corporations Act*, RSA 2000, c B-9
2. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended.
3. *Judicature Act*, RSA 2000, c J-2
4. Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters) (loose leaf updated 2021). Online: WestlawNext Canada (date accessed: 8 March 2021)
5. *Canadian Western Bank v 702348 Alberta Ltd*., 2010 ABCA 227
6. *Price Waterhouse Ltd v Paribas Bank of Canada*, 1992 CarswellNS 43
7. *Alberta Rules of Court*, Alta Reg 124/2010
8. *C(L) v Alberta*, 2011 ABQB 12
9. *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165
10. *Bank of Montreal v Northguard Holdings Ltd*., 1989 CarswellMan 23
11. *Gramaglia v Alberta (Government Services Minister)*, 2007 ABCA 93
12. *Pyrrha Design Inc v Plum and Posey Inc*, 2016 ABCA 12
13. *Matco Capital Ltd v Interex Oilfield Services Ltd.*, 2008 ABQB 295
14. *First Edmonton Place Ltd v 315888 Alberta Ltd*. (1988), 60 Alta LR (2d) 122 (Alta QB)
15. *First Edmonton Place Ltd v 315888 Alberta Ltd*, 1989 ABCA 274
16. *Zimmer v DenHollander*, 2004 ABQB 493
17. *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16
18. *Canada Business Corporations Act*, RSC 1985, c C-44
19. *Ernst & Young Inc. v Essar Global Fund Limited*, 2017 ONCA 1014

COURT FILE NUMBER	1901 - 01772
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	AMX REAL ESTATE INC. and JOSEPH SATHER
DEFENDANTS	MICHAEL STREET, 0882126 B.C. LTD., BOUNDARY MACHINE LTD., MARIELLE BRULE, PROFECTUS FINANCIAL INC. and SATHER RANCH LTD.
DOCUMENT	**STATEMENT OF CLAIM**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

PEACOCK LINDER & HALT LLP
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NOTICE TO DEFENDANTS: MICHAEL STREET, 0882126 B.C. LTD., BOUNDARY MACHINE LTD., MARIELLE BRULE, PROFECTUS FINANCIAL INC. and SATHER RANCH LTD.

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Background and Statement of Facts Relied Upon:

The Parties

1. The Plaintiff, AMX Real Estate Inc. ("**AMX**"), is a corporation incorporated pursuant to the laws of the Province of Alberta and carries on business in Alberta.

2. The Plaintiff, Joseph Sather ("**Joseph**"), is an individual resident in Alberta and the sole director and shareholder of AMX.

3. The Defendant, Sather Ranch Ltd. ("**Sather Ranch**"), is named as a necessary party to this action.

4. Sather Ranch is a corporation incorporated pursuant to the laws of the Province of Alberta and carries on business in Alberta and British Columbia. It is extra-provincially registered in British Columbia.

5. At all material times, AMX has been a 50% shareholder of Sather Ranch and Joseph Sather has been a director of Sather Ranch.

6. The other 50% shareholder of Sather Ranch is the Defendant, 0882126 B.C. Ltd. ("**088**"), a corporation incorporated pursuant to the laws of the Province of British Columbia.

7. The Defendant, Michael Street ("**Street**"), is the sole director and shareholder of 088. Street is also a director of Sather Ranch.

8. The Defendant, Boundary Machine Ltd. ("**Boundary**"), is a corporation incorporated pursuant to the laws of the Province of British Columbia. Street is also the sole director and shareholder of Boundary. Boundary and 088 share the same registered office.

9. The Defendant, Marielle Brule ("**Brule**"), is an individual resident in British Columbia and is, as far as is known to the Plaintiffs, Street's partner or common law spouse. Brule is a Chartered Professional Accountant.

10. Brule is the sole director and shareholder of the Defendant, Profectus Financial Inc. ("**Profectus**"), a corporation incorporated pursuant to the laws of the Province of British Columbia.

The History of Sather Ranch

11. Sather Ranch was incorporated in 2013 and has always operated as a cattle ranching business. Its corporate purpose is to hold land and raise cattle. For decades previous, its land and assets had been personally owned and administered by Palmer Sather, the father of Joseph Sather. Palmer Sather died in 2017.

12. The primary asset of Sather Ranch is an 80-acre parcel of land with a street address of 1313 Greyback Road, Penticton, BC (the "**Ranch Lands**"). At all material times, Sather Ranch has also owned a herd of cattle, the size of which continually varies.

13. Since 1955, Joseph has attended regularly at the Ranch Lands to assist with various aspects of the cattle ranching operation – first assisting Palmer Sather, and subsequently helping out at the ranch while it was being operated by Sather Ranch.

14. In or around 1995, Street began assisting with Palmer Sather's ranching business in an unpaid role. He volunteered his time and learned about caring for and handling cattle. Street's role and responsibilities in the ranching business grew over time.

15. Prior to the incorporation of Sather Ranch, in or around 2009, Street sought permission from Palmer Sather to begin living on the Ranch Lands in a modular home. In consideration for occupying the Ranch Lands, Street agreed to pay $1.00 per annum, install a septic system and electrical hookup at his own cost, and perform part-time

unpaid services for the benefit of the ranching business. This arrangement was reflected in a written Lease Agreement dated August 28, 2009.

16. In 2013, as a result of Palmer Sather's declining health, Joseph controlled the land and cattle that made up Palmer Sather's ranching business. Up to that point in time, the ranch had essentially operated on a "break even" basis, with the sales of cattle basically covering operating costs, with the primary assets of the ranch consisting of the land, the cattle herd and some farm equipment.

17. As Joseph did not have the time nor inclination to continue to manage and fund the ranch's operations, Joseph told Street that, while he could simply sell the land and liquidate the cattle and other assets, Joseph would be prepared to enter into an arrangement to enable Street to ultimately acquire the ranch.

18. An agreement was reached between Joseph and Street in 2013 on the following terms:

    (a) The assets of the ranch would be rolled into a company to be incorporated as Sather Ranch, with 50% of the shares being issued to each of Joseph's holding company, AMX, and to Street's holding company, 088;

    (b) In consideration for his holding company receiving 50% of Sather Ranch, Street would look after the operations and funding of Sather Ranch;

    (c) Joseph would not be required to contribute to the funding of the operations of Sather Ranch, on the understanding and expectation that it would continue to operate basically on a "break even" basis;

    (d) Joseph and Street would each be appointed a director of Sather Ranch;

    (e) Street would buy AMX's 50% interest in Sather Ranch at fair market value, within a few years, as soon as he was in a position to do so;

    (f) Until such time as AMX's 50% interest in Sather Ranch was purchased, no major improvements or expenditures would be undertaken unless:

        (i) they were done at Street's or 088's cost, in which case they would be for their own account and benefit; or

        (ii) they were undertaken with the prior, express and informed consent of Joseph and AMX.

19. Since 2013, Joseph has regularly assisted with the operations of Sather Ranch while in Alberta by, among other things, locating and purchasing cattle, cattle feed, equipment and other supplies in Alberta for delivery to the Ranch Lands, and carrying out such delivery.

The Legal Duties Owed by the Defendants

20. As a director of Sather Ranch, Street has at all material times owed fiduciary duties and duties of care to Sather Ranch at common law and under the Alberta *Business Corporations Act*, RSA 2000, c B-9 (the "**ABCA**"). Specifically, in his role as director of Sather Ranch, Street owes duties:

    (a) to act honestly and in good faith;

    (b) to act with a view to the best interests of Sather Ranch;

    (c) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances; and

    (d) to avoid putting himself in a position where his personal interests were in or could conflict with the interests of Sather Ranch.

21. Street's fiduciary obligations to Sather Ranch were further heightened by the circumstances under which he independently managed the day-to-day operations of Sather Ranch without oversight by Joseph or AMX. In the circumstances, Sather Ranch, as well as its stakeholders Joseph and AMX, were particularly vulnerable to the discretion exercised by Street.

22. In 2013, Street hired Brule (a partner at the accounting firm of White Kennedy LLP) to act as Sather Ranch's chartered accountant and business advisor. Brule was or became Street's common law spouse or intimate partner. In the circumstances, both Street and Brule knew or ought to have known that their personal relationship and the engagement of Brule and her accounting firm put them in a position of potential or actual conflict of interest.

23. Among other things, Brule and White Kennedy LLP prepared Sather Ranch's year-end financial statements. In this role, Brule owed fiduciary duties and duties of care to Sather Ranch, including specifically:

    (a) to act honestly and in good faith;

    (b) to act with a view to the best interests of Sather Ranch;

    (c) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances; and

    (d) to avoid putting herself in a position where her personal interests were in or could conflict with the interests of Sather Ranch.

24. Brule also owed duties to Sather Ranch at all material times under the CPABC Code of Professional Conduct, which is hereby pled and relied upon in its entirety.

25. Further, Street and Brule owed a duty of care to Joseph and AMX. The interests of Joseph and AMX were directly and obviously intertwined with those of Sather Ranch, such that the conduct of Street and Brule in dealing with Sather Ranch would have a foreseeable impact on the interests of those vulnerable to their discretion, including Joseph and AMX.

The Defendants' Wrongful Scheme to Steal the Ranch

26. Following Street entering into the aforesaid agreement with Joseph in 2013 and the issuance of 50% of the shares of Sather Ranch to 088, Street, 088 and Brule embarked upon a fraudulent and wrongful scheme to convert AMX's 50% equity in the ranch and to steal Joseph's entitlement to the fruits of his father's decades of effort in building up the assets of the ranch.

27. Specifically, instead of continuing to operate the ranch basically on a "break even" basis, Street, 088 and Brule conspired and acted jointly and in concert with one another to ramp up spending on "improvements" that benefited only themselves and their related companies, Boundary and Profectus, and which in no way were in the best interests of Sather Ranch. The ultimate goal of this conspiracy and concerted wrongful conduct was to put Street and 088 in a position to "credit bid" the bogus indebtedness so as to acquire the entirety of the equity in the ranch without any payment to or value being realized by Joseph and AMX.

28. Street, 088 and Brule sought to accomplish this goal by purportedly retaining the services of their related companies and otherwise incurring inflated costs and debts to the credit and benefit of themselves and their related entities, to the detriment of Sather Ranch. They then conspired and acted jointly and in concert with one another to create false and misleading Financial Statements and other corporate records purportedly documenting the indebtedness of Sather Ranch to themselves and their related entities.

29. Street, 088, Brule, Boundary and Profectus then put Sather Ranch into receivership by order of the Supreme Court of British Columbia, which Court has no jurisdiction over the affairs and undertaking of an Alberta corporation incorporated under and governed exclusively by the ABCA. Their objective in the receivership proceedings is to obtain an order barring claims made to this Honourable Court, in favour of a summary procedure to be administered by the Receiver without due process and contrary to Alberta law.

30. The aforesaid plot to steal the ranch from Joseph is laid bare by the simple fact that Palmer Sather had owned a plot of land and herd of cattle for decades and operated them on basically a "break even" basis. In the past 5 years, from the date that 50% of the shares of Sather Ranch were issued to Street's holding company, Street has purportedly run up a debt payable to himself, his spouse and their related companies of over $800,000, for which they have issued a civil claim in the Supreme Court of British Columbia. These purported expenditures have not improved the value of the assets of Sather Ranch in any material way. Rather, the entirety of this purported indebtedness was incurred in breach of the 2013 agreement between Joseph and Street, without the approval or consent of Joseph, in breach of the Defendant's fiduciary obligations and

duties of care, in breach of the By-Laws of Sather Ranch, and in reckless disregard for and of the interests of Joseph and AMX as director and shareholder of Sather Ranch and of the dictates of proper corporate governance and professional accounting standards under Alberta law.

The Unauthorized Costs

31. Since the agreement with Joseph and the incorporation of Sather Ranch, Street has applied the resources of Sather Ranch to the purchase, development and construction of amenities on the Ranch Lands that provide no material benefit to Sather Ranch, and have no link to the corporate purpose of Sather Ranch (the "**Unauthorized Costs**"). Examples of the Unauthorized Costs presently known to the Plaintiffs include the following:

    (a) development and construction of a horse-riding arena on the Ranch Lands;

    (b) development of new and expanded living areas for Street and Brule on the Ranch Lands;

    (c) the purchase of equipment for use by Street and Brule on the Ranch Lands, including multiple all-terrain vehicles;

    (d) the purchase of specialized sports horses not intended for ranching work; and

    (e) development of additional infrastructure to support Street's living areas and hobbies.

32. At all material times, Street and Brule received the benefits of the Unauthorized Costs, to the detriment of Sather Ranch.

33. Sather Ranch had operated for decades without any need for the Unauthorized Costs. The Unauthorized Costs have not materially improved the value of the Ranch Lands or the financial position of Sather Ranch.

34. Street fraudulently misrepresented, or alternatively, negligently misrepresented the nature of the Unauthorized Costs. In or around summer of 2016, upon noticing that some work was being performed on the Ranch Lands, Joseph inquired about how it was being paid for. Street represented to and assured Joseph that Street was personally financing the so-called improvements as they were for his own benefit and account. As a result of Street's long history working for his father and running the operations of Sather Ranch, Joseph accepted and relied upon this explanation.

35. In reality, Street did not personally pay for the Unauthorized Costs. Rather, the Unauthorized Costs were billed entirely to Sather Ranch.

36. The Unauthorized Costs were contrary to the Bylaws of Sather Ranch. Street was not delegated the authority to incur the Unauthorized Costs and at no time were they approved by or consented to by the Board of Sather Ranch, Joseph or AMX.

Self-Dealing and Conflict of Interest

37. Street has repeatedly and flagrantly acted in a conflict of interest in directing work on the Ranch Lands. Street contracted with Boundary to perform the vast majority of the labour and development work related to the Unauthorized Costs. Street was the sole director and shareholder of Boundary. At no time did Street notify or obtain the approval of the Board of Sather Ranch regarding the hiring of Boundary. No competitive bids were obtained by Street prior to Boundary incurring substantial charges, which form the majority of the Unauthorized Costs.

38. The work carried out by Boundary at Street's request did not reflect the fair market value of the work. For example, Street rented equipment such as backhoes at unreasonably high rates from Boundary and for unreasonably long periods, without any compelling justification.

39. Rather than fire its employees in times of slowdown, Boundary would retain its employees and direct them to carry out work on the Ranch Lands, at the expense of Sather Ranch. These decisions were made by Street, as Boundary's directing mind.

40. The result of Boundary delivering its purported services to Sather Ranch was to drain Sather Ranch of funds and divert them to a company owned by Street. This occurred with no disclosure to, or approval by, the board of Sather Ranch.

41. Street also directed Sather Ranch to purchase fuel and equipment, which were then misappropriated by Street, Brule and/or Boundary rather than being used by Sather Ranch.

Location and Identification of Corporate Assets

42. Street has concealed, relocated and misidentified certain material assets of Sather Ranch.

43. Street was put in charge of the herd of cattle owned by Sather Ranch. Under Street's care, the size of the herd owned by and branded for Sather Ranch has mysteriously declined, while Street's own personal herd has correspondingly increased in number.

44. In Sather Ranch's annual financial statement for the year ending July 31, 2017, prepared by Brule's accounting firm, Street reported steep declines in the size of the cattle herd which forms a significant portion of Sather Ranch's assets. The total inventory value of the herd dropped from $851,693 to $450,240. However, there was no corresponding increase in Sather Ranch's sales revenue that year that would account for this significant variance.

45. Street has moved a portion of the Sather Ranch herd to another location and recorded this as a decrease in inventory. This intentional relocation of cattle is inconsistent with the right of possession and ownership of Joseph, AMX and/or Sather Ranch, and Street is liable in conversion.

46. Further, Street altered the record-keeping associated with the herd of cattle, including the physical branding on the cattle, to mislead Joseph and others regarding the true size of the herd which Joseph contributed to Sather Ranch.

47. Alternatively, Street was negligent in failing to accurately keep track of the size of the Sather Ranch herd.

Knowing Assistance

48. The fraudulent and dishonest conduct carried out by Street was assisted by and participated in by Brule, 088, Boundary and Profectus. Each of these Defendants had actual knowledge of both Street's fiduciary duties owed to Sather Ranch and his fraudulent and dishonest conduct, and as a result they are each jointly and severally liable for such conduct.

49. Further, Brule knew or ought to have known that the expenses being claimed by Street, 088, Boundary and Profectus were bogus, overstated and unauthorized. Further and in the alternative, the magnitude and character of these expenses in a ranching operation of modest means imposed a duty to warn on Brule and Profectus, which they breached by failing to raise the issue or appropriately insert notes to the Financial Statements, so as to alert Joseph and AMX to the issue and risk of insolvency. Despite this knowledge, Brule and Profectus prepared Financial Statements that were false, misleading and failed to alert the reader to serious mismanagement and insolvency concerns. This was all done for the collateral purpose of assisting Street, 088 and Boundary with the plot to steal the ranch.

Oppression

50. The affairs of Sather Ranch have been conducted in an oppressive manner. Specifically, the actions of Street, 088, Boundary, Brule and Profectus have effected a result that is oppressive, unfairly prejudicial and that unfairly disregards the interests of Joseph and AMX.

51. If permitted to continue, the actions of Street, 088, Boundary, Brule and Profectus with respect to the affairs of Sather Ranch would result in further oppression to the detriment of Joseph and AMX.

52. The reasonable expectations of Joseph and AMX were at all material times that:

    (a) Street and Brule, as a result of owing fiduciary duties to Sather Ranch, would act honestly, in good faith, and with a view to the best interests of Sather Ranch;

    (b) Street and Brule would disclose to the board of Sather Ranch all conflicts of interest, would seek express board approval for any conflicts of interest, and would not pursue any unapproved opportunities which would put them in a conflict of interest;

    (c) Street and 088 would comply with the Bylaws of Sather Ranch;

(d) Boundary would not be used as an equipment or service provider for Sather Ranch without complete disclosure to, and advance approval from, the board of Sather Ranch;

(e) Street, 088, Boundary, Brule and Profectus would not render Sather Ranch insolvent through the Unauthorized Costs;

(f) Street would not attempt to acquire the assets of Sather Ranch through fraudulent means;

(g) The reporting to directors and the Financial Statements of Sather Ranch would provide full, frank and complete disclosure of the state of the financial affairs of the corporation, including by inserting appropriate disclosures in notes and risk factors associated with the risk of insolvency caused by unsustainable and extraordinary expenditures; and

(h) such further and other reasonable expectations as may be further particularized at trial.

53. Joseph and AMX plead and rely upon sections 241 and 242 of the ABCA.

The Receivership

54. By a Notice of Civil Claim filed on August 7, 2018 in Kelowna, BC, receivership proceedings were commenced against Sather Ranch by Street, Brule, Boundary and Profectus (the "**BC Receivership**").

55. Prior to closely examining the alleged debts that gave rise to the receivership proceedings, Joseph and AMX did not oppose the appointment of a receiver, G. Moroso & Associates Inc. (the "**BC Receiver**").

56. After reviewing the alleged debts of Sather Ranch and learning of Street's misconduct, which had previously been concealed by Street and Brule, Sather Ranch, Joseph and AMX rejected the validity of the alleged debts and sought to have the allegations in the Notice of Civil Claim resolved with a full and fair proceeding.

57. Joseph and AMX object to the continuation of the BC Receivership, which was ordered by a Court without any or proper jurisdiction. Sather Ranch and AMX are both companies incorporated pursuant to the laws of Alberta and they are subject to Alberta laws and their management and affairs are subject only to the jurisdiction of the Alberta Courts.

58. Further, the BC Receivership was commenced for an improper purpose, namely, to create a credit bid that Street, Brule, and their respective companies would rely on to obtain possession and title to the assets of Sather Ranch.

59. The issues raised in the within claim must be resolved by the Court of Queen's Bench of Alberta.

60. As part of the relief sought herein, Joseph and AMX are prepared to consent to the re-appointment of the BC Receiver in an Alberta receivership proceeding supervised by this Court.

Real and Substantial Connection

61. There is a real and substantial connection between Alberta and the facts on which the claims in this Action are based. In particular:

(a) Some of the events herein described occurred in Alberta;

(b) The claim relates to breaches of duties owed in Alberta;

(c) The Plaintiff, Joseph, is resident in Alberta;

(d) The Plaintiff, AMX, is a corporation incorporated pursuant to the laws of Alberta and carries on business in Alberta;

(e) The Defendant, Sather Ranch, is a corporation incorporated pursuant to the laws of Alberta and carries on business in Alberta and British Columbia.

Remedy sought:

62. An Order for accounting, tracing and declaration of a constructive trust over funds misappropriated or converted from Sather Ranch.

63. An interim Preservation Order, Attachment Order, Injunction, or other Order:

(a) Protecting and preserving the assets of Sather Ranch pending the trial of this action;

(b) Restraining the Defendants from transferring, disposing of, encumbering or dissipating any and all real or personal property of Sather Ranch; and

(c) Such further and other interim relief that this Honourable Court may deem just.

64. An Order granting leave for the Plaintiffs to amend the within Claim to name Sather Ranch as a Plaintiff rather than as a Defendant, in order to commence and prosecute a derivative action.

65. Judgment for disgorgement of all profits obtained by Street, 088, Boundary, Brule, and Profectus which were wrongfully earned and retained by conspiracy, fraud and misappropriation, and in breach of their fiduciary and other duties owed, or in knowing and willful assistance in the breach, fraud or misappropriation.

66. As against Street, 088, Boundary, Brule, and Profectus, jointly and severally:

(a) A declaration that Street has committed fraud and misappropriation of Sather Ranch assets and breached his fiduciary duties, in conspiracy with, or with the knowing and willful assistance of 088, Boundary, Brule and Profectus;

(b) Further, or in the alternative, damages in the amount of $1,500,000.00 or such further or other amount to be proven at trial for losses related to the misconduct of the Defendants;

(c) Punitive damages based on the egregious and high-handed conduct of the Defendants in an amount to be determined at trial;

(d) Interest pursuant to the terms of the *Judgment Interest Act*, R.S.A. 2000, c.J-1, or on such other basis as may be allowed by this Honourable Court; and

(e) Costs on a full indemnity or party-and-party basis.

67. An Order pursuant to s. 242 of the Act:

(a) Restraining the conduct of Street, 088, Boundary, Brule, and Profectus;

(b) Appointing a receiver or receiver-manager over Sather Ranch;

(c) Replacing or removing Street as a director of Sather Ranch;

(d) Varying or setting aside the disputed transactions or contracts which Sather Ranch purportedly entered into, on the basis they were fraudulent, void, *ultra vires*, contrary to the Bylaws of Sather Ranch, or otherwise unenforceable;

(e) Directing a process of liquidation and dissolution of Sather Ranch;

(f) Compensating Joseph and/or AMX;

(g) Directing an investigation pursuant to s. 231 of the Act regarding Sather Ranch, its business and the conduct of Street, 088, Boundary, Brule, and Profectus; and/or

(h) Granting permission to Joseph and/or AMX to bring an action in the name and on behalf of Sather Ranch, or to intervene in an action to which Sather Ranch is a party.

68. An Order staying or enjoining further proceedings from being pursued or prosecuted by the Defendants in any Court other than before this Honourable Court.

69. The Plaintiffs respectfully request the aid, recognition and assistance of any court, tribunal, regulatory or administrative body having jurisdiction, wherever located, to give effect to the Orders and other relief sought herein.

70. Costs.

71. Such further and other relief as this Honorable Court may deem just.

WARNING

NOTICE TO THE DEFENDANTS

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff against you.

TAB 1

Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of December 11, 2018

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Part 19
Remedies, Offences and Penalties

Definitions

239 In this Part,

(a) "action" means an action under this Act or any other law;

(b) "complainant" means

(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(iii) a creditor

(A) in respect of an application under section 240, or

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

1981 cB-15 s231;2000 c10 s3

Commencing derivative action

240(1) Subject to subsection (2), a complainant may apply to the Court for permission to

(a) bring an action in the name and on behalf of a corporation or any of its subsidiaries, or

(b) intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the corporation or subsidiary.

(2) No permission may be granted under subsection (1) unless the Court is satisfied that

(a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action,

(b) the complainant is acting in good faith, and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

(3) Notwithstanding subsection (2), when all the directors of the corporation or its subsidiary have been named as defendants, notice to the directors under subsection (2)(a) of the complainant's intention to apply to the Court is not required.

RSA 2000 cB-9 s240;2005 c8 s54;2014 c13 s49

Powers of the Court

241 In connection with an action brought or intervened in under section 240 or 242(3)(q), the Court may at any time make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order authorizing the complainant or any other person to control the conduct of the action;

(b) an order giving directions for the conduct of the action;

(c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary;

(d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

1981 cB-15 s233

Relief by Court on the ground of oppression or unfairness

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or bylaws;

(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in addition to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting permission to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or

(ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or bylaws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

RSA 2000 cB-9 s242;2014 c13 s49

Court approval of stay, dismissal, discontinuance or settlement

243(1) An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of the corporation or the subsidiary, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 215, 241 or 242.

(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to February 15, 2021

Last amended on November 1, 2019

À jour au 15 février 2021

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Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

TAB 3

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 11, 2018

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(i) the administration of justice where there exists no adequate remedy at law, and

(j) a grant of injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse legal title.

(4) The rules of decision in matters mentioned in subsection (3), except where otherwise provided, shall be the same as governed the Court of Chancery in England in like cases on July 15, 1870.

RSA 1980 cJ-1 s5

Pronouncement on wills, etc.

6(1) The Court has jurisdiction

(a) to try the validity of last wills and testaments, whether relating to real or personal estate and whether probate has been granted or not, and

(b) to pronounce the wills and testaments to be void for fraud and undue influence or otherwise,

in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.

(2) The Court has the same jurisdiction as the Court of Chancery had in England on July 15, 1870, with regard to

(a) leases and sales of settled estates,

(b) enabling infants with the approbation of the Court to make binding settlements of their real and personal estates on marriage, and

(c) questions submitted for the opinion of the Court in the form of special cases on the part of those persons that by themselves, their committees or guardians, or otherwise, concur therein.

RSA 1980 cJ-1 s6

Jurisdiction regarding lunatics

7 In the case of lunatics and their property and estates, the jurisdiction of the Court includes, subject to the Rules of Court, the jurisdiction that in England is conferred on the Lord High Chancellor by a Commission from the Crown under the Sign Manual.

RSA 1980 cJ-1 s7

General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either

absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

TAB 4

HMANALY L§2
Houlden & Morawetz Analysis L§2

Bankruptcy and Insolvency Law of Canada, 4th Edition

THE BANKRUPTCY AND INSOLVENCY ACT

Part XI (ss. 243-252)
L.W. Houlden and Geoffrey B. Morawetz

L§2 — Secured Creditors and Receiver Generally

L§2 — Secured Creditors and Receiver Generally

See ss. 243, 245, 246, 246.1, 247, 248, 249, 250, 251, 252

This part of Houlden, Morawetz and Sarra is not intended to be a general work on receivership; there are, of course, excellent texts on that subject. Rather, it is intended to summarize the cases on Part XI of the Act; the cases on receivership that have been reported in Canadian Bankruptcy Reports; and cases on receivership that are of interest to persons engaged in bankruptcy and insolvency practice.

Section 243 grants authority to the court, defined in s. 2 to include a judge exercising jurisdiction under the *BIA,* to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver. The new national receiver under the *BIA* is entitled to act across the country, increasing efficiency by removing the need to have a receiver appointed in each jurisdiction in which the debtor's assets are located. Creditors are still entitled to have a provincially appointed receiver act on their behalf under the Act. The subsection was further amended by providing specific powers that may be exercised by the court appointed receiver.

Under the 2009 amendments, where notice is to be sent under s. 244(1), s. 243(1.1) specifies that the appointment of a national receiver cannot be made before the expiry of ten days after the date on which the secured creditor sends the notice, unless the insolvent person consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before expiry of the ten days. The notice provides the debtor with an opportunity to repay the liability that underlies the security being enforced. Section 243(2) clarifies that a receiver under the *BIA* includes one appointed under this Act or another statute.

Section 243(4) specifies that a receiver appointed either by the court or under the terms of a security agreement to take control of all or substantially all of the inventory, accounts receivable, or other property must be a licenced trustee.

Section 243(5) specifies that an application for the appointment of a receiver must be made in the locality of the debtor. The previous statutory language was silent on where the application could be made. Accordingly, the application was sometimes brought in a location that was more convenient for the creditor who was making the application, which may not have any connection with the place in which the debtor's business was located or where other creditors were located. This practice could have the effect of preventing smaller creditors from participating in the process, because of the prohibitive cost of hiring legal counsel in a distant jurisdiction.

Under the 2009 amendments, the court may make any order respecting fees and disbursements of the receiver that it considers appropriate, and may grant a priority charge to the receiver ahead of secured lenders: s. 243(6). However, the court is not to make such an order unless it is satisfied that the secured creditors who may be materially affected by the order has been given reasonable notice and the opportunity to make representations to the court. Disbursements will not include payments made in the operation of the insolvent debtor's business: s. 243(7).

Prior to the enactment of Part XI, receivers were governed by provincial law. Now, when a receiver is appointed for a bankrupt or insolvent person, Part XI will control the conduct of the receivership.

Part XI was intended to give the bankruptcy court control over receiverships that involve all or substantially all of the property of an insolvent person or a bankrupt. It is also intended to impose on the persons who conduct such a receivership a duty to disclose, a duty to act in good faith and a duty to account for their conduct of the receivership: *Farm Credit Corp. v. Corriveau* (1993), 20 C.B.R. (3d) 124, 1993 CarswellSask 20, [1993] 6 W.W.R. 360, 110 Sask. R. 127 (Q.B.). Compliance with ss. 245 and 246 of the Act is time consuming and costly, but the sections are designed to eradicate abuses that had existed for many years in connection with receiverships: *Re Colour Box Ltd.* (1995), 29 C.B.R. (3d) 262, 21 O.R. (3d) 746, 1995 CarswellOnt 32 (Gen. Div.).

Part XI does not conflict with the enforcement provisions of provincial personal property security legislation. Both provisions can apply to security claims against an insolvent person. Since there is no operational conflict, the provincial legislation is not *ultra vires: NN Life Insurance Co. of Canada v. 568554 Saskatchewan Ltd.* (1993), 23 C.B.R. (3d) 209, 1993 CarswellSask 31, 6 P.P.S.A.C. (2d) 66, 115 Sask. R. 136 (Q.B.).

"Court" has been defined in s. 243(2)(b) and s. 250(2)(a) and (b) so as to include all courts except the bankruptcy court. "Court" in the other sections of Part XI means the bankruptcy court.

"Receiver" does not include all receivers but only receivers of the estates of insolvent persons or bankrupts: s. 243(2). "Receiver" includes receivers appointed by a secured creditor without a court order, and receivers appointed by court order: s. 243(2)(a) and (b).

The fact that the person is not called "receiver" but some other name such as "agent" or "monitor" is of no consequence. If the person has taken possession or control of the property of the insolvent person or bankrupt under a security agreement or court order, the person is a receiver for the purposes of s. 243. Because of the wide definition of "receiver" in s. 243(2), a person appointed by a mortgagee to take possession under a mortgage of business property is a receiver.

An interim receiver appointed under s. 47(1) after the filing of a notice of intention is not a receiver within the definition contained in s. 243(2): *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169, 1996 CarswellOnt 5053, 22 O.T.C. 247 (Ont. Gen. Div.).

The definition of "receiver" in s. 243(2) is not limited to the traditional appointment of a receiver, but includes a secured creditor who is (1) appointed or authorized by the terms of a security agreement or court order to take possession of and dispose of secured property, and (2) takes possession of the secured property under the authority of and by reason of the security agreement or court order. The definition does not, however, include a secured creditor who acquires possession of property in conjunction with the vesting of title. Thus, if a secured creditor acquires property through foreclosure or a voluntary transfer, it is not a receiver: *Farm Credit Corp. v. Corriveau* (1993), 20 C.B.R. (3d) 124, 1993 CarswellSask 20, [1993] 6 W.W.R. 360, 110 Sask. R. 127 (Q.B.).

A receiver-manager appointed under the *Judicature Act* (Alberta) is not entitled to the same priority under s. 20(a)(i) of the *Personal Property Security Act* (Alberta) (*PPSA*) as a trustee in bankruptcy with respect to an unperfected security interest at the date of the bankruptcy; however, it is appropriate to lift the stay of proceedings in a debtor company's *CCAA* and receivership proceedings for the limited purpose of validating a secured creditor's amended *PPSA* registration where such registration does not affect the debtor company's reorganization efforts and there is not any prejudice to the debtor company or its creditors: *Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of)* (2006), 2006 CarswellAlta 1036, 25 C.B.R (5th) 273, 2006 ABQB 572 (Alta. Q.B.).

A custodian appointed to wind up the affairs of an insolvent law firm will not be treated like a receiver for the purpose of obtaining a charging order over the assets of the firm. Although there are similarities between a receiver, a monitor and a custodian, receivers and monitors act on behalf of all interested parties, whereas custodians are appointed to protect the clients

of the insolvent law firm, not its creditors: *Re De Stefanis* (2004), 2004 CarswellBC 28, 2004 BCSC 10, 50 C.B.R. (4th) 175, 24 B.C.L.R. (4th) 306 (B.C. S.C.).

Where the holder of an inventory security agreement obtained possession of its inventory from the trustee in bankruptcy of the debtor after the trustee had received a legal opinion that the security was valid, the court held that this possession was not a voluntary transfer of the inventory, since the trustee had no option but to deliver it to the secured creditor. As the creditor was acting as a receiver as defined by s. 243(2), it had to comply with ss. 245 and 246 of the Act: *Re Colour Box Ltd.* (1995), 29 C.B.R. (3d) 262, 1995 CarswellOnt 32, 21 O.R. (3d) 746 (Gen. Div.). If a person is a receiver as defined in s. 243(2), he or she must comply with ss. 245 and 246 of the Act, and the court has no power to relieve against the strict application of the Act: *Re Colour Box Ltd., supra.*

Section 243 only applies to a receiver for all or substantially all of the inventory, accounts receivable or other property of an insolvent person or a bankrupt. It does not apply to a receiver appointed with respect to a small part of the property of an insolvent person or a bankrupt: s. 243(2); *London Life Insurance Co. v. Air Atlantic Ltd.* (1994), 27 C.B.R. (3d) 66, 133 N.S.R. (2d) 185, 380 A.P.R. 185, 1994 CarswellNS 32 (S.C.).

A receiver appointed by the court in a debentureholder's action is an officer of the court, responsible to the court and not to the holder of the debenture: *Re Philip's Manufacturing Ltd.,* 12 C.B.R. (3d) 149, 1992 CarswellBC 490, 69 B.C.L.R. (2d) 44, [1992] 5 W.W.R. 549, 92 D.L.R. (4th) 161, 15 B.C.A.C. 247 (*sub nom. Philip's Manufacturing Ltd. v. Coopers & Lybrand Ltd.*), 27 W.A.C. 247 (C.A.).

A court appointed receiver is in no sense an agent or trustee for the party at whose instance the receiver was appointed. The receiver is an officer of the court appointed for the benefit of all the parties to the proceedings. The possession of the receiver is the possession of the court and may not be disturbed without the leave of the court: *Re Jenny Lind Candy Shops Ltd.,* 16 C.B.R. 193, [1935] O.R. 119, [1935] 1 D.L.R. 654 (S.C.); *Can. Commercial Bank v. Simmons Drilling Ltd.* (1989), 76 C.B.R. (N.S.) 241, 35 C.L.R. 126, 62 D.L.R. (4th) 243, 78 Sask. R. 87 (C.A.). A *fortiori* the receiver is not an agent of the debtor company. The company does not appoint the receiver and cannot dismiss it, and the receiver is not bound to follow its directions. Only the court can dismiss or give directions to a receiver: *I.W.A., Local 1-324 v. Wescana Inn Ltd.* (1977), 27 C.B.R. (N.S.) 201.

The purpose of a general receivership is to enhance and facilitate the preservation and realization of the debtor's assets for benefit of all creditors including secured creditors: *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781, 32 C.B.R. (3d) 303, 1995 CarswellOnt 374, [1995] O.J. No. 1482 (Gen. Div.).

Receivers and managers should carry out their duties on a high professional plane. They should be careful not to assume or be placed in positions of conflict of interest: *Cherry Processing & Packaging Equipment Ltd. v. Chrysler Canada Ltd.* (1982), 42 C.B.R. (N.S.) 316 (Ont. S.C.). They should carry out their duties with civility and rectitude: *Bank of Montreal v. Steel City Sales Ltd.* (1983), 47 C.B.R. (N.S.) 15 (N.S. T.D.).

The Ontario Superior Court of Justice held that a court-appointed receiver had adopted a contract between the debtor and a third party and was therefore obligated to compensate the third party under such contract pursuant to a contingency fee arrangement, where the receiver was aware that the third party was acting in accordance with the contract after the date of the receivership order and the receiver did not dissuade the third party from continuing to act under the agreement and did not indicate that payment to the third party was at risk. The court further held that a constructive trust applied on the basis that: (i) there was an enrichment to the receiver if it retained 100% of the funds and did not pay the contingency fee to the third party; (ii) there was a corresponding deprivation in that the third party expected and was told by an employee retained by the receiver that it would receive payment; and (iii) there was no juristic reason for the enrichment since there was an expectation that the third party would be paid for its services, the funds were identifiable and not mingled with the debtor's general funds and there would be a windfall to the secured creditor if the third party was not paid as promised: *General Motors Corp. v. Peco Inc.* (2006), 2006 CarswellOnt 987, 19 C.B.R. (5th) 224 (Ont. S.C.J.).

Where the same company acted as trustee and receiver, a conflict arose as a result of the trustee and receiver taking different positions regarding validity of security. The receiver manager exposed itself to a claim for damages and to the costs of a realization that was undertaken without authority: *Re Orion Truck Centre Ltd.* (2003), 47 C.B.R. (4th) 99, 2003 CarswellBC 1857, 17 B.C.L.R. (4th) 337, 6 P.P.S.A.C. (3d) 93, 2003 BCSC 1167 (B.C. S.C. [in Chambers]).

Where directors of a company in receivership made decisions regarding legal services after the appointment of a receiver-manager and the decisions were in connection with a legal action against secured creditors, the court held that the directors of a company in receivership have the authority during the receivership to agree on behalf of the company to pay for legal services under the *Legal Profession Act* (British Columbia), but only to the extent that such legal services related to residual powers that remain with the directors during the receivership and have not been given to a receiver-manager. Although a receiver-manager is generally given the power to prosecute and defend actions, it would be a conflict of interest where the litigation was between the security holder and the company in respect of which the receiver-manager was appointed: *Lang Michener v. American Bullion Minerals Ltd.* (2006), 2006 CarswellBC 753, 21 C.B.R. (5th) 118, 2006 BCSC 504 (B.C. S.C.).

The Ontario Court of Appeal held that the regime under the Ontario *Personal Property Security Act* will not be engaged, and registration is not required, in respect of a security interest in equipment where all of the conditions of sale regarding the equipment have not been satisfied; the equipment remains the property of the supplier and title has not passed; and no debtor/creditor relationship has been created. The Court of Appeal held that a security interest in equipment cannot attach under the *PPSA* until a transaction occurs that gives the debtor rights in the equipment: *994814 Ontario Inc. v. RSL Canada Inc.* (2006), 2006 CarswellOnt 2930, 20 C.B.R. (5th) 163, 209 O.A.C. 326 (Ont. C.A.).

The Ontario Superior Court of Justice held that, pursuant to s. 14.06(7) of the *BIA,* a claim by either the federal or provincial Crown for the costs of remedying any environmental condition or damage affecting real property is secured by a charge on the real property and on any contiguous property related to the debtor's activities that caused the environmental condition or damage. However, the court held that the Crown is an unsecured creditor as regards such remedial costs insofar as the subject real property is insufficient to satisfy such remedial costs and is thereby required to prove its claim like any other unsecured creditor in the context of a bankruptcy. The court further held that neither the debtor, nor interim receiver nor trustee in bankruptcy, absent wilful misconduct or gross negligence, has a personal statutory obligation to comply with provincial environmental safety requirements, such as the *Environmental Protection Act* (Ontario). The court noted that while the *EPA* authorized the Ministry of the Environment to issue orders to a polluter to clean up polluted property, it was only in exceptional circumstances that such orders could be issued to an interim receiver or trustee in bankruptcy. Further, in determining whether a secured creditor's interest ought to be equitably subordinated to the interests of the administrator of a pension plan in the context of an insolvency, the court held that the following test must be satisfied: (a) the secured creditor must have engaged in inequitable conduct; (b) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the secured creditor; and (c) equitable subordination of the secured claim must not be inconsistent with the provisions of the *BIA: Re General Chemical Canada Ltd.* (2006), 2006 CarswellOnt 4675, 53 C.C.P.B. 284, 22 C.B.R. (5th) 298 (Ont. S.C.J. [Commercial List]).

In dismissing an appeal from this judgment, the Ontario Court of Appeal held that the claim filed by the administrator of a pension plan could not succeed because the administrator did not meet the definition of a secured creditor in the *BIA*. The Court held that the administrator does not hold a charge or lien as security for a debt due or accruing due to the administrator from the company. The function of the administrator is to ensure that the pension plan, and the pension fund maintained to provide benefits under the plan, is administered in accordance with the *Pension Benefits Act* and its regulations. There was no indication that the contributions were owed to the administrator to be held in trust for the pension funds; rather, the legislation contemplates that those contributions were owed to the pension funds pursuant to the pension plans and were not the property of the administrator. Therefore, the lien and charge accorded to the administrator secured the employer's obligation to pay the unpaid contributions required by the pension plans to the pension funds. The pension contributions owed by the debtor did not constitute a debt due to the administrator; rather, it was a legal obligation to make contributions to the pension plan: *Re General Chemical Canada Ltd.* (2007), 2007 CarswellOnt 5497, 35 C.B.R. (5th) 163, (*sub nom. Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*) 2007 C.E.B. & P.G.R. 8258, 61 C.C.P.B. 266, 31 C.E.L.R. (3d) 205, 2007 ONCA 600 (Ont. C.A.).

The court has jurisdiction to appoint a receiver whenever it appears to be "just and convenient" and the court must balance the inconvenience facing the creditor in using the usual means of execution with the cost, ultimately borne by the debtor, of appointing a receiver. In determining whether the appointment of a receiver is warranted, the court should consider whether there is a legal impediment or special circumstances that make it practically very difficult or impossible for the plaintiff to obtain the fruits of her or his judgment: *Warren v. Warren* (2008), 2008 CarswellBC 1149, 44 C.B.R. (5th) 54, 2008 BCSC 731 (B.C. S.C.).

The Manitoba Court of Appeal affirmed the decision of the motions judge who held that a First Nations person can waive the protection from seizure found under s. 89 of the *Indian Act.* The issue of whether the appellant, an "Indian" as defined under the *Indian Act* could waive the protection from seizure found under s. 89 of the *Indian Act* was a question of law reviewable on a standard of correctness. Section 89(1) provide that subject to the Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band; but that notwithstanding that provision, a leasehold interest in designated lands is subject to a charge, pledge, mortgage, attachment, levy, seizure, distress and execution. Section 89(2) specifies that a person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession remains wholly or in part in the seller may exercise his or her rights under the agreement notwithstanding that the chattel is situated on a reserve. Here, the appellant had signed an authorization and consent that in effect waived his s. 89 rights, granting the respondent the right to enter onto the lands of the reserve for the purposes of enforcing its security as against the personal property in accordance with the terms of its loan agreement with the appellant. The appellant further agreed not to exercise his rights under any treaty with the Government of Canada. The motions judge found the waiver to be valid, thereby allowing a court-appointed receiver to seize and subsequently sell the appellant's business assets to an Indian band. The court was guided by the Supreme Court of Canada's decision of *McDiarmid Lumber Ltd. v. God's Lake First Nation* (2006), 2006 CarswellMan 424, 2006 CarswellMan 425, [2006] 2 S.C.R. 846, 27 C.B.R. (5th) 204, which had held that provincial credit regimes are designed to apply universally and, unless expressly excluded by the Act, apply to Indian property. Here, the appellant had not argued that the waiver was anything but the result of informed consent. The decision of the motions judge was entirely consistent with the reasons for decision of the Supreme Court of Canada and a person defined as an "Indian" can effectively waive the protection of s. 89 of the Act with respect to a commercial transaction on a reserve: *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson* (2009), 2009 CarswellMan 305, 55 C.B.R. (5th) 53, 2009 MBCA 72 (Man. C.A.).

The Ontario Superior Court of Justice confirmed the appointment of a private receiver, but in doing so, the court broadened the inquiry beyond a review of the required elements of default under the security agreement. Given that there had previously been an unsuccessful receivership application, the court considered the confirmation application as if it were a fresh receivership application: *STN Labs Inc. v. Saffron Rouge Inc.* (2010), 2010 CarswellOnt 3588, 68 C.B.R. (5th) 287 (Ont. S.C.J.).

For floating charges and *PPSA* legislation, see *ante* F§63 *"Personal Property Security Act* — (42) Floating Charges".

The Ontario Superior Court of Justice reviewed the basis for the appointment of a receiver under s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act* (*CJA*). Newbould J. held that on a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time would generally be of short duration, not more than a few days and not encompassing anything approaching 30 days, referencing *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 1989 CarswellOnt 191, 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1, 62 D.L.R. (4th) 277 (Ont. C.A.); and *Toronto Dominion Bank v. Pritchard* (1997), 1997 CarswellOnt 4277, 154 D.L.R. (4th) 141 (Ont. Div. Ct.), leave to appeal refused (1998), 1998 CarswellOnt 641 (Ont. C.A.). Under the loan agreements, the credits were on demand, and as well, the creditor had the right to cancel the credits at any time at its sole discretion and over 70 days had passed since demand for payment was made. Under s. 243 of the *BIA* and s. 101 of the *CJA,* a court may appoint a receiver if it is "just and convenient to do so", having regard to all the circumstances and, in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so is the question of whether or not an appointment by the court is necessary to enable the receiver-manager to carry out its work and duties more efficiently. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed. Here, it was preferable to have a court appointed receiver rather than privately appointed

receiver. The prospect of more litigation was a consideration: *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 2011 CarswellOnt 896, 74 C.B.R. (5th) 300, 2011 ONSC 1007 (Ont. S.C.J.).

The Ontario Superior Court of Justice appointed a receiver over a business notwithstanding pending appeal of arbitration. The court held that the hope of winning an arbitration appeal should not result in an open time limit to repay the outstanding amount where the demand had been made three months ago. The GSA held by a creditor entitled it, on the occurrence of a demand that had not been cured, to appoint a receiver or to apply to a court for the appointment of a receiver. Newbould J. noted that although more than three months had passed since demand was made, the debtor company had not cured the default and had committed four further payment defaults. Justice Newbould observed that a reasonable time for payment is permitted before a receiver will be appointed by a court; however, if difficulties in obtaining replacement financing do not permit an open-ended time for repayment beyond days, the hopes of winning an arbitration appeal could not put a debtor on any stronger basis. Justice Newbould accepted the creditor's view that if the debtor was unable to pay for inventory when due, it would face the choice between continuing to ship inventory without any reasonable likelihood of payment and insisting on COD terms for inventory, which would either increase its financial exposure or suffer reputational effects. Newbould J. was concerned about the quality of management and the negative prospects for a turnaround of the negative equity. The court appointed a receiver with the power to operate the business, but not at the moment to sell all or parts of it outside of the ordinary course of business. If the appeal from the arbitrator were to be successful, it would be open to the debtor to apply to vary or rescind the order: *Canadian Tire Corp. v. Healy* (2011), 2011 CarswellOnt 7430, 81 C.B.R. (5th) 142 (Ont. S.C.J. [Commercial List]).

An interim receiver was appointed and found a party interested in purchasing the debtor's asset. The principal secured creditor brought a motion under s. 243 of the *BIA* to appoint the receiver under that Act with power to sell the debtor's asset. Another secured creditor opposed, arguing that hypothecary remedies in the *Code civile* were more appropriate. The court held that, here, the evidence showed that the asset consisted of contaminated lands and the *BIA* offered protection to the receiver in respect of the lands whereas the *Code* did not. Moreover the receiver was now trustee. Therefore, the court found it proper to make the appointment under s. 243 and authorize the receiver to sell the asset: *Re 9113-7521 Québec inc.* (2011), 2011 CarswellQue 7544, 83 C.B.R. (5th) 66 (Que. S.C.), affirmed (2011), 2011 CarswellQue 10935, 2011 QCCA 1894 (Que. C.A.).

In determining whether a receiver acted properly in conducting a sale, the court will consider whether sufficient effort has been made to obtain the best price; the interests of all parties; the efficacy and integrity of the process by which the receiver obtained offers; and whether there was any unfairness in the process: *Bank of Montreal v. Dedicated National Pharmacies Inc.* (2011), 2011 CarswellOnt 7972, 83 C.B.R. (5th) 155 (Ont. S.C.J. (Commercial List)).

The Ontario Superior Court of Justice dismissed the motion of a s. 81.1 claimant that requested that the receiver answer questions posed by the s. 81.1 claimant. Justice Pattillo observed that the fact that the receiver owes fiduciary duties to stakeholders does not entitle a stakeholder to go on a fishing expedition for information. A court-appointed receiver is required to respond to reasonable requests for information from parties with an interest in the receivership. What is reasonable must be determined, having regard to the interest of the requesting party and the relevance of the information sought based on the issues. In addition, the objectivity and neutrality of the officer of the court is also a factor to consider. Pattillo J. concluded that the vast majority of the more than one hundred questions had nothing to do with the s. 81.1 claim and amounted to nothing more than a fishing expedition to see if the claimant could uncover some sort of impropriety that it suspected may have occurred but of which it had no proof. Pattillo J. was satisfied that the receiver had duly and thoroughly investigated and had provided all relevant facts. It was not required to answer further questions that, in the circumstances, were either irrelevant or unreasonable and in most cases, both. Justice Pattillo observed that it is often the case that, on the Commercial List sensitive, documents concerning an asset sale are sealed in order to protect the sale process. Once that process has been completed, it follows that the information is no longer confidential. In the circumstances, Pattillo J. was of the view that the company should be required to establish that the documents in issue still remained confidential. Accordingly, this aspect of the motion was adjourned, to be brought back on with proper notice, in order to allow it to properly respond. The receiver also sought a release and discharge from any and all claims arising out of its actions as receiver save and except for gross negligence or willful misconduct. Pattillo J. noted that the release was a standard term in the model order of discharge. In his view, in the absence of any evidence of improper or negligent conduct on the part of the receiver, the release should issue; a receiver is entitled to close its file once and for all. In this case,

there was no evidence of improper or negligent conduct on the part of the receiver. The court granted the receiver its discharge and released it from any and all obligations as receiver: *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, 2012 CarswellOnt 14138, 2012 ONSC 6376 (Ont. S.C.J. [Commercial List]).

The Saskatchewan Court of Appeal reviewed the law relating to an "all obligations" clause, contained in an assigned general security agreement (GSA), and whether it could secure the previously unsecured debts owing by the debtor to the assignee from a time before the assignment took place. In the circumstances of this case, the court held that the only amounts secured were those owing by the debtor to the assignor at the time of the assignment. Justice Jackson held that courts must give sufficient respect to the principles of secured transactions law that allows security agreements to secure past and present indebtedness as well as future indebtedness, and thereby, give effect to what are known in the trade as "all obligations" clauses. A court must be concerned about fairness and the effect on bankruptcy and other priorities, but if the contract will have no effect on priorities, there may well be nothing preventing an assignee from converting unsecured debt into secured debt, if that is the intention of the contracting parties. In this case, Jackson J.A. held that the appeal was best resolved on the basis of construing the contracts in question: did the parties intend that the "all obligations" clause contained in the GSA meant that an assignee from the bank could secure its prior unsecured debts? Jackson J.A. held that the court must first interpret the GSA and the letter of offer to determine whether the original contracting parties intended the assignment clause to secure the unsecured debts of a future assignee. If the parties did so intend, the court would then have to determine whether a commercially defensible reason would exist to prevent the GSA from operating in that manner. In this appeal, however, the Court did not have to consider the second question. Justice Jackson found that ascertaining the intention of contracting parties is an objective exercise informed by the factual matrix surrounding the formation of the contract with the words in the contract being given their natural and ordinary meetings unless absurdity would result. Applying these principles excluded much of the affidavit evidence before the court for the purposes of contractual interpretation, as the evidence focused on the conduct and intentions of various individuals after entering into the GSA. The court of appeal concluded that it did not appear objectively that the bank and the debtor intended that the GSA would cover the unsecured debts of the debtor that may be owed to a third party upon assignment. While the GSA permitted an assignment without notice, it did not state that on assignment, the GSA would act to secure any and all unsecured debts previously owed to the assignee. Financial institutions are concerned about the debts that may be owed to them, but Jackson J.A. was of the view that it was a stretch to assume, without clear words, that a financial institution and the debtor intended that an "all obligations" clause secures, on assignment, the debtor's unsecured debts to the assignee. Jackson J.A. further observed that no provision in the loan documents or the GSA clearly expressed an intention by the bank with respect to the unsecured debts of a third party. It was one thing for a financial institution to intend to secured its own past, present and future debts, and quite another for it to intend to secure the past unsecured debts of others. The appeal was dismissed. The court was of the view that it was not necessary to answer the question of whether a security agreement could ever secure previously unsecured debts owing by a debtor to an assignee: *CPC Networks Corp. v. Eagle Eye Investments Inc.*, 2012 CarswellSask 838, 95 C.B.R. (5th) 76, 2012 SKCA 118, [2013] 2 W.W.R. 260 (Sask. C.A.).

The Ontario Superior Court of Justice, in the context of a mortgage enforcement proceeding, reviewed the consequences of the failure to provide the s. 244 notice of intention to enforce security. Gordon J. was satisfied that the plaintiff was in default of its obligations under the terms of the mortgage and the mortgagee was entitled to possession. Although the plaintiff had recently remitted the equivalent of 13 monthly payments, the defendant, in accordance with the terms of the mortgage, was entitled to the accelerated payment of the mortgage in full and was entitled to be paid the reasonable costs incurred in protecting its interest and realizing on its security. The mortgagee was entitled to sue for possession of all or part of the mortgaged property. It was not for the court, at this stage of the proceedings, to question its decision to proceed. Justice Gordon observed that although s. 244, standing alone, seemed to impose a clear precondition to a secured creditor realizing on its security, it must be read in conjunction with other related provisions of the *BIA* in order to determine its full meaning. Gordon J. noted that s. 69 of the *BIA* entitles an insolvent person to file a proposal and thereby prevent a secured creditor from enforcing its security unless the creditor has sent the prescribed notice more than ten days earlier. In addition, s. 248 of the *BIA* provides that the court may, on application of an insolvent person, if satisfied a secured creditor has failed to give the appropriate notice, direct the notice to be given or restrain the secured creditor from taking further action until the notice has been given. When considered in the context of these additional sections, Gordon J. was of the view that specific consequences for failing to provide the required notice are provided for in the *BIA*; and secondly, those consequences arise through action by the debtor. The significance of

requiring the relief to be sought by the debtor is the allocation to it of the onus of establishing the section applies, that notice has not been given, and that relief is appropriate. Justice Gordon held that in this case there was no suggestion that a proposal had been filed by the plaintiff and, accordingly, no statutory stay was in place. Further, an application under s. 248 must be made by an insolvent person, and the onus of proving insolvency is on the applicant, on a balance of probabilities. Gordon J. concluded that there was no evidence on which he could find that the plaintiff was insolvent: *917488 Ontario Inc. v. Sam Mortgages Ltd.*, 2013 CarswellOnt 4413, 2 C.B.R. (6th) 112, 2013 ONSC 2212 (Ont. S.C.J.).

The Ontario Superior Court of Justice lifted the stay of proceedings under a receivership order to permit the applicant creditor to bring an application for a bankruptcy order against the respondent. The receiver was appointed an equitable receiver in aid of execution. Justice Newbould considered the principles for lifting a stay of proceedings, and noted that in considering whether the stay should be lifted, the court must consider the totality of the circumstances and the relative prejudice to both the creditor and the debtor. In considering an application for leave to lift a stay, there is no requirement to establish, nor is it the court's function to inquire into the merits of any action sought to be commenced or continued. Justice Newbould held that there was no doubt that if the applicant was not permitted to lift the stay in the receivership order and permitted to apply for a bankruptcy order, she would be prejudiced. She would not be able to proceed with the recovery action, as it was clear that the receiver had no intention of proceeding with it. Justice Newbould went on to note that there is no requirement that an applicant for a bankruptcy order must exhaust all other remedies before proceeding with a bankruptcy application: *Haunert-Faga v. Faga*, 2013 CarswellOnt 11104, 4 C.B.R. (6th) 118, 2013 ONSC 5161 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice appointed a receiver over the books and records of the corporate defendants. After an extensive review of the facts, Newbould J. commenced his analysis by referencing s. 101 of the Ontario *Courts of Justice Act*, which provides that a court may appoint a receiver where it appears to the court to be just or convenient to do so. A court must have regard to the circumstances of the case and the rights of the parties. The court held that there was no pre-condition to the exercise of the court's discretion to appoint a receiver. Each case depends on its own facts, and in this case, the court found that a strong case in fraud had been established and that equity cried out for the need to have all books and records produced. While proving a strong case in fraud can obviously be of great significance in establishing the need for a receiver, Newbould J. was of the view that it was not a *sine qua non*. However, in this case, there had been established a strong case in fraud. Justice Newbould was also of the view that the solicitor's trust records were of crucial importance to understanding what had happened to the money. In the result, Newbould J. concluded that the plaintiff was entitled to the appointment of a receiver: *Degroote v. DC Entertainment Corp.*, 2013 CarswellOnt 15647, 7 C.B.R. (6th) 232, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]), additional reasons 2014 CarswellOnt 23, 7 C.B.R. (6th) 248, 2014 ONSC 63 (Ont. S.C.J. [Commercial list]).

The Ontario Superior Court of Justice reviewed the governing principles respecting the appointment of a receiver-manager. The Court held that the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly. The appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy. There must be due consideration for the effect on the parties, as well as consideration of the conduct of the parties. The court must have regard to all the circumstances, but in particular, the nature of the property and the rights and interests of all parties. Evidence of irreparable harm must be clear and not speculative. An assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. After considering all of the material filed by counsel, Maranger J. came to the conclusion that it was not appropriate, in this case, to appoint a receiver-manager. It should be noted that this case did not involve a contractual right to appoint a receiver after default: *McMurtry v. McMurtry*, 2013 CarswellOnt 17380, 14 C.B.R. (6th) 306, 2013 ONSC 7259 (Ont. S.C.J.), additional reasons 2014 CarswellOnt 1766, 14 C.B.R. (6th) 314, 2014 ONSC 1002 (Ont. S.C.J.).

A receivership order was amended so that proceeds from sale of receivership properties would be applied first to the total amounts secured by the receiver's charges and borrowing charges in respect property sold; second to the total amounts secured by any first mortgage related to the receivership property sold; third to total amounts secured by the receiver's borrowing charges in respect of other receivership properties; fourth to total amounts secured by the mortgage held that was cross-collateralized across all the receivership properties; and last to the monitor in the concurrent *CCAA* proceeding for application in that proceeding.

The court noted the importance of finality of orders; however, new facts may justify varying or setting aside an order where the evidence may have altered the judgment and could not with reasonable diligence been discovered sooner: *Romspen Investments Corp. v. Edgeworth Properties*, 2014 CarswellOnt 9980, 16 C.B.R. (6th) 81, 2014 ONSC 4340 (Ont. S.C.J.).

The British Columbia Supreme Court held that the interpretation of the term "property" in a receivership order should be construed broadly. In determining whether an agreement is a security lease (a financial lease) or not, Masuhara J. referenced *Daimler Chrysler Services Canada Inc. v. Cameron*, 2007 CarswellBC 486, 27 B.L.R. (4th) 19, 30 C.B.R. (5th) 1, 2007 BCCA 144, [2007] B.C.J. No. 456 (B.C. C.A.), where the Court of Appeal held that a court must scrutinize the relationship between the lessor and lessee to ascertain whether, in that relationship, the indicia of a security agreement are evident. If, in substance, the impugned transaction creates a security interest, it is a security agreement, irrespective of its form and the parties' subjective intention when they entered into it. Here, the vehicles in question fell within the scope of the receivership order and were found to be financing leases: *Integris Credit Union v. All-Wood Fibre Ltd.*, 2015 CarswellBC 1850, 2015 BCSC 1146 (B.C. S.C.).

The Alberta Court of Queen's Bench exercised its discretion and awarded the mortgagee party-party costs on a receivership application notwithstanding a term of the mortgage that provided for solicitor-client costs. The principle that the successful party is entitled to costs reflects the fairness of not requiring a successful party to bear all the expense of litigation; the proviso that the successful party is entitled to some costs, but not complete indemnity, reflects the public policy in restraining litigation: *Manufacturers Life Insurance Co. v. 423632 Alberta Ltd.*, 2015 CarswellAlta 1635, 29 C.B.R. (6th) 108, 2015 ABQB 566 (Alta. Q.B.).

A private receiver was appointed by a secured creditor bank. The receiver agreed that a reasonable amount of fees would be $30,000 to $50,000. In the end, the accounts were $107,000 plus disbursements and HST, and legal fees of $35,000 plus disbursements and HST. The trustee brought an application for review and adjustment. The Ontario Superior Court of Justice held that the appropriate fee was $50,000 plus HST and $28,500 for legal fees inclusive of disbursements and tax. The court held that it was not appropriate to determine the receiver's fees based on a percentage of its receipts, given the simplicity of its work. The work was modest as the business was already closed down, and another individual worked unpaid to collect receivables to minimize receivership costs. Nothing in the evidence suggested that anything significant happened in the receivership that resulted in any more work and effort by the receiver than was originally contemplated: *B. Love Holdings Inc. v. Deloitte Restructuring Inc.*, 2015 CarswellOnt 13328, 29 C.B.R. (6th) 1, 2015 ONSC 5272 (Ont. S.C.J.).

A secured creditor applied pursuant to s. 243(1) of the *BIA* for the appointment of a receiver over substantially all the assets of the debtor. The debtor was a "farmer" within the meaning of the Saskatchewan *Farm Security Act*, S.S. 1988-89, c. S-17.1 (*FSA*) and contested the appointment. The *FSA* requires a creditor to submit a notice of intention, wait a 150-day notice period, and engage in mandatory review and mediation. The trial judge found no conflict between the provisions of the *BIA* and the *FSA*; the Court of Appeal overturned that decision and the Supreme Court of Court allowed a further appeal, setting aside the Court of Appeal's finding. The Supreme Court of Canada held that under the doctrine of federal paramountcy, a conflict arises where there is operational conflict or where the operation of provincial law frustrates the purpose of the federal enactment. Paramountcy is to be narrowly construed, favouring harmonious interpretations. Here, there was no operational conflict as it was possible to comply with both statutes. Section 243 of the *BIA* has the simple purpose of establishing a regime for appointment of a national receiver, aimed at avoiding a multiplicity of proceedings and resultant inefficiency. Under the *BIA*, appointment of a national receiver cannot be made before expiry of the 10-day notice period. Part II of the *FSA* affords protection to farmers against loss of farmland by imposing a compulsory and non-waivable 150-day waiting period during which a mandatory review and mediation process occurs. The Court further held that the provisions did not frustrate the purpose of the federal legislation. The words and discretionary nature of s. 243 of the *BIA* do not suggest that it is a comprehensive remedy exclusive of provincial law. The evidence did not support the argument that the 150-day period frustrated the purpose of allowing for appointment of a national receiver. The *FSA* was not constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the *BIA*: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, 2015 SCC 53 (S.C.C.).

The British Columbia Court of Appeal reversed the decision of the motion judge and determined that equipment that was the subject of purchase money security interest (PMSI) was excluded from the receivership order. This appeal concerned an

application made under a receivership order based on the B.C. Model Receivership Order made pursuant to s. 243(1) of the *BIA* and/or s. 39 of the *Law and Equity Act* (*LEA*). Justice Savage noted that the receivership order at issue differed from the Model Receivership Order by the addition of the phrase in para. 29: "specifically, including an application by any Defendant to authorize the receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in paragraphs 16 and 19 herein." Justice Savage noted that on appeal, questions of law are reviewable on a standard of correctness. Findings of fact may be reversed on a palpable and overriding error. For true questions of mixed fact and law, where a legal principle is not readily extricable, the matter should not be overturned absent palpable and overriding error. Justice Savage also noted that the principles concerning the interpretation of orders are well settled. In *Yu v. Jordan*, 2012 CarswellBC 2760, 36 B.C.L.R. (5th) 248, 2012 BCCA 367, [2012] B.C.J. No. 1863 (B.C. C.A.), the Court of Appeal said: "... an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order." The court will examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted. After reviewing the circumstances of the receivership order, Savage J.A. stated that he did not think the issue before the court properly turned on the interpretation of "property" in the order; the applications before the court were to deliver up trucks and exclude them from the receivership, something that was expressly contemplated by para. 29 of the receivership order and was determinative of the appeal. In the result, Savage J.A. held that the trucks should have been excluded from the receivership in response to the appellants' applications and that the trucks should not be subject to the receiver's charges. The most telling circumstance weighing in favour of excluding the trucks from the receivership was that the appellants had priority with respect to the trucks pursuant to their PMSI. To allow the trucks to remain under the receivership would grant the receiver priority over the appellants. Justice Savage also noted that the court below focused on a "true lease/financing lease" analysis, but this dichotomy was not helpful in the analysis. Justice Savage was of the opinion that even if the trucks fell within the definition of "property" in the receivership order, the question of whether the appellants had superior entitlement under the priority rules of the *PPSA* was critical to the applications before the court; the priority rules are designed to achieve commercial certainty and predictability. Savage J.A. stated that the clear rules of the *PPSA* should not be circumvented by the appointment of a receiver, when the exceptions outlined in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, 1975 CarswellOnt 123, 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201 (Ont. C.A.) are not met: *Integris Credit Union v. Mercedes-Benz Financial Services Canada Corp.*, 2016 CarswellBC 1462, 37 C.B.R. (6th) 1, 2016 BCCA 231 (B.C. C.A.).

The British Columbia Supreme Court appointed a receiver after the bank did not extend a forbearance agreement. The application was brought pursuant to s. 39 of the *Law and Equity Act* and s. 243 of the *BIA*. The *Law and Equity Act* states that the court may appoint a receiver where it is just or convenient to do so. Justice Fitzpatrick stated that there was some divergence in British Columbia concerning the test to be applied in respect of appointing a receiver in these circumstances. On the one hand, there are two decisions of Burnyeat J. in *United Savings Credit Union v. F & R Brokers Inc.,* 2003 CarswellBC 1084, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279, 2003 BCSC 640, [2003] B.C.J. No. 1057 (B.C. S.C. [In Chambers]) and *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 CarswellBC 813, 93 C.B.R. (5th) 57, 24 C.P.C. (7th) 1, 2012 BCSC 437 (B.C. S.C. [In Chambers]). In both decisions, Burnyeat J. took the view that where a receivership order is sought by a secured creditor and default under the security is proven, a receiver should be granted as a right unless there is some other compelling reason why the order should not be made. On the other hand, Masuhara J.'s decision in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 CarswellBC 2982, 60 C.B.R. (5th) 142, 2009 BCSC 1527 (B.C. S.C. [In Chambers]) referred to various factors that may be considered in determining whether it is appropriate to appoint a receiver; that reasoning followed in *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171, 2010 BCSC 477, [2010] B.C.J. No. 635 (B.C. S.C. [In Chambers]). Fitzpatrick J. noted that both of these decisions are to the effect that while it is not necessary for a secured creditor to show jeopardy before a receiver is appointed, no such presumption of appointment should be made; rather, the court should review the matter holistically and decide whether on the whole of the circumstances it is, in fact, just and convenient to appoint a receiver; citing also *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, 1993 CarswellBC 2061, [1993] B.C.J. No. 2352 (B.C. S.C.). Justice Fitzpatrick noted that she followed *Maple Trade* and *Textron* in her decision in *Cascade Divide Enterprises Inc. v. Laliberte*, 2013 CarswellBC 384, 1 P.P.S.A.C. (4th) 10, 2013 BCSC 263 (B.C. S.C.) and indicated that she was following the same approach in this case, which called for a robust review of all the circumstances. She held that the bank's forbearance was based on the respondents agreeing to do certain things, including providing the bank with disclosure of information that would provide the bank with information about the state of its security. The respondents did not

live up to their obligations under the forbearance agreement and despite defaults and the bank's attempt to secure compliance without acting on its security, they failed to respond. Fitzpatrick J. was satisfied that it was just and convenient to appoint the receiver in this case. However, she was mindful of some evidence that suggested that some sales were underway. Accordingly, Fitzpatrick J. restricted the receiver's powers to less than what had been sought by the bank until the receiver could get a better sense of the situation, such as whether sales were underway, with the parties to report back to the court: *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 CarswellBC 3547, 42 C.B.R. (6th) 290, 2016 BCSC 2348 (B.C. S.C.).

An appellant was a director, the chief executive officer and majority shareholder of the debtor corporation. When the bank began providing loans and credit facilities to the debtor, the appellant signed a personal guarantee of all of the debtor's obligations to the bank. The parties then signed a second loan agreement that superseded and incorporated the earlier agreement, which linked the credit limit to the debtor's accounts receivable and required a specific level of tangible net worth at all times as well as a requirement to provide the bank certain financial information on a regular basis. The loan agreement was subject to a facility letter that provided that the line of credit would be repayable on demand, and that the bank could accelerate the payment of the loan upon the occurrence of any event of default. The bank subsequently issued a notice advising that the debtor was overdrawn on its line of credit, had been in breach of the tangible net worth and disclosure requirements. After a further period of time, a demand letter was sent, advising that the debtor had ten days to permanently repay the indebtedness. The debtor filed a notice of intention to make a proposal in bankruptcy. The bank sought and received summary judgment against the appellant guarantor. The Court of Appeal for Ontario dismissed the appeal of the guarantor, finding that while a debtor is entitled to a reasonable time to pay, that determination is fact-specific and dependent on the conduct of the parties before and after the demand. Here, the debtor was afforded a reasonable time to pay following the issuance of the demands. The Court of Appeal held that the interpretation of the guarantee is a question of mixed fact and law, and the motion judge's interpretation was, therefore, entitled to deference: *Toronto-Dominion Bank v. Konga*, 2016 CarswellOnt 20377, 44 C.B.R. (6th) 189, 2016 ONCA 976 (Ont. C.A.).

The Ontario Superior Court of Justice determined that a party claiming a possessory lien pursuant to the *Repair & Storage Liens Act* (*RSLA*) over seven trucks had to deliver the trucks to the court-appointed receiver. The receiver was then authorized to sell the trucks and place the proceeds in trust. Such authorization was without prejudice to the claim of the party asserting the lien. Justice Rady referenced the s. 69.3 stay, s. 70 that provides that every bankruptcy order takes precedence over all judicial or other attachments, garnishments, judgments, executions or other process against the property of a bankrupt and s. 243(1), which provides for the appointment of a receiver in circumstances where it is just or convenient to do so. Section 247 of the *BIA* imposes on a receiver the duty to act honestly and in good faith and to deal with the property of the insolvent in a commercially reasonable manner. A receiver acts in a fiduciary capacity with respect to all interested persons. Justice Rady also noted that ss. 3-6 of the *RSLA* set out the scheme pursuant to which a repairer has a lien against an article that the repairer has repaired. Justice Rady held that once a receiver is appointed, it is the receiver's duty to liquidate the assets, pay all costs and expenses of the receivership, and distribute the net proceeds among the creditors of the company in order of priority. A receiver owes a duty to the court that appointed it and to the creditors generally. Here, the court order prevailed, and the receiver was entitled to take possession of the liened articles, without prejudice to the claimant's possessory lien claim to be determined at another time. Rady J. held that such an interpretation was consistent with the necessity for the receiver to maintain control over the debtor's assets to ensure their advantageous and orderly disposition for the benefit of all creditors: *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 CarswellOnt 340, 44 C.B.R. (6th) 77, 2017 ONSC 368 (Ont. S.C.J.).

The New Brunswick Court of Queen's Bench dismissed a motion for injunctive relief. The intended plaintiffs sought to enjoin the receiver from selling certain property, alleging that the secured creditor had acted precipitously in appointing a receiver as none of the companies were insolvent. Clendening J. held that the creditor had a valid general security agreement ("GSA") with the intended plaintiffs; that the intended plaintiffs had breached the covenants of that agreement on more than one occasion, including by allowing the government to gain priority by not paying the property taxes. The GSA defined what may occur on a default, including the right to appoint a receiver. In reviewing the evidence and arguments presented by counsel, Clendening J. found no triable issue. The evidence pointed clearly to the fact that the creditor had a good and valid cause in law to demand full payment. There were no facts before the court to establish that the intended plaintiffs would suffer irreparable harm if the injunction was not granted. The balance of convenience fell in the creditor's favour and injunctive relief should not be granted: *Eaglewood Specialty Products et al v. Royal Bank et al*, 2017 CarswellNB 303, 2017 NBQB 136 (N.B. Q.B.).

The Ontario Superior Court of Justice held that, in a court-appointed receivership proceeding, secured creditors holding mortgages were not entitled to receive payment of three months interest pursuant to s. 17 of the Ontario *Mortgages Act* or under the terms of their mortgages. Justice Dunphy held that s. 17 of the Act applies only to "persons entitled to make payment" in respect of a mortgage default. A receiver, whether creditor-appointed or court-appointed, is not such a person. In this case, the applicants elected to seek appointment of a receiver pursuant to s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act*. Justice Dunphy held that s. 17 is designed primarily as a protection for mortgagors and subsequent encumbrances entitled to redeem by reducing what had historically been an equitable rule requiring a mortgagor to pay six months interest to claim a right to relief to payment of only three months interest; and the rule has no application where the secured creditor mortgagee seeks to realize on his or her property by way of power of sale proceedings. Justice Dunphy stated that unlike a privately-appointed receiver, a court-appointed receiver is neither the agent of the creditor nor of the debtor. While the two types of receivership are distinct in their foundation, Dunphy J. held that there was no material distinction to be drawn between a privately-appointed receiver and a court-appointed receiver for the purposes of s. 17 of the *Mortgages Act*. Section 17 confers a right on a defined, limited set of persons being "the mortgagor or person entitled to make such payment". Justice Dunphy added that a secured creditor selling the land of his or her appointed agent is not a mortgagor or person entitled to make such payment, and a court-appointed receiver is not either. Justice Dunphy concluded that the statute does not apply to the payment of proceeds of sale to an entitled secured creditor by a court-appointed receiver. In the result, Dunphy J. found that the applicants were not entitled to the claimed three months interest pursuant to s. 17 of the *Mortgages Act* or pursuant to the terms of their mortgage contracts with the respondents: *Comfort Capital Inc. v. Yeretsian*, 2018 CarswellOnt 14122, 64 C.B.R. (6th) 158, 2018 ONSC 5040 (Ont. S.C.J. [Commercial List]).

In the course of considering whether the mortgagee was entitled to a three-month interest payment, the Court of Appeal for Ontario reaffirmed the principle that for the purposes of realization on security, a privately appointed receiver acts as agent of the secured creditor: *58 Cardill Inc. v. Rathcliffe Holdings Limited*, 2018 CarswellOnt 12561, 62 C.B.R. (6th) 173, 2018 ONCA 672 (Ont. C.A.).

The Ontario Superior Court of Justice dismissed the applicant's motion to appoint an asset-based lender and investment banker to conduct a sales process on behalf of the interim receiver and the debtor. All parties agreed that some certainty for the business was required and it was agreed that the implementation of the sales process as an ongoing concern would benefit all stakeholders. Justice Beaudoin held that receivers are officers of the court and have obligations to the court to act honestly and in good faith towards all stakeholders. Beaudoin J. determined that the interim receiver could consult with the asset-backed lender if it could assist in the sale process, but the proposed agent was not a court-appointed official. In any event, the interim receiver would have to seek further directions from the court and obtain the court's approval for any sale: *Hanson v. Estate of Stephan Maisonneuve*, 2018 CarswellOnt 19083, 2018 ONSC 6533 (Ont. S.C.J.).

The Ontario Superior Court of Justice addressed concerns raised by the debtor as to issues of potential conflict of a receiver and its legal counsel. Justice McEwen noted that the unequivocal evidence that was given on behalf of proposed interim receiver confirmed that it had no prior relationship with the debtor. McEwen J. noted that it is well-known that various professional firms regularly interact with each other in insolvency proceedings; and in the absence of an actual conflict, McEwen J. was of the view that there was nothing improper. Justice McEwen therefore appointed the interim receiver and, if necessary, receiver to effect the sale: *Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2018 CarswellOnt 19726, 2018 ONSC 6894 (Ont. S.C.J.).

The Alberta Court of Appeal reversed a decision of the chambers judge refusing to prioritize a receiver's charge for fees and disbursements over a municipality's claim for unpaid property taxes: *Edmonton (City) v. Alvarez & Marsal Canada Inc* (2019), 2019 CarswellAlta 511, 2019 ABCA 109, 68 C.B.R. (6th) 165 (Alta. C.A.). For a discussion of this judgment, see L§51 "Priority of Receiver's Fees Over Secured Creditors".

The Court of Appeal for Ontario dismissed an appeal from a decision of the application judge that a proceeding had been properly commenced as an application under r. 14 of the Rules of Civil Procedure. The appellant debtor company appealed from an order appointing a receiver over its assets, undertakings and property. The Court of Appeal held that there was no need for the respondent or the application judge to resort to s. 101 of the *Courts of Justice Act* or s. 243 of the *BIA* for authority to appoint

a receiver as the general security agreement specifically allowed the respondent to appoint a receiver on the debtor's default. The application was one of three proceedings arising from the parties' failed business relationship in development of renewable energy projects in Barbados and the Dominican Republic. The application judge was appointed to case manage the proceedings on the commercial list of the Ontario Superior Court of Justice. The judge concluded that the debtor had breached and repudiated its obligations and was therefore required to repay the respondent the equivalent of $2 million USD, and in the event that it failed to make payment within 30 days, the judge appointed an interim receiver over its assets for 30 days to determine if a "sensible plan of repayment" could be made, failing which, the respondent would be entitled to have the interim receiver appointed as receiver. The debtor did not repay the amounts ordered and the receiver was appointed. On appeal, Roberts J.A. determined that the application was properly brought under r. 14 of the Rules of Civil Procedure. The respondent's omitting to state the rule or statute under which the application was brought, was a procedural, not a substantive, requirement that did not invalidate an application that otherwise complied in substance with r. 14.02. Justice Roberts noted that it has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. The Court held that that it was open to the application judge to conclude that the documents proffered by the debtor, including proposed fresh evidence, fell far short of demonstrating the debtor's position. The judge's interpretation was reasonable and was owed deference on appeal. Justice Roberts commented that absent reviewable error, deference must be shown to the reasonable case management decisions of the highly specialized judges who sit on the commercial list. Roberts J.A. saw no error in the exercise of the application judge's discretion to appoint the receiver; it was qualified to act as receiver and it was independent. The fact that the receiver had worked professionally with respondent's counsel on other unrelated matters did not raise a disqualifying conflict or prevent it from complying with its professional obligations to the court. The receiver is an officer of the court, accountable to the court and all interested parties. The grant of limited liability to the receiver permits the orderly execution of its duties without the concern that it will be subject to needless litigation, especially in the circumstances of this case, with a recalcitrant debtor who has already objected to the appointment. However, the limitation of its liability does not mean that the receiver can act with impunity; its conduct of the receivership is subject to the court's scrutiny, a process in which the debtor will actively participate: *Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2019 CarswellOnt 15397, 2019 ONCA 779 (Ont. C.A.).

The British Columbia Supreme Court dismissed an application to appoint a receiver over a retirement community. The petitioner held first ranking security over a portion of the lands and building. The application was opposed by a much larger secured lender who held first ranking security on another portion of the lands: *Computershare Trust Company of Canada v. Meadows Development Ltd.*, 2019 CarswellBC 3318, 73 C.B.R. (6th) 312, 2019 BCSC 1945 (B.C. S.C.). For a discussion of this judgment, see L§3 "Appointment of Receiver and Manager".

The Ontario Superior Court of Justice dismissed a *CCAA* application and granted a receivership order over the debtors who were special purpose project-level entities involved in the development of three residential condominiums. The secured creditors with a blocking position to any plan objected to the *CCAA* proceeding. The Court found that there was no evidence that a *CCAA* proceeding would have a material impact on safeguarding jobs nor was there any evidence that it would materially safeguard the interests of other creditors more than a receivership would: *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 CarswellOnt 5156, 78 C.B.R. (6th) 299, 2020 ONSC 1953 (Ont. S.C.J. [Commercial List]). For a discussion of this judgment, see L§3 "Appointment of Receiver and Manager".

Chief Justice Morawetz of the Ontario Superior Court of Justice approved a motion discharging a receiver without prejudice to the secured creditor's right to bring a motion before the court to seek the appointment of a receiver and/or manager of the debtors and the property pursuant to section 243 (1) of the *BIA* and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended, within two years. The receiver reported that a draft closure and reclamation plan for the project was finalized and that there were no credible and interested parties willing to submit any bid or proposal on the Tulsequah Mine Project ("project") on terms acceptable to the receiver and secured creditor. The receiver concluded that incurring the cost necessary for the continuation of the receivership was no longer beneficial to the stakeholders of the companies, including the secured creditor. With no credible and interested parties willing to pursue a transaction to acquire the project, the further costs of administering the receivership could not be justified. The secured creditor intends to continue in its efforts to find or develop a private-sector solution. The Taku River Tlingit First Nation ("TRTFN") did not oppose the discharge of the receiver but submitted that the

receiver should be discharged without the benefit of the proposed "without prejudice" provision and that the court should not exercise its discretion so as to give the secured creditor rights that it would not normally have under the *BIA*. Morawetz, C. J. held that in the vast majority of receivership proceedings, the discharge of the receiver is intended to bring finality to the receivership proceedings. There may be, in certain circumstances, ancillary work that remains to be completed, and in such cases, the discharge may be granted subject to the finalization of the outstanding work to be confirmed through the filing of a certificate of completion by the receiver. That was not the situation here. A court-supervised sale transaction involving the project is the fundamental purpose of the receivership proceedings. The Court held that in seeking to preserve a route to revive the receivership proceedings, the secured creditor was requesting extraordinary relief and the onus was on it to justify whether such relief is appropriate in the circumstances. Morawetz C.J. was satisfied that it is open to the court to consider provisions in a discharge order that would provide for the re-appointment of a receiver in certain circumstances, relying on *Re Grand River Railway Co. Limited*, [1933] O.J. No. 151, [1933] O.W.N. 704 (Ont. C.A.) and noting that there is no express prohibition in the *BIA* that would prevent the court from re-appointing a receiver. In deciding whether to exercise its discretion, the Court agreed with counsel to TRTFN that the *BIA* makes no provision for without prejudice discharge of a receiver and any authority to make an order granting an unlimited period of time to move for the re-appointment of a receiver in this proceeding lies in the discretionary power of the court in managing insolvency proceedings. Here, the concern was the chilling effect on the remediation plan, TRTFN concerned that the Province will be reluctant to engage in an expensive environmental cleanup to benefit the secured creditor and future purchasers. The secured creditor wanted to limit its ongoing financial exposure, but at the same time, preserve its ability to seek a satisfactory commercial resolution, including use of receivership to consummate a future transaction. The Court held that the solution proposed by the secured creditor resulted in an unwarranted transference of risk and uncertainty to other parties, and that the Province should not be faced with an unlimited period of time of uncertainty. There were environmental concerns with the project which needed to be addressed. The Province and the TRTFN were entitled to certainty of outcome. In balancing the interests of the receiver, the secured creditor, the Province and TRTFN, the Court granted the discharge without prejudice to the right of the secured creditor to bring a motion to seek the appointment of a receiver in these proceedings no later than two years from the date of the hearing. It was not appropriate, in the circumstances, to include a provision that would potentially extend the timeline beyond that date, as it would prolong a period of uncertainty that could be detrimental to the TRTFN and the Province: *West Face Capital Inc. v. Chieftain Metals Inc.*, 2020 CarswellOnt 14600, 2020 ONSC 5161 (Ont. S.C.J.).

Chief Justice Morawetz of the Ontario Superior Court of Justice approved a motion discharging a receiver without prejudice to the secured creditor's right to bring a motion before the court to seek the appointment of a receiver and/or manager of the debtors and the property pursuant to s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, within two years. The discharge order included provisions approving the repayment to the ranking secured creditor of any monies remaining in the hands of the receiver after payment of the fees and disbursements. The receiver reported that a draft closure and reclamation plan for the project was finalized and that there were no credible and interested parties willing to submit any bid or proposal on the Tulsequah Mine Project ("project") on terms acceptable to the receiver and secured creditor. The receiver concluded that incurring the cost necessary for the continuation of the receivership was no longer beneficial to the stakeholders, including the secured creditor. With no credible and interested parties willing to pursue a transaction to acquire the project, the further costs of administering the receivership could not be justified. The secured creditor intended to continue in its efforts to find or develop a private-sector solution. The Taku River Tlingit First Nation ("TRTFN") did not oppose the discharge of the receiver but submitted that the receiver should be discharged without the benefit of the proposed without prejudice provision. Morawetz, C. J. held that in the vast majority of receivership proceedings, the discharge of the receiver is intended to bring finality to the receivership proceedings. There may be, in certain circumstances, ancillary work that remains to be completed, and in such cases, the discharge may be granted subject to the finalization of the outstanding work to be confirmed through the filing of a certificate of completion by the receiver. That was not the situation here. A court-supervised sale transaction involving the project is the fundamental purpose of the receivership proceedings. The Court held that in seeking to preserve a route to revive the receivership proceedings, the secured creditor was requesting extraordinary relief and the onus was on it to justify whether such relief is appropriate in the circumstances. Morawetz C.J. was satisfied that it is open to the court to consider provisions in a discharge order that would provide for the re-appointment of a receiver in certain circumstances, relying on *Re Grand River Railway Co. Limited*, [1933] O.W.N. 704, [1933] O.J. No. 151 (Ont. C.A.), leave to appeal refused 1934 CarswellOnt 271 (Ont. C.A.) and noting that there is no express prohibition in the *BIA* that would prevent the court from

re-appointing a receiver. In deciding whether to exercise its discretion, the Court agreed that the *BIA* makes no provision for without prejudice discharge of a receiver and any authority to make an order granting an unlimited period of time to move for the re-appointment of a receiver in this proceeding lies in the discretionary power of the court in managing insolvency proceedings. Here, the concern was the chilling effect on the remediation plan, TRTFN concerned that the Province will be reluctant to engage in an expensive environmental clean-up to benefit the secured creditor and future purchasers. The secured creditor wanted to limit its ongoing financial exposure, but at the same time, preserve its ability to seek a satisfactory commercial resolution, including use of receivership to consummate a future transaction. The Court held that the solution proposed by the secured creditor resulted in an unwarranted transference of risk and uncertainty to other parties, and that the Province and the TRTFN were entitled to certainty of outcome. In balancing the interests of the receiver, the secured creditor, the Province, and TRTFN, the Court granted the discharge without prejudice to the right of the secured creditor to bring a motion to seek the appointment of a receiver in these proceedings no later than two years from the date of the hearing. It was not appropriate, in the circumstances, to include a provision that would potentially extend the timeline beyond that date, as it would prolong a period of uncertainty that could be detrimental to the TRTFN and the Province: *West Face Capital Inc. v. Chieftain Metals Inc.*, 2020 CarswellOnt 14600, 2020 ONSC 5161 (Ont. S.C.J.).

In the context of receivership proceedings arising out of a failed residential real estate development, the British Columbia Supreme Court held that advances made by the first and second mortgagees in excess of the face amount of their mortgages were secured and ranked in priority to the third mortgage. Fitzpatrick J. also found the second mortgage provided for a criminal interest rate and fashioned a remedy that struck one of the $2 million broker fees but increased the interest rate from 12% to 18%. The decision was appealed, and the British Columbia Court of Appeal allowed the appeal in part. The Court of Appeal held that the judge did not err in concluding that the over advances were secured by the first and second mortgages. The registration system is intended to convey certainty of title, not certainty of value. The prior charges permitted advances beyond the original advance of principal, putting a subsequent encumbrancer on notice to make further enquiries. The judge did not make a palpable and overriding error in finding that the first mortgagee did not receive notice of the third mortgage for the purposes of s. 28 of the *Property Law Act*. The provision requires notice in writing of the subsequent registration. Thus, the over advances may tack in priority onto the first mortgage. The Court of Appeal held that the judge erred in principle in assuming she had wide-ranging discretion to alter the contractual rate of interest, sever terms and impose an effective rate of interest falling somewhere below 60% based on what she considered to be commercially and contextually reasonable. Having determined that the contract should not be declared void *ab initio* in these circumstances, it was open to the judge to either sever particular terms that could have resulted in an effective annual rate of less than 60% or leave the terms intact and notionally sever the interest rate to an effective annual rate of 60%. Accordingly, the Court granted this part of the appeal, ordering that the original terms of the second mortgage be left intact, including the 12% interest rate, and capping the effective annual interest rate at 60%: *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2020 CarswellBC 433, 76 C.B.R. (6th) 165, 2020 BCCA 70 (B.C. C.A.), application for leave to appeal to the Supreme Court of Canada dismissed with costs, 625536 B.C. Ltd. and *Forjay Management Ltd.*, 2020 CarswellBC 2426 (S.C.C.).

In the same proceedings, the British Columbia Supreme Court held that “alleged acknowledgements” were sufficient only to extend the limitation period for 625536 B.C. Ltd (”625”) to enforce its security to a date specified by the court. The Court concluded that the payout statements and the steps taken in the foreclosure were not sufficient to extend the limitation period further. Fitzpatrick J. held that 625’s right to enforce its security under the mortgage must be considered as statute-barred pursuant to the *Limitation Act*, S.B.C. 2013, c. 13 (*LA*), however, its claim against 0981478 B.C. Ltd (”098”) in debt under the loan agreement remained extant and fully enforceable in these proceedings or other proceedings that might be commenced. The Court held that the dual aspects of the 625 mortgage meant that there were two separate and distinct limitation periods potentially applicable with firstly, the debt and, secondly, the security. It is always open to a lender to simply enforce the debt aspect of a mortgage, without reference to the security. Conversely, an action to enforce the security will only be allowed if the debt remains extant. The Court concluded that the minutes of agreement were an acknowledgement under s. 24 of the *LA* sufficient to extend the limitation period to two years after execution of the minutes of agreement. The defaults remained; the only effect of the document was that 625 agreed to hold off enforcement proceedings. Later amending agreements did not modify the date on which principal and interest were due under the 625 mortgage. They did not have the effect of eliminating the existing defaults in payment by waiver or otherwise; rather, they simply extended the date to which 625 agreed to forbear

from enforcing its rights that had arisen arising from such defaults. The Court found no reasonable basis on which it can be said that communications by 098 (which had acquired the lands on which the development would be constructed) amounted to an acknowledgement of liability under the 625 mortgage or an acknowledgment of "some liability" under the 625 mortgage regarding 625's legitimate right to proceed under the security by foreclosure or otherwise: *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2020 CarswellBC 1063, 82 C.B.R. (6th) 107, 2020 BCSC 637 (B.C. S.C.).

End of Document

TAB 5

2010 ABCA 227
Alberta Court of Appeal

Canadian Western Bank v. 702348 Alberta Ltd.

2010 CarswellAlta 1380, 2010 ABCA 227, [2010] 8 W.W.R. 402, [2010] A.W.L.D. 3200, [2010] A.W.L.D. 3245, 191 A.C.W.S. (3d) 33, 26 Alta. L.R. (5th) 4, 487 A.R. 340, 495 W.A.C. 340, 66 C.B.R. (5th) 14, 92 R.P.R. (4th) 175

RIC New Brunswick Inc. and 1460518 Alberta Ltd. (Appellants / Respondents) and Telecommunications Research Laboratories and Alberta Treasury Branch (Respondents / Applicants)

Canadian Western Bank (Not a Party to the Appeal / Plaintiff) and 702348 Alberta Ltd. and Guild Developments Inc. (Not Parties to the Appeal / Defendants)

Ronald Berger, Peter Costigan, Patricia Rowbotham JJ.A.

Heard: May 27, 2010
Judgment: July 14, 2010
Docket: Edmonton Appeal 0903-0151-AC

Proceedings: affirming *Canadian Western Bank v. 702348 Alberta Ltd.* (2009), 472 A.R. 297, 2009 ABQB 271, 2009 CarswellAlta 641, 55 C.B.R. (5th) 298, 8 Alta. L.R. (5th) 162, [2009] 9 W.W.R. 305, 81 R.P.R. (4th) 288 (Alta. Q.B.)

Counsel: P.T. Linder, Q.C. for Appellants
J.J. Heelan, Q.C. for Respondent, Telecommunications Research Laboratories
D.N. Tkachuk for Respondent, Alberta Treasury Branch

Subject: Corporate and Commercial; Insolvency; Property; Contracts; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.c Duties
VII.6.c.vii Miscellaneous
Real property
V Landlord and tenant
V.8 Term of lease
V.8.c Termination
V.8.c.v Miscellaneous
Headnote
Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties
G operated as commercial construction developer — In fall 2007, TR and G entered into negotiations regarding leasing of commercial property that had expected completion date in early 2008 — On execution of lease, TR paid deposit in amount of $71,000 to G and G agreed to provide approximately 10,000 square feet of space — G never completed construction of building — G had similar lease problems with ATB — Receiver was appointed to G in 2008 — Receiver did not consent to TR or ATB terminating their leases — ATB and TR brought successful applications seeking declaration that leases were terminated, and receiver brought application seeking directions — Application judge found that as result of G's fundamental breach, ATB and TR properly terminated leases — Respondents to application other than G appealed — Appeal dismissed — Application judge articulated correct law and applied relevant factors correctly to facts.

Real property --- Landlord and tenant — Term of lease — Termination — Miscellaneous
G operated as commercial construction developer — In fall 2007, TR and G entered into negotiations regarding leasing of commercial property that had expected completion date in early 2008 — On execution of lease, TR paid deposit in amount of $71,000 to G and G agreed to provide approximately 10,000 square feet of space — G never completed construction of building — G had similar lease problems with ATB — Receiver was appointed to G in 2008 — Receiver did not consent to TR or ATB terminating their leases — ATB and TR brought successful applications seeking declaration that leases were terminated, and receiver brought application seeking directions — Application judge found that as result of G's fundamental breach, ATB and TR properly terminated leases — Respondents to application other than G appealed — Appeal dismissed — Application judge articulated correct law and applied relevant factors correctly to facts.

Table of Authorities

Cases considered:

Brae Centre Ltd. v. 1044807 Alberta Ltd. (2008), 2008 CarswellAlta 1822, 2008 ABCA 397, 446 A.R. 10, 442 W.A.C. 10, 302 D.L.R. (4th) 252, [2009] 1 W.W.R. 638, 99 Alta. L.R. (4th) 41, 74 R.P.R. (4th) 165 (Alta. C.A.) — referred to

Double N Earthmovers Ltd. v. Edmonton (City) (2005), 6 M.P.L.R. (4th) 25, 41 Alta. L.R. (4th) 205, 2005 ABCA 104, 2005 CarswellAlta 276, 363 A.R. 201, 343 W.A.C. 201, [2005] 10 W.W.R. 1 (Alta. C.A.) — referred to

First City Trust Co. v. Triple Five Corp. (1989), 65 Alta. L.R. (2d) 193, [1989] 3 W.W.R. 577, 57 D.L.R. (4th) 554, 94 A.R. 106, 1989 CarswellAlta 25 (Alta. C.A.) — referred to

Great Lakes Brick & Stone Ltd. v. Vandelinder (1993), 1993 CarswellOnt 4385 (Ont. Small Cl. Ct.) — considered

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Meyer v. Partec Lavalin Inc. (2001), 94 Alta. L.R. (3d) 250, 281 A.R. 339, 248 W.A.C. 339, 11 C.C.E.L. (3d) 56, [2001] 8 W.W.R. 628, 2001 ABCA 145, 2001 CarswellAlta 804 (Alta. C.A.) — referred to

National Carriers Ltd. v. Panalpina (Northern) Ltd. (1980), [1981] A.C. 675, [1981] 1 All E.R. 161 (U.K. H.L.) — considered

RIC New Brunswick Inc. v. Telecommunications Research Laboratories (2010), 2010 CarswellAlta 108, 2010 ABCA 27, 63 C.B.R. (5th) 243 (Alta. C.A.) — referred to

RIC New Brunswick Inc. v. Telecommunications Research Laboratories (2010), 2010 ABCA 75, 2010 CarswellAlta 412 (Alta. C.A.) — referred to

Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc. (2008), 64 R.P.R. (4th) 1, 2008 ONCA 92, 233 O.A.C. 74, 2008 CarswellOnt 590, 291 D.L.R. (4th) 163, 40 B.L.R. (4th) 1, 88 O.R. (3d) 721 (Ont. C.A.) — followed

Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc. (2008), 255 O.A.C. 396 (note), 2008 CarswellOnt 4317, 2008 CarswellOnt 4318, 389 N.R. 392 (note) (S.C.C.) — referred to

Statutes considered:

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

s. 249 — considered

Judicature Act, R.S.A. 2000, c. J-2

s. 8 — considered

APPEAL by application respondents from judgment reported at *Canadian Western Bank v. 702348 Alberta Ltd.* (2009), 472 A.R. 297, 2009 ABQB 271, 2009 CarswellAlta 641, 55 C.B.R. (5th) 298, 8 Alta. L.R. (5th) 162, [2009] 9 W.W.R. 305, 81 R.P.R. (4th) 288 (Alta. Q.B.).

***Per curiam*:**

I. Introduction

1 The appellants, RIC New Brunswick Inc. (RIC) and 1460518 Alberta Ltd. (146), appeal two orders declaring that the respondents properly terminated lease arrangements that they had with 702348 Alberta Ltd. and Guild Developments Inc.

(collectively referred to as Guild): *Canadian Western Bank v. 702348 Alberta Ltd.*, 2009 ABQB 271, 472 A.R. 297 (Alta. Q.B.).The respondents challenge the appellants' standing to appeal these orders.

2 Guild developed a commercial condominium complex and obtained financing from the Canadian Western Bank (CWB) and RIC, both secured creditors. Guild executed a lease with the respondent, Telecommunications Research Laboratories (TR Labs) and an offer to lease with the respondent, Alberta Treasury Branch (ATB). A series of construction delays prevented the respondents from commencing their leases at the agreed upon dates.

3 Guild defaulted on various commitments to CWB and a receiver was appointed. The receivership order provided that no person could terminate a contract or agreement without written consent of the receiver or leave of the court. Both ATB and TR Labs asked the receiver to terminate their lease arrangements on the ground that Guild was in fundamental breach of its obligations. The receiver refused both demands and the respondents applied to the court to terminate the leases.

II. Standing

4 146 was not a party to the original proceeding. It purchased certain of the debtors' assets from the receiver. The issue of standing arises in part because of the timing of the orders. The chronology is as follows:

1. On April 16, 2009 146 and the receiver entered into an asset purchase agreement for the Guild development (APA).

2. On April 22, 2009 the chambers judge heard oral arguments with regard to three applications: 1) ATB's application to have its lease terminated; 2) TR Labs' application to have its lease terminated; and 3) 146's application to purchase the Guild development.

3. On April 24, 2009 the chambers judge approved the APA (APA Order). The APA Order contemplated that the asset purchase would be effective on a closing date. The closing date was defined as three days following the issuance of the order or some other date agreed upon by the parties.

4. On May 1, 2009 the chambers judge released his decision with respect to the leases, finding that they had both been properly terminated and two orders were issued to that effect (termination orders).

5. On May 8, 2009 the sale of the Guild development to 146 closed. The land was transferred to 146 free and clear of any claims and interests of RIC. Title was registered in 146's name.

6. On or about May 20, 2009 the receiver indicated to RIC and 146 that it did not intend to appeal the termination orders. On May 26, 2009 (still within the appeal period) RIC filed its notices of appeal of the termination orders.

7. On January 21, 2010 RIC and 146 appeared before this court on a motion requesting that 146 be substituted for RIC in the pending appeal. The motions court refused to substitute 146 for the appellant RIC, but added 146 as a co-appellant: *RIC New Brunswick Inc. v. Telecommunications Research Laboratories*, 2010 ABCA 27 (Alta. C.A.).

8. On March 3, 2010 an application by 146 to extend the time for appeal was dismissed: *RIC New Brunswick Inc. v. Telecommunications Research Laboratories*, 2010 ABCA 75 (Alta. C.A.).

5 The respondents submit that neither appellant has standing to appeal the termination orders. It is clear that RIC does not have standing as it lost its interest as a Guild creditor on April 24, 2009 when the chambers judge issued the APA Order. Para. 4 of that Order states that "all of the Encumbrances affecting or relating to the Transferred Assets are **hereby** expunged and discharged as against the Transferred Assets".

6 The respondents submit that it is only the receiver who has the right of appeal. Pursuant to Clause 2(l) of the receivership order the receiver is empowered to initiate, prosecute and continue the prosecution of any and all proceedings, and its authority "shall extend to such appeals ...in respect of any order pronounced in such proceeding." The receiver chose not to appeal and the respondents accepted lesser amounts in costs, in exchange for the receiver's decision not to appeal. The receiver could

have assigned its right of appeal, but did not. Moreover, CWB who holds the first secured charge and a prior assignment of leases did not appeal. The respondents submit that to permit 146 to appeal undermines the right of appeal contained in the receivership order.

7 The respondents further submit that for 146 to have standing it must have acquired a right of appeal from another party. 146 acknowledges that the receiver did not assign its right to appeal. 146 submits that it is a successor in interest to RIC and thereby acquired a right of appeal. However, Para. 4 of the APA Order states that:

> "**Upon the closing** of the sale of the Transferred Assets [...] possession and all estate, right, title, interest and equity of redemption of the Debtors [Guild] and the Receiver in the Transferred Assets[...] shall absolutely and irrevocably pass to and vest in the Buyer [146]"
>
> [emphasis added].

146 thus only inherited its interest in the Guild properties upon closing, on May 8, 2009 at which point the leases had already been terminated. Furthermore, by the time the chambers judge issued the termination orders, RIC had no interest in the leases.

8 146 says that in addition to the interest which it purchased under the APA, it acquired other rights from RIC. In 2007 when RIC advanced funds to Guild, the loan was guaranteed by Guild who, as security for repayment, granted an assignment of leases and rents, and a general security agreement. The general security agreement gave RIC personal property rights, including the right to enforce contracts. On April 28, 2009, before the closing, RIC assigned to 146 all of its right, title and interest to the loan and its security. 146 submits that as a result of the April 28, 2009 assignment of RIC's rights which pre-dated the vesting order, 146 has a right of appeal.

9 We are not persuaded that this is sufficient to grant standing to 146. Given the terms of the receivership order, all of the assets were placed in the hands of the receiver. Para. 4 of Yamauchi J.'s April 24, 2009 order approving the sale of the development specifies that the lands are transferred to the buyer free and clear of any and all claims and interests of the Appellant. It further provides that all of the Appellant's encumbrances against the assets sold to the buyer are expunged and discharged. 146 asks us to carve out a covenant to enforce in a situation where the underlying debt has been extinguished. We are not prepared to do so.

III. Termination of the Leases

TR Labs

10 In the fall of 2007 TR Labs and Guild entered into negotiations regarding the lease of commercial premises. At that time Guild projected that the building would be completed in early 2008. The lease was executed on February 29, 2008. A term of the lease was that the commencement date was to be April 1, 2008 and if the demised premises could not be delivered on that date, the commencement date could be adjusted by the landlord acting reasonably. Throughout the spring, summer and fall of 2008 TR Labs continued to communicate with Guild regarding completion of the premises. On September 16, 2008 Guild promised in writing to have the premises ready for occupancy by December 15, 2008. However, by that time construction of the building had ceased and builders' liens had been registered.

ATB

11 The circumstances between ATB and TR Labs are similar. The parties entered into an offer to lease which contemplated the execution of a lease. The lease was not executed. The offer to lease was executed on June 10, 2008 and contemplated that the premises would be available for occupancy on December 1, 2008. On September 17, 2008 Guild advised that the premises would be completed no later than December 15, 2008. It was obvious during a site tour in October, 2008 that no work was being done. Guild advised that the premises would probably not be completed until mid-February 2009. In November, 2008 ATB requested that the exterior roadways and parking be completed by November 14, 2008 and the rest of the work by December 15, 2008. On November 20, 2008 ATB wrote to Guild advising that it considered Guild to be in fundamental breach of its obligations and that it would be treating the offer to lease as terminated.

12 The receiver was appointed on November 20, 2008. No further work was performed on the building. The receiver's report estimated that construction could not be completed for six to nine months after the work commenced. At the time of the hearing before the chambers judge, the work had still not commenced, so that even if the work commenced immediately, there would have been a delay of 15 months. The chambers judge found that this delay amounted to a fundamental breach of the agreements and ordered that the lease and offer to lease be terminated.

IV. Grounds of Appeal

13 The appellants submit that the chambers judge erred in concluding that Guild had fundamentally breached the terms of the lease agreements with TR Labs and ATB. The appellants also submit that the chambers judge ought not to have determined the issue in a summary manner, and that the issues warranted a trial.

V. Standard of Review

14 The issue of whether Guild fundamentally breached its lease agreements with the respondents involves the application of a legal standard to a set of facts, and as such is a question of mixed fact and law. The chambers judge's articulation of the law is reviewed for correctness: *Meyer v. Partec Lavalin Inc.*, 2001 ABCA 145, 281 A.R. 339 (Alta. C.A.) at para.11. His findings of fact and application of the law to the facts are subject to deference absent a clear and palpable error: *Double N Earthmovers Ltd. v. Edmonton (City)*, 2005 ABCA 104, 363 A.R. 201 (Alta. C.A.) at para.16; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para. 36.

15 Whether the chambers judge was entitled to deal with the matter summarily is also an issue of law reviewable on the standard of correctness.

VI. Analysis

16 The appellants cite *National Carriers Ltd. v. Panalpina (Northern) Ltd.* (1980), [1981] 1 All E.R. 161 (U.K. H.L.) and *Great Lakes Brick & Stone Ltd. v. Vandelinder*, [1993] O.J. No. 2763 (Ont. Small Cl. Ct.) as support for their argument that a finding of fundamental breach is exceedingly rare in the context of a lease. The chambers judge acknowledged this but found that this was a situation to which the doctrine of fundamental breach could apply. He considered the *National Carriers* and *Vandelinder* decisions, as well as the Ontario Court of Appeal's recent decision in *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, 88 O.R. (3d) 721 (Ont. C.A.), leave denied [2008] S.C.C.A. No. 151 (S.C.C.). In *Spirent* the court held that delays in construction which prevented a sublessee from taking possession of the premises could result in a finding of fundamental breach, although on the facts of *Spirent* no breach was found. This court has also considered fundamental breach in the context of commercial tenancies: *First City Trust Co. v. Triple Five Corp.* (1989), 94 A.R. 106, 57 D.L.R. (4th) 554 (Alta. C.A.) and *Brae Centre Ltd. v. 1044807 Alberta Ltd.*, 2008 ABCA 397, 446 A.R. 10 (Alta. C.A.).

17 The chambers judge correctly noted that *Spirent* suggests five factors that the court should consider when determining whether there has been a fundamental breach: (1) the ratio of the party's obligations not performed to that party's obligations as a whole; (2) the seriousness of the breach to the innocent party; (3) the likelihood of repetition of the breach; (4) the seriousness of the consequences of the breach; and (5) the relationship of the part of the obligation not performed to the whole obligation: *Spirent* at para. 36.

18 The chambers judge then applied each of these factors to the circumstances of the respondents. With respect to the first and fifth factors he concluded that Guild and the receiver had performed little in relation to their obligation as a whole in respect of the construction of the building. With respect to TR Labs, Guild was to have completed the building by April 2008 and with respect to ATB by August 1, 2008. Although there had been extensions of the time to complete, the respondents had agreed to the latest extensions at a time when Guild was not even undertaking construction. The chambers judge's findings are amply supported by the evidence and the appellants have not demonstrated any palpable and overriding error in the findings of fact or in the application of law to those facts.

19 With respect to the third factor the chambers judge concluded that there was a high likelihood of the repetition of the breach as it was very unlikely that the building would be completed within a reasonable time. The receiver's report suggested that the building could be completed in six to nine months. The chambers judge questioned the reasonableness of this, but in any event there was no evidence as to when the construction would recommence. Although the court in *Spirent* found that there was no fundamental breach, the construction delay was a period of six months in a three year lease. Here, the delay was at least fifteen months, with no indication of when construction would recommence. The chambers judge's conclusion on this factor is entitled to deference.

20 In considering the second and fourth factors the chambers judge concluded that the breach and its consequences were serious to both TR Labs and ATB. With respect to TR Labs he concluded that without the leased premises TR Labs would be without suitable laboratory facilities in which to conduct its research in Edmonton. In August 2008 TR Labs had been forced to leave the premises that it leased from the University of Alberta. Indeed the non-renewable lease had expired in April 2008 and the University had permitted TR Labs to overhold for a further three months. As of August 2008 TR Labs was housed in temporary facilities which were unsuitable for a lab. These findings were amply supported by the affidavit evidence adduced by TR Labs. The chambers judge rejected the receiver's submission that TR Labs could relocate its research to another of its facilities in Calgary, Regina, Winnipeg or Saskatoon. His decision is entitled to deference.

21 When ATB negotiated the offer to lease, it did so on the expectation that the premises would be used to consolidate its corporate staff. The evidence disclosed that ATB's corporate staff was housed in various branches throughout Edmonton. The chambers judge concluded that the consequences of the breach were serious. His finding is supported by the evidence and the appellants have not demonstrated any palpable and overriding error.

22 The chambers judge articulated the correct law and applied the *Spirent* factors correctly to the facts. The appellants have not demonstrated any palpable and overriding error with respect to the facts found by the chambers judge. This ground of appeal is dismissed.

VII. Summary Procedure

23 The appellants submit that the chambers judge erred in terminating the leases in a summary manner, rather than by trial. These issues arose in the context of a receivership. In addition to the respondents' applications for declarations terminating their leases, the receiver applied to the court for advice and direction with a view to delaying the termination applications. At issue was whether the receiver should accept the terminations. Section 249 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and para. 23 of the receivership order authorize the receiver to apply to the court for advice and direction regarding the discharge of its powers and duties. The chambers judge was satisfied that he had jurisdiction to deal with the termination applications, noting that the receiver was appointed under the *Judicature Act*, R.S.A. 2000, c. J-2. Section 8 of that Act gives the court broad general jurisdiction. Moreover, the parties did not object to the summary procedure, opting for the "real time" litigation which often characterizes insolvency proceedings. The chambers judge did not err in deciding these issues summarily. This ground of appeal is also dismissed.

VIII. Conclusion

24 The appeal is dismissed.

Appeal dismissed.

TAB 6

1992 CarswellNS 43
Nova Scotia Supreme Court, Trial Division

Price Waterhouse Ltd. v. Paribas Bank of Canada

1992 CarswellNS 43, [1992] N.S.J. No. 192, 113 N.S.R. (2d) 434, 13 C.B.R. (3d) 176, 309 A.P.R. 434, 33 A.C.W.S. (3d) 73

PRICE WATERHOUSE LIMITED v. PARIBAS BANK OF CANADA; CCFL HIGH YIELD FUND & COMPANY, LIMITED PARTNERSHIP; K MART CANADA LIMITED; DELOITTE & TOUCHE INC. (Trustee in Bankruptcy of BARGAIN HAROLD'S DISCOUNT LIMITED)

Kelly J. [in Chambers]

Judgment: April 14, 1992
Docket: Doc. S.H. 81635/92

Counsel: *Gerald R.P. Moir*, for applicant.

Subject: Corporate and Commercial; Insolvency; International

Related Abridgment Classifications

Conflict of laws
VII Bankruptcy
VII.4 Miscellaneous

Headnote

Bankruptcy --- Conflict of laws — General

Receivers — Powers — Court-appointed Ontario receiver requesting and being granted same powers in Nova Scotia.

A receiver-manager appointed by the Ontario court applied to the Nova Scotia court for an order granting it the same powers in that province. The company under receivership had 160 outlets across Canada, 16 of which were in Nova Scotia. There was a considerable amount of inventory and equipment in Nova Scotia; the receiver wanted the power to sell those assets.

Held:

The application was granted.

In jurisdictions where receivership or receivership-like proceedings may be taken, a court appointment in one jurisdiction ought to be recognized in another. The court must be satisfied of the competence of the foreign court to make the order requested; there was no question of the competence of the Ontario Court of Justice as the superior court of Ontario. The policy against multiple proceedings also applies in the case of interprovincial receiverships.

Table of Authorities

Cases considered:

Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd., [1975] 2 S.C.R. 546, 50 D.L.R. (3d) 76, 3 N.R. 123 — *referred to*

Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992), 10 C.B.R. (3d) 23, 7 O.R. (3d) 362 (Gen. Div.) — *applied*

C.A. Kennedy Co. v. Stibbe-Monk Ltd. (1976), 23 C.B.R. (N.S.) 81, 14 O.R. (2d) 439 (Div. Ct.) — *applied*

Ernst & Young Inc. v. Deloitte & Touche Inc. (1992), Doc. S.H. 0897 (N.S. T.D.) — *referred to*

Jak v. Société Nationale Industrielle Aérospatiale (1987), 108 N.R. 380 (P.C.) — *referred to*

Rohm & Haas Co. v. N.L. Chem Canada Inc. (1989), 27 C.I.P.R. 105, 28 C.P.R. (3d) 504, 31 F.T.R. 67 — *referred to*

Royal Trust Corp. of Canada v. Route Canada Real Estate Inc. (1988), Doc. S.H. 66191 (N.S. T.D.) — *referred to*

Statutes considered:

Bills of Sale Act, R.S.N.S. 1989, c. 39.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Conditional Sales Act, R.S.N.S. 1989, c. 84.

Corporations Securities Registration Act, R.S.N.S. 1989, c. 102.

Rules considered:

Nova Scotia, Civil Procedure Rules —

r. 54.02

Application by court-appointed Ontario receiver for recognition in Nova Scotia.

***Kelly J.* (orally):**

1 This is an application by Price Waterhouse Limited, the Ontario receiver and manager of Bargain Harold's Discount Limited, seeking an order:

(a) recognizing its appointment as receiver of Bargain Harold's Discount Limited pursuant to an order of the Ontario Court of Justice;

(b) appointing Price Waterhouse Limited receiver and manager of Bargain Harold's;

(c) empowering Price Waterhouse Limited on the same terms as the Ontario Court saw fit to impose; and

(d) providing for other matters related to the appointment.

2 The essential feature of the order sought in this matter is that the court appoint a receiver, giving it exactly the same powers as granted by the court in Ontario and on exactly the same conditions. The order sought would defer to the Ontario Court of Justice (General Division) on all questions except final discharge and direction on purely local matters, and the order should as well repeat the various injunctions ordered by the Ontario Court of Justice (General Division).

3 I have before me the Ontario order and the decision of Austin J. dismissing the application of Bargain Harold's for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 and allowing the application of Paribas Bank of Canada for the appointment of a receiver. The receiver has also described by affidavit its activities since its appointment in Ontario.

4 There is also on record two affidavits by counsel for the receiver, one exhibiting the Ontario motion on the C.C.A.A. application and the other exhibiting the record on the receivership application. Also on file is an affidavit giving the result of searches under the *Corporations Securities Registration Act*, R.S.N.S. 1989, c. 102, the *Bills of Sale Act*, R.S.N.S. 1989, c. 39 and the *Conditional Sales Act*, R.S.N.S. 1989, c. 84. These show that the respondents are all of the secured creditors on record. The applicant has also filed affidavits of service which show that all parties have been served on time and in the usual way and that counsel for Paribas Bank has accepted service and consented to the order. I am satisfied that all necessary parties are before the court, have consented, or have received adequate notice.

5 On February 28 of this year, Austin J. of the Ontario Court of Justice (General Division) dismissed Bargain Harold's application under the C.C.A.A. [10 C.B.R. (3d) 23, 7 O.R. (3d) 362]. Apparently all parties had agreed that a receivership would be ordered if the C.C.A.A. proceedings were dismissed. All parties had agreed that Price Waterhouse Limited would be the most appropriate receiver and Austin J. therefore decided upon that appointment.

6 On that same day the Ontario court issued the receivership order and appointed Price Waterhouse Limited as receiver and manager. This order is similar to receivership orders that are used in this province. By para. 23 of the Ontario order, the Ontario court requested that superior courts in other jurisdictions grant such orders as might aid the receiver and further the Ontario order.

7 Subsequently, the receiver caused Bargain Harold's to make an assignment in bankruptcy and the trustee appointed is Deloitte & Touche Inc. An affidavit of a vice-president of Price Waterhouse has been filed which reports on the receivership to March 25, 1992. The court has been advised that since that time negotiations for sale of the business have fallen through and the receiver is seeking directions of the Ontario court for liquidation sales.

8 As stated above, all parties are before the court. Because of the bankruptcy, the trustee has been named as a party rather than Bargain Harold's. The applicant has also served the representative of Bargain Harold's in this province, who as well has been provided with a copy of the proposed order. This same notice has been provided to the Ontario counsel for Bargain Harold's.

9 There are 16 Bargain Harold's outlets operating out of leased locations in the province of Nova Scotia, out of 160 outlets in the country at the time of the receivership. The receiver is administering in this province such of those locations that have not been closed. There is a considerable amount of inventory and equipment in Nova Scotia which is now to be sold as part of the receivership.

10 As pointed out in R. Walton, *Kerr on Receivers*, 16th ed. (London: Sweet & Maxwell, 1983) at p. 137:

> Where, however, the court appoints a receiver over property out of the jurisdiction, the receiver is not put in possession of such foreign property by the mere order of the court. Something further has to be done ...

The appropriate "something further" will depend on the law of the foreign jurisdiction.

11 The most practical reason for the Ontario receiver to seek appointment in Nova Scotia is to give it authority to sell assets in this province. The Ontario courts have no power to deal with or foreclose chattels permanently located in this province.

12 In these circumstances, this court has jurisdiction to give effect to the foreign receivership order by confirming to the foreign receiver the authority it needs to perform its duties in this province. According to *Kerr*, supra, at p. 147:

> If the appointment of the foreign receiver has been made by a court which, according to the principles of English conflict of laws is a court of competent jurisdiction, the court may either recognise his title directly, by allowing him to sue for the assets over which he has been appointed receiver in his own name, or indirectly, by constituting a subsidiary receivership.

13 Therefore, in England, the "something further" that must be done is to obtain an order empowering the foreign receiver to sue for assets or establishing a subsidiary receivership. The applicant requests the latter order in this case. The jurisdiction of this court to grant the request is its inherent jurisdiction to appoint receivers pursuant to Civil Procedure Rule 54.02, which authorizes the appointment of receivers on being satisfied that such an appointment is "just and convenient".

14 The policy of the Ontario court is to recognize a foreign receiver as per *C.A. Kennedy Co. v. Stibbe-Monk Ltd.* (1976), 23 C.B.R. (N.S.) 81, 14 O.R. (2d) 439 (Div. Ct.) and the authorities that are referred to in that decision. There does not appear to be any Nova Scotia decisions on this issue. However, this court has granted subsidiary receivership orders in *Royal Trust Corp. of Canada v. Route Canada Real Estate Inc.* (1988), Doc. S.H. 66191 and *Ernst & Young Inc. v. Deloitte & Touche Inc.* (1992), Doc. S.H. 0897 (both unreported). Both of these orders deferred to the superior court of a sister province for passing accounts and both involved our court in the approval of a sale which had given rise to the initial application.

15 According to Frank Bennett in *Receiverships* (Toronto: Carswell, 1985) at p. 145:

> In jurisdictions where receivership or receivership-like proceedings may be taken, a court appointment in one jurisdiction ought to be recognized in another.

The policy reasons for this position are obvious. The superior courts of the various provinces ought generally to be faithful to the competent orders of their sister courts. At the very least, these courts cannot be faithless to such orders: *Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd.*, [1975] 2 S.C.R. 546, 50 D.L.R. (3d) 76, 3 N.R. 123.

16 Moreover, the policy against multiple proceedings reflected in our rules and in such doctrines as forum non conveniens rests upon the considerations that the court should avoid expensive duplicate applications and avoid the risk of conflicting judicial decisions: see discussion in *Jak v. Société Nationale Industrielle Aérospatiale* (1987), 108 N.R. 380 (P.C.) and *Rohm & Haas Co. v. N.L. Chem Canada Inc.* (1989), 27 C.I.P.R. 105, 28 C.P.R. (3d) 504, 31 F.T.R. 67 (Jerome A.C.J.). These considerations apply in the case of interprovincial receiverships. A policy of seeking efficient, expeditious and inexpensive interprovincial commercial activity supports the recognition of the orders of other provinces and the restriction to one jurisdiction of potentially contentious issues such as the approval of sales or the passing of accounts.

17 *Kerr* suggests at pp. 146 and 147 that the English courts will not recognize a foreign receiver unless the foreign jurisdiction has sufficient connection with the company in receivership. In this case the head office of Bargain Harold's and 114 of its 160 outlets are in Ontario. The court must also be satisfied of the competence of the foreign court to make the order it has made: see *C.A. Kennedy Co.*, supra, at p. 89 [C.B.R.] and *Kerr* at p. 147. There is no question of competence in this case as the Ontario Court of Justice is the superior court of that province and, parenthetically, the judge who issued the Ontario order commands the respect of this court.

18 I find that an ancillary or subsidiary receivership order is appropriate in this matter and the terms of the order should reflect those of the Ontario order and, as much as possible, restrict the contest of future issues to that jurisdiction.

Application granted.

End of Document

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 1 — Foundational Rules
Division 1 — Purpose and Intention of These Rules

Most Recently Cited in: Soloniuk Estate v. Huyghe, 2020 ABQB 616, 2020 CarswellAlta 1904, [2020] A.W.L.D. 3448, 325 A.C.W.S. (3d) 39 | (Alta. Q.B., Oct 19, 2020)

Alta. Reg. 124/2010, s. 1.2

s 1.2 Purpose and intention of these rules

Currency

1.2Purpose and intention of these rules
1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

1.2(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

1.2(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

1.2(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Currency
Alberta Current to Gazette Vol. 117:1 (January 15, 2021)

Concordance References
Rules Concordance 1, Preliminary

End of Document

TAB 7

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 194/2020

Current as of November 1, 2020

Office Consolidation

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Part 1
Foundational Rules

Division 1
Purpose and Intention of These Rules

What these rules do

1.1(1) These rules govern the practice and procedure in

(a) the Court of Queen's Bench of Alberta, and

(b) the Court of Appeal of Alberta.

(2) These rules also govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer.

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2
Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the *Judicature Act*;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;

(i) determine whether a judge is or is not seized with an action, application or proceeding;

(j) include any information in a judgment or order that the Court considers necessary.

(3) A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be

(a) recorded in the court file of the action by the court clerk, or

(b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

Rule contravention, non-compliance and irregularities

1.5(1) If a person contravenes or does not comply with any procedural requirement, or if there is an irregularity in a commencement document, pleading, document, affidavit or prescribed form, a party may apply to the Court

(a) to cure the contravention, non-compliance or irregularity, or

(b) to set aside an act, application, proceeding or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity.

Division 4
Request for Particulars, Amendments to Pleadings and Close of Pleadings

Request for particulars

3.61(1) A party on whom a pleading is served may serve on the party who served the pleading a request for particulars about anything in the pleading.

(2) If the requesting party does not receive a sufficient response within 10 days after the date on which the request is served, the requesting party may apply to the Court for an order requiring the party who served the pleading to provide the particulars.

(3) If the Court orders particulars to be provided, it must specify a time within which the order is to be complied with.

(4) Subject to any order, despite a request for particulars, the obligation under these rules to file and serve pleadings continues even though a request for particulars has been made and whether or not it has been complied with.

Amending pleading

3.62(1) A party may amend the party's pleading, including an amendment to add, remove, substitute or correct the name of a party, as follows:

(a) before pleadings close, any number of times without the Court's permission;

(b) after pleadings close,

(i) for the addition, removal, substitution or correction of the name of a party, with the Court's prior permission in accordance with rule 3.74 *[Adding, removing or substituting parties after close of pleadings]*, or

(ii) for any other amendment, with the Court's prior permission in accordance with rule 3.65 *[Permission of Court to amendment before or after close of pleadings]*.

(c) despite clauses (a) and (b), whether or not pleadings have closed, with the agreement of the parties filed with the Court,

(2) An amended pleading must be

(a) filed, and

(b) served on each of the other parties

(i) within 10 days after the date on which it is filed, or

(ii) if the pleading is a statement of claim that has not already been served, in accordance with Division 3, Subdivision 2 *[Time Limit for Service of Statement of Claim]*.

(3) A party may, without the Court's permission, amend that party's pleading before or after pleadings close if that amended pleading is

(a) a statement of defence in response to an amended statement of claim, an amended counterclaim or an amended third party claim, or

(b) a reply to an amended statement of defence, amended statement of defence to an amended counterclaim, or amended statement of defence to an amended third party claim.

(4) A response pleading referred to in subrule (3) must be

(a) filed, and

(b) served on each of the other parties within 10 days after the date that the amended pleading referred to in subrule (3) is served.

(5) If a party has pleaded in response to a pleading that is subsequently amended and served on that party and the party does not file and serve a further response to the amended pleading, the party is assumed to rely on the party's unamended pleading in response to the amended pleading referred to in subrule (3).

(6) This rule does not apply to amendments to a class proceeding under the *Class Proceedings Act*.

AR 124/2010 s3.62;163/2010;143/2011

Information note

Rule 2.7 *[Amendments to pleadings in class proceedings]* says that after a certification order is made in a class proceeding, pleadings in a class proceeding may be amended only with the Court's permission.

Identifying amendments to pleadings

3.63(1) Unless the Court otherwise orders, if a party amends a pleading, a new pleading must be filed, being a copy of the original pleading as amended.

(2) The amendment must

(a) be dated and identified, and each amended version must be identified, and

(b) be endorsed by the court clerk in the following form:

Amended on [date] by [order] [party consent]
Dated . . .

AR 124/2010 s3.63;143/2011

Information note

Where a previously amended pleading is further amended, only the last amendment need be identified.

TAB 8

2011 ABQB 12
Alberta Court of Queen's Bench

C. (L.) v. Alberta

2011 CarswellAlta 31, 2011 ABQB 12, [2011] A.W.L.D. 953, [2011] A.W.L.D. 954, [2011] A.J. No. 36, 197 A.C.W.S. (3d) 341, 4 C.P.C. (7th) 323, 509 A.R. 43

L.C., E.M.P. by Her Next Friend L.C., D.C. by His Next Friend L.C. and C.C. by Her Next Friend L.C. (Plaintiff) and Her Majesty the Queen In Right of Alberta and Metis Settlements Child & Family Services, Region 10 (Defendants) and D.L. (Proposed Next Friend)

R.A. Graesser J.

Heard: November 9, 2010
Judgment: January 6, 2011
Docket: Edmonton 0703-10836

Counsel: Robert P. Lee for Plaintiff
Peter Barber, G. Allan Meikle, Q.C., Ward K. Branch for Defendants
Denise Lightning for Proposed Next Friend for the Third Party

Subject: Civil Practice and Procedure; Family

Related Abridgment Classifications

Civil practice and procedure
XIX Pre-trial procedures
XIX.5 Case management and status hearing
XIX.5.a Case management
XIX.5.a.i Application of rule
Civil practice and procedure
XIX Pre-trial procedures
XIX.5 Case management and status hearing
XIX.5.a Case management
XIX.5.a.vi Motions

Headnote

Civil practice and procedure --- Pre-trial procedures — Case management and status hearing — Case management — Application of rule

Plaintiff and defendant Crown involved in matter awaiting certification as class action — Plaintiff wrote to Crown counsel seeking response to number of procedural and substantive matters while in case management — Crown counsel was largely unresponsive — Plaintiff brought motion seeking direction on whether application could be made under R. 1.2(3) of Alberta Rules of Court to compel Crown to provide response to questions for purposes of identifying key issues in dispute to improve efficiency of proceeding — Plaintiff was entitled to bring application and Crown was ordered to provide responses as directed — Rule 1.2(3) was intended to facilitate creation of appropriate task list and move timeline towards resolution — Crown had not cooperated with plaintiff to identify issues and find quick and inexpensive method of resolving matter — In light of obligations on both parties to comply with principles in R. 1.2, plaintiff was entitled to meaningful response to inquiries that were answerable and appropriate — Crown ordered to provide responses as directed in time for tasks and timelines to be effectively addressed at next case management conference.

Civil practice and procedure --- Pre-trial procedures — Case management and status hearing — Case management — Motions

Plaintiff and defendant Crown involved in matter awaiting certification as class action — Plaintiff wrote to Crown counsel seeking response to number of procedural and substantive matters while in case management — Crown counsel was largely unresponsive — Plaintiff brought motion seeking direction on whether application could be made under R. 1.2(3) of Alberta Rules of Court to compel Crown to provide response to questions for purposes of identifying key issues in dispute to improve efficiency of proceeding — Plaintiff was entitled to bring application and Crown was ordered to provide responses as directed — Rule 1.2(3) was intended to facilitate creation of appropriate task list and move timeline towards resolution — Crown had not cooperated with plaintiff to identify issues and find quick and inexpensive method of resolving matter — In light of obligations on both parties to comply with principles in R. 1.2, plaintiff was entitled to meaningful response to inquiries that were answerable and appropriate — Crown ordered to provide responses as directed in time for tasks and timelines to be effectively addressed at next case management conference.

Table of Authorities

Cases considered by *R.A. Graesser J.*:

Alberta (Director of Child Welfare) v. T. (J.) (2003), 2003 ABQB 402, 2003 CarswellAlta 634, 38 R.F.L. (5th) 239 (Alta. Q.B.) — considered

B. (M.) v. Alberta (Director of Child Welfare) (2005), 2005 CarswellAlta 955, 2005 ABQB 204 (Alta. Q.B.) — considered

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 43 C.P.C. (5th) 1, 114 C.R.R. (2d) 108, [2004] 2 W.W.R. 252, 313 N.R. 84, [2003] 3 S.C.R. 371, 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161, 21 B.C.L.R. (4th) 209 (S.C.C.) — considered

C. (L.) v. Alberta (2008), 2008 ABQB 518, 2008 CarswellAlta 2328 (Alta. Q.B.) — referred to

C. (L.) v. Alberta (2010), 470 W.A.C. 375, 469 A.R. 375, 2010 CarswellAlta 134, 2010 ABCA 14, 316 D.L.R. (4th) 760 (Alta. C.A.) — considered

D. (B.) v. Children's Aid Society of Halton (Region) (2007), 39 R.F.L. (6th) 245, 49 C.C.L.T. (3d) 1, 284 D.L.R. (4th) 682, 2007 CarswellOnt 4789, 2007 CarswellOnt 4790, 2007 SCC 38, 365 N.R. 302, 227 O.A.C. 161, *(*sub nom. *Syl Apps Secure Treatment Centre v. D. (B.))* [2007] 3 S.C.R. 83, 86 O.R. (3d) 720 (note) (S.C.C.) — considered

L. (T.) v. Alberta (Director of Child Welfare) (2008), 2008 ABQB 114, 436 A.R. 217, 2008 CarswellAlta 194 (Alta. Q.B.) — referred to

L. (T.) v. Alberta (Director of Child Welfare) (2009), 5 Alta. L.R. (5th) 85, 2009 ABCA 182, 2009 CarswellAlta 694, 457 W.A.C. 141, 457 A.R. 141 (Alta. C.A.) — referred to

Odhavji Estate v. Woodhouse (2003), 19 C.C.L.T. (3d) 163, [2004] R.R.A. 1, 233 D.L.R. (4th) 193, 11 Admin. L.R. (4th) 45, [2003] 3 S.C.R. 263, 70 O.R. (3d) 253 (note), 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, 312 N.R. 305, 180 O.A.C. 201 (S.C.C.) — considered

S. (C.H.) v. Alberta (Director of Child Welfare) (2006), 2006 ABQB 241, 2006 CarswellAlta 697, 27 R.F.L. (6th) 136 (Alta. Q.B.) — referred to

S. (C.H.) v. Alberta (Director of Child Welfare) (2006), 403 A.R. 103, 2006 CarswellAlta 919, 2006 ABQB 528, 34 C.P.C. (6th) 378 (Alta. Q.B.) — considered

S. (C.H.) v. Alberta (Director of Child Welfare) (2006), 391 W.A.C. 215, 401 A.R. 215, 2006 ABCA 355, 2006 CarswellAlta 1536 (Alta. C.A.) — referred to

S. (C.H.) v. Alberta (Director of Child Welfare) (2008), 2008 CarswellAlta 1117, 2008 ABQB 513, 95 Alta. L.R. (4th) 128, [2008] 12 W.W.R. 432, 452 A.R. 67, 58 C.C.L.T. (3d) 179 (Alta. Q.B.) — considered

S. (C.H.) v. Alberta (Director of Child Welfare) (2010), 470 W.A.C. 359, 469 A.R. 359, 2010 ABCA 15, 2010 CarswellAlta 148, 73 C.C.L.T. (3d) 53, 316 D.L.R. (4th) 740, 21 Alta. L.R. (5th) 7, [2010] 7 W.W.R. 304 (Alta. C.A.) — considered

S. (T.) v. Alberta (Director of Child Welfare) (2002), 2002 CarswellAlta 321, 2002 ABCA 46, 299 A.R. 290, 266 W.A.C. 290, 100 Alta. L.R. (3d) 205, 26 R.F.L. (5th) 415 (Alta. C.A.) — considered

S. (V.) v. Alberta (Director of Child Welfare) (2004), 38 Alta. L.R. (4th) 143, [2005] 7 W.W.R. 109, 373 A.R. 201, 2004 CarswellAlta 1722, 2004 ABQB 892, 125 C.R.R. (2d) 196 (Alta. Q.B.) — considered

Statutes considered:

Canadian Bill of Rights, S.C. 1960, c. 44, Pt. I, reprinted R.S.C. 1985, App. III

Generally — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 2(d) — considered

s. 7 — considered

s. 9 — considered

s. 12 — considered

s. 15 — referred to
Child Welfare Act, S.A. 1984, c. C-8.1
Generally — referred to

s. 31(3) — referred to
Child Welfare Amendment Act, 2002 (No. 2), S.A. 2002, c. 10
Generally — referred to
Child Welfare Amendment Act, 2003, S.A. 2003, c. 16
Generally — referred to
Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12
s. 31 [am. 2003, c. 16, s. 32] — referred to
Class Proceedings Act, S.A. 2003, c. C-16.5
Generally — referred to

s. 2 — considered

s. 2(1) — considered

s. 2(2) — considered

s. 2(4) — considered

s. 2(5) — considered

s. 2(6) — considered

s. 5 — considered

s. 5(1) — considered

s. 5(1)(a) — considered

s. 7 — considered

Rules considered:
Alberta Rules of Court, Alta. Reg. 390/68
R. 129(1)(a) — referred to
Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 1 — considered

R. 1.2 — considered

R. 1.2(1) — considered

R. 1.2(2) — considered

R. 1.2(3) — considered

R. 1.2(3)(a) — considered

R. 3.68 — referred to

R. 4.1 — considered

R. 4.12(3) — referred to

R. 6.37 — referred to

Surrogate Rules, Alta. Reg. 130/95

Generally — referred to

MOTION by plaintiff for directions on whether application could be made under Rule 1.2(3) of Alberta Rules of Court to compel defendant to provide responses to written questions for purposes of identifying key issues in dispute to improve efficiency of proceeding.

***R.A. Graesser J.*:**

I. Nature of Application

1 Mr. Lee has applied for relief under New Rule 1.2(2). He seeks directions from the Court to "identify the real issues in dispute so that the case can proceed efficiently".

2 This lawsuit is one of a number of similar cases relating to a proposed class action. The plaintiffs in *S. (C.H.) v. Alberta (Director of Child Welfare)* [2006 CarswellAlta 697 (Alta. Q.B.)], Action No. 0503 12123 (the "C.H.S. Action"), were originally intended to be the representative plaintiffs in the class action. However, it appears that C.H.S. no longer wishes to be the representative plaintiff in the proposed class action, either for herself as a parent or as Next Friend for her children.

3 The torch was then passed to the plaintiffs in *C. (L.) v. Alberta*, Action No. 0803 08196 (the "T.W. Action"). However, as Permanent Guardianship Orders were granted with respect to T.W.'s children, T.W. is no longer able to act as Next Friend for them and they are now represented by other counsel. Further, T.W. is not a suitable representative plaintiff for the proposed class of parents and guardians of apprehended children as her status as an "ordinary" plaintiff is unclear and Mr. Lee has been unable to obtain proper instructions from her with respect to any surviving claims.

4 Now, the role of representative plaintiff has fallen to L.C. in this Action (the "L.C. Action"). The L.C. Action was commenced as an individual action by L.C. on her behalf and on behalf of her three children. The Statement of Claim in the L.C. Action reflects only these individual claims and was not issued with the intent of converting the action to a class proceeding. L.C. and her children are now being put forward as the representative plaintiffs for the proposed class action.

5 Mr. Lee is counsel for C.H.S., T.W. and L.C., as well as other plaintiffs who have commenced similar actions against the Crown.

II. Background

A. Procedural History

6 This lawsuit is one of a group of cases under case management arising from the Court of Appeal's decision in *S. (T.) v. Alberta (Director of Child Welfare)*, 2002 ABCA 46 (Alta. C.A.) ("*T.S. #1*"). In that decision, the Court of Appeal held that a Temporary Guardianship Order ("TGO") granted in favour of the Director relating to a child apprehended under the *Child Welfare Act*, S.A. 1984, c. C-8.1, automatically expired and became a nullity if a care or service plan ("care" or "service" being used interchangeably) was not filed within 30 days from the date of the TGO. TGOs are intended for situations where there is a common hope between the Director and the parents or guardians that the apprehended children will be eventually reunited with their parents or guardians.

7 The Alberta Legislature responded to *S. (T.)* by enacting the *Child Welfare Amendment Act*, *2002, No. 2*, S.A. 2002, c. 10 ("2002 Amending Act"), which provides that despite any decision of any court, a TGO issued prior to February 21, 2002, is deemed to be valid from the date the TGO was made, even if a care plan had not been filed in accordance with the statute. This amendment came into effect on May 14, 2002, when it received Royal Assent. Effective November 1, 2004, the requirement to file care plans was removed by virtue of s. 32 of the *Child Welfare Amendment Act*, *2003*, S.A. 2003, c. 16 ("2003 Amending Act").

8 In *S. (C.H.) v. Alberta (Director of Child Welfare)*, 2010 ABCA 15 (Alta. C.A.), the Court of Appeal considered these amendments and noted at para. 7 that "there remained a period of time, from February 21, 2002 through to October 31, 2004, for which the validity of a TGO still required the Director to file a care plan no later than 30 days from the date of the TGO".

9 Thus, while the 2002 Amending Act appears to have cured any problems to February 21, 2002, it also appears that the Director continued to fail to file care plans in a timely way in some cases until November 1, 2004, when the filing obligation ended.

10 Following the decision in *S. (T.)*, a number of claims were filed on behalf of other children who were subject to TGOs and for whom no care plan had been filed within the statutory time limit. These children are seeking damages for false imprisonment, negligence, breach of fiduciary duty, Charter breaches and other wrongs alleged to have been committed against them. In addition, claims were filed on behalf of the parents, guardians and siblings of these children, seeking damages for the harm they allegedly suffered as a result of the Director's failure to file a timely care plan and to return the children subject to the TGOs to their families.

11 In the C.H.S. Action, Slatter J. (as he then was) considered an application by the plaintiffs to amend their Statement of Claim. He held that constitutional arguments under ss. 2(d), 9 and 12 of the *Charter* had no chance of success and that only s. 7 was potentially arguable based on "the suggestion that a child welfare system without a requirement of a care plan is unconstitutional": *S. (C.H.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 528 (Alta. Q.B.) at para. 27, aff'd 2006 ABCA 355 (Alta. C.A.) ("*C.H.S. #1*).

12 Following the decision of Ouellette J. in *B. (M.) v. Alberta (Director of Child Welfare)*, 2005 ABQB 204 (Alta. Q.B.), (the same M.B. who sought to be added in the T.W. Action as a representative plaintiff and next friend), claims have been filed or are anticipated to be filed by children subject to TGOs and their parents, guardians and siblings, in cases where despite the filing of a document entitled "care plan" within 30 days, the document was so deficient that it could not properly be considered to meet the requirements under the *Child Welfare Act*.

13 The C.H.S. Action involved claims by children subject to PGOs and their parents and guardians. In 2008, the Director applied in this Action and in the C.H.S. Action to strike out the Statements of Claim under Rule 129(1)(a). In *S. (C.H.) v. Alberta (Director of Child Welfare)*, 2008 ABQB 513 (Alta. Q.B.) ("*C.H.S. #2*), Thomas J. (who was then the case management judge for the C.H.S. Action) struck the claims of the parents and guardians relating to negligence, breach of fiduciary duty, misfeasance in a public office, and constitutional torts. He also held that the children themselves had arguable claims in negligence against the Director, and that while there was a possible constitutional claim under s. 7 of the *Charter*, it had not been properly pled.

14 Thomas J. further held that the only claims which survived the 2002 and 2004 amendments to the *Child Welfare Act* were in relation to TGOs filed between February 21, 2002 and November 1, 2004, and limited the proposed class to children subject to TGOs granted during that period.

15 In this action, the Crown brought a similar application to strike the Plaintiffs' claim. The L.C. Action involves claims by L.C. as the parent and guardian, the apprehended child and siblings (one of whom has since died and the other has since reached adulthood). Nielsen J., who was then case managing the L.C. Action, followed the reasoning of Thomas J. in *S. (C.H.)* and struck all claims but the child's negligence, breach of fiduciary duty and false imprisonment claims.

16 In the parallel decisions of *S. (C.H.) v. Alberta (Director of Child Welfare)*, 2010 ABCA 15 (Alta. C.A.) ("*C.H.S. Appeal*"), and *C. (L.) v. Alberta*, 2010 ABCA 14 (Alta. C.A.) ("*L.C. Appeal*"), the Court of Appeal ruled that the children subject to the TGOs had arguable negligence claims but confirmed that their mother and family members did not. Quoting *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38 (S.C.C.), the Court noted at para. 22 of the *S. (C.H.)* that "(s)ince *Syl Apps* was decided, courts have almost unanimously found that child protection authorities do not owe a duty of care to family members of children in their care".

17 The Court of Appeal accepted that there were fiduciary duties owed by the Director to apprehended children, but agreed with Thomas J. that such claims on behalf of parents or guardians are "bound to fail": *S. (C.H.)*, at para. 33.

18 The Court of Appeal further held at para. 36 of the *S. (C.H.)* that the issue of whether the Director's failure to file a care plan in a timely way and the failure to return the children to their families when the TGOs became void engaged the appellants' rights to security of the person based on s. 7 of the *Charter*, is "loosely supported".

19 In the *C. (L.)*, the Court of Appeal held at para. 13 that no duty of care exists between the Director and parents, guardians or siblings. The claims of the parents or guardians and siblings based on breach of fiduciary duty met a similar fate.

20 In terms of the children subject to the TGOs, their claims for negligence, breach of fiduciary duty and false imprisonment were allowed to proceed. Claims that the Director failed to comply with his statutory duties, and that procedures taken by the Director were unfair and failed to comply with principles of fundamental justice, were considered moot in the *C. (L.)*, but were allowed to proceed in the *S. (C.H.)*, subject to the Statement of Claim being amended to describe the claim in the context of *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (S.C.C.).

21 Constitutional arguments under ss. 7 and 9 of the *Charter* were allowed to proceed, although the Court of Appeal noted that C.H.S.'s and L.C.'s pleadings needed to be amended in order to properly plead these claims. Claims under ss. 2(d) (freedom of association), 12 (cruel and unusual punishment) and 15 (equality) were not permitted to proceed.

22 The Court of Appeal took no issue with Nielsen J. striking the claims alleging contraventions of the *Bill of Rights* and international conventions, and held that issues relating to the constitutionality of the 2003 Amending Act were moot, as the claims in *C.H.S.* and in *L.C.* related to actions during the period when the Director was obliged to file care plans, and not after they had been abolished by the 2003 Amending Act: *C. (L.)* at para. 17.

23 However, in paras. 40-42 of the *S. (C.H.)*, the Court of Appeal held that because that action was intended to be the vehicle for the class action, pleadings relating to the 2002 Amending Act should not have been struck as it raises a potential defence to the Statement of Claim. As such, the validity of the 2002 Amending Act and whether it validly extinguished claims remains in issue. The validity of the removal of the requirement to file care plans altogether by virtue of the 2003 Amending Act may be treated similarly.

24 In the interval between Thomas J.'s decision in *S. (C.H.)* and the Court of Appeal's decisions in the *S. (C.H.)* and the *C. (L.)* (August, 2008 to January, 2010), the two actions, as well as the T.W. Action, essentially sat waiting to see the result in the Court of Appeal.

25 After the Court of Appeal decisions were issued, a joint case management conference was held with counsel, Thomas J. as case management judge in the C.H.S. Action, and myself as the case management judge in the T.W. Action (it then being the intended class proceeding action). The result of that conference was that all related litigation would be stayed other than the T.W. Action. The C.H.S. Action would also be stayed, because it appeared that the C.H.S. Action was not going to proceed towards a certification application. After the joint conference, it seemed that the T.W. Action was ramping up to be turned into the proposed class action, and to potentially add as plaintiffs M.B., and her grandchildren S.B., D.B.R. and S.B. by their next friend M.B., and B.M., and her children N.B. and A.O. by their next friend B.M.

26 A 149 paragraph draft "Amended Amended Statement of Claim Pursuant to the Class Proceedings Act" was prepared and appended to an application to amend T.W.'s Statement of Claim (the "Proposed Amendments"). Lengthy affidavits filed by M.B. and B.M. were provided in support of the application to amend. These affidavits chronicle the problems M.B. and her grandchildren S.B. and D.B.R, and B.M. and her children N.B. and A.O. all had with Child Welfare.

27 The Proposed Amendments include allegations that the provisions of the 2003 Amending Act that abolished the requirement to file care or service plans are unconstitutional under ss. 7 and 9 of the *Charter*. The Proposed Amendments would create further potential claimants, namely those children subject to TGOs granted after November 1, 2004 and for whom no care plans were filed, as well as their parents, guardians and siblings.

28 It is clear that various claims arising out of *S. (T.)* are headed towards a class action certification application. These claims have resulted in extensive case management proceedings involving numerous judges: in the C.H.S. Action, firstly by Slatter J. (as he then was), and then Thomas J.; in the T.W. Action, by myself; and in the L.C. Action, firstly by Thomas J., then Nielsen J., and now me. The C.H.S. Action has been to the Court of Appeal twice, firstly on appeal from Slatter J.'s order disallowing various amendments to the Statement of Claim in *S. (C.H.)*, and then from Thomas J.'s order striking most of the claims in *S. (C.H.)*. The L.C. Action has also been to the Court of Appeal, from Nielsen J.'s decision striking most of the claims.

29 A motion has been brought before me in the T.W. Action to approve a fee agreement. Mr. Lee also gave notice before May 14, 2010 that he intended to bring an *Okanagan* application in the T.W. Action for advance costs (based on Supreme Court of Canada's decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (S.C.C.)) so that he can be financially compensated and retain others to assist in the litigation to amend the pleadings to bring them into line with the *S. (C.H.)* and the *C. (L.)*, to add the M.B. claims and B.M. claims, and to bring the certification application.

30 As we worked to schedule applications on behalf of M.B. and B.M. and to hear an *Okanagan* application through case management, T.W.'s children became permanent wards by virtue of an order of Goss J. (completing an application that had begun before her in Provincial Court before her appointment to Queen's Bench). That order, which has since been appealed but the appeal has not yet been heard, left T.W. without the capacity to maintain the action as next friend of her two children. One of M.B.'s grandchildren has also been made a permanent ward.

31 For both T.W.'s children and for M.B.'s grandson, the Public Trustee has made it clear that he does not consent to T.W. or M.B. continuing in their roles as next friends for their children, and that through the Public Trustee, the children are now being represented by outside counsel, Brian Laidlaw of Kolthammer, Batchelor & Laidlaw in Edmonton, and not by Mr. Lee.

32 During case management, I directed that it was premature to schedule a certification application as there was not yet an identified capable next friend for any of the apprehended children, nor a clearly capable adult plaintiff to act as next friend, maintain claims in his or her own right and act as a representative plaintiff. I also found that it was premature to schedule an *Okanagan* application because it was unclear as to which litigant might bring such an application, other than Mr. Lee as counsel. It was also unclear as to what claims were intended to proceed to a certification application. In short, I considered it necessary to establish a properly represented plaintiff for the affected children at the very least, and to work towards getting pleadings for such a plaintiff into a state where the claims intended and permitted to proceed were properly set out.

33 Mr. Lee had represented that none of the Plaintiffs he is acting for had funds to pay him and that he was unable to proceed much further, including amending the pleadings, without first obtaining advance costs. Because of these funding concerns, a

"mini-*Okanagan*" application was scheduled for October 19 to 22, 2010. The intent was to sort out the identified plaintiff issue discussed above before the application, so that it would be clear who was applying for funding to amend the Statement of Claim and pursue certification of the class proceeding. As a result of the pending application in the T.W. Action to have B.M., M.B., and their children added as plaintiffs, the Crown wanted to cross-examine T.W., B.M. and M.B. on their affidavits. Mr. Lee also sought to secure the attendance of various Crown witnesses at the mini-*Okanagan* application, which was opposed by the Crown.

B. "Mini-Okanagan" Application

34 I need not describe all of the twists and turns that eventually led to the "mini-*Okanagan*" application in October, 2010. Although the application was originally intended to be made in the course of the T.W. Action, it ended up in L.C. Action instead. Initially, M.B. had applied to be the next friend for T.W. and her children in the T.W. Action; before the application was heard, April Kellett was substituted as the proposed next friend. The applications that proceeded in October were in relation to the L.C. Action only, and included the following:

By the Plaintiffs:

1. To revive this action (the L.C. Action) and put it forward as the intended class proceeding;

2. To appoint Denise Lightning as next friend for L.C. and E.M.P. (L.C.'s daughter), D.C.'s estate (D.C. being L.C.'s deceased adult son), and C.C. (L.C.'s now adult daughter);

3. To relieve Ms. Lightning from any obligation to pay costs as next friend; and

4. For advance costs to allow for payment of steps necessary to get the pleadings in the L.C. Action regularized so as to permit Ms. Lightning, as next friend, to apply for certification.

By the Crown:

1. To strike portions of the affidavits being relied on by Mr. Lee in support of the applications on various bases; and

2. For an order directing an independent medical examination of L.C. and the production of some of her medical records (because Mr. Lee has advised that L.C. is medically unable to be cross-examined or to instruct him in regard to her claim).

35 In response to the second part of the Crown's application, Mr. Lee seeks to avoid having L.C. cross-examined or subjected to an independent medical examination on the basis of her state of health. The appointment of a next friend for L.C. remains pending until the medical records are produced and the Crown can consider whether it wants to cross-examine L.C.'s physician as to her fitness to proceed with the litigation herself.

36 A further application remains outstanding and needs to be scheduled. Mr. Lee had unsuccessfully applied before Thomas J. in the C.H.S. Action for an order requiring the Crown to provide him with the names and contact information for all individuals that "meet the criteria of child class members". By way of a similar application in the T.W. Action dated April 12, 2010, Mr.Lee argues that the "pleadings herein disclose a cause of action for the Child Class against the Defendant, HMTQ for trespass/unlawful confinement, negligence, abuse of public office and Charter breach", and that it was necessary for him to learn the identities of possible members of the Child Class. He further submits that the Crown is the only potential source of this information, as it knows which children were subject to TGOs, whether care plans had been filed, and whether the children had been returned to their families. The Crown advised that such information was not readily available and would involve massive searches of files and court records. In any event, the application did not proceed and has not yet not been scheduled to be heard.

C. Proposed Amendments to the Statement of Claim in the T.W. Action

37 The Proposed Amendments are to put forth the following individuals as plaintiffs and potential representative plaintiffs:

T.W., MB. and B.M. as plaintiffs and representatives of a class of persons who:

(a) were the parent foster parent or guardian of a child;

(b) the child was removed from the their care pursuant to child welfare proceedings

(c) the child was kept under the guardianship, care or custody of HMTQ without a valid Court Order, including children that remained in the care of HMTQ after a valid Court Order ended or became void.

(Collectively the "Parent Class")

D.B.R., E.B.R., S.B., A.O., J.W. and D.W. as plaintiffs and representatives of a class of persons who:

(a) were children that had parents, foster parents or guardians;

(b) were removed from those persons by HMQ pursuant to child welfare proceedings;

(c) were kept under the guardianship, care or custody of HMQ without a valid Court Order authorizing HMTQ to have the guardianship, care and or control of the child, including children that remained in the care of HMTQ after a valid Court Order ended.

(Collectively the "Children Class")

38 Before the application to amend the Statement of Claim was heard, M.B.'s application to become next friend for D.W. and J.W. was expanded to also include T.W., as T.W. was apparently not cooperating with counsel in regard to her own claim or her children's claims. T.W.'s suitability to act as representative plaintiff had been compromised because she could no longer be next friend for her children, who are subject to PGOs that are currently under appeal.

39 As matters worked their way towards the October hearing, April Kellett, a lawyer who had appeared before the Court of Appeal in *S. (T.)*, applied to become the next friend for T.W., D.W. and J.W. in the T.W. Action, and to be the representative plaintiff in the intended class action. But before the October hearing, Ms. Kellett withdrew her application and Denise Lightning has applied in her place.

40 Ms. Lightning is a lawyer of more than 10 years' standing and with considerable experience in child welfare matters. She has now stepped forward to be appointed next friend for for L.C. and the other plaintiffs in the L.C. Action, and to be the representative plaintiff in the intended class action. However, her willingness to act is subject to being granted immunity from any liability for costs, and to being paid for her services.

41 At the October hearing, it became clear that the L.C. Action was now the lawsuit in which certification would be sought. However, the only Statement of Claim actually referencing class proceedings was the one filed in the C.H.S. Action, which has been stayed since May, 2010. At present, there is no suggestion that the C.H.S. Action will continue as the intended class proceeding. The L.C. Action was also stayed in May, 2010, as it appeared at that point in time that the T.W. Action was progressing towards certification. However, there was only an as-yet unfiled draft Amended Amended Statement of Claim referencing the *Class Proceedings Act*, S.A. 2003, c. C-16.5, in the T.W. Action, which was still facing an application to strike by the Crown in regard to the existing Statement of Claim.

42 A further difficulty arose in the L.C. Action in that L.C. herself is now unwilling to act as next friend for her children, or to proceed with the action herself, or as representative plaintiff for the Parent Class. This all leads us to Ms. Lightning's application to be appointed as L.C.'s next friend, as well as next friend for L.C.'s three children (one of whom is deceased, and another is now an adult).

43 As stated earlier, there were unresolved issues as to whether L.C. is in need of a next friend, as well as collateral proceedings in relation to the production of L.C.'s medical records and whether L.C. will undergo an independent medical examination.

44 At the October hearing, I ruled on the admissibility of the various affidavits put forward on behalf of L.C., and made orders in relation the independent medical examination process and L.C.'s medical record production. I also reserved judgment on the following issues, decisions on which will be issued in due course:

(a) Whether to appoint Ms. Lighting as next friend for E.M.P.,

(b) Whether as next friend Ms. Lightning would be granted immunity from costs and whether she would be paid, and

(c) Whether to grant the mini-*Okanagan* application.

45 During the October hearing, I was advised that there were difficulties with compliance with the orders I made in relation to the IME process and production of medical records, and I anticipate that there will be further applications in relation to L.C.'s status in the litigation.

46 It is clear that Mr. Lee is now looking to certify the L.C. Action as a class action with Ms. Lightning as the representative plaintiff in her capacity as next friend for L.C. (for the Parent Class) and as next friend for E.M.P. (for the Children Class). The fact pattern for E.M.P. is that she was allegedly apprehended and made subject to a TGO on May 28, 2004. No care plan was filed with the court, and she was kept in the Director's custody until September, 2006. Her situation falls within the applicable period of February, 2002 to November, 2004, as found by Thomas J. in *S. (C.H.)*.

47 While Ms. Lightning has applied to be appointed next friend for D.C. (D.C.'s son and E.M.P.'s sibling), he reached adulthood after the L.C. Action was commenced and died some short time thereafter. The appropriate procedure for any claim to be continued on his behalf is through the appointment of an administrator *ad litem* under the *Surrogate Rules*. No such application has been brought so any claim on his estate's behalf is not properly before me. D.C. is not a proper plaintiff and his estate is not properly before the court.

48 C.C. (L.C.'s daughter and E.M.P.'s sister) has turned 18 since this action was commenced. She is no longer in need of a next friend by reason of her age. Mr. Lee has been unable to get instructions from her and I will not deal with a next friend application on her behalf without information about her being put before the court.

49 As a result, there is no identified sibling advancing a claim who is properly before the court if the proposed class action is intended to include claims on behalf of affected siblings.

50 This leaves the proposed class action with two plaintiffs representing two different classes of potential class members: an identified child, E.M.P. who was kept in the Director's custody notwithstanding that the TGO had become a nullity; and L.C., a parent whose child was kept in the Director's custody notwithstanding that the TGO had expired.

D. The Proposed Class Action

51 Mr. Lee has made it clear that the proposed class action is intended to include at least nine classes or subclasses. The potential classes or subclasses are as follows:

1. Children like E.M.P., who were apprehended, a TGO was granted between February 2002 and November 2004, no service plan was filed with the court, and they were kept under the Director's guardianship and in his custody: *T.L. #1*; *S. (C.H.)* (the "*C.H.S. #2* Children");

2. Parents or guardians of the *S. (C.H.)* Children, like L.C.;

3. Siblings of the *S. (C.H.)* Children, like E.M.P.'s siblings;

4. Children like D.B., E.B. and S.B., who were apprehended, TGOs were granted, care plans were filed, but the care plans were deficient and did not meet the requirements of s. 31(3) of the *Child Welfare Act* and which made the TGO "meaningless": *B. (M.) v. Alberta (Director of Child Welfare)*, 2005 ABQB 204 (Alta. Q.B.), *Alberta (Director of Child*

Welfare) v. T. (J.), 2003 ABQB 402 (Alta. Q.B.) (*S. (V.) v. Alberta (Director of Child Welfare)*, 2004 ABQB 892 (Alta. Q.B.))(the "*M.B.* Children");

5. Parents or guardians of the *B. (M.)* Children, like M.B., a grandmother and guardian;

6. Siblings of the *B. (M.)* Children, like D.B.'s siblings E.B. and S.B., or siblings of E.M.P, such as her deceased adult brother D.C. and her now-adult sister C.C.;

7. Children subject to guardianship agreements or PGOs which were agreed or consented to, but where the agreement or consent order is voidable or a nullity because of a lack of proper legal advice or misrepresentations made by the Director, as claimed by B.M.in her application to be added as plaintiff in the T.W. Action;

8. Parents or guardians of children subject to invalid agreements or consent orders;

9. Siblings of children subject to invalid agreements or consent orders.

52 My understanding of the latter three classes relating to invalid agreements or consent orders is that such allegations have been made in relation to D.B. and E.B. (S.B.'s children and M.B.'s grandchildren). E.B. and D.B. were apparently eventually returned to the custody of their mother S.B. and their grandmother M.B.), but as noted above D.B. is now subject to a PGO and has separate representation. M.B.'s status as someone who still wishes to pursue a claim for herself as guardian and S.B.'s status for her claim as parent are unclear, as are their interests in pursuing claims for E.B. as her friend. M.B. and S.B. have applied to be added as plaintiffs in the T.W. Action, which is currently on hold. There may be elements of invalidity involved in the claims relating to A.O. being advanced by B.M. as well.

53 In addition to the nine potential classes listed above, there may be at least three additional groups: children for whom TGOs were granted before February, 2002, and after November, 2004, and no service plans were filed (calling into question the validity of the 2002 Amending Act, following the decision in the *S. (C.H.)*); their parents or guardians; and their siblings. Some groups might be further subdivided based on when the TGO was granted, i.e. depending on whether the TGO was granted before February, 2002, or after November, 2004. Those groups might be represented by B.M. and A.O. by his next friend B.M.. However, B.M.'s status in pursuing her claim and A.O.'s claim is unclear. Her application to be added as plaintiff was made in the T.W. Action, which is on hold.

54 I recite the above information to give background and context to the present application for advice and directions pursuant to Rule 1.2(2). The above information represents only a small taste of the litigation, which also includes *C. (L.) v. Alberta* [2008 CarswellAlta 2328 (Alta. Q.B.)], Action No. 0703 12884, *A.F. et al. v. Her Majesty the Queen et al*, Action No. 0703 12964, *S.M. et al v. Her Majesty* the Queen et al, Action No. 0703 15159, *J.O. v. Her Majesty the Queen et al*, Action No. 0903 07043 and *G.H. v. HMTQ*, Action No. 0903 17941. There have been numerous case management conferences and applications before myself, Thomas J., Slatter J. before his appointment to the Court of Appeal, Gill J. and Nielsen J. that are not reflected above.

55 Despite the large number of actions and plaintiffs, it now appears that only the L.C. Action may be considered by Mr. Lee as the suitable vehicle for the intended class action: some of the plaintiffs in other actions have lost interest in pursuing the matter; some do not wish to be the representative plaintiff in a class action; some do not want to run the risk of being liable for costs. Of the existing "child" plaintiffs, it may be that E.M.P. is the "best", as she would appear to clearly fit within the category of claimant defined in *S. (T.)*. But she needs a next friend. Her mother L.C. would appear to be the "best" parent/guardian plaintiff, as her circumstances would appear to clearly fit within *S. (T.)* as well. But L.C. apparently does not want to actively pursue the litigation, and the only way that her personal claim and her claim as representative plaintiff for the proposed Parent Class can be pursued is if there is a next friend appointed for her. It is unclear as to whether her circumstances warrant the appointment of a next friend, and whether she actually wants her personal claim to proceed through a next friend, let alone as representative for the Parent Class in the proposed class action. As noted above, the only way Ms. Lightning will act as next friend is if she is relieved of potential liability for costs, and that she be paid for her services as next friend. The merits of those positions has yet to be determined.

56 As far as other plaintiffs and potential representative plaintiffs are concerned, it is fair to say that at this stage, no one else appears to be coming forward to actively pursue his or her own claim as an aggrieved parent or guardian, or as next friend of their apprehended child. While a number of such children have likely reached adulthood, there is no information before me that suggests that any of the now-adult children are coming forward with claims they wish to pursue individually or as representative plaintiffs.

57 Having regard to the amount of effort that has gone into these numerous lawsuits and the absence of any significant progress in getting the issues brought forward, I can understand Mr. Lee's frustration. Information from the Crown initially suggested that there may be some 600 children who may have been affected by the service plan issue during the two-and-one-half year period identified by Thomas J. in *S. (C.H.)*. However, subsequent information suggests that there were many thousands of children "in the system" for whom TGOs were obtained. The Crown has advised that in some cases service plans were prepared but were not filed. In some cases, court clerks refused to accept service plans for filing. When the time frame is expanded having regard to the issue as to the validity of the 2002 and 2003 Amending Acts, and one considers the issues relating to inadequate service plans and improperly obtained consents or agreements, the number of affected children, parents, guardians and siblings is potentially very large.

58 Having regard to the difficulty in finding appropriate individuals to come forward to commence actions, act as next friends, and be prepared to be representative plaintiffs, it is also understandable why Mr. Lee is frustrated by the Crown's refusal to provide the names and contact details of all affected persons. The Crown's position is supported by a previous decision made by Thomas J. in the course of the *S. (C.H.)* litigation.

59 A class action has already been certified by Thomas J. in relation to the alleged failure of the Public Trustee to appoint counsel and pursue claims on behalf of children allegedly harmed while in the custody or guardianship of the Director: *L. (T.) v. Alberta (Director of Child Welfare)*, 2008 ABQB 114 (Alta. Q.B.), aff'd 2009 ABCA 182 (Alta. C.A.). There is some potential overlap between the class action certified by Thomas J. and the intended class action for children with *S. (T.)* claims who became subject to PGOs. Hence, the recent appointment of counsel for D.W, J.W. and D.B.

60 Mr. Lee did not appeal Thomas J.'s order relating to the production of names in the *S. (C.H.)* litigation. He has applied to me in the T.W. Action for the same relief as was denied by Thomas J. in the *S. (C.H.)*. litigation. I am not bound by Thomas J.'s decision in this regard and at some stage, may have to deal with the matter myself.

III. Steps Required Before Certification Application

61 As at the time that this application was brought under New Rule 1.2(2), the status of the related litigation arising out of *T.L. #1* is that all of the actions except for the T.W. Action have been stayed. However, the T.W. Action has now essentially become dormant, and the L.C. Action was revived to carry on with the certification process. If the L.C. Action is to proceed towards certification, it will first require:

1. Appointing a next friend (now a litigation representative) for E.M.P.;

2. Appointing a next friend (now a litigation representative for L.C.;

3. Resolving the status of D.C.'s claim (now deceased);

4. Resolving the status of C.C.'s claim (now an adult);

5. Amending the Statement of Claim to:

    (a) reflect the Court of Appeal's decision in the ***C.H.S Appeal***;

    (b) reflect the Court of Appeal's decision in the ***L.C. Appeal***; and

(c) convert the action into one under the *Class Proceedings Act*.

62 These steps partly await my decision on the mini-*Okanagan* application, which will resolve issues relating to the appointment of a next friend for E.M.P., including immunity from liability for costs and payment for legal services rendered, and the extent to which advance costs might be ordered from the Crown to pay for appropriate amendments to the pleadings.

63 But that still leaves outstanding issues relating to the appointment of a next friend for L.C., and the status of D.C.'s and C.C.'s claims.

64 Once the next friend issues have been determined, the amendment process will not likely be an easy one. There are likely to be disagreements between Mr. Lee and Crown counsel as to the proper interpretation of the *S. (C.H.)* and *C. (L.)*, as well as the pleadings for the constitutional claims, the validity of the 2002 and 2003 Amending Acts, and the claims of misfeasance in public office. It is already obvious that the parties take a different view as to what claims might be pursued on behalf of the parents, guardians and siblings.

65 An additional issue that looms on the horizon is the extent to which there needs to be a real plaintiff that fits the description of the class in a class proceeding, so as to be entitled to compensation if the action is successful. This may be a fairly straightforward issue in terms of E.M.P. and L.C., as their circumstances appear to fit within those described in *S. (T.)*. However, their claims do not relate to inadequate service plans, void or voidable consents or agreements, or TGOs granted outside the February, 2002, to November, 2004, timeframe.

66 While it seems clear from the *Class Proceedings Act* that the *representative* plaintiff does not necessarily have to be one of the class members, there is nothing in the legislation that suggests that there does not have to be an actual plaintiff who is part of the class. There are nine to 12 or more arguable classes or subclasses here, and the current plaintiffs only fit in two of those classes.

67 I recognize that the *Class Proceedings Act* is new in Alberta, and that this is a relatively new area in Canadian law. No one as yet has pointed me to authority indicating that a class action can be commenced by a plaintiff as representative for unnamed, and even unknown, persons who are likely to fall into different classes.

68 The effect of Mr. Lee's argument is that there are bound to be a number of people out there that fit within each of the nine or 12 classes or subclasses. The identities of those people are known, or at least ascertainable, by the Crown. It is artificial to require an actual person from each class or subclass to be front and centre in the class action. The representative plaintiff does not have to be a class member under s. 2(4) of the *Class Proceedings Act*, so someone like Ms. Lightning should be able to bring proceedings as next friend. Because there is precedent for the Public Trustee hiring and paying for individuals to act as next friends for children under PGOs who are involved in litigation, payment for someone like Ms. Lightning should be forthcoming by the Crown. Further, as there are precedents for the Public Trustee to indemnify a next friend against costs incurred in the course of pursuing litigation for the benefit of a child under a PGO, Mr. Lee argues that shielding Ms. Lightning as the next friend from liability for costs should not be problematic either. Since the next friend may need legal advice and legal representation, allowing payment for a lawyer ought to follow, particularly given that the Public Trustee has paid for legal representation for a child under a PGO.

69 The relevant provisions of the *Class Proceedings Act* are as follows:

> 2(1) One member of a class of persons may commence a proceeding in the Court on behalf of the members of that class.
>
> (2) A person who commences a proceeding under subsection (1) must make an application to the Court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing that person, or another person who on certification will be a member of the class, as the representative plaintiff.

. . . . .

(4) Notwithstanding subsection (2), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.

(5) A person who may be both a member of a class and a member of a subclass is eligible to be appointed as a representative plaintiff for the class proceeding unless, in the opinion of the Court, it would be inappropriate in the circumstances.

(6) The Court may, where it considers it appropriate, appoint as a representative plaintiff a non-profit organization that is incorporated.

. . . . .

5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

(i) will fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

. . . . .

7(1) Notwithstanding section 5, if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the Court, the protection of the interests of the prospective subclass members requires that they be represented separately, the Court may, in addition to appointing the representative plaintiff for the class, appoint from among the prospective subclass members a representative plaintiff for the subclass who, in the opinion of the Court,

(a) will fairly and adequately represent the interests of the subclass,

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and

(c) does not have, in respect of the common issues for the subclass, an interest that is in conflict with the interests of other prospective subclass members.

(2) Where the Court is satisfied that more than one subclass meets the criteria under subsection (1) for a representative plaintiff to be appointed, the Court may appoint a representative plaintiff for each subclass.

(3) If a class is made up of persons who are residents of Alberta and persons who are not residents of Alberta, that class is to be divided into resident and nonresident subclasses.

(4) Notwithstanding subsection (1), the Court may certify a person who is not a member of the subclass as the representative plaintiff for the subclass in the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the subclass.

(5) Section 2 and (6) apply to the appointment of a representative plaintiff for a subclass under this section.

IV. Rule 1.2 Application

A. Background

70 In anticipation of the New Rules coming into force on November 1, 2010, Mr. Lee wrote to counsel for the Crown as follows:

The New Rules of Court will be in force in less than 10 days. Under the new Rules of Court lawyers have an obligation to act in a manner to achieve the purposes of the new Rules. In particular, I make reference to Rule 1.2(2) which refers to identifying the real issue in dispute, facilitating quick resolution at the least expense, and encouraging parties to resolve the claims, open and honest communication between lawyers.

We would like to identify the real issues in dispute so that the case can proceed efficiently.

With this in mind, we have the following questions for the Defendant:

Procedural Issues

1. What does the Defendant believe is the best procedure for resolving the issue of whether a child in care who was entitled to have a service plan filed, but did not have a service plan filed be resolved? Why is a class action not the best procedure?

2. What does the Defendant believe is the best procedure for resolving the issue of whether a parent of a child in care who was entitled to have a service plan filed, but did not have a service plan filed be resolved? Why is a class action not the best procedure?

3. What does the Defendant believe is the best procedure for resolving the issue of whether a sibling of a child in care who was entitled to have a service plan tiled, but did not have a service plan filed be resolved? Why is a class action not the best procedure?

4. What is the best way to put a head on this action?

5. Is a representative plaintiff, that is not a class member, a workable option? If not, then why not?

6. Is there a need for separate representative plaintiffs for each subclass of class members? (child who did not have a service plan filed, parent of child that did not have a service plan filed, sibling of child that did not have service plan filed, child that did not have an adequate service plan filed, parent of a child that did not have an adequate service plan filed, sibling of a child that did not have an adequate service plan filed, child that was under care under an invalid consent order/agreement, parent of a child that was under care under an invalid consent order/agreement, sibling of a child that was under care under an invalid consent order/agreement.)

7. If multiple representative plaintiffs are needed, is the Government prepared to pay the fees for litigation representatives for each subclass?

8. Do the Defendants agree that there are many plaintiffs that have the same common legal issue?

9. If there are subclasses, such as children who did not have a service plan filed, children who did not have an adequate service plan filed and children who were in care under an invalid Order or agreement, does the Government believe that one class action would be the best way to deal with the issues or would 3 separate class actions be preferable? Why?

10. Do the Defendants take the position that they do not have to work cooperatively with the Plaintiffs to identify the real issues in dispute and that the Defendants can just sit back and respond to motions brought by the Plaintiff?

Substantive Issues

11. In the claim for children that did not have a service plan filed, are the only issues whether or not those children are entitled to compensation and the amount of the compensation? Does the Defendant take the position that it is not an unlawful confinement and it is not a charter breach?

12. Do the Defendants agree that the issue of whether children who did not have an adequate service plan filed have a possible cause of action or do they believe that this claim ought to be struck.

13. Do the Defendants take the position that a child does have a possible claim when a TGO, TGA, PGO or PGA was obtained by obtaining consent from the parents that was not informed consent? Do the Defendants take the position that this claim should be struck?

14. Are there any common issues that the Defendants are willing to certify in a class action?

If you want the Plaintiffs to clarify anything, please let me know and when I have a client capable of giving me instructions to clarify those issues, I will let you know their reply.

If the Defendant does not wish to work collaboratively towards clearing up the issues, then I will seek instructions to make an application under Rule 1.2 (3).

71 Mr. Barber, on behalf of the Crown, responded:

At this stage of the proceeding it is not possible to address the questions you pose. In particular:

1. You have admitted that the Statement of Claim needs to be amended, but we do not have your amended claim;

2. You have admitted that the Plaintiffs need to be changed, but we do not know yet who the Plaintiffs will be; and

3. We do not have your motion for certification in this action, so we do not know the proposed scope of, or evidence in support of, class certification.

It is not possible to discuss the issues in dispute until the Plaintiffs settle on the matters the Plaintiffs will put in issue. This will not occur until these three steps are complete.

Further, we do not agree that New Rule 1.2(3) implies that the Plaintiff can bring an application at the outset of the litigation to compel answers to the types of questions you pose, particularly in the absence of the documentation outlined above.

72 In essence, Mr. Lee appears to be seeking agreement from the Crown that:

(a) There be a single class action;

(b) Ms. Lightning be appointed as the representative plaintiff;

(c) Ms. Lightning should be paid for serving as the representative plaintiff;

(d) There has been unlawful confinement of the children, charter breaches affecting the children, their parents, guardians and siblings; and

(e) The only remaining issue is compensation for the class members.

73 It is fair to characterize the Crown's response as non-responsive.

B. Can an Application be Made Under Rule 1.2?

74 The threshold issue is whether a stand-alone application can be made under Rule 1.2(3). Rule 1.2 states the following:

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

75 Rule 1.2 is clearly intended to guide the interpretation of the New Rules and might be described as the New Rules' guiding principles. Any application for relief under a Rule may bring Rule 1.2 into play, which will influence any interpretation issues. Rule 1.2 may be described as the lens through which all Rules must be interpreted. I expect that where there are competing interpretations, the interpretation closest to the intentions expressed in Rule 1 will prevail. However, there are competing interests identified in Rule 1.2: a fair and just result does not automatically equate with a timely and cost-effective one. Our system has long entitled a defendant to know the case it has to meet, which often requires extensive discovery that is both time-consuming and expensive. However, limiting discovery in the interests of timeliness and cost-effectiveness may be viewed as impairing a party's entitlement to a fair and just result.

76 Litigation remains an adversarial process. The New Rules still contain requirements with respect to pleadings and allows a defendant the opportunity to apply to dismiss an action based on deficient pleadings: Rule 3.68. A defendant is not required to assist the plaintiff in making its case against the defendant. While the New Rules contemplate greater cooperation among counsel in moving an action along towards dispute resolution and then to trial if necessary, the New Rules do not contemplate that the parties must agree to short-circuit or jump over processes to achieve a timely and cost-effective result.

77 The clear wording of the Rule itself contemplates an application being made to "identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense". There is no timeframe set out in Rule 1.2. Rule 1.2(3) would appear to make the existence of an action the only pre-condition to making an application, although in my view, it would be premature for an application to be made if the parties have not first made an effort among themselves to identify the issues in dispute and to determine the quickest way of resolving the dispute at the least expense.

78 Rule 1.2(3) contemplates that both substantive and procedural matters be addressed: the issues to be resolved presumably relate to the elements of the plaintiff's claims and the defendant's defences. I would suggest that the days when the defendant could file a defence in the old form, namely that "the Defendant denies all allegations in the Statement of Claim and puts the Plaintiff to the strict proof thereof", are over. Defendants will be required to disclose their position and state their defences sooner rather than later. But defendants are still entitled to defend actions against them vigorously and to maintain any and all defences that are not unreasonable or frivolous and can withstand a summary judgment application. They are also entitled to insist that the plaintiff follow proper procedures and comply with the Rules of Court.

79 Mr. Lee has written to the Crown seeking their response to a number of procedural and substantive matters, specifically referencing Rule 1.2; the Crown's response was essentially non-responsive. Thus, I conclude that there is no procedural bar to Mr. Lee's application that prevents me from taking jurisdiction to consider his application.

C. Grounds for Rule 1.2 Application

80 Mr. Lee's Notice of Motion filed October 28, 2010, states the following grounds:

> 1. The Defendants' actions in this proposed class action have been inconsistent with the purpose and intent of the New Rules of Court;
>
> 2. The Defendants' actions have related to procedural technicalities that have no bearing on the real issues in dispute;
>
> 3. The Defendants' actions have the opposite effect of facilitating the quickest means of resolving the claim at the least expense;
>
> 4. The Defendants are not communicating honestly and openly.

81 The Crown disputes these grounds and takes particular exception to the fourth ground, namely that it have not been communicating honestly and openly.

1. Obligation to Communicate Honestly and Openly

82 At the application, Mr. Lee advised that the basis for the fourth ground is Mr. Barber's October 28, 2010, response to Mr. Lee's letter of October 22, 2010. Mr. Lee characterized Mr. Barber's letter as disingenuous, particularly in the context of the pleadings fights both in this action that resulted in the *C. (L.)*, and in the *C.H.S.* litigation. Mr. Lee also points to the application to appoint a next friend for L.C. and E.M.P. as further evidence to support the fourth ground. In my view, Mr. Lee has overstepped the mark. The phrase "honestly and openly" comes right out of Rule 1.2 and I accept that Mr. Lee did not intend to suggest that the Crown was acting or had acted dishonestly. "Disingenuous" connotes dishonesty at worst, and most charitably game playing. The New Rules were not needed to compel counsel to act honestly, and it is curious that the drafter considered it necessary to emphasize that long-standing ethical obligation in Rule 1.2.

83 In any event, there has been nothing in the Crown's conduct in the related actions before me, and particularly in the T.W. Action, that could be remotely characterized as dishonest. To describe Mr. Barber's response as disingenuous and rely on that characterization in an application grounded in a lack of honesty is an exaggerated approach. The only basis for an allegation that the Crown has not dealt openly with the Plaintiffs might be that the Crown has not volunteered to provide the Plaintiffs with the identities of people affected by *S. (T.)*. However, the Crown cites privacy concerns and has been successful in resisting an application to produce that information in the *S. (C.H.)* litigation. A failure to respond to his letter of October 22nd in a manner satisfactory to Mr. Lee is not a lack of openness. These grounds are not made out, and frankly should not have been raised.

2. Obligation to Act

84 The first ground is answered by reason that the Crown had no obligation to act in accordance with the purpose and intent of the New Rules until November 1, 2010. It is clear that the Crown has not cooperated with Mr. Lee to identify issues and find a quick and inexpensive way of resolving the matter. Over the last number of years, the Crown has taken steps to strike out portions of the various Statements of Claim in the L.C. Action, the T.W. Action and in the *S. (C.H.)* litigation, all of which have been extensively case managed. These applications to strike were made on recognized grounds, namely that the Statements of Claim did not disclose a cause of action, or that there were defects in the pleadings. By making these applications, the Crown has successfully limited the claims which might proceed. The Crown has also successfully resisted producing the names of potential class action members to Mr. Lee, resisted consenting to class action proceedings, and more recently resisted next friend applications for L.C. and E.M.P., as well as resisting payment of advanced costs. None of these Crown responses has been frivolous. More importantly, each of the steps taken by the Crown could have been taken if the New Rules had been in effect when the steps were actually taken. I do not see that the first ground has been made out.

3. Procedural Technicalities

85 With respect to the second ground, Mr. Lee takes the position that the Crown's actions have related to "procedural technicalities" that have no bearing on the real issues in dispute. He is correct that little over the last number of years has related to the substantive issues of the Plaintiffs' claims or the Crown's defences to them. However, technical and procedural issues are unavoidable in class proceedings.

86 In any event, the "procedural technicalities" Mr. Lee refers to relate to who the plaintiffs are and what claims they are actually advancing, particularly having regard to the recent Court of Appeal decisions. It is Mr. Lee that keeps changing the plaintiffs and the claims, not the Crown. The *S. (C.H.)* litigation started as the flagship case for the intended class action, with a representative plaintiff acting for herself and as next friend for her three children. The facts as alleged fit within circumstances set out in *S. (T.)*: children were apprehended, TGOs were granted during the identified time period, no case plans were filed and the children were not returned to their families. The Crown succeeded in striking portions of the Statement of Claim in the *S. (C.H.)* litigation. Mr. Lee was partly successful on appeal but still had to remove some portions of the Statement of Claim and revise other portions relating to constitutional claims and misfeasance of public office. These amendments have not been yet been completed. However, after January, 2010, the *S. (C.H.)* litigation seemed unlikely to proceed, so the T.W. Action was identified as the intended class proceeding. The Statement of Claim in the T.W. Action, which had yet to be amended and were similar to the claims made in the *S. (C.H.)* litigation, was also facing an application by the Crown to strike the pleadings.

87 As noted above, it is clear that there is disagreement between Mr. Lee and the Crown as to what claims were permitted by the Court of Appeal to proceed. This issue will be determined once Mr. Lee revises the pleadings and will depend on whether the Crown takes issue with the revised Statement of Claim.

88 But additionally, Mr. Lee sought to add new claims after January, 2010: those relating to inadequate care plans (following Ouellette J.'s decision in *B. (M.)*); and those relating to consent PGOs or custody agreements where the validity of the consent is in question (following the allegations made by B.M.). Then the T.W. Action fell by the wayside, partly because T.W.'s children became subject to PGOs, and partly because of T.W.'s lack of cooperation with Mr. Lee. By this stage, Mr. Lee became focused on obtaining an *Okanagan* order for advance costs, so that he could be compensated for his past and ongoing work in the

litigation. Ms. Kellett then entered the picture as a potential next friend for T.W., and the search for new child plaintiffs began. Through this search, E.M.P. was identified as a suitable child plaintiff, but her mother, L.C., declined to cooperate or participate in the recent proceedings, leaving E.M.P. without an effective next friend and L.C.'s personal claim in doubt. Then Ms. Kellett stepped aside and Ms. Lightning came forward to act as next friend for both E.M.P. and L.C.

89 There may be plaintiffs out there who have valid claims against the Crown arising out of *S. (T.)*, but no one wants to step forward and be plaintiff in an intended class action. Ms. Lighting is prepared to act as next friend for the appropriate plaintiffs and as representative plaintiff for the class, so long as she has no liability for costs and receives financial compensation for her trouble. Mr. Lee is prepared to continue to act on behalf of the class or classes, taking instructions from Ms. Lightning, as long as he gets advance costs to pursue certification of the class proceeding.

90 As noted above, I can understand Mr. Lee's frustration. Many of the occurrences that have interfered with the progress of the proposed class action have been outside his control: for example, C.H.S.'s apparent change of heart, PGOs for some of the children, and the recent inability to get instructions from L.C. or T.W. Nevertheless, none of this can be attributed to the Crown.

91 However, the Rules of Court do not trump specific provisions in legislation such as s. 2.1 of the *Class Proceedings Act*, which requires:

> 2(1) One member of a class of persons may commence a proceeding in the Court on behalf of the members of that class.
>
> and further, in s. 5:
>
> > 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
> >
> > (a) the pleadings disclose a cause of action...

92 So far, there is neither a plaintiff nor pleadings that correctly disclose the permitted causes of action. These are not mere "procedural technicalities". In my view, the Crown is entitled to know who the plaintiff is and what the plaintiff's claims are.

93 There are specific requirements to be met before an application for certification can be made. Rule 1.2 cannot be interpreted in a manner that allows the court to ignore or jump over specific provisions in provincial legislation. The *Class Proceedings Act* requires that there be a plaintiff who is part of the class and that there be a Statement of Claim that discloses a cause of action against the Defendant. The Crown's steps to date have been aimed at ensuring that these requirements have been met before it faces a certification application. There has been nothing untoward or inappropriate in its actions to date. The second ground is not made out.

4. Obligation to Facilitate

94 The third ground suggests that the Crown has a duty to facilitate the quickest means of resolving the claims at the least expense. The New Rules still contemplate that there will be trials; so long as there are reasonable causes of action or reasonable defenses, the parties are still entitled to their day in court. They are also entitled to reasonable questioning and to the benefit of other aspects of the Rules such as disclosure of expert reports and independent medical examinations. Any process or procedure involves cost and takes time. But Rule 1.2 imposes on top of all of this a duty to "identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense on the parties". If they do not agree, an application can, and probably should, be made to the court for directions and advice.

95 Mr. Lee was entitled to write to the Crown to see if there were things they could agree upon in order to facilitate resolving certain issues. He was certainly entitled to enquire as to whether the Crown might agree to a class action with a single representative plaintiff with advance costs for the representative plaintiff and himself as counsel. In light of the obligations on the parties to manage their own litigation and to comply with the principles in Rule 1.2, he was entitled to a meaningful response. A meaningful response does not mean total agreement, but it does mean addressing each of the matters raised in an open and forthright way.

D. Specific Questions

96 With respect to the specific questions raised by Mr. Lee in his letter, and having regard to the state of the pleadings, the uncertainty with respect to the Plaintiffs and unresolved issues regarding the nature of the claims to be advanced, it is premature to address questions 1-3. Those should be addressed once an appropriate plaintiff has been identified and the Statement of Claim has been revised to properly advance the causes of action in an intended class proceeding.

97 With respect to question 4, I do not consider that it is appropriate for the Plaintiffs' counsel to require the Defendant to give advice as to who the Plaintiff might be, or who an appropriate next friend might be. It is up to Mr. Lee to find and propose an appropriate Plaintiff.

98 If the purpose of question 5 is to determine whether the Crown is prepared to respond to a Statement of Claim where the plaintiff is not herself a member of any of the proposed classes, then this question should be answered. While the question raises issues under s. 2 and 5 of the *Class Proceedings Act*, Mr. Lee is entitled to ask and to receive a meaningful response.

99 Similarly, with respect to questions 6 and 9, a "no" answer may prevent a search for nine or 12 plaintiffs and a similar number of representative plaintiffs. Depending on the answer, there may either be a search for more plaintiffs or a court application to determine the scope of a single plaintiff's claims on behalf of prospective class members who have significant differences in their claims from the plaintiff. Mr. Lee is entitled to a meaningful response to these questions.

100 For question 7, a meaningful response is required. Having regard to the Crown's position on L.C.'s and E.M.P.'s application for advance costs, the answer is not likely in doubt, but it is always open to a party to enquire of the other as to whether it is prepared to change its position.

101 Question 8 would be a fair question if there was clarity as to the "legal issue" mentioned. The information necessary to respond is to some extent in the Crown's hands, but the Crown does not have to identify legal issues or claims against it that it believes may be shared by a number of people. To some extent, this has been answered in a general way by the Crown's acknowlegement that there appear to be at least 600 children for whom TGO's were granted and no timely care plans were filed. This being said, it is always open to a party to serve a notice to admit facts on the other party: Rule 6.37. Seeking admissions on legal issues is a different matter and question 8 involves issues of both fact and law. The question need not be answered as presently framed.

102 Question 10 has two parts. The first part relating to identifying issues is answered by my decision that the Crown must provide meaningful responses to appropriate requests. As to the second part, a party need not disclose its litigation strategy to the other side. There is nothing in the new Rules to suggest that a defendant may not adopt a responsive position, so long as a defendant adheres to litigation plans and case management directives, complies with the Rules, and does not unduly delay an action. The word "facilitate" in Rule 1.2(3)(a) should be given its ordinary meaning, namely "to render easier; to promote, help forward; to lessen the labour of, assist (a person)": Shorter Oxford Dictionary, Oxford, 3rd Edition. Apart from Rule 1.2(3)(a) as an interpretative guideline, this provision must be read in the context of Part 4: Managing Litigation and in particular Rule 4.1, which states that:

> 4.1 The parties are responsible for managing their dispute and for planning its resolution in a timely and cost effective way.

103 Scheduling and moving the matter along is no longer primarily the obligation of the plaintiff. The New Rules recognize that litigation is not just the plaintiff's problem, but a joint problem that needs to be fairly and justly resolved in a timely and cost-effective way: Rule 1.2(1). Defendants must now shoulder some of the responsibility for meeting those objectives, and a totally responsive mode is no longer appropriate. However, that does not mean that a defendant has to forego or limit any of the steps or processes it is entitled to take under the Rules. As noted above, the parties are still entitled to their day in court if there are reasonable issues to be tried.

104 Here, the Crown has been compliant with case management orders and directives. While it has brought a number of motions, those motions have met with some success in defining the issues; most recently, it was successful in limiting the use of affidavits from other actions in support of the mini-*Okanagan* application, and in obtaining an order that L.C. be subject to an independent medical exam and that her medical records be produced.

105 Accordingly, there is no basis in the history of these matters to date to require any response to question 10.

106 As to questions 11-13, these might be seen as enquiries as to what the Crown might plead by way of its Statement of Defence. In some actions, it may be premature to require a response to inquiries like this before a defence has been filed. However, the Crown has not filed a defence in regard to the matters raised in questions 11-13 and may not be required to do so until after a decision on certification has been made in the future. I do not think it is improper or unreasonable for Mr. Lee to seek information before the certification application as to which matters the Crown intends to contest. A meaningful response here may well assist Mr. Lee as to the necessity of certain applications or other steps. The Crown should provide meaningful responses to these questions.

107 With respect to question 14, I think there should be more description of the "common issues" unless the Crown has certain issues that it wishes to pursue by way of class proceedings. Defendants can seek class proceedings as well as plaintiffs. As to the Plaintiffs' issues, there needs to be better definition before the Crown is required to provide a response.

V. Result

108 Recognizing that Rule 12.4(3) requires that intended class proceedings be in case management unless the Chief Justice decides otherwise, the question becomes what to do with the responses. The objective of case management is to assist the parties with the management of their litigation. Meaningful answers by the Crown to the questions I have directed to be answered will inform me as case manager and the parties as to what steps are likely necessary in closing pleadings and moving the matter to a certification application. I think that is the intent of Rule 1.2(3). The parties should exchange information that will assist in the design of a process that will address the real issues in a fair way.

109 In my view, a stand-alone application under Rule 1.2(3) is intended to facilitate creating an appropriate task list and moving the timeline towards resolution. It is not intended to be a punitive measure and is aimed at getting litigation moving when it is bogged down.

110 At this stage, the litigation is to some extent in abeyance, as the parties are waiting for my decision regarding E.M.P.'s next friend and advance costs, for L.C. to comply with the directions given regarding medical records, and ultimately for L.C.'s next friend status to be resolved. That does not mean that the Crown should not begin work on its reply to Mr. Lee's October 22nd letter. Absent extenuating circumstances, I would expect the Crown to provide its response by January 28, 2011. This will allow tasks and timelines to be effectively addressed at the next case management conference, following issuance of my decisions on the outstanding matters.

111 Costs of this application should be addressed at the next case management meeting.

Plaintiff entitled to bring application and defendant ordered to provide responses as directed.

End of Document

TAB 9

1997 CarswellMan 198
Supreme Court of Canada

Hercules Managements Ltd. v. Ernst & Young

1997 CarswellMan 198, 1997 CarswellMan 199, [1997] 2 S.C.R. 165, [1997] 8 W.W.R. 80, [1997] S.C.J. No. 51, 115 Man. R. (2d) 241, 139 W.A.C. 241, 146 D.L.R. (4th) 577, 211 N.R. 352, 31 B.L.R. (2d) 147, 35 C.C.L.T. (2d) 115, 71 A.C.W.S. (3d) 169, J.E. 97-1151

Hercules Managements Ltd., Guardian Finance of Canada Ltd. and Max Freed, Appellants (Applicants/Plaintiffs) v. Friendly Family Farms Ltd., Woodvale Enterprises Ltd., Arlington Management Consultants Ltd., Emarjay Holdings Ltd. and David Korn, Plaintiffs v. Ernst & Young and Alexander Cox, Respondents (Respondents/Defendants) v. Max Freed, David Korn and Marshall Freed, Third Parties v. The Canadian Institute of Chartered Accountants, Intervener

La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: December 6, 1996
Judgment: May 22, 1997
Docket: 24882

Proceedings: affirming (1995), [1995] 6 W.W.R. 301 (Man. C.A.)

Counsel: *Mark M. Schulman, Q.C.*, and *Brian A. Crane, Q.C.*, for the appellants.
Robert P. Armstrong, Q.C., and *Thor J. Hansell*, for the respondents.
W. Ian C. Binnie, Q.C., and *Geoff R. Hall*, for the intervenor.

Subject: Torts; Public; Insolvency; Corporate and Commercial
Related Abridgment Classifications
Professions and occupations
V Auditors
Headnote
Professions and Occupations --- Auditors — Negligence — General
Scope of duty of care — Shareholders bringing action against auditors for losses incurred in reliance on audit reports of company that collapsed — Shareholders claiming damages for loss of capital and equity in company and reduced value of shares — Auditors reasonably foreseeing that shareholders would rely on reports and shareholders' reliance being reasonable — Audit reports being prepared for purpose of allowing shareholders as class to oversee company management — Investors' losses of capital and equity resulting from use of reports for personal investments — Reliance on audit reports by shareholders as class to oversee management not giving rise to duty of care to individual shareholders — Auditors owing no duty of care to shareholders in preparation of reports — Corporations Act, S.M. 1976, c. 40, ss. 149(1), 163(1).
Professions et occupations --- Vérificateurs — Négligence — En général
Étendue de l'obligation de diligence — Action intentée par des actionnaires contre les vérificateurs pour des pertes subies en s'étant fié aux rapports de vérification préparés pour la compagnie mise sous séquestre — Actionnaires réclamant des dommages-intérêts pour pertes en matière de placement et pertes quant àla valeur de leur participation dans la compagnie — Vérificateurs ayant raisonnablement prévu que les actionnaires se fieraient aux rapports, et la confiance démontrée par les actionnaires étant

raisonnable — Rapports de vérification étant préparés dans le but de permettre aux actionnaires, en tant que groupe, de surveiller la gestion de la compagnie — Pertes en matière de placement résultant de l'utilisation des rapports àdes fins de placement individuel — Confiance des actionnaires, en tant que groupe, en les rapports de vérification, dans le but de surveiller la gestion, ne créant pas une obligation de diligence en faveur des actionnaires àtitre individuel — Vérificateurs n'ayant pas d'obligation de diligence àl'égard des actionnaires relativement àla préparation de leurs rapports — Loi sur les corporations, S.M. 1976, c. 40, art. 149(1), 163(1).

The appellant shareholders held shares in an investment company. The respondent auditors performed annual audits on the company, and provided audit reports to the shareholders. In 1984, the company went into receivership. The shareholders brought an action against the auditors, alleging that the audit reports for 1980, 1981, and 1982 had been negligently prepared, and that the shareholders had suffered financial losses because of their reliance on those reports. The losses claimed included the loss of capital and equity in the company, and the loss in value of the shareholdings arising from reliance on the reports in overseeing management of the company.

The auditors brought a motion for summary judgment to dismiss the shareholders' claims. The auditors argued that there was no contract between the parties, that the auditors did not owe the individual shareholders a duty of care, and that the claims asserted could only be brought by the company and not the shareholders. The motion was granted, and the shareholders' appeal was dismissed.

The shareholders appealed.

Held: The appeal was dismissed.

The existence of a duty of care in tort is determined through the application of a two-part test: (1) is there sufficient proximity between the parties that the defendant would reasonably contemplate that carelessness might cause damage to plaintiff? and (2) if yes, are there any considerations that should limit the scope of that duty? Where negligent misrepresentation is claimed, a relationship of sufficient proximity will be found where the defendant ought reasonably to have foreseen that the plaintiff would rely on his or her representation, and where such reliance would be reasonable. Reasonable reliance is indicated where the defendant had a financial interest in the transaction in respect of which the representation was made; the defendant was a professional or someone who possessed special skill or knowledge; the information was provided in the course of the defendant's business; the information was given deliberately; and the information was given in response to a specific inquiry.

The fundamental policy consideration in limiting the scope of the duty of care in claims for negligent misrepresentation is that the defendant might be exposed to liability in an indeterminate amount for an indeterminate time to an indeterminate class. The fact that audit reports will be relied on by many different people, including shareholders, creditors, and potential shareholders, for a wide variety of purposes, will almost always be reasonably foreseeable to auditors. As those reports are produced by skilled professionals, it will be wholly reasonable for any of those people to rely on them. Therefore, it makes sense, where defendant auditors do not know the identity of the plaintiffs, or where the auditors' statements are not used for a specific purpose or transaction for which they were made, to negate the duty of care owed by auditors in preparation of those reports.

Shareholders will generally rely on audited financial statements for a wide variety of purposes. This is confirmed by the fact that ss.149(1) and 163(1) of the *Corporations Act* contemplate that such statements will be placed before the shareholders at the annual general meeting of a corporation. Therefore, the possibility that the shareholders would rely on the audit reports in conducting their affairs, and that they might suffer harm if the reports were prepared negligently, was reasonably foreseeable to the auditors. The first four of the five indicia of reasonable reliance were also present. Thus, the first part of the duty of care test was met, and a prima facie duty of care existed on the part of the auditors.

However, the standard purpose of audit reports is to allow shareholders, as a class, to assess how well the directors and officers of a company are performing, and how the company should be managed, a purpose which is mandated by the Act. The auditors did not prepare the reports in order to assist the shareholders in making personal investment decisions, but the damages claimed by the shareholders for loss of capital and equity arose from their reliance on the reports in making such decisions. In addition, the audit reports were not prepared to permit individual shareholders to monitor management, but rather to permit the shareholders as a class to oversee management. Any losses suffered due to the failure to oversee management properly through reliance on faulty audit reports could not be asserted by individual shareholders as personal tort claims. Therefore, the auditors did not owe the shareholders a duty of care with respect to the losses claimed. The claim should have been made as a derivative action on behalf of the corporation. The appeal should be dismissed.

Les actionnaires appelants détenaient des actions dans une société d'investissements. Les vérificateurs intimés ont effectué la vérification annuelle des états financiers de la société et ont fourni aux actionnaires des rapports de vérification. En 1984, la compagnie a été mise sous séquestre. Les actionnaires ont intenté une action contre les vérificateurs, alléguant négligence dans la préparation des rapports de vérification de 1980, 1981 et 1982, ainsi qu'une perte financière qu'ils auraient subie en raison de leur confiance en ces rapports. Les pertes alléguées comprenaient des pertes en capital et des pertes quant àla valeur de la participation dans la compagnie, découlant de la confiance en les rapports dans le cadre de la surveillance de la compagnie.
Les vérificateurs ont déposé une requête visant àobtenir un jugement sommaire rejetant les demandes des actionnaires. Les vérificateurs ont allégué qu'aucun contrat n'existait entre les parties, qu'ils n'avaient envers chacun des actionnaires àtitre individuel aucune obligation de diligence, et que les actions engagées ne pouvaient être intentées que par la compagnie et non par les actionnaires. La requête a été accueillie et le pourvoi des actionnaires a été rejeté.
Les actionnaires ont formé un pourvoi.
Arrêt: Le pourvoi a été rejeté.
L'existence d'une obligation de diligence en matière délictuelle se détermine par l'application d'un critère àdeux volets : 1) Existe-t-il un lien étroit entre les parties suffisant pour que le défendeur doive raisonnablement prévoir qu'une négligence pourrait causer des dommages au demandeur? 2) Si oui, existe-t-il quelque considération de principe devant limiter la portée de cette obligation? Dans le cadre d'une action pour déclaration inexacte faite par négligence, il y aura un lien étroit lorsque le défendeur devait raisonnablement avoir prévu que le demandeur se fierait àsa déclaration et lorsque cette confiance était raisonnable. La confiance est raisonnable lorsque le défendeur a un intérêt financier dans l'opération pour laquelle la représentation a été effectuée; le défendeur était un professionnel ou quelqu'un possédant une habilité ou des connaissances particulières; la déclaration a été donnée dans le cadre des affaires du défendeur; la déclaration a été donnée délibérément; et la déclaration a été donnée en réponse àune demande spécifique.
La considération de principe fondamentale qui mène àlimiter la portée de l'obligation de diligence dans le cadre des actions pour déclaration inexacte faite par négligence concerne la possibilité que le défendeur encoure une responsabilité pour un montant indéterminé pour un temps indéterminé àl'égard d'une catégorie indéterminée. Le fait que plusieurs personnes différentes, actionnaires, créanciers, actionnaires potentiels, se fieront aux rapports de vérification pour une variété de motifs constitue un élément qui sera presque toujours raisonnablement prévisible pour un vérificateur. Ces rapports étant fournis par des professionnels chevronnés, il est tout àfait raisonnable pour n'importe laquelle de ces personnes de s'y fier. Par conséquent, dans les cas où les défendeurs vérificateurs ne connaissent pas l'identité des demandeurs, ou lorsque les déclarations des vérificateurs ne sont pas utilisées aux fins de l'opération pour lesquelles elles ont été faites, il est logique de nier l'existence d'une obligation de diligence incombant aux vérificateurs dans la préparation de ces rapports.
Les actionnaires vont généralement se fier aux rapports de vérification des états financiers pour une vaste gamme de motifs. Cela se trouve confirmé par le fait que les art. 149(1) et 163(10) de la *Loi sur les corporations* prévoient que de telles déclarations seront soumises aux actionnaires àl'assemblée générale annuelle de la compagnie. Par conséquent, la possibilité que les actionnaires se fient aux rapports de vérification dans la conduite de leur affaires et le fait qu'ils puissent subir un préjudice si les rapports sont préparés de façon négligente étaient raisonnablement prévisibles pour les vérificateurs. Les quatre premiers des cinq indices de l'existence du caractère raisonnable de la confiance étaient également présents. La première exigence du critère de l'obligation de diligence a ainsi été satisfaite et les vérificateurs étaient tenus àune obligation prima facie de diligence. Cependant, l'objet normal d'un rapport de vérification est de permettre aux actionnaires, en tant que groupe, d'évaluer la performance des dirigeants et des officiers de la compagnie et la façon dont celle-ci devrait être gérée, objet qui est prévu par la Loi. Les vérificateurs n'ont pas préparé les rapports afin d'aider les actionnaires àprendre des décisions personnelles en matière de placement, mais la réclamation des actionnaires pour la perte de placement et la perte de la valeur de leur participation émane du fait que ces derniers se sont fiés aux rapports afin de prendre de telles décisions. De plus, les rapports de vérification n'ont pas été préparés afin de permettre aux actionnaires individuels de contrôler la gestion, mais plutôt dans le but de permettre aux actionnaires, collectivement, de surveiller la gestion. Toute perte résultant de l'impossibilité de superviser adéquatement la gestion en raison de rapports de vérification fautifs auxquels on s'est fié ne peut être àla base d'une demande d'indemnisation d'un actionnaire àtitre individuel. Par conséquent, les vérificateurs n'assumaient pas àl'égard des actionnaires une obligation de diligence relativement aux pertes réclamées. Une action oblique aurait dû être intentée au nom de la société. Le pourvoi devrait être rejeté.

Table of Authorities

Cases considered by *La Forest J.*:

Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 W.L.R. 1024, [1977] 2 All E.R. 492 (U.K. H.L.) — applied

Canadian National Railway v. Norsk Pacific Steamship Co., 11 C.C.L.T. (2d) 1, 91 D.L.R. (4th) 289, 137 N.R. 241, *(*sub nom. *Norsk Pacific Steamship Co. c. Cie des Chemins de Fer nationaux du Canada)* [1991] R.R.A. 370, [1992] 1 S.C.R. 1021 (S.C.C.) — considered

Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164, [1951] 1 All E.R. 426 (Eng. C.A.) — considered

Caparo Industries plc v. Dickman, [1990] 1 All E.R. 568, [1990] 2 W.L.R. 358 (U.K. H.L.) — applied

Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd., [1993] 8 W.W.R. 129, 11 B.L.R. (2d) 101, 12 C.L.R. (2d) 161, *(*sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.)* 83 B.C.L.R. (2d) 145, 17 C.C.L.T. (2d) 101, *(*sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.)* 107 D.L.R. (4th) 169, *(*sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.)* [1993] 3 S.C.R. 206, *(*sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.)* 157 N.R. 241, *(*sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.)* 32 B.C.A.C. 221, *(*sub nom. *Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd.)* 53 W.A.C. 221 (S.C.C.) — considered

Fidkalo v. Levin (1992), 76 Man. R. (2d) 267, 10 W.A.C. 267 (Man. C.A.) — applied

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Glanzer v. Shepard (1922), 135 N.E. 275, 233 N.Y. 236, 23 A.L.R. 1425 (U.S. C.A.) — considered

Goldex Mines Ltd. v. Revill (1974), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 (Ont. C.A.) — considered

H. Rosenblum Inc. v. Adler (1983), 461 A.2d 138, 93 N.J. 324, 35 A.L.R.4th 199 (U.S.) — considered

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London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1993] 1 W.W.R. 1, [1992] 3 S.C.R. 299, *(*sub nom. *London Drugs Ltd. v. Brassart)* 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, *(*sub nom. *London Drugs Ltd. v. Brassart)* 18 B.C.A.C. 1, *(*sub nom. *London Drugs Ltd. v. Brassart)* 31 W.A.C. 1, 97 D.L.R. (4th) 261 (S.C.C.) — considered

McAlister (Donoghue) v. Stevenson, [1932] A.C. 562, [1932] All E.R. Rep. 1 (U.K. H.L.) — applied

Murphy v. Brentwood District Council, [1991] 1 A.C. 398, [1990] 3 W.L.R. 414, [1990] 2 All E.R. 908 (U.K. H.L.) — considered

Nielsen v. Kamloops (City), [1984] 5 W.W.R. 1, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, 54 N.R. 1, 11 Admin. L.R. 1, 29 C.C.L.T. 97, 8 C.L.R. 1, 26 M.P.L.R. 81, 66 B.C.L.R. 273 (S.C.C.) — considered

Prudential Assurance Co. v. Newman Industries Ltd., [1982] Ch. 204, [1982] 1 All E.R. 354 (Eng. C.A.) — applied

Queen v. Cognos Inc., 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) — considered

Roman Corp. v. Peat Marwick Thorne (1992), 11 O.R. (3d) 248, 8 B.L.R. (2d) 43, 12 C.P.C. (3d) 192 (Ont. Gen. Div. [Commercial List]) — applied

Roman Corp. v. Peat Marwick Thorne (1993), 12 B.L.R. (2d) 10 (Ont. Gen. Div. [Commercial List]) — referred to

Saskatchewan Wheat Pool v. R., [1983] 1 S.C.R. 205, 45 N.R. 425, [1983] 3 W.W.R. 97, 23 C.C.L.T. 121, 143 D.L.R. (3d) 9 (S.C.C.) — applied

Scott Group Ltd. v. McFarlane, [1978] 1 N.Z.L.R. 553 (New Zealand C.A.) — considered

Sutherland Shire Council v. Heyman (1985), 60 A.L.R. 1, 157 C.L.R. 424 (Australia H.C.) — referred to

Ultramares Corp. v. Touche Niven & Co. (1931), 255 N.Y. 170, 174 N.E. 441 (U.S. C.A.) — applied

Winnipeg Condominium Corp. No. 36 v. Bird Construction Co., 18 C.L.R. (2d) 1, [1995] 1 S.C.R. 85, 23 C.C.L.T. (2d) 1, 43 R.P.R. (2d) 1, [1995] 3 W.W.R. 85 (S.C.C.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

Companies Act, 1985 (U.K.), 1985, c. 6

Generally — referred to

Corporations Act, S.M. 1976, c. 40; C.C.S.M., c. C225

s. 149(1) — considered

s. 155 — considered

s. 155(1) — referred to

s. 155(2) — referred to

s. 155(6) — referred to

s. 163(1) — considered

s. 232 — referred to

Rules considered:

Manitoba, Queen's Bench Rules, Man. Reg. 553/88

R. 20 — considered

R. 20.03(1) — considered

APPEAL by plaintiffs from judgment reported at [1995] 6 W.W.R. 301 (Man. C.A.), dismissing plaintiffs' appeal from summary judgment dismissing plaintiffs' action in negligence.

POURVOI des demandeurs àl'encontre de l'arrêt publié à [1995] 6 W.W.R. 301 (Man. C.A.), rejetant l'appel des demandeurs àl'encontre du jugement sommaire rejetant l'action des demandeurs en négligence.

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

1 This appeal arises by way of motion for summary judgment. It concerns the issue of whether and when accountants who perform an audit of a corporation's financial statements owe a duty of care in tort to shareholders of the corporation who claim to have suffered losses in reliance on the audited statements. It also raises the question of whether certain types of claims against auditors may properly be brought by shareholders as individuals or whether they must be brought by the corporation in the form of a derivative action.

Facts

2 Northguard Acceptance Ltd. ("NGA") and Northguard Holdings Ltd. ("NGH") carried on business lending and investing money on the security of real property mortgages. The appellant Guardian Finance of Canada Ltd. ("Guardian") was the sole shareholder of NGH and it held non-voting class B shares in NGA. The appellants Hercules Managements Ltd. ("Hercules") and Max Freed were also shareholders in NGA. At all relevant times, ownership in the corporations was separated from management. The respondent Ernst & Young (formerly known as Clarkson Gordon) is a firm of chartered accountants that was originally hired by NGA and NGH in 1971 to perform annual audits of their financial statements and to provide audit reports to the companies' shareholders. The partner in charge of the audits for the years 1980 and 1981 is the respondent William Alexander Cox. Mr. Cox held personal investments in some of the syndicated mortgages administered by NGA and NGH.

3 In 1984, both NGA and NGH went into receivership. The appellants, as well as Friendly Family Farms Ltd. ("F.F. Farms"), Woodvale Enterprises Ltd. ("Woodvale"), Arlington Management Consultants Ltd. ("Arlington"), Emarjay Holdings Ltd. ("Emarjay") and David Korn (all of whom were shareholders or investors in NGA) brought an action against the respondents in 1988 alleging that the audit reports for the years 1980, 1981 and 1982 were negligently prepared and that in reliance on these reports, they suffered various financial losses. More specifically, the appellant Hercules sought damages for advances totalling $600,000 which it made to NGA in January and February of 1983, and the appellant Freed sought damages for monies he added to an investment account in NGH in 1982. All the plaintiffs claimed damages in tort for the losses they suffered in the value of their existing shareholdings. In addition to their tort claims, the plaintiffs also alleged that a contract existed between themselves and the respondents in which the respondents explicitly undertook, as of 1978, to protect the shareholders' individual interests in the audits as distinct from the interests of the corporations themselves.

4 After a series of amendments to the initial statement of claim, over 40 days of discovery, and numerous pre-trial conferences and case management sessions, the respondents brought a motion for summary judgment in the Manitoba Court of Queen's Bench seeking to have the plaintiffs' claims dismissed. The grounds for the motion were (a) that there was no contract between the plaintiffs and the respondents; (b) that the respondents did not owe the individual plaintiffs any duty of care in tort; and (c) that the claims asserted by the plaintiffs could only properly be brought by the corporations themselves and not by the shareholders individually. The motions judge granted the motion with respect to the plaintiffs Hercules, F.F. Farms, Woodvale, Guardian and Freed and dismissed their actions on the basis that they raised no genuine issues for trial. By agreement, the claims of the remaining plaintiffs were adjourned *sine die*. An appeal to the Manitoba Court of Appeal by Hercules, Guardian and Freed was unanimously dismissed with costs. Leave to appeal to this Court was granted on March 7, 1996 and the appeal was heard on December 6, 1996.

Judicial History

Manitoba Court of Queen's Bench

5 Dureault J. began his reasons by noting that only the claims of Hercules, F.F. Farms, Woodvale Guardian and Freed had to be addressed since, by agreement, the claims of the other plaintiffs had been adjourned. He then proceeded to set out the appropriate test to be applied in summary judgment motions. Referring to Rule 20.03(1) of the Manitoba *Court of Queen's Bench Rules*, Reg. 553/88, (which governs summary judgment motions) and citing *Fidkalo v. Levin* (1992), 76 Man. R. (2d) 267 (Man. C.A.), he explained that while the defendant bears the initial burden of proving that the case is one where the question whether there exists a genuine issue for trial can properly be raised, the plaintiff bears the subsequent burden of establishing that his claim has a real chance of success.

6 After rejecting the claim of the plaintiff F.F. Farms on the ground that it failed from the outset to establish any cause of action, Dureault J. turned to the more substantive issues in the motion. He began by addressing the question whether the plaintiffs *qua* shareholders may properly bring an action for the devaluation in their shareholdings in NGA and NGH, and held that

> ... shareholders have no cause of action in law for any wrongs which may have been inflicted upon a corporation. This principle of law is often referred to as "the rule in *Foss v. Harbottle*". The plaintiff shareholders are trying to get around this principle. At best, if any wrong was done in the conduct of the defendants' audits, it was done to [NGA] and [NGH] and cannot be considered an injury sustained by the shareholders.

Dureault J. found on this basis that the claims of Hercules, Guardian, Woodvale and Freed did not disclose any genuine issue for trial since they ought to have been brought by the corporations and not by the plaintiffs as individual shareholders.

7 The motions judge next addressed the question whether any duty of care in tort was owed by the defendants to the plaintiffs in their capacities as either shareholders or investors in the audited corporations. He noted that

> [g]enerally speaking, the law requires more than foreseeability and reliance. Actual knowledge on the part of the accountant/auditor of the limited class that will use and rely on the statements, referred to as the "proximity test", is also required.

Adopting the defendants' submissions on this issue, Dureault J. found that no duty of care was owed the plaintiffs because the audited statements were not prepared specifically for the purpose of assisting them in making investment decisions.

8 Finally, Dureault J. addressed the plaintiffs' claim that their losses stemmed from a breach of contract by the defendants. He recognised that the engagement of the auditors by the corporations is a contractual relationship, but rejected the contention that this relationship can be extended to include the shareholders so as to permit them to bring personal actions against the auditors in the event of breach. Finding that none of the plaintiffs' claims raised a genuine issue for trial, Dureault J. granted the motion with costs.

Manitoba Court of Appeal (1995), 102 Man. R. (2d) 241 (Man. C.A.) (Philp, Lyon and Helper JJ.A.)

9 An appeal was brought to the Manitoba Court of Appeal by Hercules, Guardian and Freed. Helper J.A., writing for the court, began her reasons by finding that the learned motions judge had correctly applied the *Fidkalo* test for summary judgment motion under Rule 20.03(1) She also distinguished that test from that applicable on a motion to strike pleadings on the ground that, unlike the situation on a motion to strike, a Rule 20 motion requires an examination of the evidence in support of the plaintiff's claim.

10 Turning to the question whether the respondents owed a duty of care in tort to the appellants, Helper J.A. noted the latter's two alternative submissions. The first (at p. 244) was that

> ... a common law duty of care arose ... because the respondents knew or ought to have known: i) that the appellants were relying on the audited statements and the services and advice provided by the respondents; ii) the purpose for which the appellants would rely upon the respondents' services and statements; iii) that the appellants did so rely upon those audited statements for investment and other purposes; and iv) that the respondents breached their duties to the appellants thereby causing them a financial loss.

In response to this claim, Helper J.A. explained, the respondents contended that the appellants were simply trying to avoid the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (U.K. H.L.) , by asserting their claims as individual shareholders rather than by way of derivative action. The respondents also argued that they had no knowledge that investments would be made on the basis of the audited statements and that there was no evidence to support the contention that they ought to have known that their reports would be relied upon in this manner. Finally, Helper J.A. noted, the respondents asserted that there was no evidence demonstrating that the appellants had, in fact, relied on the audited statements at issue.

11 In analysing this first main submission, Helper J.A. undertook a thorough review of *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (U.K. H.L.), where the House of Lords considered the question of the scope of the duty of care owed by auditors to shareholders and investors. After reviewing the Canadian case law on the matter, she concluded, at p. 248, that

> [t]he appellants were unable to direct this court to any evidence in support of their position which was ignored by the motions judge. Nor am I persuaded that the order dismissing the appellants' claims is contrary to the existing jurisprudence.
>
> The evidence showed that the auditors had prepared the annual reports to comply with their statutory obligations. There was a total absence of evidence to indicate the respondents knew the appellants would rely upon the reports for any specific purpose or that the appellants did rely upon the reports before infusing more capital into their companies. The appellants were content to allow management to continue running the companies despite a drop in profitability reflected in the 1982 audited report and invested more capital in the face of that report. The evidence filed in opposition to the motion did not support the appellants' claim on this issue.

In the view of the Manitoba Court of Appeal, then, the first of the appellants' submissions regarding the existence of a duty of care could not succeed.

12 The appellants' second main submission concerning the existence of a duty of care consisted in an allegation that the respondent auditors contravened the statutory independence requirements set out in s. 155 of the Manitoba *Corporations Act*, S.M. 1976, c. 40, and that this in itself gave rise to a cause of action in the individual shareholders. The relevant portions of s. 155 are as follows:

> *155(1)* Subject to subsection (5), a person is disqualified from being an auditor of a corporation if he is not independent of the corporation, all of its affiliates, and the directors or officers of the corporation and its affiliates.
>
> *155(2)* For the purposes of this section,
>
> (a) independence is a question of fact; and
>
> (b) a person is deemed not to be independent if he or his business partner
>
> (i) is a business partner, a director, an officer or an employee of the corporation or any of its affiliates, or a business partner of any director, officer or employee of the corporation or any of its affiliates, or
>
> (ii) beneficially owns or controls, directly or indirectly, a material interest in the securities of the corporation or any of its affiliates, or
>
> (iii) has been a receiver, receiver-manager, liquidator or trustee in bankruptcy of the corporation or any of its affiliates within two years of his proposed appointment as auditor of the corporation.
>
> . . . . .
>
> *155(6)* The shareholders of a corporation may resolve to appoint as auditor, a person otherwise disqualified under subsections (1) and (2) if the resolution is consented to by all the shareholders including shareholders not otherwise entitled to vote.

Specifically, the appellants alleged that because s. 155(6) of the Act allows a single shareholder to exercise a veto power over the appointment of the auditors, each shareholder also has a right of action against the auditors where damage has been occasioned by a breach of the independence requirement in s. 155(2). Helper J.A. rejected this submission both on the ground that it was unsupported by authority and on the basis that the wording of s. 155 as a whole does not suggest the interpretation urged by the appellants.

13 Finally, Helper J.A. addressed the appellants' contractual claim and held that the respondents' engagement to audit the financial statements of NGA and NGH in accordance with the Act did not give rise to a contractual relationship between them and the appellants. Similarly, she found the appellants could not sue on the contract between the corporations and the respondent Ernst & Young because of the lack of privity. Finding no evidence to support the existence of the requisite contractual relationship, Helper J.A. rejected the appellants' claim in this regard. For all these reasons, the Court of Appeal unanimously dismissed the appeal with costs.

Issues

14 The issues in this case may be stated as follows:

(1) Do the respondents owe the appellants a duty of care with respect to

(a) the investment losses they incurred allegedly as a result of reliance on the 1980-82 audit reports; and

(b) the losses in the value of their existing shareholdings they incurred allegedly as a result of reliance on the 1980-82 audit reports?

(2) Does the rule in *Foss v. Harbottle* affect the appellants' action?

Analysis

Preliminary Matters

15 Four preliminary matters should be addressed before turning to the principal issues in this appeal. The first concerns the procedure to be followed in a motion for summary judgment brought under Rule 20.03(1) of the Manitoba *Court of Queen's Bench Rules*. That rule provides as follows:

> *20.03(1)* Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

I would agree with both the Court of Appeal and the motions judge in their endorsement of the procedure set out in *Fidkalo, supra*, at p. 267, namely:

> The question to be decided on a rule 20 motion is whether there is a genuine issue for trial. Although a defendant who seeks dismissal of an action has an initial burden of showing that the case is one in which the existence of a genuine issue is a proper question for consideration, it is the plaintiff who must then, according to the rule, establish his claim as being one with a real chance of success.

In the instant case, then, the appellants (who were the plaintiff-respondents on the motion) bore the burden of establishing that their claim had "a real chance of success". They bear the same burden in this Court.

16 The second preliminary matter concerns the appellants' claim that as a result of a meeting in the summer of 1978 between David Korn, Max Freed and the respondent Cox and in light of an engagement letter sent by the respondents to NGA and NGH in 1981, a contract was formed between the shareholders of the audited corporations, on the one hand, and the respondents, on the other. This purported contract ostensibly required the respondents to conduct their audits for the benefit of the shareholders themselves and not merely for the benefit of the corporations. I have reviewed the portions of the record upon which the appellants base this submission and I am unable to find that the requisite elements of contract formation inhere on the facts. In any event, as the respondents pointed out, the appellants' request to amend their pleadings before trial to include a claim for breach of contract was denied by Kennedy J. and no appeal was brought from that decision. (See: *Hercules Management Ltd. v. Clarkson Gordon* (1994), 91 Man. R. (2d) 216 (Man. Q.B.).) I would find, therefore, that the claim in breach of contract is not properly before this Court and that the appellants' submissions in this regard must fail.

17 Thirdly, the appellants allege that the respondent Cox's investments in certain syndicated mortgages administered by NGA and NGH constituted a breach of the statutory independence requirements set out in s. 155 of the Manitoba *Corporations Act* and that such a breach either gives rise to a private law cause of action or, alternatively, that it provides an independent basis for finding a duty of care in a tort action. Assuming without deciding that the respondent Cox was in breach of the independence requirements set out in that section, I would agree with Helper J.A. in finding that the section does not, in and of itself, give rise to a cause of action in negligence; see: *Saskatchewan Wheat Pool v. R.*, [1983] 1 S.C.R. 205 (S.C.C.) . Similarly, I cannot see how breach of the independence requirements could establish a duty of care in tort. This does not mean, of course, that the statutory audit requirements set out in the Manitoba *Corporations Act* are entirely irrelevant to the appellants' claim. Rather, it simply means that a breach of the independence provisions does not, by itself, give rise either to an independent right of action or to a duty of care.

18 The final preliminary matter concerns whether or not the appellants actually relied on the 1980-82 audited reports prepared by the respondents. More specifically, the appellants allege that the Court of Appeal erred in finding, at p. 248, that

> [t]here was a total absence of evidence to indicate the respondents knew the appellants would rely upon the reports for any specific purpose *or that the appellants did rely upon the [1980-82] reports before infusing more capital into their companies*. The appellants were content to allow management to continue running the companies despite a drop

> in profitability reflected in the 1982 audited report and invested capital in the face of that report. The evidence filed in opposition to the motion did not support the appellants' claim on this issue. [Emphasis added.]

Needless to say, actual reliance is a necessary element of an action in negligent misrepresentation and its absence will mean that the plaintiff cannot succeed in holding the defendant liable for his or her losses; see: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at p. 110. In light of my disposition on the duty of care issue, however, it is unnecessary to inquire into this matter here — the absence of a duty of care renders inconsequential the question of actual reliance. Having dealt with all four preliminary matters, then, I can now turn to a discussion of the principal issues in this appeal.

Issue 1: Whether the Respondents owe the Appellants a Duty of Care

(i) Introduction

19 It is now well established in Canadian law that the existence of a duty of care in tort is to be determined through an application of the two-part test first enunciated by Lord Wilberforce in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), at pp. 751-52:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ...

While the House of Lords rejected the *Anns* test in *Murphy v. Brentwood District Council* (1990), [1991] 1 A.C. 398 (U.K. H.L.), and in *Caparo, supra*, at p. 574, *per* Lord Bridge and at pp. 585-86, *per* Lord Oliver (citing Brennan J. in *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1 (Australia H.C.), at pp. 43-44), the basic approach that test embodies has repeatedly been accepted and endorsed by this Court. (See, e.g.: *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.); *Hofstrand Farms Ltd. v. British Columbia*, [1986] 1 S.C.R. 228 (S.C.C.); *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.); *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.); *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.).)

20 In *Kamloops, supra*, at p. 10, Wilson J. restated Lord Wilberforce's test in the following terms:

> (1) is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

As will be clear from the cases earlier cited, this two-stage approach has been applied by this Court in the context of various types of negligence actions, including actions involving claims for different forms of economic loss. Indeed, it was implicitly endorsed in the context of an action in negligent misrepresentation in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206 (S.C.C.), at pp. 218-1. The same approach to defining duties of care in negligent misrepresentation cases has also been taken in other Commonwealth courts. In *Scott Group Ltd. v. McFarlane*, [1978] 1 N.Z.L.R. 553 (New Zealand C.A.), for example, a case that dealt specifically with auditors' liability for negligently prepared audit reports, the *Anns* test was adopted and applied by a majority of the New Zealand Court of Appeal.

21 I see no reason in principle why the same approach should not be taken in the present case. Indeed, to create a "pocket" of negligent misrepresentation cases (to use Professor Stapleton's term) in which the existence of a duty of care is determined differently from other negligence cases would, in my view, be incorrect; see: Jane Stapleton, "Duty of Care and Economic

Loss: A Wider Agenda" (1991), 107 *L.Q.R.* 249. This is not to say, of course, that negligent misrepresentation cases do not involve special considerations stemming from the fact that recovery is allowed for pure economic loss as opposed to physical damage. Rather, it is simply to posit that the same general framework ought to be used in approaching the duty of care question in both types of case. Whether the respondents owe the appellants a duty of care for their allegedly negligent preparation of the 1980-82 audit reports, then, will depend on (a) whether a *prima facie* duty of care is owed, and (b) whether that duty, if it exists, is negatived or limited by policy considerations. Before analysing the merits of this case, it will be useful to set out in greater detail the principles governing this appeal.

(ii) The Prima Facie Duty of Care

22 The first branch of the *Anns/Kamloops* test demands an inquiry into whether there is a sufficiently close relationship between the plaintiff and the defendant that in the reasonable contemplation of the latter, carelessness on its part may cause damage to the former. The existence of such a relationship — which has come to be known as a relationship of "neighbourhood" or "proximity" — distinguishes those circumstances in which the defendant owes a *prima facie* duty of care to the plaintiff from those where no such duty exists. In the context of a negligent misrepresentation action, then, deciding whether or not a *prima facie* duty of care exists necessitates an investigation into whether the defendant-representor and the plaintiff-representee can be said to be in a relationship of proximity or neighbourhood.

23 What constitutes a "relationship of proximity" in the context of negligent misrepresentation actions? In approaching this question, I would begin by reiterating the position I took in *Norsk, supra*, at pp. 1114-15, that the term "proximity" itself is nothing more than a label expressing a result, judgment or conclusion; it does not, in and of itself, provide a principled basis on which to make a legal determination. This view was also explicitly adopted by Stevenson J. in *Norsk, supra*, at p. 1178, and McLachlin J. also appears to have accepted it when she wrote, at p. 1151, of that case that "[p]roximity may usefully be viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors"; see also: M. H. McHugh, "Neighbourhood, Proximity and Reliance", in P. D. Finn, *Essays on Torts* (1989), 5, at pp. 36-37; and John G. Fleming, "The Negligent Auditor and Shareholders" (1990), 106 *L.Q.R.* 349, at p. 351, where the author refers to proximity as a "vacuous test". While *Norsk, supra*, was concerned specifically with whether or not a defendant could be held liable for "contractual relational economic loss" (as I called it, at p. 1037), I am of the view that the same observations with respect to the term "proximity" are applicable in the context of negligent misrepresentation. In order to render "proximity" a useful tool in defining when a duty of care exists in negligent misrepresentation cases, therefore, it is necessary to infuse that term with some meaning. In other words, it is necessary to set out the basis upon which one may properly reach the conclusion that proximity inheres between a representor and a representee.

24 This can be done most clearly as follows. The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. Indeed, this idea lies at the very heart of the concept of a "duty of care", as articulated most memorably by Lord Atkin in *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) , at pp. 580-81. In cases of negligent misrepresentation, the relationship between the plaintiff and the defendant arises through reliance by the plaintiff on the defendant's words. Thus, if "proximity" is meant to distinguish the cases where the defendant has a responsibility to take reasonable care of the plaintiff from those where he or she has no such responsibility, then in negligent misrepresentation cases, it must pertain to some aspect of the relationship of reliance. To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in *Cognos, supra*, at p. 110, the plaintiff and the defendant can be said to be in a "special relationship" whenever these two factors inhere.

25 I should pause here to explain that, in my view, to look to whether or not reliance by the plaintiff on the defendant's representation would be reasonable in determining whether or not a *prima facie* duty of care exists in negligent misrepresentation cases as opposed to looking at reasonable foreseeability alone is not, as might first appear, to abandon the basic tenets underlying the first branch of the *Anns/Kamloops* formula. The purpose behind the *Anns/Kamloops* test is simply to ensure that enquiries

into the existence of a duty of care in negligence cases is conducted in two parts: The first involves discerning whether, in a given situation, a duty of care would be imposed by law; the second demands an investigation into whether the legal duty, if found, ought to be negatived or ousted by policy considerations. In the context of actions based on negligence causing physical damage, determining whether harm to the plaintiff was reasonably foreseeable to the defendant is alone a sufficient criterion for deciding proximity or neighbourhood under the first branch of the *Anns/Kamloops* test because the law has come to recognise (even if only implicitly) that, absent a voluntary assumption of risk by him or her, it is always reasonable for a plaintiff to expect that a defendant will take reasonable care of the plaintiff's person and property. The duty of care inquiry in such cases, therefore, will always be conducted under the assumption that the plaintiff's expectations of the defendant are reasonable.

26 In negligent misrepresentation actions, however, the plaintiff's claim stems from his or her detrimental reliance on the defendant's (negligent) statement, and it is abundantly clear that reliance on the statement or representation of another will not, in all circumstances, be reasonable. The assumption that always inheres in physical damage cases concerning the reasonableness of the plaintiff's expectations cannot, therefore, be said to inhere in reliance cases. In order to ensure that the same factors are taken into account in determining the existence of a duty of care in both instances, then, the reasonableness of the plaintiff's reliance must be considered in negligent misrepresentation actions. Only by doing so will the first branch of the *Kamloops* test be applied consistently in both contexts.

27 As should be evident from its very terms, the reasonable foreseeability / reasonable reliance test for determining a *prima facie* duty of care is somewhat broader than the tests used both in the cases decided before *Anns, supra*, and in those that have rejected the *Anns* approach. Rather than stipulating simply that a duty of care will be found in any case where reasonable foreseeability and reasonable reliance inhere, those cases typically require (a) that the defendant know the identity of either the plaintiff or the class of plaintiffs who will rely on the statement, and (b) that the reliance losses claimed by the plaintiff stem from the particular transaction in respect of which the statement at issue was made. This narrower approach to defining the duty can be seen in a number of the more prominent English decisions dealing either with auditors' liability specifically or with liability for negligent misstatements generally. (See, e.g.: *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164 (Eng. C.A.), at pp. 181-82 and p. 184, *per* Denning L.J. (dissenting); *Hedley Byrne & Co. v. Heller & Partners Ltd.* (1963), [1964] A.C. 465 (U.K. H.L.); *Caparo, supra*, *per* Lord Bridge, at p. 576, and *per* Lord Oliver, at pp. 589.) It is also evident in the approach taken by this Court in *Haig v. Bamford*, [1977] 1 S.C.R. 466 (S.C.C.).

28 While I would not question the conclusions reached in any of these judgments, I am of the view that inquiring into such matters as whether the defendant had knowledge of the plaintiff (or class of plaintiffs) and whether the plaintiff used the statements at issue for the particular transaction for which they were provided is, in reality, nothing more than a means by which to circumscribe — for reasons of policy — the scope of a representor's potentially infinite liability. As I have already tried to explain, determining whether "proximity" exists on a given set of facts consists in an attempt to discern whether, as a matter of simple justice, the defendant may be said to have had an obligation to be mindful of the plaintiff's interests in going about his or her business. Requiring, in addition to proximity, that the defendant know the identity of the plaintiff (or class of plaintiffs) and that the plaintiff use the statements in question for the specific purpose for which they were prepared amounts, in my opinion, to a tacit recognition that considerations of basic fairness may sometimes give way to other pressing concerns. Plainly stated, adding further requirements to the duty of care test provides a means by which policy concerns that are extrinsic to simple justice — but that are, nevertheless, fundamentally important — may be taken into account in assessing whether the defendant should be compelled to compensate the plaintiff for losses suffered. In other words, these further requirements serve a policy-based limiting function with respect to the ambit of the duty of care in negligent misrepresentation actions.

29 This view is confirmed by the judgments themselves. In *Caparo, supra*, at p. 576, for example, Lord Bridge refers to the criteria of knowledge of the plaintiff (or class of plaintiffs) and use of the statements for the intended transaction as a "'*limit or control mechanism* ... imposed on the liability of the wrongdoer towards those who have suffered some economic damage as a consequence of his negligence'" (emphasis added). Similarly, in *Haig, supra*, at p. 476, Dickson J. (as he then was) explicitly discusses the policy concern arising from unlimited liability before finding that the statements at issue in *Haig* were used for the very purpose for which they were prepared and that the appropriate test for a duty of care in the case before him was "actual knowledge of the limited class that will use and rely on the statement". (See also *Candler, supra*, at p. 183,

per Denning L.J. (dissenting).) Certain scholars have adopted this view of the case law as well. (See, e.g.: Bruce Feldthusen, *Economic Negligence* (3rd ed. 1994), at pp. 93-100, where the author explains that the approach taken in both *Haig, supra*, and *Caparo, supra*, toward defining the duty of care was motivated by underlying policy concerns; see also: Earl A. Cherniak and Kirk F. Stevens, "Two Steps Forward or One Step Back? Anns at the Crossroads in Canada" (1992), 20 *C.B.L.J.* 164, and Ivan F. Ivankovich, "Accountants and Third Party Liability — Back to the Future" (1991), 23 *Ottawa L. Rev.* 505, at p. 518.)

30 In light of this Court's endorsement of the *Anns/Kamloops* test, however, enquiries concerning (a) the defendant's knowledge of the identity of the plaintiff (or of the class of plaintiffs) and (b) the use to which the statements at issue are put may now quite properly be conducted in the second branch of that test when deciding whether or not policy considerations ought to negative or limit a *prima facie* duty that has already been found to exist. In other words, criteria that in other cases have been used to define the legal test for the duty of care can now be recognised for what they really are — policy-based means by which to curtail liability — and they can appropriately be considered under the policy branch of the *Anns/Kamloops* test. To understand exactly how this may be done and how these criteria are pertinent to the case at bar, it will first be useful to set out the prevailing policy concerns in some detail.

(iii) Policy Considerations

31 As Cardozo C.J. explained in *Ultramares Corp. v. Touche Niven & Co.*, 174 N.E. 441 (U.S. C.A. 1931), at p. 444, the fundamental policy consideration that must be addressed in negligent misrepresentation actions centres around the possibility that the defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". This potential problem can be seen quite vividly within the framework of the *Anns/Kamloops* test. Indeed, while the criteria of reasonable foreseeability and reasonable reliance serve to distinguish cases where a *prima facie* duty is owed from those where it is not, it is nevertheless true that in certain types of situations these criteria can, quite easily, be satisfied and absent some means by which to circumscribe the ambit of the duty, the prospect of limitless liability will loom.

32 The general area of auditors' liability is a case in point. In modern commercial society, the fact that audit reports will be relied on by many different people (e.g., shareholders, creditors, potential takeover bidders, investors, etc.) for a wide variety of purposes will almost always be reasonably foreseeable to auditors themselves. Similarly, the very nature of audited financial statements — produced, as they are, by professionals whose reputations (and, thereby, whose livelihoods) are at stake — will very often mean that any of those people would act wholly reasonably in placing their reliance on such statements in conducting their affairs. These observations are consistent with the following remarks of Dickson J. in *Haig, supra*, at pp. 475-76, with respect to the accounting profession generally:

> The increasing growth and changing role of corporations in modern society has been attended by a new perception of the societal role of the profession of accounting. The day when the accountant served only the owner-manager of a company and was answerable to him alone has passed. The complexities of modern industry combined with the effects of specialization, the impact of taxation, urbanization, the separation of ownership from management, the rise of professional corporate managers, and a host of other factors, have led to marked changes in the role and responsibilities of the accountant, and in the reliance which the public must place upon his work. The financial statements of the corporations upon which he reports can affect the economic interests of the general public as well as of shareholders and potential shareholders.

(See also: Cherniak and Stevens, *supra*, at pp. 169-70.) In light of these considerations, the reasonable foreseeability/reasonable reliance test for ascertaining a *prima facie* duty of care may well be satisfied in many (even if not all) negligent misstatement suits against auditors and, consequently, the problem of indeterminate liability will often arise.

33 Certain authors have argued that imposing broad duties of care on auditors would give rise to significant economic and social benefits in so far as the spectre of tort liability would act as an incentive to auditors to produce accurate (i.e., non-negligent) reports. (See, e.g.: Howard B. Wiener, "Common Law Liability of the Certified Public Accountant for Negligent Misrepresentation" (1983), 20 *San Diego L. Rev.* 233.) I would agree that deterrence of negligent conduct is an important policy consideration with respect to auditors' liability. Nevertheless, I am of the view that, in the final analysis, it is outweighed by the socially undesirable consequences to which the imposition of indeterminate liability on auditors might lead. Indeed, while

indeterminate liability is problematic in and of itself inasmuch as it would mean that successful negligence actions against auditors could, at least potentially, be limitless, it is also problematic in light of certain related problems to which it might give rise.

34 Some of the more significant of these problems are thus set out in Brian R. Cheffins, "Auditors' Liability in the House of Lords: A Signal Canadian Courts Should Follow" (1991), 18 *C.B.L.J.* 118, at pp. 125-27:

> In addition to providing only limited benefits, imposing widely drawn duties of care on auditors would probably generate substantial costs. ...
>
> One reason [for this] is that auditors would expend more resources trying to protect themselves from liability. For example, insurance premiums would probably rise since insurers would anticipate more frequent claims. Also, auditors would probably incur higher costs since they would try to rely more heavily on exclusion clauses. Hiring lawyers to draft such clauses might be expensive because only the most carefully constructed provisions would be likely to pass judicial scrutiny.
>
> . . . . .
>
> Finally, auditors' opportunity costs would increase. Whenever members of an accounting firm have to spend time and effort preparing for litigation, they forego revenue generating accounting activity. More trials would mean that this would occur with greater frequency.
>
> . . . . .
>
> The higher costs auditors would face as a result of broad duties of care could have a widespread impact. For example, the supply of accounting services would probably be reduced since some marginal firms would be driven to the wall. Also, because the market for accounting services is protected by barriers to entry imposed by the profession, the surviving firms would pass [*sic*] at least some of the increased costs to their clients.

Professor Ivankovich describes similar sources of concern. While he acknowledges certain social benefits to which expansive auditors' liability might conduce, he also recognises the potential difficulties associated therewith (at pp. 520-21):

> ... [expansive auditors' liability] is likely to increase the time expended in the performance of accounting services. This will trigger a predictable negative impact on the timeliness of the financial information generated. It is equally likely to increase the cost of professional liability insurance and reduce its availability, and to increase the cost of accounting services which, as a result, may become less generally available. Additionally, it promotes "free ridership" on the part of reliant third parties and decreases their incentive to exercise greater vigilance and care and, as well, presents an increased risk of fraudulent claims.

Even though I do not share the discomfort apparently felt by Professors Cheffins and Ivankovich with respect to using an *Anns*-type test in the context of negligent misrepresentation actions (See: Cheffins, *supra*, at pp. 129-31, and Ivankovich, *supra*, at p. 530), I nevertheless agree with their assessment of the possible consequences to both auditors and the public generally if liability for negligently prepared audit reports were to go unchecked.

35 I should, at this point, explain that I am aware of the arguments put forth by certain scholars and judges to the effect that concerns over indeterminate liability have sometimes been overstated. (See, e.g.: J. Edgar Sexton and John W. Stevens, "Accountants' Legal Responsibilities and Liabilities", in *Professional Responsibility in Civil Law and Common Law* (Meredith Memorial Lecture, McGill University, 1983-84) (1985), 88, at pp. 101-102; and *H. Rosenblum Inc. v. Adler*, 461 A.2d 138 (U.S. 1983), at p. 152, *per* Schreiber J.) Arguments to this effect rest essentially on the premise that actual *liability* will be limited in so far as a plaintiff will not be successful unless both negligence and reliance are established in addition to a duty of care. While it is true that damages will not be owing by the defendant unless these other elements of the cause of action are proved, neither the difficulty of proving negligence nor that of proving reliance will preclude a disgruntled plaintiff from bringing an action against an auditor and such actions would, we may assume, be all the more common were the establishment of a duty of care in any given case to amount to nothing more than a mere matter of course. This eventuality could pose serious problems both for auditors, whose legal costs would inevitably swell, and for courts, which, no doubt, would feel the pressure of increased litigation. Thus, the prospect of burgeoning negligence suits raises serious concerns, even if we assume that the

arguments positing proof of negligence and reliance as a barrier to liability are correct. In my view, therefore, it makes more sense to circumscribe the ambit of the duty of care than to assume that difficulties in proving negligence and reliance will afford sufficient protection to auditors, since this approach avoids both "indeterminate liability" and "indeterminate litigation".

36 As I have thus far attempted to demonstrate, the possible repercussions of exposing auditors to indeterminate liability are significant. In applying the two-stage *Anns/Kamloops* test to negligent misrepresentation actions against auditors, therefore, policy considerations reflecting those repercussions should be taken into account. In the general run of auditors' cases, concerns over indeterminate liability will serve to negate a *prima facie* duty of care. But while such concerns may exist in most such cases, there may be particular situations where they do not. In other words, the specific factual matrix of a given case may render it an "exception" to the general class of cases in that while (as in most auditors' liability cases) considerations of proximity under the first branch of the *Anns/Kamloops* test might militate in favour of finding that a duty of care inheres, the typical concerns surrounding indeterminate liability do *not* arise. This needs to be explained.

37 As discussed earlier, looking to factors such as "knowledge of the plaintiff (or an identifiable class of plaintiffs) on the part of the defendant" and "use of the statements at issue for the precise purpose or transaction for which they were prepared" really amounts to an attempt to limit or constrain the scope of the duty of care owed by defendants. If the purpose of the *Anns/Kamloops* test is to determine (a) whether or not a *prima facie* duty of care exists and then (b) whether or not that duty ought to be negated or limited, then factors such as these ought properly to be considered in the second branch of the test once the first branch concerning "proximity" has been found to be satisfied. To my mind, the presence of such factors in a given situation will mean that worries stemming from indeterminacy should not arise, since the scope of potential liability is sufficiently delimited. In other words, in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed. Consequently, such considerations will not override a positive finding on the first branch of the *Anns/Kamloops* test and a duty of care may quite properly be found to exist.

38 As I see it, this line of reasoning serves to explain the holding of Cardozo J. (as he then was) in *Glanzer v. Shepard*, 135 N.E. 275 (U.S. C.A. 1922). There, the New York Court of Appeals held that the defendant weigher was liable in damages for having negligently prepared a weight certificate he knew would be given to the plaintiff, who relied upon it for the specific purpose for which it was issued. In reaching his decision, Cardozo J. explicitly noted that the weight certificate was used for the very "end and aim of the transaction" and not for any collateral or unintended purpose. (*Glanzer, supra*, at p. 275.) On the facts of *Glanzer, supra*, then, the scope of the defendant's liability could readily be delimited and indeterminacy, therefore, was not a concern.

39 The same idea serves to explain the rationale underlying the seminal judgment of the House of Lords in *Hedley Byrne, supra*. While that case did not involve an action against auditors, similar concerns about indeterminate liability were, nonetheless, clearly relevant. On the facts of *Hedley Byrne, supra*, the defendant bank provided a negligently prepared credit reference in respect of one of its customers to another bank which, to the knowledge of the defendants, passed on the information to the plaintiff for a stipulated purpose. The plaintiff relied on the credit reference for the specific purpose for which it was prepared. The House of Lords found that but for the presence of a disclaimer, the defendants would have been liable to the plaintiff in negligence. While indeterminate liability would have raised some concern to the Lords had the plaintiff not been known to the defendants or had the credit reference been used for a purpose or transaction other than that for which it was actually prepared, no such difficulties about indeterminacy arose on the particular facts of the case.

40 This Court's decision in *Haig, supra*, can be seen to rest on precisely the same basis. There, the defendant accountants were retained by a Saskatchewan businessman, one Scholler, to prepare audited financial statements of Mr. Scholler's corporation. At the time they were engaged, the accountants were informed by Mr. Scholler that the audited statements would be used for the purpose of attracting a $20,000 investment in the corporation from a limited number of potential investors. The audit was conducted negligently and the plaintiff investor, who was found to have relied on the audited statements in making his investment, suffered a loss. While Dickson J. was clearly cognizant of the potential problem of indeterminacy arising in the context of auditors' liability (at p. 476), he nevertheless found that the defendants owed the plaintiff a duty of care. In my view, his conclusion was eminently sound given that the defendants were informed by Mr. Scholler of the class of persons who would

rely on the report and the report was used by the plaintiff for the specific purpose for which it was prepared. Dickson J. himself expressed this idea as follows, at p. 482:

> The case before us is closer to *Glanzer* than to *Ultramares*. The very end and aim of the financial statements prepared by the accountants in the present case was to secure additional financing for the company from [a Saskatchewan government agency] and an equity investor; the statements were required primarily for these third parties and only incidentally for use by the company.

On the facts of *Haig*, then, the auditors were properly found to owe a duty of care because concerns over indeterminate liability did not arise. I would note that this view of the rationale behind *Haig, supra*, is shared by Professor Feldthusen. (See Feldthusen, *supra*, at pp. 98-100.)

41 The foregoing analysis should render the following points clear. A *prima facie* duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff, in the circumstances, would be reasonable. Even though, in the context of auditors' liability cases, such a duty will often (even if not always) be found to exist, the problem of indeterminate liability will frequently result in the duty being negated by the kinds of policy considerations already discussed. Where, however, indeterminate liability can be shown not to be a concern on the facts of a particular case, a duty of care will be found to exist. Having set out the law governing the appellants' claims, I now propose to apply it to the facts of the appeal.

(iv) Application to the Facts

42 In my view, there can be no question that a *prima facie* duty of care was owed to the appellants by the respondents on the facts of this case. As regards the criterion of reasonable foreseeability, the possibility that the appellants would rely on the audited financial statements in conducting their affairs and that they may suffer harm if the reports were negligently prepared must have been reasonably foreseeable to the respondents. This is confirmed simply by the fact that shareholders generally will often choose to rely on audited financial statements for a wide variety of purposes. It is further confirmed by the fact that under ss. 149(1) and 163(1) of the Manitoba *Corporations Act*, it is patently clear that audited financial statements are to be placed before the shareholders at the annual general meeting. The relevant portions of those sections read as follows:

> *149(1)* The directors of a corporation shall place before the shareholders at every annual meeting
>
> . . . . .
>
> (b) the report of the auditor, if any; and ...
>
> . . . . .
>
> *163(1)* An auditor of a corporation shall make the examination that is in his opinion necessary to enable him to report in the prescribed manner on the financial statements required by this Act to be placed before the shareholders, except such financial statements or part thereof as relate to the period referred to in sub-clause 149(1)(a)(ii).

In my view, it would be untenable to argue in the face of these provisions that some form of reliance by shareholders on the audited reports would be unforeseeable.

43 Similarly, I would find that reliance on the audited statements by the appellant shareholders would, on the facts of this case, be reasonable. Professor Feldthusen (at pp. 62-63) sets out five general *indicia* of reasonable reliance; namely:

> (1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
>
> (2) The defendant was a professional or someone who possessed special skill, judgment or knowledge.
>
> (3) The advice or information was provided in the course of the defendant's business.
>
> (4) The information or advice was given deliberately, and not on a social occasion.

(5) The information or advice was given in response to a specific enquiry or request.

While these *indicia* should not be understood to be a strict "test" of reasonableness, they do help to distinguish those situations where reliance on a statement is reasonable from those where it is not. On the facts here, the first four of these indicia clearly inhere. To my mind, then, this aspect of the *prima facie* duty is unquestionably satisfied on the facts.

44 Having found a *prima facie* duty to exist, then, the second branch of the *Anns/Kamloops* test remains to be considered. It should be clear from my comments above that were auditors such as the respondents held to owe a duty of care to plaintiffs in *all* cases where the first branch of the *Anns/Kamloops* test was satisfied, the problem of indeterminate liability would normally arise. It should be equally clear, however, that in certain cases, this problem does not arise because the scope of potential liability can adequately be circumscribed on the facts. An investigation of whether or not indeterminate liability is truly a concern in the present case is, therefore, required.

45 At first blush, it may seem that no problems of indeterminate liability are implicated here and that this case can easily be likened to *Glanzer, Hedley Byrne*, and *Haig, supra*. After all, the respondents knew the very identity of all the appellant shareholders who claim to have relied on the audited financial statements through having acted as NGA's and NGH's auditors for nearly 10 years by the time the first of the audit reports at issue in this appeal was prepared. It would seem plausible to argue on this basis that because the identity of the plaintiffs was known to the respondents at the time of preparing the 1980-82 reports, no concerns over indeterminate liability arise.

46 To arrive at this conclusion without further analysis, however, would be to move too quickly. While knowledge of the plaintiff (or of a limited class of plaintiffs) is undoubtedly a significant factor serving to obviate concerns over indeterminate liability, it is not, alone, sufficient to do so. In my discussion of *Glanzer, Hedley Byrne*, and *Haig, supra*, I explained that indeterminate liability did not inhere on the specific facts of those cases not only because the defendant knew the identity of the plaintiff (or the class of plaintiffs) who would rely on the statement at issue, but also because the statement itself was used by the plaintiff *for precisely the purpose or transaction for which it was prepared*. The crucial importance of this additional criterion can clearly be seen when one considers that even if the specific identity or class of potential plaintiffs is known to a defendant, use of the defendant's statement for a purpose or transaction other than that for which it was prepared could still lead to indeterminate liability.

47 For example, if an audit report which was prepared for a corporate client for the express purpose of attracting a $10,000 investment in the corporation from a known class of third parties was instead used as the basis for attracting a $1,000,000 investment or as the basis for inducing one of the members of the class to become a director or officer of the corporation or, again, as the basis for encouraging him or her to enter into some business venture with the corporation itself, it would appear that the auditors would be exposed to a form of indeterminate liability, even if they knew precisely the identity or class of potential plaintiffs to whom their report would be given. With respect to the present case, then, the central question is whether or not the appellants can be said to have used the 1980-82 audit reports for the specific purpose for which they were prepared. The answer to this question will determine whether or not policy considerations surrounding indeterminate liability ought to negate the *prima facie* duty of care owed by the respondents.

48 What, then, is the purpose for which the respondents' audit statements were prepared? This issue was eloquently discussed by Lord Oliver in *Caparo, supra*, at p. 583:

> My Lords, the primary purpose of the statutory requirement that a company's accounts shall be audited annually is almost self-evident. ... The management is confided to a board of directors which operates in a fiduciary capacity and is answerable to and removable by the shareholders who can act, if they act at all, only collectively and only through the medium of a general meeting. Hence the legislative provisions requiring the board annually to give an account of its stewardship to a general meeting of the shareholders. This is the only occasion in each year on which the general body of shareholders is given the opportunity to consider, to criticise and to comment on the conduct by the board of the company's affairs, to vote the directors' recommendation as to dividends, to approve or disapprove the directors' remuneration and, if thought

> desirable, to remove and replace all or any of the directors. *It is the auditors' function to ensure, so far as possible, that the financial information as to the company's affairs prepared by the directors accurately reflects the company's position in order first, to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing ... and, second, to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided*. [Emphasis added.]

Similarly, Farley J. held in *Roman Corp. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Ont. Gen. Div. [Commercial List]) , at p. 260 (hereinafter *Roman I*) that

> as a matter of law, the only purpose for which shareholders receive an auditor's report is to provide the shareholders with information for the purpose of overseeing the management and affairs of the corporation and not for the purpose of guiding personal investment decisions or personal speculation with a view to profit.

(See also: *Roman Corp. v. Peat Marwick Thorne* (1993), 12 B.L.R. (2d) 10 (Ont. Gen. Div. [Commercial List]).) Lord Oliver was referring to the relevant provisions of the U.K. *Companies Act 1985*, 1985 (U.K.), c. 6, in making his pronouncements, and Farley J. rendered his judgment against the backdrop of the statutory audit requirements set out in the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16.

49 To my mind, the standard purpose of providing audit reports to the shareholders of a corporation should be regarded no differently under the analogous provisions of the Manitoba *Corporations Act*. Thus, the directors of a corporation are required to place the auditors' report before the shareholders at the annual meeting in order to permit the shareholders, as a body, to make decisions as to the manner in which they want the corporation to be managed, to assess the performance of the directors and officers, and to decide whether or not they wish to retain the existing management or to have them replaced. On this basis, it may be said that the respondent auditors' purpose in preparing the reports at issue in this case was, precisely, to assist the collectivity of shareholders of the audited companies in their task of overseeing management.

50 The appellants, however, submit that, in addition to this statutorily mandated purpose, the respondents further agreed to perform their audits for the purpose of providing the appellants with information on the basis of which they could make personal investment decisions. They base this claim largely on a conversation that allegedly took place at the 1978 meeting between Mr. Cox, Mr. Freed and Mr. Korn, as well as on certain passages of the engagement letter sent to them by the respondents. I have read the relevant portions of the record on this question and I am unable to accept the appellants' submission. Indeed, on examination for discovery, Mr. Freed discussed the engagement letter of the respondents and stated as follows:

> Q It is this that you say is the document that says, it will speak for itself, but you interpret it to mean that they [the respondents] will look after your interests specifically [*sic*]?
>
> A I am saying that I took it for granted that that was their duty.
>
> Q I see. All right. Was there ever anything in writing specifically that says that is your duty, is to look after my interests, I am away all the time?
>
> A I am not aware.
>
> Q Either, from you, or to you in that respect?
>
> A I am not aware of any.
>
> Q This letter happens to say, "We are always prepared upon instruction to extend our services beyond these required procedures." Did you ever give them any additional instructions?
>
> A No. I never saw them.

Q Nor did you communicate with them in writing, or otherwise? Is that right?

A Not that I recall.

Similarly, the transcript of Mr. Korn's examination for discovery reveals the following exchange:

Q You emphasized [at the 1978 meeting] you say to Mr. Cox that because you were no longer in the management stream or chain, you would be relying more on the audited statements?

A Yes, and that — well, I wanted a sort of commitment that he understood that he was the shareholders' auditor and I did refer to the fact that he had [a] close personal association with Mr. Morris and he said no, he fully understood, have no fear.

Q Did you consider that to be a change from the normal kind of audit engagement, or were you just emphasising something that was part of the normal audit engagement?

A I just pointed out the change. As a matter of fact, he already knew about the change.

. . . . .

Q But my question was whether you considered that to be any kind of alteration from the usual audit engagement process?

A Well, that's what happened. That's the fact that I said it to him and those are the words I said, and however he took it, that's however he took it.

Q But I'm asking you if you considered that to be a change from the normal audit engagement.

A Well, I'm not — whether that was — whether those words were some sort of special instructions, those were the words and I guess there will be experts to say what consequences should have flown [*sic*] from them, and I'm not here as an expert on audit —

Q I'm entitled to know what you consider to be the case.

A Well, I made it clear that he should remember that he's the shareholders' auditor, that Clarkson was the shareholders' auditor, notwithstanding his personal relationship with Murray Morris.

Q Auditors are always the shareholders' auditors, are they not?

A And that's what I — if they are, they are.

Q And that's in fact what they are always?

A Well, that's good, I'm glad to hear that, glad to hear you say it.

Q Do you agree?

A That the auditors are the shareholders' auditors?

Q Yes.

A I agree precisely.

To my mind, these passages serve to demonstrate that despite the appellants' submissions, the respondents did not, in fact, prepare the audit reports in order to assist the appellants in making personal investment decisions or, indeed, for any purpose

other than the standard statutory one. This finding accords with that of Helper J.A. in the Court of Appeal, and nothing in the record before this Court suggests the contrary.

51 It follows from the foregoing discussion that the only purpose for which the 1980-82 reports could have been used in such a manner as to give rise to a duty of care on the part of the respondents is as a guide for the shareholders, as a group, in supervising or overseeing management. In assessing whether this was, in fact, the purpose to which the appellants purport to have put the audited reports, it will be useful to take each of the appellants' claims in turn. First, the appellant Hercules seeks compensation for its $600,000 injection of capital into NGA over January and February of 1983 and the appellant Freed seeks damages commensurate with the amount of money he contributed in 1982 to his investment account in NGH. Secondly, all the appellants seek damages for the losses they suffered in the value of their existing shareholdings.

52 The claims of Hercules and Mr. Freed with respect to their 1982-83 investments can be addressed quickly. The essence of these claims must be that these two appellants relied on the respondents' reports in deciding whether or not to make further investments in the audited corporations. In other words, Hercules and Mr. Freed are claiming to have relied on the audited reports for the purpose of making personal investment decisions. As I have already discussed, this is not a purpose for which the respondents in this case can be said to have prepared their reports. In light of the dissonance between the purpose for which the reports were actually prepared and the purpose for which the appellants assert they were used, then, the claims of Hercules and Mr. Freed with respect to their investment losses are not such that the concerns over indeterminate liability discussed above are obviated; *viz.*, if a duty of care were owed with respect to these investment transactions, there would seem to be no logical reason to preclude a duty of care from arising in circumstances where the statements were used for any other purpose of which the auditors were equally unaware when they prepared and submitted their report. On this basis, therefore, I would find that the *prima facie* duty that arises respecting this claim is negated by policy considerations and, therefore, that no duty of care is owed by the respondents in this regard.

53 With respect to the claim concerning the loss in value of their existing shareholdings, the appellants make two submissions. First, they claim that they relied on the 1980-82 reports in monitoring the value of their equity and that, owing to the (allegedly) negligent preparation of those reports, they failed to extract it before the financial demise of NGA and NGH. Secondly, and somewhat more subtly, the appellants submit that they each relied on the auditors' reports in overseeing the management of NGA and NGH and that had those reports been accurate, the collapse of the corporations and the consequential loss in the value of their shareholdings could have been avoided.

54 To my mind, the first of these submissions suffers from the same difficulties as those regarding the injection of fresh capital by Hercules and Mr. Freed. Whether the reports were relied upon in assessing the prospect of further investments or in evaluating existing investments, the fact remains that the purpose to which the respondents' reports were put, on this claim, concerned individual or personal investment decisions. Given that the reports were not prepared for that purpose, I find for the same reasons as those earlier set out that policy considerations regarding indeterminate liability inhere here and, consequently, that no duty of care is owed in respect of this claim.

55 As regards the second aspect of the appellants' claim concerning the losses they suffered in the diminution in value of their equity, the analysis becomes somewhat more intricate. The essence of the appellants' submission here is that the shareholders would have supervised management differently had they known of the (alleged) inaccuracies in the 1980-82 reports, and that this difference in management would have averted the demise of the audited corporations and the consequent losses in existing equity suffered by the shareholders. At first glance, it might appear that the appellants' claim implicates a use of the audit reports which is commensurate with the purpose for which the reports were prepared, i.e., overseeing or supervising management. One might argue on this basis that a duty of care should be found to inhere because, in view of this compatibility between actual use and intended purpose, no indeterminacy arises. In my view, however, this line of reasoning suffers from a subtle but fundamental flaw.

56 As I have already explained, the purpose for which the audit reports were prepared in this case was the standard statutory one of allowing shareholders, *as a group*, to supervise management and to take decisions with respect to matters concerning the proper overall administration *of the corporations*. In other words, it was, as Lord Oliver and Farley J. found in the cases cited

above, to permit the shareholders to exercise their role, *as a class*, of overseeing the *corporations'* affairs at their annual general meetings. The purpose of providing the auditors' reports to the appellants, then, may ultimately be said to have been a "collective" one; that is, it was aimed not at protecting the interests of individual shareholders but rather at enabling the shareholders, acting as a group, to safeguard the interests of the corporations themselves. On the appellants' argument, however, the purpose to which the 1980-82 reports were ostensibly put was not that of allowing the shareholders as a class to take decisions in respect of the overall running of the corporation, but rather to allow them, as *individuals*, to monitor management so as to oversee and protect their own personal investments. Indeed, the nature of the appellants' claims (i.e. personal tort claims) *requires* that they assert reliance on the auditors' reports *qua* individual shareholders if they are to recover any personal damages. In so far as it must concern the interests of each individual shareholder, then, the appellants' claim in this regard can really be no different from the other "investment purposes" discussed above, in respect of which the respondents owe no duty of care.

57 This argument is no different as regards the specific case of the appellant Guardian, which is the sole shareholder of NGH. The respondents' purpose in providing the audited reports in respect of NGH was, we must assume, to allow Guardian to oversee management for the better administration of the corporation itself. If Guardian in fact chose to rely on the reports for the ultimate purpose of monitoring its own investment it must, for the policy reasons earlier set out, be found to have done so at its own peril in the same manner as shareholders in NGA. Indeed, to treat Guardian any differently simply because it was a sole shareholder would do violence to the fundamental principle of corporate personality. I would find in respect of both Guardian and the other appellants, therefore, that the *prima facie* duty of care owed to them by the respondents is negated by policy considerations in that the claims are not such as to bring them within the "exceptional" cases discussed above.

Issue 2: The Effect of the Rule in Foss v. Harbottle

58 All the participants in this appeal — the appellants, the respondents, and the intervener — raised the issue of whether the appellants' claims in respect of the losses they suffered in their existing shareholdings through their alleged inability to oversee management of the corporations ought to have been brought as a derivative action in conformity with the rule in *Foss v. Harbottle* rather than as a series of individual actions. The issue was also raised and discussed in the courts below. In my opinion, a derivative action — commenced, as required, by an application under s. 232 of the Manitoba *Corporations Act* — would have been the proper method of proceeding with respect to this claim. Indeed, I would regard this simply as a corollary of the idea that the audited reports are provided to the shareholders as a group in order to allow them to take collective (as opposed to individual) decisions. Let me explain.

59 The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd.*, [1982] 1 All E.R. 354 (Eng. C.A.), at p. 367, as follows:

> The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.

To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

60 The manner in which the rule in *Foss v. Harbottle, supra*, operates with respect to the appellants' claims can thus be demonstrated. As I have already explained, the appellants allege that they were prevented from properly overseeing the

management of the audited corporations because the respondents' audit reports painted a misleading picture of their financial state. They allege further that had they known the true situation, they would have intervened to avoid the eventuality of the corporations' going into receivership and the consequent loss of their equity. The difficulty with this submission, I have suggested, is that it fails to recognise that in supervising management, the shareholders must be seen to be acting *as a body* in respect of the corporation's interests rather than as individuals in respect of their own ends. In a manner of speaking, the shareholders assume what may be seen to be a "managerial role" when, as a collectivity, they oversee the activities of the directors and officers through resolutions adopted at shareholder meetings. In this capacity, they cannot properly be understood to be acting simply as individual holders of equity. Rather, their collective decisions are made in respect of the corporation itself. Any duty owed by auditors in respect of this aspect of the shareholders' functions, then, would be owed not to shareholders *qua* individuals, but rather to all shareholders as a group, acting in the interests of the corporation. And if the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, then the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover.

61 This line of reasoning finds support in Lord Bridge's comments in *Caparo, supra*, at p. 580:

> The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. *But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders ... will be recouped by a claim against the auditors in the name of the company, not by individual shareholders*. [Emphasis added.]

It is also reflected in the decision of Farley J. in *Roman I, supra*, the facts of which were similar to those of the case at bar. In that case, the plaintiff shareholders brought an action against the defendant auditors alleging, *inter alia*, that the defendant's audit reports were negligently prepared. That negligence, the shareholders contended, prevented them from properly overseeing management which, in turn, led to the winding up of the corporation and a loss to the shareholders of their equity therein. Farley J. discussed the rule in *Foss v. Harbottle* and concluded that it operated so as to preclude the shareholders from bringing personal actions based on an alleged inability to supervise the conduct of management.

62 One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (Ont. C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done *to the corporation*. Indeed, this is the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder *qua* individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

63 The facts of *Haig, supra* provide the basis for an example of where such a claim might arise. Had the investors in that case been shareholders of the corporation, and had a similarly negligent report knowingly been provided to them by the auditors for a specified purpose, a duty of care separate and distinct from any duty owed to the audited corporation would have arisen in their favour, just as one arose in favour of Mr. Haig. While the corporation would have been entitled to claim damages in respect of any losses it might have suffered through reliance on the report (assuming, of course, that the report was also provided for the corporation's use), the shareholders in question would also have been able to seek personal compensation for the losses they suffered *qua* individuals through their personal reliance and investment. On the facts of this case, however, no claims of this sort can be established.

Conclusion

64 In light of the foregoing, I would find that even though the respondents owed the appellants (*qua* individual claimants) a *prima facie* duty of care both with respect to the 1982-83 investments made in NGA and NGH by Hercules and Mr. Freed and with respect to the losses they incurred through the devaluation of their existing shareholdings, such *prima facie* duties are negated by policy considerations which are not obviated by the facts of the case. Indeed, to come to the opposite conclusion on these facts would be to expose auditors to the possibility of indeterminate liability, since such a finding would imply that auditors owe a duty of care to any known class of potential plaintiffs regardless of the purpose to which they put the auditors' reports. This would amount to an unacceptably broad expansion of the bounds of liability drawn by this Court in *Haig, supra*. With respect to the claim regarding the appellants' inability to oversee management properly, I would agree with the courts below that it ought to have been brought as a derivative action. On the basis of these considerations, I would find under Rule 20.03(1) of the Manitoba *Queen's Bench Rules* that the appellants have failed to establish that their claims as alleged would have "a real chance of success".

65 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

TAB 10

1989 CarswellMan 23
Manitoba Court of Appeal

Bank of Montreal v. Northguard Holdings Ltd.

1989 CarswellMan 23, [1989] C.L.D. 785, [1989] M.J. No. 211,
15 A.C.W.S. (3d) 229, 58 Man. R. (2d) 241, 74 C.B.R. (N.S.) 86

BANK OF MONTREAL v. NORTHGUARD HOLDINGS LIMITED and NORTHGUARD ACCEPTANCE CORPORATION LTD.

Monnin C.J.M., Huband and Twaddle JJ.A.

Heard: April 3 and 4, 1989
Judgment: April 26, 1989
Docket: Nos. 447/88, 449/88, 36/89, 121/89, 122/89

Counsel: *D.A. Bedford*, for Bank of Montreal.
R.A. Dewar, for receiver of defendant companies.
R.L. Tapper, for Sures Group.
S.L. Tod, for Murray Morris.
E.G. Harrison and *A.F. Foran*, for Cox Group.
A.L. Clearwater and *W.M. Molloy*, for directors and shareholders of defendant companies.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.a Actions by receiver
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.d Actions against debtor in receivership
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Receivers --- Actions by and against — Actions by receiver
Receivers --- Actions by and against — Actions against debtor in receivership
Receivers — Possession of debtor's assets — Receiver disputing claims that certain company assets being held in trust and claiming moneys previously paid from company to claimants in error — Receiver and claimants agreeing to settlement releasing claimants from potential liability for fraudulent conspiracy — Judge refusing approval of settlement — Judge's exercise of discretion justified in light of relevant factors of settlement — Court dismissing appeal.
Receivers — Possession of debtor's assets — Receiver disputing claims that certain company assets being held in trust and claiming moneys previously paid from company to claimants in error — Claimants potentially liable for fraudulent conspiracy against company — Judge refusing to authorize receiver to pay to claimants trust moneys held by it in excess of its claims

against claimants — Receiver not to be required to pay out moneys held by it prior to determination of who is entitled to moneys — Court dismissing appeal.

Corporations — Actions by and against corporations — Individuals alleged to be involved in conspiracies to defraud company out of moneys belonging to it — Company subsequently in receivership — Persons in control of company prior to receivership having guaranteed debts of company — Insufficient assets in receivership not making it commercially prudent for secured creditor to pursue actions for fraudulent conspiracy — Judge authorizing shareholders of company to commence actions — Actions not frivolous — Exceptional circumstances existing where interest of guarantors justify order authorizing directors to commence actions — Directors obligated to post security of $120,000.

When the receiver was appointed, the defendant companies' assets included funds which several persons claimed were held in trust for them individually. The receiver disputed the trusts and also claimed that some of those claiming beneficial interests had been paid moneys to which they were not entitled. The receiver and certain claimants (the S. group) proposed a settlement on the basis of a set-off with a release from whatever obligation S. group might have to repay moneys paid to them in error as well as from potential liability for conspiracy. S. group and a second group were alleged to have been involved in two separate conspiracies with the former manager of the companies to defraud the companies by causing them to pay moneys to the conspirators and others to which they had no entitlement. The two individuals who controlled the companies and were connected to a majority of the shareholders had guaranteed the companies' debts to the plaintiff. As the receiver had only sufficient funds to pay costs to the plaintiff, the plaintiff believed it commercially imprudent to commence actions against the two groups and the former manager for fraudulent conspiracy. On simultaneous applications, the justice refused to sanction the settlement with S. group as there remained a serious dispute as to the facts surrounding the case. He also refused to authorize payment to the two groups of moneys held by the receiver in excess of the amount of the receiver's claims against them. He further authorized the shareholders of the companies to commence derivative actions on behalf of the companies against the two groups and the former manager for damages arising from the alleged conspiracies. The two groups and former manager appealed.

Held:

Appeals dismissed; orders varied as to terms.

In reviewing the S. group settlement, the justice applied the test of commercial prudence and, in consideration of all the relevant factors of the settlement, was justified in the exercise of his discretion not to sanction the settlement.

The dismissal of the applications for payment of the funds held by the receiver in excess of the amounts paid in error to the claimant beneficiaries was justifiable on the ground that the receiver should not be required to pay out moneys held by him until a final determination of who is entitled to them. The right of set-off may entitle the receiver to withhold funds only from those claimants against whom damages for conspiracy are awarded, but, at the present time, it was unknown against whom, if anybody, damages would be awarded and, as the conspiracy could make each claimant liable for the full amount awarded, the amount of damages was potentially larger than the total of the "trust" funds being withheld.

The court's authority to permit those who previously controlled a company in receivership to commence an action in the corporate name is not derived from the derivative provisions of s. 232 of the Corporations Act but from the common law position that the authority of the directors to commence such an action is not automatically suspended by a receivership. With a court-appointed receiver, the company is not dissolved but is a continuing entity whose management is in the control of the receiver, subject to further order of the court. While generally the court will not make an order permitting the directors or a majority of the shareholders to commence an action which the receiver does not want to bring, it can do so when it is satisfied that the action is a proper one and that an injustice may result to some or all of the shareholders if the action is not permitted. Such an action should only be authorized in exceptional circumstances, where, having regard to all the competing interests, justice requires it, and then only with safeguards that offer a reasonable measure of protection to those affected by the order. Where the assets of the company are insufficient to pay the secured creditor, the costs of prosecuting an action in relation to the chances of success may not economically justify the action from the view of the secured creditor. However, shareholders who have guaranteed the company's debts have more than a contingent interest in the action as each additional dollar recovered by the company reduces the amount owing under the guarantee. In those circumstances, weight must be given to the wishes of the shareholders provided the proposed action is not frivolous and the shareholders are willing and able to pay the additional costs that would be incurred if the action is unsuccessful. If the proposed actions against the two groups and former manager were successful, the sum of money recovered would significantly reduce the indebtedness of the guarantors of the companies. The actions were clearly not frivolous and there existed the exceptional circumstances to justify an order permitting the directors (who were the real force behind

the actions and the potential benefactors of them), rather than the shareholders of the companies, to commence the actions. However, as a safeguard, the directors should be obligated to post security in the amount of $120,000 to cover, on a solicitor-client basis, the additional costs of the receiver and the costs awarded against the companies if the actions are unsuccessful.

Table of Authorities

Cases considered:

Bank of Montreal v. Northguard Hldg. Ltd., 34 D.L.R. (4th) 1, 46 Man. R. (2d) 16 (C.A.) — *referred to*

Newhart Dev. Ltd. v. Co-op. Commercial Bank Ltd., [1978] Q.B. 814, [1978] 1 W.L.R. 636, [1978] 2 All E.R. 896 (C.A.) — *applied*

Statutes considered:

Corporations Act, S.M. 1976, c. 40 (also C.C.S.M., c. C225)

s. 232

Rules considered:

Manitoba Court of Queen's Bench Rules, Man. Reg. 553/88

R. 56.01

Appeals from orders of Simonsen J., 72 C.B.R. (N.S.) 135, declining to approve settlement between receiver and claimants, declining to authorize payment of moneys held by receiver in excess of its claims, and authorizing shareholders of companies in receivership to commence actions on behalf of companies for damages for fraudulent conspiracy.

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

1 These appeals are from orders made in the course of this receivership action by Simonsen J. [72 C.B.R. (N.S.) 135]. The learned judge:

(i) Declined to approve a proposal for the settlement of claims advanced by the receiver against Richard Sures, R. Sures & Associates (B.C.) Ltd., R. Sures & Associates Ltd., Estelle Sures, Nathan Sures, Michelle Sures, Garry Sures and Corinne Sures (hereinafter referred to collectively as "the Sures Group") or to authorize the payment to them of moneys held by the receiver in excess of the amount of its claims against them;

(ii) Declined to authorize the payment to

(a) Murray Morris, or

(b) Alexander Cox, West Hawk Management Ltd. and Longfellow Industries Ltd. (hereinafter referred to collectively as "the Cox Group")

of moneys held by the receiver in excess of the amount of its claims against them;

(iii) Authorized the shareholders of the companies in receivership to commence derivative actions on behalf of those companies for damages, arising from alleged conspiracies, against:

(a) Murray Morris and the members of the Sures Group; and

(b) Murray Morris and the members of the Cox Group.

2 The real protagonists in these appeals are not parties to the action. Out of an abundance of caution, Mr. Morris and the members of the Cox Group applied to a judge of this court in chambers for an order adding them as parties and granting them leave to appeal from the orders affecting them (other than the order affecting Mr. Morris and the Sures Group jointly). A consent order was submitted to Hall J.A. who, out of the same abundance of caution, signed it. The Sures Group, and Mr. Morris with respect to the order affecting him and the Sures Group jointly, applied to me for a similar order. I declined to sign it, referring to the court the issue of whether such an order is necessary.

3 Ordinarily, all persons with an interest in the subject matter of an action will be parties to it. A person who claims to have such an interest but is not a party should apply to the Court of Queen's Bench for an order that he be added as a party. There are, however, some classes of action in which a person with an interest is allowed to participate in the proceedings in the Court of Queen's Bench, although he is not a party to the action, in the strictest sense. One class of action in which this frequently occurs is a receivership action.

4 A person with an interest in the assets of a company in receivership may be allowed to participate in the proceedings as if he were a party. When this occurs and an order adversely affecting such a person is made, that person has a right of appeal to the court without leave.

5 Such an appellant will not find much guidance from the rules of this court as to how the cause should be styled in the notice of appeal. At first blush, is seems a simple matter to obtain an order adding the appellant as a party in this court and permitting the appeal to proceed with the amended style of cause. This procedure might prove somewhat cumbersome, however, when there are a number of persons who may be adversely affected by an appeal, but who are not themselves parties to the action. In this case we have both multiple appellants and a number of respondents who are not included in the style of cause.

6 In the interest of simplification, it is my view that, on an appeal from an order in a receivership action, the style of cause should be exactly that which it was in the Court of Queen's Bench. The name of a person appealing, his interest and the manner in which it is alleged that he is adversely affected by the order should then be set out in the notice of appeal in such a way as will make it clear to the registrar that the party has an interest which entitles him to appeal. If another interested person challenges the right of the appellant to appeal, a motion to quash can be brought before a judge in chambers. He can either allow the appeal to proceed or refer the issue to the court if the right of appeal is in doubt.

7 I have one further comment to make with respect to appeals from orders made in a receivership action. It often happens in such an action that several interrelated orders are made about the same time. Each of several persons affected by one or more of them may appeal. Whilst each appeal is technically a separate proceeding in this court, it is desirable that all interrelated appeals should be heard at the same time. This goal will be facilitated by the use of the Queen's Bench style of cause and by counsel advising the registrar that an appeal is interrelated to another already filed or anticipated.

8 I now turn to a consideration of these appeals on their merits.

The non-approval of the settlement.

9 When the receiver was appointed, the defendants' assets included funds which several persons claimed were held in trust for them individually. The existence of such trusts was disputed by the receiver, which also asserted that some of those claiming beneficial interests had been paid moneys to which they were not entitled. The receiver reached an agreement with a majority of the claimants whereby their claims and the receiver's counterclaims would be compromised. The agreement purported, however, to bind all of the claimants, whether they agreed or not. This court was of the view that such an arrangement was improper: see 34 D.L.R. (4th) 1, 46 Man. R. (2d) 16.

10 At the same time as this court rejected the notion that a majority of claimants could compromise the claims of all, it ruled as premature an application by the shareholders for leave to commence derivative actions alleging that Mr. Morris, a former manager of the companies, had conspired with the Sures Group, as to one conspiracy, and with the Cox Group, as to another, to defraud the companies by causing them to pay out moneys to the alleged conspirators and others when the recipients had no entitlement to the moneys. This court was then of the view that the receiver's claims for repayment were so interrelated with the alleged conspiracies that derivative actions should not be sanctioned, at least until the receiver had decided not to pursue them himself.

11 Since the action was last before us, the claims of many individuals who had an interest in the funds held by the receiver have been settled. Many of those claims were settled on the basis of a set-off being allowed for moneys previously paid in error.

12 The receiver proposed a similar settlement with the Sures Group. The set-off proposed was slightly less as a percentage of the overpayment than that allowed the receiver by other claimants, but we were told that this was because the amount of money involved was much larger. In any event, Simonsen J. declined to approve the settlement, noting that there was a serious dispute as to the facts and that, until the facts were deter mined, it would be impossible to decide the legal issues. He recognized, however, that a reasonable effort must be made to assess the merits of the case for the purpose of deciding whether the settlement should be approved. Although he did not articulate the test of commercial prudence, I am satisfied that he applied it, subject only to his overriding concern that the prudent settlement of one claim should not preclude the advancement of another legitimate claim.

13 The Sures Group's offer of settlement involved their release not only from whatever obligation they might have had to repay moneys paid to them in error, but also from their potential liability for conspiracy. In my view, Simonsen J. was right in taking this into account. When all of the relevant factors are considered, I cannot say that the learned judge erred in the exercise of his discretion not to sanction the settlement.

14 In the course of argument before us, counsel for the Sures Group said that his clients were prepared, if necessary, to settle the receiver's claims without a release from their potential liability for conspiracy. It may be that if that proposal had been the one placed before Simonsen J. for approval, he would have decided the application differently. But in my view it is inappropriate for this court, with its more limited knowledge of the proceedings, to consider a different proposal than that considered by the learned judge in Motions Court. The very fact that the Sures Group tied the two claims together for settlement purposes suggests that they are so intertwined that both should proceed to trial.

Withholding funds

15 It is also said that the learned judge in Motions Court erred in withholding payment of trust funds held by the receiver. Strong arguments were advanced for the proposition that the court had no authority to set off more than the receiver's claim for amounts previously paid in error to beneficiaries of the trusts which the receiver now administers. Simonsen J. based his order withholding payment on the doctrine of equitable set-off. I do not find it necessary to say that he was right in his view that that doctrine is applicable to the retention of moneys in this case. In my view, the order dismissing the applications for payment of the surplus funds by the receiver can be justified on the ground that the receiver should not be required to pay out moneys held by him until a final determination is made as to who is entitled to them.

16 It may be that, when all the dust has settled, no damages will be awarded and that each claimant will be entitled to payment in full of the funds held by the receiver for such claimant. Even if damages are awarded against some of the claimants, the right of set-off may entitle the receiver to withhold funds only from those claimants against whom damages have been awarded. But at the present time, we do not know who will be entitled to what. The damages which may be the subject of a claim to a set-off are for conspiracy which, if proved, could make each claimant liable for the full amount awarded. That amount potentially is larger than the total of the trust funds now withheld.

17 The court was not bound to direct that the funds be held until the conspiracy actions are disposed of. But Simonsen J. did not regard himself as bound to make that direction. He exercised a discretion having regard to all the circumstances of the case. It is not necessary that I agree with him to uphold his order. It is sufficient that he exercised his discretion on proper principles, which I think he did.

18 There is a serious issue which must be tried before it can be determined who is entitled to the funds in the hands of the receiver. Whoever is entitled to them will also be entitled to the interest earned by the receiver on them. It may be that this interest is less than that payable by the Sures Group on moneys owed by them to another bank, but that is the risk which is taken when an investment is made with borrowed money. The Sures Group must have known they took some risk when they borrowed money to invest in securities which bore an interest rate as high as 6 1/2 points over that at which banks were lending money to their best commercial customers.

The derivative actions

19 In my reasons for judgment in our earlier decision (34 D.L.R. (4th) at 22, 46 Man. R. (2d) 16 at 24), I referred to the possibility of a derivative action being authorized. The term "derivative action" had been used by counsel in referring to an action which the court might allow those who previously controlled the companies to bring. I adopted that terminology without considering the source of the court's authority to sanction such an action. Apparently, my use of that terminology has misled the parties and Simonsen J. into believing that the source of the court's authority to permit the shareholders to bring an action in the names of the companies is s. 232 of the Corporations Act. I regret that my misuse of language may have had this effect. Section 232 of the Corporations Act has nothing to do with the authority that might be given to those who previously controlled a company in receivership to commence an action in the corporate name. To the extent that the authority given by Simonsen J. to the complainants was given under this section, it was wrongly given. That does not mean, however, that the court did not have such authority or that Simonsen J. was wrong in exercising it in the circumstances of this case.

20 The authority of the directors of a corporation to commence an action in the company name is not suspended automatically by a receivership: see *Newhart Dev. Ltd. v. Co-op. Commercial Bank Ltd.*, [1978] Q.B. 814, [1978] 1 W.L.R. 636, [1978] 2 All E.R. 896 (C.A.). In the case of a court-appointed receiver, the order of appointment usually vests the authority to commence actions on behalf of the company in the receiver and, impliedly at least, divests the directors of this authority. But the company is not dissolved: it is a continuing entity. Its management is in the control of the receiver, but subject to further order of the court. As a general rule, the court will not make an order permitting the directors, or a majority of the shareholders, to commence an action which the receiver does not want to bring. The court can do so, however, when it is satisfied that the action is a proper one and that injustice may result to some or all of the shareholders of the company if the action is not permitted.

21 Such an action should not be authorized routinely nor without safeguards for the receiver, for those entitled to a share of the corporate assets and for those who will be sued. It should only be authorized in exceptional circumstances where, having regard to all the competing interests, justice requires it, and then only on terms which offer a reasonable measure of protection to those affected by the order.

22 It often happens that the assets of a company placed in receivership are insufficient to pay even the secured creditor in full. Although the receiver is obliged to consider the contingent interests of the unsecured creditors and shareholders, he cannot ignore the reality that in those circumstances it is the secured creditor who will pay the costs of litigation. From the secured creditor's point of view, an action may be imprudent because the costs of prosecuting it in relation to the chances of success do not justify it commercially. Nonetheless, the shareholders may have more than a contingent interest. They may have guaranteed the company's debt to the secured creditor so that each additional dollar recovered by the company reduces the amount due under the guarantee. In those circumstances, weight must be given to the wishes of the shareholders, provided the proposed action is not frivolous and they are willing and able to pay the additional costs that will be incurred if the action is unsuccessful.

23 In the present case, two individuals (Messrs. Korn and Freed), who together controlled the Northguard companies and who are connected in one way or another to a majority of the shareholders, have guaranteed payment of the debts of the Northguard companies to the Bank of Montreal. The bank does not think it would be commercially prudent to sue Mr. Morris, the Cox Group or the Sures Group for fraudulent conspiracy. Although the receiver takes a neutral position, it really shares the bank's view, but shares it because the receiver has no funds with which to pay the costs other than those which will go to the bank. The proposed actions are for substantial sums of money which, if recovered, will significantly reduce the indebtedness of Messrs. Korn and Freed to the bank. Whilst the merits of those actions cannot be determined finally without a trial, they clearly are not frivolous. As long as safeguards are put in place for the payment of costs, I am of the view that there exist exceptional circumstances which justify an order permitting the directors of the Northguard companies, rather than the shareholders, to sue Mr. Morris, the Cox Group and the Sures Group for damages on behalf of the companies.

24 The safeguards which the learned judge in Motions Court put in place are not, in my respectful view, adequate. It is likely that the Court of Queen's Bench will decide that these actions should not only be tried together, but also with the receiver's action against the Sures Group for moneys paid to them in error. This may involve the receiver in additional costs for which it should be indemnified if the actions now authorized are unsuccessful. The receiver's additional costs, as determined by the

trial judge, should be recovered out of the security to be posted as a result of this judgment. The orders of Simonsen J. should be varied accordingly.

25 The order providing security to the receiver against its potential liability for the costs of third parties is pointless. The actions will not be brought by the receiver. Any order requiring the companies to pay costs will result in a debt which will rank after the claim of the secured creditor. The receiver will not be responsible personally for the costs of an action it has not authorized.

26 The orders provide that the shareholders shall be responsible for the payment of all costs ordered against the companies if the actions are unsuccessful. These orders should be varied to impose the obligation on the directors (who are the real force behind the proposed action and the potential benefactors of it) and should require them to secure payment of the total amount of $120,000, the security to be in such form as may be approved by the master. The security should be provided in the receivership action and is in lieu of the security of $30,000 which the shareholders were ordered to post in each of the two so-called derivative actions.

27 The amount is fixed at what amounts to double the sum fixed by Simonsen J. because I am of the view that he did not allow sufficient to cover an award of solicitor-and-client costs. Such an award is in the discretion of the trial judge if the charges of fraud are not proven.

28 If the $120,000 is insufficient to pay the costs actually awarded, the $120,000 shall be divided amongst those entitled to costs in such ratio as the trial judge decides.

29 The authority to order security for costs is found not only in the receivership jurisdiction of the court, but also in the new Queen's Bench Rules promulgated by Manitoba Reg. 553/88. Rule 56.01 provides:

> 56.01 The court, on motion in a proceeding may make such order for security for costs as in the particular circumstances of the case is just, including where the plaintiff or applicant ...
>
> (*d*) is a corporation, association or a nominal plaintiff, and there is good reason to believe that insufficient assets will be available in Manitoba to pay costs, if ordered to do so.

The court's supervisory jurisdiction

30 The actions which the directors are now authorized to bring, and the action already commenced by the receiver against the Sures Group, should proceed to trial expeditiously. As substantial funds are being withheld from the proposed defendants, the court should, if necessary, invoke its supervisory jurisdiction in the receivership action to ensure that there are no unreasonable delays.

Conclusion

31 In the result, I would confirm the orders appealed from save to the extent already indicated.

32 As to the costs of the appeals, I am of the view that the receiver and the complainants should each receive one set of costs, including a factum fee of $100. The obligation to pay such costs should be on Mr. Morris, the Cox Group and the Sures Group jointly as against the others, but on the three of them rateable amongst themselves. The Bank of Montreal was entitled to be represented, but I do not think its presence was necessary for the determination of the issues. Accordingly, I would make no order with respect to its costs.

Appeals dismissed; orders varied as to terms.

TAB 11

2007 ABCA 93
Alberta Court of Appeal

Gramaglia v. Alberta (Minister of Government Services)

2007 CarswellAlta 406, 2007 ABCA 93, [2007] 6 W.W.R. 573, [2007] A.W.L.D. 1572, [2007] A.W.L.D. 1628, 156 A.C.W.S. (3d) 888, 394 W.A.C. 233, 404 A.R. 233, 54 Admin. L.R. (4th) 134, 73 Alta. L.R. (4th) 216

Salvatore Gramaglia (Appellant / Applicant) and The Alberta Government Services Minister, The Alberta Transportation Minister, The Minister of Justice and Attorney General for Alberta and The Attorney General for Canada (Respondents / Respondents) and The Chief Commissioner Charlach Mackintosh of The Alberta Human Rights and Citizenship Commission (Respondent / Respondent)

K. Ritter, P. Martin JJ.A., A. Kent J. (ad hoc)

Heard: February 14, 2007
Judgment: March 28, 2007
Docket: Calgary Appeal 0501-0368-AC

Counsel: Appellant, for himself
C. Nugent, for Respondents, Alberta Government Services Minister, Alberta Transportation Minister
J.R. Ashcroft, for Respondent, Alberta Human Rights & Citizenship Commission
L.H. Riczu, for Respondent, Minister of Justice, Attorney General for Alberta

Subject: Constitutional; Civil Practice and Procedure
Related Abridgment Classifications
Constitutional law
XIV Procedure in constitutional challenges
XIV.3 Notice to Attorney General
Human rights
III What constitutes discrimination
III.7 Disability
III.7.a Physical disability
III.7.a.i What constitutes
Headnote
Human rights --- What constitutes discrimination — Handicap — Physical handicap — What constitutes
Provincial transportation agency required complainant, who had diabetes, to submit to medical examination before renewing his operator's licence — Complainant's complaint that medical examination discriminated against individuals diagnosed with diabetes was dismissed by Human Rights and Citizenship Commission — Dismissal was upheld by Chief Commissioner — Complainant's application for judicial review was dismissed — Complainant appealed — Appeal dismissed — Commissioner's decision that further inquiry was not warranted was reasonable — Commissioner reviewed investigator's report and other material put forward by complainant and considered facts before him — Commissioner's decision was based on findings from credible sources that demonstrated that diabetes posed risk to drivers, but was not automatic bar since conditions could be imposed to address underlying concerns.
Constitutional law --- Procedure in constitutional challenges — Notice to Attorney General
Provincial transportation agency required complainant, who had diabetes, to submit to medical examination before renewing his operator's licence — Complainant's complaint that medical examination discriminated against individuals diagnosed with diabetes was dismissed by Human Rights and Citizenship Commission — Dismissal was upheld by Chief Commissioner

— Complainant's application for judicial review was dismissed — Chambers judge dismissed complainant's constitutional challenges on grounds that inadequate notice had been provided — Complainant appealed — Appeal dismissed — Chambers judge did not err in finding that notice under s. 24 of Judicature Act was so inadequate and deficient as to constitute bar to complainant's constitutional challenges — Notice filed and served by complainant did not identify which parts of legislation were being attacked, nor did it provide any particulars as to complainant's proposed argument.

Table of Authorities

Cases considered:

Alberta (Minister of Human Resources & Employment) v. Alberta (Human Rights, Citizenship & Multiculturalism Commission) (2006), 377 W.A.C. 31, 391 A.R. 31, 62 Alta. L.R. (4th) 209, 273 D.L.R. (4th) 116, 2006 ABCA 235, 2006 CarswellAlta 1030, [2006] 11 W.W.R. 233 (Alta. C.A.) — considered

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s. 6 — referred to

s. 6(1) — referred to

s. 6(2)(a) — referred to

s. 6(2)(b) — referred to

s. 7 — referred to

s. 15 — referred to

Canadian Human Rights Act, R.S.C. 1985, c. H-6
Generally — referred to
Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14
Generally — referred to

s. 11 — considered

s. 21(1) — considered

s. 21(2) — considered

s. 22(1) — referred to

s. 22(1)(a) — considered

s. 26(1) — considered

s. 26(3) — considered

s. 35 — considered
Judicature Act, R.S.A. 2000, c. J-2
s. 8 — considered

s. 24 — referred to

s. 24(3) — considered
Traffic Safety Act, R.S.A. 2000, c. T-6
Generally — referred to
Rules considered:
Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 753.04 [en. Alta. Reg. 457/87] — referred to
Regulations considered:
Administrative Procedures and Jurisdiction Act, R.S.A. 2000, c. A-3
Designation of Constitutional Decision Makers Regulation, Alta. Reg. 69/2006

Generally — referred to
Traffic Safety Act, R.S.A. 2000, c. T-6
Operator Licensing and Vehicle Control Regulation, Alta. Reg. 320/2002

Generally — referred to

s. 15(2)(a) — referred to

s. 15(2)(b) — referred to

s. 16 — referred to

APPEAL by complainant from dismissal of his complaint of discrimination on basis of medical condition.

***The Court*:**

1 This appeal by Salvatore Gramaglia addresses whether his human rights complaint, which alleges discrimination on the part of Alberta Government Services ("AGS") and Alberta Transportation ("AT") by requiring the appellant to submit to a medical examination before renewing his operator's licence, was improperly dismissed by the Chief Human Rights Commissioner (the "Chief Commissioner"). Resolution of this appeal also requires consideration of the appellant's ability to raise alleged *Charter* right violations in conjunction with his judicial review application of the Chief Commissioner's decision.

Facts

2 In 2003, the appellant sought to renew his operator's license. He was asked by the registry agent whether he had diabetes, and the appellant answered in the affirmative. He was then informed that a medical examination form had to be completed before he would be eligible to renew his operator's license. Rather than attend his doctor to have the form filled out, the appellant filed a complaint with the Alberta Human Rights and Citizenship Commission ("Commission") against AGS and AT alleging that the medical examination requirement discriminated against individuals diagnosed with diabetes.

3 The Commission appointed an investigator (the "Investigator") to assess whether the policies established pursuant to the *Traffic Safety Act*, R.S.A. 2000, c. T-6 (the "*TSA*") and the *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002 (the "*TSA Regulation*") were discriminatory toward the appellant. These legislative provisions require a person applying for an operator's license to disclose a disease or disability that may be expected to interfere with his or her safe operation of a motor vehicle (*TSA Regulation*, s.16), permits the Registrar to require an applicant to submit to a medical or physical examination (*TSA Regulation*, s.15(2)(b)), and enables the Registrar to impose conditions or restrictions on an operator's license (*TSA Regulation*, s.15(2)(a)).

4 The Investigator's report, dated January 6, 2005, summarizes the facts of the appellant's case and reviewed the submissions of the parties. The submissions included documentation relied upon by AT, the entity responsible for the development of standards and policies relating to the issuance of operator's licences, that demonstrate the licensing of diabetic drivers raises a number of safety concerns due to the chronic complications often associated with the appellant's condition, which can adversely affect driving performance. The Investigator also took into account the AT's position that the Registrar will consider, upon receipt of a medical report and with the assistance of input from medical professionals, the applicant's medical condition with a view to driving safety, and that AT accommodates individuals with health and medical conditions by issuing licences with terms and conditions that reflected an individual's ability to drive.

5 The Investigator concluded that while the requirements for further medical information may *prima facie* discriminate on the basis of physical disability, the alleged discrimination was reasonable and justifiable in the circumstances. This accords with s.11 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (the "*HRCM Act*"), which provides that: "A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances." The Investigator also considered the three part test set out in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) at para. 54. As a result, the appellant's complaint was dismissed in pursuant to s.22(1) of the *HRCM Act*.

6 The appellant requested the Chief Commissioner to review the dismissal of his complaint. On April 12th, 2005, the Chief Commissioner upheld the dismissal of the appellant's complaint, stating "I see no basis on the evidence to advance this case to the panel hearing stage and hereby dismiss the appeal."

7 The appellant brought an application for judicial review in the Court of Queen's Bench.

Decision Below

8 The reviewing judge, in dismissing the appellant's application in its entirety, found that:

(1) the standard of review of the Chief Commissioner's decision is reasonableness;

(2) the Chief Commissioner acted reasonably;

(3) the constitutional issues raised by the appellant were not properly before the court and should not be heard with the appellant's judicial review application;

(4) the constitutional notice served on the Attorney General was deficient; and

(5) the appellant's *Charter* rights were not breached.

9 The reviewing judge relied on the decision of *Calgary (City) v. Alberta (Human Rights & Citizenship Commission)*, 2003 ABCA 39 (Alta. C.A.), (sub nom. *Calgary (City) v. Cabalde*) (2003), 320 A.R. 314 (Alta. C.A.), aff'g *Calgary (City) v. Cabalde*, 2000 ABQB 712, 287 A.R. 249 (Alta. Q.B.) ("*Cabalde*") in concluding that the standard of review of the Chief Commissioner's decision was reasonableness.

10 After taking into consideration the Chief Commissioner's reasons, as well as the information before the Chief Commissioner, including the Investigator's report and the appellant's submissions, the reviewing judge found that the Chief Commissioner was reasonable in dismissing the appellant's appeal:

> The Chief Commissioner in his reasons emphasized that diabetic medical evaluations are needed since diabetes can impair sensory and motor functions and therefore affect driving competencies. The chief commissioner also noted that the requirement is not a ban on all diabetic individuals driving but rather the requirement is further medical reporting so that the licensing authority can consider, in the interests of public safety, whether or not to renew a diabetic person's license.

11 The chambers judge ruled that the constitutional issues raised by the appellant were not properly before the court on the judicial review application, and that the appellant's notice did not meet the requirements of s.24(3) of the *Judicature Act*, R.S.A. 2000, c. J-2 (*Judicature Act*"). Regardless, the chambers judge found there to be no violation of the appellant's *Charter* rights.

12 Finally, the chambers judge determined that even if the constitutional issues were properly before the court, there had been no breach of any charter right possessed by Gramaglia which the chief commissioner had breached.

Issues

13 The appellant appears to argue that the chambers judge erred in determining that the standard of review was reasonableness and in finding that the Chief Commissioner acted reasonably. He also argues that the chambers judge erred with respect to the treatment of his *Charter* challenge. Throughout his factum, the appellant suggests that various persons involved were biased or acted on improper motives.

14 Resolution of this appeal requires: (1) the identification of the correct standard of review of the Chief Commissioner's decision; (2) the application of that standard to the Chief Commissioner's decision; (3) a determination as to whether the appellant was entitled to argue *Charter* issues during his judicial review application; and (4) if so, a finding as to whether the appellant has established that his *Charter* rights were violated. Finally, if the appellant's *Charter* rights were breached, it remains necessary to determine the appropriate remedy.

15 Our brief conclusions are:

1. The proper standard of review is reasonableness *simpliciter*.

2. The Chief Commissioner's decision is reasonable.

3. The appellant was not entitled to argue *Charter* breaches.

In light of our finding that the constitutional arguments were not properly before the reviewing judge, the questions regarding the alleged violations to the appellant's *Charter* rights and the appropriate remedy do not arise.

What is the Correct Standard of Review?

16 In reviewing the decision of an administrative body, a judicial review judge must correctly determine the appropriate standard against which to review each alleged error: *Alberta (Workers' Compensation Board) v. Alberta (Workers' Compensation Board Appeals Commission)*, 2005 ABCA 276 (Alta. C.A.) at para. 12, (sub nom. *Workers' Compensation Board (Alta.) v. Workers' Compensation Board Appeals Commission (Alta.)*), (2005), 371 A.R. 318 (Alta. C.A.), citing *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609 (S.C.C.). This analysis is premised on the pragmatic and functional approach established by such as cases as *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 (S.C.C.) ("*Pushpanathan*"), *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.) ("*Ryan*"), and *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.), which requires consideration of four contextual factors:

> (i) the presence or absence of a privative clause or statutory right of appeal;
>
> (ii) the purpose of the legislation and the provision in particular;
>
> (iii) the nature of the question (law, fact, or mixed law and fact); and
>
> (iv) the expertise of the tribunal relative to that of the reviewing court on the issue in question.

17 No one factor is dispositive and they all must be considered together to determine the appropriate level of deference to be accorded to each of the issues: *Pushpanathan* at para. 38. The interplay of the factors determines the level of deference owed to the administrative decision itself, and correlates to three standards of review: correctness, reasonableness simpliciter, and patent unreasonableness: *Pushpanathan* at para. 27, *Ryan* at para. 24.

Analysis

18 The statutory delegate's authority must be analyzed when assessing the standard of review. Here, the Chief Commissioner's authority derives from the following provisions of the *HRCM Act*:

> 21(1) Where the Commission receives a complaint, the director shall, as soon as is reasonably possible, attempt to effect a settlement of the complaint by means of a conciliator or through the appointment of a person to investigate the complaint.
>
> (2) Where a conciliator is unable to effect a settlement of the complaint, the director may appoint a person to investigate the complaint.
>
> . . .
>
> 22(1) Notwithstanding section 21, the director may at any time
>
> (a) dismiss a complaint if the director considers that the complaint is without merit,
>
> . . .
>
> 26(1) The complainant may, not later than 30 days after receiving notice of dismissal of the complaint or notice of discontinuance under section 22, by notice in writing to the Commission request a review of the director's decision by the chief commissioner.
>
> . . .
>
> (3) The chief commissioner shall
>
> (a) review the director's decision and decide whether

(i) the complaint should have been dismissed, or

(ii) the proposed settlement was fair and reasonable,

as the case may be, and

(b) forthwith serve notice of the chief commissioner's decision on the complainant and the person against whom the complaint was made.

. . .

35 A decision of the chief commissioner under section 26(3)(a) is *final and binding* on the parties, *subject to a party's right to judicial review of the decision*.

[emphasis added]

1. Privative Clause

19 A privative clause in a statute is one that purports to oust the jurisdiction of superior courts to review action taken by statutory delegates. A "full" privative clause "declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded": *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.) at para. 17, (1997), 149 D.L.R. (4th) 577 (S.C.C.). Such a clause is "compelling evidence" that the legislators intended the courts to show deference to the statutory delegate, although "[t]he absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard": *Pushpanathan* at para. 30.

20 Section 35 of the *HRCM Act* provides that a decision of the Chief Commissioner is "final and binding" subject to the right of the parties to judicial review. While not a "full" privative clause, a "final and binding" privative clause suggests that some deference be given to the Chief Commissioner's decision: *C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at 332-335, (1993), 102 D.L.R. (4th) 402 (S.C.C.). The court in *Sheptycki v. Alberta (Human Rights & Citizenship Commission)*, 1999 CarswellAlta 1412 (Alta. Q.B.) at para. 4 held that this privative clause in the *HRCM Act* compels the court to give judicial deference to a decision of the Chief Commissioner, as did the court in *Bigsby v. Alberta*, 2002 ABQB 574 (Alta. Q.B.) at para. 53, (2002), 318 A.R. 144 (Alta. Q.B.) ("*Bigsby*"). We agree that the s. 35 privative clause suggests that the Chief Commissioner's decision be subject to a degree of deference.

2. Purpose of the Act

21 The appropriateness of court supervision diminishes where the purpose of the statute and of the decision maker contemplates a balancing between different constituencies, as opposed to the determination of rights or entitlements as between parties: *Pushpanathan* at para. 36. Where such a balancing does not exist, court intervention is more appropriate.

22 Here, the *HRCM Act* is directed at establishing rights and prohibiting discrimination in a number of areas of public life. In that respect, the purpose of the legislation does not invite a polycentric analysis, which suggests less deference to the Chief Commissioner's decision: *S. (G.) v. Alberta (Human Rights & Citizenship Commission)*, 2002 ABQB 597 (Alta. Q.B.) at para. 47, (2002), 322 A.R. 133 (Alta. Q.B.), aff'd at 2003 ABCA 192 (Alta. C.A.), *Bigsby* at para. 63.

3. Expertise of the Body

23 The expertise of the statutory delegate is perhaps the most important of the factors, and must be understood as a relative concept that involves a comparison of the court's expertise with that of the tribunal, taking into consideration the nature of the question before the decision-maker: *Pushpanathan* at paras. 32- 33.

24 Human rights tribunals are not usually accorded curial deference on matters other than findings of fact: *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 (S.C.C.), at 338. As indicated by the Supreme Court in *Canada*

(Attorney General) v. Mossop, [1993] 1 S.C.R. 554 (S.C.C.), at 585, a human rights tribunal's expertise "relates to fact-finding and adjudication in a human rights context." While these decisions pertain to the decision of a human rights tribunal, La Forest J.A. pointed out that "[w]hat is true of a tribunal is even more true of the Commission which, as was noted in *Mossop*, is lacking the adjudicative role of a tribunal": *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (S.C.C.) at para. 61.

25 Here, the deference warranted to the Chief Commissioner depends primarily on the nature of the Chief Commissioner's decision.

4. Nature of the Question

26 The question before the Chief Commissioner was whether the AGS and AT's policies, enacted in accordance with the *TSA* and the *TSA Regulation*, were discriminatory and, if so, whether the policies were reasonable and justifiable in the circumstances. It is this second aspect of the judgment that the appellant contests.

27 A similar issue was recently considered by this court in *Alberta (Minister of Human Resources & Employment) v. Alberta (Human Rights, Citizenship & Multiculturalism Commission)*, 2006 ABCA 235, 62 Alta. L.R. (4th) 209 (Alta. C.A.) ("*Weller*"), where the primary question was whether the particular legislation in that case was discriminatory and if so, whether it was reasonable and justifiable in the circumstances. The court defined this issue as raising two questions. The first, whether the regulation was discriminatory, was characterized as a question of law and subject to the correctness standard. The second, whether any existing discrimination was reasonable and justifiable, was considered a question of mixed fact and law and subject to a standard of reasonableness: para. 20. Though *Weller* proceeded by way of statutory appeal and the decision was not subject to the privative clause, the court nonetheless afforded a degree of deference to the determination on a question of mixed fact and law.

28 Similarly, the reviewing court in *Bigsby* concluded that the Chief Commissioner's decision in that case warranted a degree of deference, as it involved an evaluation as to the sufficiency of evidence. In that instance, the questions were characterized as mixed fact and law and subject to the standard of reasonableness: see paras. 62 and 64.

29 The nature of the question in the present case is analogous to the second question in *Weller*, and is a question of mixed fact and law. The role of the Chief Commissioner is one of evaluating the sufficiency of evidence, as was the case in *Bigsby*.

Proper Standard of Review

30 While the purpose of the *HRCM Act* suggests less deference be accorded to the Chief Commissioner's decision, the privative clause, the nature of the question and the expertise of the Chief Commissioner in relation to that question, all point toward greater deference. Balancing all factors, the standard of review is reasonableness.

31 As noted above, the reviewing judge concluded that the standard was reasonableness, though he made this determination by relying upon *Cabalde*. The nature of the question before the Chief Commissioner in *Cabalde* was a question of fact, whereas the nature the problem here involves a question of mixed fact and law. It may be that the reviewing judge was in error by applying *Cabalde* without undergoing a separate *Pushpanathan* analysis. As stated by this court in *Foster v. Alberta (Transportation & Safety Board)*, 2006 ABCA 282 (Alta. C.A.) at paras. 8 - 9:

> There may be a case that presents the very same issue, in the very same factual matrix, as another case where the standard of review has already been determined. In such a situation, a ***Pushpanathan*** analysis may be moot. There may be a case where the issue and facts are so similar to another case that a ***Pushpanathan*** analysis can be perfunctory. Very often, however, the factual context presented by a judicial review case is sufficiently nuanced that a full ***Pushpanathan*** analysis is necessary. Here, such an analysis was required. The reviewing judge therefore erred in law when she conducted only a partial pragmatic and functional ***Pushpanathan*** analysis (***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982), and concluded at para. 8 that she did not need to determine the standard of review "with finality because even if a clearly wrong" standard was applied, the Board's findings withstood scrutiny.

32 Despite any potential error in this regard, the reviewing judge correctly determined that the reasonableness standard applied.

Was the Chief Commissioner's Decision Reasonable?

33 Reasonableness *simpliciter* means intervention will be justified "only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan* at para. 55.

34 In this case, the Chief Commissioner reviewed the Investigator's report and other material put forward by the appellant and concluded that the complaint should have been dismissed. On page 2 of his reasons, the Chief Commissioner reasoned:

> Automobile licensing regulations in Alberta require medical disclosure to the Registry office of any disability that may interfere with the safe operation of a motor vehicle. Only after receiving any medical reporting that may be required can the Registry office consider renewing a diabetic person's license subject to any condition they consider advisable.
>
> From the evidence collected by the investigator in particular that found in the Canadian Diabetic Association publication "Guidelines for Diabetes and Private and Commercial Driving (2003)" it is very clear that diabetic medical evaluations are needed since the condition can impair sensory and motor functions and therefore effect driving competencies.
>
> Salvatore Gramaglia was treated no differently than any other person who has a disability that may impair their driving ability.
>
> I see no basis in the evidence to advance this case to the panel hearing stage and hereby dismiss the appeal.

35 It is this decision to which we must apply the reasonableness *simpliciter* standard. The Chief Commissioner considered the facts before him, and found that further inquiry into the matter by a human rights panel was not warranted. This finding is clearly reasonable; it is based on findings from credible sources that demonstrate diabetes to pose a risk to drivers themselves, as well as others, but recognizes that the presence of a disability is not an automatic bar since conditions may be imposed upon individuals to address the underlying concern. It can hardly be said that these reasons fail to disclose a line of analysis that could reasonably lead the Chief Commissioner to this conclusion.

Should the Appellant Have Been Entitled to Raise his *Charter* Challenges at the Judicial Review Application?

36 The appellant also challenges the chambers judge's decision respecting his ability to raise various *Charter* issues, including challenges to unspecified provisions of the *Transportation Act* (though no such enactment exists), and s.11 of the *HRCM Act*.

37 Generally, the correctness standard of review applies to constitutional cases: see *Fitzgerald (Next Friend of) v. Alberta*, 2004 ABCA 184 (Alta. C.A.) at para. 9, (2004), 348 A.R. 113 (Alta. C.A.); *Ferraiuolo Estate v. Olson*, 2004 ABCA 281 (Alta. C.A.) at para. 14, (2004), 357 A.R. 68 (Alta. C.A.). The question as to whether the appellant is entitled to raise *Charter* arguments involves the interpretation of statutes and the Alberta *Rules of Court* and is therefore an issue of law to be determined on a correctness standard. Whether particular acts of government officials result in a violation of *Charter* rights and whether certain legislative enactments should be declared inoperative as being contrary to the *Charter* are also questions of law to be decided on the correctness standard.

38 The Attorney General argues those *Charter* issues advanced by the appellant could not have been determined by the Chief Commissioner, nor by a panel constituted under the *HRCM Act*. Indeed, the *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006, promulgated under the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3 limits a human rights panel to determinations of constitutional questions relating to the division of federal and provincial powers. Based on this, it is argued that the reviewing judge is limited on a judicial review application to reviewing those matters over which the Chief Commissioner has jurisdiction, and relies on Rule 753.04.

39 Even if Rule 753.04 can be interpreted in this manner, no Alberta legislation, including the *Rules of Court*, prevents a judicial review application from being combined with an application for other relief. In fact, it may often be efficient to do so when the other relief sought is so closely connected to the matters being considered in the judicial review application. Section 8 of the *Judicature Act* directs that the court has a general jurisdiction to grant any remedy so as to avoid, if at all possible, multiple proceedings and to ensure that all matters between the parties are completely determined. Moreover, the authority to grant a *Charter* remedy is accorded to a court of competent jurisdiction, which surely includes a Queen's Bench Justice: see *R. v. Mills*, [1986] 1 S.C.R. 863, 29 D.L.R. (4th) 161 (S.C.C.).

40 Although the Chief Commissioner did not enjoy the jurisdiction to grant *Charter* remedies, the chamber's judge did and it was an error of law to decline to deal with *Charter* issues on the basis of any lack of jurisdiction *per se*.

41 Nonetheless, a chambers judge may still decide that *Charter* issues are not properly before the court where the commencing document fails to provide notice to those against whom relief is sought of what is being sought.

42 In this case, the appellant's Originating Notice is 24 pages in length containing numerous allegations as to his treatment by the Alberta human rights regime. Within these pages, the appellant appears to have sprinkled several *Charter* arguments.

43 The first is found at para 5, where the appellant alleges that the AGS and AT's Ministers' "provision" that an entitlement to a driver's licence is a privilege is contrary to "section 6.(1)(2)(a)(b)" of the *Charter*. This allegation does not identify any particular section of any validly enacted legislation that is being challenged, likely because no such provision of either the *HRCM Act* or the *TSA* exists. However, the "driving is a privilege" analysis is likely part of the common law, which is to accord with the principles of the *Charter*: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 (S.C.C.).

44 The second allegation, found in para 15, is that the Chief Commissioner's dismissal of the appellant's complaint without an oral hearing on the merits constitutes a violation of the appellant's s.7 *Charter* rights. Again, no specific legislation is addressed, though one might well surmise that the provisions of the *TSA Act* permitting the Chief Commissioner to dismiss a complaint on the basis of a record review would be under attack.

45 The third *Charter* allegation is found in para 18, where the appellant asks the court to direct that the Alberta government ensure all its legislation is brought in line with s.15 of the *Charter* and that "the value of human dignity" be enshrined into the *HRCM Act*. These allegations are so vague and general as to be meaningless, and any notice based on this assertion constitutes no notice at all.

46 Next, at the bottom of page 8 of his Originating Notice, the appellant seemingly reasserts that the right to hold an operator's licence is a constitutional right. This reassertion adds nothing to his constitutional claims.

47 At the top of page 12, the appellant asserts that diabetes is a disability and that disabled persons are protected under the *HRCM Act*, the *Canadian Human Rights Act*, the *Charter*, and the Universal Declaration on Human Rights. This assertion does not provide meaningful notice of anything, as no specific act or statute is referenced as being contravened.

48 At page 18, the appellant reasserts that the right to a driver's licence is a constitutional right that enhances mobility rights under "section 6.(2)(a)(b)" of the *Charter*. This reassertion adds nothing to his earlier references to this issue.

49 The appellant reasserts his position at the top of page 20 with respect to human rights outlined earlier at page 12 of his Originating Notice. As before, this reassertion adds nothing and does not provide meaningful notice of his argument.

50 Finally, in the relief portion of the Originating Notice, the appellant seeks an order declaring that the "provision" that a driver's licence is a privilege be struck down on the basis of "section 6(2)(a)(b)" of the *Charter*, and an order declaring the provision in the (non-existent) *Transportation Act* requiring a disabled person to furnish a medical certificate prior to being issued a driver's licence as unconstitutional and contrary to the *Charter*.

51 Despite the vagueness in the Originating Notice, we conclude that it was sufficient to raise certain *Charter* issues respecting the *TSA*, specifically as to whether any provision or regulation under the *TSA* requiring a person suffering from diabetes to provide a medical certificate before they are entitled to renew their driver's licence violates ss.6 and 15 of the *Charter*. We also conclude that the appellant sufficiently stated his challenge to the *HRCM Act* under s.7 of the *Charter* in relation to the failure to hold an oral hearing. Any other constitutional challenges fail simply because the Originating Notice does not sufficiently describe the nature of the constitutional challenge and does not provide sufficient particulars as to what is being challenged.

52 The matter does not end there, as s.24(3) of the *Judicature Act* requires an applicant to provide appropriate notice to the Attorney General of Canada and the Alberta Minister of Justice where an enactment is being challenged in a proceeding, with such notice to "include what enactment or part of an enactment is in question and give reasonable particulars of the proposed argument."

53 The appellant filed and served a form of notice on the appropriate parties. A copy of that notice is attached to this memorandum as Appendix A. It again refers to the *Transportation Act* (which does not exist) and the *HRCM Act*. It does not identify what part of either enactment is being attacked, nor does it provide any particulars as to the appellant's proposed argument. Rather, it requests that all provisions found to be inconsistent with the appellant's views regarding the *Charter* and other quasi-constitutional legislation be either struck or amended to achieve compliance with the *Charter* or the other legislation.

54 We conclude that although the chamber's judge erred in his analysis of whether a judicial review may be combined with other proceedings, he did not err in his alternative finding that the notice under s.24 of the *Judicature Act* was so inadequate and deficient as to constitute a bar to the appellant's constitutional challenges.

55 The appellant's appeal as to his constitutional challenges must also be dismissed. In the result, the appellant's appeal fails entirely and it is dismissed in total.

Appeal dismissed.

End of Document

TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: Parmar v. Royal Bank of Canada | 2016 ABQB 439, 2016 CarswellAlta 1503, [2016] A.W.L.D. 3578, [2016] A.W.L.D. 3659, 269 A.C.W.S. (3d) 561 | (Alta. Q.B., Aug 9, 2016)

2016 ABCA 12
Alberta Court of Appeal

Pyrrha Design Inc. v. Plum and Posey Inc.

2016 CarswellAlta 165, 2016 ABCA 12, [2016] A.W.L.D. 972, [2016] A.J. No. 129, 263 A.C.W.S. (3d) 633

Pyrrha Design Inc., Appellant (Plaintiff/Applicant) and Plum and Posey Inc. and Adrinna M. Hardy, Respondents (Defendants/Respondents)

Ronald Berger, J.D. Bruce McDonald, Frederica Schutz JJ.A.

Heard: November 13, 2015
Judgment: February 9, 2016
Docket: 1301 14850 - lower level on order.

Counsel: N.M. Ramessar, T.P. Lo, for Appellant / Plaintiff / Applicant
R.A. Smith, for Respondents / Defendants / Respondents

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XVIII Summary judgment
XVIII.3 Availability of summary judgment
XVIII.3.b Miscellaneous
Headnote
Civil practice and procedure --- Summary judgment — Availability of summary judgment — Miscellaneous
Parties were separately involved in creation and distribution by sale of synthetic jewelry that gave appearance of antique wax seal impressions — Parties entered into settlement agreement which required that respondent, PP Inc., cease creating and selling jewelry that had specific characteristics, these characteristics being claimed as unique and protected characteristics of jewelry created and distributed for sale by appellant, PD Inc — PD Inc. sued PP Inc., claiming that PP Inc. had breached terms of settlement contract, and applied for summary judgment — PP Inc. did not formally cross-apply for summary dismissal, although they requested this relief in their written brief filed in response to PD Inc.'s application — Chambers judge concluded that matter could be dismissed on summary basis because this was most efficient and proportionate way to proceed, and that it was fair and just to proceed on existing record — PD Inc. appealed decision, dismissing case on summary basis — Appeal dismissed — PD Inc. was not prejudiced by PP Inc.'s failure to file and serve formal notice of application for summary dismissal — Chambers judge did not err in granting summary dismissal in absence of formal application by PP Inc. — Chambers judge was required to interpret settlement contract made between parties and view photographs of PP Inc.'s impugned jewelry and decide whether jewelry showed features that were prohibited by settlement contract — Both settlement contract and photographs of impugned jewelry were admitted before chambers judge as being material evidence for consideration — Chambers judge interpreted contract in accordance with contractual interpretation principles, and she viewed with her own eyes photographic evidence proffered by PD Inc. in support of its assertion that PP Inc. had breached settlement contract — Chambers judge did not err in granting summary dismissal — Chambers judge carefully detailed five main categories of alleged breaches of settlement agreement, and thoroughly assessed photographic evidence to determine whether alleged breaches had been established.

The parties were separately involved in the creation and distribution by sale of synthetic jewelry that gave the appearance of antique wax seal impressions. The parties entered into a settlement agreement which required that the respondent, PP Inc., cease creating and selling jewelry that had specific characteristics, these characteristics being claimed as unique and protected characteristics of the jewelry created and distributed for sale by the appellant, PD Inc. PD Inc. sued PP Inc., claiming that PP Inc. had breached the terms of the settlement contract, and applied for summary judgment. PP Inc. did not formally cross-apply for summary dismissal, although they requested this relief in their written brief filed in response to PD Inc.'s application. The chambers judge concluded that the matter could be dismissed on summary basis because this was the most efficient and proportionate way to proceed, and that it was fair and just to proceed on the existing record. PD Inc. appealed the decision, dismissing the case on a summary basis.

Held: The appeal was dismissed.

Per Berger J.A. and Schutz J.A.: PD Inc. was not prejudiced by PP Inc.'s failure to file and serve a formal notice of application for the summary dismissal. The chambers judge did not err in granting a summary dismissal in the absence of a formal application by PP Inc. The chambers judge was required to interpret the settlement contract made between the parties and view photographs of PP Inc.'s impugned jewelry and decide whether the jewelry showed features that were prohibited by the settlement contract. Both the settlement contract and the photographs of the impugned jewelry were admitted before the chambers judge as being material evidence for consideration. The chambers judge interpreted the contract in accordance with contractual interpretation principles, and she viewed with her own eyes the photographic evidence proffered by PD Inc. in support of its assertion that PP Inc. had breached the settlement contract. The chambers judge did not err in granting a summary dismissal. The chambers judge carefully detailed five main categories of alleged breaches of the settlement agreement, and thoroughly assessed photographic evidence to determine whether the alleged breaches had been established.

Per McDonald J.A. (dissenting): The appeal should have been allowed, and PD Inc.'s entire action should have been set aside. The appellant should have been directed to re-apply for summary judgment before another Queen's Bench judge. At no time did counsel for PP Inc. ever advise PD Inc.'s counsel by way of correspondence that not only was he resisting PP Inc. application for summary judgment but that he was also seeking summary dismissal of the appellant's entire action. Counsel for PP Inc. did not clearly and unequivocally advise court at the outset of the application that it was seeking dismissal of the appellant's claim as opposed to merely seeking dismissal of its application for summary judgment.

Table of Authorities

Cases considered by *Ronald Berger, Frederica Schutz JJ.A.*:

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABQB 120, 2015 CarswellAlta 287, 40 C.L.R. (4th) 187 (Alta. Q.B.) — considered

Bank of Montreal v. Valerio (2009), 2009 ABQB 578, 2009 CarswellAlta 1514, 480 A.R. 393 (Alta. Q.B.) — referred to

Bighorn No. 8 (Municipal District) v. Bow Valley Waste Management Commission (2015), 2015 ABCA 127, 2015 CarswellAlta 575, 90 C.E.L.R. (3d) 203, 599 A.R. 395, 643 W.A.C. 395, 13 Alta. L.R. (6th) 342 (Alta. C.A.) — considered

Condominium Corp. No. 0321365 v. 970365 Alberta Ltd. (2012), 2012 ABCA 26, 2012 CarswellAlta 58, 15 C.P.C. (7th) 297, 57 Alta. L.R. (5th) 1, 14 R.P.R. (5th) 184, [2012] 6 W.W.R. 42, 10 C.L.R. (4th) 229, 346 D.L.R. (4th) 291, 519 A.R. 322, 539 W.A.C. 322 (Alta. C.A.) — referred to

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Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd. (2010), 2010 ABCA 126, 2010 CarswellAlta 746, 477 A.R. 112, 483 W.A.C. 112, 25 Alta. L.R. (5th) 221 (Alta. C.A.) — referred to

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Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), 2008 SCC 14, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 86 Alta. L.R. (4th) 1, [2008] 5 W.W.R. 195, (sub nom. *Lameman v. Canada (Attorney General))* 372 N.R. 239, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, [2008] 2 C.N.L.R. 295, (sub nom. *Lameman v. Canada (Attorney General))* 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General))* 421 W.A.C. 26, (sub nom. *Canada (Attorney General) v. Lameman)* [2008] 1 S.C.R. 372 (S.C.C.) — referred to

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Cases considered by *J.D. Bruce McDonald J.A.* (dissenting):

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Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — considered in a minority or dissenting opinion

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McLeod v. Alberta (Securities Commission) (2006), 2006 ABCA 231, 2006 CarswellAlta 993, 61 Alta. L.R. (4th) 201, 391 A.R. 121, 377 W.A.C. 121, 272 D.L.R. (4th) 94 (Alta. C.A.) — considered in a minority or dissenting opinion

Statutes considered by *Ronald Berger J.A., Frederica Schutz J.A.*:

Judicature Act, R.S.A. 2000, c. J-2

s. 8 — considered

Rules considered by *Ronald Berger J.A., Frederica Schutz J.A.*:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 1.3 — considered

R. 1.3(1) — considered

R. 1.3(2) — considered

R. 7.3(2) — considered

Rules considered by *J.D. Bruce McDonald J.A.* (dissenting):

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 1.2(1) — considered

R. 1.2(3)(a) — considered

R. 1.3 — considered

R. 7.3 — considered

R. 7.3(3) — considered

APPEAL from case dismissing case on summary basis.

***Ronald Berger, Frederica Schutz JJ.A.*:**

Introduction

1 This is an appeal from a chambers judge's summary dismissal of a claim involving the interpretation of a settlement agreement between the parties. For the reasons that follow, the appeal is dismissed.

Background and Decision Below

2 A detailed review of the evidence and background facts is clearly set out in the decision below, delivered orally on June 30, 2014, and will only be briefly summarized here.

3 The parties were separately involved in the creation and distribution by sale of synthetic jewellery that gave the appearance of antique wax seal impressions. The parties entered into a settlement agreement which required that the respondents cease creating and selling jewellery that had specific characteristics, these characteristics being claimed as unique and protected characteristics of the jewellery created and distributed for sale by the appellant.

4 The appellant sued the respondents, claiming that the respondents had breached the terms of the settlement contract, and applied for summary judgment. The respondents did not formally cross-apply for summary dismissal, although they requested this relief in their written brief filed in response to the appellant's application. The chambers judge concluded that the matter could be dismissed on a summary basis because this was the most efficient and proportionate way to proceed, and that it was fair and just to proceed on the existing record.

Issues

5 There are three issues raised by this appeal:

1. Did the chambers judge err in granting summary dismissal of the appellant's claim in the absence of a formal application by the respondents?

2. Did the chambers judge err in granting summary dismissal of the appellant's claim on the record that was before the Court?

3. Did the chambers judge err in interpreting the settlement contract?

Standard of Review

6 Decisions regarding summary disposition are discretionary and, absent an error of law, are reviewed for reasonableness: *Dingwall v. Foster*, 2014 ABCA 89 (Alta. C.A.) at para 19, (2014), 572 A.R. 106 (Alta. C.A.); *Condominium Corp. No. 0321365 v. 970365 Alberta Ltd.*, 2012 ABCA 26 (Alta. C.A.) at para 39, (2012), 519 A.R. 322 (Alta. C.A.). Put another way, absent palpable and overriding error, the chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination as to whether summary dismissal was appropriate is entitled to deference: *P. (W.) v. Alberta*, 2014 ABCA 404 (Alta. C.A.) at para 16, (2014), 588 A.R. 110 (Alta. C.A.); *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at para 10, (2014), 572 A.R. 317 (Alta. C.A.).

7 The appropriate standard of review for the contractual interpretation is, in this case, palpable and overriding error because this case does not involve a standard form contract and we identify no extricable error of law. In that respect, this case is on

all fours with *Bighorn No. 8 (Municipal District) v. Bow Valley Waste Management Commission*, 2015 ABCA 127 (Alta. C.A.) at paras 5-8, (2015), 13 Alta. L.R. (6th) 342 (Alta. C.A.):

> [5] Although contractual interpretation was historically considered a question of law, the Supreme Court of Canada recently confirmed that the historical approach should be abandoned. Contractual interpretation is a question of mixed fact and law that involves the application of interpretative principles to the words of the written contract, considered in light of the factual matrix: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (CanLII) at para 50. Unless a pure question of law can be readily extricated, questions of mixed fact and law are reviewed for palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 (CanLII) at paras 36-37, [2002] 2 SCR 235. Because the goal of contractual interpretation is inherently fact specific, the circumstances in which a question of law can be readily extricated from the interpretation process are rare: *Sattva* at paras 54-55.
>
> . . .
>
> [7] This Court has also concluded that correctness remains the appropriate standard of review when interpreting standard form contracts since the results would be expected to have an impact beyond the parties to a particular dispute and be of precedential value: *Sattva* at para 51; *Vallieres* at para 13.
>
> [8] This case does not involve a standard form contract, nor has the MD identified any extricable errors of law. The appropriate standard of review is therefore palpable and overriding error.

Analysis

Issue 1: Did the chambers judge err in granting summary dismissal of the appellant's claim in the absence of a formal application by the respondents?

8 It is incontestable that a chambers judge possesses inherent jurisdiction to control its process: *De Shazo v. Nations Energy Co.*, 2006 ABCA 400 (Alta. C.A.) at para 12, (2006), 401 A.R. 142 (Alta. C.A.); *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.) at para 33, (1995), 130 D.L.R. (4th) 385 (S.C.C.). This jurisdiction is also expressly granted by s 8 of the *Judicature Act*, RSA 2000, c J-2, which provides the court with power to grant any appropriate remedy that is appropriate in the discrete circumstances of a case: *Nafie v. Badawy*, 2015 ABCA 36 (Alta. C.A.) at paras 97-98, (2015), 11 Alta. L.R. (6th) 1 (Alta. C.A.); *Bank of Montreal v. Valerio*, 2009 ABQB 578 (Alta. Q.B.) at para 30, (2009), 480 A.R. 393 (Alta. Q.B.).

9 Rule 1.3(1) of the *Alberta Rules of Court* is to like effect when it states that the Court may do either or both of:

> (a) give any relief or remedy described or referred to in the *Judicature Act*; or
>
> (b) give any relief or remedy described or referred to in or under these Rules or any enactment.

Rule 1.3(2) specifically states that a "remedy may be granted by the Court whether or not it is claimed or sought in an action."

10 And, quite apart from avoiding the multiplicity of actions — the mischief sought to be avoided by s 8 of the *Judicature Act* and R 1.3 of the *Alberta Rules of Court*, a proposition for which there is also ample case authority — the chambers judge properly adhered to the urging of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) to the effect that courts are obliged to resolve legal disputes in the most cost-effective and timely method available, provided the process selected ensures fairness between the parties. Here, the chambers judge is to be commended, not criticized, for pursuing a cost-effective, timely *final* resolution to this litigation which was fair and just to the parties, as it simply serves no one's interest to permit continuation of protracted and costly litigation when it can be properly disposed of summarily and entirely.

11 This Court has expressly advocated a modern approach, involving the broad interpretation of summary judgment rules, in order to comply with the Supreme Court's recognition in *Hryniak* at para 2 that "a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system": *Windsor* at para 13. The motions court must

determine "whether the issue of law can fairly be decided on the record before the court": *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.) at para 11, (2006), 401 A.R. 88 (Alta. C.A.).

12 The respondents concede that it would have been preferable to file and serve a formal application for summary dismissal. However, having reviewed the record in these proceedings, we agree with the respondents that the appellant had sufficient notice of the respondents' position with respect to the merits of the appellant's claim and, further, that there is no suggestion that the appellant was taken by surprise or that any prejudice resulted from the procedure followed, because:

- In its statement of defence, the respondents expressly plead that the allegations made against them by the appellant were "entirely without merit".

- The respondents filed written submissions 11 days in advance of the special chambers application in which they specifically asserted that they had not breached the terms of the settlement contract and in those submissions, twice expressly requested that the action be dismissed in its entirety, on a summary basis.

- After receiving the written submissions and notice of the respondents' intention to seek summary dismissal, the appellant did not object in any fashion to this informal demand for summary dismissal although it conceded that the submissions were read, and recognized that these materials would also be read, in advance of the special hearing date, by the assigned chambers judge.

- Additionally, the respondents had signed a consent order which allowed the appellant to file a surrebuttal brief for the application, which was in fact filed and which specifically responded to the respondents' written submissions, including addressing the evidence given by Ms. Hardy at the comprehensive cross-examination on her affidavit.

13 The appellant fairly concedes that it did put its "best foot forward" before the chambers judge and did argue that its interpretation of the contract, when compared to the photographic evidence proffered at the special hearing, rendered unassailable the conclusion that the respondents had breached the settlement contract.

14 The chambers judge reached an opposite conclusion and found that on the same evidence and having regard to her "interpretation of the settlement contract", there was no merit to the appellant's claim. The gravamen of the appellant's summary judgment claim was that the photographs proved breaches of the settlement agreement. In turn, the essence of the respondents' summary dismissal argument was that the photographs did not support this claim and there had been no breach of the settlement agreement. The outcome either way depended on the chambers judge's assessment of the settlement agreement and whether the photographs proved that the agreement had been breached. If the appellant put its "best foot forward" on its summary judgment application, as it was required to do, we are not persuaded that it could have proffered any additional evidence or made any different arguments had the respondents formally applied for summary dismissal.

15 Nor do we see any merit to the appellant's objection that the respondents failed to formally comply with R 7.3(2), which dictates that an application for summary dismissal must be supported by an affidavit swearing positively that one or more of the grounds for summary dismissal have been met, or by other evidence to the effect that the grounds for summary dismissal have been met.

16 In the present case, Ms. Hardy's affidavit sworn on May 30, 2014 and filed on June 2, 2014 satisfies the substance of R 7.3(2) in that it contained the evidence upon which the respondents relied in seeking summary dismissal. In essence, the appellant's submissions in this regard are a complaint of form over substance. We find that the respondents met the substance of R 7.3(2) and the underlying basis for it.

17 In our view, the appellant was not prejudiced by the respondents' failure to file and serve a formal notice of application for summary dismissal. The appellant urged the chambers judge to do exactly that which was done, but clearly does not agree with the result and now complains that it was an unfair process. The failure to file and serve a formal notice of application may, in some circumstances, prejudice the opposite party. The essence of the Rule is to protect litigants from ambush or litigation

surprise. On the record before us, there was neither. Accordingly, we conclude that the chambers judge did not err in granting summary dismissal in the absence of a formal application by the respondents.

Issue 2: Did the chambers judge err in granting summary dismissal of the appellant's claim on the record that was before the Court?

18 Despite the appellant's position before the chambers judge that this matter could be dealt with summarily on the record before the Court, the appellant now says that for the chambers judge to do as invited was an error. The appellant now contends that this claim was never amenable to summary judgment, and despite acknowledging at the appeal hearing that it had brought its "best foot forward" in support of its summary judgment application, the appellant now says that it was a mistake to even bring the application and seeks to entirely resile from the very firm position taken before the chambers judge.

19 This Court has recently made clear that summary disposition is available where a fair process reveals there is no merit to a claim: *776826 Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49 (Alta. C.A.) at para 13, (2015), 593 A.R. 391 (Alta. C.A.). "The question is whether there is in fact any issue of 'merit' that *genuinely* requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily": *P. (W.)* at para 26.

20 Disputes over the interpretation of contracts "may lend themselves particularly well to summary judgment": *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120 (Alta. Q.B.) at para 52, (2015), 40 C.L.R. (4th) 187 (Alta. Q.B.), referencing *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380, 401 A.R. 88 (Alta. C.A.).

21 In this case, the chambers judge was required to interpret the settlement contract made between the parties and view the photographs of the respondents' impugned jewellery and decide whether the jewellery showed features that were prohibited by the settlement contract. Both the settlement contract and the photographs of the impugned jewellery were admitted before the chambers judge as being the material evidence for consideration. The factual matrix around the making of the settlement contract was not materially in dispute.

22 A large portion of the affidavits of Wade Papin express his opinion about what the settlement contract means. This is inadmissible conjecture: *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126 (Alta. C.A.) at para 16, (2010), 477 A.R. 112 (Alta. C.A.). Similarly, where Ms. Hardy's sworn evidence on cross-examination appears to conflict, it is of no consequence because Ms. Hardy's opinion about what the settlement contract means is equally inadmissible. Inadmissible evidence was properly ignored by the chambers judge.

23 The appellant's contention that the record was deficient is untenable because:

- The appellant affixed the same photographs as appendices to its statement of claim alleging that the photographs were collectively, and categorically, evidence of the respondents' breaches of the settlement contract;

- The impugned jewellery had been sold; consequently, the photographs are the best available evidence;

- The appellant enlarged the photographs to many times actual size which may well have distorted the features of the jewellery, or negatively affected the clarity of the photographic images, but the chambers judge nonetheless properly proceeded on the basis that both parties had put their "best foot forward" and decided the case on the evidence before the Court at the hearing, not upon what could have been, or should have been before it: *1214777 Alberta Ltd. v. 480955 Alberta Ltd.*, 2014 ABQB 301 (Alta. Q.B.) at para 17; *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 (S.C.C.) at para 19, [2008] 1 S.C.R. 372 (S.C.C.) [hereinafter Lameman].

24 The chambers judge interpreted the contract in accordance with contractual interpretation principles, and she viewed with her own eyes the photographic evidence proffered by the appellant in support of its assertion that the respondents had breached the settlement contract. It was entirely within the ambit and purview of the chambers judge's discretion and duty to decide for herself, in light of her interpretation of the settlement contract, whether the photographic evidence supported a breach of that contract.

25 It is noted that at the very outset of the special hearing before the chambers judge, counsel for the appellant made clear that this case was suitable for summary judgment for two reasons: (1) there is a body of case law that assists the Court in interpreting the various words used in the contract, and the interpretation of a contract is "suitable for summary judgment absent of factual dispute"; and (2) the appellant wanted to be very clear that this dispute is not about the process but "about the end result of the jewellery that is being made here." Counsel for the appellant went on to say that the admissions made by the respondents combined with the "four corners of the contract" should place the Court in a position where it is "comfortable being able to grant summary judgment."

26 Although counsel for the appellant strenuously suggested on appeal that there might have been additional evidence brought out in a trial, or that experts at trial might have illuminated the deliberations, submissions of counsel are simply not evidence. The appellant conceded that it marshalled its best evidence on the summary judgment application, and there is no substantiation of any additional evidence or argument that could have been put forward at trial. As noted by the Supreme Court, "[a] summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed": *Lameman* at para 19.

27 This is a prime example of a case with no genuine issue requiring trial because the summary process: (1) allowed the chambers judge to make the necessary findings of fact; (2) allowed the chambers judge to apply the law to the facts; and (3) was a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak* at para 49. The chambers judge in this case was confident that a summary determination on the existing record allowed for a fair and just adjudication, and it was therefore the proportionate way to resolve the dispute: *Hryniak* at para 50.

28 We conclude that the chambers judge did not err in granting summary dismissal on the record before the Court.

Issue 3: Did the chambers judge err in interpreting the settlement contract?

29 The chambers judge carefully detailed five main categories of alleged breaches of the settlement agreement, involving 100 different jewellery designs, and thoroughly assessed the photographic evidence to determine whether the alleged breaches had been established. We have reviewed the reasons of the chambers judge. We detect no error in the analysis, much less any palpable and overriding error.

Conclusion

30 We conclude that the chambers judge made no reviewable errors in this case. The appeal is dismissed.

***J.D. Bruce McDonald J.A.*, (dissenting):**

Introduction

31 For the reasons set out below, I would allow the appeal, set aside that portion of the order in the court below dismissing the appellant's entire action and direct that the appellant re-apply for summary judgment before another Queen's Bench judge on the terms set out below.

Analysis

32 This ground of the appeal raises the question of procedural fairness and hence is reviewed by this Court on the basis of correctness*: McLeod v. Alberta (Securities Commission)*, 2006 ABCA 231 (Alta. C.A.) at para 31 citing the Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.); *Alberta (Securities Commission) v. Workum*, 2010 ABCA 405 (Alta. C.A.) at para 28.

33 I would allow the appeal since the procedure followed by the respondent in this case was non-compliant with the *Alberta Rules of Court* and worked an injustice on the appellant's counsel.

34 I am mindful of Rule 1.2(1) of the *Alberta Rules of Court* which states:

> The purpose of these Rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way

I am also mindful of the new regime ushered in by the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7 (S.C.C.) wherein the courts must apply the concept of proportionality and arrive at a fair and just adjudication of the issues in a manner that does not impose upon the parties unnecessary expense.

35 That said, I do not believe that either Rule 1.2(1) or the new regime gives to either counsel or the parties themselves *carte blanche* to disregard the *Alberta Rules of Court* as was done by the respondent in this case. Indeed, Rule 1.2(3)(a) expressly states:

> To achieve the purpose and intention of these Rules the parties must, jointly and individually during an action
>
> > **(a) Identify** or make an application to identify **the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense**
> >
> > (emphasis added)

36 There is no need to reiterate the facts in their entirety; however, the following should be borne in mind:

- On February 10, 2014, the appellant formally applied for summary judgment pursuant to rule 7.3 of the *Alberta Rules of Court*. He brought this application in form 27 and by filing an affidavit in support.
- The application was set for Special Chambers on June 17, 2014.
- On June 2, 2014 the respondent filed an affidavit of Adrianna Hardy which simply stated in the final paragraph:

  > I make this Affidavit in opposition to the application for summary judgment and a permanent injunction brought by the plaintiff, Pyrrah.

- Cross-examination of the affiant Adrianna Hardy was conducted on June 9, 2014
- On June 6, 2014 the respondent filed a brief to the appellant's application whereby counsel requested that the appellant's action be "dismissed in its entirety on a summary basis".
- No cross-application was ever made by the respondent seeking summary dismissal of the appellant's claim.

37 At no time did counsel for the respondent ever advise the appellant's counsel by way of correspondence that not only was he resisting the appellant's application for summary judgment but that he was also seeking summary dismissal of the appellant's entire action.

38 Furthermore, a review of the transcript of the hearings before the chambers judge indicates that counsel for the respondent did not clearly and unequivocally advise court at the outset of the application that he was seeking dismissal of the appellant's claim as opposed to merely seeking dismissal of its application for summary judgment.

39 Indeed, a review of the transcript of the proceedings in the court below indicates that it was not until the appellant's reply argument that the court itself gave an indication that it was formally considering a summary dismissal application of the appellant's entire claim. Counsel for the appellant and the court had the following exchange:

> My Lady, if I — I may have the opportunity to make my brief reply submissions to my friend's arg —
>
> > THE COURT: Very brief.

> MR. RAMESSAR: The first submission that I have to make is my friend speaks about both parties wanting to deal with this summarily. There is no application for a summary dismissal in front of the court from my friend. He seemed to be making submissions to that context, but I never have been filed or ser — or been served with any application for summary dismissal. **And I have not had an opportunity to respond to any such arguments in my briefs.**
>
> Now that is more of a pers -
>
> THE COURT: Well, I — I — I — I — I think that in his brief he does say that you're asking for summary judgment and he's saying you can't make out your case. So whether — he doesn't have to apply for summary dismissal if he's continuing to deny your — that you made your case.
>
> MR. RAMESSAR: Well, that's — well, I just wanted to by [sic] crystal clear on the record. I understand that my friend is making submissions that say I don't meet summary judgment and we're back on the ordinary track. I understand that. But I just wanted to clarify that no one is under the impression that there's a summary dismissal application of the plaintiff's claim before the court right now because there has been no service of such materials and no notice to me of same.
>
> Now, I just want to go and —
>
> THE COURT: Well, okay. But let's stop there for a second. I think — so one option is to say this is not a matter that can be dealt with summarily. That's fine. But the other matter is to say that it can be dealt with summarily and that there is enough evidence here and I find the following, and that can be a negative finding to you, which is the same as a summary dismissal, right. I could find if I go forward on a summary judgment, that you haven't met your case and you lose, right. That's — you don't just get to win on summary judgment, I mean, or get a kick at the can to go back to trial.
>
> MR. RAMESSAR: See that would — and I think my understanding differ there. I think that, yeah, there's the possibility of deciding disputed issues, but I don't — I'm not aware of any decision where a summary judgement application could turn into a summary dismissal application against the plaintiff. The specific test that we're alleging we have to meet. But if we don't meet that particularly high test, we would always have the opportunity to meet that test on the balance of probabilities in front of a trail judge.
>
> THE COURT: Absolutely not. Absolutely not. If you're here asking me to do summary judgment on your application, I can dismiss your claim, okay.
>
> MR. RAMESSAR: All right, My Lady.
>
> THE COURT: All right. I mean, you know, **I can say this isn't a matter for summary judgment, in which case you get a trial. But if I decide that I'm doing it summarily and I look at all the evidence and I don't think you've made your case, I dismiss your case.** I'm dealing summarily with the case, not just this application. So I need you really to understand that that's the implication of what it is you're doing here.
>
> MR. RAMESSAR: No, I —
>
> THE COURT: Okay?
>
> MR. RAMESSAR: Your point is taken -

(emphasis added)

The foregoing exchange in my view does suggest prejudice to the appellant's counsel in the proceedings below.

40 Rule 7.3 does not specify what is to happen in the event that an application for summary judgment is unsuccessful. It only specifies in Rule 7.3(3) what the court may do in the event that the application "is successful".

41 It is one thing for an applicant's application for summary judgment to be dismissed with the result that the applicant must then proceed to trial in the normal course if it wants to pursue its claim. It is quite another matter however to have one's own application for summary judgment turned against it without proper notice and to have its action dismissed entirely at the chambers level.

42 Since the respondent had not filed its own application for summary dismissal, then at a minimum to be within the spirit if not the letter of the Rules, it ought to have specifically and unequivocally advised appellant's counsel of his intention to utilize the appellant's own application for summary judgment against him to seek an order to have the entire claim dismissed. This was not done in this case.

43 I am cognizant of the provisions of Rule 1.3 which states:

> 1.3(1) The Court may do either or both of the following:
>
> (a) give any relief or remedy described or referred to in the Judicature Act;
>
> (b) give any relief or remedy described or referred to in or under these rules or any enactment.
>
> (2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

This provision simply clarifies the jurisdiction generally of the Court of Queen's Bench of Alberta. It is not to be interpreted in a manner that would improperly permit the court to grant relief when it would be unfair or inappropriate to do so. The need for a proportionate approach to litigation does not come at the expense of procedural fairness and the fundamental adherence to the *Rules of Court*.

Conclusion

44 I therefore would have allowed the appeal and would have directed that the appellant re-apply for summary judgment before another judge of the Court of Queen's Bench. I would also have directed that the appellant be permitted, if it so chose, to conduct a further cross-examination of the affiant Adrianna Hardy on her affidavit.

Appeal dismissed.

TAB 13

Most Negative Treatment: Reversed
Most Recent Reversed: Matco Capital Ltd. v. Interex Oilfield Services Ltd. | 2008 ABCA 428, 2008 CarswellAlta 2013, 174 A.C.W.S. (3d) 1046, 48 C.B.R. (5th) 213, [2009] A.W.L.D. 349 | (Alta. C.A., Dec 18, 2008)

2008 ABQB 295
Alberta Court of Queen's Bench

Matco Capital Ltd. v. Interex Oilfield Services Ltd.

2008 CarswellAlta 663, 2008 ABQB 295, [2008] A.W.L.D. 2490, 167 A.C.W.S. (3d) 910, 43 C.B.R. (5th) 99, 445 A.R. 286

In the Matter of an Application under Section 46 and 47 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as Amended

Matco Capital Ltd. (Plaintiff) and Interex Oilfield Services Ltd., Cam-Star Resources (1990) Ltd. and Roblyn Oilfield Maintenance Ltd. (Defendants)

Interex Oilfield Services Ltd. (Plaintiff) and Jennings Capital Inc., Robert Jennings, Liam Balfour and Darrell Brown, Mike Sullivan, Graham Ducharme, Brian Ward and Chuck Selby in their capacity as Directors of Interex Oilfield Services Ltd. (Defendants)

Prem Singh, in the name and on behalf of Interex Oilfield Services Ltd. (Applicant / Plaintiff) and Jennings Capital Inc., Robert Jennings, Liam Balfour and Darrell Brown, Mike Sullivan, Graham Ducharme, Brian Ward and Chuck Selby in their capacity as Directors of Interex Oilfield Services Ltd. and Hardie & Kelly Inc. in their capacity as Receiver/Manager of the Estate of Interex Oilfield Services Ltd. (Respondents / Defendants)

B.E. Romaine J.

Judgment: May 16, 2008
Docket: Calgary 0601-08395, 0701-11238, 0801-01264

Counsel: Josef G.A. Krüger for Jennings Capital Inc., Robert Jennings, Liam Balfour
Colin Feasby for Darrell Brown
Sean F. Collins for Graham Ducharme, Brian Ward
James G. Hanley for Prem Singh
Randal van de Mosselaer for Hardie & Kelly Inc.
Chris Simard for Matco Capital Ltd.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.1 General requirements
X.1.w Where constituting abuse of process
Headnote
Civil practice and procedure --- Pleadings — General requirements — Where constituting abuse of process
Shareholder had small interest in bankrupt company — Shareholder wished to pursue derivative action, although action was dismissed on basis that action was asset of estate and was in control of receiver — Receiver brought proceedings based on same claim, but admitted it had no intention of serving statement of claim — Shareholder brought application to strike receiver's

statement of claim; receiver brought application to strike shareholder's originating notice — Shareholder's application dismissed; receiver's application granted — Receiver's behaviour was not abuse of process — Receiver not directed to retain funds from estate as security — No reason existed to allow shareholder to continue action — Shareholder had extremely small interest in company, for which no payment had been made, and no major shareholder or creditor had shown interest in pursuing claim — Proceedings initiated by shareholder were not framed as class action — Courts will not generally allow actions to proceed if receiver does not wish to pursue matter — Shareholder's pleadings not made in good faith — If unattributed allegations and hearsay were removed from pleadings, shareholder's case was extremely weak.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Acapulco Holdings Ltd. v. Jegen (1997), [1997] 4 W.W.R. 601, 193 A.R. 287, 135 W.A.C. 287, 1997 CarswellAlta 115, 47 Alta. L.R. (3d) 234 (Alta. C.A.) — referred to

Bank of Montreal v. Northguard Holdings Ltd. (1989), 74 C.B.R. (N.S.) 86, 58 Man. R. (2d) 241, 1989 CarswellMan 23 (Man. C.A.) — followed

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28, 1988 CarswellAlta 103 (Alta. Q.B.) — referred to

Grovit v. Doctor (1997), [1997] 1 W.L.R. 640, [1997] 2 All E.R. 417 (Eng. H.L.) — considered

House of Spring Gardens Ltd. v. Waite (1990), [1991] 1 Q.B. 241, [1990] 2 All E.R. 990, [1990] 3 W.L.R. 347 (Eng. C.A.) — considered

Hurley v. Co-operators General Insurance Co. (1998), 160 D.L.R. (4th) 645, 1998 CarswellNS 184, 169 N.S.R. (2d) 22, 508 A.P.R. 22, 7 C.C.L.I. (3d) 55 (N.S. C.A.) — considered

McIlkenny v. Chief Constable of the West Midlands (1981), *(*sub nom. *Hunter v. Chief Constable of West Midlands)* [1982] A.C. 529, [1981] 3 All E.R. 727, [1981] 3 W.L.R. 906 (U.K. H.L.) — considered

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

s. 240 — referred to

s. 240(1)(b) — referred to

Corporations Act, R.S.M. 1987, c. C225

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 129 — considered

R. 129(1)(d) — referred to

APPLICATIONS by receiver and shareholder for striking out claims of other party.

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

First Application

1 The first application before me was brought on behalf of the Jennings defendants and Messrs Brown, Ducharme and Ward for an order striking the Statement of Claim filed by the Receiver and Manager of the Interex Companies on October 31, 2007 on the basis that it is an abuse of process as described under Rule 129(1)(d) of the *Alberta Rules of Court*.

2 The primary issue is whether the Receiver's filing of the Statement of Claim in the context of what occurred before that filing and the Receiver's current stated intention not to advance the action is an abuse of process that would warrant striking the claim.

3 The Applicants rely on comments made in the House of Lords decision of *Grovit v. Doctor*, [1997] 2 All E.R. 417 (Eng. H.L.) cited by the Nova Scotia Court of Appeal in *Hurley v. Co-operators General Insurance Co.* (1998), 160 D.L.R. (4th) 645,

169 N.S.R. (2d) 22, 508 A.P.R. 22, 7 C.C.L.I. (3d) 55 (N.S. C.A.) to support the proposition that commencing and continuing litigation that a party has no intention of bringing to a conclusion can amount to an abuse of process.

4 Counsel for the Receiver points out that the *Hurley* case involved an appeal of an order dismissing an action for want of prosecution three years after the claim was filed and after the defendant had returned to court several times attempting to get the action to proceed. The motions judge found that there was inordinate delay, but the Court of Appeal did not agree nor did it find prejudice arising from delay. It was on an alternative argument that the appellant had abused the process of the court that the Court of Appeal cited the *Grovit* case and referred to the Nova Scotia equivalent of Rule 129(1)(d). The Court also referred to the Court of Appeal decision in *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 (Eng. C.A.) for assistance on the meaning of "abuse of process" before concluding that there was no abuse of process in the case before it.

5 In this case, the claim was filed in October of 2007 and the Receiver has a year before it must be served. The Receiver has been quite candid about its intentions, and takes issue with the allegation that it has abused the process of the court, even if no bad faith is alleged. It is useful to set out what the Receiver has done and said about its intentions to determine the question of whether there has been an abuse of process that would warrant a striking order under Rule 129:

> 1. After Ms. Singh's attempt to commence a derivative action in February, 2007 was dismissed on the basis that the action was an asset of the estate and under the power of the Receiver, the Receiver conducted some investigation of the claim and deposed on September 19, 2007 that it had determined that it did not wish to pursue an action. This decision was supported by the major secured creditor. The Receiver deposed that it was prepared to dispose of the action to attempt to obtain some recovery for the stakeholders of the Interex estate. Specifically, the Receiver advised stakeholders that "(a)s a result of. . .due diligence and . . .consultations [with the major creditors]," it had decided that "it would not be commencing and prosecuting this Proposed Claim."
>
> 2. The Receiver received only one offer, from Ms. Singh, to assign the cause of action to her, on the basis that if there was any recovery the estate would obtain a share. The Receiver applied for an order to approve the assignment, but upon my decision that Mr. Hardie as the affiant for the Receiver had to present himself for cross-examination, the application was adjourned. The Receiver then determined to withdraw the application because, as its counsel stated in an e-mail to interested parties, it was unable to arrange for the necessary funding that would enable it to pursue the application or the action. On October 31, 2007, prior to the Receiver being advised by the major secured creditor that there would not be funding to proceed, the Receiver filed a Statement of Claim. According to its counsel's e-mail, the claim had been filed only because of concerns related to a possible limitation period.
>
> 3. The Receiver made it clear in the same e-mail from its counsel that it would not be taking steps to serve the Statement of Claim or any other steps, had advised Ms. Singh's counsel of this "and invited him to bring whatever application he and his clients consider appropriate in the circumstances."

6 None of this constitutes an abuse of process. The Receiver did not expect that the action would lie dormant despite its own decision not to prosecute it. It expected what in fact has come to pass, the application by Ms. Singh to take carriage of the action. While it may have filed the Statement of Claim to protect itself from the prospect of liability rather than from an intention to proceed with the action, this is not behaviour that in the words of Lord Diplock in *McIlkenny v. Chief Constable of the West Midlands*, [1982] A.C. 529 (U.K. H.L.), at 536 brings "the administration of justice into disrepute among right-thinking people." While this development might frustrate the potential defendants to the action, and give rise to the kind of colourful response expressed by counsel to the Jennings defendants, it was not "manifestly unfair" to a party to the litigation given the context, nor does it meet the high threshold that must be met before an action can be dismissed under Rule 129.

7 With respect to the application to authorize and direct the Receiver to retain funds from the estate as security for the indemnity granted to it under the order of receivership, this relief was not requested by the Receiver, which takes the position that, since it is not the promoter of litigation in this matter, it is not concerned with exposure to costs.

8 I decline to make such an order. There is little possibility that an award of costs would be made against the Receiver qua Receiver, and even if an award of costs could possibly be made against the Receiver in his personal capacity, there is no evidence that the Receiver would be unable to satisfy such an award.

9 I therefore dismiss the application to strike the Statement of Claim filed by the Receiver.

Second Application

10 The second application before me is to strike Ms. Singh's Originating Notice of Motion, which seeks leave to commence a derivative action, on the basis that it discloses no cause of action and is an abuse of the process of the Court. The parties are clear that this is not to be a full hearing on the merits of the application. If the application is not struck at this point, the potential defendants will proceed to file their own affidavits and the parties will conduct cross-examinations on affidavits. The Jennings defendants supported by Messrs. Brown, Ducharme and Ward take the position that Ms. Singh's application to have the Statement of Claim assigned to her is fatally defective on its face, and that therefore it would be a wasteful and futile exercise to proceed further with it.

11 The first point made is that the only party with any interest in the proposed litigation appears to be Ms. Singh, who holds a less than 1% shareholding in Interex, acquired without the necessity of paying anything for the shares when Interex was first being formed. The second point is that, while Ms. Singh brings the application, her affidavit speaks to very little personal or direct knowledge and (I must agree) appears to funnel the voice of Mr. Sullivan, one of the directors being sued, who, unlike most of the other directors, is not opposing Ms. Singh's application.

12 The proposed defendants in the action submit that, although Ms. Singh characterizes the application as an application to bring a derivative action, it is not such an application, that the principles set out in *Bank of Montreal v. Northguard Holdings Ltd.*, [1989] M.J. No. 211, 58 Man. R. (2d) 241 (Man. C.A.), apply, and that Ms. Singh cannot meet the tests set out in that case.

13 In the *Northguard* case, the Manitoba Court of Appeal had earlier affirmed a trial judge's decision that an application by certain shareholders for leave to commence derivative actions alleging that a former manager of a group of companies in receivership had defrauded the companies was premature. The case returned to the appellate court on, among other issues, the question of whether the trial judge erred in disallowing a settlement that would result in removing any right for a derivative action to be brought by the principal shareholders and in allowing such principals shareholders to bring such an action. The Court of Appeal dismissed the appeal, but varied the order allowing the action by the principal shareholders, authorizing them to bring the action as directors, rather than shareholders, and imposing conditions for the protection of the Receiver and other stakeholders. In doing so, Twaddle, J.A. made the following comments at para. 19:

> In my reasons for judgment in our earlier decision (34 D.L.R. (4th) at p. 22; 46 Man.R. (2d) at p. 24), I referred to the possibility of a derivative action being authorized. The term "derivative action" had been used by counsel in referring to an action which the court might allow those who previously controlled the companies to bring. I adopted that terminology without considering the source of the court's authority to sanction such an action. Apparently, my use of that terminology has misled the parties and Simonsen, J. into believing that the source of the court's authority to permit the shareholders to bring an action in the names of the companies is s. 232 of *The Corporations Act*. I regret that my misuse of language may have had this effect. Section 232 of *The Corporations Act* has nothing to do with the authority that might be given to those who previously controlled a company in receivership to commence an action in the corporate name. To the extent that the authority given by Simonsen, J. to the complainants was given under this section, it was wrongly given. That does not mean, however, that the court did not have such authority or that Simonsen, J. was wrong in exercising it in the circumstances of this case.

14 He then proceeded to discuss the authority of the directors of a corporation in a receivership to commence an action in the company name, and set out certain principles and tests. In this case, an action in the name of Interex against the Jennings defendants and the former directors has been brought by the Receiver, as discussed previously in these reasons, and Ms. Singh

characterizes her application as seeking leave to commence a derivative action or to have the action filed by the Receiver assigned to her. Counsel for the Jennings defendants submits that the fact that there is an existing action filed by the Receiver should not render inapplicable the principles set out in *Northguard*, as the Receiver filed the action as a precautionary step. Counsel for Ms. Singh does not in his submissions appear to disagree, but says that, in any event, Ms. Singh meets the *Northguard* tests.

15 With respect to the submission that Ms. Singh's application is not an application to commence a derivative action based on the comments made in *Northguard*, it is not clear from the decision in *Northguard* why the Court of Appeal did not characterize the action in that case as a derivative action, other than it was referring to the *Manitoba Corporations Act* and the parties who sought to bring the action were directors as well as shareholders or creditors. In this case, however, it appears that Ms. Singh's application falls within section 240(1)(b) of the *Business Corporations Act*, R.S.A. 2000 c. B-9. That does not render the principles expressed in *Northguard* inapplicable, since Ms. Singh's application, whether it involves a derivative application or merely the assignment of authority to continue to prosecute an action in the name of the corporation, is still brought in the context of a receivership.

16 The proposed defendants submit that, if the application is properly characterized as an application to bring a derivative action, the matter is *res judicata* given that I dismissed Ms. Singh's original application for leave to commence a derivative action in February, 2007. My previous dismissal of Ms. Singh's application occurred at a time when the Receiver had not had an opportunity to review the proposed action, and was based on a finding that the action was an asset of the estate that fell within the control of the Receiver. The Receiver has now had the opportunity to consider the potential cause of action. While it commenced the action to preserve the limitation period while determining whether the major creditor wanted to fund the Receiver to pursue it, has indicated that it is not going to prosecute the action further. This change of circumstances and the fact that my February, 2007 order was not a final order means that the matter is not *res judicata*.

17 Twaddle, J.A. in *Northguard* stated at para. 20 that:

> As a general rule, the court will not make an order permitting the directors, or a majority of shareholders, to commence an action which the receiver does not want to bring. The court can do so, however, when it is satisfied that the action is a proper one and that injustice may result to some or all of the shareholders of the company if the action is not permitted.

Ms. Singh, of course, is neither a director nor does she represent any shareholder other than herself.

18 The Court in *Northguard* notes that such an action should not be authorized routinely or without safeguards for the Receiver, for those entitled to a share of the corporate assets and for those who will be sued and that it should in fact only be authorized in exceptional circumstances where justice requires this and on terms that offer a reasonable measure of protection to those affected by the order. (para. 21).

19 I agree with the proposed defendants that there is no evidence of any exceptional circumstances in this case, nor any strong evidence to indicate that justice would require allowing Ms. Singh to assume the prosecution of the matter. No major shareholder or creditor has shown an interest in prosecuting the action commenced by the Receiver, although Ms. Singh alleges that shareholders lost in excess of $18 million. It appears that some shareholders who purchased their shares have commenced an action again the Jennings defendants and Canaccord Capital Corporation in the Supreme Court of British Columbia alleging poor investment advice, but they have not sued Interex or the directors. While the directors would be unlikely to authorize or pursue an action against themselves, which in certain circumstances may be an exceptional circumstance that would warrant an order, it appears that Ms. Singh stands alone in this suit, and that she is receiving at least information if not support from one of the directors, Mr. Sullivan. The dispute therefore appears to be more of an internal dispute among the directors than one supported by any other shareholders. The Receiver after conducting its review of the situation has made its position clear. It is noteworthy that this is not a situation where there is no money in the estate that would be available to pursue the claim, but one in which the major creditor is not interested in funding what would likely be prolonged litigation.

20 In *Northguard*, the shareholders and directors who sought to bring the action had guaranteed the debts of Northguard, and therefore had more than just a contingent interest as shareholders. Given that, the Court found exceptional circumstances to justify an order permitting them to bring the action on behalf of the company. Here, however, Ms. Singh has no more than a contingent interest in the litigation as a shareholder, and in fact, cannot even claim that she lost money in that capacity, since she did not pay for her shares. The most that can be said is that she has lost the opportunity to make a profit from her small shareholding. Ms. Singh's counsel suggests that this is a form of class action, but it has not been characterized as such, nor has there been any suggestion of the certification of such an action.

21 In *Northguard*, the Court of Appeal put in place additional safeguards, ordering the payment of sufficient security to cover costs on a solicitor and client basis. Ms. Singh has not made any commitment to provide security for costs, although her counsel suggests that this is premature, and can be adjudicated if Ms. Singh is successful in her application.

22 In short, Ms. Singh's application does not meet the tests set out in *Northguard* that would justify a departure from the general rule that the court will not make an order permitting directors or shareholders to bring an action that the Receiver does not wish to pursue.

23 If this application is treated solely as an application under section 240 of the ABCA without reference to the context of the receivership, Ms. Singh would have to establish reasonable notice, which is not in issue, that she is acting in good faith and that it appears to be in the interests of Interex that the action be prosecuted. While not arguing the merits of Ms. Singh's application as a whole, the proposed defendants submit that Ms. Singh's affidavit is riddled with obvious hearsay, unattributed sources and unsubstantiated allegations such that it falls completely short of establishing the case she has to make out for the relief she claims. The good faith requirement requires the court to ensure that the action is not frivolous or vexatious: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Alta. Q.B.). The question of whether a genuine issue for trial exists is important to the requirement that the action must appear to be in the interest of the corporation: *Acapulco Holdings Ltd. v. Jegen* (1997), 47 Alta. L.R. (3d) 234 (Alta. C.A.).

24 I have reviewed Ms. Singh's affidavit and agree that if the clearly unattributed, unsourced and hearsay provisions are disregarded, very little remains, and certainly not enough to establish the serious causes of action set out in the Statement of Claim. It is clear that Ms. Singh derives almost all her information from Mr. Sullivan, who is one of the defendants in the action. Ms. Singh submits that accepting the submissions of the proposed defendants at this point and dismissing the claim is in effect dismissing the entire action without any response from the proposed defendants on the merits. The proposed defendants, of course, are not obliged to respond on the merits if Ms. Singh fails to establish a sufficient *prima facie* case that her application is able to meet the requirements of section 240 of the ABCA. I agree that she has not.

25 I therefore grant the application brought by the proposed defendants and dismiss the Originating Notice.

Shareholder's application dismissed; receiver's application granted.

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Alberta Statutes
Business Corporations Act
Part 19 — Remedies, Offences and Penalties (ss. 239-254)

Most Recently Cited in: PricewaterhouseCoopers Inc v. Perpetual Energy Inc, 2021 ABCA 16, 2021 CarswellAlta 119, 327 A.C.W.S. (3d) 20, [2021] A.W.L.D. 640, [2021] A.W.L.D. 641, [2021] A.W.L.D. 642, [2021] A.W.L.D. 643, [2021] A.W.L.D. 644, [2021] A.W.L.D. 645 | (Alta. C.A., Jan 25, 2021)

R.S.A. 2000, c. B-9, s. 242

s 242. Relief by Court on the ground of oppression or unfairness

Currency

242.Relief by Court on the ground of oppression or unfairness
242(1) A complainant may apply to the Court for an order under this section.

242(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

242(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or bylaws;

(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in addition to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting permission to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or

(ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

242(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

242(5) If an order made under this section directs an amendment of the articles or bylaws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

242(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

242(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

242(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

Amendment History
1981, c. B-15, s. 234; 2014, c. 13, s. 49

Currency
Alberta Current to Gazette Vol. 117:1 (January 15, 2021)

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TAB 14

Most Negative Treatment: Reversed
Most Recent Reversed: First Edmonton Place Ltd. v. 315888 Alberta Ltd. | 1989 ABCA 274, 1989 CarswellAlta 181, [1990] C.L.D. 017, [1989] A.J. No. 1021, [1990] A.W.L.D. 1047, 45 B.L.R. 110, 18 A.C.W.S. (3d) 165, 71 Alta. L.R. (2d) 61, [1990] 2 W.W.R. 670 | (Alta. C.A., Nov 6, 1989)

1988 CarswellAlta 103
Alberta Court of Queen's Bench

First Edmonton Place Ltd. v. 315888 Alberta Ltd.

1988 CarswellAlta 103, [1988] A.W.L.D. 1140, [1988] C.L.D. 1277, [1988] A.J. No. 511, 10 A.C.W.S. (3d) 268, 40 B.L.R. 28, 60 Alta. L.R. (2d) 122

FIRST EDMONTON PLACE LIMITED v. 315888 ALBERTA LTD., MAJESKI, JOHNSON and SEREDA

D.C. McDonald J.

Judgment: June 9, 1988
Docket: Edmonton No. 8703-23547

Counsel: *G.R. McKenzie* , for applicant.
P.F.A. Jasper , for respondents.

Subject: Corporate and Commercial
Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.i Derivative actions
III.3.e.i.B Under statute
III.3.e.i.B.1 Availability
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.E Miscellaneous
Headnote
Corporations --- Shareholders — Shareholders' remedies — Derivative actions — Under statute — Availability
Corporations --- Shareholders — Shareholders' remedies — Relief from oppression
Court discussing relevant factors for granting leave.
Court discussing relevant factors for granting leave to commence action under s. 234(3)(q).
The individual respondents were the sole shareholders and directors of the corporate respondent, which was without assets. The corporate respondent leased premises from the applicant's predecessor for a term of ten years and was granted an 18-month rent-free period, a leasehold improvement allowance of $115,900 and a signing bonus of $140,126. The corporate respondent paid the signing bonus to the individual respondents, and they occupied the premises without entering into a written lease with the corporate respondent. The individual respondents occupied the premises for the rent-free period and for an additional

three months, for which period the corporate respondent paid rent. The individual respondents then vacated the premises and no further rent was paid. The applicant sought an order requiring the individual respondents to pay compensation and, in the alternative, sought an order pursuant to s. 232 of the Business Corporations Act granting it leave to bring an action in the name and on behalf of the corporate respondent against the individual respondents, or relief from oppression under s. 234.

Held:

Application granted in part.

The derivative action remedy in s. 232 of the Business Corporations Act and the action for oppression, unfair prejudice or unfair disregard for the interests of a security holder, creditor, director or officer in s. 234 of the Act are reforms aimed at balancing the interests of all those having an interest in a corporation. These remedies involve a deliberate departure from the position at common law, where the courts would not interfere with the principle of majority rule or interfere with the internal management of a corporation except in limited circumstances, and give the courts a broad discretion to decide cases on their merits.

In order to obtain leave to commence an action under s. 232 or to obtain relief under s. 234, an applicant must be a "complainant" within s. 231 of the Act. A creditor can be a complainant under s. 231(*b*)(i) only if it is the registered or beneficial owner of a mortgage or debenture issued by, and creating a charge against, the corporation. Considering the plain meaning of s. 231(*b*)(i), a creditor can be a complainant under that section only if the security is capable of being registered under s. 88.2(2) or (5) of the Act, and in the register of mortgages affecting the property of the corporation required to be kept under s. 88.5(1). Moreover, this interpretation reflects the meaning of the terms "bonds", "debentures" and "notes" in the world of corporate finance. Accordingly, the applicant was not a complainant within s. 231(*b*)(i).

Under s. 231(*b*)(iii) the court has a discretion to find an applicant to be a "complainant" on the basis that the applicant is a proper person to bring an application, and therefore has a broad power to do justice and equity in the circumstances of a particular case where the applicant would not otherwise be a complainant within the Act. Although ss. 113(5), (6), and 240 of the Act provide specific remedies for creditors, those sections do not preclude creditors from applying for remedies under ss. 232 and 234. Although the remedies in ss. 232 and 234 are intended to protect minority shareholders, by allowing actions to be brought by persons other than shareholders the legislature intended that the abuse of majority corporate power may be remedied by actions brought by other persons. Moreover, allowing an action to be brought by a wider group of interested persons is an effective means to enhance managerial accountability. However, the Act does not expressly permit any interested person to be a complainant, and a limiting line must be drawn. Accordingly, although an applicant does not have to be a security holder or a director or officer of the corporation in order to be a complainant within the meaning of s. 231, in such a case the circumstances must show that justice and equity clearly dictate such a result. In the case of a creditor making an application under s. 232, the criterion is whether, even if the creditor does not come within s. 231(*b*)(i) or (ii), it is a person who could reasonably be entrusted with the responsibility of advancing the interests of the corporation by seeking a remedy to right a wrong allegedly done to the corporation.

As well, in order to obtain leave to bring an action under s. 232 the complainant must also be acting in good faith, and it must appear that it is in the interests of the corporation that the action be brought. Here it appeared that the applicant was acting in good faith in seeking the return of the signing bonus to the corporate respondent so that it would have assets with which to meet an action for breach of the lease. Moreover, it appeared to be in the interests of the corporate respondent to determine whether the taking of the signing bonus by the individual respondents constituted a wrong against the corporation. It was also arguable that the individual respondents had breached their duties as directors under s. 117 of the Act by allowing the corporate respondent to enter into the lease without securing a sublease. In bringing an action on this ground the applicant would also be acting in good faith and in the interests of the corporation. Accordingly, the applicant was a proper person to make an application for leave under s. 232 and should be granted leave to advance a claim on behalf of the corporate respondent.

A creditor can also be a proper person to make an application under s. 234 if the circumstances are such that considerations of justice or equity require the hearing of its claim of oppression, unfair prejudice or unfair disregard of its interests. The test should reflect the desire to balance the protection of a creditor's interest against the policy of preserving the freedom of action of a corporation's management. A remedy is available if the act complained of amounts to using the corporation to commit a fraud upon a creditor, and in other circumstances where the act is unfair, considering: the underlying expectations of the creditor in its arrangements with the corporation; the extent to which the acts were unforeseeable; whether the creditor could have reasonably protected itself; and the detriment to its interests. The use of the phrases "unfairly prejudicial" and "unfairly disregards" in addition to the word "oppressive" in s. 234 may eliminate the requirement to find bad faith and economic damage

before granting a remedy. However, in the absence of a prima facie case that an injustice would be done or that there would be inequity if a creditor was not allowed to bring its action, leave to bring the action should not be granted. Here, there was no evidence of an expectation that the corporate respondent would retain the signing bonus, or that it would grant a lease to the individual respondents or anyone else. As well, there was no evidence of any inequality of bargaining power between the parties. Finally, in order to obtain leave to commence an action under s. 234 it must be shown that the action complained of was oppressive or unfairly prejudicial to or unfairly disregarded the interests of a security holder, creditor, director or officer. In order to be a creditor under this section, the applicant had to be a creditor at the time the acts complained of occurred. Here there was no money due under the lease at the relevant time, and a landlord is not a creditor with respect to rent not yet due and payable. As no considerations of justice or reasonableness required the extension of the meaning of "creditor" under s. 234 of the Act, the applicant was not entitled to commence an action under that section.

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Cases considered:

Abraham and Inter Wide Invt. Ltd. (1985), 41 O.R. (2d) 460, 30 B.L.R. 177, 20 D.L.R. (4th) 267 (H.C.) — *considered*

Angus v. R. Angus Alta. Ltd., 58 Alta. L.R. (2d) 76, [1988] 3 W.W.R. 737, 85 A.R. 266 (C.A.) — *referred to*

Appotive v. Computrex Centres Ltd. (1981), 16 B.L.R. 133 (B.C.S.C.) — *considered*

Armstrong v. Gardner (1978), 20 O.R. (2d) 648 (H.C.) — *referred to*

Bank of Montreal v. Dome Petroleum Ltd. (1987), 54 Alta. L.R. (2d) 289 (Q.B.) — *considered*

Bellman v. Western Approaches Ltd. (1981), 33 B.C.L.R. 45, 17 B.L.R. 117, 130 D.L.R. (3d) 193 (C.A.) — *considered*

Besenski, Re; 8th Street Theatre Co. v. Besenski (1981), 15 Sask. R. 182 (Q.B.) — *considered*

Brant Invt. Ltd. v. Keeprite Inc. (1987), 60 O.R. (2d) 737, 37 B.L.R. 65, 42 D.L.R. (4th) 15 (H.C.) — *considered*

Burland v. Earle, [1902] A.C. 83 (P.C.) — *referred to*

Burnett v. Tsang (1985), 37 Alta. L.R. (2d) 159, *(*sub nom. *Re Cucci's Restaurant Ltd.; Burnett v. Tsang)* 29 B.L.R. 196, 61 A.R. 219 (Q.B.) — *referred to*

Campbell (G.T.) & Assoc. Ltd. v. Hugh Carson Co. (1979), 24 O.R. (2d) 758, 7 B.L.R. 84, 11 C.P.C. 1, 99 D.L.R. (3d) 529 , affirming 23 O.R. (2d) 136, 6 B.L.R. 32, 94 D.L.R. (3d) 722 , which affirmed 5 B.L.R. 201, 8 C.P.C. 46 (C.A.) — *distinguished*

Can. Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371 [Ont.] — *considered*

Cucci's Restaurant Ltd., Re . See *Burnett v. Tsang* .

Daon Dev. Corp., Re (1984), 54 B.C.L.R. 235, 26 B.L.R. 38, B.C. Corps. L.G. 78,261, *(*sub nom. *Re MacRae and Daon Dev. Corp.)* 10 D.L.R. (4th) 216 (S.C.) — *distinguished*

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Ebrahimi v. Westbourne Galleries Ltd., [1973] A.C. 360, [1972] 2 W.L.R. 1289, [1972] 2 All E.R. 492 (H.L.) — *considered*

Edwards v. Halliwell, [1950] 2 All E.R. 1064 (C.A.) — *considered*

Elder v. Elder & Watson Ltd., [1952] S.C. 49 — *considered*

Ferguson and Imax Systems Corp., Re (1983), 43 O.R. (2d) 128, 150 D.L.R. (3d) 718 , leave to appeal to S.C.C. refused 2 O.A.C. 158, 52 N.R. 317 — *considered*

Foss v. Harbottle (1843), 2 Hare 461, 67 E.R. 189 — *considered*

G.T. Campbell & Assoc. Ltd. See — *Campbell (G.T.) & Assoc. Ltd.*

Gandalman Invt. Inc. and Fogle, Re (1985), 52 O.R. (2d) 614, 22 D.L.R. (4th) 638 (H.C.) — *considered*

Gardner v. Newton (1916), 26 Man. R. 251, 10 W.W.R. 51, 29 D.L.R. 276 (K.B.) — *applied*

H.J. Rai Ltd. v. Reid Point Marina Ltd. , B.C.S.C., Skipp J., 26th May 1981 (unreported) — *considered*

Hulbert and Mayer, Re, 11 Alta. L.R. 239, [1917] 1 W.W.R. 380, 31 D.L.R. 330 (T.D.) — *considered*

Inversiones Montforte S.A. v. Javelin Int. Ltd., [1982] C.S. 425, 17 B.L.R. 230 (C.S. Que.) — *considered*

Jackman v. Jackets Ent. Ltd. (1977), 4 B.C.L.R. 358, 2 B.L.R. 335 (S.C.) — *considered*

Heller (Walter E.) Fin. Corp. v. Powell River Town Centre Ltd.; Western Mtge. Corp., Re; Sewell v. Western Mtge. Corp. (1983), 49 B.C.L.R. 145 (S.C.) — *considered*

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Keho Hldg. Ltd. v. Noble (1987), 52 Alta. L.R. (2d) 195, 38 D.L.R. (4th) 368, 78 A.R. 131 (C.A.) — *considered*

Little Billy's Restaurant (1977) Ltd., Re; Faltakas v. Paskalidis (1983), 45 B.C.L.R. 388, 21 B.L.R. 246 (S.C.) — *considered*

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MacRae and Daon Dev. Corp., Re . See *Daon Dev. Corp., Re* .
Marc-Jay Invt. Inc. and Levy, Re (1974), 5 O.R. (2d) 235, 50 D.L.R. (3d) 45 (H.C.) — *considered*
Mazurenko v. Mazurenko (1981), 15 Alta. L.R. (2d) 357, 23 R.F.L. (2d) 113, 124 D.L.R. (3d) 406, 30 A.R. 34 (C.A.) [leave to appeal to S.C.C. refused 30 R.F.L. (2d) xxxiv, 32 A.R. 612, 39 N.R. 539] — *referred to*
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Morgan v. 45 Flers Ave. Pty. Ltd. (1986), 10 A.C.L.R. 692 (N.S.W.S.C., Eq. Div.) — *considered*
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Peterson and Kanata Invt. Ltd., Re (1975), 60 D.L.R. (3d) 527 (B.C.S.C.) — *considered*
Porcupine Gold Reef Mining Co., Re, [1946] O.R. 145, 27 C.B.R. 216, [1946] 2 D.L.R. 618 (H.C.) [affirmed [1947] O.W.N. 185, 28 C.B.R. 105, [1947] 1 D.L.R. 918 (C.A.)] — *applied*
Redekop v. Robco Const. Ltd. (1978), 7 B.C.L.R. 268, 5 B.L.R. 58, 89 D.L.R. (3d) 507 (S.C.) — *considered*
R. v. Olan, [1978] 2 S.C.R. 1175 , 5 C.R.. (3d) 1, 41 C.C.C. (2d) 145, 86 D.L.R. (3d) 212, 21 N.R. 504 [Ont.]*considered*
R. v. Sands Motor Hotel, [1985] 1 W.W.R. 59, 28 B.L.R. 122, [1984] C.T.C. 612, 84 D.T.C. 6464, 36 Sask. R. 45 (Q.B.) — *referred to*
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Scottish Co-op. Wholesale Soc. Ltd. v. Meyer, [1959] A.C. 324, [1958] 3 W.L.R. 404, [1958] 3 All E.R. 66 (H.L.) — *considered*
Shuttleworth v. Cox Bros. & Co. (Maidenhead) Ltd., [1927] 2 K.B. 9 — *considered*
Sigurdson v. Fidelity Ins. Co., [1977] 4 W.W.R. 231, 24 C.B.R. (N.S.) 137, 2 B.L.R. 1 (B.C.S.C.) — *considered*
Stech v. Davies, 53 Alta. L.R. (2d) 373, [1987] 5 W.W.R. 563, 80 A.R. 298 (Q.B.) — *considered*
Vedova v. Garden House Inn Ltd. (1985), 29 B.L.R. 236 (Ont. H.C.) — *considered*
Walter E. Heller Fin. Corp. See — *Heller (Walter E.) Fin. Corp.*

Statutes considered:

Australian Companies Act, 1981

s. 320

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s. 1(g.1) "debt obligation", (u) "security"

s. 88.2(5), (6)

s. 88.5(1) [am. 1983, c. 20, s. 10]

s. 113(5), (6)

s. 117(1)

s. 231

s. 232

s. 234(1), (2), (3)(q)

s. 240

Canadian Business Corporations Act, S.C. 1974-75-76, c. 33

s. 234 [am. 1978-79, c. 9. s. 74]

Companies Act, 1948 (U.K.)

s. 210

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s. 75

Companies Act, 1985 (U.K.)

s. 459

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s. 185

Companies Act, S.B.C. 1973, c. 18 [now Company Act, R.S.B.C. 1979, c. 59]

s. 221 [am. 1976, c. 12, s. 44; now s. 224]

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s. 224

s. 225(1)(a) [am. 1980, c. 50, s. 21], (8)

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s. 209

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Palmer, Company Law, 24th ed. (1987), pp. 980, 991.

Proposals for a New Alberta Business Corporations Act, Alberta Institute of Law Research and Reform (August 1980), vol. 1, pp. 66, 141-42, 144, 149, 150, 234.

Proposals for a New Business Corporations Law for Canada ("Dickerson Report"), vol. 1, pp. 158-59, 160, 161, 162; paras. 476, 477, 479, 481, 482, 485.

Report of the Committee on Company Law Amendment (1945) ("Cohen Report"), Cmnd. 6659, para. 60.

Report of the Committee on Company Law (1962) ("Jenkins Report"), Cmnd. 1749, paras. 199-212.

Rostow, "To Whom and for What Ends Is Corporate Management Responsible?" in The Corporation in Modern Society, Mason ed. (1959), 48.

Shapira, "Minority Shareholders' Protection" (1982), 10 N.Z.U.L. Rev. 134, pp. 137, 138, 145-47, 149, 152.

Waldron, "Corporate Theory and the Oppression Remedy" (1981-82), 6 Can. Bus. L.J. 129, pp. 130, 136, 151, 152.

Welling, Corporate Law in Canada (1984), p. 504.

Words and phrases considered:

APPEARS TO BE IN THE INTERESTS OF THE CORPORATION

As for the requirement [in s. 232(2) of the *Alberta Business Corporations Act*, S.A. 1981, c. B-15] that the Court be satisfied that bringing an action "appears to be in the best interests of the corporations" . . .

[*Bellman v. Western Approaches Ltd.* (1981), 17 B.L.R. 117 (B.C. C.A.)] had interpreted this provision as merely requiring that an arguable case be shown to exists.

CERTIFICATE EVIDENCING A DEBT OBLIGATION

. . . the word "mortgage" includes a "charge", so that the provisions in s. 88.2 relating to the filing of "debentures containing any charge" require the registration of such debentures as well as mortgages. Section 88.2 thus creates a scheme for the registration of mortgages and debentures. Such written evidence of a debt obligation is . . . "a certificate evidencing . . . a . . . debt obligation" [within the meaning of the definition of "security" in s. 2 of the *Alberta Business Corporations Act*, S.A. 1981, c. B-15].

COMPLAINANT

. . . s. 231(b)(i) [of the Alberta *Business Corporations Act*, S.A. 1981, c. B-15] defines a "complainant" as "a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates" . . . The report of the Institute of Law Research and Reform of Alberta made the following observations concerning this definition of "complainant" (at p. 149):

The definition of "complainant" in C.B.C.A. [*Canadian Business Corporations Act*, S.C. 1974-75-76, c. 33] s. 231 includes a present and former registered holder of a "security" of a company or its affiliates. The definition of "security" in C.B.C.A. s. 2 includes a "debt obligation of a corporation" and "a certificate evidencing such a . . . debt obligation." The reference to the certificate in C.B.C.A. s. 2 and the reference to a *registered* holder in C.B.C.A. s. 231 probably restricts the definition of "complainant" to those creditors who are entitled to have certificates and who are to be entered in the securities register. [emphasis added]

. . . that is a correct interpretation of C.B.C.A., s. 231, and of the definition of "complainant" found in s. 231(b)(i) of the A.B.C.A. In other words, a creditor can be a "complainant" under s. 231(b)(i) only if it holds or is the beneficial owner of a security of the corporation, and if the security is of a type which is capable of being registered under s. 88.2(2) or (5) with the Registrar of Corporations, and in the register of mortgages specifically affecting property of the corporation, which is to be kept by the corporation pursuant to s. 88.5(1) . . .

Thus, it is clear that, by reference to the clear implication of the face of s. 231(b)(i), the word "complainant" includes only the registered holders or beneficial owners of a mortgage issued by the corporation or a debenture creating a charge, issued by the corporation . . .

Under s. 231(b)(iii), a person may be a "complainant" if he is a person "who, in the discretion of the Court, is a proper person to make an application under this Part."

This is not so much a definition as a grant to the court of a broad power to do justice and equity in the circumstances of a particular case, where a person who otherwise would not be a "complainant" ought to be permitted to bring an action under either s. 232 or s. 234 to right a wrong done to the corporation which would not otherwise be righted, or to obtain compensation himself or itself where his or its interests have suffered from oppression by the majority controlling the corporation or have been unfairly prejudiced or unfairly disregarded, and the applicant is a "security holder, creditor, director or officer".

The report of the Institute of Law Research and Reform of Alberta had some reservations about the inclusion of such a broad power to permit a person to complain . . .

. . . the legislature has not gone so far as expressly to permit *any* interested person to be a "complainant". However broad the discretion provided for in s. 231(b)(iii) may be, it nevertheless contemplates that a limiting line will be drawn. That line should, in my view, be drawn by application of the criteria which I have enunciated.

CREDITOR

In *Re Porcupine Gold Reef Mining Co.*, [1946] O.R. 145 . . . Urquhart J. defined "creditor" as "one to whom a debt is owing - correlative to debtor". In *Gardner v. Newton* (1916), 29 D.L.R. 276 (K.B.) . . . Mathers C.J.K.B. said, at p. 282:

In its largest sense "creditor" is one who has a right to require the fulfilment of an obligation or contract; but its general and almost universal meaning is a person to whom a debt is payable. Stroud, Judicial Dictionary.

My conclusion is that the word "creditor" as it is used in s. 234 [of the *Alberta Business Corporations Act*, S.A. 1981, c. B-15] does not include a lessor in respect of rent which is not owing at the time of the acts complained of . . .

My conclusion is that the word "creditor" as it is used in s. 234 [*Business Corporations Act*, S.A. 1981, c. B-15)] does not include a lessor in respect of rent which is not owing at the time of the acts complained of . . .

DEBT

. . . Professor C.R.B. Dunlop, in his work, Creditor - Debtor Law in Canada (Toronto: Carswell, 1981), stated, at pp. 19-20:

. . . the word "debt" is not today a term of art with a clear, never-changing denotation. Instead of trying to define a core meaning, it would seem better to agree with the editors of the Corpus Juris Secundum that "[the word] takes shades of meaning from the occasion of its use, and color from accompanying use, and it is used in different statutes and constitutions in senses varying from a very restricted to a very general one". One can say that the most common use of the word "debt" is to describe an obligation to pay a sum certain or a sum readily reducible to a certainty. The obligation may or may not depend on an express or implied contract, depending on the context in which the word is used, but . . . the essence of the term is that, if there is an obligation to pay a certain or ascertainable sum, the courts should tend not to concern themselves with the precise nature of the cause of action. Claims for unliquidated damages will generally not be describable as debts unless the context suggests otherwise.

IN GOOD FAITH

. . . s. 232(2) [of the *Alberta Business Corporations Act*, S.A. 1981, c. B-15] require that the complainant "is acting in good faith" . . .

. . . . .

In the present case, it is clear that First Edmonton Place is in good faith in seeking the potential return of money paid out by the corporation, in order that the corporation will have assets with which to meet the action of First Edmonton against the corporation for breach of the lease. The proposed action to be brought under s. 232 is not designed to obtain a tactical advantage against the directors. If obtaining a tactical advantage against the directors were the motive, that might constitute lack of good faith . . .

PROPER PERSON

Under s. 231(b)(iii) [of the *Alberta Business Corporations Act*, S.A. 1981, c. B-15] a persona may be a "complainant" if he is a person "who, in the discretion of the Court, is a proper person to make an application under this Part."

This is not so much a definition as a grant to the Court of a broad power to do justice and equity in the circumstances of a particular case where a person who otherwise would not be a "complainant" ought to be permitted to bring an action under either s. 232 or s. 234 . . .

There are two circumstances in which justice and equity would entitle a creditor to be regarded as "a proper person." (There may be other circumstances . . .) The first is is the act or conduct of the directors or management of the corporation which is complained of constituted using the corporation as a vehicle for committing a fraud upon the applicant . . .

Second, the Court might hold that the applicant is a "proper person to make an application" . . . if the act or conduct of the directors or management of the corporation which is complained of constituted a breach of the underlying expectation of the applicant arising from the circumstances in which the applicant's relationship with the corporation arose.

SKILL

It was thought that the introduction of a standard for skill and diligence [in s. 117(1)(b) of the *Alberta Business Corporations Act*, S.A. 1981, c. B-15] which the Court should try to apply objectively was a significant improvement. The [Institute of Law Research and Reform] did, however, set out some of the difficulties which may arise in the interpretation of this objective standard[:]

. . . there may be some difficulty in the interpretation of the provision; for example, is the standard applicable to a specially qualified professional person or businessman the same as that applicable to one who does not have the special qualification?

Despite these reservations, the institute recommended the adoption of this objective standard of skill.

. . . the duties of the directors would not change merely because the directors also happened to be the sole shareholders of the corporation.

UNFAIRLY DISREGARDS

The addition of "unfairly prejudicial" and "unfairly disregards" to "oppressive" gives the Court a broad basis upon which to apply notions of equity and fairness to the conduct of the directors and the majority . . . the addition of "unfairly prejudicial" and "unfairly disregards" puts the Court in a position to judge the fairness of the actions of management . . .

. . . . .

. . . in *Stech v. Davies* [53 Alta. L.R. (2d) 373 (Q.B.)] at 379, Egbert J. defined "unfairly disregard" as "to unjustly or without cause, in the context of s. 234(2) [of the *Alberta Business Corporations Act*, S.A. 1981, c. B-15], pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers of a corporation."

UNFAIRLY PREJUDICIAL

The addition of "unfairly prejudicial" and "unfairly disregards" to "oppressive" gives the Court a broad basis upon which to apply notions of equity and fairness to the conduct of the directors and the majority . . . the addition of "unfairly prejudicial" and "unfairly disregards" puts the Court in a position to judge the fairness of the actions of management . . .

. . . . .

In *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 at 45 (S.C.) . . . the Court considered the meaning of "unfairly prejudicial" [in the British Columbia equivalent of s. 234 of the *Alberta Business Corporations Act*, S.A. 1981, c. B-15]. Fulton J. ruled that in adding the words "unfairly prejudicial" to the statute, the Legislature must have intended that the Courts would give those words "an effect different from and going beyond that given to the word 'oppressive'". Turning to the Oxford Dictionary, he found that "prejudicial" meant detrimental or damaging to the applicant's right or interest and "unfair" meant inequitable or unjust. He concluded that "the dictionary definitions support the instinctive reactions that what is unjust and inequitable is obviously unfairly prejudicial" (at 46)

Application for leave to bring actions under ss. 232 and 234 of Alberta Business Corporations Act.

***D.C. McDonald J.*:**

1 This is an application by a lessor pursuant to the remedy provisions contained in the Business Corporations Act, S.A. 1981, c. B-15. That statute is commonly known as the "Alberta Business Corporations Act", and will be referred to henceforth as the "A.B.C.A." The applicant seeks relief for losses it has suffered which were, in its submission, due to the actions of the respondent numbered company and the three individual respondents who were and are its directors. The issues raise fundamental principles of corporate law and require consideration of the scope and purpose of the new remedies provided for by the A.B.C.A. and not previously available in the law of Alberta. These are (1) an action to right a wrong done to the corporation where the directors of the corporation will not sue to right the wrong (commonly called a "derivative action"), and (2) a remedy which may be sought by minority shareholders and others where there has been oppression or unfair prejudice to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation.

2 It is true that the applicant applies, inter alia, for an order directing the three individual respondents to pay compensation to the applicant in the sum of $390,053.34 plus interest. However, the application for such final judgment was not pressed, at this time. The two forms of relief that are pressed for at this time are as follows, as set forth in the originating notice of motion:

> 2. Alternatively, an Order pursuant to s. 234(3)(q) of the Business Corporations Act, granting leave to the Applicant to bring an action in the name and on behalf of 315888 Alberta Ltd. against Joan E. Majeski, Mark Johnson and Murray Sereda alleging that they failed to comply with s. 117 of the Business Corporations Act; and alleging that they breached their fiduciary obligations as directors of 315888 Alberta Ltd. and seeking damages of $390,053.34 plus interest.
>
> 3. Alternatively, an Order pursuant to s. 232(1) of the Business Corporations Act allowing the Applicant to bring an action in the name and on behalf of 315888 Alberta Ltd. against Joan E. Majeski, Mark Johnson and Murray Sereda alleging that they failed to comply with s. 117 of the Business Corporations Act; and alleging that they breached their fiduciary obligations as directors of 315888 Alberta Ltd. and seeking damages of $390,053.24 plus interest.

These two remedies sought are in the nature of permission to bring an action. Consequently it will be borne in mind throughout these reasons for judgment that what is being considered now is not whether on the evidence the damages sought in each proposed action should be awarded, but whether the applicant qualifies for an order granting leave to bring each action.

3 The applicant is a corporation which constructed an office building in Edmonton. The three individual respondents were lawyers in practice in Edmonton. Two of them are still in practice in Edmonton and one is now a resident in British Columbia. I shall refer to the applicant as "First Edmonton Place", and to the three individual respondents as "the three lawyers". The three lawyers practised in as sociation with each other. The corporate respondent, which was named as lessee in a lease entered into with First Edmonton Place, was a "shelf company". That is, it was a numbered company which had already been incorporated

by the three lawyers for an undefined purpose. According to the affidavit of the property manager of the applicant, one of the lawyers told him that the company was to be used as their management company. They were its sole shareholders and directors. The corporate respondent had no assets. As a result of the negotiations, a lease agreement for a term of 10 years commencing 1st December 1984 was entered into between the numbered company and First Edmonton Place Commercial Centre Ltd., the predecessor in title to the applicant, as lessor. As the present applicant stands in the shoes of the original lessor, and has a very similar name, I shall not distinguish between the original lessor and the present applicant, and I shall refer to them interchangeably as "First Edmonton Place".

4 As an inducement to enter into the lease, First Edmonton Place granted the corporate respondent an 18 months rent-free period, a leasehold improvement allowance of $115,900 and a cash payment of $140,126. The three lawyers occupied the premises without entering into a written lease with the numbered company. One of them, in an affidavit, has stated that the law firm occupied the premises "as a monthly sub-tenant" of the numbered company. They did so for the entire rent-free period and for three months beyond it, that is, until 27th September 1986. The numbered company paid rent for the three months after the expiry of the rent-free period. The three lawyers vacated the premises on the date mentioned, and no further rent was ever paid by the numbered company to First Edmonton Place.

5 Some time following the payment of the cash of $140,126, those funds were paid out by the numbered company to the three lawyers. An affidavit of an employee of First Edmonton Place deposes that one of the three lawyers has told him that the money was paid out to the three lawyers for their own "personal investment purposes". An affidavit by one of the three lawyers denies this and says that the money was used by them for purposes of their law practice. It is said by counsel for the respondents that these two versions are different, although I would have thought that it is sufficient for present purposes that the money was clearly not used for purposes of the numbered corporation. Be that as it may, there is thus a conflict of evidence before me in this application for leave to commence the actions. That is the sort of issue which can only be resolved at trial.

6 Thus the two forms of benefit which First Edmonton Place says were received by the three lawyers, and as to which First Edmonton Place claims to be entitled to a remedy, are the benefit of free occupancy of the business premises by the three lawyers for a period of 18 months, and their taking from the numbered corporation the amount which had been paid to it as a cash inducement.

7 First Edmonton Place submits that the actions of the three lawyers as directors of the numbered corporation, (a) in causing the corporation to allow their law firm to occupy the premises with no lease, written or unwritten, and without requiring rent to be paid during the rent-free period, and (b) causing the corporation to pay out the proceeds of the cash inducement to themselves, constituted deliberate breaches of their obligations as directors of the numbered corporation. As a result, First Edmonton Place seeks alternative forms of relief under ss. 232 and 234 of the A.B.C.A. Those sections read as follows:

> 232(1) Subject to subsection (2), a complainant may apply to the Court for leave to
>
> (*a*) bring an action in the name and on behalf of a corporation or any of its subsidiaries, or
>
> (*b*) intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the corporation or subsidiary.
>
> (2) No leave may be granted under subsection (1) unless the Court is satisfied that
>
> (*a*) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action,
>
> (*b*) the complainant is acting in good faith, and
>
> (*c*) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

234(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(*a*) any act or omission of the corporation or any of its affiliates effects a result,

(*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

I am not quoting the balance of s. 234, which, inter alia, enumerates a number of orders which the court may make.

8 In addition, the following definitions from s. 1 of the Act are relevant:

1 In this Act ...

(*g* .1) "debt obligation" means a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured;

(*u*) "security", except in Part 6, means a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation;

231 In this Part,

(*a*) "action" means an action under this Act or any other law

(*b*) "complainant" means

(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates, or

(iii) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

9 Underlying both actions as to which leave to commence the action is sought are the scheme and purpose of the remedial sections of the A.B.C.A. It is only in the light of understanding such scheme and purpose that it is possible to define the content and limits of the remedies, and, in the course of doing so, to define the word "complainant" as that word is used in s. 231.

General Policy of the New Remedies

10 The general remedies available to those persons having interests in limited companies have been the subject of major reform in recent years. Major changes have occurred in the whole area of company law with the enactments of new Business Corporations Acts in several jurisdictions, including the Canadian federal jurisdiction and the province of Alberta. In order to determine whether the remedies provided by s. 232 or 234 of the A.B.C.A. are available to the present applicant, it may be of some assistance to examine the policy reasons that caused these remedies to be enacted.

11 In late 1967 the Government of Canada set up a task force under Dr. R.W.V. Dickerson to consider the philosophy, the substance, and the administration of the Canada Corporations Act. As the new remedy provisions of the A.B.C.A. were modelled after those which were enacted in the Canada Business Corporations Act ("C.B.C.A.") after 1967, an examination

of the policies which resulted in the new remedies in the C.B.C.A. will be useful in interpreting the analogous provisions in the A.B.C.A. One of the objectives of the federal task force, as set out in the Detailed Background Paper for the New Canada Business Corporations Bill, was stated as follows (at p. 2):

> Even if tempting as a device to seek to achieve overall reform of the structure and conduct of the economy, the real purpose of a corporation law is to create a practical balance of interests among shareholders, creditors, management, and the public, a balance that ensures both adequate investor protection and maximum management flexibility in the overall context of the public interest.

Thus a general goal of the corporate law reformers was to achieve a balance between those who have competing interests in the corporate structure. Recognition of the rights of creditors, minority shareholders and the public played a major role.

12 Prior to the statutory enactment of the remedy provisions, the rights of the minority shareholder as against those controlling a corporation were virtually non-existent, and the plight of creditors was worse yet. The courts adopted the general view that had been stated by Scrutton L.J. as follows:

> It is not the business of the Court to manage the affairs of the company. That is for the shareholders and directors.

(*Shuttleworth v. Cox Bros. & Co. (Maidenhead) Ltd.*, [1927] 2 K.B. 9 at 23). The concepts of majority rule, and of the corporate personality as distinct from its members, stood as major roadblocks to any suits to remedy mismanagement of the corporation or to remedy wrongs done to minority shareholders.

13 The reforms were aimed at balancing the interests of all persons having interests in the corporation and, in doing so, the legislators have given the courts a "very broad discretion, applying general standards of fairness, to decide these cases on their merits": R.W.V. Dickerson et al., Proposals for a New Business Corporations Law for Canada, vol. 1, commentary ("Dickerson Report"), at p. 162. The Dickerson Report stated the rationale behind the invocation of the civil remedy provisions (at p. 158) as follows:

> 476. Second, we think that the best means of enforcing a corporation law is to confer reasonable power upon the allegedly aggrieved party to initiate legal action to resolve his problem, making the Draft Act largely self-enforcing, obviating the need for sweeping administrative discretion and harsh penal sanctions, and, at the same time, forcing resolution of the issues before the courts, which have the procedures, the machinery and the experience that enable them better than any other institution to deal with such problems.

The Dickerson task force also commented upon the broad standards contained in the remedy provisions and the need for flexibility in the area of remedies (at pp. 158-59):

> 477. Third, the remedies provided in the Draft Act recognize that corporation law — and particularly the duties of officers, directors and dominating shareholders of corporations — is in a very fluid state, reflecting the uncertain role or identity of the business corporation in contemporary society. For this reason we have frequently established only very broad quality standards of conduct (e.g., s. 9.19 referring to duties of directors and officers and s. 19.04 relating to "oppressive or unfairly prejudicial" conduct of management or dominant shareholders), permitting the courts to determine whether there has been failure to comply with those standards, that is, *to continue to develop the common law of responsibility of corporate management unhampered by the legal fetters created at a time when the courts were preoccupied with enforcing "democratic" structures — particularly voting power — as the one real object of the law.* [emphasis added]

By framing the remedy provisions in very broad terms, the reformers have sought to do away with the restrictive approach that the courts had previously taken when judging the conduct or misconduct of corporate management. The old view that the management of the company was in the total discretion of its directors and shareholders has been replaced by an expansive view of the court's role in balancing the interests of shareholders (majority and minority), creditors, and the public in general.

14 The present applicant has sought relief under both ss. 232 and 234 of the A.B.C.A. The Alberta Institute of Law Research and Reform, in its report on Proposals for a New Alberta Business Corporations Act (August 1980), vol. 1, at p. 144, had this to say with respect to the relationship between the derivative action (s. 232) and personal actions (s. 234):

> *It seems to us that the essential point in proceedings under either CBCA s. 232 or 234 is that a person with an interest in a corporation is complaining about the abuse of power by someone who controls the machinery of the corporation* . In legal form the wrongdoers in one case may be doing a wrong to the corporation; in another they may be causing the corporation to act in a way which is wrongful; and in a third they may be changing the corporation's constitution in a way which will give them an unfair advantage over the minority; but in substance they are wrongfully using the power of control. It may be that the remedy for a case in which directors who have done a wrong to the corporation and refuse to allow that corporation to sue them is to allow the complainant to bring an action against them in the corporation's name; that the remedy in another case may be an injunction to stop the company from acting in contravention of a restriction on the business which it is restricted from carrying on (probably supported by an injunction against the directors); and that the remedy in a third case may be an injunction to prevent shareholders from passing a resolution approving a sale of the corporation's property to themselves or an order deleting an amendment made by the shareholders to the articles of incorporation. *In all those cases, however, the wrongdoers are doing something to the prejudice of the complainant's interest in the corporation, whether it prejudices his rights under the corporate constitution or affects the value of the corporation to which his rights apply. The crux of the matter is that the wrongdoers are abusing their power of control* . [emphasis added]

15 It has been held that relevant law reform material can be used to help determine the mischief at which legislation is directed: *Mazurenko v. Mazurenko* (1981), 15 Alta. L.R. (2d) 357, 23 R.F.L. (2d) 113, 124 D.L.R. (3d) 406 at 413, 30 A.R. 34 (C.A.) .

Section 232 — the statutory derivative action

16 The enactment of the derivative action provisions resulted from the harsh consequences of the common law which essentially permitted the abuse by majority shareholders at the expense of the minority. The case of *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 , held that only the company itself could sue its directors for a breach of their duty to it. The decision to sue is therefore left in the hands of those who control the company, and thus gives effect to the principle of majority rule. Later cases extended this rule even further to include cases of internal irregularities in the operation of the company. As Professor M.A. Maloney has written, modern corporation statutes are "premised on two complementary principles: the concepts of separate legal personality and internal autonomy" (M.A. Maloney, "Whither the Statutory Derivative Action?" (1986), 64 Can. Bar Rev. 309, at p. 310). Professor Maloney explained the relevance of these premises to shareholder remedies as follows (at pp. 310-11):

> The separate legal entity of the corporation ensures that when a wrong is done to the company then it is a wrong for which only the corporation can sue and not individual shareholders. Accordingly, the corporation is the only proper plaintiff. Complementing this, the internal autonomy rule requires that the corporate decision to sue must be taken by the board of directors, or in certain circumstances by the majority of shareholders in general meeting. A "catch-22" situation arises from the overlap of these two tenets when the wrongs that are done to the company are done by the very people who control the company, the board of directors or, as the case may be, the majority shareholders. It is highly unlikely that wrongdoers will propose bringing an action on behalf of the company against themselves. Consequently, from the minority shareholders' perspective, the combination of these factors has often been disastrous. It has been extremely difficult, if not impossible, to bring an action against a miscreant director if the wrong complained of can be classified as a wrong to the corporation instead of, or in addition to, a personal wrong to a shareholder.

Exceptions to this common law rule were developed to cover those cases where the relevant actions could not be ratified by a majority of the shareholders. In *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 at 1067 (C.A.) , Jenkins L.J. referred to four exceptions to the rule in *Foss v. Harbottle* . A paraphrase of his description of the exceptions is put as follows by Palmer's Company Law, 24th ed., at p. 980:

> 1. an act which is *ultra vires* the company or illegal;

2. an act which constitutes a fraud against the minority and the wrongdoers are themselves in control of the company;

3. an irregularity in the passing of a resolution which requires a qualified majority;

4. an act which infringes the personal rights of an individual shareholder.

17 As a result of the problems associated with the rule in *Foss v. Harbottle* itself and the interpretation of its exceptions, corporate law reformers provided a procedure whereby aggrieved minority shareholders could bring an action on behalf of the corporation with leave of the court. Thus, s. 232 of the A.B.C.A. introduced such a procedure to the law of Alberta. The action which is provided for by s. 232 is commonly known as a "derivative action". The derivative action, as it was earlier proposed for federal corporate law in the Dickerson Report, was described in that report as follows (at p. 160):

> 481. Subsection (1) of s. 19.02 confers upon a complainant the right to apply to a court for consent to bring or intervene in a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation. This provision is largely self-explanatory, but two points merit special emphasis. First, it is most important to keep in mind that this provision relates only to the enforcement of rights of the corporation. It is not available as a remedy to enforce rights of an individual shareholder or even a group of shareholders, although a group of shareholders may bring, in representative form, a derivative action in the name of the corporation if they can characterize the issue as the enforcement of a right of the corporation. Typical examples of cases where a derivative action may be invoked are actions against directors or officers for a breach of duty under s. 9.19 alleging self-dealing or negligence, an action for an injunction to preclude a threatened injury to a corporation, or an action to restrain an act outside the scope of the authority of the corporation, its directors or officers ...
>
> 482. Subsection (2) of s. 19.02, which adopts in principle a recommendation of the Jenkins Committee (Para. 206), and which follows the model adopted in s. 99 of the Ontario Act, requires a shareholder who seeks to bring a derivative action to obtain a court order before commencing legal proceedings. At one stroke this provision circumvents most of the procedural barriers that surround the present right to bring a derivative action and, incidentally, minimizes the possible abuse of "strike suits" that might otherwise be instituted as a device to blackmail management into a costly settlement at the expense of the corporation. Although it confers extraordinarily wide discretion upon the court, subsection (2) does state the conditions that must be met before a derivative action may be commenced. By requiring good faith on the part of the complainant this provision precludes private vendettas. And by requiring the complainant to establish that the action is "prima facie in the interest of the corporation" it blocks actions to recover small amounts, particularly actions really instituted to harass or to embarrass directors or officers who have committed an act which, although unwise, is not material. *In effect, this provision abrogates the notorious rule in* Foss v. Harbottle *and substitutes for that rule a new regime to govern the conduct of derivative actions* . [emphasis added]

18 The derivative action was clearly meant to overcome the plight of minority shareholders in the face of majority rule.

Section 234 — action for oppression, unfair prejudice or unfair disregard of the interests of a security holder, creditor, director or officer

19 This remedy, as it appears in s. 234 of the C.B.C.A. (and now in s. 234 of the A.B.C.A.) has been described as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world" (Stanley M. Beck, "Minority Shareholders' Rights in the 1980s", in Law Society of Upper Canada Special Lectures (1982), Corporate Law in the 80s, 311 at p. 312). It gives the court wide discretion to remedy virtually any corporate conduct that is unfair. In view of this, each case will depend largely on its facts; however, analysis of the policy underlying this remedy can provide some guidance to the court in exercising its discretion.

a. Historical background

20 Before the creation of the statutory oppression remedy, the courts followed the rule in *Foss v. Harbottle* . In *Foss v. Harbottle* , the court refused to recognize any legal interest of the shareholder in the corporation's property and held that the corporation alone had the power to sue for an alleged wrong to its property. This rule gave effect to two corporate law concepts. First, it firmly established the corporation as a legal entity separate from its shareholders and with its own rights and obligations. Second, it left the decision to sue in the hands of those who controlled the company, giving effect to the principle of majority rule. The traditional approach of Canadian courts, the acceptance of majority rule, was that business decisions were to be made by the directors and the majority shareholders. The courts took the position that they were powerless to interfere with the internal management of a corporation: *North-West Tpt. Co. v. Beatty* (1887), 12 App. Cas. 589 (P.C.) ; *Burland v. Earle*, [1902] A.C. 83 (P.C.) . As a result of these principles, the courts would intervene only in limited circumstances. A summary of those circumstances, as stated in *Edwards v. Halliwell* , has already been quoted. Professor Gower adds a further exception — "any other case where the interests of justice require that the general rule requiring suit by the corporation should be disregarded" (Gower, The Principles of Modern Company Law, 3rd ed., at p. 585).

21 The oppression remedy in s. 234 has its roots in s. 210 of the United Kingdom Companies Act, 1948. The enactment of s. 210 was the result of the 1945 Report of the Committee on Company Law Amendment ("Cohen Report"), Cmnd. 6659, para. 60. Due to dissatisfaction with the scope of the court's powers at common law to deal with oppression, the Cohen Report recommended giving the court the power to remedy oppressive conduct by imposing whatever settlement it considered just and equitable. This power was to be an alternative to the court's power to make a winding-up order. As Professor Shapira has written,

> By proposing a general remedy against oppression, the Cohen Committee wanted to expand this jurisdiction, giving the courts a freer hand to define oppression, and a larger choice of remedies.

(Shapira, "Minority Shareholders Protection" (1982), 10 N.Z.U.L. Rev. 134, at p. 138.) Under s. 210, the applicant had to show that its case merited relief under the winding-up section, but that a winding-up order would be unfair. In addition, s. 210 required a continuing course of oppressive conduct as opposed to a single oppressive act. Finally, as Professor Mary Anne Waldron has observed,

> ... the principles of non-interference in corporate affairs greatly restricted the type of activities the court would consider under the oppression section. The conduct had to be oppressive to the shareholder in his capacity as shareholder ...

("Corporate Theory and the Oppression Remedy" (1981-82), 6 Can. Bus. L.J. 129 at p. 136.) In Canada, the British Columbia Companies Act, R.S.B.C. 1960, c. 67, s. 185, followed this provision.

22 The next development in the United Kingdom was the 1962 Company Law Report ("Jenkins Report"), Cmnd. 1749, which, at paras. 199-212, recommended expansion of the remedy created by s. 210. The Jenkins Report's main concern was to avoid a restrictive interpretation of oppression. Its view was that s. 210 was meant to cover complaints not only that the affairs of the corporation were being conducted in an oppressive manner, in the narrow sense, but also that those affairs were being conducted in a manner unfairly prejudicial to the interests of certain members (para. 204). Hence, it recommended extending s. 210 to cases where the affairs of the corporation were being conducted in a manner unfairly prejudicial to the interests of some part of the members and not merely in an oppressive manner (para. 212(c)). In addition, the Jenkins Report considered the requirement that the facts would justify a winding-up order to be unduly onerous and unnecessary (para. 201). It further recommended that s. 210 be extended to apply, not merely to an oppressive course of conduct, but to isolated oppressive acts (para. 206). Ultimately the amendment to the United Kingdom Companies Act went even further. By s. 75 of the Companies Act, 1980 (U.K.), the power of the court to grant relief no longer was based on "oppressive" conduct but simply on conduct of the company's affairs "in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) ..." This was repeated in s. 459 of the Companies Act, 1985 (U.K.). The section may, however, be open to the interpretation that the member must be affected in his capacity as a member: see the cases discussed in Palmer's Company Law, 24th ed. (1987), at p. 991.

23 Consistent with those reforms, a new generation of "legislation against oppression, better characterized as legislation against unfair prejudice", developed (Shapira, at p. 134). The Ghana Companies Code, 1961, s. 218, drafted by Professor Gower, was the first of this type of legislation. The extension of the oppression remedy to unfair prejudice first appeared in Canada in the British Columbia Companies Act, S.B.C. 1973, c. 18, s. 221 (now R.S.B.C. 1979, c. 59, s. 224). Subsequently, similar provisions were included in the Canada Business Corporations Act, S.C. 1974-75-76, c. 33, s. 234, the Australian Companies Act, 1981 (Commonwealth), s. 320, and the New Zealand Companies Act, 1955, s. 209. In addition, legislation based on s. 234 of the C.B.C.A. can be found in Alberta, Manitoba, New Brunswick, Newfoundland, Ontario and Saskatchewan. It should be noted that the C.B.C.A. and the legislation based on it provide a much wider protection than that provided until then by legislation in other jurisdictions. This was accomplished by an extended definition of "complainant" which includes parties other than shareholders and the addition of "unfairly disregards the interests" as a basis for the remedy. Originally, the Ontario Business Corporation Act ("O.B. C.A.") did not contain an oppression remedy. This was a result of the 1967 Interim Report of the Select Committee on Company Law ("Lawrence Report"). The Lawrence Report opposed the introduction of an oppression remedy in Ontario on the basis "that it is a complete dereliction of the established principle of judicial non-interference in the management of companies" (para. 7.3.12).

24 In enacting s. 234 of the C.B.C.A., the federal Parliament went beyond the recommendations in the Lawrence Report. The Detailed Background Paper for the Canada Business Corporations Bill (Department of Consumer and Corporate Affairs) contained the following observations:

> Throughout this Bill, a clear distinction has been drawn between management of the external business activities and the internal affairs of a corporation. On the one hand, the directors are given sweeping control to manage the business, subject to the residual power of the shareholders to remove them from office. On the other hand, the shareholders are generally entitled to participate in and, in the case of crisis, to control the internal affairs of the corporation, for example, constitutional change or amalgamation. But in any event, under the Bill, directors and majority shareholders are required to conduct the business and affairs of the corporations in the best interests of the corporations — not in their own interests.

25 The 1971 Proposals for a New Business Corporations Law for Canada ("Dickerson Report") recommended that "the Corporations Act should be largely self-enforcing by civil action initiated by the aggrieved party, not by severe penal sanctions or sweeping investigatory powers" (para. 479). Accordingly, "the best means of enforcing a corporation law is to confer reasonable power upon the allegedly aggrieved party to initiate legal action to resolve his problem" (para. 476). The Dickerson Report recognized that "corporation law — and particularly the duties of officers, directors and dominating shareholders of corporations — is in a very fluid state, reflecting the uncertain role or identity of the business corporation in contemporary society" (para. 477). For that reason, the Dickerson Report

> ... established only very broad quality standards of conduct ... permitting the courts to determine whether there has been a failure to comply with those standards, that is, to continue to develop the common law of responsibility of corporate management unhampered by the legal fetters created at a time when the courts were preoccupied with enforcing "democratic" structures — particularly voting power — as the one real object of the law. [para. 477]

The report noted that s. 234 is derived from s. 210 of the U.K. Companies Act, 1948, but was modified in accordance with the recommendations of the Jenkins Report. The Dickerson Report set out the following differences between s. 210 and s. 234 (at para. 485):

> 1. The standard based on just and equitable grounds to wind up the corporation has been deleted,
>
> 2. The section applies, not just to a continuing course of oppressive conduct, but also to isolated oppressive acts of any corporate body that is affiliated with the corporation,
>
> 3. The section applies, not only to acts which are "oppressive", but also to acts which are "unfairly prejudicial" to or "unfairly disregard the interests of", making it clear that it applies where the impugned conduct is wrongful, but not actually unlawful.

26 (The report set out a fourth difference, which is not relevant to this case.) Furthermore, s. 234 is not limited to the narrow case where a shareholder is oppressed in his capacity as a shareholder, but extends protection to the interests of any security holder, creditor, director or officer (para. 485).

27 The report quoted Lord Cooper in *Elder v. Elder & Watson Ltd.*, [1952] S.C. 49 , to sum up the standard set out in s. 234 (at p. 55):

> ... the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.

After quoting extensively from the Dickerson Report, the Alberta Institute of Law Research and Reform added the following comments (Proposals for a New Alberta Business Corporations Act (1980), vol. 1, at pp. 141-42):

> CBCA s. 234 appears to set up three criteria, the satisfaction of any of which gives rise to a cause of action under the section: is the conduct oppressive? Is the conduct unfairly prejudicial? Does the conduct unfairly disregard the interests of any security holder, creditor, director or officer? The three criteria probably, however, come down to one criterion which, so far as a shareholder is concerned is this: Is the conduct unfair to the shareholder? If it is, he should have a remedy. The section does not tell the courts much about what is "unfair," nor does it tell the courts how to choose between the various remedies which the section makes available; it leaves them free to apply broad equitable standards. There are obvious arguments against allowing broad discretions unaccompanied by well articulated rules for their exercise, but we think that the section embodies the best practical solution to the problems in this area. On the one hand, the present law is both uncertain and rigid, and we think that it does not allow the courts to do full justice. On the other, the circumstances in which companies and their shareholders find themselves are subject to almost infinite variation, and legislation which would try to provide for them all would necessarily be almost unbearably complex and would be unlikely to provide a net which would catch only the unscrupulous.

b. Policy

28 The introduction of a statutory remedy against oppression and unfair prejudice is a deliberate departure from the policy of judicial non-intervention in corporate affairs. Section 234 "casts the court in the role of an active 'arbiter of business policy'" (Shapira, at p. 137). It is drawn in very broad terms and as remedial legislation should be given a liberal interpretation in favour of the complainant: *Re Abraham and Inter Wide Invt. Ltd.* (1985), 41 O.R. (2d) 460, 30 B.L.R. 177 at 187, 20 D.L.R. (4th) 267 (H.C.) ; *Stech v. Davies*, 53 Alta. L.R. (2d) 373, [1987] 5 W.W.R. 563, 80 A.R. 298 (Q.B.) . In *Keho Hldg. Ltd. v. Noble* (1987), 52 Alta. L.R. (2d) 195, 38 D.L.R. (4th) 368, 78 A.R. 131 (C.A.) , Haddad J.A. stated (at p. 136):

> I concur, without hesitation, that these sections ought to be broadly and liberally interpreted. A broad interpretation will reflect the intention of the legislation to ensure settlement of intra-corporate disputes on equitable principles as opposed to adherence to legal rights.

29 The addition of "unfairly prejudicial" and "unfairly disregards" to "oppressive" gives the court a broad basis upon which to apply notions of equity and fairness to the conduct of the directors and the majority. As Professor Shapira pointed out, at p. 145 of his article, the notion of "unfair prejudice" is "not merely a relaxation of the term oppression" and in "important respects it is its antithesis". Clearly, the addition of "unfairly prejudicial" and "unfairly disregards" puts the court in a position to judge the fairness of the actions of management: *Journet v. Superchef Food Indust. Ltd.*, [1984] C.S. 916, 29 B.L.R. 206 (C.S. Que.) , at p. 223, per Gomery J. In view of the broad discretion in s. 234, each case will turn on its facts. In *Re Ferguson and Imax Systems Corp.* (1983), 43 O.R. (2d) 128, 150 D.L.R. (3d) 718 at 727 (C.A.) , leave to appeal to S.C.C. refused 2 O.A.C. 158, 52 N.R. 317 , Brooke J.A. states that "What is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another."

30 There can be little doubt that the statutory oppression remedy will radically reshape corporate law. Traditional corporate theory and the oppression remedy are, to an extent, inconsistent. As Professor Mary Anne Waldron has written, in the article already cited, at p. 130, when applying the oppression remedy "the courts have often violated many of the previously cherished tenets of corporate law." She continued:

> They have ignored the corporate persona, extensively re-ordered corporate affairs relying upon the judge's own assessment of the business, and given remedies to others for wrongs once regarded exclusively as the corporation's own.

As Professor Waldron said at p. 151, the introduction of the concept of "unfairness" extends the oppression remedy to

> ... a general range of unfair conduct: unfairness to the corporation and thus to the shareholder whose economic position depends upon its assets; unfairness in ignoring previous understandings and agreements among shareholders about their future relationships; unfairness in exercising corporate procedures solely for the benefit of the majority interests.

31 Section 234 provides a broad basis for liability with enormous potential for controlling corporate behaviour. As Professor Waldron said at p. 152, this new spirit of flexibility and fairness may be welcomed but some definition of its scope is vital. In *Vedova v. Garden House Inn Ltd.* (1985), 29 B.L.R. 236 (Ont. H.C.) , Anderson J. held that the Ontario equivalent of s. 234 is available only to protect minorities against adverse treatment by the majority (at p. 240):

> The relief available is to be determined by tests less stringent than those which traditionally had to be met in order to procure an order for winding up. But in my view they continue to be confined to protection of minorities. Specifically, they are not intended as a method of mediating between opposing groups of shareholders acting from a position of equality ... In the context of s. 247, "oppressive" connotes an equality of power or authority ... "Unfair" connotes an obligation to act inequitably or impartially in the exercise of power or authority ... I find no such obligation where, as here, power and authority, in the legal sense, are equally divided, and are so divided by pre-existing arrangement.

In *Re Gandalman Invt. Inc. and Fogle* (1985), 52 O.R. (2d) 614, 22 D.L.R. (4th) 638 (H.C.) , at p. 640, Callon J. interpreted the above quotation, not as stating that only minority shareholders can apply for an oppression remedy, but rather, that the relief is not available where power and authority are equally divided and that "oppressive" connotes an inequality of power or authority. In *H.J. Rai Ltd. v. Reid Point Marina Ltd.* , 26th May 1981, B.C.S.C. (unreported), cited in *Brant Invt. Ltd. v. Keeprite Inc.* (1987), 60 O.R. (2d) 737, 37 B.L.R. 65 at 108, 42 D.L.R. (4th) 15 (H.C.) , Skipp J. stated that the legislation "was not intended to diminish but to temper the ordinary presumption of majority rule". In *Brant Invt. v. Keeprite* , Anderson J. expressed the following concern (at p. 99):

> The jurisdiction is one which must be exercised with care. On the one hand the minority shareholder must be protected from unfair treatment; that is the clearly expressed intent of the section. On the other hand the Court ought not to usurp the function of the board of directors in managing the company, nor should it eliminate or supplant the legitimate exercise of control by the majority.

He went on to state (p. 100):

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.

32 There are almost no decisions on the availability of s. 234 to *creditors* . Most applications under s. 234 are made by minority shareholders. With respect to the applicability of decisions involving minority shareholders to cases involving creditors, in *Bank of Montreal v. Dome Petroleum Ltd.* (1987), 54 Alta. L.R. (2d) 289 (Q.B.) , Forsyth J. quoted the above statements of Anderson J. in *Brant Invt.* He then commented (at p. 298):

> While Mr. Justice Anderson in that decision was dealing with the rights of minority shareholders, I fully subscribe to those views and would adopt the same approach in dealing with the rights of creditors when it is alleged same are being unfairly dealt with in some fashion and relief is sought under s. 234.

In the *Dome Petroleum* case, the Bank of Montreal claimed that an arrangement agreement entered into by Dome and Amoco, coupled with certain confidentiality agreements, which effectively restricted any sale of Dome shares or assets for an indeterminate amount of time, unfairly prejudiced or unfairly disregarded the Bank of Montreal's position as a creditor. As the arrangement agreement could not go forward in the absence of the Bank of Montreal's consent, Forsyth J. could not find any oppression, unfair prejudice or unfair disregard on the evidence before him. As such, he granted Dome Petroleum's application for summary dismissal of the application under s. 234.

33 Three cases merit discussion for their attempts to define the key terms of the legislation. In *Scottish Co-op. Wholesale Soc. Ltd. v. Meyer*, [1959] A.C. 324 at 342, [1958] 3 W.L.R. 404, [1958] 3 All E.R. 66 (H.L.) , Viscount Simonds defined "oppressive" as "burdensome, harsh and wrongful". Numerous cases have subsequently quoted and adopted this definition: see *Re Nat. Building Maintenance Ltd.*, [1971] 1 W.W.R. 8 (B.C.S.C.) , at p. 21; *Burnett v. Tsang* (1985), 37 Alta. L.R. (2d) 159, (sub nom. *Re Cucci's Restaurant Ltd.; Burnett v. Tsang)* 29 B.L.R. 196 at 202, 61 A.R. 219 (Q.B.) . In *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.) , at p. 45, the court considered the meaning of "unfairly prejudicial". Fulton J. ruled that in adding the words "unfairly prejudicial" to the statute, the legislature must have intended that the courts would give those words "an effect different from and going beyond that given to the word 'oppressive'". Turning to the Oxford Dictionary, he found that "prejudicial" meant detrimental or damaging to the applicant's right or interest and "unfair" meant inequitable or unjust. He concluded that "the dictionary definitions support the instinctive reactions that what is unjust and inequitable is obviously also unfairly prejudicial" (at p. 46). Finally, in *Stech v. Davies* , supra, at p. 379, Egbert J. defined "unfairly disregard" as "to unjustly or without cause, in the context of s. 234(2), pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers of a corporation."

34 In *Diligenti* , the applicant and the three individual respondents formed a partnership to enter into the restaurant business. They incorporated two companies for this purpose. Each individual was a director of and held one quarter of the shares in the corporation. Subsequently, the respondents removed the applicant as director and took away his managerial responsibilities. In addition, they began paying management fees to another corporation in which the three individual respondents were the sole shareholders. The applicant applied for relief under the oppression remedy. The British Columbia provision required that the acts complained of affect the applicant in his capacity as a shareholder. With respect to this requirement, Fulton J. made the following remarks [p. 47]:

> I consider, however, that the new provision is not to be so narrowly interpreted or its effect so narrowly confined, for to do so would be to deal with it as though the word was still "oppressive". I consider that there are rights — equitable rights — attaching to the position of the applicant as shareholder in the circumstances present here, in respect of which he has been unfairly prejudiced, and in reaching this conclusion I rely upon and respectfully adopt the reasoning of Lord Wilberforce as distilled from a perusal of the whole of his judgment in the *Ebrahimi* case.

In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360, [1972] 2 W.L.R. 1289, [1972] 2 All E.R. 492 (H.L.) , in the context of a petition for equitable winding up of a company, Lord Wilberforce stated (at p. 500):

> The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure ... It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

Fulton J. recognized that the same principles could be applied in determining whether the conduct complained of unfairly prejudiced the applicant's interests as a shareholder (at p. 51):

> First, in circumstances such as exist here there are "rights, expectations and obligations inter se" which are not submerged in the company structure, and these rights are enjoyed by a member as part of his status as a shareholder in the company

> which has been formed to carry on the enterprise: amongst these rights are the rights to continue to participate in the direction of that company's affairs. Second, although his fellow members may be entitled as a matter of strict law to remove him as a director, for them to do so in fact is unjust and inequitable, and is a breach of equitable rights which he in fact possesses as a member. And third, although such breach may not "oppress" him in respect of his proprietary rights as a shareholder, such unjust and inequitable denial of his rights and expectations is undoubtedly "unfairly prejudicial" to him in his status as member.

35 *Diligenti* demonstrated a new direction. Whereas in the past good faith and the constitutional power of the directors and the majority had been critical, the emphasis shifted to the damaging effect on the interests set out in s. 234. These interests include "equitable rights" based on legitimate expectation (see Professor Shapira's article, at p. 149). The "underlying intentions, understandings, and expectations of the participants provide an analytical framework within which the concept of unfair prejudice can be developed" (Shapira, at p. 152). Expectations will vary considerably with the size, structure and nature of the corporation, as well as the circumstances surrounding the applicant's association with the corporation. In *Re Sabex Int. Ltee* (1979), 6 B.L.R. 65 (C.S. Que.) , the court's sole consideration in granting a remedy under s. 234 of the C.B.C.A. appears to have been the effect of the respondent's actions on the applicant. There was not any bad faith nor any discrimination against the applicant. In fact, there was no question that the respondent's actions were in the best interests of the company. The court merely appeared to consider that the respondent's actions might adversely affect the applicant's interests. These cases go beyond simply considering the strict legal rights between the parties and contemplate the court involving itself in the settlement of intra-corporate disputes based on broad, equitable principles.

36 I adopt the following statement by Professor Shapira, at pp. 146-47, as being applicable to the interpretation of s. 234:

> The basic formula for establishing unfair prejudice, it is submitted, should be this. The court should seek to balance protection of the minority's interest against the policy of preserving freedom of action for management and the right of the members to back up their investment by their vote. The fair view of the majority should carry considerable weight, but should not be critically important. The history, nature and structure of the company, the essential nature of the association, the type of rights affected and general company practice should all be material.
>
> More concretely, the test of unfair prejudice should encompass the following considerations: the protection of underlying expectation of shareholders in closely held companies, and the detriment to the member's proprietary interests as a shareholder.

37 The elements of the basic formula and the list of considerations should not be regarded as exhaustive. Other elements and considerations may be relevant, based upon the facts of a particular case.

38 The passage just quoted from Professor Shapira's article puts the matter in terms of the "unfair prejudice" remedy being an instrument for the protection of minority shareholders. Where, as in s. 234 of the A.B.C.A., it may be used as an instrument for the protection of the interests of a creditor, the basic formula for establishing unfair prejudice or unfair disregard of the interests of the creditor should reflect as a goal the desire to seek to balance protection of the creditor's interest against the policy of preserving freedom of action for management and the right of the corporation to deal with the creditor in a way that may be to the prejudice of the interests of the creditor or that may disregard those interests so long as the prejudice or disregard is not unfair.

39 The s. 234 remedy would be available if the act or conduct of the directors or management of the corporation which is complained of amounted to using the corporation as a vehicle for committing fraud upon a creditor. An example might be the directors of a corporation using it to obtain credit for the purchase of goods by means which if the credit were obtained by an individual would be fraudulent on the part of the individual.

40 Assuming the absence of fraud, in what other circumstances would a remedy under s. 234 be available? In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected and general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: the protection of the underlying expectation of a creditor

in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor. The elements of the formula and the list of considerations as I have stated them should not be regarded as exhaustive. Other elements and considerations may be relevant, based upon the facts of a particular case.

41 There is an emerging view in Australia that the test to be applied in interpreting a statutory provision such as s. 234 is whether "objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair": per Young J. in *Morgan v. 45 Flers Ave. Pty. Ltd.* (1986), 10 A.C.L.R. 692 at 704 (N.S.W.S.C., Equity Div.). However, this test would still leave unarticulated the basis upon which unfairness or unreasonableness is to be determined. I suggest that, at least when it is a creditor who seeks the remedy, the tests I have enunciated will be more precise.

42 To adapt a statement by Professor Shapira (at p. 145) as to the objective of the remedy provided for by a remedy such as that provided by s. 234, the type of conduct against which s. 234 affords protection should be understood in terms of the impact of the conduct complained of upon the interests of the security holder, creditor, director or officer, not in terms of intention to damage such interests or to damage the corporation. Yet there is some authority that the court must consider the bona fides of the conduct: *Re Ferguson and Imax Systems Corp.* , supra, at p. 727; *Brant Invt. v. Keeprite* , supra, at pp. 108-109. In *Brant Invt.* Anderson J. stated (at p. 107):

> It has been submitted that the granting of the oppression remedy does not require a finding that there has been a want of probity in those responsible for the impugned conduct; that oppression in the result is sufficient. As to that, I have a measure of skepticism. When one examines the facts in the decisions to which I have been referred, in which a remedy was granted, there is always a finding of conduct clearly inconsistent with good faith and honesty.

In *Bank of Montreal v. Dome Petroleum* , supra, Forsyth J. adopted this statement and added (at p. 300):

> If the finding of mala fides or the lack of probity is not a condition precedent to granting leave under s. 234, C.B.C.A., it would seem to me to take overwhelming evidence of oppression, again using the term in the broad sense, which clearly does not exist in this case, to grant the relief sought.

43 We have seen that, despite the observations of Anderson J. and Forsyth J., the introduction of "unfairly prejudicial" and "unfairly disregards", found in s. 234 of the C.B.C.A. and A.B.C.A., *may* eliminate both the requirements of bad faith and economic damage. This position finds support in cases in which s. 234 has been used by Canadian courts to enforce duties owed at common law by directors to a corporation. In *Re Peterson and Kanata Invt. Ltd.* (1975), 60 D.L.R. (3d) 527 (B.C.S.C.) , a director, in a clear conflict of duty, negotiated a contract that was obviously not in the best interests of the corporation and from which he stood to gain personally. There was no direct financial loss to the corporation. Moreover, the court did not find that the director made the contract in bad faith. Nevertheless, Toy J. found both oppressiveness and unfair prejudice. Similarly, in *Redekop v. Robco Const.* (1978), 7 B.C.L.R. 268, 5 B.L.R. 58, 89 D.L.R. (3d) 507 (S.C.) , the director and majority shareholder of the corporation negotiated a contract with another corporation in which he held shares without complying with the disclosure provisions of the Act. Again, there was no allegation of bad faith. The court, without reference to the "unfair prejudice" aspect of s. 221 of the Companies Act (B.C.), 1973, c. 18, held that this conduct was oppressive as the director had helped himself using the corporation's assets. These cases indicate that a director's breach of duty, even without bad faith and without proof of economic loss to the corporation, may be actionable through the oppression remedy.

44 The courts have granted the remedy found in s. 234 in a variety of circumstances involving appropriation of corporate property. Most of these cases also involve a director's breach of duty. For example, in *Inversiones Montforte S.A. v. Javelin Int. Ltd.*, [1982] C.S. 425, 17 B.L.R. 230 (C.S. Que.) , the court granted relief where the directors of the corporation spent large sums of money to gain and maintain control of the corporation, its subsidiaries and their respective assets. In addition, they had paid large consulting fees to a controlling shareholder. In *Re Little Billy's Restaurant (1977) Ltd.; Faltakas v. Paskalidis* (1983), 45 B.C.L.R. 388, 21 B.L.R. 246 (S.C.) , the respon dents, who held the majority of directorships and were the majority shareholders, authorized the corporation to pay a franchise fee to another corporation that they owned and controlled. The court based its

finding that this conduct was unfairly prejudicial on the ground that it conflicted with the respondents' duties as directors. The court ordered the individual respondents to repay the franchise fee to the corporation. In *Miller v. F. Mendel Hldg. Ltd.*, [1984] 2 W.W.R. 683, 26 B.L.R. 85, 30 Sask. R. 298 (Q.B.) , in addition to excluding the applicants as directors and restricting transfer of their shares, the directors and majority shareholders authorized the transfer of one of the corporation's assets for the personal benefit of one of the directors and to the corporation's detriment. In concluding that the affairs of the corporation were conducted in a manner that was unfairly prejudicial to and that unfairly disregarded the interests of the applicants, the court viewed the events as "part of a consecutive whole" and judged them "in the context of the overall relationship between the parties" (at pp. 100-101). Finally, in *Abraham v. Inter Wide Invt.* , supra, the court granted the oppression remedy where the corporation paid unauthorized directors' fees that did not appear to be associated with the directors' duties and responsibilities.

45 The oppression remedy also has provided relief where the affairs of the corporation were being conducted so as to cause a diminution of the corporation's assets. In *Jackman v. Jackets Ent. Ltd.* (1977), 4 B.C.L.R. 358, 2 B.L.R. 335 (S.C.) , the corporation borrowed money on a mortgage, used half of this money to repay a lower interest debt to an associated corporation and lent the rest to that corporation. The majority shareholder fully owned the associated corporation. Notwithstanding the absence of fraud or appropriation of corporate property, the court found that these actions unfairly prejudiced the interests of the the minority shareholder. In *Keho Hldg. v. Noble* , supra, a majority shareholder who controlled the board of directors caused the corporation to borrow money and loan it, without obtaining security, to one of his own corporations and granted himself a stock option at a price below market value of the shares. Following *Jackman v. Jackets Ent.* , Haddad J.A. found these actions both oppressive and unfairly prejudicial.

Is the applicant a "complainant" entitled to apply for leave to bring an action under s. 232 or s. 234?

46 In order to obtain leave to bring an action under either of these sections, the applicant must be found to be a "complainant" as defined in s. 231. As the applicant is clearly not within s. 231(*b*)(ii), First Edmonton Place can satisfy this requirement only if it can come within s. 231(*b*)(i) or (iii).

Is the applicant a "complainant" within the meaning of s. 231(b)(i)?

47 It will be recalled that s. 231(*b*)(i) defines a "complainant" as "a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates". On behalf of First Edmonton Place it is contended that the lease is a security of the corporation and that the lessor is the beneficial owner of the security. To repeat the definition of "security" as found in s. 1(*u*), that word includes a "debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation". We have seen also that under s. 1(*g* .1) "debt obligation" is defined as meaning "a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured". The report of the Institute of Law Research and Reform of Alberta made the following observations concerning this definition of "complainant" (at p. 149):

> The definition of "complainant" in CBCA s. 231 includes a present and former registered holder of a "security" of a company or its affiliates. The definition of "security" in CBCA s. 2 includes a "debt obligation of a corporation" and "a certificate evidencing such a ... debt obligation." *The reference to the certificate in CBCA s. 2 and the reference to a registered holder in CBCA s. 231 probably restricts the definition of "complainant" to those creditors who are entitled to have certificates and who are to be entered in the securities register.* [emphasis added]

In my opinion, that is a correct interpretation of C.B.C.A., s. 231, and of the definition of "complainant" found in s. 231(*b*)(i) of the A.B.C.A. In other words, a creditor can be a "complainant" under s. 231(*b*)(i) only if it holds or is the beneficial owner of a security of the corporation, and if the security is of a type *which is capable of being registered* under s. 88.2(2) or (5) with the Registrar of Corporations, and in the register of mortgages specifically affecting property of the corporation, which is to be kept by the corporation pursuant to s. 88.5(1). Those provisions apply, according to the definitions contained in s. 88.1, to any "mortgage", and the word "mortgage" includes a "charge", so that the provisions in s. 88.2 relating to the filing of "debentures containing any charge" require the registration of such debentures as well as mortgages. Section 88.2 thus

creates a scheme for the registration of mortgages and debentures. Such written evidence of a debt obligation is in my view "a certificate evidencing ... a ... debt obligation".

48 Thus, it is clear that, by reference to the clear implication on the face of s. 231(*b*)(i), the word "complainant" includes only the registered holders or beneficial owners of a mortgage issued by the corporation or a debenture creating a charge, issued by the corporation. It is therefore not necessary to turn to the institute's report to justify that result, but it is nonetheless worth quoting the rationale which was given by the institute for the inclusion of holders of debt security as complainants (at p. 150):

> ... the holders of debt securities are in much the same position as, and virtually indistinguishable from, the holders of non-voting preference shares, and should have similar treatment in the interests of fairness and of maintaining the attractiveness of debt securities as investments.

That rationale could, however, apply equally to lessors and to creditors who have extended credit to the corporation, for it could be argued that they too, like the holders of non-voting preference shares, should be treated fairly, and that there is an interest in encouraging the commercial liability of corporations by making it attractive to extend credit to them. Whether such a logical extension of the rationale would be justified is, however, a matter that need not be considered further because of the plain meaning of the statute.

49 This plain meaning reflects the meaning of "bonds, debentures and notes" in the world of corporate financing. In Securities Law and Practice (1984), vol. 1, by V.P. Alboini, bonds and debentures are stated to be the "traditional debt instruments issued by corporations" while notes are "issued by any issuer including individuals" (at pp. 0-33, 0-34).

Is the applicant a "complainant" under s. 231(b)(iii)?

50 Under s. 231(*b*)(iii), a person may be a "complainant" if he is a person "who, in the discretion of the Court, is a proper person to make an application under this Part."

51 This is not so much a definition as a grant to the court of a broad power to do justice and equity in the circumstances of a particular case, where a person who otherwise would not be a "complainant" ought to be permitted to bring an action under either s. 232 or s. 234 to right a wrong done to the corporation which would not otherwise be righted, or to obtain compensation himself or itself where his or its interests have suffered from oppression by the majority controlling the corporation or have been unfairly prejudiced or unfairly disregarded, and the applicant is a "security holder, creditor, director or officer".

52 The report of the Institute of Law Research and Reform of Alberta had some reservations about the inclusion of such a broad power to permit a person to complain. It is stated, at p. 150:

> We have some reservations about legislation which confers broad statutory discretions without guidelines. Here, however, we think such a discretion appropriate. The specific listed classes appear to us to cover all cases in which the derivative and personal remedies should be available, but foresight is necessarily imperfect, and the general discretion would allow the courts to make up for the imperfections of foresight. We think also that the courts can be relied upon to allow only proper applications. S. 231(b)(iv) of the draft Act therefore follows CBCA s. 231(d).

(It should be noted that what was s. 231(*b*)(iv) in the draft Act became s. 231(*b*)(iii) in the A.B.C.A.) The institute's report thus recommended that the question of who is a "proper person" be left to the discretion of the court. Even accepting that the s. 232 and s. 234 remedies should be given a liberal interpretation, the circumstances in which a person who is not a security holder (as I have interpreted that phrase) or a director or officer should be recognized as "a proper person to make an application" must show that justice and equity clearly dictate such a result.

53 In the case of a creditor who claims to be a "proper person" to make a s. 232 application, in my view the criterion to be applied would be whether, even if the applicant did not come within s. 231(*b*)(i) or (ii), he or it would nevertheless be a person who could reasonably be entrusted with the responsibility of advancing the interests of the corporation by seeking a remedy to right the wrong allegedly done to the corporation. The applicant would not have to be a security holder (as I have defined that

notion), director or officer of the corporation. The applicant could be a creditor. The applicant might even be a person who at the time of the act or conduct complained of was not a creditor but was a person toward whom the corporation might have a contingent liability. No good purpose would be served in saying more than that now.

54 I turn now to an application by a person who claims to be a "proper person" to make an application under s. 234. As in the case of an application made under s. 232, an applicant for leave to bring an action under s. 234 does not have to be a security holder, director or officer. The applicant could be a creditor, or even a person toward whom the corporation had only a contingent liability at the time of the act or conduct complained of. However, it is important to note that he would not be held to be a "proper person" to make the application under s. 234 unless he satisfied the court that there was some evidence of oppression or unfair prejudice or unfair disregard for the interests of a security holder, creditor, director or officer.

55 Having said that, *assuming* that the applicant was a creditor of the corporation at the time of the act or conduct complained of, what criterion should be applied in determining whether the applicant is "a proper person" to make the application? Once again, in my view, the applicant must show that in the circumstances of the case justice and equity require him or it to be given an opportunity to have the claim tried.

56 There are two circumstances in which justice and equity would entitle a creditor to be regarded as "a proper person". (There may be other circumstances; these two are not intended to exhaust the possibilities.) The first is if the act or conduct of the directors or management of the corporation which is complained of constituted using the corporation as a vehicle for committing a fraud *upon the applicant* . (In the present case there is no evidence suggesting *such* fraud, although there is some evidence of the directors having used the money paid as a cash inducement for their own personal investment purposes, and that, as I shall later explain, may constitute fraud against the corporation: see infra where *R. v. Olan* is cited.)

57 Second, the court might hold that the applicant is a "proper person to make an application" for an order under s. 234 if the act or conduct of the directors or management of the corporation which is complained of constituted a breach of the underlying expectation of the applicant arising from the circumstances in which the applicant's relationship with the corporation arose. For example, where the applicant is a creditor of the corporation, did the circumstances which gave rise to the granting of credit include some element which prevented the creditor from taking adequate steps, when he or it entered into the agreement, to protect his or its interests against the occurrence of which he or it now complains? Did the creditor entertain an expectation that, assuming fair dealing, its chances of repayment would not be frustrated by the kind of conduct which subsequently was engaged in by the management of the corporation? Assuming that the evidence established the existence of such an expectation, the next question would be whether that expectation was, objectively, a reasonable one.

58 Thus, in the present case, an inquiry would properly be directed at trial toward whether the lessor, First Edmonton Place, at the time of entering into the lease, consciously and intentionally decided to contract only with the numbered company, and not to obtain personal guarantees from the three lawyers. A further proper inquiry would be into whether the lessor entered into the lease fully aware that it was not protecting itself against the possibility that the corporation might pay out the cash advance to the lawyers, leaving no other assets in the corporation, and that the corporation might permit the lawyers to occupy the space without entering into a sublease either for ten years or for any lesser period. In the absence of evidence establishing at least a prima facie case that an injustice would be done to the lessor or that there would be inequity if the lessor were not allowed to bring its action and go to trial, leave to bring the action ought not to be granted. There is, in the present case, no evidence showing that there was an expectation on the part of the lessor that the lessee corporation would retain the funds in its hands for any set period of time or any time at all. Nor is there any evidence that there was an expectation that the lessee corporation would grant a lease for a term of ten years or any other set term beyond the rent-free period, to the law firm or any other person or persons. It is true that the lease contemplated the possibility that the corporation would enter into a lease with the lawyers, for it specified that the lessee could do so. That falls far short of evidencing the existence of an *expectation* that there would be a lease for the entire ten-year period or for any set term longer than the rent-free period and less than ten years. Nor does the evidence establish any inequality of bargaining power between First Edmonton Place on the one hand and the three lawyers and their corporation on the other, at the time the lease was being negotiated. If there were some circumstances evidencing such inequality of bargaining power, the result might be different.

59 It is not without significance that the A.B.C.A. does provide specific remedies to creditors where, for example, money is paid out of the corporation and the solvency test has not been passed, or where a director contravenes other parts of the Act (such as ss. 113(5), (6) and 240). The relevant provisions are as follows:

> 113 ...
>
> (5) If money or property of a corporation was paid or distributed to a shareholder or other recipient contrary to section 32, 33, 34, 39, 40, 42, 119, 184 or 234, the corporation, any director or shareholder of the corporation, *or any person who was a creditor of the corporation at the time of the payment or distribution* , is entitled to apply to the Court for an order under subsection (6).
>
> (6) On an application under subsection (5), the Court may, if it is satisfied that it is equitable to do so, do any or all of the following:
>
> (*a*) order a shareholder or other recipient to restore to the corporation any money or property that was paid or distributed to him contrary to section 32, 33, 34, 39, 40, 42, 119, 184 or 234;
>
> (*b*) order the corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares;
>
> (*c*) make any further order it thinks fit.
>
> 240 If a corporation or any shareholder, director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation contravenes this Act, the regulations, the articles or by-laws or a unanimous shareholder agreement, *a complainant or a creditor of the corporation may* , in addition to any other right he has, apply to the Court for an order directing that person to comply with, or restraining that person from contravening any of those things, and on the application the Court may so order and make any further order it thinks fit. [emphasis added]

In these provisions, creditors are specifically mentioned as persons entitled to apply to the court for remedies. While these sections do not preclude creditors from applying for other remedies (such as those provided for by ss. 232 and 234), the legislature has singled out cases in which creditors generally are specifically entitled to protection.

60 In reaching my conclusion as to the interpretation of the phrase "proper person", I have not found it necessary to rely upon the reasoning of Wallace J. in *Re Daon Dev. Corp.* (1984), 54 B.C.L.R. 235, 26 B.L.R. 38, B.C. Corps. L.G. 78,261, *(*sub nom. *Re MacRae and Daon Dev. Corp.)* 10 D.L.R. (4th) 216 (S.C.) . In that case a debenture holder applied under the derivative action provisions in the British Columbia Company Act which correspond with the provisions of s. 234 of the A.B.C.A. The relevant provisions of the British Columbia Company Act, R.S.B.C. 1979, c. 59, were as follows:

> 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
>
> . . . . .
>
> (8) For purposes of this section a member includes
>
> (*a*) a beneficial owner of a share in the company; and
>
> (*b*) any other person who, in the discretion of the court, is a proper person to make an application under this section.

The question was whether the debenture holder fell within s. 225(8)(*b*). This problem would not have arisen in Alberta, as the definition of complainant in s. 231(*b*)(i) of the A.B.C.A., unlike the British Columbia provisions, includes any security

holder, and would therefore include a debenture holder. However, Wallace J. did make some general comments concerning the interpretation of a "proper person" which may be of assistance in the present case. At p. 225 he said:

> I consider the history of derivative actions and the wording of the section requires that the category be composed of those persons who have a direct financial interest in how the company is being managed and are in a position — somewhat analgous [sic] to minority shareholders — where they have no legal right to influence or change what they see to be abuses of management or conduct contrary to the company's interest.

The court denied the application on behalf of the debenture holder "whose only interest in the management of the company is the general and indirect one of wishing to see the company prosper ..." Under the A.B.C.A. the debenture holder would have come within the definition of "complainant" in s. 231(*b*)(i). It might be thought that the statements of Wallace J. would nevertheless be relevant in deciding upon the proper approach to be taken to the definition of a "proper person" in s. 231(*b*)(iii) of the A.B.C.A.; that is, it might be contended that the phrase "proper person" in the A.B.C.A. ought not to be expanded to include a creditor who had no "direct financial interest" in the corporation. Thus, in the present case, it would be argued, the lessor would not be a "proper person" because it did not invest money directly in the corporation, i.e., did not hold any shares in the corporation. However, in my view that argument, based on *Re MacRae* , ought not to influence the interpretation of s. 231(*b*)(iii) of the A.B.C.A., for the very fact that the legislature of Alberta has chosen, in s. 231(*b*)(i), to extend the scope of complainants to include debenture holders (by virtue of using the phrase "a security") indicates that the A.B.C.A. was intended to give protection to persons who have not directly invested money in the corporation and are not shareholders in the corporation. Nor, with respect, is assistance provided by the observation of Wallace J., at p. 224, that the "Legislature intended that the person making the application must have some particular legitimate interest in the matter in which the affairs of the company are managed". Without presuming to comment on what a "legitimate interest" would be in British Columbia, it need only be said that the legislature of Alberta appears to have considered that the registered holder or beneficial owner of a mortgage or debenture creating a charge has a sufficient financial interest in the corporation to justify protection being afforded expressly to such a person.

61 In deciding who is a "proper person", and whether justice and equity require a particular applicant to be recognized as a "proper person", it is appropriate to bear in mind the purposes of the statutory actions provided for in ss. 232 and 234. To the extent that these actions were intended to protect minority shareholders, Professor Bruce Welling, in Corporate Law in Canada (1984), stated at p. 504:

> A statutory representative action is the minority shareholder's sword to the majority's twin shields of corporate personality and majority rule.

In addition to protecting minority shareholders, the actions provided for by ss. 232 and 234 serve the more general purpose of ensuring managerial accountability. That purpose encompasses protection of the rights of not only minority shareholders but also creditors and even the public in general. It is obvious that by permitting s. 232 and s. 234 actions to be brought by persons other than shareholders, the legislature intended that the abuse of majority corporate power be capable of remedial action at the invocation of persons other than shareholders.

62 The derivative action has been characterized as "the most important procedure the law has yet developed to police the internal affairs of corporations" (Rostow, "To Whom and for What Ends Is Corporate Management Responsible?" in The Corporation in Modern Society, Mason ed. (1959), p. 48). In support of the view that the derivative action should be available to a broad base of applicants is the dominant role which corporations presently play in our society. As stated by Professor Stanley M. Beck in "The Shareholders' Derivative Action" (1974), 52 Can. Bar Rev. 159, at pp. 159-60:

> The large corporation, as the dominant economic institution of our time, is particularly being redefined. No longer is it seen as a private institution operating solely for profit on behalf of and answerable only to its one true constituency, its shareholders. It is realized that it is a public institution in the sense that its major decisions have as significant an impact on the economy as do those of government and that its constituency, like government's, is the entire citizenry whether in the guise of shareholder, worker, consumer, supplier, or simply user and enjoyer of clean air and water.

It is arguable that the modern day corporation, affecting as it does such a wide variety of persons and interests, must be policed in a manner to protect these other interests. By allowing a derivative action to be brought by a wider group of interested persons, the legislature has decided that such a procedure is an effective manner in which to enhance managerial accountability by ensuring that a wrong done to a corporation is remedied. While much of the impetus for such a reform may have originated with concern for the social impact of large corporations, no attempt has been made to limit the applicability of the reform to such corporations. In her article already cited, Professor Maloney supported the availability of the derivative action on a wider basis (at p. 315):

> Derivative actions are in effect liability rules designed to act as a deterrent and, as a necessary corollary, create incentives to engage in socially desirable conduct, in this case honest and skilful management. Facilitating such conduct must of course be done in such a manner as to avoid undue interference with managerial decision-making and risk-taking. The desire to maintain an appropriate balance between corporate self-determination and the desire to ensure, from a shareholder's (and the public's) perspective, that the directors or majority shareholders do not run roughshod over minority shareholders' rights or abuse the corporate form has produced much of the tension that exists in present day statutory shareholder remedies and in the judicial decisions in this area.

And further at p. 319, she said:

> Finally and importantly, the category of applicants should not remain or become static. The changing face of capitalism and the role which corporations play in furthering its aims dictate the necessity of flexibility. As the notion of which interests the corporation is working towards changes, and becomes increasingly sophisticated, so must the pool of applicants change. Any fears regarding floodgate possibilities or limitless applications can be dealt with by the other procedural or substantive requirements.

63 Powerful as these arguments are, the legislature has not gone so far as expressly to permit *any* interested person to be a "complainant". However broad the discretion provided for in s. 231(*b*)(iii) may be, it nevertheless contemplates that a limiting line will be drawn. That line should, in my view, be drawn by application of the criteria which I have enunciated.

Is the applicant "acting in good faith", and would the proposed action be "in the interests of the corporation"?

64 Even if the applicant were found to be a "complainant", s. 232(2)(*b*) and (*c*) require that the complainant "is acting in good faith" and that "it appears to be in the interests of the corporation ... that the action be brought ..." The respondents contend that these two conditions have not been met in the present case.

65 These two requirements were commented upon in the Dickerson Report (p. 161), as follows:

> By requiring good faith on the part of the complainant this provision precludes private vendettas. And by requiring the complainant to establish that the action is "prima facie in the interest of the corporation" it blocks actions to recover small amounts, particularly actions really instituted to harass or to embarrass directors or officers who have committed an act which, although unwise, is not material.

66 It may be noted that in the C.B.C.A., as recommended by the Dickerson Report, the requirement is that the action be "prima facie in the interest of the corporation" whereas the A.B.C.A. requires that it be established that "it appears to be in the interests of the corporation" that the action be brought. Thus the A.B.C.A. requires satisfaction of a stricter criterion.

67 Is the "good faith" requirement directed against "private vendettas"? Does this requirement merely require the court to ensure that the action is not frivolous or vexatious? The latter proposition appears to be supported in several cases, including *Bellman v. Western Approaches Ltd.* (1981), 33 B.C.L.R. 45, 17 B.L.R. 117, 130 D.L.R. (3d) 193 (C.A.) ; *Armstrong v. Gardner* (1978), 20 O.R. (2d) 648 (H.C.) ; and *Re Marc-Jay Invt. Inc. and Levy* (1974), 5 O.R. (2d) 235, 50 D.L.R. (3d) 45 (H.C.) .

68 In the present case the respondents contend that the applicant, by seeking leave to bring two actions for substantially the same relief, thus shows bad faith. In *Bellman v. Western Approaches* , it was argued that where the relief requested in both

actions is substantially the same, that is evidence of a lack of good faith and vexatiousness. However, the British Columbia Court of Appeal found that the relief claimed was not the same in the two actions.

69 On behalf of the respondents it is contended that evidence of good faith must be given by affidavit, citing *Re Besenski; 8th Street Theatre Co. v. Besenski* (1981), 15 Sask. R. 182 (Q.B.) , *Re Loeb and Provigo Inc.* (1978), 20 O.R. (2d) 497, 4 B.L.R. 272, 88 D.L.R. (3d) 139 (H.C.) . However, in the *Loeb* case, it appears that the court was simply not satisfied that the good faith requirement was met. In *Re Besenski* , the materials before the court in support of the application to bring a derivative action seemed deficient in general, and it is not surprising that the court held that, in the absence of an affidavit from the applicant, there was no evidence establishing good faith. These cases do not appear to stand for the proposition that an affidavit of the applicant showing evidence of good faith is always necessary. Indeed, in *Appotive v. Computrex Centres Ltd.* (1981), 16 B.L.R. 133 (B.C.S.C.) , Rae J. said, p. 136:

> I am persuaded on the material before me that it is more likely than not that the applicant is acting in good faith and this notwithstanding that there is no affidavit from him in person. There is an affidavit from the applicant's solicitor in support of the petition.

70 In the present case it is clear that First Edmonton Place is in good faith in seeking the potential return of money paid out by the corporation, in order that the corporation will have assets with which to meet the action of First Edmonton against the corporation for breach of the lease. The proposed action to be brought under s. 232 is not designed to obtain a tactical advantage against the directors. If obtaining a tactical advantage against the directors were the motive, that might constitute lack of good faith: see *Vedova v. Garden House Inn Ltd.* , supra.

71 As for the requirement that the court be satisfied that bringing an action "appears to be in the interests of the corporation", we have already seen that the similar but not identical provision in the C.B.C.A. was commented on as follows at p. 161 of the Dickerson Report:

> And by requiring the complainant to establish that the action is "prima facie in the interests of the corporation" it blocks actions to recover small amounts, particularly actions really instituted to harass or to embarrass directors or officers who have committed an act which, although unwise, is not material.

Even allowing for the fact that the Dickerson Report recommended a "prima facie" showing that the proposed action is in the interest of the corporation, the above comment is of assistance in identifying the mischief at which this requirement was directed.

72 In deciding whether this condition has or has not been satisfied, the "courts have continued to show a willingness to grant shareholders leave to commence such an action without holding a mini-trial at the leave stage" (S.M. Beck, "Minority Shareholders Rights in the 1980s", op cit., at p. 337). The *Bellman* case, supra, had interpreted this provision as merely requiring that an arguable case be shown to exist. In *Re Marc-Jay Invt. Inc. and Levy* , supra, O'Leary J. held (at p. 47):

> It is obvious that a Judge hearing an application for leave to commence an action, cannot try the action. I believe it is my function to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful. Where the applicant is acting in good faith and otherwise has the status to commence the action, and where the intended action does not appear frivolous or vexatious and could reasonably succeed; and where such action is in the interest of the shareholders, then leave to bring the action should be given.

The test set out in *Re Marc-Jay* was also followed in *Armstrong v. Gardner* , supra. Other cases have worded this requirement in slightly different terms such as a "reasonable prospect of the action succeeding" or "more than mere suspicion" to justify the granting of leave: *Re MacRae* , supra, at p. 223; *Re Loeb* , supra, at p. 142. In *Walter E. Heller Fin. Corp. v. Powell River Town Centre Ltd.; Re Western Mtge. Corp.; Sewell v. Western Mtge. Corp.* (1983), 49 B.C.L.R. 145 (S.C.) , Macdonald J. commented upon conflicting evidence in such an application (at pp. 150-51, 153):

> The ultimate rights of the parties will be resolved on the basis of which version of those facts is found to be correct. The authorities are clear that it is not appropriate to resolve such issues at this stage of the proceedings on the basis of conflicting affidavits which have not even been tested by cross-examination. Such conflict should be resolved at trial ...
>
> ... the fact is that the opposing parties do put their differing views before the court and they become a factor in the exercise of the court's discretion. However, where the opposing views are at opposite poles and an issue of credibility clearly arises, as here, the sole purpose in considering the respondents' version of the facts is to test the reasonableness on its face of the petitioners' version.

In the present case, there is uncertainty as to the way in which the signing bonus moneys paid over by the corporation to the directors were used, but there is no doubt that they took the money. It appears to be in the interests of the corporation that it be determined at a trial whether their doing so constituted a wrong against the corporation.

73 In the action, First Edmonton Place intends to rely on s. 117(1) of the A.B.C.A. It sets out the following duties of a director:

> 117(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall
>
> (*a*) act honestly and in good faith with a view to the best interests of the corporation, and
>
> (*b*) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The duties of a director are clearly owed to the corporation. Section 117(1)(*a*) sets out the existing common law relating to a director's duty of honesty and good faith. The report of the Institute of Law Research and Reform stated that this provision could increase the responsibility of directors beyond the requirements of the common law standards (p. 66). It was thought that the introduction of a standard for skill and diligence which the court should try to apply objectively was a significant improvement. The institute did however set out some of the difficulties which may arise in the interpretation of this objective standard (at p. 66):

> We have more difficulty about the reference to skill. Firstly, we think that there may be some difficulty in the interpretation of the provision; for example, is the standard applicable to a specially qualified professional person or businessman the same as that applicable to one who does not have the special qualification? Secondly, the imposition of each additional requirement is likely to inhibit persons from accepting directorships, and a requirement of the possession and application of a degree of skill which will effectively be defined by a court after the event is likely to be more inhibiting than some other requirements might be.

Despite these reservations, the institute recommended the adoption of this objective standard of skill.

74 In the present case, the duties of the directors would not change merely because the directors also happened to be the sole shareholders of the corporation. In *Sigurdson v. Fidelity Ins. Co.*, [1977] 4 W.W.R. 231, 24 C.B.R. (N.S.) 137, 2 B.L.R. 1 at 22 (B.C.S.C.) , McKenzie J. held that "'the responsibility of the directors and officers of the corporation is to the corporation itself, whatever be its composition at any moment as to number of corporators'".

75 In deciding whether the three lawyers, as directors of the corporation, breached either of the duties set forth in s. 117(1), the trial court may well take into account an observation of Dickson J. in *R. v. Olan*, [1978] 2 S.C.R. 1175, 5 C.R. (3d) 1, 41 C.C.C. (2d) 145, 86 D.L.R. (3d) 212, 21 N.R. 504 [Ont.]. That was a criminal case in which the accused directors were charged with defrauding a company contrary to the Criminal Code. Although the case dealt with the meaning of fraud in the criminal law, the following statement by Dickson J., at p. 218, is germane:

> Using the assets of the corporation for personal purposes rather than *bona fide* for the benefit of the corporation can constitute dishonesty in a case of alleged fraud by directors of a corporation.

In the present case, if leave to sue were granted, the trial court might also wish to consider the fiduciary duty of officers and directors of the corporation as defined in *Can. Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R.

(3d) 371 at 382 -84 [Ont.]. Also of interest to the trial court may be the discussion by Belzil J.A. as to the duties owed by directors who are in control of corporate funds: see *Angus v. R. Angus Alta. Ltd.* (Court of Appeal of Alberta, 4th March 1988) [now reported 58 Alta. L.R. (2d) 76, [1988] 3 W.W.R. 737, 85 A.R. 266].

76 The applicant also wishes to bring an action under s. 232, against the three lawyers, on the ground that they failed to act in good faith and in the interest of the corporation by not obtaining from the law firm a written long-term sublease matching the lease which the corporation had entered into as lessee. It is arguable that the lawyers, as directors of the corporation, failed to act "in good faith with a view to the best interests of the corporation", and that they did not "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" in allowing the corporation to enter into the lease and incur a possible liability for rent for ten years, without securing a sublease from themselves as individuals, or their law firm, or for that matter anyone else, for at least part of the term of the lease. That is a matter which, if leave to bring an action were granted, the trial court should determine. The lessor, in bringing an action on this ground, would be acting in good faith, and if successful, the action would be in the interests of the corporation because, to the extent that there would be recovery from the lawyers, the corporation would be better enabled to meet its liability to the lessor, whatever that might be.

If an action were brought under s. 234 on the ground that the conduct of the directors was "oppressive or unfairly prejudicial to" or unfairly disregarded "the interests of any ... creditor", was the lessor a "creditor" at the time of the conduct complained of?

77 The discussion of this issue is also relevant to the question whether the lessor can be regarded as a "complainant", for the definition of "complainant" contained in s. 231(*b*)(i) refers to "a security of a corporation", and the meaning of the word "security" includes "a debt obligation of a corporation". I have already held that it is only certain limited kinds of debt obligations, of which this lease is not one, which can qualify as a "security", but if I am wrong in my decision in that regard, it would be necessary to consider whether the lessor is a creditor.

78 Bearing that in mind, I turn to the requirement of s. 234(2) that, if leave to commence the action is to be granted, it must be shown that the conduct of the directors was oppressive or unfairly prejudicial to or unfairly disregarded the interests of, inter alia, a "creditor". The applicant must have had an interest as creditor at the time the acts complained of occurred: *R. v. Sands Motor Hotel*, [1985] 1 W.W.R. 59, 28 B.L.R. 122, [1984] C.T.C. 612, 84 D.T.C. 6464, 36 Sask. R. 45 (Q.B.) . The wording of s. 113(5) supports this view, at least with respect to creditors. Section 113(5) gives creditors "at the time of the payment or distribution" relief for payments or distributions contrary to certain provisions of the Act, including s. 234.

79 At the time of the acts complained of, there was not any rent yet due under the lease. The applicant contends that the lease obligations of the corporation were a present debt at the time of the acts complained of, citing *Re Hulbert and Mayer*, 11 Alta. L.R. 239, [1917] 1 W.W.R. 380, 31 D.L.R. 330 (T.D.) . According to *Re Hulbert and Mayer* , the legal liability to pay rent is incurred at the time the lease is created. Thus, at the time of the acts complained of, although the corporation did not owe any rent to the applicant, it did have an obligation to the applicant in respect of future rent. Notwithstanding this obligation, it may be that the applicant was not a creditor at the relevant time as its claim was for unliquidated damages. In *Re Porcupine Gold Reef Mining Co.*, [1946] O.R. 145, 27 C.B.R. 216, [1946] 2 D.L.R. 618 (H.C.) , at p. 622, Urquhart J. defined "creditor" as "'one to whom a debt is owing — correlative to debtor'". In attempting to arrive at a definition for "debt", Professor C.R.B. Dunlop, in his work, Creditor-Debtor Law in Canada (1981), stated, at pp. 19-20:

> The above discussion indicates that the word "debt" is not today a term of art with a clear, never-changing denotation. Instead of trying to define a core meaning, it would seem better to agree with the editors of the *Corpus Juris Secundum* that "[the word] takes shades of meaning from the occasion of its use, and color from accompanying use, and it is used in different statutes and constitutions in senses varying from a very restricted to a very general one". One can say that the most common use of the word "debt" is to describe an obligation to pay a sum certain or a sum readily reducible to a certainty. The obligation may or may not depend on an express or implied contract, depending on the context in which the word is used, but to this writer the essence of the term is that, if there is an obligation to pay a certain or ascertainable sum, the courts should tend not to concern themselves with the precise nature of the cause of action. Claims for unliquidated damages will generally not be describable as debts unless the context suggests otherwise.

In *Gardner v. Newton* (1916), 26 Man. R. 251, 10 W.W.R. 51, 29 D.L.R. 276 (K.B.) , the issue was whether a landlord is a creditor in respect of rent which has not become due and payable. With respect to cases dealing with the general meaning of "creditor", Mathers C.J.K.B. said, at p. 282:

> The above cases all deal with the definition of the words "debtor" and "creditor" in particular statutes. They shew that in the absence of anything to indicate that a more comprehensive meaning was intended that which is ascribed to them in everyday usage is to be applied. In its largest sense "creditor" is one who has a right to require the fulfilment of an obligation or contract; but its general and almost universal meaning is a person to whom a debt is payable. Stroud, Judicial Dictionary ...

As to the specific contention that a landlord is a creditor in respect of future rent by virtue of the covenant to pay rent, he stated, at p. 285:

> The very most [the landlord] would be entitled to do would be to prove for the present value of his claim. But how is that value to be arrived at even if the trust instruments made provision for assessing it? The premises might have been destroyed the next day or they may remain intact until the expiration of the lease. No tribunal, however wide its powers, could possibly name a sum which will certainly accrue to the plaintiff. It seems to me quite impossible to say that a man is a "creditor" even using the word in its largest sense, in respect of a sum of money not one penny of which may ever become payable.

80 It is true that in *G.T. Campbell & Assoc. Ltd. v. Hugh Carson Co.* (1979), 24 O.R. (2d) 758, 7 B.L.R. 84, 11 C.P.C. 1, 99 D.L.R. (3d) 529 (C.A.) , affirming 5 B.L.R. 201, 8 C.P.C. 46 , and 23 O.R. (2d) 136, 6 B.L.R. 32, 94 D.L.R. (3d) 722 , Houlden J.A. (Brooke J.A. concurring, Lacourciere J.A. dissenting) refused to restrict "creditor" to its common law meaning of a person to whom a debt is owing and held that in the context of the liquidation provisions of the O.B.C.A., "creditor" must be extended to include a person with a claim for unliquidated damages. The reasoning of the majority need not be described in detail. It is sufficient to say that the majority held that the word "creditor" had to be given an extended meaning, rather than its plain and ordinary meaning, for otherwise there would be an unjust and unreasonable result in that the claimant for unliquidated damages would not come within the statutory requirement found in s. 253 of the O.B.C.A. that a creditor of a dissolved corporation must bring an action against the shareholders of the dissolved corporation within two years of dissolution. If the contrary point of view had been accepted, a person with an unliquidated claim for damages who failed to reach trial within two years of dissolution would not be able to claim as a "creditor" within two years of dissolution. No such consideration of justice and reasonableness dictates giving an extended meaning to the word "creditor" in s. 234 of the A.B.C.A. My conclusion is that the word "creditor" as it is used in s. 234 does not include a lessor in respect of rent which is not owing at the time of the acts complained of, and that therefore the applicant could not succeed in its claim insofar as it is based upon the lease.

Conclusion

81 In the case of the application under s. 232, the applicant was not a holder of a security or a "creditor" at the time of use of the cash inducement money by the three directors. However, there is some evidence that the cash inducement money was not used for purposes of the corporation and that its use might have been a fraud upon the corporation. If it was a fraud upon the corporation, and if the corporation were entitled to recover the money from the three directors, the applicant may have a genuine interest in advancing the claim to such recovery because the corporation might be liable in damages to the applicant. Therefore the applicant is in my opinion a proper person to make an application under s. 232 and should be granted leave to bring an action in the name and on behalf of the corporation in respect of the payment of the cash inducement money to or for the benefit of the three lawyers.

82 Moreover, as for the three lawyers, as directors of the corporation, permitting themselves as lawyers to occupy the leased premises without paying rent or entering into a lease, whether that conduct constituted a wrong to the corporation is a matter that should be tried. Once again, if there was a wrong, the applicant might ultimately stand to benefit from any recovery by the corporation. Therefore the applicant is in my opinion a proper person to make an application under s. 232 in regard to this head of claim and should be granted leave in the same action to advance a claim in the name and on behalf of the corporation

in respect of the occupation of the premises by the directors for their own personal purposes and in respect of the failure of the directors to obtain from themselves personally (or their law firm) a sublease for the term of the lease.

83 Granting leave to bring the statutory derivative action under s. 232 does not in any way imply that on the basis of the evidence placed before me I am of the view that the action is likely to succeed. As to that, of course, I offer no opinion.

84 During the course of argument there was no suggestion that if leave were granted any condition or conditions would be appropriate. If counsel for the respondents wishes to make any submission in that regard now that leave has been granted, he should make this known to me without delay.

85 In the case of the application under s. 234, leave to bring an action in regard to either claim is denied because the applicant was not a creditor at the time of the act or conduct complained of.

86 Costs may be spoken to.

Application granted in part.

TAB 15

1989 ABCA 274
Alberta Court of Appeal

First Edmonton Place Ltd. v. 315888 Alberta Ltd.

1989 CarswellAlta 181, 1989 ABCA 274, [1989] A.J. No. 1021, [1990] 2 W.W.R. 670, [1990] A.W.L.D. 1047, [1990] C.L.D. 017, 18 A.C.W.S. (3d) 165, 45 B.L.R. 110, 71 Alta. L.R. (2d) 61

315888 ALTA. LTD., MAJESKI and JOHNSON v. FIRST EDMONTON PLACE LTD.; SEREDA v. FIRST EDMONTON PLACE LTD. et al.

Lieberman, McClung and Stevenson JJ.A.

Judgment: November 6, 1989
Docket: Edmonton Nos. 8803 0833AC, 8803 0851AC

Proceedings: reversed *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 1988 CarswellAlta 103, 60 Alta. L.R. (2d) 122, 40 B.L.R. 28, [1988] A.W.L.D. 1140, 10 A.C.W.S. (3d) 268, [1988] C.L.D. 1277 ((Alta. Q.B.))

Counsel: *P.F. Jasper*, for 315888 Alta. Ltd., Majeski and Johnson.
G.R. McKenzie, for First Edmonton Place Ltd.
B.R. Alloway, for Sereda.

Subject: Corporate and Commercial
Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.i Derivative actions
III.3.e.i.B Under statute
III.3.e.i.B.1 Availability
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.E Miscellaneous
Headnote
Corporations --- Shareholders — Shareholders' remedies — Derivative actions — Under statute — Availability
Corporations — Actions by and against corporations — Derivative actions — Landlord suing for rent and other relief — Court granting landlord leave to bring derivative action — Court of Appeal adjourning order until disposition of principal action — Order being premature — Resort to derivative action not being pressing or certain in circumstances.
The landlord sued the corporate tenant for rent and the recovery of money paid to the corporation, and benefits given to it, as inducements to enter into a lease. The landlord alleged that this money was improperly paid out to the shareholders and directors of the corporation. The landlord also brought an originating notice of motion seeking leave to bring a derivative action against the shareholders and directors to force them to repay to their corporation the money which the landlord had paid to the corporate tenant. The chambers judge allowed the landlord's derivative action, and the directors and shareholders appealed.
Held:
Appeal adjourned; order stayed pending disposition of principal action.

To succeed in the proposed derivative action the landlord would need to establish the corporation's liability to it in the principal action for rent and other relief. It was not clear whether the principal action would have to be pursued to judgment and, if so, whether the judgment would be unsatisfied. Resort to the derivative action was therefore neither certain nor pressing.
Whether leave was available to a creditor in the landlord's position depended on questions of construction and practice. It should not be answered in the absence of adequate proof of the rightness of the fundamental claim on which the action would be built. The availability of this peculiar remedy should not be decided in a factual vacuum.
Since the order was made prematurely, it should be stayed until disposition of the principal action. At that time the appeal could be brought on or the question remitted to the Court of Queen's Bench for decision.

Table of Authorities

Statutes considered:

Business Corporations Act, S.A. 1981, c. B-15

Appeal from decision of McDonald J., 60 Alta. L.R. (2d) 122, 40 B.L.R. 28, granting leave to bring derivative action under Alberta Business Corporations Act.

Stevenson J.A. **(for the court) (Memorandum of judgment delivered from the bench):**

1 This is an appeal from a judgment of Mr. Justice McDonald [reported 60 Alta. L.R. (2d) 122, 40 B.L.R. 28] giving leave to bring a derivative action under the terms of the Alberta Business Corporations Act.

2 The respondent is a landlord who, as plaintiff, sued a numbered company for rent and other relief. The other relief comprised damages relating to the recovery of moneys paid to the company for benefits given to it as inducements to enter into a lease. Those inducements included free rent, a cash bonus, improvement allowance, and the like. The material used before the chambers judge suggested that these moneys were improperly paid out to the shareholders and directors of the company, which is said to be a shell.

3 The plaintiff landlord then also brought an originating notice of motion seeking leave to bring a derivative action against those shareholders and directors relating to the repayment of the moneys which the landlord had previously paid the corporate tenant. Leave was given to sue those shareholders and directors, as well as the company in the course of a derivative action. Those potential defendants are the appellants.

4 It is common ground that in order to succeed in the proposed derivative proceeding the landlord will have to establish the liability of the tenant corporation to it. Mr. McKenzie fairly conceded at the opening of his argument that those issues would be answered by, and in, that first law suit. That first law suit, which was commenced just over two years ago, is on foot; there have been discoveries and some production of documents although these steps are not, we understand, all completed. We do not know, of course, whether that action will have to be pursued to judgment and, if so, whether the judgment will be unsatisfied. We do not know, because there is a dispute about it, exactly what happened to the so-called inducements and on what grounds they were paid out.

5 The basis for any right to bring that derivative action is not established and, at this point, is speculative. Moreover, it may never, even if established, give rise to the derivative action. Any judgment might be satisfied directly or by the exercise of creditors' remedies, for example, receivership or insolvency, or through collection from the shareholders and directors as debtors.

6 So resort to the derivative action is neither certain nor pressing.

7 Whether leave is available to a creditor of this kind (assuming the relationship were established) is a nice question, depending upon questions of construction and practice. It should not be answered in the absence of adequate proof of the rightness of the fundamental claim upon which the action will be built. The claim is disputed and we do not know whether it will be established and whether, for example, proceedings relating to the satisfaction of the judgment will verify the allegations about wrongful taking of the inducements. Moreover, there are important questions of a discretionary nature that must be considered. We do not think those determinations should be allowed to proceed with the key matters still at large. Debt actions cannot routinely be turned into derivative actions. The availability of this peculiar remedy should not be decided in a factual vacuum.

8 We are of the view that it was premature to make this order. We therefore adjourn the appeal and stay the order appealed from until the disposition of the principal action, at which time any of the parties is at liberty to bring on the appeal or to remit the question to the Court of Queen's Bench for a decision on the basis of the facts then established following the conclusion of that litigation.

9 After argument the court directed that costs of the appeal abide the disposition of this question either on appeal or in Court of Queen's Bench (as the case may be).

Appeal adjourned; order stayed.

TAB 16

2004 ABQB 493
Alberta Court of Queen's Bench

Zimmer v. DenHollander

2004 CarswellAlta 1041, 2004 ABQB 493, [2004] A.W.L.D. 479, [2004] A.J. No. 902, 135 A.C.W.S. (3d) 629, 372 A.R. 29, 41 Alta. L.R. (4th) 45, 46 B.L.R. (3d) 309

In the Matter of an Application Under Part 19 of the Business Corporations Act, R.S.A. 2000, c. B-9

Marvin Zimmer, Select Pork Systems Inc. and TSC International Inc. (Applicants / Respondents)
and David DenHollander, Howard Bolinger and Pure Lean Inc. (Respondents / Applicants)

Clark J.

Heard: May 7, 2004
Judgment: June 25, 2004
Docket: Calgary 0301-20398

Counsel: Patrick D. Fitzpatrick for Applicants / Respondents
Michael P. Theroux for Respondents / Applicants

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.B Standing to apply
III.3.e.ii.B.4 Miscellaneous

Headnote

Business associations --- Specific corporate organization matters — Shareholders — Shareholders' remedies — Relief from oppression — Standing to apply

D and B were controlling shareholders of PL Inc. — Z was shareholder of PL Inc. and controlling shareholder of T Inc. and PS Inc. — Z and D executed letter of intent to purchase T Inc. and PS Inc. — Z was appointed director of PL Inc. — D caused PL Inc. to issue press release announcing that it would not be proceeding with acquisition of T Inc. and PS Inc. — D and B used majority shareholdings to remove Z as director of PL Inc. — Z, T Inc. and PS Inc. applied for oppression remedy under s. 242 of the Business Corporations Act — D, B and PL Inc. applied for order that T Inc. and PS Inc. did not have standing to bring application for oppression remedy — Application dismissed — T Inc. and PS Inc. had standing to bring application under oppression remedy — T Inc. and PS Inc. did not fit within enumerated classes that had complainant status as of right — T Inc. and PS Inc. were proper persons under s. 239(b)(iv) — T Inc. and PS Inc. had real interest in pursuing matter — T Inc. and PS Inc. were creditors for purpose of standing under oppression remedy application — T Inc.'s and PS Inc.'s interest in affairs of PL Inc. was not remote and their complaints were related to circumstances giving rise to debt — There was nexus amongst three companies — As creditors, T Inc. and PS Inc. were proper persons to bring application.

Table of Authorities

Cases considered by *Clark J.*:

A E Realisations (1985) Ltd. v. Time Air Inc. (1994), [1995] 3 W.W.R. 527, 17 B.L.R. (2d) 203, 127 Sask. R. 105, 1994 CarswellSask 287 (Sask. Q.B.) — considered

A E Realisations (1985) Ltd. v. Time Air Inc. (1995), [1995] 6 W.W.R. 423, 131 Sask. R. 249, 95 W.A.C. 249, 1995 CarswellSask 68 (Sask. C.A.) — referred to

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28, 1988 CarswellAlta 103 (Alta. Q.B.) — considered

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1989), 45 B.L.R. 110, 71 Alta. L.R. (2d) 61, [1990] 2 W.W.R. 670, 1989 CarswellAlta 181 (Alta. C.A.) — followed

First Mortgage Fund (V) Inc. (Receiver of) v. Boychuk (2001), 2001 ABQB 712, 2001 CarswellAlta 1115, *(*sub nom. *First Mortgage Fund (V) Inc. v. Boychuk)* 291 A.R. 371, 96 Alta. L.R. (3d) 306 (Alta. Q.B.) — considered

First Mortgage Fund (V) Inc. (Receiver of) v. Boychuk (2002), 2002 ABCA 194, 2002 CarswellAlta 997, 312 A.R. 1, 281 W.A.C. 1, 8 Alta. L.R. (4th) 212 (Alta. C.A.) — referred to

Gardner v. Newton (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered

HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc. (1999), 1999 CarswellAlta 458, 47 B.L.R. (2d) 180, [1999] 11 W.W.R. 281, 72 Alta. L.R. (3d) 356, 247 A.R. 37, 1999 ABQB 406 (Alta. Q.B.) — followed

Levy-Russell Ltd. v. Shieldings Inc. (1998), 1998 CarswellOnt 3455, 165 D.L.R. (4th) 183, 4 C.B.R. (4th) 72, 41 O.R. (3d) 54, 41 B.L.R. (2d) 134 (Ont. Gen. Div.) — followed

Mackenzie v. Craig (1999), 1999 CarswellAlta 193, 171 D.L.R. (4th) 268, 232 A.R. 170, 195 W.A.C. 170, 70 Alta. L.R. (3d) 166, [1999] 10 W.W.R. 450 (Alta. C.A.) — considered

Royal Trust Corp. of Canada v. Hordo (1993), 10 B.L.R. (2d) 86, 1993 CarswellOnt 147 (Ont. Gen. Div. [Commercial List]) — referred to

Statutes considered:

Business Corporations Act, S.A. 1981, c. B-15

Pt. 19 — referred to

s. 231(b) "complainant" (iii) — referred to

s. 240 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

s. 239(b) "complainant" — considered

s. 239(b)(i) — considered

s. 239(b)(ii) — considered

s. 239(b)(iii) — considered

s. 239(b)(iv) — considered

s. 242 — referred to

s. 242(1) — considered

s. 242(2) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 129 — referred to

APPLICATION for order that corporate applicants did not have standing to bring application for oppression remedy.

***Clark J.*:**

Introduction

1 The Respondents David DenHollander ("DenHollander"), Howard Bolinger ("Bolinger") and Pure Lean Inc. ("Pure Lean"), seek an order that two of the Applicants, TSC International Inc. ("TSC") and Select Pork Systems Inc. ("Select Pork"), do not have standing to bring an application for an oppression remedy on the ground that neither TSC nor Select Pork are a "complainant" as required under s. 242 of the *Business Corporations Act*, R.S.A. 2000, c. B-9 (the "*ABCA*"). The order is sought without prejudice to any entitlement on the part of TSC and Select Pork to re-commence an action by way of Statement of Claim.

2 These proceedings were commenced by way of an Originating Notice wherein Marvin Zimmer ("Zimmer"), TSC and Select Pork made an application for an oppression remedy under s. 242 of the *ABCA*. The Applicants do not dispute that Zimmer has standing and that he has the right to personally pursue the oppression remedy.

3 There was an interesting procedural aspect raised in the course of argument. The Applicants have noted that the *ABCA* provides no specific procedure for an interlocutory motion to challenge the standing of a complainant. They argue that this suggests that one must look to the *Alberta Rules of Court* for the proper procedure to be followed, and specifically that the Respondents must seek a motion to strike under Rule 129.

4 This issue was dealt with by Ritter J. (as he then was) in *First Mortgage Fund (V) Inc. (Receiver of) v. Boychuk* (2001), 96 Alta. L.R. (3d) 306, 2001 ABQB 712 (Alta. Q.B.) (reversed on other grounds). Ritter J. determined that the court has the discretion to decide the preliminary issue of an applicant's standing under the oppression remedy provisions. At para. 24 Ritter J. stated:

> I note that the ABCA does not make leave of the court a precondition to filing a statement of claim but does provide the court the discretion to determine whether the Plaintiff is a proper complainant.

Ritter J. went on at para. 25:

> It does make sense that the Plaintiff bring a chambers application for its designation as a complainant at an early date, so that if the court determines that it does not qualify, costs will not be wasted by other steps. I accordingly direct that the plaintiff, as its next step in these proceedings, bring such an application and that no other steps be taken until that application be heard.

This particular point was upheld at the Court of Appeal ((2002), 8 Alta. L.R. (4th) 212, 2002 ABCA 194 (Alta. C.A.)) where, at para. 26, the Court held that establishing status as a complainant can be a step in the proceedings.

5 Relying on these decisions, Hawco J. ordered that the issue of standing for TSC and Select Pork be resolved by way of this Special Chambers Application prior to the hearing on the merits of the Originating Notice. This judgment is confined to the issue of standing for TSC and Select Pork under the *ABCA* oppression remedy.

Facts

6 DenHollander and Bolinger are the controlling shareholders of Pure Lean. Zimmer is a shareholder of Pure Lean. Zimmer is also the controlling shareholder of TSC and Select Pork. All three companies are involved in the hog industry.

7 On May 8, 2003, Zimmer and DenHollander executed a "Letter of Intent to purchase TSC and Select Pork" (the "Letter of Intent"), which contemplated that Select Pork and TSC would be acquired by Pure Lean in exchange for shares of Pure Lean.

8 The Letter of Intent also contemplated that Pure Lean would provide a maximum of $175,000 as working capital to operate Select Pork until it was acquired by Pure Lean.

9 Zimmer was appointed a Director of Pure Lean on May 29, 2003. The nature and extent of Zimmer's work for and on behalf of Pure Lean thereafter is in dispute. In particular, Zimmer claims that he worked on a full-time basis managing TSC, Select Pork, and Pure Lean from May, 2003 through to November, 2003, and devoted a disproportionate amount of time working for Pure Lean. DenHollander, however, contends that Zimmer in fact devoted very little time working for Pure Lean.

10 By the end of July, 2003, $110,000 of the $175,000 contemplated in the Letter of Intent had been advanced by Pure Lean to Select Pork. To secure the indebtedness, Pure Lean had Zimmer sign a promissory note on behalf of Select Pork on August 1, 2003. On December 5, 2003, DenHollander sent a letter to Zimmer demanding payment on the promissory note for the $110,000. The $110,000 has not been repaid and Pure Lean has commenced an action to recover these funds.

11 Zimmer contends that while he was a Director of Pure Lean the company had financial difficulties and could not pay its debts as they became due. There has not been any evidence presented to dispute that Pure Lean experienced these financial difficulties. Zimmer claims that due to Pure Lean's poor financial situation he caused Select Pork and TSC to pay various expenses of Pure Lean on Pure Lean's behalf through the summer and into the Fall of 2003 on the expectation that the transaction contemplated in the Letter of Intent would be completed. Zimmer claims that without those expenses being paid by Select Pork and TSC, Pure Lean would have been cut off by one or more of its key suppliers, and would have gone out of business. Zimmer also claims that the payments by Select Pork and TSC on behalf of Pure Lean were done with DenHollander's full knowledge and approval.

12 On October 7, 2003, DenHollander caused Pure Lean to issue a Press Release announcing that Pure Lean would not be proceeding with the acquisition of TSC and Select Pork.

13 In the Fall of 2003, DenHollander caused Pure Lean's Bow Island Facility to be shut down, thereby discontinuing two of the three primary aspects of Pure Lean's business. This decision resulted in Pure Lean refusing to accept feeder pigs from TSC that TSC was contractually obligated to purchase. Zimmer claims that TSC had a separate contract with Pure Lean to purchase these pigs (the "Baltussen contract"), but DenHollander disputes this saying that there has never been an agreement between Pure Lean and TSC to purchase the feeder pigs from TSC. During this period the hog market declined significantly due to the fallout from the mad cow crisis. This left TSC with an obligation to purchase feeder pigs from TSC's supplier, and no buyer for the pigs.

14 On December 12, 2003, Denhollander and Bolinger used their majority shareholdings in Pure Lean to remove Zimmer as a Director of Pure Lean.

15 Zimmer has filed an affidavit in support of the Originating Notice. On cross-examination of his affidavit, Zimmer gave several undertakings to gather information and produce certain documents regarding the various expenses he claims that TSC and Select Pork incurred on behalf of Pure Lean. DenHollander has also filed an affidavit on behalf of the Respondents.

Issue

16 The sole issue for determination in this Application is whether TSC and Select Pork have standing as a "complainant" to bring an oppression remedy application under s. 242 of the *ABCA*.

17 TSC and Select Pork claim to have standing as a "complainant" both as a "proper person" and as a "creditor" as defined in Part 19 of the *ABCA*.

A. Whether TSC and Select Pork Have Standing as a "Proper Person"?

(i) The Law

18 Section 242(1) of the *ABCA* provides that only a "complainant" may apply to the Court for an oppression remedy:

> 242(1) A complainant may apply to the Court for an order under this section.

19 Section 239 of the *ABCA* provides the definition of "complainant" as it applies to a s. 242 application:

> (b) "complainant" means

> (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (ii) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (iii) a creditor
>
> (A) in respect of an application under section 240, or
>
> (B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv), or
>
> (iv) *any other person who, in the discretion of the Court, is a proper person to make an application under this Part.*

[Emphasis added.]

20 The standing of Zimmer is not disputed. He clearly qualifies as a complainant as a shareholder and former director of Pure Lean.

21 TSC and Select Pork do not fit within the enumerated classes that have complainant status as of right (*i.e.* ss. 239(b)(i) and (ii)). They ask this Court to use its discretion to find that they both have standing as proper persons under s. 239(b)(iv).

22 In *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Alta. Q.B.), McDonald J. explained at p. 140 that, since the oppression remedy is "drawn in very broad terms and as remedial legislation [it] should be given a liberal interpretation in favour of the complainant."

23 McDonald J. went on to state at p. 150, that the court's discretion under s. 231(b)(iii) [now s. 239(b)(iv)] is "not so much a definition as a grant to the court of a broad power to do justice and equity in the circumstances of a particular case." Additionally, at pgs. 155-156, McDonald J. stated:

> In addition to protecting minority shareholders, the actions provided for by ss. 232 [now s. 240] and 234 [now s. 242] serve the more general purpose of ensuring managerial accountability. That purpose encompasses protection of the rights of not only minority shareholders but also creditors and even the public in general. It is obvious that by permitting [s. 240] and [s. 242] actions to be brought by persons other than shareholders, the legislature intended that the abuse of majority corporate power be capable of remedial action at the invocation of persons other than shareholders.

24 In *HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.* (1999), 72 Alta. L.R. (3d) 356 (Alta. Q.B.), Paperny J. (as she then was) outlined some guiding principles for determining the standing of a "proper person." At para. 22, Paperny J. explained that when determining whether an applicant is a "proper person" the presiding Justice need only determine if the applicant is "*a* proper person, not *the* proper person" [emphasis in original]. Therefore, the fact that a different party could also be a "complainant" is not a reason, in itself, to deny standing to an applicant.

25 Paperny J. also noted at para. 28 that:

> The categories of persons allowed to make an application must be distinguished from the categories of persons oppressed. There must, however, be a nexus between the applicant and the harm done. That is, the applicant must have a real interest in pursuing the matter due to, for example, a contractual or other relationship with the oppressed persons.

The Respondents contend that this passage stands for the proposition that a complainant can only be allowed standing as a "proper person" if they are advancing a claim *on behalf* of a member of the enumerated list of persons in s. 242, namely, a security holder, creditor, director or officer.

26 Finally, at para. 35, Paperny J. explained that it is not a precondition to determining an applicant's standing under s. 242 that the court be satisfied that there has been oppressive conduct. The definition of "complainant" in Part 19 of the *ABCA* is also relevant to one who asks the court for leave to bring a derivative action under s. 240 (*i.e.* where oppression is not alleged) and, therefore, oppression need not be proven when determining standing.

(ii) Analysis

27 I do not accept that it was Paperny J.'s intention in *HSBC* to limit the class of potential proper persons under s. 239(b)(iv) to only those who are acting in a representative capacity. The fundamental question is whether there is a "nexus between the applicant and the harm done," or whether the applicant has a "real interest in pursuing the matter." It is also instructive when interpreting Paperny J.'s ruling that, at para. 27 in *HSBC*, she cautioned against limiting the class of potential applicants who may qualify as a "proper person" as it would "take away the court's discretion regarding 'a proper person.'" Accordingly, I find that one who is not a security holder, creditor, director or officer can bring an application for standing as a "proper person" even if they are not bringing the claim on behalf of one of these people.

28 To read s. 239(b)(iv) as the Respondents suggest would be to unduly restrict the court's discretion to do justice and equity under the remedial provisions of the *ABCA*. Such a reading would contradict the liberal and purposive interpretation intended to be given to remedial legislation as outlined by McDonald J. in *First Edmonton*.

29 This reasoning finds support in *Shareholders Remedies in Canada*, looseleaf (Markham, Ont.: Butterworths, Including Service Issues 1989-2004), where the author states at para. 2.30:

> While the "proper person" category could be used to grant standing to individuals seeking a representational role in the dispute, this ground seems to be adequately covered by the categories of directors, officers, and the Director . . . the bona fide rights of "other persons" should not be ignored. The merits of their claims can always be tested in the ensuing action.

30 TSC and Select Pork claim they have suffered from conduct that was "oppressive or unfairly prejudicial to or that unfairly disregards [their] interests" as outlined in s. 242(2). TSC and Select Pork argue this oppressive conduct is manifest in Pure Lean unilaterally backing away from the Letter of Intent, having Zimmer removed as a Director, and failing to compensate TSC and Select Pork for expenses they incurred on behalf of Pure Lean. It is their position that this provides the requisite nexus with the harm done, and that they have a real interest in pursuing the matter.

31 While the nature and extent of the relationship amongst the three companies is in dispute, the evidence before me suggests that there is a sufficient nexus between TSC and Select Pork and the harm done. I make no findings as to the legal effect of the Letter of Intent as amongst the companies, but I do note that Pure Lean advanced certain funds to Select Pork as contemplated in the Letter of Intent, and that Zimmer caused TSC and Select Pork to act in furtherance of the Letter of Intent to their detriment. Both of these facts indicate to me that the Letter of Intent created and influenced a relationship amongst the companies.

32 TSC and Select Pork also have a real interest in pursuing the matter since they claim to have suffered losses as a result of paying debts on behalf of Pure Lean, are claiming damages for breach of contract, and claim certain restitutionary and compensatory damages related to the oppressive conduct.

(iii) Conclusion

33 TSC and Select Pork are proper persons under s. 239(b)(iv) and therefore have standing to bring an application under the oppression remedy. The merits of their claims can be tested in the ensuing action.

B. Whether TSC and Select Pork Have Standing as a "Creditor"?

34 The s. 239 definition of "complainant" also includes a "creditor":

> (b) "complainant" means

. . . . .

(iii) a creditor

(A) in respect of an application under section 240, or

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv), or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

[Emphasis added.]

35 There are two steps that must be met in order to have standing as a creditor within the meaning of "complainant" in s. 239: (i) it must first be determined whether the applicant is a creditor; and (ii) if found to be a creditor, then the court must exercise its discretion under subclause (iv) to determine whether the creditor is a "proper person" to bring the claim. Not every creditor who applies for an oppression remedy will be found to be a proper person to seek such a remedy, and a creditor cannot bring an application as of right as one can if they are a security holder or former director.

(i) Are TSC and Select Pork Creditors?

36 TSC and Select Pork claim they have standing as creditors of Pure Lean on several grounds including that they paid expenses on behalf of Pure Lean, that they are owed damages for breach of contract, and that they are entitled to restitutionary and compensatory damages.

37 In *Levy-Russell Ltd. v. Shieldings Inc.* (1998), 165 D.L.R. (4th) 183 (Ont. Gen. Div.) at page 59, Pitt J. found:

> In deciding the threshold issue of whether the creditor respondents are eligible complainants, it seems reasonable . . . to assume that the disputed facts could be decided in favour of the complaining creditor unless it is clear on the face of the record that such an assumption is unfounded.

Important material facts were in dispute in *Levy-Russell* and it was decided that it was not proper to make a final determination of a creditor's status without a trial. The approach in *Levy-Russell* was to assume that the disputed facts could be found in favour of the applicant creditor unless it was clear on the face of the record that such an assumption was unfounded. I adopt that approach in this case and based on the evidence before me, it is by no means clear that TSC and Select Pork are not creditors or that such an assumption is unfounded.

38 The Respondents argue that TSC and Select Pork are not creditors of Pure Lean and dispute the existence of the Baltussen contract or any agreement that Pure Lean would purchase feeder pigs from TSC. At para. 15 of his affidavit Denhollander also contends that if TSC and Select were paying expenses of Pure Lean as Zimmer claims, they were doing so with the $110,000 that Pure Lean advanced to Select Pork.

39 The Respondents argue that there was a reasonable expectation that the $110,000 would be used for Pure Lean's bills, but the Applicants argue that this was not contemplated in the Letter of Intent. In fact, the Letter of Intent states that the money would be used "in funding requirements to operate Select Pork until the acquisition of Select Pork." Nowhere does the Letter of Intent suggest that this money would be used to pay Pure Lean's debts. DenHollander notes in para. 13 of his affidavit that the $110,000 advanced to Select Pork was for the purpose of providing operating capital for Select Pork's business.

40 No evidence, aside from the Respondent's speculation, has been presented that supports the contention that the money TSC and Select Pork used to pay the alleged expenses of Pure Lean was from the funds advanced to Select Pork. Moreover, DenHollander has commenced separate proceedings to recover the full amount of the $110,000 on the grounds that none of it has been repaid, which suggests that the $110,000 was not used to pay Pure Lean's debts.

41 When Zimmer was cross-examined on his affidavit, counsel for the Respondents had an opportunity to question him on the expenses that he claims TSC and Select Pork paid on behalf of Pure Lean. Zimmer agreed to several undertakings to

produce documents and gather information that detail these expenses, which include paying feed and medication bills on behalf of Pure Lean.

42 The Respondents also suggest that creditors under an application for an oppression remedy must be judgment creditors. They base this interpretation on the words of Farley J. in *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div. [Commercial List]) at p. 92:

> [I]t is clear that a person who may have a contingent interest in an uncertain claim for unliquidated damages is not a creditor. That person really holds a speculative claim to become a creditor in the future which will materialize only if the legal action is successful and judgment is obtained.

However, McDonald J. in *First Edmonton* held at page 151 that "[t]he applicant could be a creditor, or even a person toward whom the corporation had only a contingent liability at the time of the actor conduct complained of." Also, in *A E Realisations (1985) Ltd. v. Time Air Inc.* (1994), [1995] 3 W.W.R. 527 (Sask. Q.B.) Noble J. held at para. 27 that the argument that an applicant was not a "creditor" because the oppressive acts complained about occurred at a time when the alleged claim was both contingent and unliquidated would lead to a reading of "creditor" under the oppression remedy provisions that was "too narrow." This was affirmed by the Saskatchewan Court of Appeal at [1995] 6 W.W.R. 423 (Sask. C.A.).

43 Moreover, in *Gardner v. Newton* (1916), 10 W.W.R. 51 (Man. K.B.), Mathers C.J.K.B. provided the common law definition of creditor at page 57 when referring to the meaning given to the terms "debtor" and "creditor" in statutes:

> [I]n the absence of anything to indicate that a more comprehensive meaning was intended that which is ascribed to them in every day usage is to be applied. In its largest sense "creditor" is one who has a right to require fulfilment of an obligation or contract; but its general and almost universal meaning is a person to whom a debt is payable.

This understanding of the meaning of "creditor" does not require that one be a judgment creditor before they are considered a creditor under the everyday meaning of the word. Moreover, the *ABCA* does not require that a creditor obtain judgment before it seeks standing as a proper person under the oppression remedy provisions.

44 I am mindful of the words of the Court of Appeal in *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1989), 71 Alta. L.R. (2d) 61 (Alta. C.A.) where, in the context of a derivative action, the Court cautioned at page 63:

> Whether leave is available to a creditor . . . should not be answered in the absence of adequate proof of the rightness of the fundamental claim upon which the action will be built. The claim is disputed and we do not know whether it will be established and whether, for example, proceedings relating to the satisfaction of the judgment will verify the allegations about wrongful taking of the inducements. . . . We do not think those determinations should be allowed to proceed with the key matter still at large. Debt actions cannot routinely be turned into derivative actions. The availability of this peculiar remedy should not be decided in a factual vacuum.

I would add, however, that a debt action ought not be denied a remedy under the oppression provisions of the *ABCA* simply because it is a debt action. It is within the court's discretion to grant standing to a creditor, and if justice and equity will be served in doing so, the court ought to allow the application to proceed to a hearing on its merits.

45 Based on the remedial and purposive nature of the oppression remedy, the liberal interpretation of such legislation in favour of the complainant, and the decision in *Levy-Russell*, I find that TSC and Select Pork are creditors for the purpose of standing under an oppression remedy application. Once Zimmer answers the undertakings the Respondents will have the documents they have requested to confirm or negate Zimmer's claims that TSC and Select Pork are owed money for expenses they incurred on behalf of Pure Lean. Moreover, when this action is heard on its merits it will be for the trial judge to determine whether TSC and Select Pork's claims are founded and warrant an oppression remedy at all.

(ii) As Creditors, Are TSC and Select Pork "Proper Persons"?

46 As noted above, once the parties are found to be creditors for the purposes of an application for an oppression remedy, the Court must still exercise its discretion in deciding whether they should be allowed to have standing as a "proper person" under s. 239(b)(iv).

47 In *First Edmonton*, McDonald J. discussed when a creditor would be a "proper person" to bring an application for an oppression remedy, and these principles were recently endorsed by the Court of Appeal in *Mackenzie v. Craig* (1999), 70 Alta. L.R. (3d) 166 (Alta. C.A.). When referring to McDonald J's decision, the Court of Appeal noted at para. 17:

> McDonald J. set out the general principles. He indicated that the section grants a court power to do justice and equity in the circumstances of a particular case. McDonald J described two situations in which a creditor of a company could be a "proper person": first, where the act complained of amounts to the use of the corporation as a vehicle for committing fraud upon the applicant; and second, where the act complained of constituted a breach of the underlying expectations of the applicant arising from the circumstances in which the relationship with the corporation arose.

There is no suggestion that Pure Lean committed a fraud upon TSC and Select Pork, but it is readily seen from his affidavit that after the Letter of Intent was executed Zimmer managed the affairs of TSC and Select in accordance with his expectation that his two companies would be acquired by Pure Lean. While the Respondents are quick to point out that the acquisition of TSC and Select Pork was subject to TSX venture exchange approval and due diligence, it was not unreasonable for Zimmer to have such expectations after having money advanced to Select Pork by Pure Lean as contemplated in the Letter of Intent, and after being appointed a Director of Pure Lean by DenHollander and Bolinger.

48 The Respondents cite *Royal Trust* in support of their argument that TSC and Select Pork are not proper persons to be granted standing as creditors under the oppression remedy. There, Farley J. stated at p. 92:

> I do not think that the court's discretion should be used to give a "complainant" status to a creditor where the creditor's interest in the affairs of a corporation is too remote or where the [complaints] of a creditor have nothing to do with the circumstances giving rise to the debt or if the creditor is not proceeding in good faith. Status as a complainant should also be refused where the creditor is not in a position analogous to that of the minority shareholder and has no "particular legitimate interest in the manner in which the affairs of the company are managed."

49 The evidence discloses that TSC and Select Pork's interest in the affairs of Pure Lean are not remote and that their complaints are related to the circumstances giving rise to the debt. As noted above, there is a nexus amongst the three companies.

50 As to whether TSC and Select Pork are proceeding in good faith, there have been suggestions on both sides that certain documents and transactions have not been made in good faith such as the Baltussen contract. I leave this determination for the finder of fact.

51 The Respondents further argue that, pursuant to *Royal Trust*, a creditor should only be found to be a "proper person" where there is an inequality of power and authority analogous to that of a minority shareholder and that, since TSC and Select Pork are corporations that dealt with Pure Lean at arm's length, they should not be found to have standing. I cannot see how TSC and Pure Lean have any power and authority that is more than that of a minority shareholder in Pure Lean. While TSC and Select Pork are corporate entities, as creditors for the purpose of standing under this Part of the *ABCA* they can be oppressed by another corporate entity.

52 Finally, the Respondents have raised the concern that by not proceeding by way of Statement of Claim they will not be afforded the procedural protections afforded in a typical action such as the filing of affidavits or examination for discovery. I am confident that the affidavits and exhibits that have been filed, and the undertakings that will be answered, will provide the Applicants with sufficient documents to test the validity of the Respondents claims at trial. Moreover, the *ABCA* specifically provides in s. 249 that an oppression remedy application can be brought by way of summary procedure. If the legislature intended for there to be the same procedural protections as are afforded in a proceeding by way of Statement of Claim, it would have provided for such procedures.

(iii) Conclusion

53 I find that TSC and Select Pork are creditors for the purpose of standing under an oppression remedy application and, as creditors, are proper persons to bring the application. Therefore, TSC and Select Pork have standing to bring an application under the oppression remedy.

Disposition

54 TSC and Select Pork have standing to bring an application for an oppression remedy. Their claims can be tested in the ensuing application on the merits. Whether as creditors or as proper persons, TSC and Select Pork should, along with Zimmer, be permitted to argue that they are entitled to an oppression remedy.

55 I order further that all the undertakings that Zimmer has agreed to perform be answered within three weeks of this ruling.

Costs

56 The Applicants have been successful and are entitled to their costs. If there is a dispute as to the calculation of costs, the parties may bring the matter before me for further direction.

Application dismissed.

TAB 17

2021 ABCA 16
Alberta Court of Appeal

PricewaterhouseCoopers Inc v. Perpetual Energy Inc

2021 CarswellAlta 119, 2021 ABCA 16, [2021] A.W.L.D. 640, [2021] A.W.L.D. 641, [2021] A.W.L.D. 642, [2021] A.W.L.D. 643, [2021] A.W.L.D. 644, [2021] A.W.L.D. 645, 327 A.C.W.S. (3d) 20

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Appellant / Plaintiff) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose (Respondents / Defendants) and Orphan Well Association (Intervenor) and Canadian Natural Resources Limited (Intervenor) and Cenovus Energy Inc. (Intervenor) and Torxen Energy Ltd. (Intervenor)

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Respondent / Plaintiff) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose (Appellants / Defendants)

PricewaterhouseCoopers Inc., in its personal capacity (Appellant / Not Party to Application) and PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Respondent / Plaintiff) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose (Respondents / Defendants)

Marina Paperny, Jack Watson, Frans Slatter JJ.A.

Heard: December 10, 2020
Judgment: January 25, 2021
Docket: Calgary Appeal 1901-0255-AC, 1901-0262-AC, 2001-0174-AC

Proceedings: reversing in part *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 6, 2020 CarswellAlta 62, 6 B.L.R. (6th) 211, D.B. Nixon J. (Alta. Q.B.); additional reasons at *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 513, 2020 CarswellAlta 1732, 83 C.B.R. (6th) 206, D.B. Nixon J. (Alta. Q.B.); and reversing *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 513, 2020 CarswellAlta 1732, 83 C.B.R. (6th) 206, D.B. Nixon J. (Alta. Q.B.)

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K.T. Lentz, Q.C., for Intervenor, Orphan Well Association
G.S. Watson, C.W. Ang, for Intervenors, Canadian Natural Resources Limited, Cenovus Energy Inc., Torxen Energy Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.h Miscellaneous

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.g Fiduciary duties
III.1.g.ix Miscellaneous
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.B Standing to apply
III.3.e.ii.B.4 Miscellaneous
Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.q Costs
V.3.q.ii Scale and quantum of costs
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.f Non-party

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Trustee challenged component (asset transaction) of aggregate transaction, on basis that it was at undervalue under s. 96 of Bankruptcy and Insolvency Act — Transaction was also challenged on public policy grounds — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge held that claim under s. 96 of Act could neither be struck out nor summarily dismissed — Pleading respecting public policy claim was struck out for failure to disclose cause of action — Trustee appealed, and defendants cross-appealed — Appeal allowed; cross-appeal dismissed — Section 96 claim would have to be resolved at trial — There was no legally relevant evidence to rebut presumption that related members of defendant group who were engaged in asset transaction were not operating at arm's length — If transaction was entered into in violation of s. 96 of Act, it was no defence that it was connected to number of other transactions that did not engage s. 96 — "Public policy" pleadings should not have been struck out — They set out and engaged important underlying issue in litigation that could only be resolved at trial.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Standing to apply — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets — Transaction was also challenged under statutory corporate oppression provisions — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Oppression claim was struck out for failure to disclose cause of action, because trustee was not "proper person" to be complainant, or alternatively because oppression claim lacked merit — Trustee appealed — Appeal allowed — It was unhelpful to blend analysis of "complainant" status of trustee with substance of oppression claim — Former was not matter of "striking pleading" — On record, it was unreasonable to conclude that trustee was not "proper person" — As to merits of oppression claim, case management judge erred in his analysis for several reasons — Judge misread certain case law in finding that it was complete

answer to claim — Contrary to judge's finding, abandonment and reclamation obligations were real obligation and liability of oil and gas company — While oppression claim may have been narrower than trustee anticipated, pleadings disclosed cause of action — Trustee was to be granted complainant status if it elected to pursue claim.

Business associations --- Specific matters of corporate organization — Directors and officers — Fiduciary duties — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets — Trustee challenged component (asset transaction) of aggregate transaction, on basis that it was at undervalue under s. 96 of Bankruptcy and Insolvency Act — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Claim against SR was struck out for failure to disclose cause of action, and it was also summarily dismissed on merits, and, in any event, because resignation and mutual release that had been signed was found to be complete defence — Trustee appealed — Appeal allowed — While there was facial merit to claim of breach of director's duties, most of SR's potential liability to corporate entity in question was released by resignation and mutual release — While some portions of claim as against SR were properly summarily dismissed, there was no basis on which claim could be struck for failing to disclose cause of action — It was not possible, on this record, to dispose of alternative of Act claim that was made against SR; this and related issues had to be referred back to trial court.

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Transaction was also challenged under statutory corporate oppression provisions — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge struck out or summarily dismissed large parts of claim — Judge heard subsequent application by SR for enhanced costs — Judge concluded trustee should pay 85 per cent of SR's solicitor and client costs, and that trustee should be personally liable for those costs — Trustee appealed — Appeal allowed — Award of 85 per cent of solicitor and client costs was not justified — Claim against SR was arguable; case law did not "nullify" this claim — Case management judge overstated implications of trustee being officer of court — There was no litigation misconduct to justify enhanced costs — Awards of costs for dismissal application and application to set costs were to be set aside and referred back to case management judge.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Costs — Scale and quantum of costs

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Transaction was also challenged under statutory corporate oppression provisions — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge struck out or summarily dismissed large parts of claim — Judge heard subsequent application by SR for enhanced costs — Judge concluded trustee should pay 85 per cent of SR's solicitor and client costs, and that trustee should be personally liable for those costs — Trustee appealed — Appeal allowed — Award of 85 per cent of solicitor and client costs was not justified — Trustee does not have to meet administrative law requirements of fairness — There is no independent duty to investigate owed to third parties — There was no litigation misconduct to justify enhanced costs — Awards of costs for dismissal application and application to set costs were to be set aside and referred back to case management judge.

Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Non-party

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Transaction was also challenged under statutory corporate oppression provisions — There was related claim

against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge struck out or summarily dismissed large parts of claim — Judge heard subsequent application by SR for enhanced costs — Judge concluded trustee should pay 85 per cent of SR's solicitor and client costs, and that trustee should be personally liable for those costs — Trustee appealed — Appeal allowed — Award of 85 per cent of solicitor and client costs was not justified — Case management judge overstated implications of trustee being officer of court — Trustee does not have to meet administrative law requirements of fairness — There is no independent duty to investigate owed to third parties — Awards of costs for dismissal application and application to set costs were to be set aside and referred back to case management judge.

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s. 242(1) — considered

s. 242(2) — considered

s. 242(3)(l) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

Pt. 10 — referred to

R. 3.68 — considered

R. 3.68(1)(b) — considered

R. 3.68(2)(b) — considered

R. 10.31 — considered

R. 13.6(2)(a) — considered

R. 13.6(3) — considered

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

R. 34 — considered

R. 34-52 — referred to

R. 36 — considered

R. 39 — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Sched. C — referred to

APPEAL by trustee in bankruptcy and CROSS-APPEAL by defendants from judgment reported at *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 6, 2020 CarswellAlta 62, 6 B.L.R. (6th) 211 (Alta. Q.B.), striking out or summarily dismissing portions of claim arising from transaction; APPEAL by trustee from judgment reported at *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 513, 2020 CarswellAlta 1732, 83 C.B.R. (6th) 206 (Alta. Q.B.), imposing costs.

***Per curiam*:**

1 These appeals involve a challenge by the Trustee in Bankruptcy, PricewaterhouseCoopers Inc., to one step in a pre-bankruptcy, multi-step corporate reorganization and sale of assets, called the Aggregate Transaction. The Trustee in Bankruptcy challenges a component of the Aggregate Transaction, called the Asset Transaction, on the basis that it was at an undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. The transaction is also challenged under the statutory corporate oppression provisions, as well as on public policy grounds. There is a related claim against the respondent Susan Riddell Rose for breach of her duties as a director.

2 The Trustee in Bankruptcy appeals the striking or summary dismissal of large parts of the claim: *PricewaterhouseCoopers Inc v. Perpetual Energy Inc*, 2020 ABQB 6 (Alta. Q.B.). The respondents cross-appeal with respect to portions of the claim that were not struck out or dismissed. There is also an appeal of the subsequent ruling on costs: *PricewaterhouseCoopers Inc v. Perpetual Energy Inc*, 2020 ABQB 513 (Alta. Q.B.).

Facts

3 The challenged transaction was a part of the disposition of some of the oil and gas assets owned by the Perpetual Energy group of companies. The parent of the group is a public company, Perpetual Energy Inc. (the "Perpetual Energy Parent"). The respondent Ms. Rose was the president and Chief Executive Officer of Perpetual Energy Parent.

4 The assets of the group were actually held in the Perpetual Operating Trust. In general terms, there were three categories of asset in the Trust:

> (i) The "KeepCo Assets" that were not a part of the challenged transaction, and were to be retained by the Perpetual Energy group,
>
> (ii) A subset of the KeepCo Assets called the "Retained Interests", and
>
> (iii) The Goodyear Assets, which were the subject of the challenged transaction, and which form the basis of this litigation.

The Perpetual Operating Trust held the beneficial interest in the assets, the sole beneficiary of the Trust being Perpetual Energy Parent. The legal title to the assets, and the regulatory licences to them, were held by Perpetual Energy Operating Corp. Prior to the Aggregate Transaction, Perpetual Energy Operating Corp. had no other business interests, and it only existed to be the trustee of the Perpetual Operating Trust. Ms. Rose was the sole director of Perpetual Energy Operating Corp. until the closing of the transactions. Perpetual Energy Operating Corp. changed its name to Sequoia Resources Corp. during the Aggregate Transaction, so it can conveniently be referred to as Perpetual/Sequoia. Perpetual/Sequoia subsequently assigned itself into bankruptcy, and therefore plays the central role in this litigation.

5 The assets in the Perpetual Operating Trust included the "Goodyear Assets", which were shallow natural gas assets, described as "mature legacy assets". They had been operating with a negative cash flow for some time, were subject to high fixed operating costs, and were associated with significant future Abandonment and Reclamation Obligations, being the costs relating to the anticipated expenses of reclaiming oil and gas properties at the end of their productive life: see *infra*, paras. 85-89. The Goodyear Assets were perceived as having negative net value.

6 Perpetual Energy Parent negotiated with Kailas Capital Corp. to sell the Goodyear Assets for $1. Perpetual Energy Parent announced that the transfer of these assets would improve the Perpetual group's Licensee Liability Rating with the Alberta Energy Regulator: see *infra*, para. 9. There would be a 71% reduction in forecast corporate liabilities, and a significant reduction in its Abandonment and Reclamation Obligations. Perpetual Energy Parent would be relieved of the ongoing negative cash flow associated with the Goodyear Assets. Perpetual Energy Parent expressed to public markets its opinion that the transaction would be in its best interests, because of these advantages.

7 The sale of the Goodyear Assets was accomplished in October 2016 by a multi-step transaction, described collectively as the Aggregate Transaction:

> (c) But once a well has been exhausted, production has stopped, and the well has been shut-in, the Abandonment and Reclamation Obligations have crystallized. The Abandonment and Reclamation Obligations may be unperformed, but they are no longer "contingent" in either sense. The owner of the well is under a public duty to shut in the well and reclaim the surface.

The further reclamation is in the future, the more difficult it will be to quantify the Abandonment and Reclamation Obligations. Even if Abandonment and Reclamation Obligations can be said to be "contingent" liabilities, that is sufficient in law for some purposes: *Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd.*, 2010 ONSC 5747 (Ont. Div. Ct.) at paras. 24-25, (2010), 85 B.L.R. (4th) 77 (Ont. Div. Ct.); *Manufacturers Life Insurance Co. v. AFG Industries Ltd.*, 2008 CanLII 873 at para. 30, (2008), 44 B.L.R. (4th) 277 (Ont. S.C.J.). Further, the present value of the Abandonment and Reclamation Obligations will directly depend on how far into the future they will arise. Abandonment and Reclamation Obligations are unliquidated, some of them may be more immediate than others, and their quantum is uncertain, but they are still inevitable. They exist whether or not abandonment notices have been issued by the Alberta Energy Regulator. Abandonment and Reclamation Obligations may not be entirely a current liability or obligation, but they are a real liability or obligation. They are routinely reported on the balance sheets of oil and gas companies, including those of Perpetual Energy Parent.

88 The evidence on this record is that prior to the Aggregate Transaction, the Perpetual Operating Trust held oil and gas properties in all these categories. The KeepCo Assets and the Retained Interests were still producing; they did not carry immediate Abandonment and Reclamation Obligations. The Goodyear Assets, on the other hand, were all "mature", and their Abandonment and Reclamation Obligations were more immediate. Further, by the time of the Asset Transaction, the record suggests the Goodyear Assets included 910 shut in wells and 727 abandoned wells, meaning that some portion of the obligation to reclaim was due to be performed or was imminent. The exact cost of reclamation may have been unknown and unquantified, but the obligation was no longer "contingent"; the obligation was merely unperformed.

89 The extent of the Abandonment and Reclamation Obligations associated with the Goodyear Assets is not clear at this stage of the proceedings. When Perpetual Energy Parent publicly announced the pending Aggregate Transaction, it advised the market that it expected to relieve itself of $87 million of Abandonment and Reclamation Obligations. Perpetual/Sequoia reported them on its balance sheet at $131 million, and after the transaction closed, Perpetual Energy Parent announced it had shed $131 million of Abandonment and Reclamation Obligations. The Trustee in Bankruptcy estimates that the Abandonment and Reclamation Obligations were actually $218.9 million, comprising $98.8 million of abandonment costs, $93.2 million in reclamation costs, and $26.8 million related to other facilities: reasons at para. 368. For the purposes of these appeals the exact quantum is not material; it is sufficient to note that the amount involved is potentially substantial.

The Effect of the Redwater Decision

90 Redwater Energy Corporation was a bankrupt oil and gas company. It had about 20 producing wells that were of value, but it had over 100 other wells that were either depleted or shut in, and had no value. In fact, there was a significant liability associated with the depleted wells, because they had to be reclaimed. In effect, these wells had "negative value": *Redwater* at para. 2.

91 Redwater Energy's trustee in bankruptcy proposed to sell off the valuable wells, and use the proceeds to pay the secured creditor. That would leave the bankrupt shell of Redwater Energy with the depleted wells, and no funds to pay for reclamation. The trustee in bankruptcy needed permission from the Alberta Energy Regulator to transfer the licences for the valuable wells to the third party purchaser. The Alberta Energy Regulator refused to approve the transfers, unless the proceeds were used to reclaim the abandoned wells; those proceeds could not be paid to the secured creditor. The trustee in bankruptcy responded that it did not intend to comply with the environmental remediation orders that had been issued, and that the obligation to reclaim the wells was a "claim provable in bankruptcy": *Redwater* at paras. 50-52. As such, the reclamation obligations had to be dealt with within the bankruptcy process, and they would be treated like the claims of all other unsecured creditors. The reclamation obligations would effectively be extinguished by operation of the bankruptcy: *Redwater* at paras. 114, 117.

92 *Redwater* held that there was no constitutional conflict between the applicable federal and provincial legislation. The non-constitutional issue in *Redwater* was focused: were the reclamation obligations a "claim provable in bankruptcy" under s. 121 of the *Bankruptcy and Insolvency Act*? If they were, those obligations would be extinguished in the bankruptcy. If not, what was the trustee in bankruptcy's obligation with respect to them?

93 *Redwater* at para.119 confirmed the test for determining whether an environmental liability is a "claim provable in bankruptcy", previously set in *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.). First, there must be an obligation owed to a "creditor". Second, the obligation must be incurred before the bankruptcy. Third, it must be possible to attach a monetary value to the obligation. The end-of-life obligations did not fit the test, because there was no "creditor". Neither the Alberta Energy Regulator nor the Orphan Well Association was owed any debt; the environmental obligation was owed to the public: *Redwater* at paras. 122, 134-35. Further, there was insufficient certainty in the quantum of the Abandonment and Reclamation Obligations to make them a "claim provable in bankruptcy", because there was no certainty that the Alberta Energy Regulator would perform the remediation work: *Redwater* at paras. 145, 149, 154.

94 *Redwater* does not stand for the proposition that Abandonment and Reclamation Obligations are not a liability or obligation of the bankrupt corporation. The *Bankruptcy and Insolvency Act* provides that in some circumstances the trustee in bankruptcy is "not personally liable" for environmental obligations. The Supreme Court ruled that these provisions protect the trustee, "while the ongoing liability of the bankrupt estate is unaffected": *Redwater* at paras. 74-75. A trustee who "disclaims" assets is protected from personal liability, but "the liability of the bankrupt estate is unaffected": *Redwater* at paras. 93, 98. Claims that are "not provable in bankruptcy" remained an obligation that the bankrupt had to discharge to the extent it has assets: *Redwater* at para. 118. Having received the benefit of the oil wells, the bankrupt corporation "cannot now avoid the associated liabilities": *Redwater* at para. 157. Trustees in bankruptcy must comply with non-monetary obligations that cannot be reduced to "provable claims": *Redwater* at para. 160. Accordingly, an order was given that the proceeds of the sale of Redwater's assets could not be paid to its secured creditor, but had to be used to address its "end-of-life" obligations: *Redwater* at para. 163.

95 The case management judge focused on the fact that *Redwater* confirmed that the Alberta Energy Regulator is not a "creditor" with respect to the Abandonment and Reclamation Obligations, and accordingly the Abandonment and Reclamation Obligations cannot be a "claim provable in bankruptcy". That much is an accurate reading of *Redwater*, but it does not mean that Abandonment and Reclamation Obligations are "assumptions and speculations" that do not exist, that they are not an obligation or liability of Perpetual/Sequoia, or that they should be valued at "nil". The Abandonment and Reclamation Obligations are an obligation of Perpetual/Sequoia, owed "to the public" and the surface landowners, but which are nevertheless obligations which the trustee of a bankrupt corporation cannot ignore. Not only did *Redwater* confirm that Abandonment and Reclamation Obligations are a continuing obligation of a bankrupt corporation, that decision confirms that those obligations had to be discharged even in priority to paying secured creditors.

96 The case management judge held that Perpetual/Sequoia "could not have assumed liability" for the Abandonment and Reclamation Obligations, even though the Asset Transaction specifically confirmed that it had: *supra*, para 11. The Perpetual defendants admitted in their defence that Abandonment and Reclamation Obligations were liabilities of Perpetual/Sequoia:

> 44 (c) PEOC/Sequoia's liabilities at the time of the Transaction were comprised of the estimated future costs to be incurred over time by Sequoia in an efficient abandonment and reclamation program at a discount rate commensurate with the discount rate for the other producing assets, and were considered in the value of the Goodyear Assets;

This pleading is consistent with the statement in ***Redwater*** at para. 157, that Abandonment and Reclamation Obligations serve "to depress the tenure's value at the time of sale". The case management judge overlooked this admission, and instead relied on concessions that had been made by the Trustee's counsel in court before the ***Redwater*** decision was released.

97 Section 96 of the *Bankruptcy and Insolvency Act* addresses "transfers at an undervalue". The extent to which the assumption of obligations, specifically environmental obligations, can "depress the tenure's value", resulting in an "undervalue" as defined in s. 2, is something that can be explored at trial. Abandonment and Reclamation Obligations may not be a conventional "debt", but

rather operate by depressing the value of the assets; whichever side of the equation they be on, they could impact whether there is "undervalue" in a transaction. Likewise, the extent to which a director owes a duty to ensure that the corporation discharges environmental obligations owed to the public is unclear. However, none of the claims pleaded in this action can be struck out or dismissed for "failing to disclose a cause of action", or because they "lacked merit" on the basis that *Redwater* "nullifies" or "extinguishes" Abandonment and Reclamation Obligations.

The Section 96 Claim

98 The case management judge concluded that the claim under s. 96 of the *Bankruptcy and Insolvency Act* could neither be struck nor summarily dismissed. This is the claim that the Asset Transaction was void because it was at an undervalue, and not at arm's length. In appeal 1901-0262AC, the Perpetual Energy group challenges this portion of the decision in two steps. First of all, they argue that the proper focus of the analysis should be on the Aggregate Transaction, not on the Asset Transaction. At that level, they argue that the Aggregate Transaction was at arm's-length. Secondly, they argue that there were no issues of fact or credibility that raised a genuine issue for trial, and the case management judge erred in concluding that the record did not permit summary disposition.

99 It was not disputed that the Perpetual Energy group and their officers and directors (on the one hand), and the Kailas Capital group, 198Co and their officers and directors (on the other hand) were dealing at arm's length: reasons at para. 57. The Aggregate Transaction, which related to the disposition of the Goodyear Assets by the sale of the shares of Perpetual/Sequoia, was at arm's length. The issue was that the Asset Transaction concerned only Perpetual Energy Operating Corp. (later Sequoia), the Perpetual Operating Trust and Perpetual Energy Parent. Those parties were all related, and were presumed not to deal at arm's length under s. 4(5) of the *Bankruptcy and Insolvency Act*.

100 The Perpetual Energy group argues, however, that whether persons are dealing at arm's length is a question of fact, and that the presumption that related parties do not deal at arm's length only prevails "in the absence of evidence to the contrary": s. 4(4) and (5). They rely on the acknowledgement by the Trustee in Bankruptcy that the Kailas Capital group had an "interest" in knowing what assets were in Perpetual/Sequoia, and that they had "influence" over the Asset Transaction: reasons at paras. 59, 93. Neither factor, however, is sufficient to rebut the presumption that the Perpetual Energy parties were not dealing with each other at arm's length.

101 The Kailas Capital group undoubtedly had an "interest" in the assets, in the sense that they were buying the Goodyear Assets, and they needed to know what was included in the sale. This was a commercial interest, not a legal interest: reasons at para. 84. They also needed to know that the legal and beneficial interests in the Goodyear Assets were in fact located in the corporate vehicle they were purchasing: Perpetual/Sequoia. Exactly how the Perpetual Energy group rearranged its affairs to move the Goodyear Assets into Perpetual/Sequoia, and specifically the consideration to be paid under that transaction, was not a matter over in which they had any legal interest, or over which they had any legal control. There is no indication on this record that the acceptability of the overall Aggregate Transaction to the Kailas Capital group depended on the mechanism by, or consideration for which the Goodyear Assets were moved into Perpetual/Sequoia.

102 The fact that, in the abstract, the Kailas Capital group had some "influence" over the overall structure of the Aggregate Transaction is also not legally significant. The Kailas Capital group had no legal ability to dictate the consideration in the Asset Transaction. Any party that enters into a transaction that is in breach of s. 96 will have some motivation for doing so. The motivation of the party, however, is not a defence to a claim by a trustee in bankruptcy under that section.

103 Take as an example a corporation that is having difficulty with its banking relationship. The bank says "we are not happy" and "you need to improve your balance sheet", and we look forward to you "doing something". If the corporation then enters into a transaction that is in violation of section 96, is no defence that they were "influenced" to do so by the bank, or that the bank was "interested" in the outcome.

104 On this record, there is no legally relevant evidence to rebut the presumption that the related members of the Perpetual Energy group who were engaged in the Asset Transaction were not operating at arm's length. The evidence on the present record

is that the structure and pricing of the Asset Agreement were under the control of the directors and officers of the Perpetual Energy group. That transaction was not shown to be negotiated at arm's length. Ms. Rose's conclusory statements to the contrary are inconsistent with the documentary evidence and corporate law.

105 It is also not relevant that the overall Aggregate Transaction was undoubtedly and admittedly negotiated at arm's length. If a transaction is entered into in violation of s. 96, it is no defence that it was connected to a number of other transactions that did not engage s. 96 at all. It follows that when determining whether the transaction was at arm's-length for the purposes of s. 96, the proper focus is on the Asset Transaction, not the Aggregate Transaction. The problem of transfers at undervalue that is addressed by s. 96 persists no matter how the challenged transaction is structured, and each component of a multi-step transaction must meet the statutory requirements. Section 96 is directed at a "transfer at undervalue", and as held in *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757 (Ont. C.A.) at para. 46, " . . . the focus in determining whether the dealing was non-arm's length is on the relationship between the parties to the particular transfer". The argument that non-arm's length, undervalue steps in a multi-step transaction can be disregarded is not consistent with the policy behind s. 96.

106 It has been held that income tax cases can be helpful in determining what, *as a matter of fact*, amounts to "arm's-length" dealing, but there is no such factual dispute here: see *supra*, para. 99. In any event, it does not follow that cases about the tax consequences of the structure of multi-step transactions apply to transactions which are challenged under s. 96. It has long been accepted that a taxpayer can structure its affairs to reduce its tax liability; that concept does not apply to s. 96 of the *Bankruptcy and Insolvency Act*.

107 For example, in *McLarty v. R.* the Minister taxed a transaction as if it was not at arm's-length, because initially it was between Compton, in its own right as seller, and Compton, as an agent/purchaser for the beneficial purchasers. The Supreme Court concluded that the trial judge was entitled to conclude that Compton was dealing at arm's length with the beneficial purchasers/taxpayers, such as McLarty. McLarty was the one being taxed, and he was not involved in the original transaction. In these appeals the Asset Transaction occurred entirely within the Perpetual Energy group, and there was no external party with a beneficial interest in it analogous to the one held by McLarty.

108 The decision in *Teleglobe Canada Inc. v. R.*, 2002 FCA 408, [2003] 1 C.T.C. 255 (Fed. C.A.) is also distinguishable. In that case the Government of Canada privatized and sold Teleglobe to Memotec Data. When the tax consequences of the transaction were considered, an issue arose as to whether the relevant transaction was that between "Old Teleglobe" and "New Teleglobe", or the overall one between Canada and Memotec Data. The former transaction was not at arm's-length, but it was driven by policy considerations, specifically the need to maintain a debt to equity ratio that would generate consumer telecommunication rates consistent with those charged by other carriers. The court decided that the Canada/Memotec transaction was the appropriate transaction to consider, because the consideration at that level was negotiated at arm's length. It was Canada/Memotec's "agreement which fixed the values in question": *Teleglobe* at para. 30. There was no evidence on this record of any equivalent arms-length negotiation of the *consideration* that was set in the Asset Transaction for the transfer of the Goodyear Assets; that consideration was apparently set in-house, not at arm's-length. The consideration set in the Aggregate Transaction was disconnected from the consideration set in the Asset Transaction. Further, there were no policy considerations underlying the Aggregate Transaction that are remotely analogous to those in *Teleglobe*.

109 The Perpetual Energy defendants accurately pleaded that the Asset Transaction was "a technical step" required before the Share Transaction could close. Ms. Rose fairly deposed that the Kailas Capital group had an interest in "which assets would comprise the Goodyear Assets". The Trustee in Bankruptcy acknowledged that the Asset Transaction was a preliminary step to the Share Transaction, and that the Kailas Capital group needed to have assurances that "the beneficial interest in the Goodyear Assets" had been transferred to Perpetual/Sequoia. None of that, however, displaces the critical fact that, on this record, the consideration paid in the Asset Transaction was apparently set not-at-arm's-length within the Perpetual Energy group.

110 Finally, the respondents argue that Perpetual/Sequoia failed due to a fall in natural gas prices, not as a result of any transaction at an undervalue. That is not necessarily relevant, because s. 96 can be engaged if, at the time of transfer, the transferor is insolvent: s. 96(1)(b)(ii)(A). Section 96 assumes that the transferor might already have failed by the time of the transfer, or will fail as a result of it.

111 It follows that appeal 1901-0262AC, seeking the summary dismissal or striking of the s. 96 claim, is dismissed. That claim will have to be resolved at trial.

The Alternative Section 96 Claim

112 The case management judge did not deal with the related claim, described as the "alternative *BIA* claim", against Perpetual Energy Parent, New Trustee and Ms. Rose. It was alleged that these defendants were "privies" under s. 96(3), and "by reason of the [Asset Transaction], directly or indirectly, received a benefit or caused a benefit to be received by another person": see *supra*, paras. 15, 20. This portion of the claim may have effectively been dismissed as against the defendant Ms. Rose, because the case management judge concluded that the Resignation & Mutual Release was a complete defence for her.

113 A "privy" need not actually be a party to the challenged transaction, so long as the privy is not dealing at arm's-length with one of the contracting parties. There can be little doubt in these circumstances that the sole director of a corporation does not deal at arm's length with that corporation. This is not a case like *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 556 A.R. 200, 86 Alta. L.R. (5th) 203 (Alta. C.A.) where the director was dealing on his own account, with respect to his contract of employment. The decisive issue here is therefore whether there was a "benefit" conferred on any of the named defendants.

114 The Trustee in Bankruptcy did not plead any direct benefit that was received from the Asset Transaction. The argument presented orally was that the Asset Transaction accrued generally to the benefit of Perpetual Energy Parent, which would cause its shares to rise in value, and that Ms. Rose, as a shareholder of Perpetual Energy Parent would derive an indirect benefit. The record suggests that the shares of Perpetual Energy Parent actually decreased in value after the Aggregate Transaction. Ms. Rose held approximately 1-2% of the publicly traded shares of Perpetual Energy Parent, which may not constitute a sufficiently proximate "benefit" to engage s. 96(3).

115 On the present record, it is not possible to identify what benefit may have been received by which defendant, and which defendant might have "caused that benefit" to have been conferred. The case management judge did not deal with the issue, and oral argument in this Court did not properly canvass it. Whether the Resignation & Mutual Release can encompass this claim is also an open issue: see *infra*, para. 166. These reasons accordingly do not deal with the alternative *BIA* claim, which remains before the trial court.

The Oppression Claim

116 The Trustee in Bankruptcy pleaded that the business of Perpetual/Sequoia and its affiliates had been conducted in a way that was oppressive or unfairly prejudicial to its creditors, within s. 242(2) of the *Business Corporations Act*:

> (2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

One potential remedy under s. 242(3)(l) is an order compensating an aggrieved person.

117 The statement of claim alleges:

> 19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, PEI, POT to enter into and carry out the [Aggregate Transaction]:

19.1 Ms. Rose exercised her powers as a director of PEOC and its affiliates in a manner; and

19.2 PEI and POC carried on or conducted their business or affairs in a manner that was:

oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors.

Under s. 242, the "corporation" in question was "PEOC", that is Perpetual/Sequoia. Perpetual Energy Parent ("PEI") and the New Trustee ("POC") were "affiliates". Perpetual Operating Trust, not being a corporation, did not fit the definition of "affiliate".

118 Section 242(1) provides that only a "complainant" can apply for an oppression remedy, so a threshold issue was whether the Trustee in Bankruptcy could qualify as a complainant.

119 The case management judge found that the claim of complainant status by the Trustee in Bankruptcy should be struck. Alternatively, the case management judge would not have exercised his discretion to grant complainant status. Further, even if the Trustee in Bankruptcy was given complainant status, the oppression claim should be struck or summarily dismissed on the basis that the "*Redwater* decision nullifies the Oppression Claim".

Complainant Status of the Trustee in Bankruptcy

120 The *Business Corporations Act* defines the "complainants" entitled to seek an oppression remedy:

239 In this Part,

(b) "complainant" means

(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(iii) a creditor . . .

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

In short, a creditor has no automatic status as a complainant in an oppression action, but can qualify as a complainant if the court exercises its discretion to recognize it as a "proper person" to seek an oppression remedy.

121 Although "any other person", even if not a creditor, could theoretically prove it was "a proper person", the oppression action itself must still be directed at the interests of the four groups identified in s. 242(2): a security holder, creditor, director or officer. Neither "the environment" nor "the public" is listed.

122 The case management judge considered the threshold issue of complainant status concurrently with the merits of the oppression claim, and appears to have "struck out" the claim for complainant status. This was partly because of an absence of particulars to support the claim for complainant status: reasons at paras. 202-203, 206, 237. As previously noted, if the problem was an absence of particulars, the remedy was to call for the provision of particulars, not to strike out the claim.

123 Complainant status is a form of standing granted by the court, which is not properly regarded as a pleading that can be "struck out for failing to disclose a cause of action". Being a "complainant" is a recognized legal concept. In this case the Trustee in Bankruptcy pleaded that it was the trustee of Perpetual/Sequoia, and that as such it was a "proper person" to advance

an oppression claim on behalf of the creditors. This was not an allegation of either fact or law, rather it was merely a statement of one component of the remedy that the Trustee in Bankruptcy sought: appointment as a complainant in the discretion of the court. Complainant status was not a "fact" that could be presumed to be "true" under R. 3.68(2)(b), as suggested in the reasons at para. 200. As noted, this pleading also did not amount to an assertion by the Trustee in Bankruptcy that it could self-appoint as a complainant.

124 Seeking recognition as a "complainant" is a question of evidence, not a matter of pleading that is susceptible to being struck out under R. 3.68. The court may or may not exercise its discretion to recognize the proposed complainant, but making a claim for standing is not a matter of "striking out" a pleading for failure to disclose a cause of action. Complainant status is determined based on affidavit evidence presented by the potential plaintiff/complainant, outlining the nature of the alleged oppression, and the proponent's suitability to seek a remedy for that oppression. It was an error of principle to suggest that no evidence supporting the claim for complainant status could be considered on the application: reasons at para. 203. The statement of claim should undoubtedly plead sufficient facts to make out the oppression claim, but there is no requirement that all of the particulars supporting the appointment of the proponent as a complainant must be pleaded. Pleadings are not to contain evidence: R. 13.6(2)(a).

125 The issue actually before the case management judge was whether the Trustee in Bankruptcy should be afforded complainant status. The case management judge indicated he would not exercise his discretion to do so for a number of reasons: (a) the oppression claim was "selective", rather than "collective", because it only reflected the interests of two classes of creditors: reasons at para. 238; (b) *Redwater* "nullified the oppression claim" because Abandonment and Reclamation Obligations are not a liability: reasons at para. 239; (c) the Trustee in Bankruptcy's prospect of success was "very low": reasons at para. 240; (d) the municipality creditors were not shown to be in a position analogous to a minority shareholder, nor was it shown that they had any legitimate interest in the management of the corporation: reasons at para. 202.

126 Requiring a creditor to apply for complainant status reflects a policy that oppression claims are not to be used as a method of debt collection. The mere fact that a corporation does not or cannot pay its debts as they come due does not amount to oppression. In this litigation, however, the Trustee in Bankruptcy is not merely asserting the failure to pay a debt. The allegation here is that the corporation has been re-organized in such a way that it has been rendered unable to pay its debts. For example, the Asset Transaction, which resulted in the separation of the Goodyear Assets from the KeepCo assets, was alleged to be unfairly prejudicial to the creditors.

127 In declining to grant the Trustee in Bankruptcy status as a complainant under the *Business Corporations Act* the case management judge failed to appreciate the collective nature of the role of a trustee in bankruptcy, namely that the oppression action was being brought by the Trustee in Bankruptcy on behalf of the estate of Perpetual/Sequoia, not on behalf of individual creditors. This was largely occasioned by the argument of the Trustee in Bankruptcy, which focused on two liabilities of particular concern, the Abandonment and Reclamation Obligations and the municipal taxes owed. He viewed the oppression claim as articulated by the Trustee in Bankruptcy as directly engaging the issue of whether the Abandonment and Reclamation Obligations were associated with creditors in the sense used both in *Redwater* and in the *Business Corporations Act*. He concluded that because *Redwater* made clear that there was no creditor associated with the Abandonment and Reclamation Obligations, the oppression action was doomed to fail.

128 Section 242 contemplates that conduct can be oppressive respecting "any" security holder, creditor, director or officer. In circumstances like this, one creditor could apply for complainant status, effectively on behalf of all creditors, or only on its own behalf. It follows that there is nothing inherently unreasonable about a trustee in bankruptcy applying for complainant status. That could be a legitimate part of the trustee's duties to maximize the value of the bankrupt estate for the benefit of all of the creditors.

129 The respondents rely on the *Hordo* case, which identified four criteria for determining if a creditor (and by analogy a trustee in bankruptcy) qualified as a complainant. The allegations in *Hordo* were very unusual, and indeed implausible. While that decision outlines some relevant considerations, it does not set out any binding preconditions to complainant status for a creditor. In order to qualify as a complainant, it is undoubtedly true that a creditor must demonstrate more than that it is owed

a debt. However, the creditors of a corporation do have a legitimate interest in preventing management from conducting the business of the corporation a way that prevents it from satisfying its obligations. The creditors may not have any assurance that their debts will be paid, but they do have a reasonable expectation that the corporation's business and assets will not be unfairly re-structured in such a way that payment of those debts becomes impossible: *Tannis Trading* at paras. 25-26; *Manufacturers Life* at para. 31; *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183 (Ont. C.A.) at para. 66, (2008), 41 B.L.R. (4th) 51 (Ont. C.A.); *Gestion Trans-Tek Inc. v. Shipment Systems Strategies Ltd.*, [2001] O.T.C. 860 (Ont. S.C.J.) at paras. 30-36, (2001), 20 B.L.R. (3d) 156 (Ont. S.C.J.).

130 There is no hard rule that the creditor must be in a position analogous to that of a minority shareholder to qualify as a complainant, if only because s. 242 identifies "creditor" as a distinct category of complainant. Further, that requirement is somewhat circular, because if the business of the corporation is conducted in a way that unfairly disregards the interests of the creditors, one could argue that the creditors are in a position analogous to that of an oppressed minority shareholder.

131 The case management judge concluded that an oppression claim by a creditor should be "collective" in the sense that it should be for the benefit of all of the creditors. A single creditor should not use the oppression remedy to collect its own debt. That, however, would not generally be a barrier to a trustee in bankruptcy seeking complainant status, because trustees in bankruptcy, by definition, represent all of the creditors of the bankrupt. The aggregate claims in a bankruptcy always consist of a number of individual claims. The case management judge's objection was that the Trustee in Bankruptcy focused his arguments on the two main obligations of Perpetual/Sequoia: the Abandonment and Reclamation Obligations and unpaid municipal taxes. As set out in the next section of these reasons, the Abandonment and Reclamation Obligations cannot support "creditor" status for the purposes of an oppression action, but they are still relevant to whether a claim of oppression exists and is properly brought by creditors of the estate through its representative the Trustee in Bankruptcy: see *infra*, paras. 140-41. That narrows, but does not necessarily eliminate, the Trustee in Bankruptcy's claim to complainant status.

132 The Trustee in Bankruptcy did not provide particulars of the debts of Perpetual/Sequoia existing at the time of the Asset Transaction that remained unpaid on the date of bankruptcy. As a matter of pleading, that level of detail would not be necessary. Further, if the detail was of concern, the answer was to seek particulars, or to cross-examine the Trustee in Bankruptcy on his affidavit, not to strike the pleading.

133 It is admittedly not clear from the record to what extent Perpetual/Sequoia assumed responsibility for any debts in the Asset Transaction, other than the Abandonment and Reclamation Obligations and municipal taxes. Nevertheless, the collective pursuit of all of those outstanding taxes in an oppression action would be "collective" not "selective". There is no rule that a creditor oppression action can only be launched if there are diverse debts owing to diverse creditors.

134 If the judge concludes that there is no possible merit to the oppression claim, it would be pointless to grant complainant status to a creditor. That, however, is not the same thing as saying that the proposed complainant is unsuitable. That is one factor to consider, but is not a conclusive consideration in determining his complainant status.

135 In summary, it was unhelpful to blend the analysis of the "complainant" status of the Trustee in Bankruptcy, with the substance of the oppression claim. The former is not a matter of "striking a pleading". On this record, it was unreasonable to conclude that the Trustee in Bankruptcy was not a "proper person".

The Merits of the Oppression Claim

136 The case management judge concluded that the oppression claim could be struck out because it failed to disclose a cause of action. In his oral reasons he concluded that the oppression claim could not be summarily dismissed, but in the subsequent written reasons he concluded that summary disposition would have been possible as an alternative: reasons at paras. 233-35.

137 The case management judge concluded that the *Redwater* decision was a complete answer to the oppression claim for two reasons. First of all, *Redwater* "nullified" the claim because it held that Abandonment and Reclamation Obligations were not a true obligation or liability, but merely "an allegation that is based on assumptions and speculations". Secondly *Redwater* concluded that Abandonment and Reclamation Obligations were owed to the public, and not to any "creditor"; neither

the Alberta Energy Regulator nor the Orphan Well Association were creditors for that purpose. As previously noted, the first conclusion arises from a misreading of *Redwater*. However, *Redwater* did conclude that there was no "creditor" with respect to Abandonment and Reclamation Obligations, and to that extent *Redwater* is relevant to these appeals.

138 For the reasons previously given, Abandonment and Reclamation Obligations are a real obligation and liability of an oil and gas company: *supra*, paras. 85-89. The outcome of *Redwater* was that the proceeds from the sale of Redwater Energy's valuable assets had to be used to discharge those obligations, and could not be paid to the secured creditor. That in itself demonstrates the reality of these obligations. *Redwater* did not "nullify" Abandonment and Reclamation Obligations.

139 What *Redwater* did decide, however, was that there was no "creditor" associated with Abandonment and Reclamation Obligations. As a result, Abandonment and Reclamation Obligations could not be "claims provable in bankruptcy". These appeals are concerned with the *Business Corporations Act*, not the *Bankruptcy and Insolvency Act*, but there is no principled basis to distinguish *Redwater* on this point, and find that there is a "creditor" associated with Abandonment and Reclamation Obligations for the purposes of s. 242. The definition of "creditor" for oppression purposes may be wider than it is in other contexts, for example by including contingent claims: *Tannis Trading* at paras. 24-25; *Manufacturers Life* at para. 30. However, given the finding in *Redwater* that Abandonment and Reclamation Obligations are not associated with a creditor, they cannot *directly* be used to support complainant status in an oppression claim brought by "creditors".

140 The conclusion that there is no creditor associated with Abandonment and Reclamation Obligations is not fatal to the oppression claim. The oppression claim can still be advanced by the Trustee in Bankruptcy on behalf of all other creditors who were owed money at the time of the alleged oppressive conduct, and remained unpaid on the date of bankruptcy. As previously noted, the quantum of debts of that nature owed to the recognized creditors of Perpetual/Sequoia is unclear on this record. The respondents argue that, with respect to municipal taxes, there are only three municipalities still owed taxes from before 2017, and they have all entered into deferred payment plans.

141 Further, even though the Abandonment and Reclamation Obligations may not be associated with a "creditor", that does not mean that they are irrelevant to an oppression claim brought on behalf of creditors. As *Redwater* confirms, Abandonment and Reclamation Obligations are real liabilities or obligations of oil and gas companies. It is possible that the directors and officers of a corporation might manage those Abandonment and Reclamation Obligations in a manner that is unfairly prejudicial to the interests of creditors.

142 The case management judge also concluded that the proposed oppression claim was contrary to the policies of the Alberta Energy Regulator: reasons at paras. 120-25. He concluded "the Trustee asks the Court to frame a legal regime that has been rejected by the legislature": reasons at para. 125. The Trustee in Bankruptcy points to two threshold problems with this analysis: no evidence is permitted in an application under R. 3.68(2)(b), and in any event the evidence relied on by the case management judge was not placed on the record by the parties. It was an error for the case management judge to attempt to resolve this complex issue without a proper evidentiary record, and proper submissions from the parties.

143 The extent to which the Asset Transaction is consistent with public policy may well be a central issue at trial. Further, the public policy of the Alberta Energy Regulator is not as clear as the case management judge suggested. In *Redwater*, the Alberta Energy Regulator stated that its policy was to require that all the assets of the corporation be used for reclamation, but that the Regulator would not go outside the corporation to impose liability on others: *Redwater* at paras. 104, 107-108. If that policy were applied here, it could mean that the Regulator's policy was that recourse could be had to the KeepCo Assets, but it not would not extend beyond that. It is not obvious that the Trustee in Bankruptcy's claim is inconsistent with any policy.

Summary of the Oppression Claim

144 In summary, the case management judge erred in his analysis for several reasons including conflating the determination of whether to grant complainant status with the merits of the claim. There was no principled basis to deny the Trustee in Bankruptcy complainant status to launch an oppression action. It was unreasonable to conclude that the Trustee in Bankruptcy was not a "proper person". Further, while the oppression claim may be narrower than the Trustee in Bankruptcy anticipated, the pleadings

TAB 18

CANADA

CONSOLIDATION

CODIFICATION

Canada Business Corporations Act

Loi canadienne sur les sociétés par actions

R.S.C., 1985, c. C-44

L.R.C. (1985), ch. C-44

Current to February 15, 2021

Last amended on January 1, 2020

À jour au 15 février 2021

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PART XX

Remedies, Offences and Punishment

Definitions

238 In this Part,

action means an action under this Act; (*action*)

complainant means

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part. (*plaignant*)

1974-75-76, c. 33, s. 231; 1978-79, c. 9, s. 1(F).

Commencing derivative action

239 (1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

Conditions precedent

(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that

(a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

PARTIE XX

Recours, infractions et peines

Définitions

238 Les définitions qui suivent s'appliquent à la présente partie.

action Action intentée en vertu de la présente loi. (*action*)

plaignant

a) Le détenteur inscrit ou le véritable propriétaire, ancien ou actuel, de valeurs mobilières d'une société ou de personnes morales du même groupe;

b) tout administrateur ou dirigeant, ancien ou actuel, d'une société ou de personnes morales du même groupe;

c) le directeur;

d) toute autre personne qui, d'après un tribunal, a qualité pour présenter les demandes visées à la présente partie. (*complainant*)

1974-75-76, ch. 33, art. 231; 1978-79, ch. 9, art. 1(F).

Recours similaire à l'action oblique

239 (1) Sous réserve du paragraphe (2), le plaignant peut demander au tribunal l'autorisation soit d'intenter une action au nom et pour le compte d'une société ou de l'une de ses filiales, soit d'intervenir dans une action à laquelle est partie une telle personne morale, afin d'y mettre fin, de la poursuivre ou d'y présenter une défense pour le compte de cette personne morale.

Conditions préalables

(2) L'action ou l'intervention visées au paragraphe (1) ne sont recevables que si le tribunal est convaincu à la fois :

a) que le plaignant a donné avis de son intention de présenter la demande, dans les quatorze jours avant la présentation ou dans le délai que le tribunal estime indiqué, aux administrateurs de la société ou de sa filiale au cas où ils n'ont pas intenté l'action, n'y ont pas mis fin ou n'ont pas agi avec diligence au cours des procédures;

b) que le plaignant agit de bonne foi;

TAB 19

2017 ONCA 1014
Ontario Court of Appeal

Ernst & Young Inc. v. Essar Global Fund Limited

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

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

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

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

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

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

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.d Award of costs
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Bankruptcy and insolvency

XVII Practice and procedure in courts
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III.3.e.ii.C Oppressive conduct
III.3.e.ii.C.5 Miscellaneous

Headnote

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Standing to apply — Miscellaneous

E Global acquired A Ltd. through its subsidiaries in 2007 — A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016, order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act (CCAA) to commence and continue proceedings under s. 241 of the Canada Business Corporations Act (CBCA) for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global (collectively E Group) — Action arose in context of recapitalization of A Ltd. and transaction between A Ltd. and Port of Algoma Inc. (Portco), two companies indirectly owned by E Global, in which A Ltd.'s port facilities in Sault Ste. Marie were conveyed to Portco (Port Transaction) — Trial judge found Port Transaction and other conduct of E Global to be oppressive and granted remedy designed to address that oppression — E Global and some members of E Group, together with GIP, who were arm's length lenders who loaned Portco US$150 million to effect transaction appealed on several grounds, including that Monitor lacked standing to bring oppression claim — Appeal dismissed — Monitor could be complainant under CBCA and should have been made one, however, it would only occur on rare occasions at CCAA supervising judge's discretion — CCAA supervising judge was justified in providing authorization as prima facie case was established; Monitor had reviewed and reported to court on related party transactions; oppression action served to remove insurmountable obstacle to restructuring and Monitor could efficiently advance oppression claim representing stakeholders who were not organized as group and who were similarly affected by alleged oppressive conduct.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Oppressive conduct — Miscellaneous

E Global acquired A Ltd. through its subsidiaries in 2007 — A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016, order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act to commence and continue proceedings under s. 241 of the Canada Business Corporations Act for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global (collectively E Group) — Action arose in context of recapitalization of A Ltd. and transaction between A Ltd. and Port of Algoma Inc. (Portco) two companies indirectly owned by E Global, in which A Ltd.'s port facilities in Sault Ste. Marie were conveyed to Portco (Port Transaction) — Trial judge found Port Transaction and other conduct of E Global to be oppressive and granted remedy designed to address that oppression — E Global and some members of E Group, together with GIP, who were arm's length lenders who loaned Portco US$150 million to effect transaction appealed on basis trial judge erred in tailoring remedy — Appeal dismissed — Trial judge had broad latitude to fashion oppression remedy based on facts before him — Trial judge properly identified need to avoid overly broad remedy and varying transaction as he did was one such way — Trial judge's remedy removed Portco's control rights and after GIP was paid, restored Port to the ownership of A Ltd. — Remedy was responsive to oppressive conduct unlike award of damages — Further, remedy granted preserved security GIP had bargained for and therefore GIP did not suffer any prejudice as result of remedy — Regarding issue of set-off, trial judge's subsequent ruling was full answer to GIP's submissions and ensured that GIP would not suffer any prejudice as result of remedy granted in response to E Global's oppressive conduct.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Derivative actions — At common law — Miscellaneous

E Global acquired A Ltd. through its subsidiaries in 2007 — A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016, order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act to commence and continue proceedings under s. 241 of the Canada Business Corporations Act for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global — Action arose in context of recapitalization of A Ltd. and transaction between A Ltd. and Port of Algoma Inc. (Portco), two companies indirectly owned by E Global, in which A Ltd.'s port facilities in Sault Ste. Marie were conveyed to Portco (Port Transaction) — Trial judge found Port Transaction and other conduct of E Global to be oppressive and granted remedy designed to address that oppression — E Global, along with some companies directly or indirectly owned by E Global, together with GIP, who were arm's length lenders who loaned Portco US$150 million to effect transaction appealed on several grounds including alleged harm was to A Ltd. and appropriate redress was derivative action — Appeal dismissed — Court affirmed principles that derivative action and oppression remedy were not mutually exclusive and that there may be circumstances giving rise overlapping derivative actions and oppression remedies where harm was done both to corporation and to stakeholders in their separate stakeholder capacities — Question was whether impugned conduct was "oppressive" and, if so, whether stakeholder suffered harm in its capacity as stakeholder as result of that conduct.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Oppressive conduct — Corporate governance

Business judgment rule — E Global acquired A Ltd. through its subsidiaries in 2007 — A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016, order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act to commence and continue proceedings under s. 241 of the Canada Business Corporations Act for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global (collectively E Group) — Action arose in context of recapitalization of A Ltd. and transaction between A Ltd. and Port of Algoma Inc. (Portco), two companies indirectly owned by E Global, in which A Ltd.'s port facilities in Sault Ste. Marie were conveyed to Portco (Port Transaction) — Trial judge found Port Transaction and other conduct of E Global to be oppressive and granted remedy designed to address that oppression — E Global and some members of E Group, together with GIP, who were arm's length lenders who loaned Portco US$150 million to effect transaction appealed — Appeal dismissed — There was evidence of subjective expectations before trial judge, who also drew reasonable inferences from evidence and circumstances that existed at A Ltd. that supported expectations Monitor relied upon — Trial judge did not err in his analysis of wrongful conduct and harm as there was recognition that stakeholders were neither party to nor involved in amended plan of arrangement proceedings — Trial judge made his finding of wrongful conduct on totality of E Global's conduct

regarding recapitalization and Port Transaction — Trial judge had not misunderstood E Global's contribution to recaptalization — Causal connection between E Global's Equity Commitment and Port Transaction was factual matter and trial judge's factual finding was supported by evidence — Trial judge also correctly described business judgment rule however appellate court added rule shielded business decisions from court intervention only where they were made prudently and in good faith, and rule's protection was available only to extent that Board of Directors' actions actually evidenced their business.

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Award of costs — General principles

A Ltd. owned steel production operations and, in late 2013, was faced with liquidity crisis — Its investments were managed by E Capital — In 2016, order was granted authorizing Monitor appointed under Companies' Creditors Arrangement Act to commence and continue proceedings under s. 241 of the Canada Business Corporations Act for oppression against A Ltd.'s parent, E Global and other companies owned directly or indirectly by E Global — GIP, who were arm's length lenders, sought costs against monitor on partial indemnity scale of $750,156.18 on basis that relief sought by monitor at various times in one form or another would have affected GIP security — Monitor acknowledged that if only position taken by GIP was scope of relief, they were entitled to costs but GIP took broader attack, including whether monitor had standing to bring action, contending they had veto provision in was commercially reasonable and fair value of transaction was established, none of which was established — GIP appealed oppression decision and requested appellate court order that it was error to find that monitor was proper complainant or to find oppression of A Ltd. and thus it was contended that GIP could not say it was wholly successful — Court was not privy to GIP`s strategy in filing its appeal and issues had been decided at first instance but may be appealed — In circumstances, success was divided between monitor and GIP and no order was made to costs — GIP applied for leave to appeal costs award — Application dismissed — There was no basis on which to interfere with costs award of trial judge as there was no error in principle in trial judge's exercise of discretion.

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Held:

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CW Shareholdings Inc. v. WIC Western International Communications Ltd. (1998), 160 D.L.R. (4th) 131, 1998 CarswellOnt 1891, 38 B.L.R. (2d) 196, 39 O.R. (3d) 755, 61 O.T.C. 81 (Ont. Gen. Div. [Commercial List]) — referred to

Essar Steel Algoma Inc. et al Re (2017), 2017 ONSC 3930, 2017 CarswellOnt 12528, 53 C.B.R. (6th) 321 (Ont. S.C.J.) — referred to

Fedel v. Tan (2010), 2010 ONCA 473, 2010 CarswellOnt 4658, 83 C.C.E.L. (3d) 60, 70 B.L.R. (4th) 157, 101 O.R. (3d) 481, 264 O.A.C. 144 (Ont. C.A.) — followed

Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board) (2006), 2006 CarswellOnt 13, 12 B.L.R. (4th) 189, 206 O.A.C. 61, 263 D.L.R. (4th) 450, 79 O.R. (3d) 81 (Ont. C.A.) — considered

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193, 316 N.R. 265, 184 O.A.C. 209, 2004 C.L.L.C. 210-025, 70 O.R. (3d) 255 (note), [2004] 1 S.C.R. 303, 70 O.R. (3d) 255, 2004 CSC 9 (S.C.C.) — referred to

Ivaco Inc., Re (2006), 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 2006 C.E.B. & P.G.R. 8218 (headnote only), 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43 (Ont. C.A.) — considered

J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd. (2008), 2008 ONCA 183, 2008 CarswellOnt 1348, 41 B.L.R. (4th) 51, 234 O.A.C. 59, 67 R.P.R. (4th) 1 (Ont. C.A.) — considered

Korea Data Systems Co. v. Chiang (2009), 2009 ONCA 3, 2009 CarswellOnt 28, 49 C.B.R. (5th) 1, (sub nom. *Chiang (Trustee of) v. Chiang)* 93 O.R. (3d) 483, (sub nom. *Chiang (Trustee of) v. Chiang)* 305 D.L.R. (4th) 655, 78 C.P.C. (6th) 110, (sub nom. *Mendlowitz & Associates Inc. v. Chiang)* 257 O.A.C. 64 (Ont. C.A.) — referred to

Malata Group (HK) Ltd. v. Jung (2008), 2008 ONCA 111, 2008 CarswellOnt 699, 89 O.R. (3d) 36, 233 O.A.C. 199, 290 D.L.R. (4th) 343, 44 B.L.R. (4th) 177 (Ont. C.A.) — considered

Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 85 O.A.C. 29, 23 B.L.R. (2d) 286, 1995 CarswellOnt 1207 (Ont. C.A.) — referred to

Nortel Networks Corp., Re (October 3, 2012), Doc. Toronto 09-CL-7950 (Ont. S.C.J. [Commercial List]) — considered

Northland Properties Ltd., Re (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146, 1988 CarswellBC 531 (B.C. S.C.) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2003), 2003 CarswellOnt 5210, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.)* 180 O.A.C. 158, 46 C.B.R. (4th) 313, 42 B.L.R. (3d) 14, 68 O.R. (3d) 544 (Ont. C.A.) — considered

Pente Investment Management Ltd. v. Schneider Corp. (1998), 1998 CarswellOnt 4035, 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.)* 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (Ont. C.A.) — considered

Philip's Manufacturing Ltd., Re (1992), 67 B.C.L.R. (2d) 385, 12 C.B.R. (3d) 145, 1992 CarswellBC 489 (B.C. C.A.) — considered

R. v. Palmer (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, 1979 CarswellBC 533, 1979 CarswellBC 541 (S.C.C.) — followed

Rea v. Wildeboer (2015), 2015 ONCA 373, 2015 CarswellOnt 7602, 384 D.L.R. (4th) 747, 37 B.L.R. (5th) 101, 126 O.R. (3d) 178, 335 O.A.C. 161 (Ont. C.A.) — distinguished

Reference re Companies' Creditors Arrangement Act (Canada) (1934), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75, 1934 CarswellNat 1 (S.C.C.) — referred to

Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208, 69 O.A.C. 312, 111 D.L.R. (4th) 19, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232, 1994 CarswellOnt 375 (Ont. C.A.) — followed

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

U.S. Steel Canada Inc., Re (2016), 2016 ONCA 662, 2016 CarswellOnt 14104, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1 (Ont. C.A.) — considered

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2002), 2002 CarswellOnt 2096, 214 D.L.R. (4th) 496, 32 C.C.P.B. 120, 27 B.L.R. (3d) 53, 19 C.C.E.L. (3d) 203 (Ont. S.C.J. [Commercial List]) — referred to

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2004), 2004 CarswellOnt 691, (sub nom. *UPM-Kymmene Corp. v. Repap Enterprises Inc.)* 183 O.A.C. 310, 42 B.L.R. (3d) 34, 32 C.C.E.L. (3d) 68, 40 C.C.P.B. 114, 250 D.L.R. (4th) 526 (Ont. C.A.) — referred to

Woodward's Ltd., Re (1993), 77 B.C.L.R. (2d) 332, 100 D.L.R. (4th) 133, 1993 CarswellBC 75 (B.C. S.C.) — considered

Statutes considered:

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

Generally — referred to

s. 13 — considered

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 192 — considered

s. 238 "complainant" (d) — considered

s. 239 — considered

s. 241 — considered

s. 241(1) — considered

s. 241(2) — considered

s. 241(3) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

s. 23 — considered

s. 23(1)(c) — considered

s. 23(1)(k) — considered

APPEAL by certain defendants from judgment reported at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 2017 ONSC 1366, 2017 CarswellOnt 4049, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 137 O.R. (3d) 438 (Ont. S.C.J. [Commercial List]), respecting ruling on oppression claim; APPLICATION by arm's length lender for leave to appeal order reported at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 2017 ONSC 4017, 2017 CarswellOnt 12508, 50 C.B.R. (6th) 148, 71 B.L.R. (5th) 324 (Ont. S.C.J.), respecting costs.

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

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

2 The supervising *CCAA* judge authorized the Monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "Port") were conveyed to Portco.

3 Portco is a single purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie Port. Portco obtained control in November 2014 in a transaction between Algoma, Portco, and Essar Global (the "Port Transaction"). The Port Transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The interveners below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively "GIP"), are arm's length lenders who loaned Portco US$150 million to effect the transaction.

4 The trial judge found the Port Transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are first, that the Monitor lacked standing to bring an oppression claim and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

91 Accordingly, the trial judge ordered that the lease, the Cargo Handling Agreement, and the Shared Services Agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

92 The trial judge decided at para. 147 that the appropriate place for Portco to assert its claims for a declaration that the US $19.8 million promissory note had been paid as a result of set-off and for amounts owing under the Cargo Handling Agreement was in the ongoing *CCAA* proceedings.

(7) Costs

93 Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN$1.17 million to the Monitor. The trial judge then ordered Essar Global to pay Algoma CDN$1.5 million in costs and ordered that no costs be payable by the Monitor or by or to GIP.

C. ISSUES

94 There are eight issues to be addressed:

1. Did the Monitor lack standing to be a complainant under s. 238 of the *CBCA*?

2. Could the claim of the Monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

3. Did the trial judge err in his analysis of reasonable expectations?

4. Did the trial judge err in his analysis of wrongful conduct and harm?

5. Did the trial judge err in tailoring a remedy?

6. Was there procedural unfairness?

7. Should the fresh evidence be admitted?

8. Should leave to appeal costs be granted to GIP and the costs award varied?

D. ANALYSIS

(1) Standing of the Monitor

95 Essar Global submits that the Monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the Monitor could avoid conflicts.

96 GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the Monitor's oppression claim against it. Also, Algoma can be directed to make the Cargo Handling Agreement payments to GIP directly and therefore the Monitor owed a fiduciary duty to GIP.

97 In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the Monitor could have standing to bring an oppression action.

(a) The Purpose of CCAA Restructurings

98 As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

99 As outlined by Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], the *CCAA* fell into disuse after amendments in 1953 that limited its application to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 336-337; and *Century Services*, at para. 13.

100 The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially-distressed corporations without forcing them to first declare bankruptcy: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at p. 661.

101 The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-339. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

102 The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

103 To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

104 It is against this background that the role of a monitor must be considered.

(b) The Role of the Monitor

105 Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.). In that case, an interim **receiver** was appointed whose role was described at p. 277 as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan was being formulated":

A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq www.mondaq.com. The monitor was thus a court-appointed officer.

106 The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

107 Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008) 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor — taking on larger mandates, often times involving complex, cross-border restructurings.

108 Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd., Re* (1992), 67 B.C.L.R. (2d) 385 (B.C. C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd., Re* (1993), 77 B.C.L.R. (2d) 332 (B.C. S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy.

109 Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy, and as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed it is required by statute to do so. See for example s. 23 of the *CCAA* that describes certain duties of a monitor.

110 Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) A Monitor as Complainant in an Oppression Action

111 Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*.[5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate law remedy that should be available in such proceedings.[6] I do not understand the appellants to be taking the former position; rather they simply argue that the Monitor has no standing.

112 Section 238 of the *CBCA* defines a complainant as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(d) is the relevant subsection.

113 Section 241***o***f the *CBCA* describes the oppression remedy:

> (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,
> >
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

114 The question here is whether the trial judge erred in concluding that the Monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the Monitor have been a complainant in this case? I would answer both questions affirmatively.

115 As is clear from s. 238(d) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an oppression action involving an oppressive agreement between the debtor and a non-arm's length party. As this court said in that case at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

116 Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

117 Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(k) of the *CCAA* expressly provides that a monitor shall carry out any functions in relation to the company that the court may direct. Moreover, s. 23(1)(c) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

118 Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order it considers appropriate

in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 39 C.B.R. (6th) 173 (Ont. C.A.), at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

119 Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

120 However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

121 Here, in para. 37(c) of the Amended and Restated Initial *CCAA* Order dated November 20, 2015, the Monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the Monitor to commence proceedings under s. 241 of the *CBCA*. The Monitor proceeded with the oppression action in the interests of the restructuring consistent with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The Monitor took the action as an "adjunct to its role in facilitating a restructuring".

122 Moreover, it cannot be said that the Monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

123 It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether:

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

124 In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the Monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

125 Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the *CCAA* proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to supervise all parties including the Monitor to ensure that no unfairness or unwarranted impartiality occurred.

126 Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the Monitor to exercise any powers properly exercisable by a Board of Directors of Nortel or its subsidiaries. But this expansion was

a response to the resignations of the Boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the Monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

127 In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the Monitor standing to pursue an action for oppression.

(2) Derivative or Oppression Action

128 In addition to attacking the standing of the Monitor to bring the action, the appellants also submit that the Monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that *Act*. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the Monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

129 In support of their submission, the appellants rely heavily on the decision of this Court in *Wildeboer*. This case is not *Wildeboer*, however.

130 In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]."

131 The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly re-affirmed the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

> I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata* [*Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee* [*Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (C.A.)] make it clear that there are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); *Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), aff'd [2001] O.J. No. 3918 (Ont. Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at para. 526, leave to appeal refused, (2005), [2004] S.C.C.A. No. 291 (S.C.C.).

132 Or, as Armstrong J.A. put it in *Malata Group (HK) Ltd. v. Jung* [2008 CarswellOnt 699 (Ont. C.A.)], at para. 30:

> [T]here is not a bright line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

133 In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion — unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation — this case falls into the overlapping category.

134 For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the Monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted at para. 31, the Monitor initially cast quite widely the net of stakeholders affected by the Port Transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners, and retirees.

