BASIC PRINCIPLES OF CANADIAN CIVIL PROCEDURE

CASE BOOK

2017

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A. Justiciability

Black v. Chrétien et al.
[Indexed as: Black v. Canada (Prime Minister)

54 O.R. (3d) 215, [2001] O.J. No. 1853

Court of Appeal for Ontario

Laskin, Goudge and Feldman JJ.A.

May 18, 2001

The judgment of the court was delivered by **LASKIN J.A.**:--

A. Introduction

[1] The appellant Conrad Black wants to be appointed a peer in the United Kingdom, which would allow him to sit in the House of Lords. He alleges that Prime Minister Jean Chrétien intervened with the Queen to oppose his appointment and that, but for the Prime Minister's intervention, he would have received the honour and title of peer. Mr. Black has sued the Prime Minister for abuse of power, misfeasance in public office and negligence. He has sued the Government of Canada, represented by the Attorney General of Canada, for negligent misrepresentation. He seeks declaratory relief and damages of $25,000.

[2] The respondents Prime Minister Chrétien and the Attorney General of Canada brought a motion to dismiss all of Mr. Black's claims (except the claim for negligent misrepresentation against the Government) on two grounds: first, that the claims are not justiciable and therefore disclose no reasonable cause of action; and second, that the Superior Court has no jurisdiction to grant declaratory relief against the respondents because that jurisdiction lies exclusively with the Federal Court.

[3] In a decision reported as Black v. Canada (Prime Minister) (2000), 47 O.R. (3d) 532 (S.C.J.), LeSage C.J.S.C. held that the Superior Court had jurisdiction to entertain Mr. Black's claims. However, the motions judge dismissed these claims, concluding at p. 544 that "[i]t is [the Prime Minister's] prerogative, non-reviewable in court, to give advice and express opinions on honours and foreign affairs . . . his actions and his reasons for giving that advice or expressing those opinions are not justiciable."

[4] Black appeals on the issue of justiciability and the respondents cross-appeal on the jurisdiction of the Superior Court to grant declaratory relief. Together, the appeal and the cross-appeal raise the following three issues:

(1) Is it plain and obvious that, in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising a prerogative power of the Crown?

(2) If so, is it plain and obvious that this exercise of the prerogative is not reviewable by the courts?

(3) If the Prime Minister's exercise of the prerogative is reviewable, does the Superior Court have jurisdiction to grant declaratory relief?

[5] For the reasons that follow, I would answer yes to all three questions. Because of my answers to the first two questions, I would dismiss Mr. Black's appeal. In my view, in advising

the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising his honours prerogative, a prerogative power that is beyond the review of the courts.

B. The Claim

[6] For the purpose of both the motion before LeSage C.J.S.C. and this appeal, the facts pleaded in Mr. Black's amended statement of claim must be taken as true and assumed to be proven. I will briefly summarize Mr. Black's pleading.

(a) **The factual allegations**

[7] In February 1999, the leader of the British Conservative Party advised Mr. Black that he intended to nominate him for appointment by the Queen as a peer. At the time, Mr. Black was a Canadian citizen ordinarily residing in England. The nomination was accepted and recommended by the British Government. The appointment would permit Mr. Black to use a title and sit in the House of Lords.

[8] On May 10, 1999, the British Government asked the Government of Canada to confirm the absence of a legal impediment to conferring a peerage on Mr. Black. On May 24, the Canadian High Commissioner in London spoke to Mr. Black. The Commissioner told Mr. Black that he had been advised by the Honours Committee of the Canadian Government that Mr. Black was not prevented from accepting a peerage by any statutory bar in Canada, though consultation between the United Kingdom and Canada was customary. Mr. Black claims that hundreds of honours, including more that 25 titular honours, have been bestowed on Canadians without objection by the Canadian Government. Some of those honours have been bestowed during Prime Minister Chrétien's term in office.

[9] On May 28, 1999, the Prime Minister of England, Mr. Blair, told Mr. Black that as long as he became a British citizen and did not use the title in Canada, the Canadian Government did not object to the peerage. The Canadian Government confirmed Prime Minister Blair's advice in a letter to the British Government dated June 9, 1999. The British High Commission received the same advice from Canada.

[10] Relying on this advice, Mr. Black immediately applied for, and on June 11, 1999 obtained, British citizenship. On June 14, Prime Minister Blair wrote Mr. Black confirming that his nomination as a peer was being forwarded to the Queen. Mr. Black was told that his appointment would be made on June 18, 1999.

[11] However, on June 17, Prime Minister Blair told Mr. Black that Prime Minister Chrétien had intervened with the Queen to oppose Mr. Black's peerage, citing a contravention of Canadian law. Prime Minister Chrétien asserted that he had a right to block Mr. Black's nomination because of the Nickle Resolution passed by the House of Commons in 1919, which requested the King to refrain from conferring titles on any of his Canadian subjects. Later that day, Mr. Black telephoned Prime Minister Chrétien**.** The Prime Minister refused to change his position. He defended his actions by referring to the Nickle Resolution and the status of the monarchy in Canada. He added that he had not been kindly treated by the National Post, a newspaper published by Mr. Black. This was the third time in six months that the Prime Minister had expressed to Mr. Black his dissatisfaction with comments made about him in the National Post.

[12] Because of Prime Minister Chrétien's intervention with the Queen, Mr. Black's appointment as a peer was suspended or deferred "with considerable public embarrassment and

inconvenience" to him. The Prime Minister later tried to justify his actions by referring to a Regulation passed in 1968 and a Policy issued in 1988.

(b) Canadian policy statements

[13] Mr. Black's amended statement of claim refers to three Canadian policy statements dealing with the granting of honours to Canadian citizens by foreign countries: the 1919 Nickle Resolution, the 1968 Regulation and the 1988 Policy.

[14] The Nickle Resolution passed by the House of Commons in 1919 asked the King "to refrain hereafter from conferring any title or honour or titular distinction upon any of your subjects domiciled or ordinarily resident in Canada . . .". The amended statement of claim states that Prime Minister Chrétien relied on the Nickle Resolution in opposing Mr. Black's appointment. However, Mr. Black pleads that the Nickle Resolution "had no legal effect on the prerogative of Her Majesty the Queen in Right of the United Kingdom" and "without the status of a statute . . . could not affect in any way the prerogative of Her Majesty the Queen". Mr. Black also pleads that the Nickle Resolution must yield to the Citizenship Act, R.S.C. 1985, c. C-29, which permits and recognizes dual citizenship with the United Kingdom. And, finally, Mr. Black pleads that he was a British citizen resident in the United Kingdom before the Prime Minister intervened with the Queen.

[15] Mr. Black also alleges that Prime Minister Chrétien relied both on the 1968 Regulation and the 1988 Policy "after the fact" and that neither justified the Prime Minister's actions. The 1968 Regulation[1] at end of document] was issued by the Secretary of State Department, the 1988 Policy[2] at end of document] by the Clerk of the Privy Council. Both the Regulation and the Policy require foreign countries to obtain the Government of Canada's approval before awarding an order, a decoration or a medal to a Canadian citizen. And both the Regulation and the Policy state that the Government of Canada shall not grant approval for an award "that carries with it an honourary title or confers any precedence or privilege". However, s. 5 of the 1968 Regulation states that "approval is generally given to accept orders and decorations conferred on Canadian citizens who have dual nationality, provided acceptable evidence is offered that the recipient is ordinarily resident in or has a closer actual connection with the donor country."

(c) Relief sought

[16] In substance, Mr. Black seeks three declarations: first, a declaration that the Prime Minister and the Government of Canada had no right to advise the Queen not to confer an honour on a British citizen or a dual citizen; second, a declaration that the Prime Minister committed an abuse of power by intervening with the Queen to prevent him from receiving a peerage; and third, a declaration that the Government of Canada negligently misrepresented to Mr. Black that he would be entitled to receive a peerage if he became a dual citizen and refrained from using his title in Canada. Mr. Black also seeks damages of $25,000 against both respondents for abuse of power, negligence and negligent misrepresentation. The respondents acknowledge that the negligent misrepresentation claim against the Government of Canada can proceed to trial. However, they move to dismiss all other claims against the Government of Canada and all claims against the Prime Minister.

C. The Decision of the Motions Judge

[17] LeSage C.J.S.C. dealt first with the question whether the Superior Court had jurisdiction to grant declaratory relief against the Prime Minister and the Government of Canada. He held that it did. He concluded at p. 539 that Mr. Black's claim did not "come clearly or exclusively within the jurisdiction of the Federal Court (Trial Division)" under s. 18(1) of the Federal Court Act, R.S.C. 1985, c. F-7 because Prime Minister Chrétien did not act under an Act of Parliament or make any "order".

[18] The motions judge then considered whether Mr. Black's claims were justiciable. He concluded that they were not. He held that the justiciability of the Prime Minister's actions depended on how these actions were characterized. The motions judge characterized them as an exercise of the Crown prerogative in relation to the granting of honours or the giving of advice in foreign affairs. In his view, these actions came "within the political area of the prerogative that is not subject to review in the courts" (supra, at p. 541).

[19] The motions judge then looked separately at the claims in negligence and for abuse of power. He concluded that these claims could not succeed. Having found that Prime Minister Chrétien acted within his prerogative, the motions judge held that neither the improper exercise of that prerogative nor the wisdom of the Prime Minister's actions was justiciable. The motions judge therefore struck out all claims as non-justiciable, except the claim for negligent misrepresentation against the Government of Canada, which was permitted to proceed.

D. Discussion

[20] The respondents brought their motion under rule 21.01(1) (b) and rule 21.01(3)(a) of the Rules of Civil Procedure [R.R.O. 1990, Reg. 194]. Under rule 21.01(1)(b), the respondents contend that Mr. Black's claim, other than the negligent misrepresentation claim against the Government, discloses no reasonable cause of action. Under rule 21.01(3) (a), they contend that the Superior Court has no jurisdiction to grant the declaratory relief Mr. Black requests.

[21] I will deal first with whether Mr. Black's claim discloses a reasonable cause of action. The test under rule 21.01(1)(b) is well established. The threshold is low. The court must assume that the facts pleaded are true. The court should strike out the statement of claim only if it is "plain and obvious" that the claim discloses no reasonable cause of action: "Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail . . . should the relevant portions of a plaintiff's statement of claim be struck out": Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 980, 49 B.C.L.R. (2d) 273. In applying this test, counsel for Mr. Black appropriately cautioned us not to give this statement of claim extra scrutiny because of who the parties are.

[22] The broad question raised by Mr. Black's pleading is whether it discloses a justiciable cause of action against the Prime Minister. As I stated earlier, this broad question divides into two issues: Is it plain and obvious that in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising a prerogative power? If so, is the exercise of this prerogative power reviewable by the courts?

First issue: Was the Prime Minister exercising a prerogative power?

[23] The motions judge concluded that the Prime Minister's communication with the Queen was an exercise of the prerogative power to grant honours and conduct foreign affairs. I agree with

the motions judge that Prime Minister Chrétien was exercising a prerogative power, although I rest my own conclusion on the honours prerogative alone.

[24] Mr. Black submits that the motions judge erred in his conclusion for four reasons. First, because Mr. Black did not plead that the Prime Minister exercised a Crown prerogative, the motions judge should not have concluded that he did. Second, in Canada the Prime Minister does not have the power to exercise the Crown prerogative, only the Governor General does. Third, the actions of Prime Minister Chrétien pleaded in the statement of claim were not an exercise of the Crown prerogative, in relation to either the granting of honours or the conduct of foreign affairs, but an unsolicited personal intervention in which the Prime Minister gave wrong legal advice. Fourth, in Canada the prerogative power to conduct foreign affairs has been displaced by the Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22.

[25] To put these submissions in context, I will briefly review the nature of the Crown's prerogative power. According to Professor Dicey, the Crown prerogative is "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown": Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London: Macmillan, 1959) at p. 424. Dicey's broad definition has been explicitly adopted by the Supreme Court of Canada and the House of Lords. See Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings, [1933] S.C.R. 269 at pp. 272-73, 59 C.C.C. 301, and Attorney General v. De Keyser's Royal Hotel, [1920] A.C. 508 at p. 526, [1920] All E.R. Rep. 80 (H.L.). See also Peter Hogg and Patrick Monahan, Liability of the Crown, 3rd ed. (Toronto: Carswell, 2000) at p. 15.

[26] The prerogative is a branch of the common law because decisions of courts determine both its existence and its extent. In short, the prerogative consists of "the powers and privileges accorded by the common law to the Crown": Peter Hogg, Constitutional Law in Canada, loose-leaf ed. (Toronto: Carswell, 1995) at 1.9. See also Proclamations Case (1611), 12 Co. Rep. 74, 77 E.R. 1352 (K.B.). The Crown prerogative has descended from England to the Commonwealth. As Professor Cox has recently observed, "it is clear that the major prerogatives apply throughout the Commonwealth, and are applied as a pure question of law": N. Cox, The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity, 14 Australian Journal of Law and Society (1998-99) 15 at 19.

[27] Despite its broad reach, the Crown prerogative can be limited or displaced by statute. See Parliament of Canada Act, R.S.C. 1985, c. P-1, s. 4. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The Crown may no longer act under the prerogative, but must act under and subject to the conditions imposed by the statute: Attorney General v. De Keyser's Royal Hotel, supra. In England and Canada, legislation has severely curtailed the scope of the Crown prerogative. Dean Hogg comments that statutory displacement of the prerogative has had the effect of "shrinking the prerogative powers of the Crown down to a very narrow compass" (supra). Professor Wade agrees:

> [I]n the course of constitutional history the Crown's prerogative powers have been stripped away, and for administrative purposes the prerogative is now a much-attenuated remnant. Numerous statutes have expressly restricted it, and even where a statute merely overlaps it the doctrine is that the prerogative goes into abeyance.

E.C.S. Wade, Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988) at pp. 240-41.)

Nonetheless, as I will discuss, the granting of honours has never been displaced by statute in Canada and therefore continues to be a Crown prerogative in this country.

[28] I turn now to Mr. Black's submissions. Mr. Black did not plead that Prime Minister Chrétien exercised a prerogative power. Therefore, he first submits that on a rule 21.01(1)(b) motion, LeSage C.J.S.C. should not have characterized his allegations about the Prime Minister's actions as amounting to an exercise of the prerogative, and then used that characterization to strike out the amended statement of claim. If the Prime Minister is relying on the prerogative, he must plead it in his statement of defence.

[29] I disagree with this submission. As is evident from my earlier discussion, whether the Prime Minister exercised a prerogative power is a question of law. The court has the responsibility to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute. Although Mr. Black did not expressly plead that the Prime Minister was exercising the Crown prerogative, the motions judge was entitled to consider the "legal character" of Mr. Black's allegations.

[30] That the motions judge was entitled to do so on a motion under rule 21.01(1)(b) is supported by the Supreme Court of Canada's decision in Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 13 C.R.R. 287. In that case, the plaintiffs pleaded that the decision of the federal Cabinet to allow the United States to test cruise missiles in Canada violated s. 7 of the Canadian Charter of Rights and Freedoms. The court struck out the claim, holding that it did not disclose a reasonable cause of action. The plaintiffs did not plead that in deciding to permit cruise missile testing the Cabinet was exercising the Crown prerogative. Nonetheless, both the Federal Court of Appeal and Wilson J., in her concurring judgment in the Supreme Court of Canada, held that [the] Cabinet's decision was an exercise of the Crown prerogative relating to national defence and foreign affairs. That finding alone did not insulate the Cabinet's decision from review under the Charter. But Wilson J.'s judgment shows that in determining whether a statement of claim discloses a reasonable cause of action, the court may consider whether, on the allegations pleaded, the defendant exercised a prerogative power.

[31] Mr. Black's second submission is that the Prime Minister cannot exercise the Crown prerogative. He submits that in Canada, only the Governor General can exercise the prerogative. I find no support for this proposition in theory or in practice. Admittedly, the Governor General is the Queen's permanent representative in Canada. The 1947 Letters Patent constituting the office of the Governor General of Canada [Canada Gazette, Part I, Vol. 81, p. 3104] is the instrument by which the Monarch delegates her prerogative powers for application in Canada. The Letters Patent empower[s] the Governor General "to exercise all powers and authorities lawfully belonging to Us in respect of Canada" (at para. II). By convention, the Governor General exercises her powers on the advice of the Prime Minister or Cabinet. Although the Governor General retains discretion to refuse to follow this advice, in Canada that discretion has been exercised only in the most exceptional circumstances. See Pa ul Lordon, Q.C., Crown Law (Toronto: Butterworths, 1991) at p. 70.

[32] Still, nothing in the Letters Patent or the case law requires that all prerogative powers be exercised exclusively by the Governor General. As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative: see Lordon, supra, at p. 71. The reasons of Wilson J. in Operation Dismantle affirm that prerogative power may be exercised by cabinet ministers and therefore does not lie exclusively with the Governor

General. Similarly, in England the prerogative "[was] gradually relocated from the Monarch in person to the Monarch's advisors or ministers. Hence it made increasing sense to refer to those powers as belonging to the Crown . . .": Bridgid Hadfield, "Judicial Review and the Prerogative Power" in M. Sunkin and S. Payne, The Nature of the Crown (Oxford: Oxford University Press, 1999) at p. 199. This gradual relocation of the prerogative is consistent with Professor Wade's general view of the Crown prerogative as an "instrument of government": Commentary on Dicey's Introduction to the Study of the Law of the Constitution, 9th ed. (London: Macmillan, 1950). The conduct of foreign affairs, for example, "is an executive act of government in which neither the Queen nor Parliament has any part": F.A. Mann, Foreign Affairs in English Courts (Oxford: Clarendon Press, 1986) at p. 2. See also Barton v. Commonwealth of Australia (1974), A.L.J.R. 161 at 172.

[33] Counsel for the respondents points out that if Mr. Black were correct, the Prime Minister -- whose powers are not enumerated in any statute -- would have no legal authority to speak for Canada on foreign affairs. This proposition is, on its face, absurd. I therefore reject Mr. Black's submission that only the Governor General can exercise prerogative powers in Canada. I conclude that the Prime Minister and the Government of Canada can exercise the Crown prerogative as well.

[34] Mr. Black's third submission is that even if the Prime Minister can exercise prerogative power relating to the granting of honours or the conduct of foreign affairs, on the facts pleaded in the amended statement of claim, Prime Minister Chrétien was doing neither. He was not deciding whether to grant Mr. Black an honour -- that decision rests with the Queen -- and he was not conducting foreign affairs. Instead, according to Mr. Black**,** Prime Minister Chrétien intervened personally with the Queen and gave unsolicited and wrong legal advice.

[35] In my view, however, whether one characterizes the Prime Minister's actions as communicating Canada's policy on honours to the Queen, giving her advice on Mr. Black's peerage, or opposing Mr. Black's appointment, he was exercising the prerogative power of the Crown relating to honours.

[36] Unquestionably, the granting of honours is the prerogative of the Crown. The Monarch is "the fountain, parent and distributor of honours, dignities, privileges and franchises": Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (London: Butterworths and Son, 1820), at p. 6. Because no statute in Canada governs the conferral of honours, this prerogative has not been displaced by federal law. Nor has it been limited by the common law. As Hogg and Monahan, supra, observe at pp. 18-19, appointments and honours is one area in which the prerogative power "remains meaningful". Their view is consistent with the opinion of Lord Roskill in the important House of Lords decision, Council of Civil Service Unions v. Minister for the Civil Service, [1985] 1 A.C. 374, [1984] 3 All E.R. 935. In his speech in that case Lord Roskill said at p. 418 that the modern exercise of the prerogative includes "the making of treaties , the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others . . .". (Emphasis added.)

[37] It is one thing to state that the honours prerogative still exists in Canada. However, one critical question on this appeal is the scope of that power. Common sense dictates that, at a minimum, the honours prerogative includes the power to grant or refuse to grant an honour to a Canadian citizen. However, in my view the honours prerogative is much broader than that, and is

not limited to conferrals the Government of Canada or the Prime Minister might make. The honours prerogative also includes giving advice on, even advising against, a foreign country's conferral of an honour on a Canadian citizen. If that were not so, the three Canadian policy statements on the granting of honours by foreign countries -- the 1919 Nickle Resolution, the 1968 Regulation and the 1988 Policy -- would be meaningless. Because these policy statements guide the exercise of Canada's honours prerogative, the exercise of the prerogative necessarily embraces the communication of these policies to a foreign country considering bestowing a title on a Canadian citizen. Furthermore, the authority to communicate that policy rests with the nation's leader, the Prime Minister.

[38] The policy statements show that Canada has chosen to exercise the honours prerogative differently from England. As we have seen, Canada calls for foreign countries to obtain the Government of Canada's approval before granting honours to Canadian citizens. The underlying rationale of these policies is egalitarianism. Canada disapproves of ranking its citizens according to status and lineage. In communicating Canada's policy to the Queen, in giving her advice on it, right or wrong, in advising against granting a title to one of Canada's citizens, the Prime Minister was exercising the Crown prerogative relating to honours.

[39] Mr. Black's argument appears to rest on the notion that Prime Minister Chrétien's communication with the Queen was grounded not in the prerogative but was a "personal intervention" motivated by a "personal vendetta". He argues that the exercise of a prerogative power is confined to powers and privileges unique to the Crown; powers and privileges enjoyed equally with private persons are not part of the prerogative. There are two answers to Mr. Black's argument. One answer is that the Prime Minister's authority is always derived from either a federal statute or the prerogative; it is never personal in nature. See Dicey, supra, at p. 424 and Schreiber v. Canada (Attorney General), [2000] 1 F.C. 427 at p. 444, 174 F.T.R. 221. Here, Prime Minister Chrétien did not act under a statute; he therefore acted under the authority of the Crown prerogative.

[40] The other answer is that even if the Prime Minister does at times act as a private citizen of Canada, he could hardly be said to have been acting as one in this case. Private citizens cannot ordinarily communicate private advice to the Queen. Thus, even accepting Mr. Black's pleading, Prime Minister Chrétien's intervention with the Queen was not personal. Whatever his motivation, he was acting as the leader of this country, giving advice or communicating Canada's policy on honours to a foreign head of state.

[41] For these reasons, I conclude that it is plain and obvious the Prime Minister was exercising the Crown prerogative relating to the granting of honours. Because I am satisfied that the Prime Minister was exercising prerogative power relating to the granting of honours, it is unnecessary to consider the alternative basis for the motions judge's decision, the foreign affairs prerogative, or Mr. Black's submissions on it.

Second issue: Is the prerogative power exercised by the Prime Minister reviewable in the courts?

[42] This is the main question on this appeal. The motions judge concluded at p. 541 that Mr. Black's complaint about the Prime Minister was not justiciable. He wrote: "It is not within the power of the court to decide whether or not the advice of the PM about the prerogative honour to be conferred or denied upon Black was right or wrong. It is not for the court to give its opinion

on the advice tendered by the PM to another country. These are non-justiciable decisions for which the PM is politically accountable to Parliament and the electorate, not to the courts."

[43] Mr. Black submits that the motions judge erred in concluding that Prime Minister Chrétien's exercise of the honours prerogative was not reviewable by the court. The amended statement of claim pleads that the Prime Minister gave the Queen wrong legal advice, which detrimentally affected Mr. Black. Mr. Black argues that had the advice been given under a statutory power, it would have been subject to judicial review; it should similarly be subject to judicial review if given under a prerogative power.

[44] I agree with Mr. Black that the source of the power -- statute or prerogative -- should not determine whether the action complained of is reviewable. However, in my view, the action complained of in this case -- giving advice to the Queen or communicating to her Canada's policy on the conferral of an honour on a Canadian citizen -- is not justiciable. Even if the advice was wrong or given carelessly or negligently, it is not reviewable in the courts. I therefore agree with the motions judge's conclusion.

[45] Under the law that existed at least into the 1960s, the court's power to judicially review the prerogative was very limited. The court could determine whether a prerogative power existed and, if so, what its scope was, and whether it had been superseded by statute. However, once a court established the existence and scope of a prerogative power, it could not review how that power was exercised. See S. DeSmith, H. Woolf and J. Jowell, DeSmith, Woolf & Jowell's Principles of Judicial Review (London: Sweet & Maxwell, 1999) at p. 175 and De Keyser's Royal Hotel, supra. The appropriateness or adequacy of the grounds for its exercise, even whether the procedures used were fair, were not reviewable. The courts insisted that the source of the power -- the prerogative -- precluded judicial scrutiny of its exercise. The underlying rationale for this narrow review of the prerogative was that exercises of prerogative power ordinarily raised questions courts were not qualified or competent to answer.

[46] Even this narrow view of the court's role in reviewing the prerogative power now has to be modified in Canada because of the Canadian Charter of Rights and Freedoms. By s. 32(1)(a), the Charter applies to Parliament and the Government of Canada in respect of all matters within the authority of Parliament. The Crown prerogative lies within the authority of Parliament. Therefore, if an individual claims that the exercise of a prerogative power violates that individual's Charter rights, the court has a duty to decide the claim. See Operation Dismantle, supra. However, Mr. Black does not assert any Charter claim.

[47] Apart from the Charter, the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power. The preferable approach is that adopted by the House of Lords in the Civil Service Unions case, supra. There, the House of Lords emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. If, in the words of Lord Roskill, the subject matter of the prerogative power is "amenable to the judicial process", it is reviewable; if not, it is not reviewable. Lord Roskill provided content to this subject matter test of reviewability by explaining that the exercise of the prerogative will be amenable to the judicial process if it affects the rights of individuals. Again, in his words at p. 417 A.C.:

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

[48] In his speech in that case, Lord Diplock discussed two ways in which the exercise of a prerogative power may affect the rights of an individual: by altering the individual's legal rights and obligations or by affecting the individual's legitimate expectations. He stated at p. 408 A.C.:

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker [that the benefit or advantage] will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[49] I agree with the House of Lords that the proper test for the review of the exercise of the prerogative is the subject matter test. It is that test that I will endeavour to apply in this case.

[50] At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. See Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources), [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604; Thorne's Hardware Ltd. v. R., [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577. Only those exercises of the prerogative that are justiciable are reviewable. The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch": Reference re Canada Assistance Plan (British Columbia), [1991] 2 S.C.R. 525 at p. 545, 58 B.C.L.R. (2d) 1.

[51] Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.

[52] Thus, the basic question in this case is whether the Prime Minister's exercise of the honours prerogative affected a right or legitimate expectation enjoyed by Mr. Black and is therefore judicially reviewable. To put this question in context, I will briefly discuss prerogative powers that lie at the opposite ends of the spectrum of judicial reviewability. At one end of the spectrum lie executive decisions to sign a treaty or to declare war. These are matters of "high policy": R. v. Secretary of State for Foreign & Commonwealth Affairs, Ex p. Everett, [1989] 1 All E.R. 655 at p. 660, [1989] Q.B. 811, per Taylor L.J. Where matters of high policy are concerned, public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations. In my view, apart from Charter claims, these decisions are not judicially reviewable.

[53] At the other end of the spectrum lie decisions like the refusal of a passport or the exercise of mercy. The power to grant or withhold a passport continues to be a prerogative power. A passport is the property of the Government of Canada, and no person, strictly speaking, has a legal right to one. However, common sense dictates that a refusal to issue a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable. This was the position taken by the English Court of Appeal in R. v. Secretary of State for Foreign & Commonwealth Affairs, Ex p. Everett, supra. Two passages from that case are worth highlighting. O'Connor L.J. wrote at p. 658 All E.R.:

> The judge held that the issue of a passport fell into an entirely different category. That seems common sense. It is a familiar document to all citizens who travel in the world and it would seem obvious to me that the exercise of the prerogative, because there is no doubt that passports are issued under the royal prerogative in the discretion of the Secretary of State, is an area where common sense tells one that, if for some reason a passport is wrongly refused for a bad reason, the court should be able to inquire into it. I would reject the submission made on behalf of the Secretary of State that the judge was wrong to review the case.

And Taylor L.J. wrote at p. 660 All E.R.:

> At the top of the scale of executive functions under the prerogative are matters of high policy, of which examples were given by their Lordships: making treaties, making law, dissolving Parliament, mobilising the armed forces. Clearly those matters, and no doubt a number of others, are not justiciable. But the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision, affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases.

[54] In today's world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or a luxury but a necessity. Possession of a passport offers citizens the freedom to travel and to earn a livelihood in the global economy. In Canada, the refusal to issue a passport brings into play Charter considerations; the guarantee of mobility under s. 6 and perhaps even the right to liberty under s. 7. In my view, the improper refusal of a passport should, as the English courts have held, be judicially reviewable.

[55] A similar view might also be taken of the exercise of the prerogative of mercy, still preserved in Canada by s. 749 of the Criminal Code, R.S.C. 1985, c. C-46. Though on one view mercy begins where legal rights end, I think the prerogative of mercy should be looked at as more than a royal favour. The existence of this prerogative is the ultimate safeguard against

mistakes in the criminal justice system and thus in some cases the Government's refusal to exercise it may be judicially reviewable. That was the view taken by the English Queen's Bench Division in Re Secretary of State for the Home Department, Ex p. Bentley, [1993] 4 All E.R. 442. There, the court held that the Home Secretary's decision not to grant a posthumous conditional pardon was judicially reviewable.

[56] Against the context of these cases I return to the issue raised in this appeal -- whether the action of the Prime Minister affected a right or legitimate expectation enjoyed by Mr. Black and is therefore judicially reviewable. This issue turns on how the subject matter of Prime Minister Chrétien's exercise of the honours prerogative is characterized. Mr. Black characterizes the subject matter of the Prime Minister's actions in one of two ways: first, as giving unsolicited and wrong legal advice to the Queen, which detrimentally affected Mr. Black; or second, as an administrative decision involving the improper interpretation and application of Canadian policy, the Nickle Resolution, to the granting of an honour. See also Hogg and Monahan, supra, at p. 20.

[57] In my opinion, these are not accurate characterizations of Prime Minister Chrétien's actions as pleaded in the amended statement of claim. Prime Minister Chrétien was not giving legal advice or making an administrative decision. Focusing on wrong legal advice or the improper interpretation of a policy misses what this case is about. As I see it, the action of Prime Minister Chrétien complained of by Mr. Black is his giving advice to the Queen about the conferral of an honour on a Canadian citizen. The Prime Minister communicated Canada's policy on honours to the Queen and advised her against conferring an honour on Mr. Black.

[58] So characterized, it is plain and obvious that the Prime Minister's exercise of the honours prerogative is not judicially reviewable. Indeed, in the Civil Service Unions case, Lord Roskill listed a number of exercises of the prerogative power whose subject matters were by their very nature not justiciable. Included in the list was the grant of honours. He wrote, in a passage I have already referred to, at p. 418 A.C.:

> But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another. (Emphasis added)

[59] Lord Roskill's opinion on the grant of honours was obiter in that case, and regardless of course, is not binding on this court. Moreover, including the grant of honours in a list of non-reviewable exercises of the prerogative has been criticized by some as overly broad. See Hogg and Monahan, supra, at p. 15 and Hadfield, supra, at p. 217. However, I agree with Lord Roskill. Holding that the exercise of the honours prerogative is always beyond the review of courts is not a departure from the subject matter test espoused by the House of Lords in the Civil Service Unions case. Rather, it is faithful to that test. See also Cox, supra, at p. 19.

[60] The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr. Black's rights were not affected, however broadly "rights" are construed. No Canadian citizen has a right to an honour.

[61] And no Canadian citizen can have a legitimate expectation of receiving an honour. In Canada, the doctrine of legitimate expectations informs the duty of procedural fairness; it gives no substantive rights: Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at pp. 838-42 S.C.R., pp. 212-14 D.L.R.. See also Civil Service Unions, per Lord Diplock at pp. 408-09 A.C. Here Mr. Black does not assert that he was denied procedural fairness. Indeed, he had no procedural rights.

[62] But even if the doctrine of legitimate expectations could give substantive rights, neither Mr. Black nor any other Canadian citizen can claim a legitimate expectation of receiving an honour. The receipt of an honour lies entirely within the discretion of the conferring body. The conferral of the honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court's intervention. Instead, it involves "moral and political considerations which it is not within the province of the courts to assess". See Operation Dismantle, supra, per Wilson J. at p. 465 S.C.R.

[63] In other words, the discretion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the court. In this case, the court has even less reason to intervene because the decision whether to confer a British peerage on Mr. Black rests not with Prime Minister Chrétien, but with the Queen. At its highest, all the Prime Minister could do was give the Queen advice not to confer a peerage on Mr. Black.

[64] For these reasons, I agree with the motions judge that Prime Minister Chrétien's exercise of the honours prerogative by giving advice to the Queen about granting Mr. Black's peerage is not justiciable and therefore not judicially reviewable.

[65] Once Prime Minister Chrétien's exercise of the honours prerogative is found to be beyond review by the courts, how the Prime Minister exercised the prerogative is also beyond review. Even if the advice was wrong or careless or negligent, even if his motives were questionable, they cannot be challenged by judicial review. To paraphrase Dickson J. in Thorne's Hardware, supra, at p. 112 S.C.R.: "It is neither our duty nor our right" to investigate the Prime Minister's motives or his reasons for his advice. Therefore, the declaratory relief and the tort claims asserted by Mr. Black cannot succeed. For these reasons, I would dismiss his appeal.

. . .

E. Conclusion

[77] I would dismiss the appeal with costs. I would also dismiss the cross-appeal with costs. I conclude by thanking counsel for their submissions. This case was exceptionally well-argued by both sides.

Appeal and cross-appeal dismissed.

What claims is Black raising (what causes of action is he asserting)? What forms of relief does he seek? What does he seek in damages? What does this sum suggest about why he's bringing suit – what's really motivating him here?

How did the case come up to the Court of Appeal; that is, what action by the court below prompted this appeal? What did the P.M. seek to do (procedurally) at the trial level?

Notice that Laskin J.A. does us the favour (in para. 5) of answering all three questions in advance. Although it might seem obvious that judgments should always spell out the court's ultimate conclusion in advance, sometimes they are not so helpful. When you find that the conclusion isn't presented at the outset, it's useful to turn to the end to see what the court did, and then return to the beginning with a sense of where all this is headed. Just because the court has decided to write it like a mystery story, there's no rule against turning to the end to see how it comes out.

We are reading this case because of its treatment of the issue of the justiciability. If you find the treatment of jurisdiction confusing, feel free to skip over that material and focus on the discussion of justiciability instead.

I. Exercise of the prerogative power

Although this is not a course in the division of powers, it is hard to follow the judgment without seeking to understand what the prerogative power is, and why the court concluded that the P.M. was properly exercising his prerogative power in this case. To that end, you might focus on the definitions in paras. 25-26.

One of Black's criticisms of the decision by the motions judge is that Black did not argue, in his amended statement of claim, that the case turned on the P.M.'s exercise of prerogative power, and therefore the motions judge should not have taken this issue into consideration when ruling on the motion to dismiss (paras. 28 & following). What's the court's answer to this argument? Stepping back from this dispute for a moment, consider what would follow if the court agreed with Black on this point, and held that so long as Black hadn't raised any argument about the prerogative power, the motions judge was barred from considering that issue. What would that answer suggest, as a general matter, about advisable litigation strategies for plaintiffs to pursue?

Black's further argument (paras. 31 & following) that only the G.G., and not the P.M., can exercise the prerogative power, isn't worth much attention, but you might focus on the nature of the answer given in para. 33, explaining the consequences that would flow from Black's argument, if it were correct. The "absurd results" argument is a common means, in legal analysis, of rebutting a party's assertions, and where it accurately describes the consequences of a party's litigating position, courts usually find it very persuasive.

Black's third argument (treated in paras. 34 & following) is the one that takes up most of the court's attention, and it's the one that has generated the most debate by commentators on this judgment. What does Black assert here, and how does the court fend off his criticism? If you were going to challenge the court's analysis (if you were Black's lawyer) how would you either (1) describe the scope or content of the prerogative power in contrast to the court's description; or (2) formulate the criticism so as to forestall the response that the court gives here (assuming that you could anticipate the court's answer)?

II. Reviewability of the P.M's action (justiciability of the dispute)

At this point you might begin to expect a definition of 'justiciability.' Given what is said in paras. 42-44 and 50-53, how would you define the term? Does the test in para. 48 help with the definition?

In para. 44 the court restates its characterization of the impugned conduct whose justiciability is in question. In your view, how does this way of describing the conduct match up with the characterization in paras. 34-35?

As to the evaluation of policies that affect rights or legitimate expectations, how does the court propose to make that determination? Does the spectrum, as delineated here, make sense to you?

We get what might seem like a new definition of justiciability in para. 58. How does this definition relate (if at all) to the earlier version?

When the P.M. is exercising the prerogative power, what procedural rights (if any) are due to those who are in any way affected by this exercise? That is, even if their 'legitimate expectations' are *not* affected, is the P.M. obliged to observe any particular procedures when acting on this power?

I.1. Who Can Litigate: Justiciability, Standing, *Amici Curiae* & Intervention

B. Standing

I. *Does the beneficiary of an unsigned will have standing to claim under the will, if the lack of signature renders the document legally ineffective?*

Papageorgiou v. Walstaff Estate, 2008 CarswellOnt 3828 (Ont. S.C.J.)

MOTION by respondent for summary judgment for declaration that 1990 Draft Will was not valid will and for declaration that 1973 Will was valid will.

1 Peter Papageorgiou claims to be the estate trustee and the sole beneficiary of an unsigned and unwitnessed will, dated June 25, 1990 (the "1990 Draft Will"), of his friend, the late Eva Walstaff.

2 The matter comes before the Court by way of a motion for summary judgment by the respondent, Vikki Lyons, for a declaration that the 1990 Draft Will is not a valid will and for a declaration that Ms. Walstaff's Last Will and Testament dated December 14, 1973 (the "1973 Will") is a valid will.

3 For the reasons that follow, I conclude that, in Ontario, an unsigned document cannot be a valid will and that Mr. Papageorgiou has no interest in the estate of Ms. Walstaff.

. . .

29 There are no exceptions to the statutory requirement that the will must be signed. This requirement can be traced to the original English statute, the *Wills Act 1837*, (U.K.) 7 Will. 4 and I. Vict. C. 26, s. 9. The making of a will is an important and solemn act and the law requires that it must be confirmed by the signature of the testator, in the presence of at least two witnesses, who must also sign. The obvious purpose of this statutory requirement is to prevent fraud.

30 Unlike some other provinces, including Manitoba, New Brunswick, Prince Edward Island and Saskatchewan, Ontario has no statutory provision that allows a will to be proven if there is "substantial compliance" with the statutory requirements …

. . .

32 There is no case in Ontario in which a will has been admitted to probate without having been signed by the testator or, as permitted by the statute, signed by some person in his or her presence and by his or her direction, and the signature acknowledged. Although there have been cases of the will being signed in the wrong place, initialed rather than signed, or the name printed rather than signed, … [the *Succession Law Reform Act*, R.S.O. 1990] nevertheless requires that any will, holograph or otherwise, contain the testator's signature at the end of the will.

33 With commendable diligence and candour, counsel on behalf of the respondent has brought to the Court's attention an English decision, … *Betts v. Doughty* (1879-80) L.R. 5 P.D. 26 (Eng. P.D.A.), which bears some passing similarity … to the case before me. The testatrix had made a will in 1853, leaving her property to nieces and nephews who were the children of three of her siblings. In 1874, she had given instructions for a new will, in which she excluded the plaintiffs, her sister's two children, with whom she was living at the time and with whom she lived until her death. A draft of the 1874 will had been prepared and

> approved by the testatrix, but it was never signed. The action came on for trial before a jury and, in the course of the trial, evidence was led of the clerk of the solicitor who had prepared the 1874 will, who testified that he had attended at the plaintiff's house for the purpose of having the will signed, but he was not allowed to see the deceased. The deceased, who was about eighty years of age, had allegedly been told by the plaintiffs that if she executed the will she could no longer live in their house.
>
> 34 When this evidence came to light, the defendants moved to amend their statement of defence to allege that "the said deceased was prevented by the force and threats of the plaintiffs from executing a further will prepared by and under her instructions, whereby the plaintiffs would have been deprived of all interest under the said alleged will." They also amended the pleading to claim a declaration that the plaintiffs were trustees of any interest devolving to them under the 1853 will, for the benefit of the intended beneficiaries of the 1874 draft will.
>
> 35 The court allowed the amendment and adjourned the hearing to allow the parties to produce further evidence with respect to the facts alleged. The law report contains no discussion of the issue. It records that during the adjournment the parties came to terms and that the court pronounced only on the validity of the 1853 will.
>
> 36 The case cannot, therefore, be regarded as authority. It is interesting to note, however, that there was no suggestion that the unsigned document prepared in 1874 could be proven as a will — it was simply alleged that the plaintiffs were required to hold any interest they received under the 1853 will in trust for the intended beneficiaries of the alleged later will.
> . . .
> 45 In this case, there never was a signed will. Mr. Papageorgiou recognizes the legal obstacle in his way and asks me to make new law. I have no authority to do so. An Ontario will is not valid unless it is signed by the testatrix. The 1990 Draft Will is not a will. It is a piece of paper with no legal effect.
>
> 46 It follows that Mr. Papageorgiou has no financial interest in the estate of Ms. Walstaff and has no standing to advance these proceedings.

[The judgment was affirmed in a 3-sentence judgment, per curiam, by the Ontario Court of Appeal].

II. *Where a party gives up her title in fee simple to a piece of property, does she thereby abandon all legal interests sufficient to anchor standing with respect to the property?*

Chender v. Lewaskewicz, 2007 NSCA 108 (opinion of Roscoe, J.A.)

> 1 This is an appeal from a decision … dismissing the application by appellant Klara Lewaskewicz to set aside a right of first refusal [“**RFR**”] … and a consent order.

4 … Klara Lewaskewicz, a widow, now 83 years old, sold 12 acres of oceanfront land in Inverness County, Nova Scotia to … Robert and Amy Chender of New York for $200,000. Klara’s only child, Henry Lewaskewicz, acted on her behalf, with her consent, in listing the property for sale and in dealing with the purchasers and the lawyers. (Because three parties have the same surname, Lewaskewicz, I will hereafter refer to those parties by their given names.) Henry also received the net proceeds of the sale. The agreement of purchase and sale included a clause providing that: … The Seller shall grant to the Buyer a right of first refusal for the remaining property of the Seller between the lands and the main highway.

5 The Chenders sought the right of first refusal to attempt to control the future development of Klara’s remaining lands.

6 Although Henry and his wife … listed the property with the real estate agent, signed the agreement of purchase and sale, and conducted the negotiations with the Chenders, the land was actually owned by Klara.

. . .

8 In June 2003, Henry attempted to sell the gravel pit, another part of his mother’s lands. Around the same time he and his wife moved from Cape Breton to Ontario. The Chenders were of the view that the gravel pit parcel was covered by the RFR and that the sale or subdivision of any part of Klara’s lands would trigger their right to buy the balance of her lands pursuant to the agreement. Although Henry arranged for the sale of the gravel pit, Klara refused to sign the agreement of purchase and sale.

9 In November 2003, … Klara signed a quit claim deed conveying all her remaining property to Henry and Georgina. ... Shortly thereafter the Chenders … indicat[ed] their intent to exercise their option to purchase Klara’s remaining lands. It was their view that the quit claim deed triggered the option contained in the RFR. The Chenders made several offers to purchase the remaining lands and indicated that they were prepared to allow Klara to stay in her house on the property as long as she wished. The offers were all rejected by Henry. The land was listed for sale …

10 … [I]n August 2004, the Chenders commenced an application for specific performance of the RFR. … Shortly thereafter Henry retained another lawyer … to represent himself and his mother in the dispute with the Chenders. …

11 Continued negotiations between [the parties’ lawyers] led to a settlement which was later confirmed by a consent order issued … on July 12, 2005. The order allowed the Chenders’ application for specific performance. The defendants Klara, Henry and Georgina Lewaskewicz were ordered to convey the balance of Klara’s lands, free and clear of encumbrances and with vacant possession, to the Chenders before June 1, 2006. The Chenders in turn were to pay $130,000 to the defendants.

12 Several months following the issuance of the consent order, [Klara’s lawyer] filed a court application … to seek an order setting aside the consent order [and] a declaration that the RFR was void.

. . .

15 [The chambers judge] reached the following conclusions: …
Henry and Georgina had full responsibility for defending the action for specific performance. … Klara no longer had an interest in the property and therefore no status to seek to set aside the consent order which settled the action.

Issues
16 The appellant raises the following issues: …
Did the Chambers Judge err in finding that the Appellant did not have standing to apply for the Consent Order to be set aside?
. . .
24 The appellant takes issue with the chambers judge's finding that Klara did not have standing to seek to set aside the consent order because she did not own the property at the time the order was granted. I agree with the appellant's argument on this point. Although Klara no longer held title in fee simple to the property, because of the deed to Henry, given the arrangement she had with her son, she had an equitable interest in the land that included at least a right of occupancy. Depending on how the quit claim deed was construed, it was also possible that Klara held a life interest or was the settlor and beneficiary of a revocable trust. As well, she was in possession of the property and had been a named party to the action for specific performance brought by the Chenders. The order compelled Klara as one of the defendants to sign a warranty deed and to deliver vacant possession. Surely she had standing to bring the application to review the order.
. . .
(opinion of Cromwell, J.A., concurring):
78 . . . [T]he appellant clearly had standing quite *apart from any interest she retained under the quit claim deed*. As my colleague points out, and I agree, the appellant was a named party in the proceedings, she was in possession of the property and the order required her to execute a deed and to deliver vacant possession. In short, her rights and interests were affected by the order which was directed, in part, to her. That gave her standing to challenge it. [emphasis added]

III. *Where a party breaches a statute and thereby imposes costs on another party, does the latter have standing, under the statute, to claim against the first party?*

Consider this case: Bo Peep Co. monopolizes wool and inflates the price, in violation of the Competition Act. The Commissioner of Competition has not investigated BPC, but Citizen Amy has indisputable proof of the conspiracy in restraint of trade and abuse of a dominant position, and has herself overpaid for wool clothing. Should Amy have a claim against BPC?

The statutory provision giving rise to this litigation, ***s. 86(c)*** *of the Canada Grain Act (now slightly modified and relocated to* ***s. 105(d)****), provided, in relevant part: "No operator of a licensed elevator shall … receive into or discharge from the elevator any grain … that is infested." [Notably, the court refers to this provision by section number in the judgment, but nowhere quotes this language; see para. 1 below.]*

R. v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205

1 This case raises the difficult issue of the relation of a breach of a statutory duty to a civil cause of action. Where "A" has breached a statutory duty causing injury to "B", does "B" have a civil cause of action against "A"? If so, is "A's" liability absolute, in the sense that it exists independently of fault, or is "A" free from liability if the failure to perform the duty is through no fault of his? In these proceedings the Canadian Wheat Board (the board) is seeking to recover damages from the Saskatchewan Wheat Pool (the pool) for delivery of infested grain out of a terminal elevator contrary to **s. 86(*c*)** of the *Canada Grain Act*, 1970-71-72 (Can.), c. 7.

2 The respondent pool is a grain dealer and operates licensed primary country grain elevators in Saskatchewan. … [T]he pool agreed to act as an agent of the board to accept delivery of, and to carry out the purchase of, grain. The board is an agent of the Crown and is authorized under the Canadian Wheat Board Act, R.S.C. 1970, c. C-12, to buy, sell and market wheat … for marketing in interprovincial and export trade. … The quantities are large. The grain received by the pool at Thunder Bay varied from 100 railway carloads a day in January to 600 or 700 carloads a day in September. Each carload, upon arrival at the terminal elevator, has a sample taken from it by inspectors employed by the Canadian Grain Commission. These samples are visually scrutinized for insect infestation. Adult rusty beetles can sometimes be detected by visual inspection but not always. A berlase funnel test is performed to reveal infestation from rusty beetle larvae. This test takes from four to six hours to complete. It is performed only on about 10 per cent of the grain cars entering the terminal elevator. It cannot be conducted on the spot. It is done at the headquarter offices of the Canadian Grain Commission in Thunder Bay. The results are not known for two or three days. By the time the results are known, the grain could be either in the terminal elevator or on a ship.

. . .

5 The dispute in this case arises from an infestation of rusty grain beetle larvae. On 19th September 1975 the board surrendered to the pool terminal elevator receipts for a quantity of No. 3 Canada Utility Wheat at Thunder Bay and gave directions for the wheat to be loaded onto the vessel Frankcliffe Hall. … This wheat was loaded under the scrutiny of the Canadian Grain Commission's inspectors as well as the scrutiny of the pool's representatives. At the loading no one had any knowledge that the grain was infested with rusty beetle larvae. … Visual inspection revealed no infestation. A berlase funnel test, however, conducted at the Grain Commission's headquarters after the ship had sailed, disclosed an infestation of rusty grain beetle larvae in the 273,569 bushels of wheat loaded into holds 5 and 6. This was the first rusty beetle larvae infestation known to occur in a ship. The Canadian Grain Commission ordered the board to fumigate the affected wheat. The board directed the Frankcliffe Hall to be diverted to Kingston for fumigation and was obliged to pay the vessel owner and the elevator operator at Kingston $98,261.55, comprising detention claims, cost of unloading and reloading the grain and fumigation of the grain and holds. It is this amount which the board is now claiming from the Saskatchewan Wheat Pool.

6 The board makes no claim in negligence. It relies entirely on what it alleges to be a statutory breach. It is common ground that the board received grain of the kind, grade and quantity to which it was entitled.

II The Judicial History

(a) At Trial

7 [The trial judge ruled] in favour of the board on the basis that, considering the *Canada Grain Act* as a whole, **s. 86(*c*)** of the Act, which prohibits the delivery of infested grain out of a grain elevator, "point[ed] to a litigable duty on the defendants, enforceable by persons injured or aggrieved by a breach of that duty". The judge also found the statutory duty to be absolute and not qualified; evidence of reasonable care on the part of the defendant, although possibly a good answer to a criminal charge, was not sufficient to absolve the pool of civil liability.

(b) On Appeal

8 [The Federal Court of Appeal] reversed in a unanimous judgment … [The FCA] referred to **s. 13(1)** of the *Canadian Wheat Board Act*, which provides in part that every elevator shall be operated for and on behalf of the board. He found that the *Canada Grain Act* was not intended to benefit any particular class of persons; it is a statute to regulate the grain industry and protect the public interest since that industry is an important matter to Canada as a whole; it is legislation imposing general duties and obligations in respect of the production, marketing and quality control of one of Canada's most important primary products … The board could not rely on a breach of the statute in order to found a civil cause of action. The court concluded that the *Act* did not impose an absolute duty upon operators of elevators, and reached the ultimate finding that the *Canada Grain Act* does not grant a private right of action to persons who suffer loss resulting from breach of a statutory duty imposed by that *Act*.

. . .

III Statutory Breach Giving Rise to a Civil Cause of Action

11 The uncertainty and confusion in the relation between breach of statute and a civil cause of action for damages arising from the breach is of long standing. The commentators have little but harsh words for the unhappy state of affairs, but arriving at a solution, from the disarray of cases, is extraordinarily difficult. It is doubtful that any general principle or rationale can be found in the authorities to resolve all of the issues or even those which are transcendent.

. . .

30 The use of breach of statute as evidence of negligence as opposed to recognition of a nominate tort of statutory breach is … [an] intellectually acceptable [approach]. It avoids … the fictitious hunt for legislative intent to create a civil cause of action which has been so criticized in England. … [W]here there is no duty of care at common law, breach of nonindustrial penal legislation should not affect civil liability unless the statute provides for it.

. . .

37 For all of the above reasons I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.

38 It must not be forgotten that the other elements of tortious responsibility equally apply to situations involving statutory breach, i.e. principles of causation and damages. To be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains. Should this be so, the violation of the statute should be evidence of negligence on the part of the defendant.

The Canadian Council of Churches *Appellant* ***v.***

Her Majesty The Queen and The Minister of Employment and Immigration *Respondents*

and

The Coalition of Provincial Organizations of the Handicapped, Quebec Multi Ethnic Association for the Integration of Handicapped People, League for Human Rights of B'Nai Brith Canada, Women's Legal Education and Action (LEAF) and Canadian Disability Rights Council (CDRC) *Interveners*

Supreme Court of Canada

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Stevenson and Iacobucci JJ.

Heard: October 11, 1991; Judgment: January 23, 1992

Counsel: *Steven M. Barrett, Barb Jackman* and *Ethan Poskanzer*, for appellant
Graham R. Garton, for respondents

Appeal and Cross-appeal from judgment of Federal Court of Appeal, . . . allowing in part an appeal from judgment of Federal Court, Trial Division, . . . dismissing application to strike out statement of claim.

The judgment of the court was delivered by *Cory J.*:

1 At issue on this appeal is whether the Canadian Council of Churches should be granted status to proceed with an action challenging, almost in its entirety, the validity of the amended *Immigration Act, 1976*, which came into effect January 1, 1989.

Factual Background

2 The Canadian Council of Churches (the "council"), a federal corporation, represents the interests of a broad group of member churches. Through an inter-church committee for refugees it co ordinates the work of the churches aimed at the protection and resettlement of refugees. The council, together with other interested organizations, has created an organization known as the Concerned Delegation of Church, Legal, Medical and Humanitarian Organizations. Through this body the council has commented on the development of refugee policy and procedures both in this country and in others.

3 In 1988 the Parliament of Canada passed amendments to the *Immigration Act, 1976*, S.C. 1976-77, c. 52, by S.C. 1988, c. 35 and c. 36. The amended Act came into force on January 1, 1989. It completely changed the procedures for determining whether applicants come within the definition of a Convention refugee. While the amendments were still under consideration the council expressed its concerns about the proposed new refugee determination process to members of the government and to the parliamentary committees which considered the legislation. On the first business day after the amended Act came into force, the council commenced this action, seeking a declaration that many if not most of the amended provisions violated the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, R.S.C. 1985, App. III. The Attorney General of Canada brought a motion to strike out the claim on the basis that the council did not have standing to bring the action and had not demonstrated a cause of action.

Proceedings in the Courts Below

Federal Court, Trial Division, Rouleau J., [1989] 3 F.C. 3

4 Rouleau J. dismissed the application. His judgment reflects his concern that there might be no other reasonable, effective or practical manner to bring the constitutional question before the court. He was particularly disturbed that refugee claimants might be faced with a 72-hour removal order. In his view, such an order would not leave sufficient time for an applicant to attempt either to stay the proceedings or to obtain an injunction restraining the implementation removal order.

Federal Court of Appeal, [1990] 2 F.C. 534, 10 Imm. L.R. (2d) 81, 44 Admin. L.R. 56, 68 D.L.R. (4th) 197, 106 N.R. 61, 46 C.R.R. 290

5 MacGuigan J.A., speaking for a unanimous court, allowed the appeal and set aside all but four aspects of the statement of claim.
6 In his view the real issue was whether or not there was another reasonably effective or practical manner in which the issue could be brought before the court. He thought there was. He observed that the statute was regulatory in nature and individuals subject to its scheme had, by means of judicial review, already challenged the same provisions impugned by the council. Thus there was a reasonable and effective alternative manner in which the issue could properly be brought before the court.
7 He went on to consider in detail the allegations contained in the statement of the claim. He concluded that some were purely hypothetical, had no merit and failed to disclose any reasonable cause of action. He rejected other claims on the grounds that they did not raise a constitutional challenge and others on the basis that they raised issues that had already been resolved by recent decisions of the Federal Court of Appeal.
8 He granted the council standing on the following matters raised on the statement of claim:

> 1. The claim in para. 3(c) of the statement of claim which alleges that the requirement that detainees obtain counsel within 24 hours from the making of a removal order violates s. 7 of the Charter (at p. 558 [F.C.]);
>
> 2. The claim in para. 6(a) which alleges that provisions temporarily excluding claimants from having claims considered violate s. 7 of the Charter (at p. 554);
>
> 3. The claim in para. 10(a) which alleges that provisions allowing the removal of a claimant within 72 hours leave too short a time to consult counsel and violate s. 7 of the Charter (at p. 561);
>
> 4. The claim in para. 14(c) which alleges that the provisions permitting the removal of a claimant with a right to appeal within 24 hours if a notice of appeal is not filed in that time violate the Constitution (at p. 562).

9 The appellant seeks to have the order of the Federal Court of Appeal set aside. The respondents have cross-appealed to have the remaining positions of the statement of claim struck out.

Issues
10 The principal question to be resolved is whether the Federal Court of Appeal erred in holding that the Canadian Council of Churches should be denied standing to challenge many of the

provisions of the *Immigration Act, 1976*.
11 The secondary issue is whether the Federal Court of Appeal erred in holding that certain allegations in the statement of claim failed to disclose a cause of action and others were hypothetical or premature.
. . . .
The Question of Standing in Canada

28 Courts in Canada, like those in other common law jurisdictions, traditionally dealt with individuals. For example, courts determine whether an individual is guilty of a crime; they determine rights as between individuals; they determine the rights of individuals in their relationships with the state in all its various manifestations. One great advantage of operating in the traditional mode is that the courts can reach their decisions based on facts that have been clearly established. It was by acting in this manner that the courts established the rule of law and provided a peaceful means of resolving disputes. Operating primarily, if not almost exclusively, in the traditional manner, courts in most regions operate to capacity. Courts play an important role in our society. If they are to continue to do so care must be taken to ensure that judicial resources are not overextended. This is a factor that will always have to be placed in the balance when consideration is given to extending standing.
29 On the other hand there can be no doubt that the complexity of society has spawned ever more complex issues for resolution by the courts. Modern society requires regulation to survive. Transportation by motor vehicle and aircraft requires greater regulation for public safety than did travel by covered wagon. Light and power provided by nuclear energy require greater control than did the kerosene lamp.
30 The State has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of State activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the *Charter* this court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases; *Thorson v. Canada (Attorney General)*, supra, *McNeil v. Nova Scotia (Board of Censors)* . . . and *Borowski v. Canada (Minister of Justice)* . . . Writing for the majority in *Borowski*, Martland J. set forth the conditions which a plaintiff must satisfy in order to be granted standing, at p. 598 [S.C.R.]:

> [T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

Those then were the conditions which had to be met in 1981.
31 In 1982, with the passage of the *Charter*, there was for the first time a restraint placed on the sovereignty of Parliament to pass legislation that fell within its jurisdiction. The *Charter* enshrines the rights and freedoms of Canadians. It is the courts which have the jurisdiction to preserve and to enforce those *Charter* rights. This is achieved, in part, by ensuring that legislation does not infringe the provisions of the *Charter*. By its terms the *Charter* indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, *Charter* rights might be unenforced and *Charter* freedoms shackled. The *Constitution Act, 1982* does not of course affect the discretion courts possess to grant standing to public litigants. What

it does is entrench the fundamental right of the public to government in accordance with the law.
32 The rule of law is recognized in the preamble of the *Charter*, which reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:" The rule of law is thus recognized as a cornerstone of our democratic form of government. It is the rule of law which guarantees the rights of citizens to protection against arbitrary and unconstitutional government action. The same right is affirmed in s. 52(1), which states: "52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Parliament and the legislatures are thus required to act within the bounds of the Constitution and in accordance with the *Canadian Charter of Rights and Freedoms*. Courts are the final arbiters as to when that duty has been breached. As a result, courts will undoubtedly seek to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and *Canadian Charter of Rights and Freedoms*.
33 The question of standing was first reviewed in the post-*Charter* era in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. In that case Le Dain J., speaking for the court, extended the scope of the trilogy and held that courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. He based this conclusion on the underlying principle of discretionary standing which he defined as a recognition of the public interest in maintaining respect for "the limits of statutory authority."
34 The standard set by this court for public interest plaintiffs to receive standing also addresses the concern for the proper allocation of judicial resources. This is achieved by limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation. In *Finlay*, it was specifically recognized that the traditional concerns about widening access to the courts are addressed by the conditions imposed for the exercise of judicial discretion to grant public interest standing set out in the trilogy. Le Dain J. put it in this way, at p. 631 [S.C.R.]:

> [T]he concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in *Thorson*, *McNeil* and *Borowski*.

Should the Current Test for Public Interest Standing be Extended?

35 The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition, some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act, 1982*. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning

organizations pursuing their own particular cases certain in the knowledge that their cause is all-important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

36 The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this court need not and should not be expanded. The decision whether to grant status is a discretionary one with all which that designation implies. Thus, undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

The Application of the Principles for Public Interest Standing to this Case

37 It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

(1) Serious Issue of Invalidity

38 It was noted in *Finlay*, supra, that the issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge. In the case at bar the Federal Court of Appeal in its careful reasons turned its attention to the question of whether the amended statement of claim raised a reasonable cause of action. The claim makes a wide-sweeping and somewhat disjointed attack upon most of the multitudinous amendments to the *Immigration Act, 1976*. Some of the allegations are so hypothetical in nature that it would be impossible for any court to make a determination with regard to them. In many ways the statement of claim more closely resembles submissions that might be made to a parliamentary committee considering the legislation than it does an attack on the validity of the provisions of the legislation. No doubt the similarity can be explained by the fact that the action was brought on the first working day following the passage of the legislation. It is perhaps unfortunate that this court is asked to fulfil the function of a motions court judge reviewing the provisions of a statement of claim. However, I am prepared to accept that some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation.

(2) Has the Plaintiff Demonstrated a Genuine Interest?

39 There can be no doubt that the applicant has satisfied this part of the test. The council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants.

(3) Whether There is Another Reasonable and Effective Way to Bring the Issue Before the Court

40 It is this third issue that gives rise to the real difficulty in this case. The challenged legislation is regulatory in nature and directly affects all refugee claimants in this country. Each one of them has standing to initiate a constitutional challenge to secure his or her own rights under the

Charter. The applicant council recognizes the possibility that such actions could be brought but argues that the disadvantages which refugees face as a group preclude their effective use of access to the court. I cannot accept that submission. Since the institution of this action by the council, a great many refugee claimants have, pursuant to the provisions of the statute, appealed administrative decisions which affected them. The respondents have advised that nearly 33,000 claims for refugee status were submitted in the first 15 months following the enactment of the legislation. In 1990, some 3,000 individuals initiated claims every month. The Federal Court of Appeal has a wide experience in this field. MacGuigan J.A., writing for the court, took judicial notice of the fact that refugee claimants were bringing forward claims akin to those brought by the council on a daily basis. I accept without hesitation this observation. It is clear therefore that many refugee claimants can and have appealed administrative decisions under the statute. These actions have frequently been before the courts. Each case presented a clear, concrete factual background upon which the decision of the court could be based.

41 The appellant also argued that the possibility of the imposition of a 72-hour removal order against refugee claimants undermines their ability to challenge the legislative scheme. I cannot accept that contention. It is clear that the Federal Court has jurisdiction to grant injunctive relief against a removal order: see *Toth v. Canada (Minister of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123, *(*sub nom. *Toth v. Minister of Employment & Immigration)* 86 N.R. 302 (Fed. C.A.). Further, from the information submitted by the respondents it is evident that persons submitting claims to refugee status in Canada are in no danger of early or speedy removal. As of March 31, 1990, it required an average of five months for a claim to be considered at the initial "credible basis" hearing. It is therefore clear that in the ordinary case there is more than adequate time for a claimant to prepare to litigate the possible rejection of the claim. However, even where the claims have not been accepted "the majority of removal orders affecting refugee claimants have not been carried out." (See *Report of the Auditor General of Canada to the House of Commons, Fiscal Year Ended 31 March 1990*, at pp. 352-353, para. 14.43.) Even though the Federal Court has been prepared in appropriate cases to exercise its jurisdiction to prevent removal of refugee claimants there is apparently very little need for it to do so. The means exist to ensure that the issues which are sought to be litigated on behalf of individual applicants may readily be brought before the court without any fear that a 72-hour removal order will deprive them of their rights.

42 From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the court. On this ground the applicant council must fail. I would hasten to add that this should not be interpreted as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. The council must, therefore, be denied standing on each of the counts of the statement of claims. This is sufficient to dispose of the appeal. The respondents must also succeed on their cross-appeal to strike out what remained of the claim as the plaintiff council does not satisfy the test for standing on any part of the statement of claim. I would simply mention two other matters.

Intervenor Status

43 It has been seen that a public interest litigant is more likely to be granted standing in Canada than in other common law jurisdictions. Indeed, if the basis for granting status were significantly broadened, these public interest litigants would displace the private litigant. Yet the views of the public litigant who cannot obtain standing need not be lost. Public interest organizations are, as they should be, frequently granted intervenor status. The views and submissions of intervenors on issues of public importance frequently provide great assistance to the courts. Yet that assistance is given against a background of established facts and in a time-frame and context that is controlled by the courts. A proper balance between providing for the submissions of public interest groups and preserving judicial resources is maintained.

Review of the Statement of Claim to Determine if it Discloses a Cause of Action

44 In light of the conclusion that the appellant has no status to bring this action, there is no need to consider the statement of claim in detail. Had it been necessary to do so I would have had some difficulty agreeing with all of the conclusions of the Federal Court of Appeal on this issue. Perhaps it is sufficient to set out once again the principles which should guide a court in considering whether a reasonable cause of action has been disclosed by a statement of claim. It was put in this way by Wilson J., giving the reasons of this court in *Hunt v. T & N plc*, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 2 S.C.R. 959, . . . at p. 980 [S.C.R.]:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' (sub nom. *Hunt v. Carey Canada Inc.*) that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

If these guidelines had been followed a different result would have been reached with regard to some aspects of this statement of claim. A party who did have standing might well find in this vast broadside of grievances some telling shots that would form the basis for a cause of action somewhat wider than that permitted by the Federal Court of Appeal.

Disposition of the Result

45 In the result I would dismiss the appeal and allow the cross-appeal on the basis that the plaintiff does not satisfy the test for public interest standing. Both the dismissal of the appeal and the allowance of the cross-appeal are to be without costs.

CCC is a case about *standing*, not intervention. CCC sought, in this litigation, to bring a case (not to join an already pending case).

The Court briefly summarizes the *Thorson-McNeil-Borowski* line (a.k.a. the *Borowski* trilogy). Here, it is sufficient to understand that the language in the block quotation in para. 30 represents the result of this line. The standing doctrine, as presented there, involves 4 requirements:

Precondition: 1. the plaintiff must be seeking to show that *legislation* is invalid [*Finlay*, as I will explain, extends this condition to governmental implementation of legislation]; *and*

2. *serious* question to invalidity of the impugned legislation; *and*
3. directly affected *or* genuine interest; *and*
4. no other reasonable and effective manner to raise the legal claim

This is a test in the conjunctive (all 4 conditions must be satisfied); except for the third requirement, which is in the disjunctive (either of the 2 is sufficient).

- Why require all four? Why not just allow one of these (or a subset)?
- What kinds of claims are screened out by the precondition?
- What kinds of parties can't be addressed under this test (so that a plaintiff must either satisfy the traditional, pre-*Borowski* test or have no standing at all)?
- What does the third condition achieve (what is its 'liberalizing' effect)?
- In your view, is this test broad enough, or does it serve to deny standing in some cases that should be heard? If the test seems too restrictive to you, how would you propose broadening it?

At various points the Court associates these requirements with 'public interest standing.' It is important to recognize that while these requirements might be described as extending the traditional standing test, in cases involving questions of public interest, a party seeking standing under this test does ***not*** have to be a public interest *organization* (such as the CCLA, or here, the CCC). The same test applies to all who seek to be plaintiffs – whether a public interest organization or an individual who wants to commence litigation. The term 'public interest standing' is misleading insofar as it might seem to confer standing on public interest *organizations*; rather, it refers to standing to raise *claims* in the public interest. In other words, if there is such a thing as 'public interest standing,' it was already available under *Borowski*, before *CCC* was decided. *CCC* does nothing to extend *Borowski*-style standing to public interest organizations.

Did this case begin by way of action or application? Why did CCC select the mode of proceeding that it chose? What significance, if any, does this choice have on the court's treatment of the standing issue?

What is the 'application' that was dismissed by the trial court (para. 4)? What, in paras. 40 & 42, does the phrase "applicant council" refer to?

The F.C.A. rejected some of CCC's claims but allowed others to proceed (para. 7). What grounds did the F.C.A. rely on, in rejecting certain claims? What rules or doctrines would justify rejection on those grounds?
Each side now cross-appeals (para 8). What do CCC and the Minister, respectively, seek in their cross-appeals?

What policy reasons does the Court cite for the traditional (limited) standing requirements (para. 28)? What policy reasons does the Court cite additionally in relation to the *Borowski* trilogy (para. 33)?

In paras. 35-36, the Court discusses further extension of the standing doctrine. How does the Court characterize the proposed extension? In your view is this an accurate characterization? As explained here, what is the rationale for the extension associated with *Borowski*? What standard of proof must a plaintiff meet to show that the *Borowski* requirements are satisfied?

On what basis does the Court conclude that CCC has satisfied the requirement of a "serious issue" (para. 38)?

What problem arises here under the last prong of the *Borowski* test (paras. 40-42)?

The Court reassures potential p.i. plaintiffs that even when they cannot get standing to initiate litigation, they might nevertheless be granted intervener status (para. 43). How comforting do you find this reminder? In your view are there legitimate concerns about situations in which intervener status would be insufficient?

Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General), 2012 SCC 45

***Cromwell J.*:**

I. Introduction

1 This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.), at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.

2 In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.), at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

3 In this case, the respondents the Downtown Eastside Sex Workers United Against Violence Society, whose objects include improving working conditions for female sex workers, and Ms. Kiselbach, have launched a broad constitutional challenge to the prostitution provisions of the *Criminal Code*, R.S.C. 1985, c. C-46. The British Columbia Court of Appeal found that they should be granted public interest standing to pursue this challenge; the Attorney General of Canada appeals. The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing. In my view, the latter approach is the right one. Applying it here, my view is that the Society and Ms. Kiselbach should be granted public interest standing. I would therefore dismiss the appeal.

II. Issues

4 The issues as framed by the parties are whether the respondents should be granted public interest standing and whether Ms. Kiselbach should be granted private interest standing. In my

view, this case is best resolved by considering the discretion to grant public interest standing and standing should be granted to the respondents on that basis.

III. Overview of Facts and Proceedings

A. Facts

5 The respondent Society is a registered British Columbia society whose objects include improving working conditions for female sex workers. It is run "by and for" current and former sex workers living in the Vancouver Downtown Eastside. The Society's members are women, the majority of whom are Aboriginal, living with addiction issues, health challenges, disabilities, and poverty; almost all have been victims of physical and/or sexual violence.

6 Sheryl Kiselbach is a former sex worker currently working as a violence prevention coordinator in the Downtown Eastside. For approximately 30 years, Ms. Kiselbach engaged in a number of forms of sex work, including exotic dancing, live sex shows, work in massage parlours and street-level free-lance prostitution. During the course of this time, she was convicted of several prostitution-related offences. Ms. Kiselbach left the sex industry in 2001. She claims to have been unable to participate in a court challenge to prostitution laws when working as a sex worker because of risk of public exposure, fear for her personal safety, and the potential loss of social services, income assistance, clientele and employment opportunities (chambers judge's reasons, 90 B.C.L.R. (4th) 177 (B.C. S.C.) [*Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*], at paras. 29 and 44).

7 The respondents commenced an action challenging the constitutional validity of sections of the *Criminal Code* that deal with different aspects of prostitution. They seek a declaration that these provisions violate the rights of free expression and association, to equality before the law and to life, liberty and security of the person guaranteed by ss. 2(*b*), 2(*d*), 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The challenged provisions are what I will refer to as the "prostitution provisions", the "bawdy house provisions", the "procurement provision" and the "communication provision". Prostitution provisions is the generic term to refer to the provisions in the *Criminal Code* relating to the criminalization of activities related to prostitution (ss. 210 to 213). Within these provisions can be found the bawdy house provisions, which include those relating to keeping and being within a common bawdy house (s. 210), and transporting a person to a common bawdy house (s. 211). The procurement provision refers to the act of procuring and living on the avails of prostitution (s. 212, except for s. 212(1)(*g*) and (*i*)), while the communication provision refers to the act of soliciting in a public place (s. 213(1)(*c*)). Neither respondent is currently charged with any of the offences challenged.

8 The respondents' position is that the prostitution provisions (ss. 210 to 213) infringe s. 2(*d*) freedom of association rights because these provisions prevent prostitutes from joining together to increase their personal safety; s. 7 security of the person rights due to the possibility of arrest and imprisonment and because the provisions prevent prostitutes from taking steps to improve the health and safety conditions of their work; s. 15 equality rights because the provisions discriminate against members of a disadvantaged group; and s. 2(*b*) freedom of expression rights by making illegal communication which could serve to increase safety and security.

B. Proceedings

(1) British Columbia Supreme Court (Ehrcke J.)

9 The Attorney General of Canada applied in British Columbia Supreme Court Chambers to dismiss the respondents' action on the ground that they lacked standing to bring it. … The chambers judge dismissed the action, holding that neither respondent had private interest standing and that discretionary public interest standing should not be granted to them. …

10 The chambers judge reasoned that neither the Society nor Ms. Kiselbach was charged with any of the impugned provisions or was a defendant in an action brought by a government agency relying upon the legislation. Further, the Society is a separate entity with rights distinct from those of its members. Ms. Kiselbach, he determined, was not entitled to private interest standing because she was not currently engaged in sex work and the continued stigma associated with her past convictions could not give rise to private interest standing because that would amount to a collateral attack on her previous convictions.

11 The chambers judge turned to public interest standing and found that he should not exercise his discretion to grant standing to either respondent. He reviewed what he described as the three "requirements" for public interest standing as set out in *Canadian Council of Churches* and concluded that the respondents' action raised serious constitutional issues and they had a genuine interest in the validity of the provisions. Thus, the judge held that the first and second "requirements" for public interest standing were established. He then turned to the third part of the test, "whether, if standing is denied, there exists another reasonable and effective way to bring the issue before the court" (para. 70). This, in the judge's view, was where the respondents' claim for standing faltered.

12 He agreed with the Attorney General's argument that the provisions could be challenged by litigants charged under them. The fact that members of the Society were "particularly vulnerable" and allegedly unable to come forward could not give rise to public interest standing (para. 76). Members of the Society would likely have to come forward as witnesses should the matter proceed to trial and if they were willing to testify as witnesses, they were able to come forward as plaintiffs. The chambers judge noted that there was litigation underway in Ontario raising many of the same issues: *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52 (Ont. S.C.J.), rev'd in part, *Bedford v. Canada (Attorney General)* (2012), 2012 ONCA 186, 109 O.R. (3d) 1 (Ont. C.A.). He reasoned that, while the existence of this litigation was not necessarily a sufficient reason for denying standing, it tended to show that there "may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75). He also referred to the fact that there had been a number of cases in British Columbia and elsewhere where the impugned legislation had been challenged and that there are hundreds of criminal prosecutions every year in British Columbia in each of which the accused "would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77).

13 The judge concluded that he was bound to apply the test of whether there is no other reasonable and effective way to bring the issue before the court and that the respondents did not meet that test (para. 85).

(2) British Columbia Court of Appeal (2010 BCCA 439, 10 B.C.L.R. (5th) 33 (B.C. C.A.) [Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)], Saunders J.A., Neilson J.A. Concurring, Groberman J.A. Dissenting)

14 The respondents appealed, submitting that the chambers judge had erred by rejecting private interest standing for Ms. Kiselbach and public interest standing for both respondents. The chambers judge's finding that the Society did not have private interest standing was not appealed (para. 3). The majority of the Court of Appeal upheld the chambers judge's decision to deny Ms. Kiselbach's private interest standing, but concluded that both respondents ought to have been granted public interest standing. The only issue on which the Court of Appeal divided was with respect to the third factor, that is, whether standing should be denied because there were other ways the issues raised in the respondents' proceedings could be brought before the courts.

15 Saunders J.A. (Neilson J.A. concurring), writing for the majority, found no reason for denying public interest standing. She held that this Court has made it clear that the discretion to grant standing must not be exercised mechanistically but rather in a broad and liberal manner to achieve the objective of ensuring that impugned laws are not immunized from review. The majority read the dissenting reasons for judgment of Binnie and LeBel JJ. in *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35, [2005] 1 S.C.R. 791 (S.C.C.), as characterizing the *Charter* challenge in that case as a "systemic" challenge, which differs in scope from an individual's challenge addressing a discrete issue. To the majority, *Chaoulli* recognized that any problems arising from the difference in scope of the challenge may be resolved by taking "a more relaxed view of standing in the right case" (para. 59).

16 Applying this approach, the majority considered this case to fall closer on the spectrum to *Chaoulli* than to *Canadian Council of Churches*. Saunders J.A. took the view that the chambers judge had stripped the action of its central thesis by likening it to cases in which prostitution-related charges were laid. Saunders J.A. focused on the multi-faceted nature of the proposed challenge and felt that the respondents were seeking to challenge the *Criminal Code* provisions with reference to their cumulative effect on sex trade workers. In the majority judges' view, public interest standing ought to be granted in this case because the essence of the complaint was that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities and exacerbates their vulnerability.

17 In dissent, Groberman J.A. agreed with the chambers judge's reasoning. In his view, this case did not raise any challenges that could not be advanced by persons with private interest standing. He accepted the respondents' position that it was unlikely that a case would arise in which a multi-pronged attack on all of the impugned provisions could take place. However, he did not consider that the lack of such an opportunity established a valid basis for public interest standing. He took the view that a very broad-ranging challenge such as the one in this case required extensive evidence on a multitude of issues and he did not find it clear that the litigation process would deal fairly and effectively with such a challenge in a reasonable amount of time.

Interpreting the judgment in *Chaoulli*, Groberman J.A. held that the Court had not broadened the basis for public interest standing. In his view, *Chaoulli* did not establish that public interest standing should be granted preferentially for wide and sweeping attacks on legislation.

IV. Analysis

A. Public Interest Standing

(1) The Central Issue

18 In *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.), the majority of the Court summed up the law of standing to seek a declaration that legislation is invalid as follows: if there is a serious justiciable issue as to the law's invalidity, "a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court" (p. 598). At the root of this appeal is how this approach to standing should be applied.

19 The chambers judge, supported by quotations from the leading cases, was of the view that the law sets out three requirements — something in the nature of a checklist — which a person seeking discretionary public interest standing must establish in order to succeed. The respondents, on the other hand, contend for a more flexible approach, emphasizing the discretionary nature of the standing decision. The debate focuses on the third factor as it was expressed in *Borowski* — that there is no other reasonable and effective manner in which the issue may be brought to the court — and concerns how strictly this factor should be defined and how it should be applied.

20 My view is that the three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes.

21 I do not propose to lead a forced march through all of the Court's case law on public interest standing. However, I will highlight some key aspects of the Court's standing jurisprudence: its purposive approach, its underlying concern with the principle of legality and its emphasis on the wise application of judicial discretion. I will then explain that, in my view, the proper consideration of these factors supports the Court of Appeal's conclusion that the respondents ought to be granted public interest standing.

(2) The Purposes of Standing Law

22 The courts have long recognized that limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so: *Canadian Council of Churches*, at p. 252. On the other hand, the increase in governmental regulation and the coming into force of the *Charter* have led the courts to move

away from a purely private law conception of their role. This has been reflected in some relaxation of the traditional private law rules relating to standing to sue: *Canadian Council of Churches*, at p. 249, and see generally, O. M. Fiss, "The Social and Political Foundations of Adjudication" (1982), 6 *Law & Hum. Behav*. 121. The Court has recognized that, in a constitutional democracy like Canada with a *Charter of Rights and Freedoms*, there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts.

23 This Court has taken a purposive approach to the development of the law of standing in public law cases. In determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources": *Canadian Council of Churches*, at p. 252.

24 It will be helpful to trace, briefly, the underlying purposes of standing law which the Court has identified and how they are considered.

25 The most comprehensive discussion of the reasons underlying limitations on standing may be found in *Finlay*, at pp. 631-34. The following traditional concerns, which are seen as justifying limitations on standing, were identified: properly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and preserving the proper role of courts and their constitutional relationship to the other branches of government. A brief word about each of these traditional concerns is in order.

(a) Scarce Judicial Resources and "Busybodies"

26 The concern about the need to carefully allocate scarce judicial resources is in part based on the well-known "floodgates" argument. Relaxing standing rules may result in many persons having the right to bring similar claims and "grave inconvenience" could be the result: see e.g. *Smith v. Ontario (Attorney General)*, [1924] S.C.R. 331 (S.C.C.), at p. 337. Cory J. put the point cogently on behalf of the Court in *Canadian Council of Churches*, at p. 252: "It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important." This factor is not concerned with the convenience or workload of judges, but with the effective operation of the court system as a whole.

27 The concern about screening out "mere busybodies" relates not only to the issue of a possible multiplicity of actions but, in addition, to the consideration that plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources. The court must also consider the possible effect of granting public interest standing on others. For example, granting standing may undermine the decision not to sue by those with a personal stake in the case. In addition, granting standing for a challenge that ultimately fails may prejudice other

challenges by parties with "specific and factually established complaints": *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 (S.C.C.), at p. 694.

28 These concerns about a multiplicity of suits and litigation by "busybodies" have long been acknowledged. But it has also been recognized that they may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. As Professor K. E. Scott once put it, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom": "Standing in the Supreme Court — A Functional Analysis" (1973), 86 *Harv. L. Rev.* 645, at p. 674. Moreover, the blunt instrument of a denial of standing is not the only, or necessarily the most appropriate means of guarding against these dangers. Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: see e.g. *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.), at p. 145.

(b) Ensuring Contending Points of View

29 The second underlying purpose of limiting standing relates to the need for courts to have the benefit of contending points of view of the persons most directly affected by the issue. Courts function as impartial arbiters within an adversary system. They depend on the parties to present the evidence and relevant arguments fully and skillfully. "[C]oncrete adverseness" sharpens the debate of the issues and the parties' personal stake in the outcome helps ensure that the arguments are presented thoroughly and diligently: see e.g. *Baker v. Carr* (1962), 369 U.S. 186 (U.S. Sup. Ct.) (1962), at p. 284.

(c) The Proper Judicial Role

30 The third concern relates to the proper role of the courts and their constitutional relationship to the other branches of government. The premise of our discretionary approach to public interest standing is that the proceedings raise a justiciable question, that is, a question that is appropriate for judicial determination: *Finlay*, at p. 632; *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.), at pp. 90-91; see also L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at pp. 6-10.

This concern engages consideration of the nature of the issue and the institutional capacity of the courts to address it.

(3) The Principle of Legality

31 The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada. For example, in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163) supports granting standing and that a question of constitutionality should be not be "immunized from judicial

review by denying standing to anyone to challenge the impugned statute" (p. 145). He concluded that "*it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication*" (p. 145 (emphasis added)).

32 The legality principle was further discussed in *Finlay*. The Court noted the "repeated insistence in *Thorson* on the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation" (p. 627). To Le Dain J., this was "the dominant consideration of policy in *Thorson*" (*Finlay*, at p. 627). After reviewing the case law on public interest standing, the Court in *Finlay* extended the scope of discretionary public interest standing to challenges to the statutory authority for administrative action. This was done, in part because these types of challenges were supported by the concern to maintain respect for the "limits of statutory authority" (p. 631).

33 The importance of the principle of legality was reinforced in *Canadian Council of Churches*. The Court acknowledged both aspects of this principle: that no law should be immune from challenge and that unconstitutional laws should be struck down. To Cory J., the *Constitution Act, 1982* "entrench[ed] the fundamental right of the public to government in accordance with the law" (p. 250). The use of "discretion" in granting standing was "necessary to ensure that legislation conforms to the Constitution and the *Charter*" (p. 251). Cory J. noted that the passage of the *Charter* and the courts' new concomitant constitutional role called for a "general and liberal" approach to standing (p. 250). He stressed that there should be no "mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (p. 256).

34 In *Hy and Zel's*, Major J. commented on the underlying rationale for restricting standing and the balance that needs to be struck between limiting standing and giving due effect to the principle of legality:

> If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations. [p. 692]

(4) Discretion

35 From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. As Laskin J. put it in *Thorson*, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process" (p. 161); see also pp. 147, 161 and 163; *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.), at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not

be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).

36 It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

(5) A Purposive and Flexible Approach to Applying the Three Factors

37 In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

38 The main issue that separates the parties relates to the formulation and application of the third of these factors. However, as the factors are interrelated and there is some disagreement between the parties with respect to at least one other factor, I will briefly review some of the considerations relevant to each and then turn to my analysis of how the factors play out here.

(a) Serious Justiciable Issue

39 This factor relates to two of the concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the seriousness of the issue to the concern about allocation of scarce judicial resources (p. 631); see also L'Heureux-Dubé J., in dissent, in *Hy and Zel's*, at pp. 702-3.

40 By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role (*Finlay*, at p. 632). Le Dain J. in *Finlay* referred to *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), and wrote that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government": pp. 632-33; …

41 This factor also reflects the concern about overburdening the courts with the "unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody: *Canadian Council of Churches*, at p. 252; *Finlay*, at pp. 631- 33. As discussed earlier, these concerns can be overplayed and must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.

42 To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.). Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the proposed action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

(b) The Nature of the Plaintiff's Interest

43 In *Finlay*, the Court wrote that this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody (p. 633). In my view, this factor is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. The Court's case law illustrates this point. In *Finlay*, for example, although the plaintiff did not in the Court's view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In *Borowski*, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski's engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in *Canadian Council of Churches*, the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants" (p. 254). In examining the plaintiff's reputation, continuing interest, and link with the claim, the Court thus assessed its "engagement", so as to ensure an economical use of scarce judicial resources (see K. T. Roach, *Constitutional Remedies in Canada* (loose-leaf), at ¶ 5.120).

(c) Reasonable and Effective Means of Bringing the Issue Before the Court

44 This factor has often been expressed as a strict requirement. For example, in *Borowski*, the majority of the Court stated that the person seeking discretionary standing has "to show ... that there is *no* other reasonable and effective manner in which the issue may be brought before the Court" (p. 598 (emphasis added)); see also *Finlay*, at p. 626; *Hy and Zel's*, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and

effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area.

(i) The Court Has Not Always Expressed and Rarely Applied This Factor Rigidly

45 A fair reading of the authorities from this Court demonstrates, in my view, that while this factor has often been expressed as a strict requirement, the Court has not done so consistently and in fact has not approached its application in a rigid fashion.

46 The strict formulation of the third factor as it appeared in *Borowski* was not used in the two major cases on public interest standing: *Thorson*, at p. 161; *McNeil*, at p. 271. Moreover, in *Canadian Council of Churches*, the third factor was expressed as whether "there [was] *another* reasonable and effective way to bring the issue before the court" (p. 253 (emphasis added)).

47 A number of decisions show that this third factor, however formulated, has not been applied rigidly. For example, in *McNeil*, at issue was the constitutionality of the legislative scheme empowering a provincial board to permit or prohibit the showing of films to the public. It was clear that there were persons who were more directly affected by this regulatory scheme than was the plaintiff, notably the theatre owners and others who were the subject of that scheme. Nonetheless, the Court upheld granting discretionary public interest standing on the basis that the plaintiff, as a member of the public, had a different interest than the theatre owners and that there was no other way "practically speaking" to get a challenge of that nature before the court (pp. 270-71). Similarly in *Borowski*, although there were many people who were more directly affected by the legislation in question, they were unlikely in practical terms to bring the type of challenge brought by the plaintiff (pp. 597-98). In both cases, the consideration of whether there were no other reasonable and effective means to bring the matter before the court was addressed from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs proposed to bring.

48 Even when standing was denied because of this factor, the Court emphasized the need to approach discretionary standing generously and not by applying the factors mechanically. The best example is *Canadian Council of Churches*. On one hand, the Court stated that granting discretionary public interest standing "is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant" (p. 252). However, on the other hand, the Court emphasized that public interest standing is discretionary, that the applicable principles should be interpreted "in a liberal and generous manner" and that the other reasonable and effective means aspect must not be interpreted mechanically as a "technical requirement" (pp. 253 and 256).

(ii) This Factor Must Be Applied Purposively

49 This third factor should be applied in light of the need to ensure full and complete adversarial presentation and to conserve judicial resources. In *Finlay*, the Court linked this factor to the concern that the "court should have the benefit of the contending views of the persons most directly affected by the issue" (p. 633); see also Roach, at ¶ 5.120. In *Hy and Zel's*, Major J.

linked this factor to the concern about needlessly overburdening the courts, noting that "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use" (p. 692). The factor is also closely linked to the principle of legality, since courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors. Applying this factor purposively thus requires the court to consider these underlying concerns.

(iii) A Flexible Approach Is Required to Consider the "Reasonable and Effective" Means Factor

50 The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

51 It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.

• The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.

• The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

• The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the

other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.

• The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.), at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.

(iv) Conclusion

52 I conclude that the third factor in the public interest standing analysis should be expressed as: whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court. This factor, like the other two, must be assessed in a flexible and purposive manner and weighed in light of the other factors.

(6) Weighing the Three Factors

53 I return to the circumstances of this case in light of the three factors which must be considered: whether the case raises a serious justiciable issue, whether the respondents have a real stake or a genuine interest in the issue(s) and the suit is a reasonable and effective means of bringing the issues before the courts in all of the circumstances. Although there is little dispute that the first two factors favour granting standing, I will review all three as in my view they must be weighed cumulatively rather than individually. I conclude that when all three factors are

considered in a purposive, flexible and generous manner, the Court of Appeal was right to grant public interest standing to the Society and Ms. Kiselbach.

(a) Serious Justiciable Issue

54 As noted, with one exception, there is no dispute that the respondents' action raises serious and justiciable issues. The constitutionality of the prostitution laws certainly constitutes a "substantial constitutional issue" and an "important one" that is "far from frivolous": see *McNeil*, at p. 268; *Borowski*, at p. 589, *Finlay*, at p. 633. Indeed, the respondents argue that the impugned *Criminal Code* provisions, by criminalizing many of the activities surrounding prostitution, adversely affect a great number of women. These issues are also clearly justiciable ones, as they concern the constitutionality of the challenged provisions. Consideration of this factor unequivocally supports exercising discretion in favour of standing.

55 The appellant submits, however, that the respondents' action does not disclose a serious issue with respect to the constitutionality of s. 213(1)(*c*) (formerly s. 195.1 (1)(*c*)) because this Court has upheld that provision in *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.), and *R. v. Skinner*, [1990] 1 S.C.R. 1235 (S.C.C.).

56 On this point, I completely agree with the learned chambers judge. He held that, in the circumstances of this broad and multi-faceted challenge, it is not necessary for the purposes of deciding the standing issue to resolve whether the principles of *stare decisis* permit the respondents to raise this particular aspect of their much broader claim. A more pragmatic approach is to say, as did Cory J. in *Canadian Council of Churches* and the chambers judge in this case, that some aspects of the statement of claim raise serious issues as to the invalidity of the legislation. Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim. They can be assessed using other appropriate procedural vehicles.

(b) The Proposed Plaintiff's Interest

57 Applying the purposive approach outlined earlier, there is no doubt, as the appellant accepts that this factor favours granting public interest standing. The Society has a genuine interest in the current claim. It is fully engaged with the issues it seeks to raise.

58 As the respondents point out, the Society is no busybody and has proven to have a strong engagement with the issue. It has considerable experience with the sex workers in the Downtown Eastside of Vancouver and it is familiar with their interests. It is a registered non-profit organization that is run "by and for" current and former sex workers who live and/or work in this neighbourhood of Vancouver. Its mandate is based upon the vision and the needs of street-based sex workers and its objects include working toward better health and safety for sex workers, working against all forms of violence against sex workers and lobbying for policy and legal changes that will improve the lives and working conditions of the sex workers (R.F., at para. 8).

59 From Sheryl Kiselbach's affidavit, it is clear that she is deeply engaged with the issues raised. Not only does she claim that the prostitution laws have directly and significantly affected her for 30 years (A.R., vol. IV, at pp. 15-17), but also she notes that she is now employed as a violence prevention coordinator.

(c) Reasonable and Effective Means of Bringing the Issue Before the Court

60 Understandably, the chambers judge treated the traditional formulation of this factor as a requirement of a strict test. He rejected respondents' submission that they ought to have standing because their action was "the most reasonable and effective way" to bring this challenge to court. The judge noted that this submission misstated the test set down by this Court and that he was "bound to apply" the test requiring the respondents to show that there "is no other reasonable and effective way to bring the issue before the court" (paras. 84-85). However, for the reasons I set out earlier, approaching the third factor in this way should be considered an error in principle.

We must therefore reassess the weight to be given to this consideration when it is applied in a purposive and flexible manner.

61 The learned chambers judge had three related concerns which he thought militated strongly against granting public interest standing. First, he thought that the existence of the *Bedford* litigation in Ontario showed that there could be other potential plaintiffs to raise many of the same issues. Second, he noted that there were many criminal prosecutions under the challenged provisions and that the accused in each one of them could raise constitutional issues as of right. Finally, he was not persuaded that individual sex workers could not bring the challenge forward as private litigants. I will discuss each of these concerns in turn.

62 The judge was first concerned by the related *Bedford* litigation underway in Ontario. The judge noted that the fact that there is another civil case in another province which raises many of the same issues "would not necessarily be sufficient reason for concluding that the present case ... should not proceed", it nonetheless "illustrates that if public interest standing is not granted ... there may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75).

63 The existence of parallel litigation is certainly a highly relevant consideration that will often support denying standing. However, I agree with the chambers judge that the existence of a civil case in another province — even one that raises many of the same issues — is not necessarily a sufficient basis for denying standing. There are several reasons for this.

64 One is that, given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. What is needed is a practical and pragmatic assessment of whether having parallel proceedings in different provinces is a reasonable and effective approach in the particular circumstances of the case. Another point is that the issues raised in the *Bedford* case are not identical to those raised in this one. Unlike in the present case, the *Bedford* litigation does not challenge ss. 211, 212(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*h*) or (3) of the *Code* and does not challenge any provisions on the basis of ss. 2(*d*) or 15 of the *Charter*. A further point is that, as discussed earlier, the court must examine not only the precise legal issue, but the perspective from which it is raised. The perspectives from which the challenges in *Bedford* and in this case come are very different. The claimants in *Bedford* were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. As the claim of unconstitutionality of the prostitution laws revolves mainly around the effects it has on street-level sex workers, the respondents in this action ground their challenges in a distinctive context. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. We were told, for example, that the respondents proposed that their appeal to this Court should be stayed awaiting the results of the *Bedford* litigation. A stay of proceedings pending resolution of other litigation is one possibility that should be taken into account in exercising the discretion as to standing.

65 Taking these points into account, the existence of the *Bedford* litigation in Ontario, in the circumstances of this case, does not seem to me to weigh very heavily against the respondents in

considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward. The *Bedford* litigation, in my view, has not been shown to be a more reasonable and effective means of doing so.

66 The second concern identified by the chambers judge was that there are hundreds of prosecutions under the impugned provisions every year in British Columbia. In light of this, he reasoned that "the accused in each one of those cases would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77). He noted, in addition, that such challenges have been mounted by accused persons in numerous prostitution-related criminal trials (paras. 78-79). In my view, however, there are a number of points in the circumstances of this case that considerably reduce the weight that should properly be given this concern here.

67 To begin, the importance of a purposive approach to standing makes clear that the existence of a parallel claim, either potential or actual, is not conclusive. Moreover, the existence of potential plaintiffs, while of course relevant, should be considered in light of practical realities. As I will explain, the practical realities of this case are such that it is very unlikely that persons charged under these provisions would bring a claim similar to the respondents'. Finally, the fact that some challenges have been advanced by accused persons in numerous prostitution-related criminal trials is not very telling either.

68 The cases to which we have been referred did not challenge nearly the entire legislative scheme as the respondents do. As the respondents point out, almost all the cases referred to were challenges to the communication law alone … Most of the other cases challenged one provision only, either the procurement provision … or the bawdy house provision ... From the record, the only criminal cases that challenge more than one section of the prostitution provisions were commenced *after* this case …

69 Of course, an accused in a criminal case will always be able to raise a constitutional challenge to the provisions under which he or she is charged. But that does not mean that this will necessarily constitute a more reasonable and effective alternative way to bring the issue to court. The case of *Blais* illustrates this point. In that case, the accused, a client, raised a constitutional challenge to the communication provision without any evidentiary support. The result was that the Provincial Court of British Columbia dismissed the constitutional claim, without examining it in detail. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance. For instance, in *R. v Hamilton* (Affidavit of Elizabeth Campbell, September 17, 2008, at para. 6 (A.R., vol. II, at pp. 34-35), the Crown, for unrelated reasons, entered a stayed of proceedings after the accused filed a constitutional challenge to a bawdy house provision. Thus, the challenge could not proceed.

70 Moreover, the fact that many challenges could be or have been brought in the context of criminal prosecutions may in fact support the view that a comprehensive declaratory action is a more reasonable and effective means of obtaining final resolution of the issues raised. There could be a multitude of similar challenges in the context of a host of criminal prosecutions. Encouraging that approach does not serve the goal of preserving scarce judicial resources.

Moreover, a summary conviction proceeding may not necessarily be a more appropriate setting for a complex constitutional challenge.

71 The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)). As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.

72 I conclude, therefore, that these three concerns identified by the chambers judge were not entitled to the decisive weight which he gave them.

73 I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

74 The record supports the respondents' position that they have the capacity to undertake this litigation. The Society is a well-organized association with considerable expertise with respect to sex workers in the Downtown Eastside, and Ms. Kiselbach, a former sex worker in this neighbourhood, is supported by the resources of the Society. They provide a concrete factual background and represent those most directly affected by the legislation. For instance, the respondents' evidence includes affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver (R.F., at para. 20). Further, the Society is represented by experienced human rights lawyers, as well as by the Pivot Legal Society, a non-

profit legal advocacy group working in Vancouver's Downtown Eastside and focusing predominantly on the legal issues that affect this community (Affidavit of Peter Wrinch, January 30, 2011, at para. 3 (A.R., vol. VI, at p. 137)). It has conducted research on the subject, generated various reports and presented the evidence it has gathered before government officials and committees (see Wrinch Affidavit, at paras. 6-21). This in turn, suggests that the present litigation constitutes an effective means of bringing the issue to court in that it will be presented in a context suitable for adversarial determination.

75 Finally, other litigation management tools and strategies may be alternatives to a complete denial of standing, and may be used to ensure that the proposed litigation is a reasonable and effective way of getting the issues before the court.

(7) Conclusion With Respect to Public Interest Standing

76 All three factors, applied purposively, favour exercising discretion to grant public interest standing to the respondents to bring their claim. Granting standing will not only serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized members of society, but it will also promote the economical use of scarce judicial resources: *Canadian Council of Churches*, at p. 252.

B. Private Interest Standing

77 Having found that the respondents have public interest standing to pursue their claims, it is not necessary to address the issue of whether Ms. Kiselbach has private interest standing.

V. Disposition

78 I would dismiss the appeal with costs. …

DESW is a case about standing, not intervention. The plaintiff, DESW, sought to bring a case (not to join an already pending case). It's a decision that is hard to reduce to a manageable size without stripping away too much of the facts; you might use these questions to guide your reading instead of trying to read all of the excerpted material (since all 16 pages do not repay careful attention). Notice that the case proceeded by way of action, not application; given the issues in play, why might that be?

The court revises the standing test set out in *Canadian Council of Churches*, which summarized the test developed in the *Borowski* trilogy. That test had four components:

1. the plaintiff must be seeking to show that *legislation* is invalid; *and*
2. *serious* question to invalidity of the impugned legislation; *and*
3. directly affected *or* genuine interest; *and*
4. no other reasonable and effective manner to raise the legal claim

Borowski stated that "a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court." In *DESW*, the Court notes that before *Borowski* (and since), the requirement of "no other reasonable and effective manner" has been applied more liberally (paras. 37 & 46). Cromwell J characterizes this stage of the analysis as determining "whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts." Is this approach consistent with the third branch of the inquiry as framed in *Borowski*?

According to *Canadian Council of Churches* the court should ask whether there is "another reasonable and effective way to bring the issue before the court." How would Mr. Borowski have fared under that test?

At para. 42, the Court presents the question variously as (1) "a substantial constitutional issue" (*McNeil* at p 268); (2) an important one (*Borowski* at p 589); (3) "far from frivolous" (*Finlay* at p 633). Are these formulations of the second requirement equivalent? Given the function of this part of the inquiry, does it particularly matter how the question is formulated?

At oral argument, Prof. Kent Roach characterized the "serious question as to invalidity" as requiring only that the issue raised be "neither frivolous nor vexatious". Is this a lower standard? Is it an appropriate standard?

Various parties intervened in this case, offering proposals for reimagining the requirements for public standing. One approach suggested that in a constitutional case, where the remedy sought was under s.54 (a declaration of invalidity) it would not be necessary to apply the third branch of the test. Only when a s.24 remedy was sought would the third branch of the test be applicable. Why might this be true?

Downtown East Side Sex Workers v Canada – comments & questions

At para. 51, the Court lists several factors that may deserve consideration in addressing public interest standing. What factors will foreseeably arise in future cases?

Ultimately, the court grants DESW standing. En route to the Supreme Court, there would have been a substantial expenditure of judicial resources. Will the test as now formulated discourage the exhaustive litigation of questions of standing?

Would the Court likely have granted standing under the *Borowski* test?

As this is a criminal provision that would likely give rise to future prosecutions, do you agree that this is a reasonable and effective manner of litigating the claim?

I.1. Who Can Litigate: Justiciability, Standing, *Amici Curiae* & Intervention

C. *Amici* & Intervention

R.R.O. 1990, REGULATION 194

RULE 13: INTERVENTION

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; ***or***

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (1); O. Reg. 292/99, s. 4; O. Reg. 186/10, s. 2.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2.

Incredible Electronics Inc. v. Canada (Attorney General)

Incredible Electronics Inc., *Applicants* and Attorney General of Canada, *Respondent* and Bell Expressvu Limited Partnership, Astral Media Inc. and Alliance Atlantis Communications Inc., *Intervenors* and Congrès Ibéroaméricain du Canada Inc., ***Moving Party***

Ontario Superior Court of Justice

Heard: October 18, 2002; Judgment: October 25, 2002

MOTION by non-party for leave to intervene in application.

***Stinson J.*:**

1 These reasons concern a motion brought by the Congrès Ibéroaméricain du Canada Inc. ("CICI") for leave to intervene in this application pursuant to Rule 13 of the *Rules of Civil Procedure*. The motion was supported by the applicants and opposed by the Attorney General of Canada and by the existing intervenors, Bell ExpressVu Limited Partnership, et al.

Background

2 This application concerns a constitutional challenge to certain sections of the *Radiocommunication Act*, R.S.C. 1985, c. R-2. It was commenced in the wake of the Supreme Court of Canada decision in *Bell ExpressVu Ltd. Partnership v. Rex* (2002), 212 D.L.R. (4th) 1 (S.C.C.). In that case, the Supreme Court ruled that so-called "grey market" satellite TV distribution activities of the respondents in that appeal were prohibited by s. 9(1)(c) of the *Radiocommunication Act*. In essence, the Supreme Court declared that s. 9(1)(c) creates a prohibition against all decoding of encrypted program-ming signals, followed by an exception where authorization is received from the person holding the lawful right in Canada to transmit and authorize decoding of the signal.

3 During the course of the interlocutory proceedings leading up to the argument of the appeal in *Bell ExpressVu v. Rex*, and at the request of the respondents in the appeal, Rex et al., the Supreme Court stated two constitutional questions as follows:

> 1. Is s. 9(1)(c) of the Radiocommunication Act, R.S.C., 1985, c. R-2, inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms?
>
> 2. If the answer to question 1 is "yes", can the statutory provision be justified pursuant to s. 1 of the Charter?

In the final analysis, the Supreme Court declined to answer the constitutional questions that had been stated before it, because the factual record did not provide a sufficient basis for their resolution.

4 In the present application, the applicants seek a declaration that the provisions of the *Radiocommunication Act* that were the subject of the Supreme Court's decision in *Bell ExpressVu v. Rex* are contrary to the Canadian *Charter of Rights and Freedoms*, to the extent that

they apply to persons who distribute or purchase encrypted subscription programming signals from a supplier who is not the holder of a license issued under the *Broadcasting Act*, R.S.C. 1985, c. B-11. In particular, the applicants contend that the impugned provisions of the *Radiocommunication Act* are contrary to and offend the right of freedom of expression contained in s. 2(b) of the *Charter*.

5 Immediately after the notice of application in the present case was issued, the applicants obtained from Carnwath J. an *ex parte* injunction restraining the Attorney General from taking steps to enforce the impugned sections. Blair R.S.J. heard the applicants' motion to continue the order granted by Carnwath J. He dismissed that motion. In his written reasons, found at (Ont. S.C.J.), Blair R.S.J. succinctly recited the factual underpinning of the present dispute as follows:

> ¶5 The business of broadcasting and distributing television signals via satellite for reception in Canada on a direct-to-home ("DTH") basis is governed by the provisions of the *Broadcasting Act* ... and the *Radiocommunication Act*. A license issued by the Canadian Radio-television and Telecommunications Commission (the "CRTC") is required to carry on such a DTH distribution undertaking. There are only two such licensees in Canada — the Intervenor, Bell ExpressVu Limited Partnership, and Star Choice Communications Inc.
>
> ¶6 The Applicants … engage in … the "grey market" side of the business of disseminating subscription television signals via satellite. They distribute and sell receivers and related equipment, in Canada, to Canadian consumers, and they facilitate their customers' making arrangements for the purchase of subscription programming provided through American DTH distribution undertakings whose satellite signals may be received in Canada but who are not licensed by the CRTC.
>
> ¶7 The principal American distribution undertakings in question are DIRECTV and DishNetwork (also known as Echostar).
>
> ¶8 … the Applicants' customers are purchasers of decoded encrypted subscription programming signals, or encrypted network feed, from suppliers of signals or network feed who are not holders of a license issued under the *Broadcasting Act*. That is why they are said to operate in the "grey market". Until the decision of the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex* ... the law was not clear whether s. 9(1)(c) of the *Radiocommunication Act* prohibited the decoding of encrypted signals emanating from U.S. broadcasters, or whether it operated only to bar the unauthorized decoding of signals emanating from licensed Canadian distributors. Earlier decisions at the provincial appellate levels in British Columbia and Ontario, had adopted the latter approach, which favours the Applicants. …
>
> ¶9 … Section 9(1)(c) of the *Radiocommunication Act* states:
>
> 9(1) No person shall,
>
> (c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed.

> ¶10 "Subscription programming" and "lawful distributor" are defined in s. 2 of the Act, and s. 9(1)(d) prohibits anyone from operating a radio apparatus so as to receive such a signal or feed that has been decoded in contravention of s. 9(1)(c). Section 10(1) of the Act makes anyone guilty of an offence who:
>
> > without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9.
>
> ¶11 In its April 26th ruling in the *Bell ExpressVu* case, the Supreme Court of Canada made it clear that s. 9(1)(c) does have the effect of prohibiting the decryption of encrypted signals emanating from U.S. broadcasters, in Canada, since the U.S. broadcasters (i.e. DIRECTV and DishNetwork) are not licensed under the *Broadcasting Act*.

6 … [T]he applicants are corporations or individuals who are engaged in the business of distributing and selling grey market receivers and related equipment. …

7 The only party named as a respondent in the present application is the Attorney General of Canada. At the same time as Blair R.S.J. heard the injunction motion, however, he also granted the motion of Bell ExpressVu Limited Partnership, Astral Media Inc., and Alliance Atlantis Communications Inc. for leave to intervene in the application as added parties. As noted above, Bell ExpressVu is a licensee that carries on a satellite DTH undertaking. Astral Media is a "channel provider", that is, it packages various types of entertainment programming and sells it to distributors. Alliance Alantis is a large movie producing studio that sells its product to, among others, the channel providers. On these facts Blair R.S.J. found that these three parties clearly had "an integral interest — both commercially, financially and legally — in the subject matter of the Application". …

…

The present motion

9 In the present motion CICI seeks an order pursuant to rule 13.01 allowing it to intervene as a party to the application, with attendant rights to file affidavit material, conduct cross-examinations and to participate fully in all proceedings. CICI is a newly incorporated entity, having received its Certificate of Incorporation on October 16, 2002, just two days before the argument of the motion before me. Prior to that date, the activities of CICI had been carried on through an unincorporated association known as Congrès Ibéroaméricain du Canada (the "Congrès"). Indeed, the Congrès was the original moving party in the present motion.

10 The incorporation of CICI as the successor to the Congrès came about as a response to the position (correctly) taken by counsel for the Attorney General and for Bell ExpressVu et al. that, as an unincorporated entity, the Congrès did not have standing to intervene in a proceeding before the Superior Court of Justice: see *Adler v. Ontario* (1992), 8 O.R. (3d) 200 (Ont. Gen. Div.). That position apparently came as a surprise to counsel for the Congrès, in as much as he had successfully sought intervenor status on behalf of the Congrès before the Supreme Court of Canada in the *Bell ExpressVu v. Rex* case and had participated in the argument of that appeal.

The Ontario *Rules of Civil Procedure*, however, restrict participation in proceedings before this court to legal "persons". There being no identifiable prejudice, at the request of counsel for the moving party at the commencement of the motion before me, I made an order pursuant to rule 5.04(2) substituting CICI as the named moving party, in the place and stead of the Congrès.

The Congrès/CICI

11 The Congrès itself apparently came into being in June 2001, not long before it applied for intervenor status in the *Bell ExpressVu v. Rex* case. It was one of five applicants (including the Attorney General of Canada, the Canadian Motion Picture Distributors Association and DIRECTV Inc.) who sought and were granted intervenor status in that appeal. In support of its motion for intervention in that case, the Congrès filed an affidavit by Paul Fitzgerald (who was also the deponent of the only affidavit filed on the motion before me), who described himself as the Vice President and Legal Counsel of the Congrès. In that affidavit (upon which there was no cross-examination) Mr. Fitzgerald deposed, among other things, as follows:

> The applicant [the Congrès] ... was established for the express purpose of promoting and defending the rights of the Spanish-speaking community in Canada. It brings this application on behalf of 103 of the respondents' customers who have subscribed to Spanish language television through the respondents and also on behalf of many thousands of other Canadians who have subscribed to Spanish language television through other firms ....
>
> In representing a minority language group in Canada … the applicant has a perspective which is distinct from that which is advanced by the appellants or respondents in this appeal.

12 In its factum filed on the appeal, the Congrès described itself as "an unincorporated organization representing thousands of Spanish speaking Canadians who have subscribed through the respondent or similar firms to Spanish language programming packages from the U.S." It may thus be seen that, before the Supreme Court, the Congrès represented itself as an organization that represented a minority language group and that it was, in essence, speaking on behalf of thousands of Canadians. In none of the materials filed by it before the Supreme Court did the Congrès describe its history, its past activities or its membership.

13 The record before me paints a significantly different picture. … The cross- examination of Mr. Fitzgerald revealed that the Congrès is made up of only three people. It has no board of directors. It has no members. In large measure, it is the creation of Mr. Fitzgerald and the other two participants. In addition to intervening in the *Bell ExpressVu* case, Mr. Fitzgerald made a presentation on behalf of the Congrès to the House of Commons Standing Committee on Canadian Heritage concerning the value of foreign satellite television to ethnic communities in Canada. Apart from these two specific activities, the Congrès has apparently had some involvement, on an informal basis, in addressing the concerns of Spanish speaking immigrants in connection with seeking Canadian accreditation for their foreign professional qualifications. Other than the present motion for intervention, there is little evidence of any other formal activity by the Congrès.

…

15 In his factum filed in support of the motion, counsel for CICI submitted that the issue whether his client was entitled to intervenor status was *res judicata*, in light of the ruling by the Supreme Court granting intervenor status to the Congrès in *Bell ExpressVu v. Rex*. In oral argument before me, he conceded that the requirements of *res judicata* were not met. Nevertheless, he submitted that the Supreme Court's ruling on the intervention issue was of strong precedential value.

16 With the greatest of respect, I disagree. As noted above, the factual record before me is significantly different from that which formed the basis for the Supreme Court ruling. In my view, it is necessary to examine that record and to assess it against the legal test for granting intervenor status.

The legal test for intervention

17 In *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (Ont. C.A.), at 167 Chief Justice Dubin wrote:

> In constitutional cases, including cases under the Canadian *Charter of Rights and Freedoms*, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.
>
> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

18 Various cases were cited in argument before me in which motions for intervention have been granted or refused. Counsel for CICI relied in particular upon the decision of *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32 (Ont. Gen. Div.), in which Adams J. summarized the jurisprudence governing applications for intervention in constitutional cases, as follows (at 39):

In summary, where intervenor status is granted to a public interest group, either as a party or as a friend of the court, at least one of the following criteria is usually met:

> (a) the intervenor has a real, substantial and identifiable interest in the subject matter of the proceedings;
>
> (b) the intervenor has an important perspective distinct from the immediate parties; or
>
> (c) the intervenor is a well recognized group with a special expertise and with a broad identifiable membership base.

19 I will deal with each of the criteria articulated by Adams J., in turn.

(a) Does CICI have a real, substantial and identifiable interest in the subject matter of the application?

20 As I understand this criterion, it requires the would-be intervenor to demonstrate that its legal interests would be directly and particularly affected by the outcome of the proceeding. This criterion is not met, in my view, by demonstrating that the proposed intervenor represents the interests of an identifiable group or membership base; that is the purpose of criteria (b) and (c). I find support for this conclusion in the decision of Steele J. in *John Doe v. Ontario (Information & Privacy Commissioner)* (1991), 87 D.L.R. (4th) 348 (Ont. Div. Ct.). In that case, Steele J. refused a motion for intervention on the ground that the proposed intervenor had "no greater interest in the subject matter of the proceeding than any member of the general public."

21 In the present case, CICI itself has no commercial, financial or legal interest in the outcome of the application. It has no involvement in the business side of the satellite TV distribution system, unlike the current intervenors. It is not a subscriber to any of the satellite services that from the factual underpinning of the dispute. To borrow the language of Steele J., CICI has "no greater interest in the subject matter of the proceeding than the general public."

22 I therefore conclude that intervenor status cannot be granted to CICI based on criterion (a).

(b) Does CICI have an important perspective distinct from the immediate parties?

23 It was argued on behalf of CICI that, because it purports to speak on behalf of Spanish speaking TV viewers who wish to continue to receive grey market satellite signals, it has a perspective on the issues in this case that is different than the existing applicants, of whom only one is a consumer and, at that, an anglophone.

24 While it is true that only one named applicant is a consumer of grey market satellite TV services, the applicants' materials contain considerable evidence relating to the demand for these services among various linguistic and cultural minorities. Among others, the applicants' materials include affidavits from distributors who sell grey market satellite services to consumers who speak Spanish, Turkish and Polish, as well as affidavits from consumers who subscribe to services that offer programming in Polish, Spanish, Greek and Russian, as well as Asian, Filipino, and Brazilian channels. …

25 Thus it is apparent that, at least from an evidentiary perspective, the applicants have attempted to articulate the concerns of members of a variety of linguistic and ethnic minorities. There is no reason to doubt that the applicants will not continue to advocate on behalf of the interests of these various consumers. They share the common goal of preserving the availability of grey market signals. Presumably, if CICI were permitted to intervene, its perspective would be confined to the interests of the Spanish speaking community. If anything, then, the perspective of the proposed intervenor is actually narrower than that of the applicants.

26 In the circumstances, I conclude that CICI does not meet criterion (b).

27 I wish to add one comment to the foregoing. In answer to an undertaking given on the cross-examination of Mr. Fitzgerald, counsel for CICI indicated that, if granted leave to intervene, CICI intended to raise the following issues "on its intervention":

> (a) that subsections 9(1)(c), 9(1)(d), and 10(1)(b) of the *Radiocommunication Act* contravene the freedom of expression of Spanish speaking Canadians, and of other linguistic minorities within Canada, guaranteed by subsection (2)(b) of the *Charter*, by denying them adequate access to television broadcast in their native language;
>
> (b) that those statutory provisions also deny Spanish speaking Canadians, and other linguistic minorities within Canada, equal benefit of the law without discrimination, contrary to s. 15(1) of the *Charter*, because the effect of those statutory provisions is to denying [sic] those linguistic minorities the same access to television broadcasts in their native language as are enjoyed by Canadians of other linguistic backgrounds in their native language;
>
> (c) that the obligation, in s. 27 of the *Charter*, to interpret subsections 2(b) and 15(1) in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians, requires the Court to adopt an interpretation of subsections (2)(b) and 15(1) which either (a) wholly invalidates sections 9(1)(c), 9(1)(d) and 10(1)(b) of the *Radiocommunication Act* or (b) limits the scope of those prohibitive sections to permit Spanish speaking Canadians, and other linguistic minorities, continued access to foreign television broadcasting in their native language.

28 As currently constituted, the application challenges the impugned provisions of the *Radiocommunication Act* solely on the ground that they are contrary to s. 2(b) of the *Charter*. The applicants have framed their materials accordingly. They sought (and briefly obtained) injunctive relief on that basis. The respondent and the intervenors have responded to the application on the basis that it was founded on a s. 2(b) *Charter* challenge. As such, the s. 15(1) and s. 27 issues mentioned by counsel for CICI are novel, and a significant departure from the case as initially framed. It might be said, therefore, that by advancing arguments based upon s. 15(1) and s. 27, CICI would indeed bring a distinct perspective to the case.

29 By seeking to advance these additional arguments, however, CICI is doing far more than bringing a distinct perspective to the pending application. Rather, it is seeking to litigate its own issues in a proceeding in which those issues do not arise. In my view, if CICI wishes to litigate those issues, the appropriate forum for it to do so is in another proceeding. To permit those issues to be raised in the present proceeding, given the current state of the record, would significantly distort the proceeding. It would, as well, unduly delay and quite possibly prejudice the determination of the rights of the parties in the present proceeding. This would be a ground for refusing leave to intervene, pursuant to rule 13.01(2).

(c) Is CICI a well recognized group with a special expertise and a broad identifiable membership base?

30 I have previously reviewed the history and background of CICI. Laudable as its pursuits may be, I do not consider that it qualifies, at this stage at least, as a well recognized group with a

special expertise. Nor, quite plainly, does CICI have a broad membership base. As such, it does not meet criterion (c).

Conclusion

31 In my view, none of the criteria listed by Adams J. in *Ontario v. Dieleman* is satisfied in the present case. To paraphrase Chief Justice Dubin in the *Peel* case, having regard to the nature of this case and the issues which arise, I have concluded that it is unlikely that CICI can make a useful contribution to the resolution of this application, without causing injustice to the immediate parties. The motion for intervention is therefore dismissed.

Incredible Electronics Inc. v. Canada – questions

Who began this litigation? What parties were present before CICI got involved? What remedy did the plaintiffs seek?

Did the litigation proceed by way of action or application? Why would it make sense for the plaintiff to select this mode of proceeding?

Notice that the case involves a constitutional challenge against federal legislation (this should remind you of Borowski & CCC). Imagine that the case instead involved a claim against a private party. Should the court use the same analysis for evaluating CICI's eligibility to intervene?

In *Rex*, why did the Sup. Ct. not address the question raised here? In your view would it have been wiser for the Court to take up that question?

Bell ExpressVu, Astral Media, and Alliance Atlantis were allowed in as interveners – why?

What rights specifically did the applicant here seek, when requesting intervener status?

When first presented with the Congrès's application to intervene, the A.G. and Bell ExpressVu argued that this was impossible, as the Congrès was not incorporated, and therefore lacked the legal status to be heard as a party. The Congrès tried to reject this argument, on res judicata grounds, but lost. In your view, should they have won that argument? Consider:

R. 13.01(1) applies to "a person who is not a party to a proceeding," and R. 13.02 provides that "[a]ny person may, with leave of a judge … and without becoming a party to the proceeding, intervene as a friend of the court." R. 1.03 provides that: " 'person' includes a party to a proceeding." According to R. 2 of the *Rules of the Supreme Court*, " 'person' includes a body politic or corporate"; and according to R. 55 of the *Rules of the Supreme Court*, "Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge." If the Congrès was a "person" for purposes of intervention before the Supreme Court, why not here?

Notice the discrepancy between how the Congrès described itself, in its factum in *Rex*,, and the facts as presented here. In light of this, should the Congrès have been allowed to intervene in *Rex*? Why did no one oppose it?

The court draws on *Peel* when explaining the principles that bear on a court's decision to grant leave to intervene. As explained below, while *Peel* is used primarily for constitutional cases, the same principles are used when the dispute involves private parties.

Incredible Electronics Inc. v. Canada – questions

Notice the differences between the *Dielman* test and the test in *Borowski* / *CCC*. The *Dielman* test is a disjunctive one – a would-be intervenor only needs to satisfy one of the three prongs – whereas *Borowski* is conjunctive. Yet *Borowski*'s requirement relating to the interest in the case ("directly affected *or* genuine interest") seems easier to satisfy than *Dielman*'s requirement on this point ("real, substantial and identifiable interest"). Why is that? (Or are the courts simply misguided in using a higher "interest" threshold for intervention as opposed to commencing litigation?)

Why did CICI fail the first prong of the *Dieleman* test?

Besides not having distinct perspective, what was the problem with CICI's contribution to this case?

I.2. Striking Claims & Summary Judgment

R.R.O. 1990, REGULATION 194

RULE 20: SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

EVIDENCE ON MOTION

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. O. Reg. 438/08, s. 12.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. O. Reg. 438/08, s. 12.

FACTUMS REQUIRED

20.03 (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 14.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 4.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 4.

(4) Revoked: O. Reg. 394/09, s. 4.

DISPOSITION OF MOTION

General

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is ***no genuine issue requiring a trial*** with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13 (3).

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount. R.R.O. 1990, Reg. 194, r. 20.04 (3); O. Reg. 438/08, s. 13 (4).

Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge. R.R.O. 1990, Reg. 194, r. 20.04 (4); O. Reg. 438/08, s. 13 (4).

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts. R.R.O. 1990, Reg. 194, r. 20.04 (5).

WHERE TRIAL IS NECESSARY

Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. O. Reg. 438/08, s. 14.

Directions and Terms

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs. O. Reg. 438/08, s. 14.

Specified Facts

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice. O. Reg. 438/08, s. 14.

Order re Affidavit Evidence

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration. O. Reg. 438/08, s. 14.

Order re Experts, Costs

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs. O. Reg. 438/08, s. 14.

Failure to Comply with Order

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just. O. Reg. 438/08, s. 14.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default. O. Reg. 438/08, s. 14.

COSTS SANCTIONS FOR IMPROPER USE OF RULE

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay. O. Reg. 438/08, s. 14.

EFFECT OF SUMMARY JUDGMENT

20.07 A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief. R.R.O. 1990, Reg. 194, r. 20.07.

STAY OF EXECUTION

20.08 Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just. R.R.O. 1990, Reg. 194, r. 20.08.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

20.09 Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims. R.R.O. 1990, Reg. 194, r. 20.09.

R.R.O. 1990, REGULATION 194

RULE 21: DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

MOTION TO BE MADE PROMPTLY

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. R.R.O. 1990, Reg. 194, r. 21.02.

FACTUMS REQUIRED

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 15.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 5.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 5.

. . .

CITATION: Hryniak *v.* Mauldin, 2014 SCC 7

DATE: 20140123
DOCKET: 34641

Robert Hryniak
Appellant
and
Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith
Respondents

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

On appeal from the Court of Appeal for Ontario

The judgment of the Court was delivered by: Karakatsanis J.

1. Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

2. Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

3. Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (*Ontario Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, address the proper interpretation of the amended Rule 20 (summary judgment motion).

4. In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

5. To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

6. As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

7. While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

I. Facts

8. More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital, which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

9. In June 2001, two members of the Mauldin Group met with Cranston, Peebles, and Hryniak, to discuss an investment opportunity.

10. At the end of June 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos's funds, including the funds contributed by the Mauldin Group, were stolen.

11. Beyond a small payment of US$9,600 in February 2002, the Mauldin Group lost its investment.

II. Judicial History

A. Ontario Superior Court of Justice, 2010 ONSC 5490 (CanLII)

12. The Mauldin Group joined with Bruno Appliance and Furniture, Inc. (the appellants in the companion appeal) in an action for civil fraud against Hryniak, Peebles and Cassels Brock. They brought motions for summary judgment, which were heard together.

13. In hearing the motions, the judge used his powers under the new Rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw inferences. He found that the Mauldin Group's money was disbursed by Cassels Brock to Hryniak's company, Tropos, but that there was no evidence to suggest that Tropos had ever set up a trading program. Contrary to the investment strategy that Hryniak had described to the investors, the Mauldin Group's money was placed in an account with the offshore New Savings Bank, and then disappeared. He rejected Hryniak's claim that members of the New Savings Bank had stolen the Mauldin Group's money.

14. The motion judge concluded that a trial was not required against Hryniak. However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that

claim involved factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial. Consequently, he also dismissed the motion for summary judgment against Cassels Brock, as those claims were based on the theory that the firm was vicariously liable for Peebles' conduct.

B. Court of Appeal for Ontario, 2011 ONCA 764, 108 O.R. (3d) 1

15. The Court of Appeal simultaneously heard Hryniak's appeal of this matter, the companion *Bruno Appliance* appeal, and three other matters which are not before this Court. This was the first occasion on which the Court of Appeal considered the new Rule 20.

16. The Court of Appeal set out a threshold test for when a motion judge could employ the new evidentiary powers available under Rule 20.04(2.1) to grant summary judgment under Rule 20.04(2)(a). Under this test, the "interest of justice" requires that the new powers be exercised only at trial, unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings on a motion for summary judgment. The motion judge should assess whether the benefits of the trial process, including the opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand, are necessary to fully appreciate the evidence in the case.

17. The Court of Appeal suggested that cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record, are generally not fit for determination in this manner. Conversely, cases driven by documents, with few witnesses, and limited contentious factual issues are appropriate candidates for summary judgment.

18. The Court of Appeal advised motion judges to make use of the power to hear oral evidence, under Rule 20.04(2.2), to hear only from a limited number of witnesses on discrete issues that are determinative of the case.

19. The Court of Appeal concluded that, given its factual complexity and voluminous record, the Mauldin Group's action was the type of action for which a trial is generally required. There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross-claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

20. Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

III. Outline

21. In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally and the interpretation of Rule 20 in

particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

22. Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

IV. Analysis

A. Access to Civil Justice: A Necessary Culture Shift

23. This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

24. However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,[1] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

25. Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

26. In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

27. There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and

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[1] For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, or for cases involving certain minority rights (see the Language Rights Support Program).

[2] In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top ten countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

28. This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

29. There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

30. The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

31. Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53).

32. This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

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[3] This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); *Ontario Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312, at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, at para. 12.

33. A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. Summary Judgment Motions

34. The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

35. Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

36. Rule 20 was amended in 2010, following the recommendations of the Osborne Report, to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.

37. Early summary judgment rules were quite limited in scope and were available only to plaintiffs with claims based on debt or liquidated damages, where no real defence existed.[5] Summary judgment existed to avoid the waste of a full trial in a clear case.

38. In 1985, the then new Rule 20 extended the availability of summary judgement to both plaintiffs and defendants and broadened the scope of cases that could be disposed of on such a motion. The rules were initially interpreted expansively, in line with the purposes of the rule changes.[6] However, appellate jurisprudence limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: "claims that have no chance of success [are] weeded out at an early stage".[7]

39. The Ontario Government commissioned former Ontario Associate Chief Justice Coulter Osborne Q.C., to consider reforms to make the Ontario civil justice system more accessible and affordable, leading to the report of the Civil Justice Reform Project (the Osborne Report). The Osborne Report concluded that few summary judgment motions were being brought and, if the

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[4] Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 ff of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). Moreover, s. 165(4) of the Code provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

[5] For a thorough review of the history of summary judgment in Ontario, see T. Walsh and L. Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2013* (2013), 419, at pp. 422-32.

[6] *Ibid.*, at p. 426; for example, see *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242 (H.C.J.).

[7] *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 10.

summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed (p. 35). Among other things, it recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented (pp. 35-36).

40. The report also recommended the adoption of a summary trial procedure similar to that employed in British Columbia (p. 37). This particular recommendation was not adopted, and the legislature made the choice to maintain summary judgment as the accessible procedure.

41. Many of the Osborne Report's recommendations were taken up and implemented in 2010. As noted above, the amendments codify the proportionality principle and provide for efficient adjudication when a conventional trial is not required. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case.

42. Rule 20.04 now reads in part:[8]

(2) [General] The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

43. The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue <u>for</u> trial" to asking whether there is a "genuine issue <u>requiring</u> a trial". The new rule, with its enhanced factfinding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

[8] The full text of Rule 20 is attached as an Appendix.

44. The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.[9]

45. These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

46. I will first consider when summary judgment can be granted on the basis that there is "no genuine issue requiring a trial" (Rule 20.04(2)(a)). Second, I will discuss when it is against the "interest of justice" for the new fact-finding powers in Rule 20.04(2.1) to be used on a summary judgment motion. Third, I will consider the power to call oral evidence and, finally, I will lay out the process to be followed on a motion for summary judgment.

(1) When is There no Genuine Issue Requiring a Trial?

47. Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

48. The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

49. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

50. These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the

[9] As fully canvassed by the Court of Appeal, the powers in Rule 20.04(2.1) were designed specifically to overrule a number of long-standing appellate decisions that had dramatically restricted the use of the rule; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

51. Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

(2) The Interest of Justice

52. The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

53. To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself, "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

54. The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

55. The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

56. While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers — and the purpose of the amendments — would be frustrated.

57. On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and 20.04(2.2) can provide an equally valid, if less extensive, manner of fact finding.

58. This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

59. In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

60. The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

(3) <u>The Power to Hear Oral Evidence</u>

61. Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

62. The Court of Appeal suggested the motion judge should only exercise this power when

> (1)Oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) Any such issue is narrow and discrete — *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

This is useful guidance to ensure that the hearing of oral evidence does not become unmanageable; however, as the Court of Appeal recognized, these are not absolute rules.

63. This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can

be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

64. Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

65. Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

(4) The Roadmap/Approach to a Motion for Summary Judgment

66. On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

67. Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

68. While summary judgment *must* be granted if there is no genuine issue requiring a trial,[10] the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary.[11] The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of

[10] Rule 20.04(2): "The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial . . .".

[11] Rule 20.04(2.1): "In determining . . . whether there is a genuine issue requiring a trial . . . if the determination is being made by a judge, the judge may exercise any of the following powers . . . 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence." Rule 20.04(2.2): "A judge may . . . order that oral evidence be presented . . .".

such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

C. Tools to Maximize the Efficiency of a Summary Judgment Motion

(1) Controlling the Scope of a Summary Judgment Motion

69. The *Ontario Rules* and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

70. The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

71. Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

72. I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

73. A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

(2) Salvaging a Failed Summary Judgment Motion

74. Failed, or even partially successful, summary judgment motions add — sometimes astronomically — to costs and delay. However, this risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction.

75. Rule 20.05(1) and (2) provides in part:

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just . ..

76. Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

77. These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent. In my view, the summary trial model would also be available further to the broad powers granted a judge under Rule 20.05(2).

78. Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

79. While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.

D. Standard of Review

80. The Court of Appeal concluded that determining the appropriate test for summary judgment — whether there is a genuine issue requiring a trial — is a legal question, reviewable on a correctness standard, while any factual determinations made by the motions judge will attract deference.

81. In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned, absent palpable and overriding error, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

82. Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.

83. Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

84. Of course, where the motion judge applies an incorrect principle of law, or errs with regard to a purely legal question, such as the elements that must be proved for the plaintiff to make out her cause of action, the decision will be reviewed on a correctness standard (*Housen v. Nikolaisen*, at para. 8).

E. Did the Motion Judge Err by Granting Summary Judgment?

85. The motion judge granted summary judgment in favour of the Mauldin Group. While the Court of Appeal found that the action should not have been decided by summary judgment, it nevertheless dismissed the appeal. Hryniak argues this constituted "prospective overruling" but, in light of my conclusion that the motion judge was entitled to proceed by summary judgment, I need not consider these submissions further. For the reasons that follow, I am satisfied that the motion judge did not err in granting summary judgment.

(1) <u>The Tort of Civil Fraud</u>

86. The action underlying this motion for summary judgment was one for civil fraud brought against Hryniak, Peebles, and Cassels Brock.

87. As discussed in the companion *Bruno Appliance* appeal, the tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

(2) <u>Was There a Genuine Issue Requiring a Trial?</u>

88. In granting summary judgment to the Mauldin Group against Hryniak, the motion judge did not explicitly address the correct test for civil fraud but, like the Court of Appeal, I am satisfied that his findings support that result.

89. The first element of civil fraud is a false representation by the defendant. The Court of Appeal agreed with the motion judge that "[u]nquestionably, the Mauldin group was induced to invest with Hryniak because of what Hryniak said to Fred Mauldin" at the meeting of June 19, 2001 (at para. 158), and this was not disputed in the appellant's factum.

90. The motion judge found the requisite knowledge or recklessness as to the falsehood of the representation, the second element of civil fraud, based on Hryniak's lack of effort to ensure that the funds would be properly invested and failure to verify that the eventual end-point of the funds, New Savings Bank, was secure. The motion judge also rejected the defence that the funds were stolen, noting Hryniak's feeble efforts to recover the funds, waiting some 15 months to report the apparent theft of US$10.2 million.

91. The motion judge also found an intention on the part of Hryniak that the Mauldin Group would act on his false representations, the third requirement of civil fraud. Hryniak secured a US$76,000 loan for Fred Mauldin and conducted a "test trade", actions which, in the motion judge's view, were "undertaken . . . for the purpose of dissuading the Mauldin group from demanding the return of its investment" (para. 113). Moreover, the motion judge detailed Hryniak's central role in the web of deception that caused the Mauldin Group to invest its funds and that dissuaded them from seeking their return for some time after they had been stolen.

92. The final requirement of civil fraud, loss, is clearly present. The Mauldin Group invested US$1.2 million and, but for a small return of US$9,600 in February 2002, lost its investment.

93. The motion judge found no credible evidence to support Hryniak's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. He made no palpable and overriding error in granting summary judgment.

(3) Did the Interest of Justice Preclude the Motion Judge from Using his Powers Under Rule 20.04?

94. The motion judge did not err in exercising his fact-finding powers under Rule 20.04(2.1). He was prepared to sift through the detailed record, and was of the view that sufficient evidence had been presented on all relevant points to allow him to draw the inferences necessary to make dispositive findings under Rule 20. Further, while the amount involved is significant, the issues raised by Hryniak's defence were fairly straightforward. As the Court of Appeal noted, at root, the question turned on whether Hryniak had a legitimate trading program that went awry when the funds were stolen, or whether his program was a sham from the outset (para. 159). The plaintiffs are a group of elderly American investors and, at the return date of the motion, had been deprived of their funds for nearly a decade. The record was sufficient to make a fair and just determination and a timely resolution of the matter was called for. While the motion was complex and expensive, going to trial would have cost even more and taken even longer.

95. Despite the fact that the Mauldin group's claims against Peebles and Cassels Brock had to proceed to trial, there is little reason to believe that granting summary judgment against Hryniak would have a prejudicial impact on the trial of the remaining issues. While the extent of the other defendants' involvement in the fraud requires a trial, that matter is not predetermined by

the conclusion that Hryniak clearly was a perpetrator of the fraud. The motion judge's findings speak specifically to Hryniak's involvement and neither rely upon, nor are inconsistent with, the liability of others. His findings were clearly supported by the evidence. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

Conclusion

96. Accordingly, I would dismiss the appeal, with costs to the respondents.

Hryniak v Mauldin – notes & questions

Hryniak was the appeal of *Combined Air Mechanical Services v. Flesch,* in which the OCA addressed five cases all involving the new summary judgment rule (R. 20).

While the term "proportionality" is probably already familiar to you from Constitutional law, and while the concept appears in R. 1.04(1.1) (see para. 1), the term has not been invoked frequently in the analysis of SJ. You can expect to see a lot more of it in civil procedure, following this decision.

In the opening paragraphs, the court discusses other related rationales for the enhanced power of the judge under the new R.20. You can expect to see these rationales invoked frequently in the coming years, in judgments explaining the rule's application, and you would be well-advised to cite these rationales yourself, when justifying a MSJ.

The court does not devote much time to the structure of burden-shifting on a MSJ. As set out in Irving Ungerman Ltd. v. Galanis (1991), 1991 CanLII 7275 (ON CA):

> The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists.

Under this scheme, what is the burden on the party responding to a MSJ?

You will not encounter this burden-shifting structure often in other reading for first-year subjects, but it will reappear in other doctrinal areas in upper-year courses. You might compare it to the structure that applies when a party seeks to benefit from a legal presumption. For example, if a party in tort argues *res ipse loquitur*, does that establish the plaintiff's claim or does it simply create a presumption, which the defendant may seek to rebut?

More generally, on a MSJ, the court should grant SJ only when the moving party would be entitled to SJ in its favour, if the facts as pleaded by the adverse party were correct. The "mini-trial" procedure now allows for more room for fact-finding where there are ambiguities that the court must resolve.

* * *

According to the form of SJ available before 1985, who could move for SJ? On what kinds of claims? Why, would you guess, the procedure was limited in this way? How did R. 20, in its original version, change this?

The previous version of R. 20 provided for SJ only if there was "no genuine issue for trial." As the court explains this requirement, what did the standard of "genuine issue" mean? What kind of evidence could be used to make the determination? What kind of evidence could not be used? What kinds of evidentiary findings were allowed, and what kinds were prohibited?

While the losing party may appeal a court's decision to *grant* SJ, that party may also appeal a SJ. That is, a SJ is a verdict on the merits, and may be used for purposes of *res judicata*. Why (would you guess) that when the losing party does appeal, it is rarely an appeal of the judgment, and almost always an appeal of the decision to grant SJ?

Assume that a dispute ends in a grant of SJ, which the losing party does not appeal. What binding effect, via *res judicata*, can flow from the grant of SJ?

The revised language, specifying that there must be "no genuine issue *requiring* a trial," is "more than mere semantics" (para. 43). What does this new standard mean?

The trial judge is exposed to the parties and the evidence in a way that an appellate judge is not. What are the main differences? In your view, does this explain why legal issues are appealed on a standard of correctness, but facts on a standard of reasonableness?

Until now, SJ has involved resolution on the basis of paper evidence – documents, affidavits, transcripts, etc. How could that affect the judge's understanding of the events and disputed facts?

What is the "trial narrative" and what bearing does it have on the decision whether to grant SJ? Who controls the trial narrative? What form does it take when the judge decides to grant SJ?

The Court devotes a great amount of attention to the "full appreciation" test. Full appreciation of what? In your view, are the demands of this test sufficiently clear that the test can be applied reliably, or is this a way of saying, "I know it when I see it, and I can't be more specific than that in advance"? In other words – assuming that "full appreciation" is a standard, not a test – is it an acceptable standard or one that will lead to confusion and uncertainty? Would it be better to have a test?

According to this standard, when is a trial required?

On the analysis presented here, if a party moves for SJ before discovery is complete, what should the court do?

Assume that the court does not grant SJ. Is there anything else to be achieved under the provisions in R. 20?

CAREY CANADA INC. (CAREY-CANADIAN MINES LTD.) et al. v. HUNT, T & N plc and FLINTKOTE MINES LIMITED; FLINTKOTE MINES LIMITED et al. v. HUNT, T & N plc and CAREY CANADA INC.

Supreme Court of Canada

Lamer C.J.C., Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

Heard: February 22, 1990
Judgment: October 4, 1990
Docket: Nos. 21508, 21536

The judgment of the court was delivered by *Wilson J.*:

1 The issue raised in these appeals is whether it is open to the respondent to proceed with an action against the appellants for the tort of conspiracy. In particular, the appeals raise the question whether those portions of the respondent's statement of claim in which he alleges that the appellants conspired to withhold information concerning the effects of asbestos fibres disclose a reasonable claim within the meaning of R. 19(24)(*a*) of the British Columbia Rules of Court.

1. The Facts

2 The respondent, George Hunt, is a retired electrician who alleges that he was exposed to asbestos fibres over the course of his employment. Mr. Hunt has brought an action against Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcox & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulation Ltd., Johns-Manville Amiante Canada Inc., Lac D'Amiante du Québec Ltée., National Asbestos Mines Limited, The Quebec Asbestos Mining Association and T & N plc ("the defendants").

3 Mr. Hunt alleges that the defendants were involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. He alleges that after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres. In addition to suing Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N in negligence, Mr. Hunt alleges that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma.

4 The relevant portions of Mr. Hunt's statement of claim read as follows:

> 16. At various times, the particulars of which are well known to the defendants, including the period between 1940 and 1967, the defendants mined and processed asbestos and designed, manufactured, packaged, advertised, promoted, distributed and sold a variety of products containing asbestos fibres (the "Products"), the particulars of which are also well known to the defendants.

> 17. After about 1934 the defendants knew or ought to have known that the asbestos fibres contained in the Products could cause diseases, including cancer and asbestosis, in those who worked with or were otherwise exposed to those fibres.
>
> 18. After about 1934, some or all of the defendants conspired with each other with the predominant purpose of injuring the plantiff [sic] and others who would be exposed to the asbestos fibres in the Products, by preventing this knowledge becoming public knowledge and, in particular, by preventing it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products.
>
> 19. Alternatively, after about 1934, some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff and others who would be exposed to the asbestos fibres in the Products would result from the defendants' acts.
>
> 20. The defendants' acts in furtherance of the conspiracy referred to in paragraphs 18 and 19 include:
>
> (a) fraudulently, deceitfully or negligently suppressing, distorting and misrepresenting the results of medical and scientific research on the disease-causing effects of asbestos;
>
> (b) fraudulently, deceitfully or negligently misrepresenting the disease-causing effects of asbestos by disseminating incorrect, incomplete, outdated, misleading and distorted information about those effects;
> (c) fraudulently, deceitfully or negligently attempting to discredit doctors and scientists who claimed that asbestos caused disease;
>
> (d) fraudulently, deceitfully or negligently marketing and promoting the Products without any or adequate warning of the dangers they posed to those exposed to them; and
>
> (e) fraudulently, deceitfully or negligently attempting to influence to their benefit government regulation of the use of asbestos and the Products.

5 Carey Canada Inc. brought an application before the Supreme Court of British Columbia under R. 19(24)(*a*) of the British Columbia Rules of Court seeking to have the action against it, which was based solely on the allegations of conspiracy, dismissed on the basis that it disclosed no reasonable claim. Rule 19(24) provides:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence as the case may be, or
(b) it is unnecessary, scandalous, frivolous or vexatious, or
(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
(d) it is otherwise an abuse of the process of the court,

and may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client.

2. The Courts Below

(a) Supreme Court of British Columbia

6 Hollinrake J. accepted Carey Canada's submission that the only damage that could be the subject of a conspiracy action was "direct damage". Although counsel's memorandum summarizing Hollinrake J.'s oral reasons for judgment does not explain precisely what he understood the term "direct damage" to mean, it would appear that he meant damage suffered by a plaintiff that flows directly from acts aimed specifically at that plaintiff. Hollinrake J. stated:

> Dealing with the issue of direct or indirect damage, in the first kind of conspiracy Estey J. refers to the "predominant purpose" of the defendants' conduct [see *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471]. I think this does import direct damage. The second type of conspiracy refers to conduct "directed towards the plaintiff". I think this imports direct damage. I think these conclusions are justified by what happened in *Can. Cement LaFarge Ltd.*

Hollinrake J. therefore allowed the motion and dismissed the action against Carey Canada as disclosing no reasonable claim.

(b) British Columbia Court of Appeal

7 By order of the British Columbia Court of Appeal (dated 30th March 1989), Flintkote Mines Limited and T & N plc were named as respondents to the appeal in the Court of Appeal.

8 Anderson J.A. (Macfarlane and Esson JJ.A. concurring) allowed the appeal [[1989] B.C.W.L.D. 1516 (sub nom. *Hunt v. T & N plc*)] and set aside Hollinrake J.'s order. Anderson J.A. explained his reasons:

> (1) The cases relied upon by counsel for the respondent Carey Canada Inc. and the learned trial judge to the effect that there is no such tort as a conspiracy to injure by unlawful means where the damage is indirect, all relate to the area of competition in the marketplace and to labour-management disputes. They may not be applicable to the very different circumstances alleged in this case and to the very different social considerations.
>
> (2) The arguments as to law and fact are intricate and complex and should be dealt with at trial after all the evidence is adduced. At this stage of the proceedings it is impossible to reach the conclusion that there is no cause of action in fact or law: see *Minnes v. Minnes* (1962), 39 W.W.R. 112 at 122, 34 D.L.R. (2d) 497 (B.C.C.A.).

9 Esson J.A. (Anderson and Macfarlane JJ.A. agreeing) gave additional reasons stressing that the "language of predominant purpose and direct damage" in *Can. Cement LaFarge Ltd.* had arisen in cases that involved competition and pure economic loss. In Mr. Hunt's case, however,

the context was very different. Mr. Hunt had suffered personal injury and claimed that by conspiring to suppress information the defendants had created a foreseeable risk of causing him the harm which he in fact suffered. It was not possible at this stage in the proceedings to determine that the damage was not sufficiently direct to be able to support an action rooted in the tort of conspiracy. Esson J.A. specifically declined to embark upon a detailed consideration of the law of conspiracy, noting:

> It has not generally been part of our tradition and, given the complexity and novelty of some of the issues raised in this case, it would I think be particularly undesirable to render such decisions, as it were, in a vacuum. For those reasons, as well as the reasons given by Mr. Justice Anderson, I agree in allowing the appeal.

3. The Issues

10 The issues that arise in this appeal are:

11 1. *In what circumstances may a statement of claim (or portions of it) be struck out?*

12 2. Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

4. Analysis

13 **(1) In What Circumstances May a Statement of Claim be Struck Out?**

14 Carey Canada's motion to have the action dismissed was made pursuant to R. 19(24)(*a*) of the British Columbia Rules of Court. This rule stipulates that a court may strike out any part of a statement of claim that "discloses no reasonable claim". The rules of practice with respect to striking out a statement of claim are similar in other provinces. In Ontario, for example, R. 21.01 of the Rules of Civil Procedure states:

> 21.01 (1) A party may move before a judge,
>
> (*a*) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial savings of costs; or
>
> (*b*) *to strike out a pleading on the ground that it discloses no reasonable cause of action* or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> (2) No evidence is admissible on a motion,
>
> (*a*) under clause (1)(*a*), except with leave of a judge or on consent of the parties;
>
> (*b*) under clause (1)(*b*). [emphasis added]

15 Rule 19(24) of the British Columbia Rules of Court and analogous provisions in other provinces are the result of a "codification" of the court's power under its inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action: see McLachlin and Taylor, British Columbia Practice, 2nd ed. (1979), vol. 1, p. 19-71. This process of codification first took place in England shortly after the Supreme Court of Judicature Act, 1873 [36 & 37 Vict, c. 66], was enacted. It is therefore of some interest to review the interpretation the courts in England have given to their rules relating to the striking out of a statement of claim.

. . .

(b) Canada

(i) Ontario and British Columbia Courts of Appeal

25 In Canada, provincial courts of appeal have long had to grapple with the very same issues concerning the rules with respect to statements of claim that courts in England have dealt with for over a century. As noted earlier, the rules of practice in this country are to a large extent modelled on England's rules of practice. It comes as no surprise, therefore, that the test Canadian courts of appeal have adopted is in essence the same one that the courts in England favour.

Ontario

26 In Ontario, for example, the Court of Appeal dealt with R. 124 (the predecessor to R. 21.01) in *Ross v. Scottish Union and National Ins. Co.* (1920), 47 O.L.R. 308, 53 D.L.R. 415 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4, and read as follows:
124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

27 In *Ross*, Magee J.A. embraced the "plain and obvious" test developed in England, stating at p. 316:

> That inherent jurisdiction is partly embodied in our Rule 124, which allows pleadings to be struck out as disclosing no reasonable cause of action or defence, and thereby, in such case, or if the action or defence is shewn to be vexatious or frivolous, the action may be stayed or dismissed or judgment be entered accordingly. *The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence*. [emphasis added]

Magee J.A. went on to note at p. 317:

> To justify the use of Rule 124, a statement of claim should not be merely demurrable, but it should be manifest that it is something worse, so that it will not be curable by amendment: *Dadswell v. Jacobs* (1887), 34 Ch. D. 278, 281; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: *Boaler v. Holder* (1886), 54 T.L.R. 298.

28 At an early date, then, the Ontario Court of Appeal had modelled its approach to R. 124 on the approach that had been consistently favoured in England. And over time the Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything other than the clearest of cases. As Laidlaw J.A. put it in *R. v. Clark*, [1943] O.R. 501 at 515, [1943] 3 D.L.R. 684 (C.A.):
The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: *Evans v. Barclay's Bank et al.*, [1924] W.N. 97. But if it be made clear to the Court that an action

is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained.

29 More recently, in *Gilbert Surgical Supply Co. v. F.W. Horner Ltd.*, [1960] O.W.N. 289 at 289-90, 34 C.P.R. 17 (C.A.), Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

30 Thus, the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

British Columbia

31 In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in *Minnes v. Minnes* (1962), 39 W.W.R. 112 at 122-23, 34 D.L.R. (2d) 497 (B.C.C.A.), Tysoe J.A. observed:

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, R. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. *So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out*. If the action involves investigation of serious questions of law or questions of general importance, or if the facts are to be known before rights are definitely decided, the Rule ought not to be applied. [emphasis added]

For his part Norris J.A. noted at p. 116 (agreeing with Tysoe J.A.):

> I might add that upon the motion, with respect, *it was not for the learned trial judge as it is not for this court to consider the issues between the parties as they would be considered on trial*. All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed from that pleading with such amendments as might reasonably be made, a proper case to be tried. [emphasis added]

The law as stated in *Minnes v. Minnes* was recently reaffirmed in *McNaughton v. Baker*, [1988] 4 W.W.R. 742, 25 B.C.L.R. (2d) 17 at 23, 28 C.P.C. (2d) 49 (C.A.), per McLachlin J.A. Similarly, Anderson and Esson JJ.A. relied on *Minnes v. Minnes* in this appeal.

32 Once again then the "plain and obvious" test has been firmly embraced. The British Columbia Court of Appeal has confirmed that the summary proceedings available under the rule in question do not afford an appropriate forum in which to engage in a detailed examination of the strengths and weaknesses of the plaintiff's case. The sole question is whether, assuming that

all the facts the plaintiff alleges are true, the plaintiff can present a question "fit to be tried". The complexity or novelty of the question that the plaintiff wishes to bring to trial should not act as a bar to that trial taking place.

(ii) Supreme Court of Canada

33 While this court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the court in *A.G. Can. v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735 at 740, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.], stated:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co*.

34 I had occasion to affirm this proposition in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1 [Fed.]. At pp. 486-87 I provided the following summary of the law in this area (with which the rest of the court concurred):

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?"

And at p. 477 I observed:

> It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. *The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs*. [emphasis added]

35 Most recently, in *Dumont v. Can. (A.G.)*, [1990] 1 S.C.R. 279, [1990] 4 W.W.R. 127, 67 D.L.R. (4th) 159, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

36 Thus, the test in Canada governing the application of provisions like R. 19(24)(*a*) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it

contains a radical defect ranking with the others listed in R. 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under R. 19(24)(*a*).

37 The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even though it may call for a complex or novel application of the tort of conspiracy.

(2) Should Mr. Hunt's Allegations Based on the Tort of Conspiracy Be Struck from his Statement of Claim?

38 In the last decade the tort of conspiracy has received a considerable amount of attention. In England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt (*Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.*, [1989] 3 W.L.R. 563 at 593, per Slade L.J.):

> If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious conspiracy actionable at the suit of C exists *unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B.* This proposition is established by five decisions at the highest level: *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.*, [1892] A.C. 25; *Quinn v. Leathem*, [1901] A.C. 495; *Sorrell v. Smith*, [1925] A.C. 700; *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 and *Lonrho Ltd. v Shell Petroleum Co. Ltd. (No. 2)*, [1982] A.C. 173. [emphasis added]

Courts in England have, however, encountered greater difficulty in stating with precision the applicable principles governing situations in which unlawful means are employed. In particular, they have struggled to decide whether the plaintiff must establish, not just that the defendants used means that were unlawful and resulted in harm to the plaintiff, but also that the defendants actually intended to harm the plaintiff.

39 In *Lonrho v. Shell Petroleum Co.*, [1982] A.C. 173, [1980] 1 W.L.R. 627, the House of Lords dealt with a consultative case stated by arbitrators in which it was asked to consider whether the tort of conspiracy could be extended to embrace a situation where the agreement in question resulted in a contravention of penal law (unlawful means) but did not include an intention to injure the plaintiff. In the process of deciding whether the tort should be so extended Lord Diplock noted at pp. 188-89:

> My Lords, conspiracy as a criminal offence has a long history. It consists of "the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it." I cite from Viscount Simon L.C.'s now classic speech in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435, 439. Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the

> cause of action is damage to the plaintiff; so long as it remains unexecuted the agreement which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.

40 Lord Diplock went on to observe that he was of the view that the rationale that had apparently fueled the development of the tort in the late 19th and early 20th centuries, namely, that "a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise" (see *Mogul S.S. Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 at 616, per Bowen L.J.) was somewhat anachronistic in light of modern commercial developments. Nevertheless he did not feel that this meant that the tort could now be dispensed with. He said at p. 189:

> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in *Quinn v. Leathem*, [1901] A.C. 495, and accepted as good law in the *Crofter* case [1924] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

41 Having set out this groundwork and having thereby confirmed that the tort of conspiracy was applicable in circumstances where the defendants entered into an agreement the predominant purpose of which was to injure the plaintiff, Lord Diplock turned to the question whether the tort should be extended beyond these confines. He concluded at p. 189:

> This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already anomalous tort beyond those narrow limits that are all that common sense and the application of the legal logic of the decided cases require.
>
> My Lords, my choice is unhesitatingly the same as that of Parker J. and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

42 Lord Diplock's observations made clear that in order to succeed with the tort of conspiracy in England a plaintiff would have to demonstrate that the purpose for which parties acted in accordance with their agreement was to harm the plaintiff. The English Court of Appeal has recently had an opportunity to consider Lord Diplock's judgment in *Lonrho* (see *Metall und*

Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., supra) and has confirmed at p. 604 that "the House plainly intended the presence of a predominant intention to injure to be the touchstone of an actionable conspiracy." The Court of Appeal continued:

> Where the predominant intention to injure is absent but the defendants pursuant to agreement commit torts against the plaintiff, the House held, we conclude, that common sense and the legal logic of the decided cases are satisfied if the plaintiff is denied a remedy in conspiracy and left to sue on the substantive torts.
>
> Thus, regardless of whether the alleged conspirators used lawful or unlawful means, the law in England required the plaintiff to establish that the defendants entered into the agreement with the predominant purpose of injuring the plaintiff.

43 Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in *Lonrho*. Indeed, this court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in *Lonrho* in *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, supra. Justice Estey stated at p. 468:

> The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases in which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff.

44 This passage made clear that this court agreed with the House of Lords that where a plaintiff alleges that the defendants entered into an agreement whose predominant purpose was to injure the plaintiff and where the plaintiff alleges that he or she has in fact suffered damage as a result of the agreement, then regardless of the lawfulness of the means that the defendants are alleged to have used to implement the agreement the plaintiff will have made out a cognizable claim in the tort of conspiracy.

45 But what of situations in which the plaintiff alleges that there was an agreement that involved the use of unlawful means and that resulted in the plaintiff's suffering damage? Must the plaintiff also establish that the predominant purpose of the agreement was to injure him or her? It is in answering this question that Estey J. chose to follow a somewhat different path from Lord Diplock. Estey J. was of the view that it was not appropriate to go as far as the House of Lords had gone in precluding the action. He said at pp. 471-72:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) *where the conduct of the defendants is unlawful*, the conduct is directed towards the plaintiff (alone or together with others), and *the defendants should know in the circumstances that injury to the plaintiff is likely to and does result*. In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause

> injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. [emphasis added]

46 Estey J.'s summary of the law in Canada suggests that in cases falling into the second category it may not be necessary to prove actual intent. As G.H.L. Fridman has noted in The Law of Torts in Canada (1990), vol. 2, at p. 265:

> The difference between the English and Canadian formulations of the tort of conspiracy lies in the way the intent of the defendants is expressed. The language of Lord Diplock seems to indicate that the necessary intent should be actual. That of Estey J. suggests that it may be possible for a court to infer an intent to injure from the circumstances even if the defendants deny they acted with any such intent.

Fridman goes on to observe at pp. 265-66:

> In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the pre- dominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.

In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

47 I note that in this appeal Mr. Hunt was clearly fully aware of Estey J.'s observation in *Can. Cement LaFarge Ltd.*, when he prepared paras. 18 and 19 of his statement of claim. Paragraph 18 of his statement of claim follows faithfully the first proposition that Estey J. put forward at p. 471, alleging that some or all of the defendants "conspired with each other with the predominant purpose of injuring" Mr. Hunt. Paragraph 19 of the statement of claim presents an alternative argument that is faithful to the wording of Estey J.'s second proposition, alleging that "some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff" would result. If there is a defect in Mr.Hunt's statement of claim, it is certainly *not* that paras. 18 or 19 fail to follow the language of this court's most recent pronouncement on the conditions that must be met in order to ground a claim in the tort of conspiracy. In other words, given this court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim, it is not "plain and obvious" that the plaintiff's statement of claim fails to disclose a reasonable claim.

48 The defendants contend, however, that this court's recent pronouncements, as well as those

of courts in England, make clear that the tort of conspiracy cannot be invoked outside a commercial law context and that it certainly cannot be invoked in personal injury litigation. They point out that in *Lonrho*, supra, at p. 189, Lord Diplock was not prepared to extend the tort to cover the facts of the case before him. They em phasize that Estey J. displayed a measure of sympathy for Lord Diplock's reluctance to extend the scope of the tort when he stated at p. 473 of *Can. Cement LaFarge Ltd.*:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho, supra*, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

49 Finally, the defendants point to my observations in *Frame v. Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, [1988] 1 C.N.L.R. 152, 42 D.L.R. (4th) 81, 42 C.C.L.T. 1, 23 O.A.C. 84, 78 N.R. 40, where I had occasion to consider whether the tort of conspiracy might be extended to cover a case in which a father was suing his former wife for denying him access to his children. Although I was in dissent in the final result, the court agreed with my observations about the tort of conspiracy (see La Forest J. at p. 109). The defendants place a good deal of weight on my suggestion that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context" (at p. 124). I concluded that even though the tort could in theory be extended to the facts of *Frame*, it was not desirable to extend the tort to the custody and access context.

50 Not surprisingly, the defendants contend that it would be equally inappropriate to extend the tort of conspiracy to cover the facts of this case. The difficulty I have, however, is that in this appeal we are asked to consider whether the allegations of conspiracy should be struck from the plaintiff's statement of claim, not whether the plaintiff will be successful in convincing a court that the tort of conspiracy should extend to cover the facts of this case. In other words, the question before us is simply whether it is "plain and obvious" that the statement of claim contains a radical defect.

51 Is it plain and obvious that allowing this action to proceed amounts to an abuse of process? I do not think so. While there has clearly been judicial reluctance to extend the scope of the tort beyond the commercial context, I do not think this court has ever suggested that the tort could not have application in other contexts. While Estey J. expressed the view in *Can. Cement LaFarge Ltd.*, supra, at p. 473, that the action had lost much of its usefulness, and while I noted in *Frame v. Smith*, at pp. 124-25, that some have even suggested that consideration should be given to abolishing the tort entirely (see Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C. L. Rev. 229, at p. 254), we both affirmed the ongoing existence of the tort at the date of these judgments. In my view, it would be highly inappropriate for this court to deny a litigant who is capable of fitting his allegations into Estey J.'s two-pronged summary of the law on civil conspiracy the opportunity to persuade a court that the facts are as alleged and that the tort of conspiracy should be held to apply on these facts. While courts

should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

52 I note that in *Frame v. Smith*, at p. 126, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination" [p. 125]. But in the appeal now before us it seems to me much less obvious that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

53 The issues that will arise at the trial of the plaintiff's action in conspiracy will unquestionably be difficult. The plaintiff may have to make complex submissions about whether the evidence establishes that the defendants conspired either with a view to causing him harm or in circumstances where they should have known that their actions would cause him harm. He may well have to make novel arguments concerning whether it is enough that the defendants knew or ought to have known that a class of which the plaintiff was a member would suffer harm. The trial judge might conclude, as some of the defendants have submitted, that the plaintiff should have sued the defendants as joint tortfeasors rather than alleging the tort of conspiracy. But this court's statements in *Inuit Tapirisat* and *Operation Dismantle Inc.*, as well as decisions such as *Dyson* and *Drummond-Jackson*, make clear that none of these considerations may be taken into account on an application brought under R. 19(24) of the British Columbia Supreme Court Rules.

54 In my view, Anderson and Esson JJ.A. were entirely correct in suggesting that it should be left to the trial judge to ascertain whether the plaintiff can establish that the predominant purpose of the alleged conspiracy was to injure the plaintiff. It seems to me that they were also correct in suggesting that it should be left to the trial judge to consider the merits of any arguments that may be advanced to the effect that the "predominant purpose" test should be modified in the context of this case. Similarly, it seems to me that the argument that some of the defendants advanced, to the effect that Quebec's Business Concerns Records Act, R.S.Q. 1977, c. D-12, might limit the range of information that the defendants could produce at trial, is a matter that is not relevant to the question whether the plaintiff's statement of claim discloses a reasonable claim.

55 The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical

that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

56 Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in para. 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.

57 In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff *alleges* that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the *facts* as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants') submission that "[u]pon proof of the commission of the tortious acts alleged" in para. 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

58 This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This is a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

59 In the result the appellants have not demonstrated that those portions of the respondent's statement of claim which allege the tort of conspiracy fail to disclose a reasonable claim. They should not therefore be struck out under R. 19(24)(*a*) of the British Columbia Rules of Court.

5. Disposition

60 The appeal should be dismissed with costs.

Appeal dismissed.

I.3. When to Litigate: Limitation Periods

Limitations Act, 2002

S.O. 2002, CHAPTER 24
Schedule B

Last amendment: 2010, c. 16, Sched. 4, s. 27.

CONTENTS

DEFINITIONS AND APPLICATION

Definitions

1. In this Act,

…

"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission; ("réclamation")

Application

2. (1) This Act applies to claims pursued in court proceedings other than,

(a) proceedings to which the *Real Property Limitations Act* applies;

(b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;

(c) proceedings under the *Judicial Review Procedure Act*;

(d) proceedings to which the *Provincial Offences Act* applies;

(e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and

(f) proceedings based on equitable claims by aboriginal peoples against the Crown. 2002, c. 24, Sched. B, s. 2 (1).

Exception, aboriginal rights

(2) Proceedings referred to in clause (1) (e) and (f) are governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed. 2002, c. 24, Sched. B, s. 2 (2).

…

BASIC LIMITATION PERIOD

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

Demand obligations

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made. 2008, c. 19, Sched. L, s. 1.

Same

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004. 2008, c. 19, Sched. L, s. 1.

Minors

6. The limitation period established by section 4 does not run during any time in which the person with the claim,

(a) is a minor; and

(b) is not represented by a litigation guardian in relation to the claim. 2002, c. 24, Sched. B, s. 6.

Incapable persons

7. (1) The limitation period established by section 4 does not run during any time in which the person with the claim,

(a) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and

(b) is not represented by a litigation guardian in relation to the claim. 2002, c. 24, Sched. B, s. 7 (1).

Presumption

(2) A person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved. 2002, c. 24, Sched. B, s. 7 (2).

Extension

(3) If the running of a limitation period is postponed or suspended under this section and the period has less than six months to run when the postponement or suspension ends, the period is extended to include the day that is six months after the day on which the postponement or suspension ends. 2002, c. 24, Sched. B, s. 7 (3).

Exception

(4) This section does not apply in respect of a claim referred to in section 10. 2002, c. 24, Sched. B, s. 7 (4).

Litigation guardians

8. If a person is represented by a litigation guardian in relation to the claim, section 5 applies as if the litigation guardian were the person with the claim. 2002, c. 24, Sched. B, s. 8.

…

Assaults and sexual assaults

10. (1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition. 2002, c. 24, Sched. B, s. 10 (1).

Presumption

(2) Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise. 2002, c. 24, Sched. B, s. 10 (2).

Same

(3) Unless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced. 2002, c. 24, Sched. B, s. 10 (3).

…

Successors

12. (1) For the purpose of clause 5 (1) (a), in the case of a proceeding commenced by a person claiming through a predecessor in right, title or interest, the person shall be deemed to have knowledge of the matters referred to in that clause on the earlier of the following:

1. The day the predecessor first knew or ought to have known of those matters.
2. The day the person claiming first knew or ought to have known of them. 2002, c. 24, Sched. B, s. 12 (1).

…

Acknowledgments

13. (1) If a person acknowledges liability in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgment was made. 2002, c. 24, Sched. B, s. 13 (1).

…

ULTIMATE LIMITATION PERIODS

Ultimate limitation periods

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section. 2002, c. 24, Sched. B, s. 15 (1).

General

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place. 2002, c. 24, Sched. B, s. 15 (2).

Exception, purchasers for value

(3) Despite subsection (2), no proceeding against a purchaser of personal property for value acting in good faith shall be commenced in respect of conversion of the property after the second anniversary of the day on which the property was converted. 2002, c. 24, Sched. B, s. 15 (3).

Period not to run

(4) The limitation period established by subsection (2) does not run during any time in which,

(a) the person with the claim,

(i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and

(ii) is not represented by a litigation guardian in relation to the claim;

(b) the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim; or

(c) the person against whom the claim is made,

(i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or

(ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage. 2002, c. 24, Sched. B, s. 15 (4).

Burden

(5) Subject to section 10, the burden of proving that subsection (4) applies is on the person with the claim. 2002, c. 24, Sched. B, s. 15 (5).

Day of occurrence

(6) For the purposes of this section, the day an act or omission on which a claim is based takes place is,

(a) in the case of a continuous act or omission, the day on which the act or omission ceases;

(b) in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs;

(c) in the case of an act or omission in respect of a demand obligation, the first day on which there is a failure to perform the obligation, once a demand for the performance is made. 2002, c. 24, Sched. B, s. 15 (6); 2008, c. 19, Sched. L, s. 2 (1). [*Note: in the*

2002 statute, this provision read: "in the case of an act or omission in respect of a demand obligation, the day on which the default occurs."]

Application, demand obligations

(7) Clause (6) (c) applies in respect of every demand obligation created on or after January 1, 2004. 2008, c. 19, Sched. L, s. 2 (2).

NO LIMITATION PERIOD

No limitation period

16. (1) There is no limitation period in respect of,

(a) a proceeding for a declaration if no consequential relief is sought;

(b) a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court;

(c) a proceeding to obtain support under the *Family Law Act* or to enforce a provision for support or maintenance contained in a contract or agreement that could be filed under section 35 of that Act;

(d) a proceeding to enforce an award in an arbitration to which the *Arbitration Act, 1991* applies;

(e) a proceeding under section 8 or 11.2 of the *Civil Remedies Act, 2001*;

(f) a proceeding by a debtor in possession of collateral to redeem it;

(g) a proceeding by a creditor in possession of collateral to realize on it;

(h) a proceeding arising from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether financially or otherwise;

(i) a proceeding to recover money owing to the Crown in respect of,

(i) fines, taxes and penalties, or

(ii) interest that may be added to a tax or penalty under an Act;

(j) a proceeding described in subsection (2) that is brought by,

(i) the Crown, or

(ii) a delivery agent under the *Ontario Disability Support Program Act, 1997* or the *Ontario Works Act, 1997*; or

(k) a proceeding to recover money owing in respect of student loans, medical resident loans, awards or grants made under the *Ministry of Training, Colleges and Universities Act*, the *Canada Student Financial Assistance Act* or the *Canada Student Loans Act*. 2002, c. 24, Sched. B, s. 16 (1); 2007, c. 13, s. 44 (1); 2010, c. 1, Sched. 14, s. 1.

…

Same

(3) Without limiting the generality of subsection (2), clause (1) (j) applies to proceedings in respect of claims for,

(a) the recovery of social assistance payments, student loans, awards, grants, contributions and economic development loans; and

…

Conflict with s. 15

(4) This section and section 17 prevail over anything in section 15. 2002, c. 24, Sched. B, s. 16 (4).

Undiscovered environmental claims

17. There is no limitation period in respect of an environmental claim that has not been discovered. 2002, c. 24, Sched. B, s. 17.

GENERAL RULES

…

Other Acts, etc.

19. (1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,

(a) the provision establishing it is listed in the Schedule to this Act; or

(b) the provision establishing it,

(i) is in existence on January 1, 2004, and

(ii) incorporates by reference a provision listed in the Schedule to this Act. 2002, c. 24, Sched. B, s. 19 (1); 2008, c. 19, Sched. L, s. 3.

…

Adding party

21. (1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding. 2002, c. 24, Sched. B, s. 21 (1).

…

Limitation periods apply despite agreements

22. (1) A limitation period under this Act applies despite any agreement to vary or exclude it, subject only to the exceptions in subsections (2) to (6). 2006, c. 21, Sched. D, s. 2.

Exception

(2) A limitation period under this Act may be varied or excluded by an agreement made before January 1, 2004. 2006, c. 21, Sched. D, s. 2.

Same

(3) A limitation period under this Act, other than one established by section 15, may be suspended or extended by an agreement made on or after October 19, 2006. 2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (1).

Same

(4) A limitation period established by section 15 may be suspended or extended by an agreement made on or after October 19, 2006, but only if the relevant claim has been discovered. 2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (1).

Same

(5) The following exceptions apply only in respect of business agreements:

1. A limitation period under this Act, other than one established by section 15, may be varied or excluded by an agreement made on or after October 19, 2006.

2. A limitation period established by section 15 may be varied by an agreement made on or after October 19, 2006, except that it may be suspended or extended only in accordance with subsection (4). 2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (1).

Definitions

(6) In this section,

"business agreement" means an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act, 2002*;

"vary" includes extend, shorten and suspend. 2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (2).

…

Transition

Definition

24. (1) In this section,

"former limitation period" means the limitation period that applied in respect of the claim before January 1, 2004. 2002, c. 24, Sched. B, s. 24 (1); 2008, c. 19, Sched. L, s. 5 (1, 2).

Application

(2) This section applies to claims based on acts or omissions that took place before January 1, 2004 and in respect of which no proceeding has been commenced before that date. 2002, c. 24, Sched. B, s. 24 (2); 2008, c. 19, Sched. L, s. 5 (4).

Former limitation period expired

(3) If the former limitation period expired before January 1, 2004, no proceeding shall be commenced in respect of the claim. 2002, c. 24, Sched. B, s. 24 (3); 2008, c. 19, Sched. L, s. 5 (3).

Former limitation period unexpired

(4) If the former limitation period did not expire before January 1, 2004 and if no limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, there is no limitation period. 2002, c. 24, Sched. B, s. 24 (4); 2008, c. 19, Sched. L, s. 5 (5).

Same

(5) If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:

1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.

2. If the claim was discovered before January 1, 2004, the former limitation period applies. 2002, c. 24, Sched. B, s. 24 (5); 2008, c. 19, Sched. L, s. 5 (3, 6, 7).

No former limitation period

(6) If there was no former limitation period and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after January 1, 2004, the following rules apply:

1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.

2. If the claim was discovered before January 1, 2004, there is no limitation period. 2002, c. 24, Sched. B, s. 24 (6); 2008, c. 19, Sched. L, s. 5 (3, 8).

Assault and sexual assault

(7) In the case of a claim based on an assault or sexual assault that the defendant committed, knowingly aided or encouraged, or knowingly permitted the defendant's agent or employee to commit, the following rules apply, even if the former limitation period expired before January 1, 2004:

1. If section 10 would apply were the claim based on an assault or sexual assault that took place on or after the January 1, 2004, section 10 applies to the claim, with necessary modifications.

2. If no limitation period under this Act would apply were the claim based on a sexual assault that took place on or after January 1, 2004, there is no limitation period. 2002, c. 24, Sched. B, s. 24 (7); 2008, c. 19, Sched. L, s. 5 (3).

Claims re payments alleged to be *ultra vires*

(7.1) For the purposes of this section, clause 45 (1) (g) of the *Limitations Act*, as it read immediately before its repeal, applies to a claim respecting amounts paid to the Crown or to another public authority for which it is alleged that no valid legal authority existed at the time of payment. 2008, c. 19, Sched. L, s. 5 (9).

Agreements

(8) This section is subject to any agreement to vary or exclude a limitation period that was made before January 1, 2004. 2002, c. 24, Sched. B, s. 24 (8); 2008, c. 19, Sched. L, s. 5 (10).

Conventional Limitations Problems

(I) The Onset of Discoverability
- **Ng v. Bank of Montreal, 2010 ONSC 5692**
- **Verombeck v. Jerome, 2015 ONSC 2272**

(II) Discoverability of Ongoing Problems
- **Swartz v. Verrette, (2011) 334 N.S.R. (2d) 147**
- **Johnson v. British Columbia Hydro & Power Authority, (1981) 123 D.L.R. (3d) 340**
  (B.C.S.C.)
- **Wong v. Rashidi**, 2011 BCCA 489
- **K & L Land Partnership v. Canada (Attorney General), 2014 BCSC 1701**

I. Time-Barred Claims and Reasonable Discoverability

These two cases illustrate typical applications of the limitations bar, first in an employment claim alleging negligence and wrongful dismissal, second in a negligence claim alleging medical malpractice.

In *Ng*, notice the plaintiff's reasons for asserting that her claim became reasonably discoverable on the date of her final severance payment (or during the course of her proceeding in the tribunal); why did the court select an earlier date? According to the court's analysis, how long past the limitations deadline did Ns. Ng wait to bring her legal claim?

Verombeck usefully shows how courts evaluate discoverability for med. mal. claims. Again, consider the parties' positions on the date when the claim accrued, and the court's reasons for endorsing the defendant's view. Notice the use of the mini-trial procedure there, and its value in helping the judge make credibility findings. Also notice what the court says about the use of expert evidence in med. mal. claims, and the reasons why no expert evidence was required here.

1. Ng v. Bank of Montreal, 2010 ONSC 5692

I. Motion for summary judgment

1 The Bank of Montreal ("BMO") seeks summary judgment dismissing Ms. Ng's wrongful dismissal and negligence action on the grounds that it is statute-barred or, alternatively, it is an abuse of process.

II. The record on the motion

A. The Bank's evidence

2 On January 16, 2007, the Bank of Montreal ("BMO"), gave the plaintiff, Rachel Ng, written notice terminating her employment as of that date. The severance package document advised the plaintiff that … "your severance of $18,686.00 will be disbursed as salary & benefit continuation between January 17, 2006 and June 1, 2007."

3 Ms. Ng retained Mr. Guiste as counsel. He wrote to BMO by letter dated January 25, 2006 (which should have been dated January 25, 2007) advising that Ms. Ng had suffered damages as a result of her termination and invited BMO to contact him "should you wish to resolve this short of litigation".

4 On January 26, 2007, Mr. Guiste filed a complaint by Ms. Ng under Part III of the *Canada Labour Code* against BMO with Human Resources Development Canada alleging unjust dismissal against BMO. The complaint registration form identified January 16, 2007 as the "last day worked for this employer". Ms. Ng signed the form. In her form Ms. Ng wrote that "employer has no cause to dismiss me".
[The parties proceeded through the tribunal; Ms. Ng sought to have the adjudicator, Mr. Cooper, recuse himself, stating that she believed he would not give her claim an impartial hearing; he refused to recuse himself; and Ms. Ng decided to withdraw her complaint and proceed with at law instead.]

12 Ms. Ng issued a Statement of Claim in this Court on March 25, 2009. Mr. Guiste was her counsel of record. In her Claim Ms. Ng sought general damages of $500,000 and alleged that "from October, 2001 until June, 2007 she was gainfully employed by the Defendant". Ms. Ng alleged that BMO had "negligently promoted [her] to the position of QA Analyst", and then "summarily dismissed [her] for poor work performance". Ms. Ng alleged that BMO had breached a duty of care to her by failing to provide her with proper training. Alternatively, Ms. Ng pleaded that she was wrongfully dismissed by BMO. …

B. Ms. Ng's evidence

14 Ms. Ng filed a responding affidavit on this motion in which she took three positions. First, she stated that she received the full amount of the severance payments which ran until June 1, 2007. Second, she noted that on her Record of Employment BMO recorded that the "last day for which paid" was June 1, 2007, i.e. the end of the severance package period. Finally, she contended that it was not until (some unspecified) time during the adjudication before Mr. Cooper "that evidence of the Defendant's negligence crystallized. I elected to exercise my right under the Code to seek a civil remedy which would make me whole."

C. BMO's Reply evidence

15 In response, BMO filed evidence that it is unable to generate a Record of Employment as long as a person continues to receive payments from the bank. A person is not eligible for employment insurance benefits until payments from the employer have ended.

III. Analysis

16 On this motion for summary judgment I must ascertain whether BMO, as the moving party, has discharged its burden of demonstrating that no genuine issue requiring a trial exists with respect to the plaintiff's claim: Rule 20.04(2) of the *Rules of Civil Procedure*.

17 Section 4 of the *Limitations Act, 2002*, establishes a two-year limitation period to claims of the sort asserted by Ms. Ng. Section 5(1) of that Act identifies the criteria to apply in ascertaining when a claim is discovered, and section 5(2) presumes that a person with a claim knew of the matters referred to in s. 5(1)(a) on the day the act on which the claim is based took place, unless the contrary is proved.

18 In wrongful dismissal claims the cause of action usually arises when the contract was breached - i.e. when the employer dismissed the employee without reasonable notice: *Jones v. Friedman* [2006 CarswellOnt 120 (Ont. C.A.)], 2006 CanLII 580, paras. 3 and 4. Facts unique to a case may call into question that general principle and point to a later date as the one on which the claim was discovered: *Webster v. Almore Trading & Manufacturing Co.*, 2010 ONSC 3854 (Ont. S.C.J.).

19 Turning to the uncontroverted facts of this case, on January 16, 2007, BMO informed Ms. Ng that her employment was at an end. On January 25, 2007, Ms. Ng's lawyer wrote to BMO complaining about "the termination of her employment". The following day, January 26, 2007 Ms. Ng's lawyer filed her complaint of "unjust dismissal" against BMO with HRSCD. Ms. Ng signed the complaint identifying January 16, 2007 as the "last day worked for this employer". In light of this conduct by Ms. Ng and her counsel, I find that Ms. Ng took the position, from the start, that BMO had terminated her employment on January 16, 2007. That she continued to receive severance payments after that date does not affect the determination of when she discovered her wrongful dismissal claim against BMO.

20 As to Ms. Ng's claims sounding in negligence against BMO, again it is well established that a plaintiff need not know the precise cause of her injury before the limitation period for a negligence claims begins to run; it is sufficient if the plaintiff knows enough facts to base her allegation of negligence against the defendant: *McSween v. Louis* [2000 CarswellOnt 1934 (Ont. C.A.)], 2000 CanLII 5744, para. 51. In section H of her Complaint Registration form dated January 24, 2007, Ms. Ng provided the following "details of complaint": "I was not placed on probation when I assumed my position in May/06. I received no guidance and no training. Employer enforced unfair and arbitrary standards." In the previous section G, Ms. Ng had written: "Employer unfairly harassed me." Ms. Ng's claims of negligence in paragraphs 6 and 7 of her Statement of Claim, and her claim of bad faith conduct pleaded in paragraph 9 of her Claim, simply tracked the "details of complaint" and section G of her January 24, 2007 Complaint Registration form.

21 It is clear on the evidence filed that Ms. Ng had discovered her negligence claims no later than January 24, 2007. That she believed she secured evidence to support those claims during the course of the examination of BMO witnesses before Adjudicator Cooper is neither here nor there. For the purposes of the commencement of a limitation period the question is not when did a person amass all the evidence she required to support a claim, but when did she discover her claim?

22 The plaintiff submitted that a genuine issue requiring trial existed regarding the applicability of section 11(1) of the *Limitations Act, 2002*. I disagree. That section provides that the limitation period established by section 4 will not run, where the person with a claim and the

person against whom the claim is made "have agreed to have an independent third party resolve the claim or assist them in resolving it", until the date the claim is resolved, the date the attempted resolution process is terminated or the date a party terminates or withdraws from the agreement. Without deciding whether the Alternative Dispute Resolution process offered by HRSDC for Part III *CLC* complaints would constitute an independent third party resolution process, the simple fact of this case is that when HRSDC offered that service to both parties, the plaintiff rejected the offer and called for the appointment of an adjudicator. Accordingly, the parties did not agree to have an independent third party resolve the claim, so section 11(1) of the *Limitations Act, 2002* does not apply on the facts of this case.

23 I conclude that no material facts are in dispute on the issue of when Ms. Ng discovered her claims. I find that she discovered her wrongful dismissal claim on the date of her termination, January 16, 2007, and she discovered her negligence claims (assuming her Statement of Claim discloses actionable claims) no later than January 24, 2007. A two-year limitation period applied to both claims. Ms. Ng did not commence this action against BMO until March 25, 2009, more than two years after she discovered her claims. Consequently, her action is statute-barred. I conclude that BMO has demonstrated that no genuine issue requiring a trial exists in respect of the claims pleaded in Ms. Ng's Statement of Claim, and I grant summary judgment dismissing Ms. Ng's action against BMO.

2. Verombeck v. Jerome, 2015 ONSC 2272

MOTION by defendant dentist for summary judgment, in action brought by plaintiff patient.

1 The defendant seeks the dismissal of this action based on the plaintiff's alleged failure to commence it within two years of the day on which the claim was discovered…

2 The parties first appeared on this motion on 11 September 2014. … It seemed to me that the interests of justice could best be served by engaging the procedure provided for by Rule 20.04(2.2) mini-trial to determine whether there is a genuine issue for trial in respect of the limitation defence pleaded by the defendant.

3 At the mini-trial hearing on 2 April 2015, oral testimony was given by the plaintiff and by Dr. Jim Yuan Lai.

Background

4 The defendant rendered dental treatment to the plaintiff between December 2000 and December 2009. …

7 The plaintiff experienced ongoing issues with his teeth while receiving treatment from the defendant, including pain and discomfort on various occasions, and periodic loosening of the fixed bridge inserted by the defendant in the summer of 2007.

8 On three occasions, the bridge loosened and had to be re-cemented.

9 On no less than ten occasions, the defendant worked on the plaintiff's tooth No. 15. In his amended statement of claim, the plaintiff asserts that "[t]he restorations were unsuccessful". *[Mr. Verombeck continued to suffer dental problems …]*

13 Because, by 17 December 2009, the plaintiff had run out of barter credits and the defendant was unable to permanently fix the upper bridge before further restoration work was done, the plaintiff sought out treatment with another dentist, Dr. Petrovic, who accepted barter credits under another barter system that the plaintiff belonged to. He was seen by Dr. Petrovic on 21 December 2009 who confirmed that the bridge could not be re-cemented at that time.

14 On 8 March 2010, the plaintiff was seen by yet another dentist, Dr. Pulec. He told the plaintiff that dental implants could be inserted at a cost of approximately $15,000.

15 On 19 May 2010, the plaintiff went back to see Dr. Petrovic. He was having problems with tooth No. 16 and was advised by Dr. Petrovic that the tooth had to be extracted.

16 On 20 May 2010, tooth 15 and tooth 16 were extracted by Dr. Sobhi.
…

18 On 15 June 2010, the plaintiff attended at the Dentistry Oral Reconstruction Centre at the University of Toronto Faculty of Dentistry. He was seen by Dr. Lai …

19 Dr. Lai … noted "complex case - need to consult with third year student and Dr. Lin". Dr. Lai explained that this reference meant that the plaintiff did not need just a simple replacement. There would need to be an overall treatment plan. However, Dr. Lai could not tell from his notes why he concluded that the plaintiff's case was complex. He says he was probably talking about the concept of bridge work and the number of ways that an implant could be used to give teeth back to the plaintiff. Nor did he have any specific recollection of meeting the plaintiff, let alone of what was discussed.

20 The plaintiff's affidavit said this about his meeting with Dr. Lai:

> [Dr. Lai] reviewed my condition and advised me that dental treatment performed by Dr. Jerome had been performed improperly, and had to be redone. … The consultation with Dr. Lai was my first indication that certain dental treatment performed by the Defendant was improper, and I would be required to undergo further treatment and incur further expenses to repair and rectify damage caused to my teeth dentition by the Defendant's improper treatment.

21 Under cross-examination, the plaintiff acknowledged that he had no specific recollection of Dr. Lai referring to the defendant's treatment as "improper". Indeed, the plaintiff had virtually no independent recollection of his meeting with Dr. Lai, and repeatedly referred to paragraphs 21 and 22 of his affidavit as the source of his recollection about that meeting. He said on a number of occasions that the meeting had taken place a long time ago and he could not remember specifics. When it was put to him that his affidavit had been sworn as recently as 20 June 2014, he was unable to explain why he was able to recall what Dr. Lai had said then, but could not recall now. …

23 While … Dr. Lai could not recall specifics of his meeting with the plaintiff, he testified, quite emphatically, that he would not on an initial consultation have criticised another dentist's work to a recent patient of that dentist.

24 On 6 July 2010, the plaintiff wrote a letter to the Royal College of Dental Surgeons of Ontario. A copy of that letter has not been produced but a copy of the response from the College, dated 8 July 2010 has. The College wrote as follows:

> It appears … that you are seeking damages. … The College's Inquiries Complaints and Reports Committee can only investigate the conduct of the dentist and the standard of treatment provided. It has no authority to assess damages …

25 The plaintiff pursued his complaint against the defendant with the College. He received a copy of a decision of the Inquiries, Complaints and Reports Committee on 24 November 2011. …

26 The plaintiff claims that upon receipt of the decision of the Inquiries, Complaints and Reports Committee of the College he became aware of various other deficiencies in the dental treatment provided by the defendant, of which he was not previously aware.

27 On 23 October 2012 (so, after his action was commenced), the plaintiff met with Dr. John H. Gryfe, an oral and maxillofacial surgeon engaged by his lawyers to provide a medical legal opinion. In his subsequent report, dated 14 March 2013, Dr. Gryfe wrote, in respect of the plaintiff's dealings with the defendant:

> "Mr. Verombeck acknowledges that throughout this five or six year period, he continued to be unhappy with the apparent lack of success that Dr. Jerome was having in creating and maintaining a stable dentition for him, but he continued to see Dr. Jerome for cleanings for a "period of time".
>
> . . .
>
> "Repeated visits to Dr. Jerome resulted only in the bridge being re-cemented repeatedly with temporary adhesives. Despite continuing problems with the bridge, Dr. Jerome did not offer to remake the prosthesis. Despite his continuing visits to Dr. Jerome, the surrounding teeth "started to decay" and as a result in 2009 or thereabouts, Mr. Verombeck started to obtain appropriate treatment elsewhere from a number of other dentists, including Dr. Biljna Petrovic, whom he visited a number of times in 2009 and 2010, and Dr. Venns Sobhi, who removed two maxillary right posterior teeth in 2010. Finally, he became a patient of the dental clinic at the University of Toronto, Faculty of Dentistry where he was treated between 2010 and 2012 for various complaints including ongoing pain, infection, and a desire to restore his dentition with implant dentistry."

28 The plaintiff does not acknowledge that he told Dr. Gryfe that throughout the five or six year period he was being treated by Dr. Jerome "he continued to be unhappy with the apparent lack of success". He also disagrees with the characterisation in Dr. Gryfe's report that he "started to obtain appropriate treatment elsewhere" from Dr. Petrovic and Dr. Sobhi in 2009 and 2010. The plaintiff steadfastly maintains that it was the consultation with Dr. Lai on 15 June 2010 that triggered his awareness of the possibility that Dr. Jerome had been negligent.

Issue

29 The issue to be determined on this motion is the application of the *Limitations Act, 2002* to the facts.

Discussion and Analysis

30 Section 4 of the *Limitations Act, 2002* provides a basic limitation period of two years running from the day on which the plaintiff's claim was discovered. …

31 The defendant argues that the plaintiff has failed to rebut the presumption provided for in s. 5(2) that he is deemed to have discovered his claim on the day the act or omission on which the claim is based took place, unless the contrary is proved. For the purposes of his argument, the defendant is content to use the last day that he treated the plaintiff, namely 17 December 2009, as the date from which the two year limitation period should run.

32 The plaintiff has expressly pleaded, in respect of his discovery of the claim against the defendant:

> ...that on or about June 15, 2010 during a consultation with Dr. Lai...he was informed that the dental treatment performed by the Defendant had been performed improperly and had to be redone.
>
> ...his consultation with Dr. Lai was his first indication that certain dental treatment performed by the Defendant was improper and that further expenses would have to be incurred to repair and rectify damage caused by the Defendant.
>
> . . . the claim against the Defendant was discovered on or about June 15, 2010.

33 As pleaded, this is not a case where the plaintiff is arguing that he needed to get an expert opinion before he was capable of discovering the existence of a claim against the defendant.

34 In *Tremain v. Muir (Litigation guardian of)*, 2014 ONSC 185 (Ont. S.C.J.), the court stated (at para. 56):

> Sometimes the determination of negligence would be impossible to ascertain based on the knowledge possessed by the plaintiff or plaintiffs and further investigation by way of, for example, an independent medical report may be required or copies of medical charts or both. However sometimes there may be clear evidence from the plaintiff that would seemingly speak of negligence.

35 According to the defendant, there was ample evidence of the very complaints which the plaintiff makes about Dr. Jerome's treatment more than two years before the commencement of the plaintiff's action. Quite apart from what he reported to Dr. Gryfe in 2012, there are the facts that the plaintiff was seen by no less than three other dentists between December 2009 and May 2010, at which time Dr. Sobhi extracted the very tooth which the plaintiff complains that the defendant unsuccessfully attempted to restore.

36 Any problems associated with the dental work undertaken by Dr. Jerome would, the defendant submits, have been immediately apparent following the work done by the defendant. The consultations with Dr. Petrovic, Dr. Pulec and Dr. Sobhi would have reinforced this.

37 The plaintiff, despite his limited recollection of the meeting with Dr. Lai on 15 June 2010 testified that he had no appreciation, until that consultation, that Dr. Jerome had been negligent. Of the meeting with Dr. Lai, the plaintiff testified that he became aware from his discussion with Dr. Lai that work that he thought had been done by Dr. Jerome had not been done. He said that he was shocked by that. He claims that Dr. Lai performed a thorough oral examination to determine the possible installation of implants and what had to be done to restore the plaintiff's dentition.

38 Whatever else may have transpired from the meeting on 15 June 2010, the plaintiff's evidence was that prior to meeting with Dr. Lai he did not have a concern with respect to the work done by Dr. Jerome, but following the meeting he did.

Findings

39 In determining whether summary judgment should be granted on the limitation defence that has been pleaded, rule 20.04(2.1) provides that the court shall consider the evidence submitted by the parties and may exercise any of the following powers for that purpose:

1. Weighing the evidence;
2. Evaluating the credibility of the deponent; and
3. Drawing any reasonable inference from the evidence.

40 In the present case, as previously indicated, I ordered a mini-trial pursuant to rule 20.04(2.2) for the purposes of being better able to exercise the powers set out in subrule 2.1.

41 I find that although the plaintiff did not complain to Dr. Jerome about the efficacy or otherwise of the treatment he was receiving, he was, as he subsequently reported to Dr. Gryfe, unhappy with the apparent lack of success that Dr. Jerome was having in creating and maintaining a stable dentition for him.

42 I accept the plaintiff's evidence that the reason for the termination of his relationship with Dr. Jerome was economic (his inability to use further barter credits with Dr. Jerome). However, within a matter of days after his last consultation with Dr. Jerome, he had been seen by Dr. Petrovic who had confirmed that the bridge could not be re-cemented. He then learned, as a result of his visit to Dr. Pulec on 8 March 2010, that it would cost $15,000 to insert dental implants.

43 On 20 May 2010, the plaintiff's tooth 15 and tooth 16 were extracted by Dr. Sobhi.

44 I accept the plaintiff's evidence that it was the cost of Dr. Pulec's quotation for implants which drove the plaintiff to seek assistance from the University of Toronto Faculty of Dentistry Oral Reconstruction Centre.

…

46 Having now heard the oral testimony of the plaintiff and Dr. Lai, I am satisfied that I am in as good a position as a trial judge would be to determine the limitation issue once and for all.

47 The plaintiff's evidence that his visits to Dr. Pulec, Dr. Petrovic and Dr. Sobhi did not alert him to the possibility that Dr. Jerome's treatment had been "improper" is unconvincing. By the time that the very tooth which Dr. Jerome had laboured over improving so many times over a six year period was extracted, I find that a reasonable person in the plaintiff's position would have realized that Dr. Jerome's treatment might have been a cause of his dental problems.

48 In coming to this conclusion, my view is reinforced by the evidence given by both the plaintiff and Dr. Lai with respect to what happened on 15 June 2010.

49 The fact is that the plaintiff cannot remember Dr. Lai saying that the treatment he had received from Dr. Jerome was "improper", as set out in the plaintiff's affidavit sworn on 20 June 2014. I find it troubling that less than ten months later, the plaintiff can no longer remember details that he deposed to in his affidavit. One is left with the very strong impression that the narrative in the affidavit does not accurately reflect the plaintiff's recollection at the time.

50 It is also noteworthy that there was nothing in the affidavit about the realization, first articulated by the plaintiff during the course of re-examination, that as a result of his consultation with Dr. Lai he became aware that work that he thought had been done by Dr. Jerome had not been done, which, he says, "shocked" him. When pressed on what he meant by this, he was vague.

51 While the plaintiff did make a complaint to the College shortly after his meeting with Dr. Lai, the evidence does not support a conclusion that the meeting with Dr. Lai was determinative of whether a complaint was made or not.

52 Indeed, when, later on, the plaintiff received a copy of the decision of the Inquiries, Complaints and Reports Committee of the College on 24 November 2011, as a result of which, according to him, he learned of various other deficiencies in the dental treatment provided to him by the defendant of which he was not previously aware, he still waited until 23 April 2012 before he consulted a lawyer and then, subsequently, on 11 June 2012, commenced an action.
…

55 … in *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80 (Ont. S.C.J.), [the court] remarked that "discovery of a claim does not depend on the plaintiff knowing that her claim is likely to succeed, nor does it depend upon awareness of the totality of the defendants' wrongdoing."

56 I do not accept, on a balance of probabilities, that it was the meeting with Dr. Lai that resulted in some sort of epiphany on the part of the plaintiff. Dr. Lai was firm in his evidence that he would not have openly criticised a colleague in the circumstances of the consultation which took place on 15 June 2010 which, it will be remembered, involved only a brief - and not detailed - oral examination for the purposes of getting an idea of the plaintiff's condition and

providing a rough estimate of the financial cost of the restoration work that the plaintiff had come to consult with him about.

57 The evidence simply does not support the plaintiff's pleading that the claim against the defendant was discovered on or about 15 June 2010 during the consultation with Dr. Lai.

58 Rather, I find that by no later than 20 May 2010, the date upon which Dr. Sobhi extracted the plaintiff's tooth 15 and tooth 16, the plaintiff knew, or reasonably should have known, that his dental problems were related to some act or failure to act on the part of Dr. Jerome and that there was the possibility of negligence of some kind on his part: …

Disposition

59 By reason of the foregoing, the defendant's motion for summary judgment is granted, with the result that the plaintiff's action is dismissed.

Costs

60 The parties provided costs outlines with respect to the motion for summary judgment. The defendant's partial indemnity costs, including disbursements, are claimed in the amount of $11,799.58. The plaintiff's partial indemnity costs of the motion (inclusive of disbursements) are claimed at $18,111.92.

61 Given the result, I conclude that the defendant should have his costs of the motion on a partial indemnity basis which I fix in the amount of $11,799.58.

62 The defendant is also entitled to his costs of the action. If those costs cannot be agreed, either party should notify me within 14 days of the date of release of these reasons. I will then set a timetable for the delivery of submissions.

II. Discoverability of Ongoing Problems: what constitutes a continuing harm, such that the claimant remains free to raise a claim long after the harm first became apparent?

Swartz v. Verrette, (2011) 334 N.S.R. (2d) 147

3 The issue in this case is water drainage. The Claimants contend that the Defendants had some work done to level out their property in 1991, which resulted in a change to the drainage pattern. Since about the spring of 1992, a large section of the Swartz lot has become very wet, to the extent that there have been some incidents of flooding into their basement. The photos placed in evidence show significant amounts of water in the yard.

[The defendants offered an alternative theory as to the cause of flooding, which the court rejected] …

6 Having heard all of the evidence, there is no doubt in my mind that there was [previously] a degree of wetness that the Claimants experienced, but that it increased

significantly after the Defendants had their work done. The Hurricane Juan theory is improbable because it did not occur until eleven years *after* the Claimants began to experience a significant problem.

8 The fact that the water increased significantly after the Defendants changed the contours of their land is too suspicious to amount to a pure coincidence. It is more probable than not that the work affected the water flow, and the Claimants are suffering an unintended result.

13 Although the event in question happened almost twenty years ago, the damaging effect is an ongoing one and the *Limitation of Actions Act* has no application. Statutes of limitations **only begin to run after** *all* **of the damage has been suffered.**

→ *If the statute does not begin to run until "all of the damage has been suffered," how would the claimant ever be able to tell when that point has been reached? And assuming there is some way to tell, why would a claimant ever commence litigation earlier than that?*

Johnson v. British Columbia Hydro & Power Authority, (1981) 123 D.L.R. (3d) 340 (B.C.S.C.)

1 … The action arises out of the erection by the defendant about the month of July 1971 of a power transmission line across the Sucwoa Indian Reserve (No. 6), which is located between the towns of Gold River and Tahsis on Vancouver Island.

21 … the erection of the power transmission line in this case constitutes a continuing trespass which gives rise to a new cause of action each day. A power transmission line requires servicing from time to time, and daily there is a continual flow of electrical energy transmitted by the defendant across the property of the plaintiffs. In Fleming, *The Law of Torts*, 5th ed. (1977), the following passages occur at pp. 40-41:

> If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitute an actionable wrong. There is a 'continuing trespass' as long as the object remains; and on account of it both a subsequent transferee of the land may sue and a purchaser of the offending chattel or structure be liable, because the wrong gives rise to actions *de die in diem* until the condition is abated. Likewise, if the chattel was initially placed on the land with the possessor's consent, termination of the licence creates a duty to remove it; and it seems that, according to modern authority, a continuing trespass is committed by failure to do so within a reasonable time. In all these cases, the plaintiff may maintain successive actions, but in each damages are assessed only as accrued up to date of the action. **This solution has the advantage to the injured party that the statute of limitations does not run from the initial trespass, but entails the inconvenience of forcing him to institute repeated actions for continuing loss.**

Wong v. Rashidi, 2011 BCCA 489

48 It may well be prudent for there to be a fence on top of the retaining wall in view of the drop-off in elevation from the Burdened Lands to the easement area, and it also provides a degree of privacy for the owners of the Burdened Lands as well as the owners of the Benefitted Lands. The trial judge remarked that the fence had utility, but concluded that it is

not required for the dominant tenement's reasonable use of the easement area. The agreement of the plaintiffs' parents to the fence is not binding on the plaintiffs as successors in title unless the fence is a right ancillary to the Easement, which the judge found it was not.

49 The defendants argue that any trespass constituted by the construction of the fence and the deck in the early 1990s can only have given rise to a cause of action in favour of the parents of the plaintiffs against the third parties and that the limitation period for bringing such an action has expired. I agree with the plaintiffs that these two arguments are answered by the continuing nature of the trespass in question. This is explained in … Fleming, *The Law of Torts*, which was cited with approval by Mr. Justice Murray in *Johnson v. British Columbia Hydro & Power Authority* (1981): [see block quotation above]

→ *Where the trespass involves an object unlawfully placed on the claimant's property (like the fence in Wong), the value of the damages may be fixed even if the harm is of a continuing nature. But if the harm results in rising damages over time (like the power transmission line in Johnson, which "require[d] servicing" and caused a "continual flow of electrical energy"), is there any way for the claimant to solve the problem of instituting repeated actions?*

K & L Land Partnership v. Canada (Attorney General), 2014 BCSC 1701

1 This is an action by the plaintiffs, K & L Land Partnership and a group related companies, against the Attorney General of Canada (the Crown) for damages allegedly caused by a failure to warn of a risk of danger relating to lands purchased by the plaintiffs in 2005 for development purposes. Unknown to the plaintiffs until 2007, the Crown (through the Department of National Defence or DND) had historically used the lands for military training purposes and there is a "potential presence" of unexploded munitions remaining on the lands. There are also claims in trespass and nuisance.

7 A large portion of the privately held lands used for military training in the Vernon area was south of the DND's Vernon Military Camp, known as the Commonage. In 2005, the plaintiffs purchased 11 parcels of land in the north part of the Commonage from the third party, Robert Armstrong. These parcels comprise approximately 1,350 acres (the Lands). The plaintiffs intended to develop the Lands as a residential subdivision for sale to the public. At the time of the purchase, they had no knowledge that the Lands were previously used by DND for military training purposes and possibly had UXO on them.

44 There is no question that the genesis of the UXO problem stems from the Crown's military activities in the 1940s. However, just as the negligence claim is not based on the Crown's conduct that created the danger in the first place, neither are the claims in trespass and nuisance. They are based on the allegation that the continuing presence of UXO/MS on the Lands will continue to constitute a trespass or nuisance until they are removed.

45 In my view, the trespass claim is clearly a continuing one. This plea is consistent with common law principles, succinctly summarized in … Fleming, *The Law of Torts*, … and cited in *Johnson*: [see block quotation above]

→ *These cases answer the question of whether the plaintiff's claim is barred, but they do not explain what damages the plaintiff may seek, if the damages have been increasing over time. Assume that harm amounts to $1000 per year over 20 years, and the plaintiff goes to court in year 20. What can the plaintiff recuperate?*

2005 YKSC 51
Yukon Territory Supreme Court
Malcolm v. Kushniruk
RONELDA MALCOLM (Plaintiff) And JOHN KUSHNIRUK and ROBIN KUSHNIRUK (Defendants)
Gower J.
Judgment: September 12, 2005

Counsel: Timothy S. Preston, Q.C. for Plaintiff
Mr. Ray Baril, Q.C. for Defendants

***Gower J.*:**

Introduction

1 This is an application for summary judgment by the defendants on the ground that the plaintiff failed to commence her action within the two-year limitation period. The plaintiff was injured in a motor vehicle accident on July 23, 2000. The writ of summons was not filed until August 6, 2002, more than two years later. Section 2(1)(d) of the *Limitation of Actions Act*, R.S.Y. 2002, c. 139 (the "*Act*") states that personal injury actions are to be commenced "within two years after the cause of action arose".

2 The parties acknowledge that the cause of action arises when the plaintiff first becomes aware, or should reasonably have known, that some damage has occurred and has identified the other party allegedly responsible (the "tortfeasor").1 Putting it another way, a cause of action arises when the material facts on which it is based have been discovered, or ought to have been discovered through the exercise of reasonable diligence.2 This latter phrase has been referred to alternately as the discoverability principle or the discoverability rule. The material facts include both the plaintiff's awareness of the damage or injury and the knowledge of the other party's identity.

3 In this case, the plaintiff concedes that she was aware of her personal injury from the date of the accident, or in any event prior to August 6, 2000, which is more than two years before the filing of the writ of summons. However, the plaintiff says that she did not learn the identity of the defendants until several days after the accident. She argues that the onus is on the defendants to prove conclusively that she became aware of their identity more than two years before the filing of the writ and since they have not, then the limitation period does not bar her from commencing this action. The defendants' position is that the plaintiff either became aware of their identity more than two years prior to the filing of the writ of summons, or that she could have discovered their identity with the exercise of reasonable diligence. The defendants also submit that the onus is on the plaintiff to establish that the cause of action arose within the limitation period.

Issues

4 The issues in this application are as follows:

1. When a limitation defence is raised, who bears the onus of establishing when the plaintiff knew the material facts (in this case, the identity of the defendants), or could have discovered those material facts with the exercise of reasonable diligence?
2. When could the plaintiff, with the exercise of reasonable diligence, have discovered the identity of the defendants?
3. When did the plaintiff actually learn the identity of the defendants?
4. Is the plaintiff's claim barred by the limitation period?

Analysis

#1 When a limitation defence is raised, who bears the onus of establishing when the plaintiff knew the material facts (in this case, the identity of the defendants), or could have discovered those material facts with the exercise of reasonable diligence?

5 It is acknowledged that the defendants were identified in the police report of the accident. However, the parties have different interpretations of the plaintiff's evidence at her examination for discovery about when she received that report. Her evidence included the following questions and answers:

> Q Okay. The police prepared a report on the accident?
> A Yes.
> Q Did the Police give you a copy of that report?
> A Yes.
> Q Did the police give you a copy of that report at the scene of the accident?
> A No.
> Q When did they give that to you?
> A I got that report after I had my surgery.
> Q How long after the surgery?
> A I — you know what, I can't give you an exact date, but it could have been a week to ten days approximately, but I'm not positive of what day.
> Q All right.
> A All I know is I had my surgery, and when I got home I had to, I phoned and phoned and phoned, finally they brought the report to me.

6 The plaintiff had her surgery in the hospital on July 27, 2000. In her first affidavit she attached as an exhibit her statement to the insurance adjuster dated August 9, 2000. In that statement she said she was discharged from the hospital on July 30, 2000. The plaintiff's counsel argued that it is not clear from the questions and answers I have just quoted whether the plaintiff received the police report "a week to ten days approximately" after the date of her actual surgery or after the date of her discharge from hospital. If the plaintiff intended to mean the former, then she might have received the police report as early as August 4th. If she intended to mean the latter, then she would have received the police report on or after August 7th. The plaintiff's counsel goes on to argue that, as the knowledge of the other driver's identity is a material fact in this case, and as the defendants have failed to establish on a balance of probabilities that the plaintiff was in

possession of all material facts prior to August 6, 2000, they therefore cannot prove that the cause of action arose more than two years before August 6, 2002, when the action was commenced.

7 The plaintiff provided no case authority for the proposition that the defendants have the burden of proof here. Plaintiff's counsel simply argued that it was up to the defendants to "prove" the limitation defence, as with any other defence. However, at the hearing, plaintiff's counsel appeared to concede that because the reasonable diligence of the plaintiff is an issue in this context, at the very least, an evidentiary burden must fall upon the plaintiff to establish the relevant facts and conduct capable of constituting reasonable diligence, as those would generally be expected to be within her knowledge, and not within the defendants' knowledge.

8 Counsel for the defendants argued that when a defendant pleads a limitation period as a defence, the onus is on the plaintiff to prove that the cause of action arose within the limitation period: *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.*, [2004] O.J. No. 597 (Ont. C.A.), at para. 10, affirming *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.*, [2001] O.J. No. 5124 (Ont. S.C.J.), at para. 208. In other words, the "limitation clock"3 does not begin to run until the cause of action arises and it is up to the plaintiff to prove when the cause of action arose. I agree.

9 In *Ryan v. Moore*, cited above, the Supreme Court of Canada noted that in some provinces the discoverability rule has been codified by statute. For example, in British Columbia the plaintiff bears the burden of proving that the running of the "limitation clock" has been postponed in a particular case. In *Novak v. Bond*, [1999] 1 S.C.R. 808 (S.C.C.), McLachlin J., as she then was, speaking for the majority, was discussing the provisions of the British Columbia *Limitation Act*, R.S.B.C. 1996, c. 266, at para. 69, where she said:

> ... the Act contains provisions aimed at treating plaintiffs fairly. For example, s. 6(3) to (5) ***reflect the common law view*** that it is unfair to the plaintiff if the running of time commences before the existence of the cause of action is reasonably discoverable. To determine when the running of time should commence ... the court is generally directed to consider the actions of a reasonable person in the particular plaintiff's circumstances. ... ***the plaintiff bears the burden*** of proving that, on the basis of these tests [as set out in the legislation], the running of time has been postponed in a particular case ... (emphasis added)

10 Thus, British Columbia is an example of a jurisdiction which has codified the discoverability principle in its *Limitation Act*. Further, that statute clearly places the burden of proof on the plaintiff to prove that the discoverability principle applies and that the running of the limitation clock should be postponed in a particular case. Finally, the Supreme Court of Canada has recognized that statutes such as the one in British Columbia "reflect the common law view," which is that the plaintiff bears the onus here.

11 Accordingly, the plaintiff must establish the date the cause of action arose. One would normally expect the cause of action to arise on the date of the accident.4 Therefore, if the action was commenced more than two years after the date of the accident, it falls to the plaintiff to establish the cause of action did not arise on that date because:

a) she did not learn all of the material facts until a later date, which is within two years from the commencement of the action; and
b) she could not, even with reasonable diligence, have discovered those material facts until that later date.

#2 When could the plaintiff, with the exercise of reasonable diligence, have discovered the identity of the defendants?

12 The plaintiff's next argument is that she was reasonably diligent in attempting to discover the name of the defendant driver. In her examination for discovery and her first affidavit, the plaintiff provided details of her circumstances commencing from the date of her surgery, on July 27, 2000. In her affidavit she describes how she was suffering from considerable pain and anxiety for several weeks after her discharge from hospital. At her examination for discovery, after admitting she could not provide the exact date she received the police report, she said:

> All I know is I had my surgery, and when I got home I had to, I phoned and phoned and phoned, finally they brought the report to me.

13 However, I indicated to plaintiff's counsel that I found it strange there was a lack of sworn evidence from the plaintiff detailing her circumstances over the earlier period from the date of the accident until the date of her surgery, more than three clear days later.

14 For example, In both her statement to the insurance adjuster and her examination for discovery, she said that her husband was with her in the vehicle at the time of the accident. Although she was advised by the police to remain in the vehicle, her husband got out of the vehicle and, apparently, had some communication with the driver of the other vehicle. Indeed, one could infer from the following discovery evidence that the plaintiff's husband did obtain information about the identity of the other driver, but simply didn't write it down:

> Q Did your husband get out of the vehicle at the scene?
> A Yes, he did.
> Q Did your husband note down information concerning the name of the driver of the other vehicle
> A Did he write it down?
> Q **Did he get the information as to who was, who had impacted the rear of the vehicle you were driving?**
> A **He didn't write it down**. I know he told everybody to stay until the police came.
> Q Okay. Did your husband know Mr. Kushniruk?
> A No.
> Q Did he take down the licence number of the vehicle?
> A I don't know.
> Q Did he take down the insurance details of the other vehicle?
> A No. Oh, I don't know. I shouldn't say no, that's wrong. I don't know.

(emphasis added)

15 What is particularly curious about this point is that the defendants' counsel made a specific request of plaintiff's counsel to confirm whether or not the plaintiff's husband obtained any information about the driver of the other vehicle. While the plaintiff's counsel says that he

responded to that request, the defendants' counsel has no record of having received such a response. As a result, there is no clear evidence before me on this summary judgment application as to what, if anything, the husband learned about the identity of the other driver.

16 On the other hand, to the extent one can infer that the plaintiff's husband did learn of the identity of the other driver, it becomes more difficult for the plaintiff to argue that she was reasonably diligent if she made no attempt to discover that information from her husband. Unfortunately, there is no evidence from the plaintiff to clarify this point. In any event, let me be clear that I do not base my conclusion on this inference, but rather on what follows.

17 It is apparent from the plaintiff's discovery evidence and her statement to the insurance adjuster that she had at least two conversations with the police on the day of the accident. The first was at the scene of the accident just prior to the arrival of the ambulance which took her to the hospital. The second was after the plaintiff was released from hospital, when she says she went to the police station to provide her statement (presumably the mandatory statement required under s. 95(1) of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153).

18 This latter reference to her attendance at the police station was not part of the plaintiff's discovery evidence, nor was it addressed in her first affidavit. It appears only in her statement to the insurance adjuster and it prompted me to ask the plaintiff's counsel about the time from the date of the accident until the date of her surgery. It seems to me that during that period of time, again more than three clear days, one would logically and naturally expect the plaintiff to be curious about the identity of the other driver. In particular, one would reasonably expect the plaintiff to have asked the police about the identity of the other driver either at the scene or at the police station later that same day. There is no evidence that the plaintiff was physically incapacitated or suffering to the extent that she was unable to ask such a question of the police on the date of the accident. On the contrary, she was well enough to attend at the detachment to provide her statement.

19 Admittedly, in her statement to the insurance adjuster the plaintiff did say that the day after the accident, July 24th, she started to have pain in her stomach and, on July 25th, she went to see her family doctor who advised her she had a hernia. She then consulted with another doctor on July 26th and was scheduled for surgery on July 27th. While the plaintiff was undoubtedly preoccupied with her injuries over this period, she was still able to attend two medical appointments. Yet, there is no evidence from the plaintiff to explain whether she also made an attempt to discover the identity of the other driver over this time period, or if not, why not.

20 In *Peixeiro*, cited above, at para. 18, Major J., delivering the judgment of the Supreme Court of Canada said:

> It was conceded that at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period.

This comment was made in the context of the determination that the plaintiff does not need to know the exact extent of her loss for the cause of action to arise. Once she knows some damage has occurred and has identified the party responsible for that damage, the cause of action has accrued.

21 However, the point can also be made that "ignorance" of the identity of the other party does not delay time under a limitation period either, if that ignorance is the result of the plaintiff's failure to investigate. As McLachlin J., as she then was, said in *Novak v. Bond*, cited above, at para. 65, "There is a burden on the plaintiff to act reasonably". Aitken J. of the Ontario Superior Court of Justice in the *Carleton Condominium* case, cited above, reflected that principle at para. 211:

> The plaintiff is required to act with due diligence in acquiring facts in order to be fully appraised of the material facts upon which a negligence claim can be based.

In my view, this duty also applies to the plaintiff's obligation to ascertain the name of the alleged tortfeasor.

22 Thus, I am satisfied that the plaintiff could have, by exercising reasonable diligence, learned the identity of the other driver, and ultimately, the identity of the owner of the other vehicle (the defendants), either on the day of the accident, or at some point prior to the surgery on July 27th.

#3 When did the plaintiff actually learn the identity of the defendants?

23 A significant part of the argument between counsel was whether the plaintiff had actual notice of the identity of the other driver more than two years before the action was commenced on August 6, 2002. The plaintiff's counsel argued that his client's answer in her discovery — that she did not receive the police report for "a week to ten days approximately" after her surgery — allows for the possibility that she may not have received that report until on or after August 7, 2000. That would mean the cause of action arose within two years of the commencement of the action, and the limitation defence would fail. The defendants' counsel stressed that the plaintiff's answer in her discovery on this point must be interpreted to mean a week to ten days after the date of her surgery, and not the date of her release from hospital. However, the point is moot, as I have found that the plaintiff could have, by exercising reasonable diligence, discovered the identity of the other driver prior to her surgery on July 27th.

#4 Is the plaintiff's claim barred by the limitation period?

24 In the alternative, plaintiff's counsel argued that even if the discoverability principle operates against the plaintiff, a "contextual view" of her circumstances dictates that her action should not be statute barred. The plaintiff's counsel stressed the injuries suffered by the plaintiff and said that even if she had known all the material facts prior to August 6, 2000, she was still recovering from her injuries on that date. Presumably, this is put forward as an explanation for why the plaintiff did not commence her action sooner. In any event, the plaintiff's counsel says that the "dates in question are so close as to be in the *de minimis* range". I presume he is referring to the short period of time between the date of the accident on July 23rd and August 6th, 2000, when the two-year period prior to the filing of the writ of summons commenced.

25 The reference to the need to take a more contextual view of the parties' circumstances comes from the comments of McLachlin J., as she then was, in *Novak v. Bond*, cited above, at para. 65. There, she was referring to the fact that many legislatures have moved to modernize their limitations statutes and that as part of that process, attention has been given to ensuring that the statutes address more consistently the plaintiff's interests and not just those of the defendant. In that context she said the following:

> ... Arbitrary limitation dates have been discouraged in favour of a more contextual view of the parties' actual circumstances. To take just one example, it has been well-recognized that it is unfair for the limitation period to begin running until the plaintiff could reasonably have discovered that he or she had a cause of action ... Even on this new approach, however, limitation periods are not postponed on the plaintiff's whim. There is a burden on the plaintiff to act reasonably.

26 In my view, this comment about taking "a more contextual view" was clearly referring to the new legislation across the country dealing with limitations. It was not a statement of the common law. Some of these statutes, for example the British Columbia *Limitations Act* previously noted, have indeed codified the discoverability rule. However, there are also provisions within these various statutes which take into account other particular circumstances of the case, for example, "the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action": Nova Scotia *Limitation of Actions Act*, R.S.N.S., c. 258, s. 3(4)(e), as discussed in *Smith v. Clayton*, [1994] N.S.J. No. 328 (N.S. S.C.), at para. 12. It is those types of other circumstances, together with the principle of discoverability, which I believe McLachlin J., as she then was, was referring to in talking about the legislatures taking a more contextual view.

27 Unfortunately for the plaintiff, the Yukon *Limitation of Actions Act* is not among the modernized limitation statutes which McLachlin J., as she then was, was referring to in *Novak*. Certainly, the Yukon legislation does not contain any provisions respecting the circumstances of the parties such as those in British Columbia or Nova Scotia. Therefore, at common law, I can do no more than apply the discovery principle as an "interpretive tool" for construing the *Act*: *Ryan v. Moore*, cited above, at para. 23. I do not have jurisdiction to take into account various other particular circumstances of the parties, in particular those of the plaintiff, at whim, but only as they relate to the principle of reasonable discoverability.

28 In any event, the circumstances which the plaintiff's counsel says are pertinent are her injuries and her recovery from surgery and these are the same circumstances which I have already discussed in applying the discoverability principle. Therefore, I fail to follow the argument of the plaintiff's counsel that even if I decide the discoverability principle operates against his client, that a contextual view of her circumstances, (i.e. her injuries) would dictate that her action should not be statute barred.

29 Finally, I wish to address the "*de minimis*" argument. Once again, I disagree with the plaintiff's counsel on this point. As I understood him, when a plaintiff has missed the limitation period by only a few days, as opposed to a few weeks, months or years, there is less prejudice to the defendants, and therefore I ought to take a more lenient view. Unfortunately, there is no case authority to support that proposition and it is simply not a valid consideration in law.

30 McLachlin J., as she then was, in *Novak*, cited above, said, at para. 64, that limitations statutes in this country have been held to rest on "certainty, evidentiary and diligence rationales". "Certainty" refers to the right of potential defendants to be secure in their reasonable expectation that they will not be held to account for ancient obligations. The "evidentiary" rationale concerns the desire to prevent claims based on stale evidence. Under the "diligence" rationale, plaintiffs are expected to act in a timely fashion and not "sleep on their rights". While the discoverability

rule obviously incorporates the diligence rationale, McLachlin J., as she then was, said at para. 70 that:

> Certainty and diligence, however, remain important goals. The running of time cannot be postponed indefinitely ... Only upon the expiration of the relevant ultimate limitation period can the potential defendant truly be assured that no plaintiff may bring an action against him or her. At that time, any cause of action that was once available to the plaintiff is extinguished. ...

31 Thus, one of the objectives of limitation periods is that they are definitive of the rights of the parties. In order to be definitive one has to have a fixed and certain date to decide if the limitation period has been missed. It does not matter if, having applied the discoverability rule, the date has only been missed by one day — if it has been missed, the plaintiff is out of luck. Under the Yukon *Limitation of Actions Act*, there is no other reason (except perhaps an agreement between the parties) to extend a limitation period. Certainly, the plaintiff has provided no case authority to suggest otherwise.

32 Since the plaintiff did not commence this action until August 6, 2002, she has the onus of establishing that her cause of action arose within the two-year period prior to that date. She has failed to meet that onus. Accordingly, her claim is barred by the limitation period in s. 2(1)(d) of the *Limitation of Actions Act*, cited above.

Conclusion

33 The action is dismissed with costs to the defendants.
Application granted; action dismissed.

Footnotes

1 *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), at para. 18.
2 *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.); *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.); and *Ryan v. Moore*, 2005 SCC 38 (S.C.C.).
3 *Ryan v. Moore*, cited above, at para. 27.
4 *Somersall v. Friedman*, 2002 SCC 59 (S.C.C.), at para. 30.

Malcolm v. Kushniruk: questions

A good part of the decision is devoted to the question of who bears the burden of establishing that the limitations period has lapsed. That question was a matter of trite law, not open to dispute, and the real question is why the plaintiff's lawyer even adopted that tactic (answer: presumably, because he was grasping at straws, having realised that he had no other leg to stand on). I have not excised that material from the judgment, but suggest that you focus on the following:

- The facts
- The judge's skepticism about the plaintiff's evidence on discoverability (paras. 12-16)
- The plaintiff's production of evidence during the discovery process (i.e.: not discovery of the claim, but discovery as required process of exchanging evidence) (para. 18)
- The judge's comments about timing/delay, in relation to the lapse of the limitations period (paras. 21-22)
- And particularly, the treatment in section #4 of the plaintiff's argument about the "contextual" approach (what does it actually mean? what does it require?) and the plaintiff's argument that any harm to the defendant was merely *de minimis*.

In what posture does this case arise? It is not a judgment on the merits of the claim; why is the limitations issue relevant at this particular node in the litigation?

"[L]imitation periods are not postponed on the plaintiff's whim. There is a burden on the plaintiff to act reasonably." (para. 25, quoting *Novak*). Is the implication that the plaintiff in this case did not act reasonably? If yes, why does the court view her conduct that way? In your view, is that a fair assessment?

"Unfortunately for the plaintiff, the Yukon *Limitation of Actions Act* is not among the modernized limitation statutes" and "does not contain any provisions respecting the circumstances of the parties such as those in British Columbia or Nova Scotia" (para. 27). What if the Yukon statute did include such a provision? Would it change the result here, and if so, how?

The plaintiff's lawyer argued that the defendant was not prejudiced by any failure to bring the claim within the limitations period. Why does the judge reject that argument?

York Condominium Corporation No. 382 (Plaintiff/Appellant) v.
Jay-M Holdings Limited and the City of Toronto (Defendants/Respondent)

84 O.R. (3d) 414

Ontario Court of Appeal

K.M. Weiler, S.E. Lang and P.S. Rouleau JJ.A.
Judgment: January 29, 2007.

K.M. WEILER J.A.:--

A. Overview

1 Is the claim of York Condominium Corporation #382 ("York") against the City of Toronto (the "City") for an alleged act of negligence that took place over 15 years ago, but which it pleads that it only discovered in May 2004, barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "Act")?

2 Previously, time for bringing a claim for general negligence did not begin to run until the claimant knew or ought to have known that he or she had a claim. This was known as "the discoverability rule". See *Kamloops (City) v. Nielson*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Peixeiro v. Haberman* (1995), 25 O.R. (3d) 1 (C.A.), aff'd [1997] 3 S.C.R. 549. The rule subjected a defendant to potential liability indefinitely. The current Act seeks to balance the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs. … [T]he Act provides for a fifteen-year ultimate limitation period dating from the act or omission giving rise to a claim. Regard for this provision in isolation would automatically bar York's claim. However, the transition provision in s. 24(5) Rule 1 states: "If the claim was not discovered before [January 1, 2004], the Act applies as if the act or omission had taken place on [January 1, 2004]." As I would interpret this transition provision, if a claim is not discovered until after January 1, 2004, but the act or omission took place before that date, the ultimate limitation period of fifteen years starts to run as if the act or omission had taken place on January 1, 2004 and York's claim is not barred.

B. The Facts and the Relevant Provisions of the *Limitations Act*

3 In May 2004, York discovered that the condominium building's demising walls were not fire-rated in accordance with the Building Code. It brought an action in June 2005 against the condominium developer, Jay-M Holdings Limited, and the City, alleging the former was negligent in its construction of the building and the latter was negligent in its inspection of the building. The parties agree that the last act by the City with respect to its alleged negligence took place in February 1978.

4 Pursuant to s. 4 of the Act, which came into force on January 1, 2004, the basic limitation period expires two years from the day on which the claim is discovered. York brought its claim within this time limit. However, the Act also contains a 15-year ultimate limitation period. Section 15 of the Act provides:

> (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

5 Thus, pursuant to s. 15, if a negligent act or omission occurred on January 2, 2004, but remained undiscovered until January 6, 2019, no action could be brought although the basic limitation period of two years from the date of discovery had not expired.

6 The City pleaded that on its face s. 15 barred York's action since the alleged negligent act took place over 27 years ago. The City then brought a motion under Rule 21 to strike York's claim. The motions judge ruled in favour of the City and struck York's claim as being statute-barred.

7 York appeals the dismissal of its action against the City on the basis that the ultimate limitation period in s. 15 must be read in light of the Act's transition provision in s. 24(5) Rule 1 and that the motions judge erred in his interpretation of this provision.

8 Section 24(5) provides:

> If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:
>
> 1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.

The effective date of the Act is defined in s. 24(1) as January 1, 2004.

C. The Reasons of the Motions Judge

9 The motions judge held:

* The wording of s. 24(5) is ambiguous. Able submissions on two conflicting interpretations of the transitional provisions was evidence of ambiguity when viewed with s. 15.
* Subsection 24(5) cannot be looked at in isolation. The structure and purpose of the legislation incorporates a balancing between the discovery principle and a cut-off date for bringing an action.
* All external sources cited to the court are consistent with an ultimate limitation period to counter-balance the codification of the discovery principle. No authorities on the interpretation of the ultimate limitation provision or the transitional provisions of the new Act were cited to the court.
* To interpret the transitional provisions as submitted by York could lead to an absurd result and absurd results are to be avoided whenever possible.
* Regard for the analogous limitations provisions of British Columbia and Alberta and the need to have regard for the policy considerations behind a statute of limitations leads to the conclusion that York's position must be rejected.

As a result of his interpretation of the Act, the motions judge dismissed the action as against the City.

D. Standard of Review

10 The interpretation of section 24(5) of the *Act* is a question of law and thus review of the motions judge's decision is on a standard of correctness. See: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8.

E. The Modern Approach to Statutory Interpretation

11 The prevailing approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87. This approach has been widely endorsed by the Supreme Court. See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26. The interpretive factors set out by Driedger, need not be canvassed separately in every case: *Bell ExpressVu, supra*, at para. 31.

12 The different interpretations of a provision by counsel engaged in litigation are not an appropriate starting point from which to conclude that legislation is ambiguous. *Bell ExpressVu, supra*, at paras. 29- 30.

13 The ordinary meaning of legislation is "the natural meaning which appears when the provision is simply read through". …. Having determined the ordinary meaning, the court must go on to consider the context of the provision, the purpose and scheme of the legislation as well as the consequences of adopting the ordinary meaning and any other relevant indicators of legislative meaning. If, after undertaking this analysis, the words of the provision are reasonably capable of more than one meaning, a real ambiguity exists. …

14 The court must adopt an interpretation that best fulfills the objects of the legislation. Having regard to this broader context, the court may modify or reject the application of the presumption that favours an interpretation in accordance with the ordinary meaning. However, the interpretation adopted must be plausible in the sense that it is one that the words are reasonably capable of bearing.

15 A statute, should, if possible, be construed so as to avoid any inconsistency between its different provisions. One way of reconciling an inconsistency is through the "implied exception" rule of statutory interpretation, which holds that a special provision prevails over a more general provision. See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at 273.

F. Application to this Case

16 The motions judge erred in concluding that simply because counsel had put forward two conflicting interpretations respecting the interpretation of the transitional provisions, s. 24(5) was ambiguous when viewed alongside the provisions of s. 15: *Bell Expressvu, supra.*

17 To determine whether the legislation should be given its ordinary meaning, a contextual and purposive approach is required. The same approach is used to resolve a true ambiguity in legislation. While the motions judge undertook a contextual and purposive analysis, I conclude that his analysis was not correct. Rather, the adoption of a contextual and purposive approach leads me to conclude that the transition provisions postpone the starting date for the running of the ultimate limitation period to January 1, 2004.

18 For the purposes of this appeal, I have grouped the discussion under two broad headings: a) Grammatical and Ordinary Sense, and b) Legislative and Broader Context.

a) Grammatical and Ordinary Sense

19 For ease of reference I will repeat s. 24(5) Rule 1:

> If the former limitation period did not expire before the effective date[4] and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:
>
> 1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.

20 The ordinary grammatical meaning of s. 24(5) Rule 1 is that where an act or omission occurred prior to the current Act coming into force, if the limitation period under the former Act had not expired, and the claim was discovered after the current Act came into force, the calculation of the fifteen-year ultimate limitation period will commence from January 1, 2004.

21 Under the now-repealed *Limitations Act*, York had six years from the time of discovery of the omission to bring its claim. The limitation period had not expired under the former *Limitations Act* before the effective date of the current Act on January 1, 2004 because York had not discovered the alleged negligence by that date. If the act or omission had taken place after January 1, 2004, York would be subject to a limitation period under the current Act. That limitation period is "the second anniversary of the day on which the claim was discovered." For the purposes of this motion, it is accepted that York did not discover its claim until after the effective date of the Act or until May 2004, and that it brought its claim within the two-year limitation period. Insofar as the ultimate limitation period is concerned, York submits that under Rule 1, the Act applies as if the negligent act or omission took place on January 1, 2004. Thus, the ultimate fifteen-year limitation period begins to run from January 1, 2004, not from the actual date of the negligent Act or omission as prescribed in s. 15.

22 Rule 1 provides that, "If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date." The City submits that Rule 1 ought to mean that, if the claim was not discovered before the effective date, the Act applies. This interpretation gives no meaning to the concluding words of Rule 1, "as if the act or omission had taken place on the effective date."

23 It is certainly arguable that s. 15(1) is not in harmony with the transitional provision of s. 24(5) Rule 1. Again, section 15(1) states:

> Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

However, in keeping with the rule that, if possible, disharmony should be avoided, I would hold that disharmony can be avoided by treating s. 24(5) as a special provision that applies to the limited number of transitional situations and by treating s. 15(1) as a general provision.

24 The City argues that because s. 24(5) does not specifically say that it applies despite s. 15, it cannot be read in the manner York submits. In support of its position, the City points to other sections of the Act where s. 15 is specifically made subject to another section. For example, s. 16(4) states that ss. 16 and 17 prevail over anything in s. 15. However, neither of those sections deals with a transitional context. Section 16 deals with general situations where there is no limitation period and s. 17 deals with environmental claims. These sections apply indefinitely for the foreseeable future until the Act is amended. Section 24(5) is transitory and the situations to which it applies will run their course. There would be little point in enacting this transition provision if it were not intended to apply to s. 15.

…

26 Driedger articulates the common-sense proposition that effect should be given to the ordinary meaning of a legislative provision unless there is a good reason not to do so. The court is therefore required to consider the purpose and scheme of the legislation, the consequences of adopting the ordinary meaning and all other relevant indicators of legislative meaning. In light of these additional considerations, the court may adopt an interpretation that modifies or rejects the ordinary meaning provided that the words can bear the proposed alternative meaning. The interpretation of the motions judge can be viewed as a marked departure from previous limitations act jurisprudence [holding] that when the provisions of a statute of limitations are in issue, "[they] should be liberally construed in favour of the individual whose right to sue for compensation is in question." *Papamonolopoulos v. Toronto (Board of Education)* (1986), 56 O.R. (2d) 1 at 7 (C.A.), aff'd, [1987] 1 S.C.R. v, 58 O.R. (2d) 528*n*. While an evolution respecting statutory construction has occurred in the past two decades, the broader principle, that access to justice should not be frustrated except in clear cases, has not changed and informs the legislative and broader context discussed below.

b) *Legislative and Broader Context*

27 The Act is the culmination of several earlier attempts since the late 1960s to reform the law of limitations. In 1969, the Ontario Law Reform Commission (OLRC) called for a simplification of the law of limitations … The Attorney General released a discussion paper in 1977, comprising a draft bill, which largely borrowed from the OLRC report. … Much of the draft bill from 1977 was reflected in Bill 160 (*An Act to revise the* Limitations Act, 3rd Sess., 32nd Leg., Ontario), introduced in 1983, which did not proceed beyond first reading. …

28 In 1991, a consultation group produced a paper for the Attorney General on the proposed *Limitations Act*. …

29 The consultation paper led to the introduction of Bill 99 (*An Act to revise the* Limitations Act, 2nd Sess., 35th Leg., Ontario) in 1992. As recommended in the consultation paper, Bill 99 contained a basic two-year limitation period, codification of the discoverability principle and a thirty-year limitation period with a shorter ultimate limitation period of ten years for some cases. As with Bill 160, Bill 99 did not go beyond first reading.

30 The next proposed reform came in 2000, with the introduction of Bill 163 (*An Act to revise the* Limitations Act, 1st Sess., 37th Leg., Ontario), which contained a codification of the discoverability principle but which also introduced a general fifteen-year ultimate limitation period. After prorogation of the legislature, Bill 163 was … reintroduced in 2002 as Schedule B to Bill 213, the *Justice Statute Law Amendment Act, 2002* (3rd Sess., 37th Leg., Ontario). Bill 213 … received Royal Assent as the *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24, on December 9.

…

32 The purpose of the Act as a whole is to balance the right to access to justice by bringing a lawsuit with the right to certainty and finality in the organization of one's affairs. The purpose of the ultimate limitation period is to balance the concern for plaintiffs with undiscovered causes of action with the need to prevent the indefinite postponement of a limitation period and the associated costs relating to record-keeping and insurance resulting from continuous exposure to

liability. While the motions judge considered the purpose of the Act and of the ultimate limitation period, he did not consider the purpose of the transitional provisions. The purpose of transitional provisions in general is to provide when a new Act applies and when it does not apply, or to provide for how it applies to situations that arose before the coming into force of the Act that are affected by its passage.

33 From the legislative history of the Act one can deduce that the time chosen for the ultimate limitation period, fifteen years, represented a compromise between the thirty-year period proposed for most claims and the ten-year period proposed for others. … Although the common law rule of discoverability is modified by s. 15, section 24(5) operates to mitigate the effect of the new legislation on pre-existing but undiscovered claims.

34 The motions judge looked to the interpretation of the ultimate limitation period and its relationship to the discoverability principle in the British Columbia *Limitation Act* passed in 1975, and the decision of *Armstrong v. West Vancouver (District)* (2003), 223 D.L.R. (4th) 102 (B.C.C.A.). That case held that the ultimate limitation period of thirty years applied from the date the damage occurred. The ultimate limitation period did not run from the date the evidence of the negligence in issue was discovered. …

35 The motions judge accepted the City's submission that the same interpretation … should be given to section 24(5) Rule 1 here. However, the City's submission ignores the fact that, while the wording of the ultimate limitation provision in s. 15 of Ontario's legislation is similar to the British Columbia statute, the wording of Ontario's transition provisions in s. 24 is significantly different.

36 The transition provision in the British Columbia statute, s. 14, provides, that if the cause of action arose before the new *Limitations Act* comes into force and the limitation period provided under the former legislation is longer than the limitation period provided under the new Act, the limitation period expires two years after the new Act comes into force or pursuant to the limitation period under the former Act, whichever is shorter. The Alberta *Limitations Act*, R.S.A. 2000 c. L-12, which came into force on March 1, 1999, contains a similarly worded transition provision and a ten-year ultimate limitation period. In *Bowes v. Edmonton (City)* (2005), 386 A.R. 1 (Q.B.), Clarkson J. concluded that the ultimate limitation period was intended to have retrospective effect and, as a result, the plaintiffs' action against the City of Edmonton was statute-barred because the City's negligent act of issuing building permits to the plaintiffs, notwithstanding the geological reports it had concerning the instability of the land on which their homes were built, occurred more than ten years before the land collapsed in 1999 (after the new Act had come into force).

37 Neither the British Columbia statute nor the Alberta statute … provides, as does s. 24(5) Rule 1, that "If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date." If the claim was not discovered before the coming into force of the Act, the Act in effect triggers the start of the new fifteen-year ultimate limitation period. Such a provision does not seem to me to do violence to the intention of the legislators or to the policy of the Act.

38 The motions judge was also concerned that interpreting the transitional provision as submitted by York would lead to an absurd result. As an example, he stated that a proceeding based on an act that occurred in 1978 but discovered in 2003 could not proceed, whereas a proceeding based on the same 1978 act discovered in 2018 could proceed. The example given by

the motions judge was flawed. If the 1978 act was discovered in 2003, the claim was discovered before the effective date of the new Act on January 1, 2004, and, pursuant to s. 24(5) Rule 2, the limitation period under the former Act would apply. That limitation period would ordinarily be six years. Thus, the claimant would have until 2009 to bring a claim.

39 In this case, the effect of my proposed interpretation is to allow a twenty-seven-year-old claim that was not discovered until shortly after the new Act had come into force to go forward. This time frame is within thirty years from the date of the act or omission, the ultimate time recommended in the Ontario consultation paper for most claims, as well as that contained in the earlier Bill, and the same time as provided in the B.C. legislation for all claims. It cannot be said to be an absurd result particularly when one recalls that, prior to the passage of the new Act, there was unlimited liability for as-yet-undiscovered claims (i.e. there was no ultimate limitation period). In moving to a new regime with an ultimate limitations period, s. 24(5) Rule 1 effectively creates a 15-year transition period for undiscovered claims. Although such a transition provision may be regarded as generous, it is part of the Act's attempt to ensure that, with respect to pre-existing situations, access to justice be preserved while limiting liability on a go-forward basis.

40 In view of my conclusion I need not address York's argument on retrospectivity. I also need not comment on the effect of any subsequent amendment.

G. Disposition

41 For the reasons given, I would allow the appeal and set aside the order dismissing York's action.

. . .

York Condo. Corp. No. 382 v. Jay-M Holdings Ltd. - questions

What did the plaintiff-appellant allege against J-M and the City? What was the date of the event giving rise to the claim?

What was the old (pre-2002) "discoverability rule"? What was the problem with it? (or maybe not a problem, depending on how you look at it).

What, procedurally, did the City move to do? Why did the motions judge grant the motion?

What was the "absurd result" that the motions judge rejected?

"The different interpretations of a provision by counsel engaged in litigation are not an appropriate starting point from which to conclude that legislation is ambiguous" (para. 12). Why not? How did this issue figure in the judgment below?

"[A] contextual and purposive approach is required" (para. 17). What does this mean? How was the judgment below flawed in this respect?

"The City submits that Rule 1 ought to mean that, if the claim was not discovered before the effective date, the Act applies" (para 22). What is wrong with this view?

In explaining why s. 24(5) should be treated as a "special provision that applies to the limited number of transitional situations," the court reasons that "[t]here would be little point in enacting this transition provision if it were not intended to apply to s. 15." What is the underlying logic of this argument?

The court goes through the legislative history of the statute, going back to the 1960s. What seems to be the purpose of this historical review?

The motions judge relied in part on a B.C. judgment holding that the ultimate limitations period runs from the date the damage occurred, and is not based either on the date of discovery or the date on which the new statute took effect. Why is this case inapposite (according to the court)?

According to Weiler J.A., the B.C. statute is significantly different. Summarizing the statute, without quoting from it, he explains that "if the cause of action arose before the new *Limitations Act* comes into force and the limitation period provided under the former legislation is longer than the limitation period provided under the new Act, the limitation period expires two years after the new Act comes into force or pursuant to the limitation period under the former Act, whichever is shorter." Although this account isn't very clear, it seems to mean that you compare (1) the date on which the claim terminates, under the former legislation, and (2) the date that is two years after the date on which the new legislation came into effect. The earlier of these would be the date when the claim terminates.

Weiler J.A. then mentions an Alberta case (*Bowes*), relating to that province's Limitations Act, which he claims "contains a similarly worded transition provision and a ten-year ultimate limitation period." Again he does not quote from the Alberta statute. Its transitional scheme applies only to claims that were reasonably discoverable before the new statute took effect. It provides (s. 2) that "if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim," then the claim terminates on "the earlier of" either (1) the date "that would have been applicable" under the former limitations statute, or (2) "two years after the [current statute comes] into force" (which was on March 1, 1999). It also provides:

> **Limitation periods**
> 3(1) … if a claimant does not seek a remedial order within
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> (i) that the injury for which the claimant seeks a remedial order had occurred,
> (ii) that the injury was attributable to conduct of the defendant, and
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
> or
> (b) 10 years after the claim arose,
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

The statute also provides, in s. 3(b), that "a claim based on a breach of a duty arises when the conduct, act or omission occurs."

In *Bowes*, the City had negligently issued building permits between 1967 and 1978; the new statute came into effect on March 1, 1999; the land under the buildings collapsed (surprising all those who lived on the tract) in October 1999; and the plaintiffs filed their statements of claim in June 2000. Why should the ultimate limitations period (10 years) in the new statute run from the date when the permits were issued, rather than the date when the land collapsed? Is the difference between the Alberta statute and the Ontario statute apparent from the explanation offered by Weiler J.A. (paras. 36-37)?

The court rejects the motions judge's 'absurd results" theory. Why?

Mary P. Hare, Plaintiff (Appellant), and
Brian Hare, Defendant (Respondent)

Ontario Court of Appeal
Toronto, Ontario
E.E. Gillese, R.G. Juriansz and H.S. LaForme JJ.A.
Heard: September 21, 2006; Judgment: December 14, 2006.

On appeal from the order of Justice Edwin B. Minden of the Superior Court of Justice dated April 10, 2006.

Counsel:
John W. Montgomery for the appellant
Philip C. Polster for the respondent

Reasons for judgment were delivered by E.E. Gillese J.A., concurred in by H.S. LaForme J.A. Separate reasons were delivered by R.G. Juriansz J.A.

1 **E.E. GILLESE J.A.:--** Has the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "new *Limitations Act*"), changed the law in respect of demand promissory notes so that refusal to repay the loan now triggers the running of the limitation period? This appeal decides that question.

BACKGROUND

2 In February 1997, the appellant loaned her son, the respondent, the sum of $150,000. By promissory note dated February 10, 1997 (the "Note"), the respondent promised to pay the appellant, on demand, the sum of $150,000. The Note also required the respondent to pay interest at the rate of prime plus one per cent per annum.

3 The respondent last made an interest payment on October 26, 1998. No payments in respect of the Note have been made since then.

4 On November 10, 2004, the appellant made a demand for repayment. She met with no success so, on February 17, 2005, she commenced the present action in which she claims all sums due on account of the Note.

5 The respondent moved for summary judgment. By order dated April 10, 2006, Minden J. granted the motion and dismissed the appellant's claim. He held that the appellant's action is barred by s. 45(1)(g) of the *Limitations Act*, R.S.O. 1990, c. L.15 (the "former *Limitations Act*").

6 The motion judge referred to the appellant's submission that the new *Limitations Act* applied. His reasons for rejecting that submission are extremely brief. The full text of the reasons in respect of this issue is as follows:

> Plaintiff's principal submission, unsupported by any caselaw, concerning the applicability of *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B. was premised upon the defendant's refusal to comply with the plaintiff's November 10, 2004 demand letter as constituting the act or omission giving rise to the plaintiff's claim. As I have said, the authorities binding upon me make it clear that it was, rather, the making of the demand loan that gave rise to the plaintiff's claim.

7 The appellant appeals. Counsel for the appellant notes that, given the paucity of the reasons on the issue of the applicability of the new *Limitations Act*, it is unclear whether the motion judge considered its provisions. If he did, the appellant argues that the motion judge erred in concluding that her claim arose when the Note was made, rather than when the respondent refused to repay the loan after a demand for repayment had been made. Consequently, the appellant says, the limitation period under the new *Limitations Act* has not expired and her claim is not statute-barred.

8 For the reasons that follow, I would dismiss the appeal.

THE ISSUES

9 This appeal requires the court to decide the following issues:

1. What effect does the new *Limitations Act* have on the present action?
2. Is the action statute-barred?

10 Before addressing these issues, it is useful to consider the result under the former *Limitations Act*.

THE RESULT UNDER THE FORMER *LIMITATIONS ACT*

11 If the former *Limitations Act* applies, the limitation period expired before the action was commenced. I agree with the motion judge who explained this result as follows:

> In my view, this situation is governed by clear and binding authorities, including the Ontario Court of Appeal's decision in *Royal Bank v. Hogg*, [1930] 2 D.L.R. 488, … to the effect that … "a demand note matures for all purposes as soon as it is delivered". … In these circumstances, where the loan is repayable on demand, s. 45(1)(g) of the *Limitations Act*, R.S.O. 1990, C. L.15 applies to bar an action unless commenced with[in] 6 years of the funds being advanced … Here, the limitation period was started afresh by reason of the last payment [on October 26, 1998] … Thus, the effective limitation period by which this action had to have commenced was October 26, 2004. Accordingly, this action commenced February 17, 2005 is statute barred.

WHAT EFFECT DOES THE NEW *LIMITATIONS ACT* HAVE ON THE PRESENT ACTION?

12 The present action was commenced on February 17, 2005, after the new *Limitations Act* came into force on January 1, 2004. To determine whether the appellant's claim is to be dealt with in accordance with the former or the new *Limitations Act*, recourse must be had to the transition provisions in s. 24 of the new *Limitations Act*.

Section 24(2) of the new Limitations Act

13 The parties argued this appeal on the basis that s. 24(5) of the new *Limitations Act* applies. However, it appears to me that s. 24(2) determines whether the transition provisions in s. 24 apply. Thus, in my view, s. 24(2) must be considered before it can be known whether s. 24(5) is applicable.

14 Section 24(2) provides:

> 24(2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.

15 There are two conditions in s. 24(2): first, that the appellant's claim is based on an act or omission that took place before January 1, 2004; and, second, that no proceeding had been commenced in respect of that claim before January 1, 2004. The second condition is met as the present action is the only proceeding to have been commenced in relation to the Note and it was brought after January 1, 2004.

16 Thus, … the only issue is whether the appellant's claim is based on an act or omission that took place before the effective date. As the demand for payment was made on November 10, 2004, a date after the effective date of January 1, 2004, while the appellant may argue that she "discovered" her claim after January 1, 2004, since she argues on the basis that s. 24(5) applies, she must concede that for purposes of s. 24(2), her claim is based on an act or omission that took place prior to January 1, 2004. The only such acts are the delivery of the Note on February 10, 1997, the making of the last interest payment on October 26, 1998, or the failure to repay the loan prior to January 1, 2004, without the necessity of a demand for repayment having been made. As explained below, I agree that the act is the delivery of the Note as extended by the making of an interest payment. As those events took place before January 1, 2004, s. 24 applies to her claim.

Section 24(5) of the new Limitations Act

17 Section 24(5) reads as follows:

> 24(5) If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:
>
> 1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.
> 2. If the claim was discovered before the effective date, the former limitation period applies.

"Effective date" and "former limitation period" are defined in s. 24(1), which reads as follows:

> 24(1) In this section,
>
> "effective date" means the day on which this Act comes into force;
>
> "former limitation period" means the limitation period that applied in respect of the claim before the coming into force of this Act.

18 On a plain reading of s. 24(5), its rules apply if two conditions are met:

1. the former limitation period did not expire before January 1, 2004; and,
2. a limitation period under the new *Limitations Act* would apply if the claim were based on an act or omission that took place after January 1, 2004.

19 Thus, I must first consider whether the two conditions in s. 24(5) have been met.

Have the conditions in s. 24(5) of the new Limitations Act been met?

The First Condition

20 The former limitation period, as provided by s. 45(1)(g) of the former *Limitations Act*, was six years. As the motion judge explained, given that a payment had been made in October 1998,

that six-year limitation period expired in October 2004. As the former six-year limitation period had not expired before January 1, 2004, the first condition is met.

The Second Condition

21 The second condition requires a determination as to whether a limitation period under the new *Limitations Act* would apply if the appellant's claim were based on an act or omission that took place after January 1, 2004.

22 The parties disagree as to what act or omission is the basis of the appellant's claim. The appellant contends that her claim is based on the respondent's refusal to repay the loan after demand for repayment had been made. The respondent maintains that the appellant's claim is based on the Note. In my view, regardless of which of those views is correct, a limitation period under the new *Limitations Act* would apply and the second condition has been met.

23 Section 4 of the new *Limitations Act* creates a basic limitation period of two years following the discovery of a claim. It reads as follows:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

24 None of the exceptions in s. 2 of the new *Limitations Act* apply to a demand promissory note so *prima facie* the appellant's claim … would be subject to the two-year limitation period provided for by s. 4. As discussed below, the appellant's claim may be subject to the 15-year ultimate limitation period in s. 15 of the new *Limitations Act*. However, whether the applicable limitation period is 2 years or 15 years is immaterial for the purposes of the second condition as all that is required is that a limitation period under the new *Limitations Act* would apply if the claim were based on an act or omission that took place after January 1, 2004.

25 As both conditions in s. 24(5) are met, its rules apply. Determination of which of its two rules applies will dictate whether the governing limitation period is that provided by the former or the new *Limitations Act*.

Does Rule 1 or Rule 2 of s. 24(5) Apply?

26 Rule 1 in s. 24(5) provides that if the appellant's claim was not discovered before January 1, 2004, the new *Limitations Act* applies as if the act or omission had taken place on January 1, 2004. Rule 2 provides that if the appellant's claim was discovered before January 1, 2004, the former limitation period applies. It is readily apparent that in order to decide which of the two rules applies, it must be determined when the appellant's claim was discovered.

27 The appellant contends that it was the respondent's refusal to comply with the demand letter of November 10, 2004, that constituted the "act or omission" giving rise to her loss and, hence, to her claim. Thus, the appellant argues that her claim was discovered after the demand for repayment was made in November 2004. As November 2004 falls after January 1, 2004, the appellant says that Rule 1 applies. Rule 1 provides that the new *Limitations Act* applies as if the act or omission had taken place on January 1, 2004. As the action was commenced in February 2005, it was brought in time.

28 The respondent argues that the appellant's claim was discovered on February 10, 1997, when the Note was made. As February 1997 is a date before January 1, 2004, the respondent

argues that Rule 2 applies. Hence, the limitation period under the former *Limitations Act* applies and it has expired.

29 There is a great deal of strength to the appellant's position. The language of the new *Limitations Act* is very different from that of the former *Limitations Act*. Where the former *Limitations Act* speaks of "action", the new legislation speaks of "claims". "Claim" is defined in s. 1 of the new *Limitations Act* as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".

30 Section 5 of the new *Limitations Act* ties the discovery of a claim to the notion of "injury, loss or damage". Section 5(1) reads as follows:

> 5(1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

31 The appellant argues that in the modern commercial world, a reasonable lender would not be considered to have suffered "injury, loss or damage" until there was a failure to comply with a demand for repayment.

32 For the same reason, several commentators have suggested that the new *Limitations Act* should be interpreted as changing the law so that the limitation period would begin to run from the date of default of payment, as opposed to from the date of the promissory note. …

33 Further, the Alberta *Limitations Act*, R.S.A. 2000, c. L-12 (the "Alberta Act"), has been interpreted so that failure to pay, after the demand for repayment has been made, triggers the running of the limitation period.

34 Section 3(1) of the Alberta Act provides:

> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or:

> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

35 Section 3(1) was interpreted in the context of a claim based on a demand loan in *Sawchuk v. Bourne*, [2004] A.J. No. 526 (Q.B.). In *Sawchuk*, the court held that the limitation period started to run when the plaintiff demanded payment and the defendant refused to pay. The court acknowledged that at common law, the cause of action on a demand loan runs from the date of the advancement of the loan. However, the court referred to s. 3(1) of the Alberta Act and held that the limitation period began to run not on the date the cause of action arose but on the date of injury. The date of injury was held to be when the defendants failed to repay the loan despite a demand having been made.

…

37 I do not find *Sawchuk* to be helpful in construing the new *Limitations Act*, as the wording of the Alberta Act is materially different. Significantly, "injury" is defined in s. 1(e)(iv) of the Alberta Act to include "non-performance of an obligation" whereas the new *Limitations Act* does not define "injury, loss or damage".

38 In any event, I reject the appellant's argument for three reasons.

39 First, to accede to the appellant's submission, I would have to accept that the legislature intended to change the law relating to demand notes by means of the new *Limitations Act*, a piece of legislation that is directed at limitation periods, not commercial law. In my view, it would require very clear language evidencing an intention on the part of the legislature to impair existing rights before such a construction, which would overturn centuries' old jurisprudence, would be warranted. As the Supreme Court of Canada stated in *Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 at 614:

> [A] Legislature is not presumed to depart from the general system of the law without expressing its intention to do so with irresistible clearness, failing which the law remains undisturbed.

40 In my view, the language in the new *Limitations Act* is not so "irresistibly clear" that it can be presumed that the legislature intended to depart from established commercial law and disturb existing common law rights.

41 Second, the appellant's interpretation, taken to its logical extreme, results in limitless liability. If a demand for repayment must be made before the limitation period would begin to run and no demand is made, the limitation period would never begin to run and the claim would exist in perpetuity. Consequently, liability would exist indefinitely. That is contrary to the foundational notions underlying the creation of limitation periods, namely, the need for the law to promote finality and certainty in legal affairs and to prevent indefinite liability. When considering the undesirability of indefinite liability, the words of this court in *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725 at 729-30 are usefully recalled:

> When limitation periods were under consideration by the common law courts in the 18th and 19th centuries, the judges described these limitation statutes as "statutes of repose" or "statutes of peace". The emphasis then was as it is today, on the necessity of giving security to members of society. Citizens would not expect to be disturbed once the

> limitation period had expired. Today when a limitation period has expired it is considered that, generally speaking, a defendant need no longer be concerned about the location or preservation of evidence relevant to the particular claim or relevant to a claim which has not been made. Further, the defendant is, presumably, at that stage free to act and plan his life without concern for stale claims or claims of which he has no knowledge which have arisen out of the original incident. When considering the purpose of limitation periods, the maxim, although used frequently in other connections, *expedit reipublicae ut sit finis litium* is appropriate; it is indeed in the public interest that there should be an end to litigation. [citations omitted]

…

43 It has been suggested that the ultimate fifteen-year limitation period provided by s. 15 of the new *Limitations Act* resolves the problem that a claim could exist in perpetuity. In my view, it does the opposite. It confirms that a claim could exist in perpetuity should a demand for repayment (or failure to respond to such a demand) be the triggering event.

44 Sections 15(2) and (6)(c) read as follows:

> 15(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.
>
> (6) For the purposes of this section, the day an act or omission on which a claim is based takes place is,
>
> (c) in the case of a default in performing a demand obligation, the day on which the default occurs.

45 Section 15(2) creates an ultimate fifteen-year limitation period. It is triggered by the "act or omission on which the claim is based". Section 15(6)(c) provides that, in the case of demand obligations, the day an act or omission on which a claim is based takes place is the date of default. If default does not occur until a demand for repayment has been made and no demand is made, there can be no default and the limitation period cannot begin to run. If, on the other hand, default is the failure to repay on the day that a demand promissory note is delivered, the limitation period begins to run on that date and the ultimate limitation period will necessarily operate. This interpretation is consistent with established jurisprudence, as explained above, and with s. 5(2) of the new *Limitations Act*, discussed below.

46 In my view, it would be contrary to common sense to think that a piece of legislation designed to create uniform, simplified limitation periods actually did the opposite by taking a well-settled area of commercial law and creating indefinite liability.

47 If the act on which the appellant's claim is based is the delivery of the demand note,[5] however, no such problem exists. Pursuant to s. 5(2) of the new *Limitations Act*, the appellant is presumed to have discovered her claim in February 1997. Section 5(2) reads as follows:

> 5(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

48 As the act on which the appellant's claim is based is the delivery of the Note in February 1997, pursuant to s. 5(2) of the new *Limitations Act*, the appellant is presumed to have "discovered" her claim in February 1997. There was no evidence tendered to rebut the presumption. Consequently, she is presumed to have discovered the claim before January 1, 2004, and Rule 2 of s. 24(5) applies.

49 My third reason for rejecting the appellant's submission is this. The alleged deficiency in the approach to limitation periods under the former legislation is that it failed to recognize that a person may not know of a cause of action at the time the limitation period commences. Hence, the former approach could act to unfairly bar claims before potential plaintiffs had any knowledge of their causes of action.

50 This concern, it seems to me, does not arise in the case of demand promissory notes. The law is well-settled that a lender has the right to immediate repayment of such loans. The face of the promissory note makes clear that the debtor owes money to the lender. As there is no repayment period specified, the lender is entitled to require immediate repayment. There is nothing to be discovered by the lender before he or she becomes aware of their claim. They know of their claim immediately on receipt of the demand promissory note.

IS THE ACTION STATUTE-BARRED?

51 Rule 2 of s. 24(5) of the new *Limitations Act* provides that the former limitation period applies. As explained above, the former limitation period is the six-year limitation period under s. 45(1)(g) of the former *Limitations Act*. For the reasons given by the motion judge, set out above, the former limitation period has expired and the appellant's action is statute-barred.

DISPOSITION

52 Accordingly, I would dismiss the appeal.

…

E.E. GILLESE J.A.
H.S. LaFORME J.A.:-- I agree.

R.G. JURIANSZ J.A. (dissenting):--

I. INTRODUCTION

54 I have had the opportunity to read the reasons of Gillese J.A. and agree with her statement of the facts and characterization of the issues. However, I would interpret the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "new Act") differently and, as a result, would allow the appeal. I will discuss my interpretation of the new Act first and explain the application of the transition provision to the present appeal second.

55 The question is whether the new Act changes the commencement date for the limitation period for demand loans generally to the date of default following a demand, as opposed to the date the loan is made. I conclude that it does.

56 Gillese J.A. reaches the conclusion she does because she does not accept that the legislature, by enacting the new Act, intended to change the law relating to demand notes. She would require very clear language to make evident the intention of the legislature to depart from established commercial practice and disturb existing common law rights before adopting a construction of the new Act that would overturn long-established jurisprudence.

57 Gillese J.A. further points out that if the limitation period relating to a demand loan does not begin to run until a demand is made for payment, then liability would exist indefinitely so long as a demand is not made. She considers it contrary to common sense to think that a

limitations act designed to create uniform, simplified limitation periods would have created indefinitely existing liability for demand loans.

58 I would not resort to these interpretive techniques in deciding this case. I would conclude, on the basis of the text of the new Act, that the limitation period for a demand loan starts to run on the date of default following a demand for repayment. This result does not, in my view, interfere with commercial practice or common law rights.

II. The New Act

59 I would begin the process of statutory interpretation by employing the modern approach, as stated by Driedger and approved by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

60 Looking at the new Act as whole, it marks a major change of approach from the former limitations regime. It prescribes a basic limitation period of two years and an ultimate limitation period of fifteen years that both apply generally, it enumerates a number of claims subject to no limitation period, and it lists specific statutory limitation periods that remain unchanged. I will describe the key parts of the new Act in more detail.

61 First, the new Act creates a new "basic limitation period" of two years that applies generally. It begins to run on the day on which the claim was discovered as opposed to the day on which the cause of action arose. This is apparent from sections 1, 4 and 5, which are set out below.

> 1. In this Act, ... "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
> 5(1) A claim is discovered on the earlier of,
> (a) the day on which the person with the claim first knew,
> (i) that the injury, loss or damage had occurred,
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> (iii) that the act or omission was that of the person against whom the claim is made, and
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

62 Second, the new Act provides for an "ultimate limitation period" that also applies generally. The fifteen-year ultimate limitation period begins to run on the day on which the act or omission on which the claim is based took place. This is set out in s. 15:

> 15(1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.
>
> (2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

63 Third, ss. 16 and 17 set out a number of claims that are not subject to any limitation period, including proceedings for a declaration where no consequential relief is sought, proceedings to enforce a court order or an arbitration award, proceedings to obtain support under the *Family Law Act*, and undiscovered environmental claims.

…

III Application of the Former Act to Demand Loans

66 At the outset, it is important to note that "[t]he law of limitations is wholly a creature of statute. Limitation periods were unknown to the common law, although equity developed the doctrine of laches": Graeme Mew, *The Law of Limitations*, 2nd ed. (Markham: LexisNexis Butterworths, 2004) at 29.

67 The general rule under the former Act was that the limitation period began to run on the date the cause of action accrued. Section s. 45(1)(g) of the former Act, which applied to demand notes, stipulated that the action "shall be commenced ... within six years after the cause of action arose." [Emphasis added.]

68 In *July et al. v. Neal* (1986), 57 O.R. (2d) 129 (C.A.), Morden J.A. adopted the definition of "cause of action" as espoused by Diplock L.J. in *Letang v. Cooper*, [1965] 1 Q.B. 232 at 242-43: "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

69 The common law authorities reasoned that since a demand loan is fully mature and repayable when it is made, a cause of action to collect on a demand note accrues as soon as the note is delivered. For example, in *Royal Bank v. Hogg*, [1930] 2 D.L.R. 488 (Ont. S.C. (A.D.)) the court wrote at 489:

> [As] to the note on demand, while no formal demand was made, it has been law … since *Norton v. Ellam* (1837), 2 M. & W. 461, and probably for centuries before, that a promissory note on demand is due as soon as it is delivered.

70 The logic of the common law is easily appreciated. There would be no basis upon which the courts could dismiss an action brought before the making of a demand. Not only was the loan fully mature and repayable as soon as it was made, but the bringing of the action itself constituted a demand for payment. In *Birks v. Trippet* (1666), 1 Wms. Saund. 32, 85 E.R. 34 (K.B.), the court adopted counsel's argument that "no actual request is necessary, but the bringing of the action is a sufficient request." Further, in *Rumball v. Ball* (1711), 10 Mod. Rep. 39, 88 E.R. 616 (K.B.), the court noted: "Besides, supposing the demand necessary, the action itself, perhaps, is a demand."

71 The point I emphasize is that while the common law came into play in identifying the date on which the "cause of action arose," it was statute law that prescribed that the limitation period began to run when a cause of action arose.

72 It is also worth noting that the former Act did not contemplate demand loans specifically, as does the new Act in s. 15(6)(c). Section 45(1)(g) of the former Act set out a six-year limitation period for actions based on "trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander." This was the provision that applied to demand loans. Under it, the limitation period began to run immediately upon the delivery of the demand note.

73 Finally, I note that all of the authorities regarding the commencement of the limitation period for a demand loan antedate the development of the discoverability principle. It appears as though this is the first case in Ontario to consider when a claim based on a demand loan is discovered.

74 I turn now to a consideration of the new Act keeping in mind that the common law determined when one was first entitled to sue, and it was the former Act that stipulated that the limitation period began to run on that day.

IV. Application of the New Act to Demand Loans

75 The new Act establishes a new and different regime for limitation periods. Section 4, which is set out above, provides for a basic limitation period of two years that begins to run, not when the cause of action arose, but on the day "on which the claim was discovered." Section 5, also set out above, stipulates the criteria that define the day on which a claim is discovered. Section 5 refers to "injury, loss or damage", but for the sake of simplicity I will, at times, speak of "damage" only.

76 My view is that the earliest a plaintiff can "discover" a claim based on a demand loan is the date on which default in making repayment following a demand occurs … and not the date on which the demand loan is made.

77 Some commentators have suggested that without default following a demand for payment, one cannot speak of the lender of a demand loan suffering from injury, loss or damage. …

78 That commonsense view is foreclosed by the common law authorities. The rationale of the common law authorities dictates the conclusion that the holder of a demand note has suffered some sort of legally cognizable damage on the day the loan is made. Otherwise, the creditor would not be entitled to bring an action in court.

79 Employing the logic of the common law authorities leads to the conclusion that the criteria of ss. 5(1)(a)(i), (ii) and (iii) are satisfied on the date the demand loan is made. As required by subparagraph (i), legally cognizable damage has occurred because there is a fully mature loan that has not been repaid. Subparagraph (ii) is satisfied because the act that caused the damage was the delivery of the demand note or equivalent act that created the demand loan. Subparagraph (iii) is met because the claim is made against the person who delivered the demand note or otherwise created the demand obligation.

80 While ss. 5(1)(a)(i), (ii) and (iii) may be satisfied as of the date of the loan, s. 5(1)(a)(iv) is not. Subparagraph (iv) requires that the claimant know that "having regard to the nature of the ... damage, a proceeding would be an appropriate means to seek to remedy it." Section 5(1)(a)(iv)

imposes a completely new requirement. There is nothing analogous to it in the former Act. Nor are the common law authorities of any assistance in understanding this new requirement, as they address when a lender is *entitled* to bring a proceeding as opposed to when it is *appropriate* to do so. A more detailed examination of the words of s. 5(1)(a)(iv) is necessary.

81 My first observation is that s. 5(1)(a)(iv) sets out something the claimant must know, in addition to knowing the matters in ss. 5(1)(a)(i), (ii) and (iii). In the context of a demand loan, knowledge of the matters in the first three subparagraphs is sufficient for a creditor to appreciate that he or she has a cause of action against the debtor. If s. 5(1)(a) were satisfied upon a creditor knowing he or she has a cause of action, then s. 5(1)(a)(iv) would be devoid of meaning. This leads me to conclude that, at least in the context of a demand loan, the creditor must know more than that a cause of action has accrued.

82 I next observe that the "nature" of the injury, loss or damage is important in assessing whether the claimant should know a proceeding is appropriate. The "nature" of an injury, loss or damage requires consideration of matters beyond the mere fact that such exists. "Nature" is a general word. It would seem to include the character as well as the extent of the injury, loss or damage. Before the concept of discoverability was judicially developed, the nature and extent of damages were not relevant to the determination of whether a cause of action accrued. As Major J. noted in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at para. 18:

> … Once the plaintiff knows that some damage has occurred and has identified the tortfeasor ..., the cause of action has accrued. Neither the extent of damage nor the type of damage need be known.

83 For the determination of this case, it is sufficient to say that the nature of the damage that flows from a freely advanced demand loan is latent or potential until the debtor defaults in making repayment. Until then, the creditor is in precisely the situation he or she expected to be in. … It is only when the debtor fails to repay the money after a demand is made, that the creditor realizes the damage is not latent but actual. The creditor knows from the beginning that he or she is owed money, but only knows after the debtor has defaulted following a demand for repayment that he or she has a "bad debt". I conclude that the nature of the damage occasioned by the debt, whether "latent" or "actual", is pertinent to the application of s. 5(1)(a)(iv).

84 It is necessary, in interpreting section s. 5(1)(a)(iv), to consider what a reasonable person with the abilities and in the circumstances of the person with the claim ought to have known as required by s. 5(1)(b). A reasonable person who has extended a demand loan would know from the common law that he or she was entitled to commence legal action without first making a demand. That person would know that a legal proceeding might not be necessary to collect the debt as the making of a simple demand might prompt repayment. He or she would also know that commencing a legal proceeding could result in unnecessary costs. Finally and most importantly, the reasonable person would be well aware that the courts take a dim view of unnecessary litigation.

…

86 The inappropriateness of commencing a legal action on a demand note without first making a demand is so apparent there are few cases where such action has been taken. Nevertheless, in *Byles on Bills of Exchange* (London: Sweet & Maxwell, 1965) at 378, Maurice Megrah writes: "If a bill or note is payable on demand, no demand other than action brought is necessary, apart

from the question of costs, to enforce payment." For this proposition, *Macintosh v. Haydon* (1826), Ry. & Mood. 362, 171 E.R. 1050 (K.B.), is cited as authority, where the court wrote at 363:

> … in strict law no demand is necessary against an acceptor, but in practice a demand is usual, and ought to be made before proceedings are instituted …

…

88 Thus, it would seem to me that a reasonable person would not know that it was appropriate to commence a legal proceeding to recover a demand loan without first making a demand for repayment.

89 I have considered the reasoning that a creditor would know that the limitation period had begun to run upon the making of a demand loan, and so would regard it as appropriate to commence a legal proceeding before the limitation period expired. In my view, this reasoning is circular. It uses a presumption about when the limitation period begins in order to construe the statutory definition of when the limitation period begins. Section 5(1)(a)(iv) is part of the statutory definition of the commencement date of the limitation period under the new Act. It should be construed without presuming the creditor knows the limitation period began upon the making of the loan. As well, I see no reason for making such a presumption. The common law does not provide a basis for making the presumption, as the common law does not establish limitation periods, but only addresses when a creditor is *entitled* to commence an action. The only possible source for such a presumption is the former Act, which has been repealed. Under the new Act, which governs now, it is only when the creditor knows not only that he or she is *entitled* to bring an action but also that it is *appropriate* to do so that the limitation period begins to run.

90 In my view, the grammatical and ordinary sense of the words of s. 5(1) is clear. They do not identify the date the demand loan was made as "the day on which the claim was discovered." Under s. 5(1) the basic limitation period for a claim based on a demand note commences on the date that the debtor defaults on a demand for immediate repayment by the creditor. To find otherwise would be to countenance unnecessary litigation as appropriate.

91 Other sections of the Act provide no reason to depart from this construction.

92 Section 5(2) provides that claimants are presumed to discover their claims on "the day the act or omission on which the claim is based took place." It follows from the common law, again, that a claim on a demand note is based on the act of delivering the note or otherwise creating the demand obligation. At first glance, it might seem that s. 5(2) would entirely negate the effect of s. 5(1) for claims based on demand obligations. That is not so, because, in my view, evidence that no demand for repayment had been made would be sufficient to rebut the presumption in s. 5(2).

93 Section 15(2) provides that the fifteen-year ultimate limitation period also begins to run on "the day on which the act or omission on which the claim is based took place." Attaching the same meaning to this phrase as in s. 5(2), it would seem, at first, that a claim based on a demand loan would be subject to an ultimate limitation period of fifteen years from when it is made. However, s. 15(6)(c), provides:

15(6) For the purposes of this section, the day an act or omission on which a claim is based takes place is,

(c) in the case of a default in performing a demand obligation, the day on which the default occurs.

94 This provision is undoubtedly pivotal in understanding the legislature's intent regarding limitation periods for demand loans, as it is the only provision of the new Act that deals with demand loans expressly.

95 … the common law authorities may be taken to imply, awkwardly in my view, that a debtor is in default of performing a demand loan as soon as the loan is made. I reject this construction because the day on which "default occurs" cannot be the same day that would be identified as "the day of the act or omission on which the claim is based" absent the section. If that were so, s. 15(6)(c) would be a tautology - i.e. the day of the act on which the claim is based is the day of the act on which the claim is based. Section 15(2) already provides that the ultimate limitation period begins to run on "the day on which the act or omission on which the claim is based took place." A special provision to say the general provision applies to demand obligations is not necessary. As s. 15(6)(c) must have meaning, the day of default must be construed to be a day other than the day that would be identified as "the day of the act or omission on which the claim is based" absent the section.

96 In argument, the respondent did not offer any interpretation of s. 15(6)(c). In my view, s. 15(6)(c) refers to the day of default in not performing the obligation to repay a demand loan after a demand has been made. The words "default" and "in performing" in s. 15(6)(c) do not aptly describe the passive state of simply being subject to a demand obligation in good standing. I would conclude that these words identify the day on which the debtor defaults after being called upon to "perform" by repaying the demand obligation.

97 As Gillese J.A. points out, the result of such a construction is that the limitation period for a demand loan will not be triggered unless a demand is made. This potential for indefinitely existing liability does not result from s. 5 or s. 15(2). Section 5 and s. 15(2), without s. 15(6)(c), would result in there being an ultimate limitation period of fifteen years from the day the demand loan is made if there were no demand for repayment. It is s. 15(6)(c), and s. 15(6)(c) alone, that produces the potential for indefinitely existing liability. Section 15(6)(c) creates a special rule for demand obligations. In my view, it reflects the express legislative intent to allow the potential for indefinitely existing liability for demand obligations where no demand is made.

98 I do not regard this result as disharmonious with the overall scheme of the new Act. While I agree that the legislation was designed to create uniform and simplified limitation periods generally, the new Act provides for special situations in which claims have no limitation periods. First, it would seem that the whole of s. 15(6) is devoted to situations where the limitation period could remain open indefinitely. Sections 15(6)(a) and (b) create the possibility for indefinite limitation periods where there is a continuous act or omission and a series of acts or omissions, as the ultimate limitation period in such situations will never begin to run as long as the act or series of acts continues. While paragraphs (a) and (b) concern matters that are different in concept, they do provide for indefinitely existing liability and the new Act deals with them in the same subsection as demand obligations.

99 Second, as noted above, s. 16 lists a number of situations in which there is no limitation period at all. … Therefore, the legislature did contemplate indefinitely continuing liability in certain debtor-creditor relations.

100 Therefore, I see no disharmony between the possibility for indefinitely existing liability for demand obligations and the new Act as a whole.

101 Nor do I see a departure from established commercial practice or the common law. There is no interference with the common law that determines when a cause of action accrues. The creditor of a demand loan may still commence an action without making a demand for repayment, as unlikely and inappropriate as that action may be. Only the provincial statute of limitations has changed. Commercial practice must be based on the statutory limitation period. Commercial practice would be more affected by the majority's conclusion, which results in the considerable reduction, from six years to two years, in the limitation period during which creditors could recover on demand loans. I venture that a two-year limitation period for demand loans would cause difficulties in numerous routine commercial transactions. For example, a small company's operating line of credit secured by a personal demand note of the owner would need to be revisited every two years.

…

107 In sum, … I would conclude that a claim based on a demand loan cannot be discovered until a debtor defaults following a demand for repayment. At that point, both the basic and the ultimate limitation period will begin to run.

V. Application of the Transition Provision to Determine if the Present Action is Statute-Barred

108 The transition provision of the new Act has to be applied to determine whether the new Act or the former Act applies to the present appeal. Section 24 reads as follows:

> 24(1) In this section,
>
> "effective date" means the day on which this Act comes into force;
>
> "former limitation period" means the limitation period that applied in respect of the claim before the coming into force of this Act.
>
> (2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.
>
> (3) If the former limitation period expired before the effective date, no proceeding shall be commenced in respect of the claim.
>
> ...
>
> (5) If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:
>
> 1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.
> 2. If the claim was discovered before the effective date, the former limitation period applies.

109 In this case, the demand note was given on February 10, 1997 and some interest was paid on October 26, 1998. The terms of the note did not specify when the interest should be paid and the parties did not attach any significance to the payment of interest. As Gillese J.A. does, I find it convenient to refer to the date of the note for the sake of simplicity and to reflect the way the issue was presented to the court. Using the October 26, 1998 date as the commencement of the former limitation period would not change the result.

110 The six-year former limitation period had not expired on the effective date of the new Act, January 1, 2004. The act referred to in s. 24(2) must mean the act of delivering the note in February 1997 and not the act of default. I say this because default is only deemed to be the act or omission for the purposes of s. 15. Therefore, the claim is based on an act that took place before the effective date and no proceeding was commenced before the effective date. The transition provision applies.

111 According to the criteria for discovery stipulated in s. 5 of the new Act, the claim was not discovered before the effective date of the new Act. In particular, the appellant, having regard to the nature of the damage could not know that a proceeding would be an appropriate means to seek to remedy the claim before a demand was made. The presumption in s. 5(2) does not apply because the record indicates that no demand for payment was made until after the effective date.

112 The first rule in s. 24(5) applies and the limitation period is calculated as if the act or omission had taken place on the effective date. Applying the new Act, the basic limitation period would begin to run upon the respondent's default in repaying the loan following the appellant's demand made on November 10, 2004. As such, the claim was not statute-barred when the appellant started proceedings in 2005.

VI. Conclusion

113 I would conclude that the new Act applies, that the appellant did not discover her claim until the default following the demand for repayment made on November 10, 2004, and that the appellant's action was launched within the basic two-year limitation period which began on that day. Consequently, I would conclude that the motion judge erred in granting summary judgment. I would allow the appeal, set aside the summary judgment, and replace it with an order dismissing the respondent's motion for summary judgment.

R.G. JURIANSZ J.A.

Hare v. Hare – questions

Both the majority and dissenting judgments are included here, because of the unusually complicated nature of the dispute and the argumentative force of both positions. This case is as much about statutory interpretation as about limitations, and should be read with some thought about which position makes more sense, given (1) what the statute says expressly, (2) what statute seems, from its silence, to take for granted, and (3) the common-law decisions already in place when the new statute was adopted.

What are the 3 dates on which it could potentially be said that the plaintiff's claim accrued (i.e., on which she discovered the claim)?

Why, according to Gillese J. A., must the plaintiff "concede that for purposes of s. 24(2), her claim is based on an act or omission that took place prior to January 1, 2004" (para. 16)?

Why, according to Gillese J. A., is the parties' disagreement over the date of accrual irrelevant when determining that "a limitation period under the new *Limitations Act* would apply if the appellant's claim were based on an act or omission that took place after January 1, 2004" (paras. 21-22)?

Gillese J.A. spends a fair amount of time on reasons that could support the plaintiff-appellant's position (paras. 29- 35) before rejecting that position. In particular, she considers the Alberta statute and *Sawchuk*, but reasons that that case is inapposite. Why? If the Ontario statute were analogous, should that change the outcome here?

Gillese J.A. first rejects the plaintiff-appellant's view because the statute does not expressly say that it means to alter the law on demand notes (para. 39). Do you find this persuasive?

She then considers the problem of "endless liability" (para. 41). Why would that (according to this view) flow from the plaintiff-appellant's view?

She specifically rejects the suggestion that the 15-year ultimate limitation period would forestall the problem of "endless liability" (paras. 43-45). Why?

Third, Gillese J.A. rejects the view that, with respect to demand notes, "a person may not know of a cause of action at the time the limitation period commences" (para. 49). Why? Do you agree with this view?

Juriansz J.A. begins by emphasizing the most widely cited rule of statutory interpretation, namely, that "the words of an Act are to be read in their entire context … harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." On its face, as quoted here, does this approach suggest some way of examining the question, in a different fashion from the approach taken by Gillese J.A.?

Why does it help to know that "[t]he law of limitations is wholly a creature of statute" (para. 66)? That is, given that this area is not part of the common law, and is free for legislatures to revise as they like, how should that affect our view of the issues here?

Hare v. Hare – questions

A court defined a cause of action as "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person" (para. 68). Does this help resolve the issue?

Juriansz J.A. distinguishes between the common-law doctrine on the accrual of a claim (i.e., "the date on which the 'cause of action arose'") and the provision, under the *previous* Limitations Act (see para. 67), that "the limitation period began to run when a cause of action arose" (para. 71). What is his point?

According to Juriansz J.A., the new Act differs from the former one by basing the limitations regime on discoverability rather than on the accrual of a claim ("[the] basic limitation period of two years … begins to run, *not* when the cause of action arose, but on the day 'on which the claim was discovered,'" para. 75). Do you find this argument persuasive? Assuming that he's right about this distinction, is that sufficient to resolve the dispute? What's the response of the majority on this point?

After reconsidering the material quoted from the jurisprudence on demand notes (paras. 11, 69-70), does it appear that the distinction cited above tells us something useful about how to apply those cases here?

Juriansz J.A. concedes that "the holder of a demand note has suffered some sort of legally cognizable damage on the day the loan is made" (para. 78). Why? Doesn't this undermine his position?

Juriansz. J.A. proceeds to distinguish the fourth condition under s. 5(1)(a) from the other three (paras. 80 ff). On what ground? Do you find this persuasive?

Juriansz. J.A. also observes (in para. 95) that if "a debtor is in default of performing a demand loan as soon as the loan is made," then s. 15(6)(c) would be a tautology. Why? Do you find this persuasive?

Finally, Juriansz J.A. acknowledges that his approach would allow for "indefinitely existing liability for demand obligations," but he concludes that there was "express legislative intent to allow" this result, and he reads other provisions of the Act as consistent with this view. Do you agree?

To someone who shared Juriansz J.A.'s concern about foreclosing the lender's claim too soon (i.e., before the lender can tell that the debtor will default), is it a sufficient answer to say that we should assume the lender knows the law, and could always have selected some other kind of loan (that is, not a demand note but one payable at regularly specified intervals)?

What, in your view, are the strongest arguments on each side? Are those arguments answered (or at least, is an answer attempted) by the other side?

In the end, is this simply a case about opposing policy views as to the acceptability of indefinitely existing liability, when not expressly set out in the statute?

Ontario Superior Court of Justice
Holomego v. Brady
2004 CarswellOnt 5405, [2004] O.J. No. 5283, 135 A.C.W.S. (3d) 1159
STANLEY HOLOMEGO (Plaintiff) and RONALD N. BRADY (Defendant)
Molloy J.
Heard: December 15, 2004
Judgment: December 16, 2004

Counsel: Stanley Holomego, for himself
H.S. Arrell, for Defendant

ACTION against lawyer for damages resulting from alleged negligence in missing limitation period.

***Molloy J.*:**

Applicable Law

1 The plaintiff was injured in a motor vehicle accident, which occurred on November 7, 1995 in the State of New York. Two cars collided, one of which then ran into Mr. Holomego's vehicle, which was parked in a driveway entrance near the highway. It is clear the accident was not Mr. Holomego's fault. The person most likely at fault was the young male driver of one of the two cars in the collision. He was a resident of New York and was driving a car owned by a New York resident. The other car was a rental vehicle owned by a company located in New York and driven by a tourist from Sweden. The only connection between the accident and Ontario is that Mr. Holomego's ordinary residence was Ontario. It is clear from the expert evidence of Mr. Thomas Segalla (a New York lawyer) that the courts in New York would take jurisdiction over any action relating to this accident. It is likewise clear from Canadian case law that New York is the proper forum for the action: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.); *Somers v. Fournier*, [2002] O.J. No. 2543 (Ont. C.A.); *Wong v. Lee*, [2002] O.J. No. 885 (Ont. C.A.).

Was the solicitor negligent?

2 The first time Mr. Holomego consulted any lawyer with respect to a potential claim he might have arising from the accident was in September 1997 when he first met with the defendant Ronald Brady. On that occasion, Mr. Brady correctly advised Mr. Holomego that although the limitation period in Ontario would be two years, the action should be commenced in New York rather than Ontario and the limitation period in New York was three years from the date of the accident. I accept Mr. Brady's evidence as to what occurred in that meeting. He kept notes of the meeting, which assisted his recollection, and he also had a very good independent recollection of the events. In particular, I accept Mr. Brady's evidence that he was never retained by Mr. Holomego to commence an action in Ontario, nor was he retained to commence an action in New York. Further, I accept Mr. Brady's evidence that he told Mr. Holomego that he needed to retain counsel in New York and impressed upon him the limitation period involved. Mr. Brady also correctly alerted Mr. Holomego to the threshold issue in New York and told him he would need to get advice from a New York lawyer on that point.

3 Mr. Brady testified, and I accept, that at the initial meeting he called a lawyer in Buffalo, a Mr. Haggerty, and spoke with him on conference phone in Mr. Holomego's presence. He could not remember if he gave Mr. Haggerty's phone number to Mr. Holomego, and Mr. Holomego denies receiving it. However, according to Mr. Brady, Mr. Holomego said he was going to be away for a period of time and would speak again with Mr. Brady upon his return.

4 Mr. Brady testified that the scope of his retainer was to assist Mr. Holomego in getting together medical reports he would need in order to properly instruct New York counsel. The documentation produced by Mr. Brady is fully consistent with that being the nature of his retainer. He never billed Mr. Holomego for anything except for disbursements. Mr. Holomego had ample time to retain New York counsel to proceed with an action and there was no need for Mr. Brady to do anything further at that point. There was no negligence to that point.

5 When Mr. Brady next met with Mr. Holomego in January 1998, he had received a number of medical reports and he reviewed them with Mr. Holomego. For some strange reason that was not reasonably explained at trial, Mr. Holomego surreptitiously tape recorded that discussion. In the discussion, Mr. Brady correctly advised Mr. Holomego that the medical reports failed to establish a causal link between the accident and many of the symptoms he was attributing to the accident. Again, nothing Mr. Brady did was negligent. He provided accurate advice. At no time did Mr. Holomego indicate that he was under the impression that an action had been commenced in New York, or that Mr. Brady was arranging that for him.

6 Mr. Brady testified that he provided the medical brief to Mr. Holomego so that he could brief New York counsel and that he again advised him about the limitation period. Shortly after this meeting with Mr. Brady, Mr. Holomego met with a New York lawyer, Mr. Steinhaus. Mr. Steinhaus was concerned that Mr. Holomego's case would not meet the threshold for personal injury claims under New York law. He asked for a further medical report from Mr. Holomego's family doctor Dr. Bonar, which was provided in March 1998. Upon receiving that, Mr. Steinhaus advised Mr. Holomego that the medical evidence did not support his claim, reminded him of the three year limitation period and urged him to retain other counsel immediately if he wished to proceed.

7 I do not accept Mr. Holomego's evidence that he merely consulted Mr. Steinhaus for a second opinion. It is apparent from Mr. Steinhaus' two letters to Mr. Holomego that he was not aware of any pending litigation. The timing of Mr. Holomego's consultation with Mr. Steinhaus is consistent with Mr. Brady's evidence that he gave the medical brief to Mr. Holomego with the advice that he should consult New York counsel soon, and with the warning that the medical evidence available was not strong. I found Mr. Brady to be a reliable and honest witness throughout. His evidence was corroborated in some areas by the documentary record. I do not believe Mr. Holomego was deliberately attempting to mislead the court, nor that he was deliberately fabricating his evidence. However, much time has passed and Mr. Holomego's memory is not the best. In many cases, his evidence is simply improbable and inconsistent with the documentary record. Where there is a conflict in the evidence between Mr. Brady and Mr. Holomego, I prefer the evidence of Mr. Brady.

8 I find as a fact that the way things were left with Mr. Holomego in January 1998, Mr. Brady reasonably believed that his retainer had ended. He did not undertake to retain New York counsel on Mr. Holomego's behalf. He did not agree to commence an action. He merely agreed to help Mr. Holomego out by pulling together the medical records and gave him some very good advice as to the strength of his case. However, he urged Mr. Holomego to satisfy himself on the strength of his case by consulting counsel in New York, which Mr. Holomego did. The advice he got from Mr. Steinhaus was consistent with what Mr. Brady had told him and Mr. Holomego did nothing further. In these circumstances, there was no requirement for Mr. Brady to do anything further.

9 I find as a fact that there was no breach of any duty owed by Mr. Brady to Mr. Holomego and hence no negligence. Mr. Holomego did not call an expert witness on the standard of care to be applied in a case such as this. However, I do not consider that to be fatal to his case in these circumstances. Essentially, it is a matter of contract. Mr. Brady had a limited retainer, which he completed properly. He never heard from Mr. Holomego again until 1999, after the New York limitation period had expired. Mr. Brady probably would have been wiser to have confirmed in writing with Mr. Holomego in January 1998 that he was doing nothing further, but that is a counsel of perfection and more directed towards covering his own exposure than anything else. A failure to confirm in writing in these circumstances does not, in my view, amount to negligence.

Were there any damages?

10 In any event, if there was negligence by Mr. Brady, Mr. Holomego did not suffer any damage as a result. The foundation of Mr. Holomego's cause of action against Mr. Brady is that as a result of Mr. Brady's negligence, Mr. Holomego did not start an action in New York before the limitation period had expired.

11 The defence called as an expert witness, Mr. Thomas Segalla, who testified as to the law of New York. No other witness was called to rebut that evidence. Mr. Segalla testified, and I accept, that based on all of the medical evidence available as well as Mr. Holomego's testimony at trial, Holomego had no chance of succeeding in an action in New York. There is a "no-fault" type regime in place in New York with a threshold for personal injury claims. Mr. Segalla is of the opinion that Mr. Holomego's claim would not meet any aspect of the threshold. Indeed, he is further of the view that Mr. Holomego's claim is so weak that it would likely have been dismissed on a summary judgment motion if it had been commenced within the limitation period.

12 I have reviewed the medical reports and considered the testimony at trial. Mr. Segalla's testimony is very persuasive. In addition to the threshold question, there is also a serious causation issue with respect to virtually all of the symptoms Mr. Holomego attributes to the motor vehicle accident.

13 In a case based on the failure of the defendant to do something, the onus is on the plaintiff to prove on a balance of probabilities that circumstances would have been different but for the negligence. Assuming for the sake of argument that Mr. Brady was negligent, it is by no means

clear that Mr. Holomego would in fact have proceeded with the action in New York. All of the advice he received was against that. He showed no particular interest in following up with Mr. Brady as to what was happening with the New York action, if in fact he believed one had been commenced. In my view, his failure to take any steps after receiving the advice he did from Mr. Steinhaus is telling. It is quite likely that Mr. Holomego would not have proceeded with litigation in New York in any event. Accordingly, he has failed to prove causation, which is fatal to his claim for damages here.

14 However, even if I were to accept that Mr. Holomego intended to proceed with an action in New York and would have done so but for negligence by Mr. Brady, all that Mr. Holomego has lost is the opportunity to assert that cause of action in New York. It is not necessary for Mr. Holomego to prove he would be certain of success in a New York action, or even that on the balance of probabilities he would likely win a judgment in New York. All he needs to establish to recover some damages in the action before me for the lost opportunity is that there would be some reasonable prospect of success in the New York action, beyond mere speculation. If there would have been some reasonable prospect of success, then the amount of damages recoverable in this action would be based on the percentage likelihood of success in New York, difficult though that may be to quantify: *Prior v. McNab* (1976), 78 D.L.R. (3d) 319 (Ont. H.C.); *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 100 D.L.R. (4th) 469 (Ont. C.A.); *Wong v. 407527 Ontario Ltd.* (1999), 179 D.L.R. (4th) 38 (Ont. C.A.).

15 However, I find that Mr. Holomego's case is so weak that he has failed to meet even that relatively low test. I find that he had no chance of success in the New York claim that is anything more than speculative. Accordingly, even if Mr. Holomego had convinced me on the other issues raised, I would have dismissed his claim on this basis as having failed to prove any damages arising from the alleged negligence of Mr. Brady.

Conclusion and Costs

16 In the result therefore this action is dismissed. The defendant is claiming costs. I am in as good a position as the assessment officer to determine costs and it is appropriate that they by fixed rather than incurring the further expense of an assessment hearing. I will determine costs based on written submissions. Since the defendant has been entirely successful, he is presumptively entitled to costs. The first submission should therefore be from the defendant. The submissions should address entitlement to costs, the appropriate scale of costs and the quantum of costs. Dockets should be produced, with full explanations and receipts where applicable. The defendant's submissions shall be delivered to my attention at the Court House at 361 University Avenue in Toronto by no later than January 21, 2005 (allowing extra time in light of the intervening holidays). The plaintiff shall have 21 days from receipt of the defendant's submissions to file a response, if any.

Action dismissed.

2015 MBQB 88
Manitoba Court of Queen's Bench
Wong v. Grant Mitchell Law Corp.
Leo Kai Yen Wong, plaintiff and Grant Mitchell Law Corporation, Cynthia Lazar, Taylor McCaffrey LLP, Barristers & Solicitors, defendants

Judgment: June 4, 2015

Counsel: Plaintiff, for himself
William S. Gange, David Cordingley, for Defendants

ACTION by plaintiff engineer against defendant lawyers and law firm for negligence.

***Dewar J.*:**

Introduction

1 When a limitation date is missed, a lawyer is exposed to a claim for damages by the client. In such circumstances, the success of the claim against the lawyer is largely dependent on the merits of the claim foreclosed by the limitation defence. This case illustrates the relationship between the claim against the lawyer and the claim that was barred by the effluxion of time. It also illustrates the problems which arise for a lawyer when a lawyer does not clearly limit his/her retainer when the client expresses an interest in taking a proceeding in which the lawyer has no confidence.

Facts

The events of 1995-96

2 In 1989, the plaintiff, Leo Kai Yen Wong, a professional engineer, was hired by Manitoba Hydro as a draftsperson. He worked approximately ten months in that position before landing a permanent position as a specification writer and editor in the Purchasing Department of Manitoba Hydro. He remained in that position until he went on long-term disability in March 2007.

3 Mr. Wong's tenure at Manitoba Hydro was marked by conflict with co- workers and superiors and aggressive letter writing and grievances on the part of Mr. Wong. This appears to have begun at least by 1991 when Mr. Wong complained to the Premier of the province that there was racial discrimination in Manitoba Hydro which was reflected by Mr. Wong's salary being less than others. It also appears to have surfaced in 1995 as a result of complaints rendered by Mr. Wong to his superiors which referenced personal harassment towards him and abuse of authority by supervisory staff. The result was a meeting with, and a subsequent letter of November 2, 1995 from, Ms Sharon Hooper, a manager in the Industrial Relations Department of Manitoba Hydro, in which she indicated that her review of his recent complaint disclosed "no evidence of personal harassment or abuse of authority by supervisory staff" as had been alleged by Mr. Wong. Further, Ms Hooper notified Mr. Wong that before he could come back into work,

he was required to meet with Dr. Gary Hawryluk, "an experienced organizational psychologist" who would "meet with you [Mr. Wong] to review your situation, provide his assessment of what he believes are the underlying issues and he will recommend a course of action to help resolve the deteriorating workplace." An appointment was set for Mr. Wong to see Dr. Hawryluk on November 7, 1995 at 8:00 a.m. at Dr. Hawryluk's office. Mr. Wong was warned that if he did not attend that meeting, or any other meeting that Dr. Hawryluk deemed necessary, or if he did not sign an enclosed medical release, his employment status would be reviewed.

[The facts go on to recite that Mr. Wong met with Dr. Hawryluk four times, and later requested a copy of Dr. Hawryluk's report, which stated that he believed Mr. Wong was committed to resolving the conflict in a positive manner. In the litigation, Mr. Wong argued that Dr. H. had given him "professional advice," which Dr. H. and the defendants disputed, saying that the visits were for "assessment," not "treatment." Mr. Wong's supervisor was not satisfied with Dr. H's letter, and sought more concrete suggestions from him; in response, Dr. H. sent a report stating that Mr. Wong suffered from "paranoid disorder," observing that "relatively 'innocuous' events can be viewed as extremely threatening, and fuelled by more sinister motives, than do actually exist" and noting that "individuals with this type of problem generally demand psychiatric intervention." Dr. H. added that, because of ethical guidelines provided by the Canadian Psychological Association, his comments should not be passed along to Mr. Wong, because that would make him more distressed. Relations between Mr. Wong and his employer continued to deteriorate, and after receiving several warning letters, he was suspended. His employer made some attempt to accommodate him by arranging for him to come back to work on a "light duties" basis, but that did not work. He remained on sick leave until March 21, 2007. When Mr. Wong's sick leave ran out, he went on long-term disability as of March 22, 2007.

On July 6, 2007, he filed a complaint against Manitoba Hydro at the Manitoba Human Rights Commission, alleging that he was mistreated by his supervisor and other management personnel, and unfairly disciplined while he suffered from his disabilities (which he described as major depressive disorder, generalized anxiety disorder and panic disorder), and that he did not receive appropriate accommodation in the workplace. He also claimed to have been a victim of discrimination on the basis of his Chinese ancestry. During that process, he sought copies of his personal health information records within Manitoba Hydro pursuant to The Freedom of Information and Protection of Privacy Act., C.C.S.M. c. F175, and on November 8, 2007, he received all of the reports and correspondence described above. This led him to believe that he was the victim of a conspiracy by his employer and Dr. H. Mr. Wong wanted to sue Dr. H. on that ground, and he retained Grant Mitchell, a labour lawyer with Taylor McCaffrey LLP. He and Mr. Mitchell (and eventually another lawyer at the firm, Cynthia Lazar) discussed various claims that Mr. Wong might raise, and the means of proceeding, which would include the retention of psychiatric experts (which Mr. Wong would have to pay for in advance). The lawyers worked on his case and negotiated with his employer, to no avail. Mr. Wong, dissatisfied with their efforts, terminated his relation with the firm on December 17, 2008.]

Post-Taylor McCaffrey

94 Following his discharge of the Taylor McCaffrey firm, Mr. Wong had some direct dealings with Manitoba Hydro. Receiving no satisfaction, Mr. Wong commenced an action on October 30, 2009 against Manitoba Hydro, his union, and Dr. Hawryluk. Dr. Hawryluk made a motion in that proceeding for summary judgment dismissing the claim against him on the basis that Mr. Wong's action was commenced beyond the applicable limitation period. Perlmutter J. … agreed with Dr. Hawryluk and dismissed Mr. Wong's action. He also dismissed Mr. Wong's claim against Manitoba Hydro and the Union …

95 Mr. Wong is therefore now foreclosed from suing Dr. Hawryluk. He brings this action in which he claims that because the Taylor McCaffrey firm did not provide him with appropriate advice as to the applicable limitation period, he has lost his opportunity to sue Dr. Hawryluk.

Analysis

The approach

96 When a lawyer is sued for failing to properly abide by, or advise, as to a limitation date, there are often two cases that need to be tried within the action against the lawyer. Firstly, if the lawyer defends the allegations that the lawyer has been negligent, and/or has breached a contractual duty, then the court must make a determination concerning the lawyer's liability. Secondly, in the event that the court determines that the lawyer has breached a duty to the plaintiff, the court must consider whether the action that was barred by the missed limitation period ("the underlying action") was meritorious. If it was not, then no significant damage could be ordered against the lawyer since, fortuitously, the plaintiff has lost nothing. Indeed, the plaintiff has gained, because he/she has been saved the costs of pursuing an unsuccessful claim. If, however, the plaintiff's underlying action was meritorious, the inability to pursue it because of limitations has taken away his/her right to recover a monetary judgment, and the lawyer would be required to compensate the plaintiff for the loss of that right.

97 This approach, however, raises the following question — in order to prove the loss, does the plaintiff need to demonstrate that he/she would have won the underlying action, or does the plaintiff need only demonstrate that he/she had a case worth arguing, in which event he/she has lost the settlement value of the case? In my opinion, if it is possible to try the underlying action at the time that the plaintiff goes to trial against the lawyer, the plaintiff must demonstrate that he/she probably would have had success against the defendant in the underlying action — in other words, the plaintiff must try the underlying action in the same trial in which the plaintiff advances his/her case against the lawyer. If it is not possible to try the underlying action at the time that the trial proceeds against the lawyer, then the court is free to attempt to assess the settlement value of the case and use it as the measure of damage caused by the lawyer's tortious or contractual breach of duty.

98 I derive this approach from the cases of *Fisher v. Knibbe*, 1992 ABCA 121, 125 A.R. 219 (Alta. C.A.), and *Stealth Enterprises Ltd. v. Hoffman Dorchik*, 2003 ABCA 58, 320 A.R. 300 (Alta. C.A.), both decisions of the Court of Appeal from Alberta. A more relaxed approach might

be found in the case of *Holomego v. Brady*, 2004 CarswellOnt 5405, [2004] O.J. No. 5283 (Ont. S.C.J.) where the court said that all the plaintiff need show to recover some damages in the action against the lawyer for the lost opportunity is "that there would be some reasonable prospect of success" in the underlying action, "beyond mere speculation" (para. 14). I prefer the approach of the Alberta Court of Appeal since if a court in a trial involving the conduct of a lawyer is able to adjudicate the underlying action, the parties are entitled to receive a definitive opinion about the merits of that case rather than a speculative opinion on how the case might have been settled. If the underlying case can be tried, then there is a duty on the trial judge to decide it.

99 In this case, the underlying action is Mr. Wong's case against Dr. Hawryluk wherein he alleged that the failure of Dr. Hawryluk to advise Mr. Wong that he suffered from paranoid personality disorder was a breach of a duty owed by Dr. Hawryluk to Mr. Wong. Mr. Wong attempted to prove in the case before me that Dr. Hawryluk breached such a duty which resulted in damage to Mr. Wong. It is as possible to decide that issue in the case at bar as it would have been had Mr. Wong successfully applied for an extension of the limitation period under Part II of *The Limitation of Actions Act*, within the time constraints set out therein. Therefore, Mr. Wong in the case before me needs to demonstrate not just that he had something to say in a case against Dr. Hawryluk, but that he would probably have won his case against Dr. Hawryluk.

> *[The court then considered whether it should first address the merits of the underlying action or the conduct of the lawyer, and concluded that on these facts, it was more sensible to consider the merits of Mr. Wong's case against Dr. H.]*

104 …. Here, the evidence is that the lawyers at the Taylor McCaffrey firm were aware that a statement of claim could be issued against Dr. Hawryluk. However, they did not consider it to be the preferable course for Mr. Wong to take, or if taken, that it had a reasonable chance of success. Under such circumstances, it makes more sense to consider the underlying action first. If the lawyers were correct about their opinion that an action against Dr. Hawryluk would not succeed, then a court should be aware of that when it assesses the lawyer's conduct. I propose to adjudicate the underlying action first.

The underlying action against Dr. Hawryluk

105 Mr. Wong has claimed that Dr. Hawryluk had a duty to disclose to Mr. Wong the results of Dr. Hawryluk's assessment as contained in his letter of February 29, 1996 to Manitoba Hydro. Mr. Wong argues that if he had been made aware at that time that he suffered from a paranoid personality disorder, he would have sought treatment for it, and that the treatment would have been successful. He argues that he would therefore have become a model employee rather than a source of controversy in the workplace. As a consequence, Mr. Wong posits that he would have been promoted in the period leading up to November 2007, not disciplined as he was, and would have been able to work until the age at which he was aiming to retire, namely 68 years of age. He argues that since he was never treated in 1996 for paranoid personality disorder, he was forced to go on long term disability on March 22, 2007, never to work again. Not only did he lose the higher salary which he says he would have earned by reason of his anticipated promotions, he claims to have lost income while on disability or on early retirement since disability payments

are only 70% of his regular salary and his pension after retirement is also only a portion of his income. He claims further that his inability to work until age 68 resulted in a lower pension being paid thereafter because his five best years of employment would have been for the years in which he was aged 64 to 68, as distinct from his five best years predating August 2010, the date of his actual retirement. He calculates his total income loss to be $1,489,281 and claims that Dr. Hawryluk would have been liable to pay him that amount, plus general and punitive damages and costs, had he been allowed to continue his action against Dr. Hawryluk.

Liability in the underlying action

106 In order to be successful in a malpractice action against Dr. Hawryluk, Mr. Wong would have had to meet four requirements:

a) Dr. Hawryluk must have owed Mr. Wong a legal duty of care;
b) Dr. Hawryluk must have breached the standard of care established by law;
c) Mr. Wong must have suffered injury or loss; and
d) Dr. Hawryluk's conduct must have been the actual and legal cause of Mr. Wong's injury.

[To determine whether Dr. H. owed Mr. Wong a duty of care, the court took up again the question of whether Dr. H. was merely assessing Mr. Wong, or was treating him.]

107 One of the major issues in this part of the case deals with whether Dr. Hawryluk owed *any* duty to Mr. Wong. After all, Mr. Wong did not retain Dr. Hawryluk — Manitoba Hydro did. It was Manitoba Hydro who requested Dr. Hawryluk's services and it was Manitoba Hydro who leveraged Mr. Wong to go and see Dr. Hawryluk or risk being disciplined, even losing his job, if he did not cooperate.

. . .

114 In this case, there is no criticism by Mr. Wong about the kind of advice which Dr. Hawryluk gave to Manitoba Hydro. Rather, Mr. Wong complains that there was a duty to disclose the report to him. This raises the question that even if Dr. Wong had no right to sue Dr. Hawryluk about performing his assessment negligently, is there a duty to at least make any report available to Mr. Wong upon his request?

115 Mr. Wong relies on the case of *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 (S.C.C.). That was a case in which the Supreme Court of Canada wrote that in most cases, a patient has a right of access to his/her medical records, subject to certain exceptions which I will consider later. Mr. Wong argues that this is a definitive case which outlines the obligations of Dr. Hawryluk to provide the February 29, 1996 report to Mr. Wong upon his demand.

116 In *McInerney*, a physician who had treated an applicant patient refused to provide copies of reports and records which she had in her file but which had originated from other physicians. The physician argued that the applicant patient should obtain copies of those documents from the other physicians and that it would be unethical for her to release them directly to the applicant patient. In the unanimous judgment of the Court, written by La Forest J., the Court concluded, at p. 159:

> In the absence of regulatory legislation, the patient is entitled, upon request, to inspect and copy all information in the patient's medical file which the physician considered in administering advice or treatment. Considering the equitable base of the patient's entitlement, this general rule of access is subject to the superintending jurisdiction of the court. *The onus is on the physician to justify a denial of access*. ...

[emphasis added]

117 Mr. Wong argues that as a registered psychologist, Dr. Hawryluk would have an obligation similar to that of a medical doctor. Mr. Wong further argues that since he had made a request to Dr. Hawryluk's office for copies of any reports made to Manitoba Hydro, the fact that Dr. Hawryluk steered Mr. Wong to Manitoba Hydro in the first place, plus the fact that his February 29, 1996 report requested Manitoba Hydro to refrain from releasing the report directly to Mr. Wong, constituted a breach of the duty of disclosure of a health care professional set forth in the *McInerney* decision.

118 The *McInerney* decision is predicated on the existence of a fiduciary relationship between a physician and a patient. However, the *McInerney* case dealt with a situation in which the respondent doctor was in a treatment relationship with the applicant patient.

…

121 In my view, the relationship between Dr. Hawryluk and Mr. Wong was different from a treatment relationship. Mr. Wong argues that he was in a treatment relationship with Dr. Hawryluk, but I do not find that from the evidence before me. The only reason that Mr. Wong went to see Dr. Hawryluk was because of the insistence of Ms Hooper and the fear that he would lose his job if he did not go.

. . .

125 … Based upon Dr. Hawryluk's testimony, any coping suggestions offered by Dr. Hawryluk to Mr. Wong were general in nature and did not constitute advice which one might expect to receive in a full treatment relationship. Given his reliance on an inaccurate picture painted by Mr. Wong, I do not accept Dr. Stambrook's opinion that a treatment relationship existed between Dr. Hawryluk and Mr. Wong.

126 I conclude that the relationship that existed was essentially an assessment relationship.

…

135 Even in *McInerney*, however, La Forest J. acknowledged the existence of some circumstances in which the requirement to provide access to medical records would not exist. For example, without limiting the range of circumstances, La Forest J. listed five such situations, at p. 155:

> If a physician objects to the patient's general right of access, he or she must have reasonable grounds for doing so. … A number of arguments … have been advanced … for denying a patient access to medical records. These include: … (3) the medical records may be misinterpreted … (5) disclosure of the contents of the records may be harmful to the patient or a third party.

137 … the Supreme Court in *McInerney* appears to recognize the existence of a therapeutic privilege as its fifth exception. However, the Court went on to say that for therapeutic privilege to apply, the facts must clearly demonstrate that harm will result to the patient or a third party if disclosure occurs. La Forest J. wrote, at pp. 157-8:

> Non-disclosure may be warranted if there is a real potential for harm either to the patient or to a third party. This is the most persuasive ground for refusing access to medical records. …

138 In his February 29, 1996 report, Dr. Hawryluk's stated reasons for withholding disclosure to Mr. Wong were articulated as follows:

> … Given ethical guidelines provided by the Canadian Psychological Association, the welfare of the client/patient remains paramount in an assessment or therapeutic relationship, and as such, the following comments are based upon the understanding that the current correspondence will not be released directly to Mr. Wong, given that I consider certain comments in this correspondence likely to cause Mr. Wong some distress. *This is based chiefly upon characterological features of Mr. Wong's personality which tends to render him prone to misinterpret details or to interpret information out of context, coupled with an excessively detail oriented style which, I believe, would likely result in Mr. Wong's possibly misinterpreting the following information, which is offered to you on the basis that this information will be held in strictest confidence.*

[emphasis added]

…

140 Dr. Hawryluk testified that he thought telling Mr. Wong about his diagnosis would upset Mr. Wong unduly. Mr. Wong had been interested in trying to convince Dr. Hawryluk that Manitoba Hydro was harmful to him. Dr. Hawryluk was concerned that when Mr. Wong heard the word "paranoid", he might go and do his own research and come to an erroneous conclusion about the extent of the disorder. Such misinterpretation might encourage Mr. Wong's paranoiac tendencies as distinct from resolving them which would further complicate his employment relationship with Manitoba Hydro. At that time it was in Mr. Wong's interest that he preserve his employment relationship with Manitoba Hydro. Dr. Hawryluk feared that interest would be jeopardized if the report was released directly to Mr. Wong.

141 Do these concerns reach the level of "harm" to justify a therapeutic privilege? I conclude that the contemplated distress described in the February 29, 1996 report does not constitute the "harm" described in the *McInerney* decision, namely a "significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient." The *McInerney* decision stands for the proposition that therapeutic privilege should outweigh a patient's right to health information in only the clearest and most harmful situations.

142 I do not perceive the kind of upset to which Mr. Wong would be exposed would qualify for an *unqualified* therapeutic privilege. Rather, the better course, more consistent with the *McInerney* case in which therapeutic privilege was limited to a "small number of circumstances", would be to provide Mr. Wong with the results of the assessment but under controlled conditions which would reduce the risk of misinterpretation and subsequent distress. I conclude that the fear expressed by Dr. Hawryluk in his February 29, 1996 report was that, given Mr. Wong's paranoid

personality, he would simply perceive this report as another example of a Manitoba Hydro person treating him unfairly.

…

144 In my view, the fear expressed by Dr. Hawryluk would fall within the third exception described in *McInerney* and would not automatically trigger the therapeutic exemption which is referred to in the fifth exception set out in the *McInerney* case.

145 In *McInerney*, La Forest J. said this about the third exception, at pp. 156-7:

> The arguments that the records may be meaningless or that they may be misinterpreted do not justify non-disclosure in the ordinary case. If the records are, in fact, meaningless, they will not help the patient but neither will they cause harm. It is always open to the patient to obtain assistance in understanding the file. In the Report of the Commission of Inquiry into the Confidentiality of Health Information (Ontario, 1980) (the "Krever Report"), vol. 2, at p. 469, Krever J. expressed the opinion that habitual use of jargon or technical terminology is not a sufficiently sound reason for denying a patient access to health records. He did note, however, that a re-evaluation of record keeping methodology may be necessary if a general rule of access is established. *If it is possible that the patient will misconstrue the information in the record (for example, misinterpret the relevance of a particular laboratory test), the doctor may wish to advise the patient that the medical record should be explained and interpreted by a competent health-care professional.*

[emphasis added]

146 Therefore, one of the additional duties falling upon Dr. Hawryluk which arose from his request to control disclosure of his report was to take reasonable steps to explain, or arrange for the proper explanation of the results of his assessment to Mr. Wong, in order to guard against the mischief which formed the basis of his request to Manitoba Hydro that it refrain from providing a copy of the report directly to Mr. Wong. This leads to the question whether Dr. Hawryluk took such reasonable steps.

147 When Dr. Hawryluk forwarded his February 29, 1996 report to Manitoba Hydro, he did not then take concurrent steps to sit down with Mr. Wong and explain the report to him. Given that Mr. Wong was entitled to receive from Manitoba Hydro the results of the report, and given Dr. Hawryluk's requirement that the report not be disclosed directly to Mr. Wong, Dr. Hawryluk assumed the responsibility of ensuring that Mr. Wong received the appropriate explanation about its contents. There is nothing in the evidence before me that shows that Dr. Hawryluk made attempts to contact Mr. Wong at the end of February or the beginning of March 1996. It may well be that he was awaiting the opportunity to discuss the matter with Manitoba Hydro before contacting Mr. Wong, but there is no evidence which allows me to conclude that.

…

168 … I must … conclude that Dr. Hawryluk failed in his duty to take reasonable steps to provide his report, or arrange for a suitable explanation of same, to Mr. Wong.

169 Dr. Hawryluk had placed himself in a difficult situation. He was contractually bound to give a report to Manitoba Hydro, yet professionally concerned that the report would cause Mr.

Wong distress if it was disclosed directly to him. In my view, having placed the string upon the disclosure of the report, there arose an obligation on the part of Dr. Hawryluk to attempt to disclose the contents of the report to Mr. Wong in a constructive way. The onus is on him to demonstrate that he did so on a balance of probabilities. The effluxion of time since 1996 may have made it more difficult to overcome that onus, but the reason for the untimely disclosure of the report results from *his* decision. He has not satisfied the onus which the law places upon him to justify the non-disclosure of the report.

…

175 … I have … concluded that the distress contemplated by Dr. Hawryluk did not qualify for the absolute therapeutic privilege exemption, but that there was a legal imperative to take reasonable steps to share the assessment with Mr. Wong in a controlled way. The issue is not whether Dr. Hawryluk struggled with resolving the tension between disclosure and distress to Mr. Wong, but rather, whether Dr. Hawryluk can in law justify not disclosing the results of the assessment to Mr. Wong at all. I have already concluded that the evidence does not satisfy that onus.

…

Damages in the underlying action

177 However, even if there was a duty that was breached, I would not, in this case, be persuaded on a balance of probabilities that the damage claimed by Mr. Wong has occurred. The largest component of Mr. Wong's loss is his loss of income claim. Yet it is predicated on a number of propositions, namely:

a) that if Mr. Wong had been made aware of Dr. Hawryluk's diagnosis, Mr. Wong would have sought treatment;

b) that if Mr. Wong had been treated, the treatment would have been successful in restoring Mr. Wong's mental health;

c) that Mr. Wong would have received promotions and gone on to become an exemplary employee; and

d) that Mr. Wong would have worked until he was 68 years of age.

[The court reviewed each proposition and found, on a balance of probabilities, that Mr. Wong could not meet his burden of proof as to any of them.]

186 The short answer is that a claim by Mr. Wong against Dr. Hawryluk would have resulted in no material compensable benefit to Mr. Wong.

The case against the lawyers

187 The defendant lawyers testified that they were of the opinion that there was no merit to a proceeding against Dr. Hawryluk, or that the better course of action for Mr. Wong was to the HRC. The evidence discloses that both lawyers tried to channel Mr. Wong's focus onto the HRC complaint which he had started against Manitoba Hydro prior to their retainer. They assessed that the strength of Mr. Wong's case lay in a claim before the HRC that Manitoba Hydro had failed to accommodate Mr. Wong while possessing knowledge that he suffered from a mental

illness. In the end, I have concluded that the lawyers were right — there was no worthwhile claim against Dr. Hawryluk.

188 The case raises interesting questions about the duty of lawyers to advise a client about the limitation period for a cause of action in which the lawyer has no confidence and even advises against. Mr. Wong argues that his retainer of the Taylor McCaffrey firm was not limited to his human rights complaint, and even though he acknowledges that the lawyers did not share his enthusiasm for suing Dr. Hawryluk, they were duty bound to clearly and unequivocally advise him to go elsewhere if he wished to pursue such a claim, and, at least in a time-sensitive situation, advise him of the limitation period applicable to such a claim.

189 The converse argument is that there was no such duty. Advice regarding the limitation period for a claim that was doomed for failure would be academic. In any event, the lawyers argue that Mr. Wong was told, at least by Ms Lazar, that such a claim against Dr. Hawryluk would be fruitless.

Liability of the lawyers

190 In this case, in order to recover against the defendants, Mr. Wong must prove the following:

a) the existence of a lawyer and client relationship;
b) the applicable standard of care of a lawyer to his/her client in respect of the advice concerning limitation periods;
c) breach of the applicable standard of care; and
d) damage resulting from the breach.

191 It is common ground that a lawyer and client relationship existed between the defendants and Mr. Wong. There was no written retainer agreement, but the evidence shows that the purpose of the retainer was to take the appropriate action to obtain compensation for Mr. Wong as a result of his inability to work at Manitoba Hydro because of a mental illness of which Manitoba Hydro had been aware since 1996.

192 It is common ground that the lawyers were of the view that the preferable procedure to take was to continue the application against Manitoba Hydro before the HRC.

193 It is also common ground that Mr. Wong from time to time raised the notion of suing Dr. Hawryluk. The evidence shows that Mr. Mitchell told Mr. Wong that a lawsuit was not a preferable procedure and Ms Lazar told Mr. Wong that a claim against Dr. Hawryluk had no reasonable chance of success. The evidence also shows that notwithstanding this advice, to the knowledge of Mr. Mitchell and Ms Lazar, Mr. Wong never gave up his view that Dr. Hawryluk should be sued.

194 It is also common ground that neither Mr. Mitchell nor Ms Lazar gave any advice to Mr. Wong about the limitation period applicable to Mr. Wong's proposed suit against Dr. Hawryluk. The essential question, which is included in the notion of standard of care, is whether Mr.

Mitchell and Ms Lazar were under any obligation to give Mr. Wong any advice about the applicable limitation period for an action which they did not support, let alone commence.

[The court went over the evidence involving Mr. Wong's desire to sue Dr. H and the lawyers' advice against doing so.]

…
204 I cannot fault Mr. Mitchell for his assessment that Mr. Wong should focus on the HRC complaint. Indeed, I am of the view that that was good, solid, practical legal advice. Nor can I say that Ms Lazar's assessment of the strength of Mr. Wong's case against Dr. Hawryluk was outside the range of possible outcomes, although I have not shared some of her conclusions. However, where I do take issue with the lawyers is that they had a duty to provide advice to protect Mr. Wong's opportunity to commence any reasonable action, and by failing to direct their minds to limitations of actions, they failed in providing that protection.

205 As in most cases, the duties of a lawyer should be viewed contextually. A lawyer may be able to dismiss a client's suggestions if they are frivolous or fraudulent. In such circumstances I see no obligation on the lawyer to assess a particular limitation period. However, where a client's suggestions have some merit, even if not many, the lawyer should take steps on the part of that client to ensure that the client's potential claim is protected, or unambiguously tell the client to go somewhere else if the client wishes to pursue it. I have concluded that Mr. Wong's claim would have been unsuccessful, but it was at least arguable and having raised it with the lawyers, he was entitled to receive protective advice about it.

206 If the latest limitation date prescribed by s. 2 of *The Limitation of Actions Act* was January 26, 2009, this was a date which fell approximately one month after the termination of the lawyer/client relationship between Mr. Wong and the Taylor McCaffrey firm. Given the imminence of the limitation date, I am of the view that the lawyers could not simply withdraw from the relationship without advising Mr. Wong that he should take immediate steps to seek limitation advice from another firm respecting any claim against Dr. Hawryluk. …
…
210 Accordingly, I find that the defendants have failed to provide the appropriate protective advice to Mr. Wong respecting the limitation dates to sue Dr. Hawryluk and that Mr. Wong's inability to make a claim within the appropriate limitation period against Dr. Hawryluk is the direct result of that failure.

Damages
211 The authorities suggest that where a lawyer fails in a duty respecting limitations where the underlying action would have been unsuccessful in any event, nominal damages are to be awarded (see *Fisher v. Knibbe*, *supra*). There are exceptions such as where the underlying action was unreasonable or fraudulent (see *Serban v. Egolf* (1983), 43 B.C.L.R. 209 (B.C. S.C.), but this is not such a case.

Conclusion

212 Having found Mr. Wong's claim against Dr. Hawryluk to have been materially unsuccessful, I therefore assess nominal damages only against the defendants jointly and severally in the amount of $100.

213 Costs may be spoken to, if requested.

Action allowed; nominal damages awarded.

The case is useful for our purposes because it shows (1) the complications that lawyers may have to confront, if they miss the limitations deadline for a client; (2) the difficult burden that the ex-client (would-be plaintiff) faces, when suing the lawyers for professional negligence as a result of that failure.

Consider what the Queen's Bench has to say about the circumstance that gave rise to this litigation—namely, the expiration of Mr. Wong's claim against Dr. Hawryluk. In paragraph 206, the court suggests that Mr. Wong may have missed the limitations deadline by as a little as one month. Is there any implication that when the claim in *Wong v. Hawryluk* was dismissed on the ground that it was time-barred, the court should have been more flexible and permitted Mr. Wong to proceed?

What considerations does the court enumerate, when determining whether Mr. Wong suffered any damage (primarily in the form of lost income) because of the alleged breach of duty of care on Dr. Hawryluk's part?

What are the elements in determining the lawyers' liability to Mr. Wong, in his case against them for professional negligence?

Given that the judge agrees with the lawyers, that Mr. Wong had at best a feeble case against Dr. Hawryluk, what explains the conclusion that the lawyers breached the standard of care and owe damages to Mr. Wong?

In your view, have we made it too difficult to sue lawyers for professional negligence under these circumstances? After all, that may be the only option that remains for the ex-client, in a such a case.

I.4. How Many Times? *Res Judicata*

2012 BCCA 286
British Columbia Court of Appeal
Singh v. McHatten

Laaljot Singh, Respondent (Plaintiff) and Kevin Orval McHatten, Jarnail Singh Rai, Mercado Capital Corporation and C. Keay Investments Ltd. dba Ocean Trailer, Appellants (Defendants)
Ryan, Donald, Neilson JJ.A.
Heard: June 13, 2012
Judgment: June 28, 2012

Proceedings: reversing *Singh v. McHatten* (2011), 2011 BCSC 1093, 2011 CarswellBC 2098 (B.C. S.C.)
Counsel: G. Ritchey, for Appellants
E.A. Thomas, A.T. McLelan, for Respondent

APPEAL by defendants from judgment reported at *Singh v. McHatten* (2012), 2012 BCCA 286, 2012 CarswellBC 1878 (B.C. C.A.), dismissing defendant's application for summary judgment in action arising out of automobile accident.

***Donald J.A.*:**

1 The respondent brought two separate actions for claims arising from a single motor vehicle accident; the first was in the Small Claims Court and the second in Supreme Court.

2 The appellants in the Supreme Court action pleaded *res judicata* and moved to dismiss the action. On 11 August 2011, a summary trial judge dismissed the application: [*Singh v. McHatten*] 2011 BCSC 1093 (B.C. S.C.). The appellants appeal from that decision.

3 The judge dismissed the application on the finding that the causes of action were not the same. She held that although nominally the defendants were the same, the real dispute in Small Claims Court was between the respondent and the Insurance Corporation of British Columbia ("ICBC") over ICBC's attribution of fault in the accident having implications for future insurance premiums and recovery of the deductible on the respondent's collision repairs. She distinguished this suit from the Supreme Court action, which is a claim for personal injury damages.

4 The judge held in the alternative that if the elements of cause of action estoppel were present, she would exercise her discretion against applying the doctrine on the basis that otherwise the respondent would be denied his day in court.

5 The appellants say the judge erred in confusing the respondent's motivation for bringing the first proceeding with the cause of action supporting it and in failing to identify any valid special circumstance justifying the refusal to give effect to cause of action estoppel.

6 I respectfully agree with these contentions. I would allow the appeal and dismiss the action.

Facts

7 The respondent was rear-ended by a tractor trailer on 29 July 2006. He filed a claim form with ICBC listing certain injuries within a few days. An ICBC representative informed him on 2 August 2006 that ICBC determined he was 100% at fault for the accident.

8 The respondent retained counsel who wrote to the ICBC adjuster on the claim that his client was disputing the fault assessment. On 27 September 2006, the respondent commenced an action in Small Claims Court by filing a notice of claim. The notice form asks the question, "What happened?" In the appropriate place, the notice states as follows:
On July 29, 2006 around 2:10 p.m. the Claimant was driving his vehicle and was rear ended by a semi trailer driven by the Defendant, Kevin Orval Mchatten. Jarnail Singh Rai is the owner of the vehicle driven by Kevin Orval Mchatten. The Defendant was 100% responsible for the collision. … As a result of the collision the Claimant's vehicle suffered damages. The repair costs of the claimant's vehicle was about $7045.84.
…
11 The judge found for the respondent and held that the defendants were 100% responsible for the accident. … [and awarded damages of $ 7,045.85.]

12 There are only two references to personal injury in the trial transcript. The first is in the examination-in-chief of the respondent:
Q What injuries would you say you suffered or did you suffer?
A When I went that night, night time, you know, and I was going to go to sleep my neck was hurting and when I was taking [*sic*] side and my back would hurt.
Q And what about your daughter, what injuries did your daughter suffer?
A She was saying that her left arm, something, and that was hurting and her back was stiff.
Q And what happened after the accident?
A After the accident when my daughter was crying and she was screaming and then I called ambulance.

13 The second reference occurs at the point in the trial where the judge is seeking assistance in framing the terms of the judgment order and the question of the respondent's premium is discussed:
…
MS. TIWANA: As well as — and Mr. Singh also advises, and ICBC didn't cover, he had to pay — as a result of the accident he said he did end up going to physio, which ICBC didn't cover.
THE COURT: We — I don't have a personal injury claim in front of me, but, yes, okay.
MS. TIWANA: No, no, and that's what I told him. That's what I told him, that ICBC would have to look into that.
THE COURT: That's not before me, the damages for injuries, right.
MS. TIWANA: No, that's separate.
THE COURT: It's simply for the vehicle and the costs of determining this issue of liability, right.
…
14 The respondent asserts that counsel for the appellants, then Mr. Kaatz, was aware of a personal injury claim and content that the question of damages be dealt with later.

15 When the relevant passages are read in context, the transcript will not support that assertion. It is plain, in my view, that any reference to damages in Mr. Kaatz's remarks pertains only to the amount of repair costs, and where counsel speak of trying liability only, they are not to be taken as having personal injury damages in mind.

16 The judge found, at para. 23 of her reasons, that, "Mr. Kaatz also took no issue with Ms. Tiwana's statement that Mr. Singh's personal injuries were not in issue but were to be determined later".

17 I regret to say that the finding is unsupported by the Small Claims Court record. It follows that there is no basis for an understanding that the case would be split between liability and damages in all respects.

18 This analysis removes one of the foundations of the judge's conclusion, expressed as follows:

[31] In my view the cause of action in the prior Small Claims action is distinct from the cause of action in this Court. While the Notice of Claim filed by the plaintiff in Small Claims Court claimed "vehicle damage & repair costs", it is clear on a review of the transcript of the proceedings that the plaintiff's vehicle had been repaired by ICBC; he was not seeking damages for repair costs because ICBC had paid the repair costs. The primary issue was ICBC's determination that the plaintiff was wholly at fault for the accident and the plaintiff's increased insurance premiums. Counsel for the plaintiff made it clear that the claim for personal injuries and damages would be dealt with later, and that was understood by counsel for ICBC. On that basis neither the third nor the fourth criteria for cause of action estoppel, or the first criteria for issue estoppel have been met.

[Emphasis added.]

The underlined portion cannot be sustained on any reasonable view of the evidence.

19 The other flaw in the judge's reasoning lies in her equating the respondent's motivation in bringing the first action with a cause of action. The causes of action in the two proceedings are undeniably the same: damages for negligence. In order to achieve the respondent's goal of reversing ICBC's fault determination and to recover the deductible, it was necessary for the respondent to sue the driver and owner/lessor and prove all the elements of negligence: duty of care, standard of care, causation and loss. He would have to repeat the same process in the Supreme Court action in order to recover personal injury damages.

…

[The appellate court referred again to the trial judge's statement that the criteria for neither cause of action estoppel nor issue estoppel had been met, and in any case, if those criteria had been met, then the trial court would exercise its discretion to decline to apply the estoppel because "there are special circumstances not to apply res judicata for to do so would cause a real injustice to the plaintiff. The plaintiff has not had his day in court on his claim for damages for personal injuries arising out of the accident." The appellate court then explained that the criteria for cause of action estoppel had been met]:

23 … The Small Claims action in this case is not framed in terms of contract or breach of statutory duty against ICBC but in negligence against alleged tortfeasors.
…
25 Were there special circumstances here? At para. 33 of the reasons quoted above, the judge refers to the Small Claims limit and denial of the respondent's day in court. Neither is a valid special circumstance.

26 The damages limit in Small Claims does not present an obstacle. If a claimant wishes to litigate a matter in Small Claims Court, he can abandon the excess amount of his claim and remain there (R. 1 (4) and (5), *Small Claims Rules*) or if, having started there, he realizes his claim may exceed the limit, he can apply to have the claim transferred to the Supreme Court (R. 7.1, *Small Claims Rules*).

27 The other circumstance said by the judge to be special is the denial of the respondent's day in court to litigate his personal injury damages. By itself, that cannot be a valid consideration because such a denial will happen in almost every application of the doctrine — indeed, its necessary effect is to prevent the litigation of a matter that ought to have been raised and dealt with in an earlier proceeding.

28 If the judge's sense of injustice is felt because of a concern that the appellant's conduct led the respondent to believe that the case was split and that personal injury damages could be tried later, I am bound to say, as discussed earlier, that such a view is unsupported. One would expect to see an express understanding that the parties would proceed in that way. There is none here. The facts do not establish a tacit understanding to that effect.

29 For these reasons, I would allow the appeal, set aside the order below, and dismiss the action.

Appeal allowed.

Comments

Singh shows how cause of action estoppel applies in a case where the plaintiff originally proceeded in small claims court and then sought additional damages in the B.C. Supreme Court. The trial judge allowed this, only to be reversed on appeal, when the BCCA held that the second claim duplicated the first one. The defendant pleaded r/j at trial and sought summary judgment on that basis, but the trial judge rejected the plea for two reasons: (1) mutuality was lacking, and the plaintiff had not sought damages related to "personal injuries" in the small claims case, but had only sought a judgment on whether the defendant was liable or not, and on damages related to the vehicle; (2) even if the plaintiff had indeed sought damages for personal injury in the small claims case, to preclude his claim in the trial court would amount to denying him his day in court. The appellate court disagreed with both of these conclusions.

One aspect of the case is somewhat confusing. In paras. 11-13, the BCCA reviews the part of the trial transcript in which the plaintiff testified about having pursued claims for personal damages in the small claims court. In the quoted portion, the small claims judge remarks, "That's not before me, the damages for [personal] injuries, right," to which the plaintiff's counsel answers, "No, that's separate." This statement might seem to support Mr. Singh's contention, before the BCCA, that he had not previously sought damages for personal injuries. However, in the BCCA's interpretation ("when … read in context," para. 15), when the lawyer said 'No, that's separate," she meant, "Injuries for personal damages are separate from damages relating to the vehicle, and we are seeking both." That is why the BCCA held that Mr. Singh had not raised a new and different claim, when he took his case to the Supreme Court.

Although the case does not raise any particularly profound issues, it does illustrate some useful points:

(1) although seemingly not a hard case, the trial court and the appellate court made opposite rulings

(2) the case shows how a plaintiff might seek to recharacterize an already litigated claim in a new fashion, hence attempting to circumvent the r/j bar

(3) the BCCA suggests that it might well have come out the other way (affirming the trial court), if it were true that liability and damages were split (bifurcated) in the previous litigation; it's therefore worth noticing when a case is bifurcated in this fashion, since the application of r/j may be more complex

Questions:

What led the trial judge to conclude that mutuality was lacking? (para. 3) Notice that this point gets very little play in the BCCA's analysis. Should it have received more attention? Do you think it helps explain the trial judge's decision to exercise her discretion not to apply an estoppel? If so, why?

Why, according to the plaintiff, did he *not* seek damages for personal injuries in the small claims case? What is the BCCA's response? (paras. 25-26)

In your view, was this the easy case that the BBCA suggests it is, or do you think there is some merit to the trial judge's view?

Town of Grandview v. Doering

Supreme Court of Canada

Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

Judgment: October 27, 1975

Counsel: K. B. Foster and R. Stevenson, for appellant.
W. C. Newman, Q.C., and L. J. Lucas, for respondent.

Appeal from the judgment of the Manitoba Court of Appeal, [1975] 1 W.W.R. 321, 52 D.L.R. (3d) 395, which allowed an appeal from the judgment of Dewar C.J.Q.B., 45 D.L.R. (3d) 623, who allowed a motion staying the second action.

Held (Laskin C.J.C., Pigeon, Spence and Beetz JJ. dissenting), the appeal was allowed and the order of Dewar C.J.Q.B. staying the second action restored.

Ritchie J. (Martland, Judson, Dickson and de Grandpré JJ. concurring):

1 I have had the advantage of reading the reasons for judgment of my brother Pigeon in which he has recited many of the facts giving rise to this appeal as well as relevant portions of the pleadings and of the judgments in the Manitoba courts.

2 This is the second of two actions brought by the respondent against the Town of Grandview; both actions are founded in nuisance and both assert claims for damage by water to the respondent's land and the crops thereon, allegedly caused by the conduct of the Town of Grandview in the construction and operation of a "make-shift" dam whereby the waters of the Valley River where it runs through the respondent's land were so "impounded" as to have adversely affected his soil and crops.

3 The first action was brought in April 1969 claiming that by repairing and replacing a dam previously existing, the town had "impounded a large volume of water and caused to be built up a large unnatural and above normal head of water ... and raised the water levels in the said River ..." and it is further alleged that "the said dam obstructed the natural flow of water and caused the waters therein to overflow the banks ... flooded, inundated, cut away and eroded the plaintiff's said land."

4 The first case which related to damage to the plaintiff's lands and crops in the years 1967 and 1968, and which is herein referred to as the 1969 action, was apparently not called for trial until September 1972 at which time the hearing was adjourned until May 1973 when Tritschler C.J.Q.B. rendered his decision, the opening words of which indicate that both parties had ample time to consider all phases of the matter before and during the trial; in this regard, the Chief Justice observed:

> This case has been before the courts for many years, and this is our second hearing.

5 Chief Justice Tritschler's reasons for judgment are conveniently recited in the reasons of my brother Pigeon and I only find it necessary for the purpose of these reasons to abstract the following two quotations:

> (i) The very simple issue here is whether the frequent flooding of Mr. Doering's land, which no one disputes, is attributable to the maintenance by the Town of Grandview of its dam.
> Unfortunately, Mr. Doering has convinced himself that the dam has been the cause of his flooding troubles. That is not so. Not only has he failed to satisfy the onus of proving that the flooding of his land was caused by the defendant's dam, but his own evidence establishes the very contrary of that; namely, that the flooding would have taken place if the dam had not been in existence.
> (ii) It is clear from the evidence that plaintiff's land is going to be flooded to some extent nearly every year because it will flood whenever the flow exceeds 750 cubic feet per second, and the mean flood is 879 cubic feet per second. You are going to have flooding there every year except in a dry year like the present.
> The evidence fully satisfies the Court that the flooding, which is the subject matter of this action, was not caused and was not contributed to by the defendant's dam.

6 Within nine months of this judgment being rendered, a new action was commenced by the same Mr. Doering claiming damage to his crops from water in 1969, 1970, 1971 and 1972 as a result of the Town of Grandview having maintained the waters of the Valley River at an artificially high level behind the same dam. The conduct alleged against the town as the foundation for both actions was the same, namely, the impounding of the waters of the river at an artificial height due to the dam, but in the second action it was alleged that the damage was occasioned by the "impounding" causing the water of the river to overflow and enter an "aquifer" consisting of sandy soil about four feet below the surface of Doering's lands and thus to saturate the soil with water.

7 The reason for bringing the second action is frankly explained in the affidavit filed herein by Mr. Doering where he says:

> I consulted Walter Carman Newman about taking an appeal from that judgment which held that the damage to my land and crops that I suffered in 1967 and 1968 was not caused by surface flooding by waters impounded by the dam in question.
> 4. I was advised by Walter C. Newman that the damage to my land and crops which continued in 1968, 1969, 1970, 1971 and 1972, was probably not due to surface flooding at all but caused by the impounded water flowing through an aquifer layer underneath the topsoil of the plaintiff's land and saturating the ground above during the relevant periods. He further advised me that since these issues were not dealt with in the 1969 action, an appeal would be ineffectual in such a case and that I had to start another action.
> 5. Acting upon the suggestion of Walter C. Newman I consulted Professor Andrew Baracos, a recognized soils expert, who conducted tests on the said land and confirmed the suggestion of Walter C. Newman.
> 6. Prior to 1973 I had no knowledge of an aquifer lying close beneath the topsoil of my land or the effect that such an aquifer would have when waters are impounded at an artificial height in a river to which the aquifer extends, I believing only that the saturation of my soil could only be due to surface flooding. The question of the aquifer was therefore not raised in the 1969 action and the action in any event could not deal with the damage caused to my land and crops in the years 1969 to 1972 both inclusive.

8 This affidavit was filed on a motion brought by the defendant before Dewar C.J.Q.B. seeking to have the action stayed or set aside. Excerpts from the decision on that motion are once again conveniently recited in the reasons for judgment of my brother Pigeon. I only find it necessary to advert to the following paragraph which he quoted [45 D.L.R. (3d) 623 at 627:

> None of the facts alleged re the conduct of the defendant in the pending action are new, in the sense that they did not exist when the prior action went to trial in September 1972. There is no suggestion the aquifer, now alleged to serve as a conductor of water from the forebay to plaintiff's lands, did not exist in the years 1967 through 1972. All of the facts now alleged as to tortious conduct (which is the essence of this type of actionable nuisance) were available and could have been brought forward in the prior action. If they were not, whether by inadvertance, failure to exercise reasonable diligence, or accident, the plaintiff is not now entitled to pursue what is substantially the same claim, but for damage alleged to have been sustained in subsequent years.

9 Later in his judgment, Dewar C.J.Q.B. cited the cases of Henderson v. Henderson (1843), 3 Hare 100, 67 E.R. 313, and Ord v. Ord, [1923] 2 K.B. 432, and quoted the following passage from Wigram V.-C.'s reasons for judgment in the former case at p. 115:

> ... I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

10 In reversing the judgment of Dewar C.J.Q.B., Matas J.A., speaking for himself and Freedman C.J.M. (Guy J.A. dissenting) in the Court of Appeal of Manitoba, referred to the last-quoted excerpt from the case of Henderson v. Henderson but adopted the interpretation placed upon that case by Johnson J.A., with whom Ford C.J.A. agreed, in the Appellate Division of the Alberta Supreme Court in Hall v. Hall and Hall's Feed & Grain Ltd. (1958), 15 D.L.R. (2d) 638 , where he characterizes the proposition stated by Wigram V.-C. as "the wider principle of res judicata" and goes on to say [p. 646]:

> It was apparently the wider principle of res judicata that was applied in the present case. This doctrine has not so wide an application as the broadness of the language might lead one to infer. It is limited to such matters as arise within one cause of action. It is, I think, clear that if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent an examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct.

11 In that case the first action had been brought for an accounting between husband and wife, whereas the second action involved the allegation that a business partnership had existed

between them which had been converted into a limited company and the wife sought compensation for her interest in the partnership. There were thus clearly two separate causes of action, but with the greatest respect I cannot agree that the causes of action in the two cases here under consideration are separate and distinct. As Dewar C.J.Q.B. points out, all the facts which are alleged to constitute tortious conduct by the town in the present case existed when the prior action went to trial and it was there found that these facts did not support the present respondent's action for damage to his crops by water. The only new issue raised in the present case is the contention that the same conduct for which the town was exonerated from blame in respect of damage to crops in 1967 and 1968 is blameworthy in respect of the damage done in 1969, 1970, 1971 and 1972 because, although the water came from the same source, it reached the respondent's land by a different route. The aquifer was on the respondent's land before 1967 and he states in his affidavit that damage to his land and crops complained of in the first action was probably caused by it according to the information which he received from the expert whom he consulted after the trial. Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory. Such an expert could probably have been consulted before the first action, and if he had been then the matter would no doubt have been put in issue at that time, but in my view the circumstances here are to be considered in the light of the principles established in Phosphate Sewage Co. v. Molleson (1879), 4 App. Cas. 801 , where Earl Cairns L.C. said at pp. 814-15:

> As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, and I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before. Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words res noviter veniens in notitiam, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to.

12 This passage was adopted by the Supreme Court of Nova Scotia in Fenerty v. Halifax (1919), 53 N.S.R. 457, where it was said at p. 463:

> The doctrine of res judicata is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed for the same cause. The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties had an opportunity of raising. It is clear that the plaintiff must go forward in the first suit with his evidence; he will not be permitted in the event of failure to proceed with a second suit on the ground that he has additional evidence. In order to be at liberty to proceed with a second suit he must be prepared to say: I will

> show you this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before.

13 The same proposition was stated by Lord Denning M.R. in Fidelitas Shipping Co. v. V/O Exportchleb, [1966] 1 Q.B. 630, [1965] 2 All E.R. 4, where he said at pp. 8-9:

> The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatam ... But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ... And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances.

14 The distinction between what has come to be referred to as "cause of action estoppel" on the one hand, which precludes a person from bringing an action again against another when the same cause of action has been determined in earlier proceedings, and "issue estoppel", is discussed and explained in the reasons for judgment of Dickson J., speaking on behalf of the majority of this Court in Angle v. Minister of National Revenue (1974), 74 D.T.C. 6278, 47 D.L.R. (3d) 544 at 555.

15 It is obvious here that the question of whether or not the water entered the aquifer and thus saturated the respondent's soil was not determined in the 1969 action because it was not raised and it would therefore not be strictly accurate to classify the present case as one of issue estoppel, but I am of the view that it is certainly a case within the principle established in Henderson v. Henderson, supra, and the Phosphate Sewage Co. case, supra, and it is to be noted that the respondent has not alleged either in his pleadings or his affidavit that he could not, by reasonable diligence, have put himself in a position to advance the theory of soil saturation through the aquifer at the time of the first action, nor can it be said that his failure to raise that particular point did not arise "through negligence, inadvertence or even accident". In my opinion the burden lay upon the respondent to at least allege that the new fact could not have been ascertained by reasonable diligence at the time when the first action was commenced before he could invoke it so as to expose the appellant a second time to litigation arising out of the same conduct. I appreciate that my brother Pigeon has adopted what he refers to as "the guiding principle" stated by Lord Maugham L.C. in New Brunswick Ry. Co. v. Br. and French Trust Corpn. Ltd., [1939] A.C. 1 at 20-21, [1938] 4 All E.R. 747. It will be noted, however, that the

Lord Chancellor did not question the rule in Henderson v. Henderson but found that in the case before him there were exceptional circumstances which he described as follows:

> I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the appellants had appeared in and contested the first action. But the judgment in that action limited in form to a single bond was pronounced in default of appearance by the defendants. In my view not all estoppels are 'odious'; but the adjective might well be applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action.

16 I cannot find any such exceptional circumstances in the present case. The issue of whether the river was caused to overflow its banks and damage the respondent's lands because the Town of Grandview had wrongfully impounded the waters behind the dam, was thoroughly explored in the first action. The same question is raised by the present action. Although the years when the damage is alleged to have occurred in the second action are different from the first, all other conditions are exactly the same except that since Tritschler C.J. Q.B. rendered his judgment in 1973, the respondent has taken advice leading him to the conclusion that the water which damaged his crops, although coming from the same source, reached his land by saturation through an aquifer rather than by "flooding".

17 For all these reasons, as well as for those contained in the reasons for judgment of Dewar C.J.Q.B., I would allow the appeal and restore that judgment with costs, except that I would allow no costs of the respondent's motion made at the hearing which was withdrawn.

Pigeon J. (dissenting) (Laskin C.J.C., Spence and Beetz JJ concurring):

18 This appeal is from a judgment of the Court of Appeal for Manitoba [[1975] 1 W.W.R. 321, 52 D.L.R. (3d) 395] setting aside, Guy J.A. dissenting, an order made by Dewar C.J.Q.B. [45 D.L.R. (3d) 623] staying an action brought on 21st January 1974 by the respondent Doering against the present appellant, the Town of Grandview.

19 Doering had sued the town in 1969 for damages to his land and crops resulting from flooding in the years 1967 and 1968 and alleged to be due to a dam earlier built by the town but altered by it in 1967. The action also claimed an order for the removal of the dam. That action was dismissed by Tritschler C.J.Q.B. on 24th May 1973. His oral judgment disposed of the claims in the following words:

> This case has been before the Court for many years, and this is our second hearing. I have had an opportunity of studying carefully the report prepared by the Water Resources Branch under the direction of Mr. Bodnaruk, a professional engineer. His evidence today strengthens the conclusions which were reached in that report, and I see no reason for delaying this matter further.
>
> The very simple issue here is whether the frequent flooding of Mr. Doering's land, which no one disputes, is attributable to the maintenance by the Town of Grandview of its dam.

> Unfortunately, Mr. Doering has convinced himself that the dam has been the cause of his flooding troubles. That is not so. Not only has he failed to satisfy the onus of proving that the flooding of his land was caused by the defendant's dam, but his own evidence establishes the very contrary of that; namely, that the flooding would have taken place if the dam had not been in existence.
> At the north boundary of plaintiff's quarter section, that is, at 'Cross Section L' shown in Ex. 8, the backwater effect of the dam was less than one-tenth of a foot for the 1967 flood, and at 'Cross Section Q' and 'U' there was no noticeable backwater effect from the dam.
> Mr. Bodnaruk's report and the evidence establishes that, regardless of the dam, plaintiff's land will experience flooding when the river discharge exceeds 750 cubic feet per second. In the spring of 1967 it was 1,330 cubic feet per second and there had to be flooding.
> It is clear from the evidence that plaintiff's land is going to be flooded to some extent nearly every year because it will flood whenever the flow exceeds 750 cubic feet per second, and the mean flood is 879 cubic feet per second. You are going to have flooding there every year except in a dry year like the present.
> The evidence fully satisfies the Court that the flooding, which is the subject matter of this action, was not caused and was not contributed to by the defendant's dam. The action fails and will be dismissed.

20 The essential allegations of the statement of claim in the present case, as amended, are the following:

> 4. Prior to the 1st day of January, 1967, the defendant operated a dam in the said River at a point in the said River within the corporate limits of the defendant corporation. The said dam was operated in such a manner as to during the fall and winter seasons impound water and cause to be built up the water up stream from the dam to an artificially high level but after spring break up the defendant would cause the dam to be adjusted so as to return the water level to its natural height during the crop growing season. In 1966 the said dam was damaged, and was replaced by a mound of earth, stones and large pieces of waste concrete constructed by or on behalf of the defendant as a makeshift dam and no attempt was made except as hereinafter stated to reduce the level of the water impounded up stream by the said mound during the growing season in each year.
> 5. The said farm land of the plaintiff has a layer of natural aquifer consisting of sandy soil about four feet below the surface of its top soil and in consequence of the defendant maintaining the water up stream at an artificially high level since 1967 during the growing season including where the said river runs through the plaintiff's land causes the water to enter the aquifer and to saturate the soil to such an extent that either crops cannot be sown or if they are sown then crops fail to grow on some 40 acres more or less thus causing the plaintiff damage.
> 6. The plaintiff has repeatedly demanded that the defendant reduce the height of water to its natural level during the growing season and has advised the defendant repeatedly of the damage caused but the defendant has refused or failed to do anything to eliminate the said cause except once just prior to the 1973 growing season when the said mound that serves as a make-shift dam was opened up in time to enable the plaintiff to sow his 1973 crop and for it to grow unaffected by the saturation aforesaid.

7. The acreage affected by the said saturation has never been less than 34 or more than 46 acres and the plaintiff has had to work the land whether or not he harvests the crop.
8. In consequence of the said wrongful actions of the defendant the plaintiff has suffered the following crop losses during the under-mentioned years including interest, namely:

1969	46 acres	$1,350.00
1970	34 acres	$ 986.00
1971	40 acres	$1,118.00
1972	40 acres	$1,036.00
	Total	$4,490.00

9. The defendant has refused to give assurances for the 1974 growing season, and for every year thereafter that the said river will be permitted to fall to its natural level during the crop growing season.

21 Allowing the town's motion to stay the action, Dewar C.J. Q.B. said in particular [p. 627]:

> None of the facts alleged re the conduct of the defendant in the pending action are new, in the sense that they did not exist when the prior action went to trial in September 1972. There is no suggestion the aquifer, now alleged to serve as a conductor of water from the forebay to plaintiff's lands, did not exist in the years 1967 through 1972. All of the facts now alleged as to tortious conduct (which is the essence of this type of actionable nuisance) were available and could have been brought forward in the prior action. If they were not, whether by inadvertence, failure to exercise reasonable diligence, or accident, the plaintiff is not now entitled to pursue what is substantially the same claim, but for damage alleged to have been sustained in subsequent years ...
> The alleged tortious conduct of defendant is not the only issue that has already been the subject of litigation. The damages now claimed (i.e., for the years 1969 through 1972) were also at issue in the 1969 action, whether or not they were pleaded.
> Rule 222 provides:
>
> > Damages in respect of any continuing cause of action shall be assessed to the time of assessment.
>
> The 1969 action was tried in September 1972 and May 1973.
> The effect of R. 222 is indicated in the reasons of Schroeder J.A. in Roman v. Toronto General Trusts Corpn., [1963] 1 O.R. 310, 37 D.L.R. (2d) 16, affirmed 41 D.L.R. (2d) 290.
> Plaintiff is not entitled to what would be a re-trial of the same issues determined in the earlier action.
> '... the plea of res judicata is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation': per Maugham J. in Green v. Weatherill, [1929] 2 Ch. 213 at 221.

22 On the other hand, Matas J.A. with whom Freedman C.J.M. agreed, said [p. 325]:

> In my view, with respect, it is open to plaintiff in the case at bar to raise the question of the aquifer in a second action. That question was not raised and was not considered in the 1969 action nor was it fundamental to the decision in the first action: Hill v. Hill (1966), 56

> W.W.R. 260, 57 D.L.R. (2d) 760 (B.C. C.A.). It is clear from a reading of the judgment in the 1969 action that Tritschler C.J.Q.B. considered the liability of Grandview only in the context of a claim as to surface flooding. If plaintiff had sought to relitigate that issue he would be precluded from doing so by the plea of res judicata. But if plaintiff were to be successful in these proceedings, the judgment would not be inconsistent with that of Tritschler C.J.Q.B. where the only question considered by the Court was the effect of the impounding of water on surface flooding. The finding of the Court in that action is not challenged by plaintiff in any way. The present action is concerned not with surface flooding but with sub-surface saturation of the soil due to the alleged effect of the dam on the aquifer.

23 In my view, the majority opinion in the Court of Appeal reflects a sound approach to the doctrine of res judicata. It is in accordance with the guiding principle stated by Lord Maugham L.C. in New Brunswick Ry. Co. v. Br. and French Trust Corpn., [1939] A.C.1 at 20-21:

> ... I desire to make it plain that I am not desirous of questioning the general rule on the subject of res judicata laid down by Wigram V.-C. in Henderson v. Henderson (1843), 3 Hare 100 at 114, 67 E.R. 313. His statement of the rule was cited and approved by the Judicial Committee in Hoystead v. Commrs. of Taxation, [1926] A.C. 155 at 170. It is, however, to be noted that the learned Vice-Chancellor was stating the rule in general terms, and he qualified the rule by the exception of special circumstances or special cases. I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the appellants had appeared in and contested the first action. But the judgment in that action limited in form to a single bond was pronounced in default of appearance by the defendants. In my view not all estoppels are 'odious'; but the adjective might well be applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action.

24 In the present case, the central fact is that Doering's claim for damages to his crops in 1969, 1970, 1971 and 1972 by water saturation due to the effect of the dam on the aquifer was never litigated. All that was litigated was a claim for damages due to flooding in 1967 and 1968. It was found that flood conditions were not appreciably aggravated by the dam and Doering should certainly not be allowed to raise that contention again, even in respect of later years.

25 It is true that the issue of whether the river was caused to overflow its banks and damage the respondent's lands because the town had impounded water behind the dam was thoroughly explored in the first action. It was then determined that the impoundment had a negligible effect on the overflow and it is the only basis on which the action was dismissed.

26 The same question is not raised in the present action. What is urged is a completely different cause of action said to have occurred at a different time of the year, not at flood time, but during the growing season after any flood has subsided. It it not claimed that the dam has caused the river to overflow its banks, but that, due to the presence of an aquifer four feet under the surface,

it has caused water saturation by keeping the water level higher than it would be under natural conditions. In other words what has been determined in the first action is that the dam did not cause the overflow that occurred in flood time — it has never been determined that it did not cause the water saturation that is alleged to have occurred after flood time. More simply, the question in the first action was whether the dam caused damage in high water, in the second, it is whether it caused damage in low water.

27 It is said that the aquifer always was there, this is true, but it is not by its mere presence that the crops are alleged to have been damaged, but by the raising of the water level, not to overflow level, but to aquifer level. Nothing shows that the damage suffered by the respondent in the two years covered by the first action was not, in fact, caused by the flooding for which the town was held not responsible. To say that it was in fact caused by water saturation as in the subsequent years covered by the second action is to make an assumption for which there is no basis in the record. The respondent is precluded by res judicata from so contending in respect of the damage claimed by the first action. Then on what basis may the town so contend in order to defeat the claim in respect of subsequent years? I cannot see any.

28 I fail to see any valid reason preventing the respondent from claiming damages in later years because, by artificially keeping the water level higher than it would be under natural conditions after the flood has subsided, the town's dam causes damages to the crops on account of the presence of an aquifer under the surface soil. To so hold is to deny justice by a technical application of rules of court. When dealing with statutes, it is our duty, as I see it, to apply the law as Parliament has written it. However, when, as here, we are dealing with judge-made law, I can see no reason for denying justice on account of technicalities …

29 In my view, the rule concerning the assessment of damages up to the date of the trial for a continuing cause of action was meant to facilitate recovery of what is due in fairness, not to deprive litigants of claims they have not urged. Reference was made by Dewar C.J.Q.B. to Schroeder J.A.'s reasons in Roman v. Toronto General Trust Corpn., supra. In my view, what was there decided is fully in accordance with the principle I am contending for as to the effect of the rule: it was not permitted to defeat the claim for damages subsequent to the trial.

30 In the present case, it is not a matter of assessment of damages that is in issue, it is the entitlement to damages that comes up for decision and, in my view, the rule as to a continuing cause of action is not properly applicable. What happens each year is due to what occurs that year. There may be damage one year, not in another.
. . .

32 I would dismiss the appeal with costs . . .

Grandview v Doering – notes and questions

This was a close decision (5-4). The majority and dissent don't disagree significantly about the doctrine; rather, they disagree about what it takes to create a new claim that is sufficiently independent that it shouldn't be barred. In essence, this case shows how there can be two conflicting legal interpretations of the same set of facts. Perhaps, though, D. might have been more successful if his lawyer had done more to show why the second case was different. If you were D's lawyer, what steps could you take to try to persuade the court on that point?

What did Doering allege in his first lawsuit? (that is, what facts and legal claims)?

What did he allege the second time? What reason did he give for not alleging these claims earlier?

In the reasons given by Tritschler CJ, (in para. 5, (ii)), is it clear what causes the flooding?

In the litigation that ultimately led to this appeal, the Town of Grandview sought, in the trial court (Queen's Bench), to have D's claims eliminated. What procedural mechanism did the Town use?

In his judgment in the Town's favour, Dewar C.J.Q.B. drew on the judgment of Wigram V.C. in a case from 1843. What's the essential point from that judgment that would justify a judgment for the Town?

D. appealed to the Manitoba C.A., and Matas J.A. reversed (in a 2-1 judgment), ruling for D. How did Matas distinguish this case, and what was his view of the language quoted from Wigram V.-C.?

Ritchie J., in turn, disagrees with Matas J.A., although the basis of his disagreement is buried in para. 11. What's his view?

Though unnecessarily long, the quotation from *Phosgate Sewage* does have something to say about when new facts may be used to justify bringing a new case. The idea was then adopted in *Fenerty*. What's the rationale? Does the material quoted from *Fidelitas Shipping* add anything to this proposition?

Ritchie J. states that "and it would … not be strictly accurate to classify the present case as one of issue estoppel." Why not?

Ritchie makes a point of noting that D. said nothing, in his pleadings or affidavit, to indicate that he couldn't previously have raised the point about the aquifer, and in the double negative that follows, Ritchie J. suggests that it was simply D's inadvertence (or the like) which is to blame for his failure to raise the point earlier. Is this just a case of bad lawyering? Should D's lawyer have been alert to this point, and made sure that when D. went to court the second time, he said something about why he couldn't have raised this earlier? Suppose

that D. had said this in his pleadings or affidavit. What would be the Town's next move? Could the case have come out differently?
What, according to *New Brunswick Rwy.*, would render an estoppel "odious"? Is this the "exceptional circumstance" contemplated in para. 16 (and also at the end of the block quotation in para 13)?

In your view, might D. have succeeded the first time, if he had raised the issue about the aquifer? Suppose the answer is yes. Why, according to the language quoted in para. 15, should that be irrelevant? And what bearing (if any) does this have on the "odiousness" of estoppels?

In the dissent, Pigeon J. states that D's new claims were "never litigated" in the first action (para. 24). Pigeon J. says that "a completely different cause of action" is now being raised. (para. 26). What distinction, if any, does Pigeon J. identify?

Pigeon J. says the majority has "ma[d]e an assumption for which there is no basis in the record" (para 27). What is the assumption? Assuming that he is correct, should this change the outcome? How (if at all) does the majority respond to this point?

Montreal Trust Company of Canada and Gary Graham, Appellants
and Khandker Shamsul Hoque, Respondent

Nova Scotia Court of Appeal
Judgment: October 27, 1997

Freeman, Roscoe, **Cromwell** JJ.A.

I. Overview:

1 Dr. Hoque and companies controlled by him granted mortgages and entered into related agreements with Montreal Trust. After Dr. Hoque made an assignment in bankruptcy, Montreal Trust commenced action on the mortgages. These actions were not defended and final orders of foreclosure were issued by the Supreme Court.

2 After his discharge from bankruptcy, Dr. Hoque commenced the present action against Montreal Trust and its employee Gary Graham (hereafter referred to collectively as “Montreal Trust”) for breach of fiduciary duty, breach of contract, tortious interference with business relations, trespass and conversion. The allegations in this action concern Montreal Trust’s dealings with Dr. Hoque in relation to the mortgages and related agreements. In response, Montreal Trust brought an application to dismiss Dr. Hoque’s action on the basis that the issues raised in it could have been dealt with in the foreclosure actions. Saunders, J. refused to dismiss Dr. Hoque’s action.

3 Montreal Trust now applies for leave to appeal from that decision and, if leave is granted, seeks on appeal an order dismissing Dr. Hoque’s action as *res judicata*. The issue in the appeal is whether the final orders of foreclosure bar Dr. Hoque’s action.

II. The Facts:

4 The main argument by Montreal Trust is that all of the issues raised in Dr. Hoque’s action could have been determined in the foreclosure actions. It is therefore necessary to review the facts and allegations in detail.

5 Throughout the 1980's, Montreal Trust had various mortgage loans outstanding with Dr. Hoque and companies controlled by him . . . In 1992, Dr. Hoque experienced difficulties in servicing the mortgages. An agreement was reached to capitalize outstanding arrears, reduce the interest rate under the mortgages and otherwise to vary the previous legal obligations of the parties. This amending agreement, (hereafter "the agreement") was executed on August 4, 1992. Dr. Hoque was represented in the negotiations leading up to this amending agreement by a major Toronto law firm.

. . .

10 On February 11, 1993, Montreal Trust demanded payment of all outstanding amounts (roughly $20,000,000) by March 15. In early March, Dr. Hoque made a voluntary assignment under s. 49 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and Coopers & Lybrand Limited was appointed trustee.

11 Montreal Trust commenced foreclosure proceedings in April, 1993. . . .

12 The trustee was served with notice of these foreclosure actions but did not defend. On May 19, 1993, Goodfellow, J. granted an order for foreclosure, sale and possession in favour of Montreal Trust in each of the foreclosure actions. It is worth noting that Dr. Hoque's possible causes of action against Montreal Trust are not referred to in his statement of affairs as assets of the estate and that, so far as the record discloses, there was no detailed consideration given to them until after the final orders of foreclosure had issued.

13 The matter was discussed by creditors after the foreclosure orders were made. Advice was obtained to the effect that the estate could move to stay the sale under foreclosure or alternatively sue Montreal Trust independently. Advice was also given to the effect that the rights of parties to pursue actions independently continued to exist notwithstanding that an order of foreclosure had already been granted.

14 Subsequent to his discharge, Dr. Hoque sought and received from the inspectors an agreement to assign to Dr. Hoque the estate's rights to all causes of action against secured creditors, including the claim against Montreal Trust. …

15 In September of 1994, Dr. Hoque commenced action against Montreal Trust. His Statement of Claim was substantially amended in February of 1996 and that is the Statement of Claim before us. It alleges that:

> a. "Montreal Trust and Gary Graham commenced in a malicious and calculating manner, a course of action designed to destroy Dr. Hoque and his business empire." (Para 6)
> b. the refinancing arrangements set out in the amending agreement were unconscionable . . .
> e. Montreal Trust improperly disclosed confidential information to third party lenders "which was calculated to cause and did cause others to act precipitously (paragraph 36 and 39(j)
> f. Montreal Trust acted in an abusive and disrespectful manner causing financial loss, embarrassment and mental distress. (Paragraphs 39(c) and 44)
> g. Montreal Trust acted "in a calculating and conspicuous manner ... so as to intentionally and tortiously interfere with the economic and business relations of Dr. Hoque."(paragraph 42)
> h. Montreal Trust's illegal acts caused Dr. Hoque's bankruptcy and loss of everything he had owned apart from a few personal effects (Paragraph 37) and further caused Dr. Hoque to suffer from depression and mental distress (paragraph 38)
> i. Montreal Trust committed acts of trespass and conversion in relation to Dr. Hoque's property. (Paragraph 45). . .

16 Montreal Trust . . . brought an application before the Chambers judge . . . for an order dismissing the action on the grounds that it is barred by cause of action estoppel or, in the alternative, issue estoppel. . . . The Chambers judge . . . dismissed Montreal Trust’s application. Montreal Trust now seeks to appeal to this Court.

III. The Decision of the Chambers Judge:

17 The Chambers judge had to resolve a number of procedural and evidentiary matters which are no longer in issue. On the question of whether Dr. Hoque's action is barred by *res judicata*, the Chambers judge held that the matters now raised by Dr. Hoque's action constitute defences or a basis for set-off and counterclaim against Montreal Trust in the foreclosure actions and could have been raised therein. However, the learned judge was of the view that the application of *res judicata* is grounded on principles of fairness and public policy and that in the circumstances of the present action, it would be unfair for Dr. Hoque to be denied the opportunity to have his allegations determined on their merits.

. . .

IV. Issue:

18 There is one fundamental issue on this appeal: whether the Chambers judge erred in law in refusing to dismiss Dr. Hoque's action as *res judicata*.

V. Analysis:

19 This appeal involves the interplay between two fundamental legal principles: first, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause. Distilled to its simplest form, the issue in this appeal is how these two important principles should be applied to the particular facts of this case.

20 *Res judicata* has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) at 555:

> .... The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ..... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-1:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that

were never actually addressed in the previous litigation, but which properly belonged to it.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

22 It is the second aspect which is relied on by the appellants. Their principal submission is that all matters which *could* have been raised by way of set-off, defence or counterclaim in the foreclosure action cannot now be litigated in Dr. Hoque's present action.

23 *Res judicata* requires that the previous court decision be final and between the same parties or their privies. Both of these requirements are met here. The final orders of foreclosure were not appealed or otherwise challenged. As to privity, it is not argued that there was no privity as between Dr. Hoque and his trustee in bankruptcy who was the named defendant in the foreclosure actions. It is not disputed that all of the claims now asserted by Dr. Hoque vested in his trustee at the time of his assignment in bankruptcy.

24 There are some very wide statements about the scope of cause of action of estoppel. For example, in the seminal case of *Henderson v. Henderson* [1843-60] All E.R. Rep. 378 (Eng. V.-C.), Vice-Chancellor Wigram stated that the plea of *res judicata* ... "applies ... not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to *every point which properly belonged to the subject litigation and which the parties exercising reasonable diligence might have brought forward at the time*." (at 381-2), (emphasis added). . . .

27 The relatively recent decision of the House of Lords in *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41 (U.K. H.L.) supports a more flexible approach. In that case, Lord Keith noted that the often quoted passage from *Henderson v. Henderson*, *supra*, specifically referred to exceptional "special circumstances" noting that this passage "... appears to have opened the door towards the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action" (at p. 46). The learned Law Lord also cited, with approval, the following passage from the speech of Lord Kilbrandon in *Yat Tung Investment Co. v. Dao Heng Bank Ltd.*, [1975] A.C. 581 (Hong Kong P.C.) at p. 590:

> The shutting out of a "subject of litigation" - a power which no Court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.

28 Moreover, Lord Keith indicated that cause of action estoppel and issue estoppel are both essentially concerned with preventing abuse of process: at 51-52.

. . .

30 The submission that all claims that *could* have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matters not actually raised and

decided, the test appears to me to be that the party *should* have raised the matter and, in deciding whether the party *should* have done so, a number of factors are considered.

31 Some of the cases involve attempts to rely on new evidence to support a claim previously litigated. In such cases, the courts are concerned whether the new evidence could have been available in the first action with reasonable diligence. A leading example is *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.). The plaintiff sued unsuccessfully for damages resulting from flooding of his land and crops in the years 1967 and 1968. He then commenced a new action relating to the years 1969-72, alleging that the defendant town had acted to cause the water behind a dam to rise to such high levels that it saturated the plaintiff's land. The differences between the first unsuccessful action and the second were the years complained of and that the second action alleged saturation as a result of water entering an aquifer as opposed to the surface flooding alleged in the first action. Ritchie, J., for 5 members of the Court, held that the second action was barred by the principle of cause of action estoppel. He said: "Nothing had changed between the bringing of the first action and the second one except that the res-pondent had received advice from a soil expert who expounded the aquifer theory." (At 638) He went on:

> It is obvious here that the question of whether or not the water entered the aquifer and thus saturated the respondent's soil was not determined in the 1969 action because it was not raised and it would therefore not be strictly accurate to classify the present case as one of issue estoppel, but I am of the view that it is certainly a case within the principle established in *Henderson v. Henderson, supra*, and the *Phosphate Sewage Co.* case, and it is to be noted that the respondent has not alleged either in his pleadings or his affidavit that he could not by reasonable diligence, have put himself in a position to advance the theory of soil saturation through the aquifer at the time of the first action, nor can it be said that his failure to raise that particular point did not arise "through negligence, inadvertence or even accident." (emphasis added)

32 Some of the cases are concerned with whether the second action alleges a cause of action which is distinct from that asserted in the first action. For example, in *Grandview, supra*, Ritchie J appears to have accepted the general proposition that the principle of cause of action estoppel applies only to matters that arise within one cause of action, but holds that the two actions before him did not give rise to causes of action that were separate and distinct.

33 Another group of cases holds that cause of action estoppel applies where the second action alleges a new legal basis for claims arising out of facts and relationships that have been the subject of the earlier litigation. This is the approach taken by the British Columbia Court of Appeal in *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C. C.A.) in which the Court found that the dismissal on consent of the first action for damages for breach of contract barred the subsequent action pleaded in breach of fiduciary duty arising out of the same relationship. Davey, CJBC for the Court said:

> ... it seems to me that the second action involves nothing more than a claim for the same sum of money and arising out of the same relationship and for the same services, but based upon a different legal conception of the relationship between the parties. (at 251) (emphasis added)

34 There are other cases which turn on that principle that all of the matters necessary to the making of a final order may not be challenged except by appeal or other direct review.

35 This principle was stated in *420093 B.C. Ltd. v. Bank of Montreal*, *supra* at p. 503: "A valid and subsisting order made by a competent court cannot be attacked collaterally." This well-established principle was restated by McIntyre J. In *R. v. Wilson* (1983), 4 D.L.R. (4th) 577, 9 C.C.C. (3d) 97, [1983] 2 S.C.R. 594. After reviewing a number of authorities, he said at p. 597:

> It has long been a fundamental rule that a court order made by a court having jurisdiction to make it stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the high court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence. (emphasis added)

36 In the same case, Dickson, J.,(as he then was) said at p. 584: "I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs."

37 Other cases turn on abuse of process, which Lord Keith in *Arnold* thought to be the true basis of the rule. These decisions are founded on the conclusion, in light of all the circumstances, that the subsequent litigation is an attempt to use the Court's process "to delay and frustrate the course of justice": *Bank of Montreal v. Prescott* (1994), 1 B.C.L.R. (3d) 304 (B.C. C.A.) .

38 Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, *should* have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.
. . .

64 The appellants in this appeal rely principally on the broad formulation of cause of action estoppel. There is, of course, no suggestion that the issues of breach of fiduciary duty, breach of collateral contract, tortious interference with business relations or trespass and conversion were actually raised and adjudicated in the final orders of foreclosure which were issued by default. The appellants' submission is that all of these matters could have been raised by the trustee in

bankruptcy and were not. Therefore, according to the appellants, Dr. Hoque is foreclosed from raising them in this action.

65 My review of these authorities shows that while there are some very broad statements that all matters which *could* have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party *should* have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.

66 In light of this understanding of the principle of cause of action estoppel, did the Chambers judge err in law in deciding that Dr. Hoque's action was not barred?

67 In my respectful view, the Chambers judge did err in law in this regard. However, I base my conclusion on a narrower ground than that argued by the appellants.

68 Finality of court orders is an important value. As Fleming James, Hazard and Leubsdorf put it:

> ... the purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy. It is important that judgments of the court have stability and certainty. This is true not only so that the parties and others may rely on them in ordering their practical affairs (such as borrowing or lending money or buying property) and thus be protected from repetitive litigation, but also so that the moral force of court judgments will not be undermined.

Fleming James, Jr., Geoffrey C. Hayward, Jr. and John Leubsdorf, ***Civil Procedure*** (4th, 1992) at 581.

69 At the core of cause of action estoppel is the notion that final judgments are conclusive as to all of the essential findings necessary to support them. This is seen in the cases concerned with collateral attack, *supra*, and is reflected in the restrictive approach to *res judicata* founded on default judgments.

70 In my respectful view, Dr. Hoque cannot be permitted to allege in this action anything which is inconsistent with the final orders of foreclosure. In other words, all of the matters essential to the granting of the final orders of foreclosure are not now open to be relitigated in these proceedings. This is not a mere technical rule but an application of a fundamental principle of justice: once a matter has been finally decided, it is not open to reconsideration other than by appeal or other proceedings challenging the initial finding.

71 Dr. Hoque's action makes several claims that are inconsistent with the findings essential to the validity of the foreclosure orders.

72 Dr. Hoque alleges in his statement of claim (paragraph 18) that the refinancing arrangements in the amending agreement were unconscionable. However, the amending agreement was specifically pleaded in the foreclosure actions and the final orders of foreclosure were predicated on its validity and enforceability. Therefore, the allegation of unconscionability in Dr. Hoque's action is inconsistent with the final orders of foreclosure.

73 Dr. Hoque alleges that there were collateral agreements, in essence waiving or delaying Montreal Trust's right to the $150,000 payments provided for in the amending agreement. In addition, there are alleged to be collateral agreements relating to the partial discharge provisions in the amending agreement to the effect that something less than the presale of 50% of the units would be sufficient (paragraphs 22-25). These allegations are inconsistent with the enforceability of the amending agreement. However, its enforceability is an essential basis of the final orders of foreclosure.

74 Dr. Hoque's statement of claim further alleges that the course of dealing by Montreal Trust in entering into the amending agreement and enforcing it according to its terms was "a course of action designed to destroy Dr. Hoque", and was conduct designed to "intentionally and tortiously interfere with [his] economic and business relations". Once again, these allegations go to the root of the legality and enforceability of the amending agreement and the mortgages.

75 Although the pleading is not specific with respect to the acts of trespass and conversion relied on, it appears that these allegations relate to the exercise by Montreal Trust of its remedies as mortgagee and under related agreements. They are, therefore, inconsistent with the validity and enforceability of the mortgages and the amending agreement.

76 I conclude, therefore, that Dr. Hoque is precluded from asserting any of these claims in this action and that the learned Chambers judge erred in law in failing to strike them out.

77 I would not go so far as to hold that the application of *res judicata* in a case like this one is completely inflexible. There may be, to use the words of Vice-Chancellor Wigram, special circumstances in which some flexibility may be required to prevent a serious injustice. To the extent that the learned Chambers judge relied on this flexibility in this case, I think, with great respect, that he erred in principle by failing to give sufficient weight to two considerations which, in this case, are of fundamental and overriding importance.

78 First, there is the strong policy in favour of the finality of court orders. As set out above, this is important not only for the certainty of transactions between the parties, but to the integrity of the judicial process. This consideration is fundamental to the administration of justice and I think, with respect, that it was not given sufficient weight by the Chambers judge.

79 Second, there are the underlying objectives of the *Bankruptcy and Insolvency Act*. These include the provision of a scheme for the orderly and fair distribution of the property of the bankrupt among his or her creditors while permitting the debtor to obtain a discharge from his or her debts on reasonable conditions: . . .

84 There is one, and possibly two elements, in Dr. Hoque's statement of claim which are not inconsistent with the final orders of foreclosure. These are, first, the allegation that Montreal Trust improperly disclosed confidential information to third party lenders in a way that was "calculated to cause and did cause others to act precipitously" and second, that Montreal Trust acted "in an abusive and disrespectful manner". This second allegation is not pleaded with particularity so it is difficult to assess it. If this refers to a cause of action separate from and not inconsistent with the validity and enforceability of the mortgages and the amending agreement, it is not barred by *res judicata*.

85 Neither of these allegations is inconsistent with the validity of the mortgages or amending agreement. Nor do they fall into any of the categories of claims that *should* have been advanced. They are not simply an attempt to put a new legal conception upon settled facts or to raise facts which, with reasonable diligence, ought to have been placed before the court in the foreclosure actions. They are separate and distinct causes of action. It is not argued that asserting them now, in all of the circumstances, constitutes an abuse of process.

86 It was conceded by the appellants in argument that the allegations relating to breach of duty to maintain confidential information was not barred by issue estoppel. I am also of the view, for the reasons which I have given, that it is not barred by cause of action estoppel. . . .
87 In summary, I am of the view that all of the allegations in Dr. Hoque's statement of claim are barred by the principle of cause of action estoppel with the exception of the claim relating to the breach of duty to keep information confidential and the allegation that Montreal Trust acted in an abusive and disrespectful manner. The Chambers judge, with great respect, erred in law in failing to so decide. To the extent that there may exist some measure of judicial discretion to apply *res judicata* with some flexibility, I think, with respect, that the learned Chambers judge erred in principle in exercising it in this case.

88 I would, therefore, grant leave to appeal, allow the appeal, set aside the order of the learned Chambers judge and strike out Dr. Hoque's statement of claim. However, in light of my finding that two aspects of the statement of claim are not barred by *res judicata* or issue estoppel, I would not dismiss the action, but grant leave to Dr. Hoque to amend his statement of claim, if so advised, in accordance with these reasons. This is an order which was open to the Chambers judge to make under *Rule 14.25(1)* and is, therefore, open to the Court of Appeal pursuant to *Rule 62.23(1)(b)*. The amended allegations, if any, must not be inconsistent with the validity or enforceability of the mortgages or the amending agreement. Given that this action is now more than three years old and relates to events considerably older than that, I would also order that any amended pleading must be filed within 30 days of the release of these reasons and in default thereof Dr. Hoque's action will stand dismissed.

Hoque v. Montreal Trust Co. of Canada – notes & questions

Is this a case of cause of action estoppel or issue estoppel?

What claims is Hoque raising against MT? Which claims of his are left standing in the end? Why did those claims survive?

What did MT seek to do at the trial level?

MT argues (para. 2) that Hoque's claims "***could*** have been dealt with in the foreclosure actions." Is this ultimately the basis on which the court evaluates the r/j argument?

Insofar as you can discern the basis for the decision of the Chambers judge, what seems to have been his reasoning?

The N.S.C.A., in explaining the tensions that animate this case, observes that 'a party should not … be twice vexed for the same cause" (para. 19). Is that rationale apposite here? If not, how would you express the idea?

We usually think of r/j principles as applying to instances in which a party has raised an argument and a court has addressed it, and now the same party seeks to try again. What makes this case different? (see paras. 21 and following).

In para. 21, Cromwell J. explains the principle that any matter that "properly belong[s]" to a claim or defense, if not raised by the party asserting the claim or defense, is barred from being raised later, and that this "prevents fragmentation of litigation" (because it ensures that instead of being able to raise each relevant issue separately, in another case, the parties must raise all the relevant issues in the same case). He then adds, "*Cause of action estoppel* is concerned with the application of this … principle because its operation bars all of the *issues* properly belonging to the earlier litigation" (italics added). If the *issues* are barred, why is it an application of cause of action estoppel, rather than issue estoppel?

The court suggests that earlier formulations, such as those by Wigram VC in *Henderson*, are "very wide." What's wrong with Wigram's version (according to the N.S.C.A.)? Do you agree? How, if it all, could this broad formulation be cabined to create an acceptably narrower version?

Among the situations that may justify the invocation of r/j are those in which "the second action alleges a new legal basis for [previously litigated] claims" (para. 33). What does this mean?

The court also observes that r/j applies to prevent "collateral attack" (para. 35). How is this different from the previously considered bases for r/j?

The court ultimately rejects the "*could* have been raised" formulation (para. 65) on the ground that "none of the [earlier] cases actually demonstrates this broad principle." Is this, in your view, an acceptable reason for rejecting that formulation? How can the court tell

that none of the cases supports the broad principle? Assuming that the court is correct on this point, what more general lesson does this suggest as a litigating strategy for parties who seek to avoid the effects of a broadly phrased precedent? Assuming that the court is correct, what lessons might be gleaned about the considerations that a court should take into account when crafting its holding?

The court identifies two fundamental considerations that the Chambers judge overlooked: finality of orders, and the underlying objectives of the *Bankruptcy and Insolvency Act*. Why is the latter significant here?

Canadian Union of Public Employees, Local 79 *Appellant*

v.

City of Toronto and Douglas C. Stanley *Respondents*

and

Attorney General of Ontario *Intervener*

Indexed as: Toronto (City) *v.* C.U.P.E., Local 79

2003: February 13; 2003: November 6.

On appeal from the Court of Appeal for Ontario

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by: **ARBOUR J. —**

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

III. Procedural History

A. *Superior Court of Justice (Divisional Court)* (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. … O'Driscoll J. found that … relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant's argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision", applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each case, the standard for judicial review had been met (para. 86).

B. *Court of Appeal for Ontario* 2001 CanLII 24114 (ON C.A.), (2001), 55 O.R. (3d) 541

…
8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. … Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

> **22.1** (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,
>
> (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
>
> (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.
>
> (2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.
>
> (3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

> **48.** (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. *Standard of Review*

…

16 … I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. *Section 22.1 of Ontario's Evidence Act*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. …

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary". There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. … [T]he common law … recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court … Section 22.1 does not change this; the legislature has not explicitly displaced the common law doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. *The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* … which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States … In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer ...

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. … The arguments … urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants . . . .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc.*, now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The

> rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category — what would be described in U.S. law as "non-mutual offensive preclusion". Although technically speaking the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

> First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".
>
> Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.
>
> In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. … The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation". For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) <u>Collateral Attack</u>

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, 1983 CanLII 35 (S.C.C.), [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in

> proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, 1996 CanLII 200 (S.C.C.), [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (S.C.C.), [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" … McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge … In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. ...

37 … [H]ere, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles*, (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. … This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter*, *supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed

non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter*, *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality … In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts … Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter*, *supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter*, *supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Re Del Core*, *supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues determined in a criminal proceeding.

For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

> The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so. . . . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined . . . . [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter*, *supra*; … there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. …

…

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a

full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. ***Application of Abuse of Process to Facts of the Appeal***

56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):

> Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated

and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court — or the jury — guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

Toronto (City) *v.* CUPE Local 79 – questions

In this case, the Court attempts to distinguish among issue estoppel, abuse of process and collateral attack. This is perhaps the only decision of the Supreme Court to elucidate those distinctions. Whether the effort succeeds is for you to decide.

What was the procedural history of O's case? Did he appeal?

Who testified at the trial?

How did the arbitrator treat the evidence from the criminal trial? What evidence, presented at the arbitration, led to the finding that O had been dismissed without just cause?

According to the *Evidence Act*, proof of a criminal conviction, by a court of competent jurisdiction, is sufficient proof, "in the absence of evidence to the contrary," that the accused committed the crime. According to the Court, what bearing does *res judicata* have on "evidence to the contrary" (para. 19)?

Notice that issue estoppel is defined in para. 6 as a means by which "an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud." If protection from collateral attack is a *goal* of issue estoppel, there is reason to wonder whether "the rule against collateral attack" is a freestanding principle distinct from the more conventional modes of estoppel.

<u>Issue Estoppel</u>

Issue estoppel doesn't apply because mutuality is lacking: in the criminal case, "the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver." What is a *lis*?

What is the rationale (as presented by Prof. Gary Watson) for permitting the use of issue estoppel defensively? Does this suggest to you that issue estoppel should always be applied to the situation described here?

The Court next contemplates offensive issue estoppel. What is the rationale for permitting its use (or requiring its application)?

It is asserted that "offensive [issue estoppel] … encourages potential plaintiffs not to join in the first action." So what? Why is that such a bad thing?

It is asserted that permitting offensive use as a matter of course (that is, allowing it routinely instead of on a discretionary, case-by-case basis) "would increase rather than decrease the total amount of litigation." Can this be right? Why is this result any more likely than in the situations where a later court would be governed by *stare decisis*? Consider: I want to raise a claim against my landlord, involving a novel extension of the doctrine involving the warrant of habitability. I know that other tenants in the neighbourhood suffer from a more severe version of the problem that is making me consider litigation (none of us are in privity, and we have different landlords). If I "wait and see" if another tenant will take the trouble to sue,

would anyone say that we should hesitate to let me benefit from the result of that lawsuit, because my approach was calculated to increase the total amount of litigation?

According to the language in the block quotation in para. 28, when would it be unfair to the defendant to permit non-mutual preclusion (in the form of offensive issue estoppel)? Compare the reasons here to those in *Danyluk*, near the end of para. 71. Why the similarity? After all, *Danyluk* is a case for issue estoppel (isn't it?), and here the Court says that issue estoppel doesn't apply.

The Court observes (para. 29) that in this case, "the true concerns are not primarily related to mutuality"; rather, they relate to "the integrity and the coherence of the administration of justice." The first part of this statement is tautologically true, if mutuality is truly lacking – as it always is, when at least one of the parties is not in privity with a litigant in the previous case. But why is this case about "the integrity and the coherence of the administration of justice"? Isn't it just a case in which the City doesn't want to have to prove something already established at trial? That is, isn't it just the flip side of the "twice vexed" principle? (Just as O might claim to be "twice vexed" if he'd been cleared of the criminal charges, and then he got fired for the same conduct, the City doesn't want to prove again what was already proved at trial.)

Concerns about the "wait and see" plaintiff "[do not] arise when the original action is in a criminal prosecution." Why not? In that case, why not simply specify that criminal convictions offer an occasion for applying issue estoppel offensively? That is, why not say that as a general matter, in this instance mutuality is not required, instead of including placing it under "abuse of process"?

"The mutuality requirement … is hardly reflective of the true role of the prosecutor" (para. 31). Why is that?

<u>Collateral Attack</u>

As noted earlier, it is not clear whether "the rule against collateral attack" can be separated from issue estoppel. Given what is said in para. 33, do you see any way to distinguish between the two?

<u>Abuse of Process</u>

Para. 35 sets out grounds for applying abuse of process. Which of the grounds apply here?

Besides cases of non-mutual estoppel, what are some other concrete situations in which it seems, from the discussion in paras. 35 and following, that the abuse of process doctrine should be applied?

What are the policy grounds for the abuse of process doctrine?

Lord Denning sought to rely on non-mutual issue estoppel in *McIlkenny*, but when the case was appealed to the House of Lords (under the name *Hunter*) the court relied instead on abuse of process. Why? From the account given here, what does it appear the latter doctrine achieved, as distinct from the former?

"Critics … have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion" (para. 43). What is the focus that distinguishes abuse of process, and why is that focus the proper one, as a general matter, in every case in which mutuality is lacking? Conversely, why is that never the proper focus when the mutuality requirement is met? In your view, is it sometimes the proper focus even when there is mutuality?

The Court implies that if we applied issue estoppel, rather than abuse of process, O's *motives* for relitigation might be given undue significance, and might even be treated as a reason to permit relitigation (para. 46). Does that seem like an accurate account of how a court might proceed, if issue estoppel were the basis for the analysis? Imagine the same dispute we have here, except that O (rather than CUPE) is the party challenging his dismissal. Would the analysis be different from the one presented here?

Abuse of process should not be limited "only to those cases where the plaintiff has initiated the relitigation" (para 47). Why not?

One of the notable features of the abuse of process doctrine is its discretionary nature. What factors, bearing on the decision whether to apply the doctrine, are set out in this case?

Mary Danyluk *Appellant*

v.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited *Respondents*

2000: October 31; 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

On appeal from the Court of Appeal for Ontario

The judgment of the Court was delivered by: **BINNIE J. –**

1 The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the *Employment Standards Act*, R.S.O. 1990, c. E.14 ("ESA" or "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

2 In the fall of 1993, the appellant became involved in a dispute with her employer … over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. … Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions which brought the total to about $300,000.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

4 An employment standards officer, Ms. Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994 met with her for about an hour. The appellant gave Ms. Burke various documents including her correspondence with the employer. They had no further meetings.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, … commenced a court action in which she claimed

damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

6 On June 1, 1994, solicitors for the employer wrote to Ms. Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms. Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

7 On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

8 The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. *Ontario Court (General Division)* (June 10, 1996)

9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. … [H]e concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. *Court of Appeal for Ontario* 1998 CanLII 5431 (ON C.A.), (1998), 42 O.R. (3d) 235

10 After reviewing the facts of the case, Rosenberg J.A. for the court identified, at pp. 239-40, the issues raised by the appellant's appeal:

> This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

11 In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

12 In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. …

13 Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

> The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to consider and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law (at p. 252):

> These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

15 Rosenberg J.A. noted that if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

III. Relevant Statutory Provisions

17 *Employment Standards Act*, R.S.O. 1990, c. E.14

> **1.** In this Act,
>
> "wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment …
>
> . . .
>
> **6. –** (1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.
>
> (2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.
>
> **65.** – (1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,
>
> (a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled; or
>
> (b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement
>
> . . .
>
> (7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer …
>
> . . .
>
> **67.** – (1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled … the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.
>
> (2) An employee who considers himself or herself aggrieved by the refusal to issue an order … may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) ...
>
> (3) Upon receipt of an application for review, the Director may appoint an

> adjudicator who shall hold a hearing.
>
> . . .
>
> (5) The adjudicator who is conducting the hearing may … exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.
>
> . . .
>
> (7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.
>
> **68.** – (1) An employer who considers themself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, … may, within a period of fifteen days after the date of delivery or service of the order… apply for a review of the order by way of a hearing.
>
> . . .
>
> (3) The Director shall select a referee from the panel of referees to hear the review.
>
> . . .
>
> (7) A decision of the referee under this section is final and binding …

IV. Analysis

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558 ... The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel) … Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it …

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

22 The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s … Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them": *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact <u>distinctly put in issue and directly determined</u> by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, <u>once determined</u>, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

… This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:

(1) that the same question has been decided;
(2) that the judicial decision which is said to create the estoppel was final; and,
(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

26 The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the ESA to deal with the claim, the ESA officer lost jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel *per rem judicatem* in the circumstances of this case, and erred in failing to do so.

A. *The Statutory Scheme*

1. The Employment Standards Officer

27 The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves

more rapidly than could realistically be expected in the courts. There are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

2. The Review Process

30 The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director may appoint an adjudicator who shall hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

31 It seems clear the legislature did not intend to confer an appeal as of right. Where the Director does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" … puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim *de novo* and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

B. *The Applicability of Issue Estoppel*

1. Issue Estoppel: A Two-Step Analysis

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. … The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra.* If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* 1998 CanLII 6467 (BC C.A.), (1998), at para. 32 …

34 The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

35 A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities … there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, *was* the decision made in a judicial manner? These are distinct requirements:

> It is of no avail to prove that the alleged *res judicata* was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes. (Spencer Bower, Turner and Handley, *supra*, para. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent *ex curia* statement of Handley J. (the current editor of *The Doctrine of Res Judicata*) that:

> The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to *res judicata* estoppels. ("Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar Rev.* 214, at p. 215)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard *capable* of supporting an issue estoppel? In my opinion, the answer to this question is yes.

(a) *The Institutional Framework*

38 The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: *Re Downing and Graydon*, *supra*, *per* Blair J.A., at p. 305:

> In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important *indicia* of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. …

(b) *The Nature of ESA Decisions Under Section 65(1)*

39 An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

40 One distinction between administrative and judicial decisions lies in differentiating adjudicative from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. … The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in *Thoday v. Thoday*, [1964] P. 181 (Eng. C.A.), at p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function …

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

(c) *Particulars of the Decision in Question*

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

44 The appellant contends that it is not enough to say the decision *ought* to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in *Rasanen*, *supra*, *per* Abella J.A., at p. 280:

> As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

45 Trial level decisions in Ontario subsequently adopted this approach … The statement of Métivier J. in *Munyal v. Sears Canada Inc.* 1997 CanLII 12328 (ON S.C.), at p. 60, reflects that position:

> The plaintiff relies on [*Rasanen*] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

…

47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions. As early as *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 584-85. The decision remains a "judicial decision", although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

48 I mentioned at the outset that estoppel *per rem judicatem* is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in *Harelkin*, *supra*. In that case a university student failed in his judicial review application to quash the decision of a faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes,

including issue estoppel, the *Harelkin* barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

49 The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though *Maybrun*, *supra*, says that an act in excess of a jurisdiction which the decision maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to *Maybrun*, on which forum the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin*, *supra*, and collateral attack in *Maybrun*, *supra*.

52 Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

53 I turn now to the three preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) *That the Same Question Has Been Decided*

54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, … the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action, she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

(b) *That the Judicial Decision Which Is Said to Create the Estoppel Was Final*

56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

58 I have already noted that in this case, unlike *Harelkin, supra,* the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA decision must nevertheless be treated as final for present purposes.

(c) *That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies*

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be …

60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, 1983 CanLII 19 (S.C.C.), [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

63 In *Bugbusters*, *supra*, Finch J.A. (now C.J.B.C.) observed, at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke*, *supra*, at paras. 38 and 43:

> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> . . .
>
> . . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court. …

…

65 In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. … He simply concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's

> recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

66 In my view it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67 The list of factors is open. They include many of the same factors listed in *Maybrun* in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in *Minott*, *supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

(a) *The Wording of the Statute from which the Power to Issue the Administrative Order Derives*

68 In this case the ESA includes s. 6(1) which provides that:

> No civil remedy of an employee against his or her employer is suspended <u>or affected</u> by this Act. [Emphasis added.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. …

70 While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings – including any available appeals – has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

(b) *The Purpose of the Legislation*

71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In *Bugbusters*, *supra*, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. *Forest Act*, R.S.B.C. 1979, c. 140. The expense claim was allowed *despite* an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, *per* Finch J.A., at para. 30, was that

> a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the *Forest Act*].

A similar point was made in *Rasanen*, *supra*, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking discovery and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American *Restatement of the Law, Second: Judgments 2d* (1982), vol. 2 § 83(2)(e), which refers to

> procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. …

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) *The Availability of an Appeal*

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: *Harelkin*, *supra*, at p. 592. Here the employee had no *right* of appeal, but the existence of a potential administrative review and her failure to take advantage of it must be counted against her …

(d) *The Safeguards Available to the Parties in the Administrative Procedure*

75 As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

76 Morden A.C.J.O. pointed out … in *Rasanen*, *supra*, at p. 295: "… deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." …

(e) *The Expertise of the Administrative Decision Maker*

77 In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack (*Maybrun*, *supra*, at para. 50):

> . . . where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal.

(f) *The Circumstances Giving Rise to the Prior Administrative Proceedings*

78 In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in *Minott*, *supra*, at pp. 341-42:

> . . . employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them . . . .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

(g) *The Potential Injustice*

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

81 On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

82 I would therefore allow the appeal with costs throughout.

Danyluk v. Ainsworth – questions

How much is D claiming, and why does she say it is owed to her?

When did D go to court to file her civil claim?

Why is this a case of issue estoppel and not cause of action estoppel?

Once McCombs J., at the trial level, decided that issue estoppel applied, what result did this produce?

When D appealed to the OCA, Rosenberg J.A. agreed with D that she had been denied procedural fairness, yet he ruled that this failure did not prevent the operation of issue estoppel. Why not?

According to Rosenberg J.A., "if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing" (para 15). In light of what is said in the text of that section of the statute, and in light of what the Court later says about this, what is the significance of this observation?

The Court describes the rule against collateral attack as "[a]nother aspect of the judicial policy favouring finality" (para. 20). How does that rule differ from the forms of estoppel mentioned in the same paragraph?

Should it matter whether the issues in question were (1) "collaterally or incidentally in the earlier proceedings" (or had to be "be inferred by argument from the judgment"), or instead were (2) "fundamental to the decision" (para. 24)? The Court goes to some pains to make this distinction, but why is it significant (if at all)?

Of the 3 preconditions from *Angle* (para. 25), the one concerning privity is generally seen as the most controversial and difficult to apply (see para. 60).

According to the Court's characterization, D's argument is that "even though the ESA officer was required to make a decision in a judicial manner, she failed to do so." Is this the ground on which the court rules in her favour?

What, according to the Court, are the advantages of the ESA scheme?

What is the "may"/"shall" distinction that the Court notes in para. 31?

The Court sets out 3 considerations bearing on whether a decision was judicial: (1) *could* the institution exercise "adjudicative authority"; (2) did this particular decision have to be made "in a judicial manner"; (3) was the decision *in fact* made "in a judicial manner"?
What is "adjudicative authority"? When is a decision made "in a judicial manner"?

D argued that the "denial of natural justice" in her case sufficiently answered the inquiry above. What was the Court's view on this? What is the rationale for that view?
The Court distinguishes between void and voidable errors (para. 47). What is the difference?

Harelkin plays an important part in the analysis – and yields an important principle – but the Court describes it ineptly. We are told that "a university student failed in his judicial review application to quash the decision of a faculty committee of the University of Regina," and that while the faculty committee did not afford him "proper notice and an opportunity to be heard," nevertheless this failure "did not deprive the faculty committee of its adjudicative jurisdiction." The committee's decision "was subject to judicial review, but this was refused in the exercise of the [Supreme] Court's discretion." Why? The crucial detail missing from this summation is that, while Harelkin was deprived of natural justice by the faculty committee, he "had and still has a *better alternative remedy* [that is, better than turning next to the courts] in his right of appeal to the *senate committee*; he ought to have exercised it" (Harelkin at para. 3; emphasis added). As the Court explained, parties are not entitled to a legal remedy if "an adequate alternative remedy exists" (Harelkin at para. 29; see also Danyluk, para. 14). *Harelkin* then discussed the factors bearing on whether an alternative remedy is indeed adequate (e.g., "the procedure on the appeal, the composition of the … [appeal] committee, its powers … the burden of a previous finding, expeditiousness and costs"). The lesson is that where a tribunal or administrative body has its own system of appeal *as of right*, courts usually conclude that an internal appeal is an adequate remedy and must be pursued before the would-be plaintiff may turn to the courts (although the courts retain discretion to hear the claim, if the internal appeal process is found not to be adequate). It's common for courts to refuse to hear claims until the internal appeal process is complete. (See, e.g., I.B.E.W. Local 894 v. Ellis-Don Ltd., 2001 SCC 4, para. 94). This can be an unpleasant burden when the would-be plaintiff is persuaded that the internal appeal process is unfair. Here, the Court eventually explains (para. 58) that "[t]he appellant could fairly argue … that unlike Harelkin she had no 'adequate alternative remedy' available to her as of right."

The Court here rejects D's argument that "the ESA officer stepped outside her judicial role" because accepting that argument would require the courts to permit would-be plaintiffs to shortcut the internal appeal process (and hence to ignore *Harelkin*) whenever the tribunal acts in a fashion that amounts to a denial of natural justice.

Despite the observation that an "unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available," the Court denies that "the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position" (para. 52). Why?

Why could D have "fairly argue[d] … that unlike Harelkin she had no 'adequate alternative remedy' available to her as of right"?

Danyluk v. Ainsworth – questions

The Court leans heavily on the language of s. 6(1) in the statute (paras. 68 ff). What is the significance of that provision? Imagine that the statute did not include that provision. Would the case come out differently? Why or why not?

In considering the factors bearing on whether to exercise discretion in applying issue estoppel (or refusing to apply it), the Court mentions:

- the language of the statute (see directly above)
- purpose of the legislation: how does this bear on the analysis?
- the availability of an appeal (see discussion of *Harelkin* above)
- the available safeguards: how does this bear on the analysis?
- the decisionmaker's expertise: how does this bear on the analysis?
- the circumstances giving rise to the administrative proceedings: how does this bear on the analysis?
- the potential injustice : how does this bear on the analysis?

It's often a good rule, when looking at how courts deal with a multifactor analysis, to see which issues take up the most space. In D's case, "the purpose of the legislation" gets the most attention, and the Court raises several points there that may not seem to belong under that heading. Ignoring the heading, and instead focusing on the rationales discussed there, along with those involving "the potential injustice," what would you say are the issues that have the most significant effect on the Court's decision?

II. Strategic Interaction in Litigation: Jurisdiction, Preliminary Relief, Discovery

II.1. Where to Litigate: Jurisdiction and *Forum Non Conveniens*

R.R.O. 1990, REGULATION 194

RULE 17: SERVICE OUTSIDE ONTARIO

DEFINITION

17.01 In rules 17.02 to 17.06,

"originating process" includes a counterclaim against only parties to the main action, and a crossclaim. R.R.O. 1990, Reg. 194, r. 17.01.

SERVICE OUTSIDE ONTARIO WITHOUT LEAVE

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

Property in Ontario

(a) in respect of real or personal property in Ontario;

Administration of Estates

(b) in respect of the administration of the estate of a deceased person,

(i) in respect of real property in Ontario, or

(ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;

Interpretation of an Instrument

(c) for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,

(i) real or personal property in Ontario, or

(ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;

Trustee Where Assets Include Property in Ontario

(d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

Mortgage on Property in Ontario

(e) for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;

Contracts

(f) in respect of a contract where,

(i) the contract was made in Ontario,

(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,

(iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or

(iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;

Tort Committed in Ontario

(g) in respect of a tort committed in Ontario;

Damage Sustained in Ontario

(h) in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed;

Injunctions

(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario;

. . .

Judgment of Court Outside Ontario

(m) on a judgment of a court outside Ontario;

Authorized by Statute

(n) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;

Necessary or Proper Party

(o) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;

Person Resident or Carrying on Business in Ontario

(p) against a person ordinarily resident or carrying on business in Ontario;

Counterclaim, Crossclaim or Third Party Claim

(q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or

Taxes

(r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality. R.R.O. 1990, Reg. 194, r. 17.02; O. Reg. 171/98, s. 2; O. Reg. 131/04, s. 9.

. . .

ADDITIONAL REQUIREMENTS FOR SERVICE OUTSIDE ONTARIO

17.04 (1) An originating process served outside Ontario without leave shall disclose the facts and specifically refer to the provision of rule 17.02 relied on in support of such service. R.R.O. 1990, Reg. 194, r. 17.04 (1).

. . .

. . .

MOTION TO SET ASIDE SERVICE OUTSIDE ONTARIO

17.06 (1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

(a) for an order setting aside the service and any order that authorized the service; or

(b) for an order staying the proceeding. R.R.O. 1990, Reg. 194, r. 17.06 (1).

(2)The court may make an order under subrule (1) or such other order as is just where it is satisfied that,

(a) service outside Ontario is not authorized by these rules;

(b) an order granting leave to serve outside Ontario should be set aside; or

(c) Ontario is not a convenient forum for the hearing of the proceeding. R.R.O. 1990, Reg. 194, r. 17.06 (2).

(3) Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service. R.R.O. 1990, Reg. 194, r. 17.06 (3).

(4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party. R.R.O. 1990, Reg. 194, r. 17.06 (4).

DE SAVOYE v. MORGUARD INVESTMENTS LIMITED and CREDIT FONCIER TRUST COMPANY

Supreme Court of Canada

Dickson C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

Heard: April 23, 1990; Judgment: December 20, 1990

The judgment of the court was delivered by *La Forest J.*:

1 This appeal concerns the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there. Specifically, the appeal deals with judgments granted in foreclosure proceedings for deficiencies on sale of mortgaged property.

Facts

2 The respondents, Morguard Investments Limited and Credit Foncier Trust Company, became mortgagees of land in Alberta in 1978. The appellant, Douglas De Savoye, who then resided in Alberta, was originally guarantor but later took title to the land and assumed the obligation of mortgagor. Shortly afterwards he moved to British Columbia, and he has not resided or carried on business in Alberta since. The mortgages fell into default and the respondents brought action in Alberta. The appellant was served with process in the action by double registered mail addressed to his home in British Columbia pursuant to orders for service by the Alberta court in accordance with the rules for service outside its jurisdiction. There are rules to the same effect in British Columbia.

3 The appellant took no steps to appear or to defend the action. There was no clause in the mortgage by which he agreed to submit to the jurisdiction of the Alberta court, and he did not attorn to its jurisdiction.

4 The respondents obtained judgments nisi in the foreclosure action. At the expiry of the redemption period, they obtained "Rice orders" against the appellant. Under these orders, a judicial sale of the mortgaged properties to the respondents took place and judgment was entered against the appellant for the deficiencies between the value of the property and the amount owing on the mortgages. The respondents then each commenced a separate action in the British Columbia Supreme Court to enforce the Alberta judgment for the deficiencies. Judgment was granted to the respondents by the Supreme Court in a decision which was upheld on appeal to the British Columbia Court of Appeal. The appellant then sought and was granted leave to appeal to this court.

Analysis

28 The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century: see *Faridkote*, supra. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction. . . .

29 Modern states . . . cannot live in splendid isolation, and do give effect to judgments given in other countries in certain circumstances. Thus a judgment in rem, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.

30 But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court. In particular, the English courts refused to enforce judgments on contracts, wherever made, unless the defendant was within the jurisdiction of the foreign court at the time of the action or had submitted to its jurisdiction. And this was so, we saw, even on actions that could most appropriately be tried in the foreign jurisdiction, such as a case like the present, where the personal obligation undertaken in the foreign country was in respect of property located there. Even in the 19th century this approach gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states, of adopting a doctrine of this kind.

31 For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113 at 163-64 (1895), in a passage cited by Estey J. in *Spencer v. R.*, [1985] 2 S.C.R. 278 at 283, as follows:

> " 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws": *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64.

As Dickson J. in *Zingre v. R.*, [1981] 2 S.C.R. 392 at 400, citing Marshall C.J. in *The Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), stated, "common interest impels sovereigns to mutual intercourse" between sovereign states. In a word, the rules of private international law are

grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. Von Mehren and Trautman have observed in "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968), 81 Harvard L. Rev. 1601, at p. 1603:

> The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted.

32 Hessel E. Yntema, in "The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721 (though speaking more specifically there about choice of law), caught the spirit in which private international law, or conflict of laws, should be approached when he stated at p. 741:

> In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws.

As is evident throughout his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.

33 This formulation suggests that the content of comity must be adjusted in the light of a changing world order. The approach adopted by the English courts in the 19th century may well have seemed suitable to Great Britain's situation at the time. One can understand the difficulty in which a defendant in England would find himself in defending an action initiated in a far corner of the world in the then state of travel and communications. The *Symon* case, supra, where the action arose in Western Australia against a defendant in England, affords a good illustration. The approach of course demands that one forget the difficulties of the plaintiff in bringing an action against a defendant who has moved to a distant land. However, this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly Englishmen who carried on enterprises in faraway lands. As well, there was an exaggerated concern about the quality of justice that might be meted out to British residents abroad: see Lord Reid in *Re The Atlantic Star; The Atlantic Star v. The Bona Spes,* [1974] A.C. 436 (H.L.).

34 The world has changed since the above rules were developed in 19th-century England. Modern means of travel and communications have made many of these 19th-century concerns appear parochial. The business community operates in a world economy, and we correctly speak of a "world community" even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments, to the general advantage of litigants.

35 However that may be, there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view there never was, and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to co-operate with courts of other provinces where necessary to meet the ends of justice: . . .

36 In any event, the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Canadian Charter of Rights and Freedoms: . . .

37 These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges — who also have superintending control over other provincial courts and tribunals — are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada.

38 These various constitutional and sub-constitutional arrangements and practices make unnecessary a “full faith and credit” clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a régime of mutual recognition of judgments across the country is inherent in a federation. Indeed, the European Economic Community has determined that such a feature flows naturally from a common market, even without political integration. To that end its members have entered into the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

39 The integrating character of our constitutional arrangements as they apply to interprovincial mobility is such that some writers have suggested that a “full faith and credit” clause must be read into the Constitution and that the federal Parliament is, under the “Peace, Order and good Government” clause, empowered to legislate respecting the recognition and enforcement of judgments throughout Canada: see, for example, Black and Hogg. The present case was not, however, argued on that basis, and I need not go that far. For present purposes it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of

other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.

40 This court has, in other areas of the law having extraterritorial implications, recognized the need for adapting the law to the exigencies of a federation. . . .

41 A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. I referred earlier to the principles of order and fairness that should obtain in this area of the law. Both order and justice militate in favour of the security of transactions. It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides whatever the inconvenience and costs this may bring and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?

42 These concerns, however, must be weighed against fairness to the defendant. I noted earlier that the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives, and I added that recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest, or at least significant, contacts with the subject matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit: . . . Thus fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly-restrained jurisdiction.

43 As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is: When has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of the accepted grounds traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments — in the case of judgments in personam, where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment, whether by agreement of by attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.

44 The difficulty, of course, arises where, as here, the defendant was outside the jurisdiction of that court and he was served ex juris. To what extent may a court of a province properly exercise jurisdiction over a defendant in another province? The rules for service ex juris in all the provinces are broad — in some provinces, Nova Scotia and Prince Edward Island, very broad indeed. It is clear, however, that, if the courts of one province are to be expected to give

effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province.

45 It will be obvious from the manner in which I approach the problem that I do not see the "reciprocity approach" as providing an answer to the difficulty regarding in personam judgments, whatever utility it may have on the international plane. Even there, I am more comfortable with the approach taken by the House of Lords in *Indyka v. Indyka*, supra, where the question posed in a matrimonial case was whether there was a real and substantial connection between the petitioner and the country or territory exercising jurisdiction. I should observe, however, that in a case involving matrimonial status the subject matter of the action and the petitioner are obviously at the same place. That is not necessarily so of a personal action, where a nexus may have to be sought between the subject matter of the action and the territory where the action is brought.

46 A case in this court, *Moran v. Pyle Nat. (Can.) Ltd.*, [1975] 1 S.C.R. 393, though a tort action, is instructive as to the manner in which a court may properly exercise jurisdiction in actions in contracts as well. In that case, an electrician was fatally injured in Saskatchewan while removing a spent light bulb manufactured in Ontario by a company that neither carried on business nor held any property in Saskatchewan. The company sold all its products to distributors and none to consumers. It had no salesmen or agents in Saskatchewan. The electrician's wife and children brought action against the company under the Fatal Accidents Act of Saskatchewan, claiming that the company had been negligent in the manufacture of the light bulb and in failing to provide an adequate safety system to prevent unsafe bulbs from leaving the plant and being sold or used. On a chambers motion, the trial judge held that any negligence would have occurred in Ontario, and so the tort was committed out of Saskatchewan. However, he, granted special leave under a provision of the Queen's Bench Act to commence an action in Saskatchewan, and made an order allowing service of the statement of claim and a writ of summons in Ontario. The company successfully appealed to the Saskatchewan Court of Appeal, but the Court of Appeal's judgment was reversed by this court.

47 Dickson J. gave the reasons of the court. The location of a tort, he noted, was a matter of some difficulty. A plaintiff, he observed, could be sued on the theory that the court where the defendant happened to be had physical power over the defendant. But, he added, that suit could also be brought where the tort had been committed. Where the situs of the tort was, however, was not an easy question. One theory was that it was situated where the wrongful action took place (there, Ontario). Another would have it that it is the place where the damage occurred. But, as he noted, at p. 398:

> Logically, it would seem that if a tort is to be divided and one part occurs in state A and another in state B, the tort could reasonably for jurisidictional purposes be said to have occurred in both states or, on a more restrictive approach, in neither state. It is difficult to understand how it can properly be said to have occurred only in state A.

At the end of the day, he rejected any rigid or mechanical theory for determining the situs of the tort. Rather, he adopted "a more flexible, qualitative and quantitative test" [p. 407], posing the question, as had some English cases there cited, in terms of whether it was "inherently reasonable" [p. 408] for the action to be brought in a particular jurisdiction, or whether, to adopt

another expression, there was a "real and substantial connection" [p. 408] between the jurisdiction and the wrong-doing. . . .

48 Before going on I should observe that, if this courts thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment. This is obvious from the fact that in *Moran* Dickson J. derived the reasonableness of his approach from the "normal distributive channels" of products [p. 409], and in particular the "interprovincial flow of commerce" [p. 409]. If, as I stated, it is reasonable to support the exercise of jurisdiction in one province, it would seem equally reasonable that the judgment be recognized in other provinces. . . .

. . .

51 I am aware, of course, that the possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions in rem now. In any event, this consideration must be weighed against the fact that the plaintiff, under the English rules, may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred. It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a "power theory" or a single situs for torts or contracts for the proper exercise of jurisdiction.

SUPREME COURT OF CANADA

Club Resorts Ltd. Appellant and

Morgan Van Breda and Viktor Berg Respondents

- and -

Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, and Canadian Lawyers for International Human Rights Interveners

CORAM: McLachlin C.J. and Binnie,* LeBel, Deschamps, Fish, Abella, Charron,* Rothstein and Cromwell JJ.

(* Binnie and Charron JJ. took no part in the judgment.)

LEBEL J. —

I. Introduction

[1] Tourism has grown into one of the most personal forms of globalization in the modern world. Canadians look elsewhere for the sun, or to see new sights or seek new experiences. Trips are planned and taken with great expectations. But personal tragedies do happen. Happiness gives way to grief, as in the situations that resulted in these appeals. A young woman, Morgan Van Breda, suffered catastrophic injuries on a beach in Cuba. A family doctor and father, Dr. Claude Charron, died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant Club Resorts Ltd. ("Club Resorts"), a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. The same issues have now been raised in this Court. I will begin by summarizing the events that led to the litigation, the conduct of the litigation and the judgments of the courts below. I will then consider the principles that should apply to the assumption of jurisdiction and the doctrine of *forum non conveniens* under the common law conflicts rules of Canadian private international law. Finally, I will apply those principles to determine whether the Ontario courts have jurisdiction and, if so, whether they should decline to exercise it.

II. Background and Facts

A. *Van Breda*

[2] In June 2003, the respondent Viktor Berg and his spouse, Ms. Van Breda, went on a trip to Cuba, where they stayed at the SuperClub's Breezes Jibacoa resort managed by Club Resorts. Mr. Berg, a professional squash player, had made arrangements for a one-week stay for two people at this hotel through René Denis, an Ottawa-based travel agent operating a business known as Sport au Soleil.

[3] Mr. Denis's business involved arranging for racquet sport professionals for, among others, Club Resorts, in exchange for undisclosed compensation. Mr. Denis also received a fee from each professional. Once the arrangements for Mr. Berg were finalized, Mr. Denis sent him a letter on letterhead bearing the words "SuperClubs Cuba — Tennis", which confirmed the details of the agreement with Club Resorts: Mr. Berg was to provide two hours of tennis lessons a day in exchange for bed and board and other services for two people at the hotel.

[4] The accident happened on the first day of their stay. Ms. Van Breda tried to do some exercises on a metal structure on the beach, but the structure collapsed. She suffered catastrophic injuries and, as a result, became paraplegic. After spending a few days in a hospital in Cuba, she returned to Canada, going to Calgary where her family lived. She is now living in British Columbia with Mr. Berg. They never returned to Ontario, which they had planned to do after their holiday.

[5] In May 2006, Ms. Van Breda, her relatives and Mr. Berg sued several defendants, including Mr. Denis [and] Club Resorts, and some companies associated with Club Resorts in the SuperClubs group, in the Ontario Superior Court of Justice. Their claim was framed in contract and in tort. They sought damages for personal injury, damages for loss of support, care, guidance and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, and punitive damages.

[6] Some of the parties, including those who were served outside Ontario under rule 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, moved to dismiss the action for want of jurisdiction. In the alternative, they asked the Superior Court of Justice to decline jurisdiction on the basis of *forum non conveniens*.

B. *Charron*

[7] In January 2002, Dr. Charron and his wife booked a vacation package through a travel agent, Bel Air Travel Group Ltd. ("Bel Air"). This package was offered by Hola Sun Holidays Ltd. ("Hola Sun"), which sold packages offered by, among others, SuperClubs. It was an all-inclusive package — at the Breezes Costa Verde hotel in Cuba — that featured scuba diving. The hotel was owned by Gaviota SA (Ltd.) ("Gaviota"), a Cuban corporation, but was managed by the appellant, Club Resorts. Dr. and Mrs. Charron reached the Breezes Costa Verde on February 8, 2002. Four days later, Dr. Charron drowned during his second scuba dive.

[8] Mrs. Charron and her children sued for breach of contract and negligence. Dr. Charron's estate sought damages for loss of future income, and the individual plaintiffs also sought damages for loss of love, care, guidance and companionship pursuant to the *Family Law Act*. The statement of claim was served on the Ontario defendants, Bel Air and Hola Sun. It was also served outside Ontario on several foreign defendants, including Club Resorts, under rule 17.02. The parties served outside Ontario included the diving instructor and the captain of the boat. Club Resorts and an associated company, Village Resorts International Ltd., which owned the SuperClubs trademark, moved to dismiss the action on the ground that the Ontario courts lacked jurisdiction or, in the alternative, to stay the action on the grounds that Ontario was not the most appropriate forum.

C. *Judicial History*

(1) *Van Breda*— Ontario Superior Court of Justice, (2008), 60 C.P.C. (6th) 186

[9] In *Van Breda*, Pattillo J. held that Club Resorts' motion turned on whether there was a real and substantial connection in accordance with the test laid out by the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20. He found that there was a connection between Ontario and Club Resorts by virtue of the activities the company engaged in in Ontario through Mr. Denis. He also found …that the agreement between Mr. Berg and Club Resorts had actually been concluded in Ontario. … [H]e held that there was a sufficient connection between Ontario and the subject matter of the litigation. … Although he accepted that Cuba also had jurisdiction, he concluded that it had not been established that a Cuban court would clearly be a more

appropriate forum. …

(2) *Charron*— Ontario Superior Court of Justice, (2008), 92 O.R. (3d) 608

[10] In *Charron*, Mulligan J. held against Club Resorts. In his opinion, a contract had been entered into between Dr. Charron and Bel Air. The travel agency had booked an all-inclusive package at the Cuban hotel through Hola Sun, which had an agreement with Club Resorts. These facts weighed in favour of assuming jurisdiction. Mulligan J. also found that there was a connection between Ontario and the defendants. In his view, the resort relied heavily on international travellers to ensure its profitability. Club Resorts marketed the resort in Ontario by way of an agreement with Hola Sun. … [T]he record indicated that Club Resorts … had an office in Richmond Hill, Ontario. … Mulligan J. held that the Ontario courts had jurisdiction with respect to Club Resorts. In considering *forum non conveniens*, Mulligan J. … took into account the fact that more parties and witnesses were located in Ontario than in Cuba, that the damage had been sustained in Ontario and that a liability insurance policy was available to the foreign defendants in Ontario. In addition, Mrs. Charron and her children would lose the benefit of statutory family law remedies if the case were to proceed in Cuba. For these reasons, Mulligan J. held that the Ontario court was clearly a more appropriate forum than a Cuban court.

(3) Ontario Court of Appeal, 2010 ONCA 84, 98 O.R. (3d) 721

[11] The two cases were heard together in the Court of Appeal. After ordering a rehearing, the Court of Appeal, in reasons written by Sharpe J.A., took the opportunity to review and reframe the *Muscutt* test. …

[12] … [A]fter recasting the *Muscutt* test, the Court of Appeal unanimously held, in both cases, that the Ontario courts had jurisdiction over the claims and the parties. It then decided that the Ontario courts should not decline jurisdiction on the basis of *forum non conveniens* principles …

[13] The appeals in *Van Breda* and *Charron* were also heard together in this Court. They were heard during the same session as two other appeals involving the issues of jurisdiction and *forum non conveniens*, which concerned actions in damages for defamation (*Breeden v. Black*, 2012 SCC 19, and *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18).

III. Analysis

Issues

(1) Nature and Scope of Private International Law

[14] These appeals raise broad issues about the fundamental principles of the conflict of laws as this branch of the law has traditionally been known in the common law, or “private international law” as it is often called now.

…

(2) Issues Related to Jurisdiction: Assumption and Exercise of Jurisdiction

[17] Two issues arise in these appeals. First, were the Ontario courts right to assume jurisdiction over the claims of the respondents Van Breda and Charron and over the appellant, Club Resorts? Second, were they right to exercise that jurisdiction and dismiss an application for a stay based on *forum non conveniens*?

[18] To be able to resolve these issues, I must first discuss the evolution of the rules of jurisdiction *simpliciter* in Canadian private international law. …

[19] I will then propose an analytical framework and legal principles for assuming jurisdiction (jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). …

[20] Before turning to these issues, however, it is important to consider the constitutional underpinnings of private international law in Canada. This part of the analysis is necessary in order to explain the origins of the "real and substantial connection test" as it is now known, its nature, and its impact on the development of the principles of private international law.

(3) Constitutional Underpinnings of Private International Law

[21] Conflicts rules must fit within Canada's constitutional structure. Given the nature of private international law, its application inevitably raises constitutional issues. This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country. … The interplay between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province's courts. The Constitution assigns powers to the provinces. But these powers are subject to the restriction that they be exercised within the province in question … and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution …

(4) Origins of the Real and Substantial Connection Test

[22] The real and substantial connection test arose out of decisions of this Court … aimed at establishing broad and flexible principles to govern the exercise of provincial powers and the actions of a province's courts. It was focussed on two issues: (1) the risk of jurisdictional overreach by provinces and (2) the recognition of decisions rendered in other jurisdictions within the Canadian federation and in other countries. In developing the real and substantial connection test, the Court crafted a constitutional principle rather than a simple conflicts rule … However, the test was born as a general organizing principle of the conflict of laws. Its constitutional dimension appeared only later. Courts have used the expression "real and substantial connection" to describe the test in both senses, and often in the same judgment. This has produced confusion about both the nature of the test and the constitutional status of the rules and principles of private international law. A clearer distinction needs to be drawn between the private international law and constitutional dimensions of this test.

[23] From a constitutional standpoint, the Court has, by developing tests such as the real and substantial connection test, sought to limit the reach of provincial conflicts rules or the assumption of jurisdiction by a province's courts. … In its constitutional sense, [this test] places limits on the reach of the jurisdiction of a province's courts and on the application of provincial laws to interprovincial or international situations. It also requires that all Canadian courts recognize and enforce decisions rendered by courts of the other Canadian provinces on the basis of a proper assumption of jurisdiction. But it does not establish the actual content of rules and principles of private international law, nor does it require that those rules and principles be uniform.

[24] The first mention of a "real and substantial connection test" in the Court's modern jurisprudence can be found in … *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393. That case concerned a tort action with respect to manufacturer's liability. The main issue was whether the courts of Saskatchewan had jurisdiction over the claim and, if so, what substantive law governed it. Dickson J. suggested that the English courts seemed to be moving towards some form of "real and substantial connection test" (pp. 407-8) to resolve issues related to the assumption of jurisdiction by a province's courts … The test was formally adopted in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. As … in *Moran*, the Court's intention in *Morguard* was to develop an organizing principle of Canadian private international law, albeit with constitutional overtones. The test's constitutional role in the Canadian federation was confirmed … in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. Its Janus-like nature — with a private international law face on the one hand and a constitutional face on the other — crystallized in *Hunt* and remained a permanent feature of the subsequent jurisprudence.

[25] … *Morguard* … initiated a major shift in the framework governing the conflict of laws … by accepting the validity of the real and substantial connection test … At issue in *Morguard* was an application to enforce, in British Columbia, a judgment rendered in Alberta against a resident of British Columbia. The claim related to a debt secured by a mortgage on property in Alberta. The parties were resident in Alberta at the time the loan was made. La Forest J., writing for a unanimous Court, called for a re-evaluation of relationships between the courts of the provinces within the Canadian federation. The creation of the Canadian federation established an internal space within which exchanges should occur more freely than between independent states. The principle of comity and the principles of fairness and order applicable within a federal space required that the rules of private international law be adjusted (*Morguard*, at pp. 1095-96).

[26] In *Morguard*, the Court held that the courts of a province must recognize and enforce a judgment of a court of another province if a real and substantial connection exists between that court and the subject matter of the litigation. Another purpose of the test was to prevent improper assumptions of jurisdiction by the courts of a province. Thus, the test was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and it requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced. La Forest J. did not seek to determine the precise content of this real and substantial connection test (*Morguard*, at p. 1108), nor did he elaborate on the strength of the connection. Rather, he held that the connections between the matters or the parties, on the one hand, and the court, on the other, must be of some significance in order to promote order and fairness. They must not be "tenuous" (p. 1110). … [The Court] refrained from determining whether the real and substantial connection test should be considered a constitutional test.

[27] … *Hunt* confirmed the constitutional nature of the real and substantial connection test. That case concerned the application of a "blocking" statute enacted by the Quebec legislature that prohibited the transfer to other jurisdictions of certain documents kept by corporations in Quebec, even in the context of court litigation. The Court found that the statute was not applicable to litigation conducted in British Columbia. It held that assumptions of jurisdiction by a province and its courts must be grounded in the principles of order and fairness in the judicial system. The real and substantial connection test from *Morguard* reflected the need for limits on assumptions of jurisdiction by a province's courts (*Hunt*, at p. 325). Any improper assumption of

jurisdiction would be negated by the requirement that there be a "real and substantial connection."

[28] Since *Hunt*, the real and substantial connection test has been recognized as a constitutional imperative in the application of the conflicts rules. It reflects the limits of provincial legislative and judicial powers and has thus become more than a conflicts rule. Its application was extended to the recognition and enforcement of foreign judgments in *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416.

[29] But, in the common law, the nature of the conflicts rules that would accord with the constitutional imperative has remained largely undeveloped in this Court's jurisprudence. Although the real and substantial connection test has been consistently applied both as a constitutional test and as a principle of private international law, … the Court has generally declined to articulate the content of the private international law rules that would satisfy the test's constitutional requirements or to develop a framework for them. The Court has continued to affirm the relevance and importance of the test and has even extended it to foreign judgments, but without attempting to elaborate upon the rules it requires (see *Beals*, at paras. 23 and 28, *per* Major J.).

…

[31] … [W]e should remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the law of conflicts. With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*. These limits are, in essence, concerned with the legitimate exercise of state power, be it legislative or adjudicative. The legitimate exercise of power rests, *inter alia*, upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority. The purpose of constitutionally imposed territorial limits is to ensure the existence of the relationship or connection needed to confer legitimacy.

[32] As can be observed from the jurisprudence, in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication. This test suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute.

[33] The constitutionally imposed territorial limits on adjudicative jurisdiction are related to, but distinct from, the real and substantial connection test as expressed in conflicts rules. Conflicts rules include the rules that have been chosen for deciding when jurisdiction can be assumed over a given dispute, what law will govern a dispute or how an adjudicative decision from another jurisdiction will be recognized and enforced. The constitutional territorial limits, on the other hand, are concerned with setting the outer boundaries within which a variety of appropriate conflicts rules can be elaborated and applied. The purpose of the constitutional principle is to ensure that specific conflicts rules remain within these boundaries and, as a result, that they authorize the assumption of jurisdiction only in circumstances representing a legitimate exercise of the state's power of adjudication.

[34] This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. I leave further elaboration of the content of the constitutional test for adjudicative jurisdiction for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits. To be clear, however, the existence of a constitutional test aimed at maintaining the constitutional limits on the powers of a province's legislature and courts does not mean that the rules of private international law must be uniform across Canada. Legislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system. Nor does this test's existence mean that the connections with the province must be the strongest ones possible or that they must all point in the same direction.

[35] Turning to the search for appropriate conflicts rules, the trend is towards retaining or establishing a system of connecting factors informed by principles for applying them, as opposed to relying on almost pure judicial discretion to achieve order and fairness. This trend is apparent in the laws passed by certain provincial legislatures and is reflected in a number of judicial decisions. These decisions include the important jurisprudential current that the Ontario Court of Appeal has been developing since *Muscutt* …. The real and substantial connection test should be viewed not in isolation, but rather in the context of its historical roots, contemporary legislative developments, the academic literature and initiatives aimed at developing and modernizing Canada's conflicts rules. … [B]oth the common law and the civil law have relied largely on the selection and use of a number of specific objective factual connections.

…

[37] Not long after *Hunt*, the Court rendered its judgment in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, a case concerned mainly with determining what law should apply to a tort. … The Court established a new conflicts rule in respect of torts, abandoning the rule it had adopted in *McLean v. Pettigrew*, [1945] S.C.R. 62, that favoured the law of the forum (*lex fori*) and holding that, in principle, the law governing the tort should be that of the place where the tort occurred (*lex loci delicti*). The *situs* of the tort would also justify the assumption of jurisdiction by the courts of a province. The Court … held that in this context, the objectives of fairness and efficiency in the conflicts system would be better served by relying on factual connections with the place where the tort occurred.

[38] In La Forest J.'s opinion, *Morguard* prevented courts from overreaching by entering into matters in which they had little or no interest (*Tolofson*, at p. 1049). But he also cautioned against building a system of private international law based solely on the expectations of the parties and concerns of fairness in a specific case, as such a system could hardly be considered rational. A degree of predictability or reliability must be assured:

> … [A] system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem. (*Tolofson*, at pp. 1046-47)

To La Forest J. in *Tolofson*, order was needed in the conflicts system, and was even a precondition to justice (p. 1058). Certainty was one of the key purposes being pursued in framing

a conflicts rule (p. 1061). With this in mind, the Court crafted what it hoped would be a clear conflicts rule for torts that would bring a degree of certainty to this part of tort law and private international law (pp. 1062-64). Subject to the constitutional requirement established in *Morguard*, this rule would make it possible to identify some connecting factors linking the court or the law to the matter and to the parties. The presence of such factors would not necessarily resolve everything. Specific torts might raise particular difficulties that could require crafting carefully defined exceptions (p. 1050). Such difficulties indeed arise in the companion cases of *Breeden* and *Éditions Écosociété Inc.* Nevertheless, a conflicts rule based on specific connections seemed likely to introduce greater certainty into the interpretation and application of private international law principles in Canada.

…

[40] Across Canada, various initiatives have been undertaken to flesh out the real and substantial connection test. For example, the Uniform Law Conference of Canada proposed a uniform Act to govern issues related to jurisdiction and to the doctrine of *forum non conveniens* (see *Uniform Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*") (online).

[41] The *CJPTA* focusses mainly on issues related to the assumption of jurisdiction. Section 3(e) provides that a court may assume jurisdiction if "there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based" (text in brackets in original). Section 10 enumerates a variety of circumstances in which such a connection would be presumed to exist. For example, it lists a number of factors that might apply where the purpose of the proceeding is the determination of property rights or rights related to a contract. In the case of tort claims, s. 10(g) provides that the commission of a tort in a province would be a proper basis for the assumption of jurisdiction by that province's courts. Section 10 states that the list of connecting factors would not be closed and that other circumstances might be proven in order to establish a real and substantial connection. The *CJPTA* also includes specific provisions regarding forum of necessity (s. 6) and *forum non conveniens* (s. 11). A number of subsequent provincial statutes are clearly based on the *CJPTA* (see, e.g., *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7 (not yet in force)).

[42] In these statutes, … the *CJPTA* has been adopted, with some differences …, as they include non-exhaustive lists of prescriptive connecting factors which are presumed to establish a real and substantial connection. … [T]he legislatures that enacted them did not attempt to codify the entire field of private international law, but attached particular importance to issues related to the assumption and exercise of jurisdiction.

[43] Unlike in these other provinces, the Ontario legislature has not enacted a statute based on the *CJPTA*. However, the province has established its own set of connecting factors for the purposes of service outside Ontario, which are set out in the Ontario *Rules of Civil Procedure*. These factors, which are found in rule 17.02, are similar, in part, to those of the *CJPTA* and of the statutes based on the *CJPTA*. It has been observed, though, that rule 17.02 is purely procedural in nature and does not by itself establish jurisdiction in a case …

(5) Understanding the Real and Substantial Connection Test — The Ontario Court of Appeal in *Muscutt*

[44] Given the absence of statutory rules, the Ontario Court of Appeal endeavoured to establish a common law framework for the application of the real and substantial connection test … in *Muscutt*. At issue in that case was a claim in tort. An Ontario resident had been injured in a car crash in Alberta. The four defendants lived in Alberta at the time. One of them moved to Ontario after the accident. The plaintiff returned to Ontario and sued all the defendants in Ontario. Two of the Alberta defendants moved to stay the action for want of jurisdiction and, in the alternative, on the basis of *forum non conveniens*. … They also challenged the constitutional validity of the provisions of the Ontario rules on service outside the province. In their opinion, those provisions were *ultra vires* the province of Ontario because they had an extraterritorial effect. The Ontario Superior Court of Justice dismissed the constitutional challenge and assumed jurisdiction. The matter was then appealed to the Court of Appeal, which took the opportunity to consider the constitutional issues, although the main focus of its decision was on the content and the application of the real and substantial connection test.

[45] The Court of Appeal quickly disposed of the argument that rule 17.02(h) was unconstitutional. It acknowledged that the real and substantial connection test imposed constitutional limits on the assumption of jurisdiction by a province's courts. But in its opinion, rule 17.02(h) was purely procedural and did not by itself determine the issue of the jurisdiction of the Ontario courts. The rule applied within the limits of the real and substantial connection test and did not resolve the issue of the assumption of jurisdiction …

[46] The Court of Appeal then turned to the central issue in the case: whether it was open to the Superior Court of Justice to assume jurisdiction. Sharpe J.A. first sought to draw a clear distinction between the assumption of jurisdiction itself and *forum non conveniens* … A court must determine whether it has jurisdiction by applying the appropriate principles governing the assumption of jurisdiction. If it does have jurisdiction, it might then have to consider whether it should decline to exercise that jurisdiction in favour of a more appropriate forum (*Muscutt*, at paras. 40-42). …

[47] Sharpe J.A. emphasized the importance of this Court's decisions … in the re-crafting of the traditional approaches to the resolution of conflicts in private international law. The adoption of the real and substantial connection test mandated a flexible approach to the assumption of jurisdiction informed by the underlying requirements of order and fairness. This approach required a concrete analysis of a number of factors that would allow a court to decide whether a sufficient connection existed between the forum and the subject matter of the litigation rather than with the parties. The court was to look not for the strongest possible connection with the forum, but for a minimum connection sufficient to meet the constitutional requirement that the matter be linked to the forum (para. 44). The Court of Appeal held that a court should consider a variety of factors to determine whether it has jurisdiction. Sharpe J.A. recommended taking a broad approach to jurisdiction. The defendant's relationship with the forum might be an "important" connecting factor, but not a "necessary" one (para. 74) (emphasis deleted).

[48] Although the Court of Appeal acknowledged the importance of flexibility, it stressed that clarity and certainty are also necessary characteristics of the conflicts system. It accordingly developed a list of eight factors to be considered when deciding whether an assumption of jurisdiction is justified:

(1) the connection between the forum and the plaintiff's claim;
(2) the connection between the forum and the defendant;
(3) unfairness to the defendant in assuming jurisdiction;
(4) unfairness to the plaintiff in not assuming jurisdiction;
(5) the involvement of other parties to the suit;
(6) the court's willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis;
(7) whether the case is interprovincial or international in nature; and
(8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[49] In the Court of Appeal's opinion, no single factor should be determinative. In Sharpe J.A.'s words, "all relevant factors should be considered and weighed together" (*Muscutt*, at para. 76). The Court of Appeal held that the Superior Court of Justice could assume jurisdiction in the case before it. It turned briefly to the issue of *forum non conveniens*, but found that an Alberta court would not be a more appropriate forum (para. 115).

…

(6) Reconsideration of *Muscutt* by the Ontario Court of Appeal

[51] A few years after *Muscutt*, the Court of Appeal decided that, in the cases now before this Court, a review of the existing framework for the assumption of jurisdiction by Ontario courts and of issues related to *forum non conveniens* had become necessary. … *Muscutt* was considered an influential authority, and its framework was often accepted as an appropriate one for resolving issues related to the assumption of jurisdiction. But … a number of common law provinces preferred to adopt the framework proposed in the *CJPTA.* On occasion, courts outside Ontario expressed reservations about certain aspects of the *Muscutt* framework … It was suggested that the *Muscutt* test gave judges too much latitude in exercising their discretion on a case-by-case basis and was thus incompatible with the objectives of order and predictability in the assumption of jurisdiction. The wide parameters of this broad jurisdiction might also lead a court to conflate the jurisdictional analysis and the application of the doctrine of *forum non conveniens* in a search for the better or more appropriate forum in any given case. The analysis under the *Muscutt* test could also generate an instinctive bias in favour of the forum chosen by the plaintiff.

(7) The New *Van Breda-Charron* Approach of the Ontario Court of Appeal

[52] As the Court of Appeal noted, it had heard a variety of opinions and conflicting suggestions regarding the need to reframe the *Muscutt* test and how this should be done. Some of the litigants wanted to retain *Muscutt* as it was; others proposed the adoption of a test based on a list of presumptive connecting factors similar to that of the *CJPTA* (*Van Breda-Charron*, paras. 56-57). The Court of Appeal declined to craft a common law rule that would in substance reproduce the content of the *CJPTA*. Sharpe J.A. expressed the view that the unpredictability of the *Muscutt* test had been exaggerated, as had the degree of certainty and predictability that would result if the *CJPTA* scheme were adopted (para. 68). He proposed what he saw as a middle way. The Court of Appeal would retain the *Muscutt* test, but would modify it by simplifying it and bringing it closer to the *CJPTA* model. Sharpe J.A. stated: "In refining the *Muscutt* test, we can look to *CJPTA* as a worthy attempt to restate and update the Canadian law of jurisdiction . . . and, in so doing, bring Ontario law into line with the emerging national consensus on appropriate jurisdictional standards" (para. 69).

[53] On that basis, the Court of Appeal reframed the *Muscutt* test in part. The first change … was the creation of a category-based presumption of jurisdiction … Sharpe J.A. asserted that most of the connecting factors enumerated in rule 17.02, such as the fact that a contract was made in Ontario (rule 17.02(f)) or a tort was committed in the province (rule 17.02(g)), would presumptively confirm the jurisdiction of the Ontario court (para. 72). In other words, whenever one of these factors was established, a real and substantial connection justifying the assumption of jurisdiction by an Ontario court would be presumed to exist.

[54] Sharpe J.A. added that where the presumption applied, it would be rebuttable. It would be open to a party to argue that, even though a presumptive connection existed, the real and substantial connection test had not been met (para. 72). …

[55] According to this view, the appropriate factors generally operate as reliable markers of jurisdiction at common law. The adoption of these markers would mitigate the complexity and unpredictability of the *Muscutt* test. Sharpe J.A. noted that the jurisprudence on service *ex juris* provides support for the use of these factors as indicators of a real and substantial connection. For example, in *Hunt*, La Forest J. had observed that, even if some of the traditional rules of jurisdiction might have to be recast in light of *Morguard*, the established factors could nevertheless be viewed as "a good place to start" … But Sharpe J.A. declined to give presumptive effect to the factors set out in rules 17.02(h) (damage sustained in Ontario) and 17.02(o) (necessary or proper party). Neither of these factors is included in the *CJPTA*. Nor have they gained broad acceptance as reliable indicators of jurisdiction. Indeed, the Court of Appeal found in *Muscutt* and its companion cases that the factor of "damage sustained in Ontario" was often not reliable and significant enough to justify an assumption of jurisdiction by an Ontario court.

…

[57] Building on this first principle that recognized the list of presumptive connecting factors, Sharpe J.A. re-crafted the *Muscutt* test. He retained part of the *Muscutt* analysis, merged some of its factors and reviewed the roles of other principles governing the assumption of jurisdiction. The defendants' connection with the court seized of the action continued to be a valid and important consideration. However, the connection between the plaintiffs' claim and the forum was maintained as a core element of the real and substantial connection test (paras. 87-88). A test based solely on the defendant's contacts with the jurisdiction would be "unduly restrictive" (para. 86).

[58] The Court of Appeal merged the two factors related to fairness to the parties of assuming or declining jurisdiction into a single one. At the same time, it recommended that judges avoid treating the consideration of fairness as a separate inquiry distinct from the core of the test, since fairness cannot compensate for weak connections. Sharpe J.A. understood, however, the need to retain fairness to the plaintiff and to the defendant as an analytical tool in assessing the relevance, quality and strength of the connections with the forum …

…

[62] In the future, Sharpe J.A. stated, whether the courts would be willing to recognize and enforce a foreign judgment should not be treated as a separate factor to be weighed against the other connecting factors in determining jurisdiction. Rather, it is a general and overarching principle that constrains … the assumption of jurisdiction against extraprovincial defendants. A

court should not assume jurisdiction if it would not be prepared to recognize and enforce a foreign judgment rendered on the same jurisdictional basis (para. 103). Whether the case is international or interprovincial was also removed from the list of factors. This would be treated as a question of law liable to be considered in the real and substantial connection analysis (para. 106). The court adopted the same approach in respect of comity and the standards of jurisdiction and of recognition and enforcement of judgments prevailing elsewhere. These considerations, while remaining relevant to the real and substantial connection analysis, would no longer serve as specific factors (paras. 107-8).

[63] Finally, the Court of Appeal held that considerations related to foreign law remain relevant to the issue of the assumption of jurisdiction. In Sharpe J.A.'s view, evidence on how foreign courts would treat such cases might be helpful (para. 107). I note in passing, however, that undue emphasis on juridical disadvantage as a factor in the jurisdictional analysis appears to be hardly consonant with the principle of comity that should govern legal relationships between modern democratic states, as this Court held in *Beals*. In particular, such an emphasis would seem hard to reconcile with the principle of comity that should govern relationships between the courts of different provinces within the same federal state, as this Court held in *Morguard* and *Hunt*.

[64] In summary, the *Van Breda-Charron* approach offers a simplified test in which the roles of a number of the factors of the *Muscutt* test have been modified. In short, when one of the presumptive connecting factors applies, the court will assume jurisdiction unless the defendant can demonstrate the absence of a real and substantial connection. If, on the other hand, none of the presumptive connecting factors are found to apply to the claim, the onus rests on the plaintiff to prove that a sufficient relationship exists between the litigation and the forum. In addition to the list of presumptive and non-presumptive factors, parties can rely on other connecting factors informed by the principles that govern the analysis.

[65] I will now turn to the issue of whether the Court of Appeal was right to hold that it was open to the Ontario courts to assume jurisdiction in the two cases now before us. If I conclude that it was open to them to do so, I will then discuss whether they should have declined to exercise their jurisdiction under the principles of *forum non conveniens*.

(8) Framework for the Assumption of Jurisdiction

[66] … The conflicting approaches articulated in this Court reflect the tension between a search for flexibility, which is closely connected with concerns about fairness to individuals engaged in litigation, and a desire to ensure greater predictability and consistency in the institutional process for the resolution of conflict of laws issues related to the assumption and exercise of jurisdiction. Indeed, striking a proper balance between flexibility and predictability, or between fairness and order, has been a constant theme in the Canadian jurisprudence and academic literature since this Court's judgments in *Morguard*, *Hunt*, *Amchem* and *Tolofson*.

[67] The real and substantial connection test is now well established. However, it is clear that dissatisfaction with it and uncertainty about its meaning and conditions of application have been growing, and that there is now a perceived need for greater direction on how it applies. …At this point, it is necessary to clarify the rules of the conflict of laws in a way that is consistent with the constitutional constraints on the provinces' courts but does not turn every private international law issue into a constitutional one.

[68] … [T]his Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside Canada or outside the province. …

…

[71] The development of an appropriate framework for the assumption of jurisdiction requires a clear understanding of the general objectives of private international law. But the existence of these objectives does not mean that the framework for achieving them must be uniform across Canada. Because the provinces have been assigned constitutional jurisdiction over such matters, they are free to develop different solutions and approaches, provided that they abide by the territorial limits of the authority of their legislatures and their courts.

[72] … A particular challenge … lies in the fact that court decisions dealing with the assumption and the exercise of jurisdiction are usually interlocutory decisions made at the preliminary stages of litigation. These issues are typically raised before the trial begins. As a result, even though such decisions can often be of critical importance to the parties and to the further conduct of the litigation, they must be made on the basis of the pleadings, the affidavits of the parties and the documents in the record before the judge, which might include expert reports or opinions about the state of foreign law and the organization of and procedure in foreign courts. Issues of fact relevant to jurisdiction must be settled in this context, often on a *prima facie* basis. These constraints underline the delicate role of the motion judges who must consider these issues.

[73] Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up "on the fly" on a case-by-case basis — however laudable the objective of individual fairness may be. As La Forest J. wrote in *Morguard*, there must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect. The need for certainty and predictability may conflict with the objective of fairness. An unfair set of rules could hardly be considered an efficient and just legal regime. The challenge is to reconcile fairness with the need for security, stability and efficiency in the design and implementation of a conflict of laws system.

[74] The goal of the modern conflicts system is to facilitate exchanges and communications between people in different jurisdictions that have different legal systems. In this sense, it rests on the principle of comity. … Comity cannot subsist in private international law without order, which requires a degree of stability and predictability in the development and application of the rules governing international or interprovincial relationships. Fairness and justice are necessary characteristics of a legal system, but they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system ...

[75] …[S]tability and predictability in this branch of the law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it. At the same time, the need for fairness and justice to all parties engaged in litigation must be borne in mind in selecting these presumptive connecting

factors. … [T]he preferred approach … has been to rely on a set of specific factors, which are given presumptive effect, as opposed to a regime based on an exercise of almost pure and individualized judicial discretion.

…

[77] In the *CJPTA*, in the case of tort claims, s. 10(g) refers to the *situs* of a tort as a specific factor connecting the act with the jurisdiction. The identification of the *situs* of a tort may well lead to further questions … such as: Where did the acts that gave rise to the injury occur? Did they happen in more than one place? Where was the damage suffered or where did it become apparent? Other connecting factors might also become relevant, such as the existence of a contractual relationship (s. 10(e)) or a business carried on in the province (s. 10(h)). Jurisdiction can also be presence-based, when the defendant resides in the province (s. 3(d)). …

…

[79] … [A] clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

[80] Before I go on to consider of a list of presumptive connecting factors for tort cases, I must define the legal nature of the list. It will not be exhaustive. Rather, it will, first of all, be illustrative of the factual situations in which it will typically be open to a court to assume jurisdiction over a matter. These factors therefore warrant presumptive effect, as the Court of Appeal held in *Van Breda-Charron* (para. 109). The plaintiff must establish that one or more of the listed factors exists. If the plaintiff succeeds in establishing this, the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules and that it is acting within the limits of its constitutional jurisdiction ... Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors.

[81] The presumption with respect to a factor will not be irrebuttable, however. The defendant might argue that a given connection is inappropriate in the circumstances of the case. In such a case, the defendant will bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor, either listed or new, applies in the circumstances of a case or if the presumption of jurisdiction resulting from such a factor is properly rebutted, the court will lack jurisdiction on the basis of the common law real and substantial connection test. I will elaborate on each of these points below.

(a) *List of Presumptive Connecting Factors*

[82] Jurisdiction must … be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. ... This means that the courts must rely on a basic list of factors that is drawn at first from past experience in the conflict

of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.

[83] At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. They are generally consistent with the approach taken in the *CJPTA* ... They thus offer guidance for the development of this area of private international law.

[84] I would not include general principles or objectives of the conflicts system, such as fairness, efficiency or comity, in this list of presumptive connecting factors. These systemic values may influence the selection of factors or the application of the method of resolution of conflicts. Concerns for the objectives of the conflicts system might rule out reliance on some particular facts as connecting factors. But they should not themselves be confused with the factual connections that will govern the assumption of jurisdiction.

[85] The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.

[86] The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor. … Absent other considerations, the presence of the plaintiff in the jurisdiction will not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant. On the other hand, a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).

[87] Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.

[88] The *situs* of the tort is clearly an appropriate connecting factor … The difficulty lies in locating the *situs*, not in acknowledging the validity of this factor … Claims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i)).

[89] The use of damage sustained as a connecting factor may raise difficult issues. For torts like defamation, sustaining damage completes the commission of the tort and often tends to locate the

tort in the jurisdiction where the damage is sustained. In other cases, the situation is less clear. The problem with accepting unreservedly that if damage is sustained at a particular place, the claim presumptively falls within the jurisdiction of the courts of the place, is that this risks sweeping into that jurisdiction claims that have only a limited relationship with the forum. An injury may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor.

[90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the province;
(b) the defendant carries on business in the province;
(c) the tort was committed in the province; and
(d) a contract connected with the dispute was made in the province.

(b) *Identifying New Presumptive Connecting Factors*

[91] As I mentioned above, the list of presumptive connecting factors is not closed. Over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;
(b) Treatment of the connecting factor in the case law;
(c) Treatment of the connecting factor in statute law; and
(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

[92] When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

[93] If, however, no recognized presumptive connecting factor — whether listed or new — applies, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.

[94] Where, on the other hand, a recognized presumptive connecting factor does apply, the court should assume that it is properly seized of the subject matter of the litigation and that the defendant has been properly brought before it. In such circumstances, the court need not exercise its discretion in order to assume jurisdiction. It will have jurisdiction unless the party challenging the assumption of jurisdiction rebuts the presumption resulting from the connecting factor. I will now turn to this issue.

(c) *Rebutting the Presumption of Jurisdiction*

[95] The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

[96] Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation. And where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

[97] In each of the above examples, it is arguable that the presumptive connecting factor points to a weak relationship between the forum and the subject matter of the litigation and that it would accordingly not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction. In such circumstances, the real and substantial connection test would not be satisfied and the court would lack jurisdiction to hear the dispute.

[98] However, where the party resisting jurisdiction has failed to rebut the presumption that results from a presumptive connecting factor … the court must acknowledge that it has jurisdiction and hold that the action is properly before it. At this point, it does not exercise its discretion to determine whether it has jurisdiction, but only to decide whether to decline to exercise its jurisdiction should *forum non conveniens* be raised by one of the parties.

[99] I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. …

[100] To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting

factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor — whether listed or new— exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action … If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. …

(9) Doctrine of *Forum Non Conveniens* and the Exercise of Jurisdiction

…

[103] If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. … The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

…

[105] A party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations and concerns. Despite some legislative attempts to draw up exhaustive lists, I doubt that it will ever be possible to do so. In essence, the doctrine focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient. For example, s. 11(1) of the *CJPTA* provides that a court may decline to exercise its jurisdiction if, "after considering the interests of the parties to a proceeding and the ends of justice", it finds that a court of another state is a more appropriate forum to hear the case. Section 11(2) then provides that the court must consider the "circumstances relevant to the proceeding". To illustrate those circumstances, it contains a non-exhaustive list of factors:

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
> (b) the law to be applied to issues in the proceeding;
> (c) the desirability of avoiding multiplicity of legal proceedings;
> (d) the desirability of avoiding conflicting decisions in different courts;
> (e) the enforcement of an eventual judgment; and
> (f) the fair and efficient working of the Canadian legal system as a whole. [s. 11(2)]

…

[109] … [T]he normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that … it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all

relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. … [T]he court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

[110] As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

[111] Loss of juridical advantage is a difficulty that could arise should the action be stayed in favour of a court of another province or country. This difficulty is aggravated by the possible conflation of two different issues: the impact of the procedural rules governing the conduct of the trial, and the proper substantive law for the legal situation, that is, in the context of these two appeals, the proper law of the tort. In considering the question of juridical advantage, a court may be too quick to assume that the proper law naturally flows from the assumption of jurisdiction. However, the governing law of the tort is not necessarily the domestic law of the forum. This may be so in many cases, but not always. In any event, if parties plead the foreign law, the court may well need to consider the issue and determine whether it should apply that law once it is proved. Even if the jurisdictional analysis leads to the conclusion that courts in different states might properly entertain an action, the same substantive law may apply, at least in theory, wherever the case is heard.

…

(10) Application

[113] Before discussing the outcomes in the two appeals, I must note that the evidence was not the same in *Van Breda* and *Charron*, although they did raise similar legal issues and their factual matrices were the same in important aspects. The Court of Appeal rightly observed that the evidence about Club Resorts' activities in Ontario was not identical in the two cases. In particular, the plaintiffs in *Charron*, unlike the plaintiffs in *Van Breda*, asserted that the SuperClubs group of companies, to which the appellant Club Resorts belonged, maintained an office near Toronto and that Club Resorts had availed itself of that office's services. They also relied on the fact that representatives of Club Resorts had travelled to Ontario to promote their business. Moreover, it is important to note that in considering the decisions of the courts below, this Court must show deference to the findings of fact of the judge of the Superior Court of Justice.

(a) *Van Breda*

[114] In *Van Breda*, there is little evidence about the existence of sufficient factual connections. Ms. Van Breda's accident and physical injuries happened in Cuba. Mr. Berg and Ms. Van Breda were living in Ontario at the time of their trip. After the accident, however, they did not return to Ontario, as they moved first to Calgary and later to British Columbia, where they were living when they brought their action. Ms. Van Breda's damage, pain and suffering have happened mostly in British Columbia, like most of the treatments she has received. In addition, the

evidence is essentially silent about Club Resorts' activities in Ontario, except on one point which I will address below. Moreover, I do not accept that evidence of advertising in Ontario would be enough to establish a connection. Advertising is often international, if not global. It is ubiquitous, crossing borders with ease. It does not, on its own, establish a connection between the claim and the forum. If advertising sufficed to create a connection with a forum, commercial organizations of a certain size could be sued in courts everywhere and anywhere in the world. The courts of a victim's place of residence would possess an almost universal jurisdiction over diverse and vast classes of consumer claims.

[115] The motion judge and the Court of Appeal concluded, however, that a sufficient connection between the claim and the province arose out of the contractual relationship created between Mr. Berg and Club Resorts through the defendant Denis. Mr. Denis, who operated a specialized travel agency known as Sport au Soleil, had an agreement with Club Resorts under which he found tennis and squash professionals and sent them to Club Resorts hotels. In exchange for bed and board at a resort, each professional would give a few hours of instruction to guests of the hotel during his or her stay. It appears that Mr. Denis received some form of compensation from Club Resorts.

[116] I find no reviewable error in the findings that Mr. Denis had the authority to represent Club Resorts and that a contract existed under which Mr. Berg was to provide services to Club Resorts. The benefit of this contract, accommodation at the resort, was extended to Ms. Van Breda, who was injured while there in the context of Mr. Berg's performance of his contractual obligation. Deference is owed to the motion judge's findings. No palpable and overriding error has been established. A contract was entered into in Ontario and a relationship was thus created in Ontario between Mr. Berg, Club Resorts and Ms. Van Breda, who was brought within the scope of this relationship by the terms of the contract.

[117] The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. The events that gave rise to the claim flowed from the relationship created by the contract. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. On this basis, I would uphold the Court of Appeal's conclusion that there was a sufficient connection between the Ontario court and the subject matter of the litigation.

[118] Whether the Superior Court of Justice should have declined jurisdiction on the basis of the doctrine of *forum non conveniens* remains to be determined. Club Resorts had the burden of showing that a Cuban court would clearly be a more appropriate forum. I recognize that a sufficient connection exists between Cuba and the subject matter of the litigation to support an action there. The accident happened on a Cuban beach, at a hotel managed by Club Resorts. The initial injury was suffered there. Some of the potential defendants reside in Cuba. However, other issues related to fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would present serious challenges to the parties. There may be problems with witnesses, concerns about the application of local procedures, and expenses linked to litigating there. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba. They would face substantial additional expenses and would be at a clear disadvantage relative to the defendants. They might also suffer a loss of juridical advantage. But on this point the evidence is far from clear and satisfactory. In the end, the appellant has not shown that a Cuban court would clearly be a more appropriate

forum. I agree that the motion judge made no reviewable error in deciding not to decline to exercise his jurisdiction, and I would affirm the Court of Appeal's judgment dismissing the appeal from that decision.

(b) *Charron*

[119] In *Charron*, the existence of a sufficient connection with the Ontario court was hotly disputed. As in *Van Breda*, the accident itself happened in Cuba. On the other hand, Mrs. Charron returned to Ontario after her husband's death and continued to reside in that province. The damage claimed by the respondents was sustained largely in Ontario. But these facts do not constitute presumptive connecting factors and do not support the assumption of jurisdiction on the basis of the real and substantial connection test.

[120] However, the evidence does support the presumptive connecting factor of carrying on business in the jurisdiction. The Superior Court of Justice assumed jurisdiction, and the Court of Appeal upheld its decision, mainly on the basis of an active commercial presence in Ontario that was not limited to advertising campaigns targeting the Ontario market. In the opinion of the courts below, Club Resorts had an active presence in Ontario even though its corporate head office was not in that province. Its presence was not limited to advertising activities or to contacts with travel package wholesalers or travel agents. The courts below concluded that the appellant had engaged in significant commercial activities in Ontario, especially through the office of the SuperClubs group, before the Charrons booked their holiday. The booking resulted at least in part from those activities in Ontario. … Sharpe J.A. wrote the following for the Court of Appeal in respect of this factor:

> The record reveals that CRL [Club Resorts Ltd.] was directly involved in activity in Ontario to solicit business for the resort. …
>
> - pursuant to its contract with the Cuban hotel owner, CRL was required to and did promote and advertise the resort using the "SuperClubs" brand in Canada;
> - CRL relies on maintaining a high profile for the SuperClubs brand in Ontario as residents of Canada and Ontario represent a high proportion of CRL's target market;
> - CRL was licenced to use the "SuperClubs" label and itself "created" the "SuperClubs Cuba" label and used these labels to market the resort in Ontario
> - CRL's witness Abe Moore agreed on cross-examination:
>   - "that CRL was in the business of carrying out activities in countries such as Canada to generate paying guests of the resort";
>   - that to do so CRL had to "either directly or engage others to undertake the activity of solicitation, promotion and advertising" in Canada;
>   - that CRL ensured that it had relationships with others to do so in Ontario to satisfy its contractual obligation to promote the resort;
> - CRL representatives regularly travel to Ontario to further CRL's promotional activity;
> - CRL arranged for the preparation and distribution of promotional materials in Ontario; and
> - as outlined in the following paragraph, CRL benefited from an office in Ontario that provided information and engaged in the promotion of the SuperClubs brand. . . .
>
> In my view, one can fairly infer … that …CRL is implicated in and benefits from the physical presence in Ontario of an office and contact person held out to the public as representing the same "SuperClubs" brand CRL uses to carry on its business of promoting and operating the resort. [paras. 117 and 119]

[121] The Superior Court of Justice considered this evidence at a preliminary stage on the basis of the parties' pleadings. The nature and weight of this evidence has been challenged in this Court. But the courts below made findings about its content and about what it meant. The appellant has not demonstrated that the motion judge made any reviewable errors, and deference must be shown to his findings of fact.

[122] Although whether this factor applies was a very hard fought issue in these appeals, the motion judge's findings of fact lead to the conclusion that Club Resorts was carrying on business in Ontario. Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis. It benefited from the physical presence of an office in Ontario. Most significantly, on cross-examination Club Resorts' witness admitted that it was in the business of carrying out activities in Canada. Together, these facts support the conclusion that Club Resorts was carrying on business in Ontario. It follows that the respondents have established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction.

[123] Club Resorts has not rebutted the presumption of jurisdiction that arises from this presumptive connecting factor. Its business activities in Ontario were specifically directed at attracting residents of the province, including the Charron family, to stay as paying guests at the resort in Cuba where the accident occurred. It cannot be said that the claim here is unrelated to Club Resorts' business activities in the province. Accordingly, I find that the Ontario court has jurisdiction on the basis of the real and substantial connection test.

[124] I also find that the motion judge made no error in declining to stay the proceedings on the basis of *forum non conveniens*. Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily in the respondents' favour. The inconvenience to the individual plaintiffs of transferring the litigation is greater than the inconvenience to the corporate defendant of not doing so. On the question of juridical advantage, I refer to my comments about *Van Breda*. I would add that keeping the case in the Ontario courts will probably avert a situation in which the proceedings against the various defendants are split.

IV. Conclusion

[125] For these reasons, I would dismiss Club Resorts' appeals …

"This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law *conflicts rule for the assumption of jurisdiction*. I leave further elaboration of the *content* of the *constitutional test for adjudicative jurisdiction* for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits." Lebel J. defers this observation until para. 34, but it is helpful to know this in advance, because it clarifies various earlier statements about constitutional law vs. conflict of laws.

Although narrated in a rather disjointed fashion, the Court's story about the RSC test boils down to this: the test began as a conflicts rule, suggested in *Moran*, adopted in *Morguard*. Those cases acknowledged that the rule has constitutional implications, but did not address them. As a conflicts rule, the RSC test simply specifies factors bearing on when a court *may* exercise jurisdiction over a dispute. (Yes, I realize that RSC is so vague, by itself, that it's hard to see how it specifies any factors at all, but just accept this for the time being.) *Moran* and *Morguard* involved interprovincial disputes, but their analysis applies analogously to international disputes (private international law). A conflicts rule does not purport to make it constitutionally permissible for a province (or a country) to exercise jurisdiction. It just says how to tell if jurisdiction may be exercised, if we assume that it *is* constitutionally permissible. *Hunt* then "constitutionalized" the rule, holding that without RSC, it is constitutionally impermissible for any province (or for Canada, vis-à-vis some other country) to exercise jurisdiction over a dispute. Although *Van Breda* mentions the constitutional aspect, it does not specify what that issue entails, except to say that jurisdiction "must be exercised in a manner consistent with the *territorial restrictions* created by the Constitution" (para. 21; emphasis added); that the RSC test, in its constitutional aspect, "places *limits* on the reach of the jurisdiction of a province's courts" (para. 23); and that those limits, which "derive from the text of s. 92 of the *Constitution Act, 1867*," involve "the legitimate exercise of state power, be it legislative or adjudicative" (para. 31). That is: "Is it within the constitutional power of the state, exercised through the legislature or the courts, to claim jurisdiction over a dispute?" The Court says nothing further to illuminate the constitutional aspects of the question, and this is not a course in constitutional law, so our focus will be on RSC as a conflicts rule. The upshot of the distinction, though, is that some day the Court may state that, when considered as a constitutional requirement, RSC demands a different analysis than the one set out here, or the Court might even come up with a different name (or test) for the constitutional requirement. (Certain faculty members have a bet on the outcome of this case, when it arises.)

"Conflicts rules include the rules that have been chosen for deciding when jurisdiction can be assumed over a given dispute, what law will govern a dispute[,] or how an adjudicative decision from another jurisdiction will be recognized and enforced" (para. 33). The RSC test is a conflicts rule for deciding when jurisdiction can be assumed. It is not a conflicts rule for deciding what law will govern a dispute. That is, if an Ontario court hears a dispute involving parties or events associated with Quebec, the RSC test does not necessarily determine which province's law governs, although in most cases, the applicable law will be the law of the province that exercises jurisdiction.

When the test was originally formulated in *Morguard*, the Court said only that there must be a RSC, and that the values thereby promoted are "order and fairness." The last 30 years have witnessed the provinces' efforts to specify more precisely what constitutes a RSC, and *Van Breda* represents the Supreme Court's first contribution to those efforts.

* * *

On the facts, as narrated at the outset, what contacts existed between Ontario, the parties, and the events giving rise to the claims, in (a) *Van Breda* and (b) *Charron*?

In the accounts of the judgments by the SCJ, is there anything surprising about any of the considerations that led the court to conclude that jurisdiction was appropriate?

"[T]he trend is towards retaining or establishing a system of connecting factors informed by principles for applying them, as opposed to relying on almost pure judicial discretion to achieve order and fairness" (para. 35). Does this seem like the right direction to you?

Tolofson "cautioned against building a system of private international law based solely on the expectations of the parties and concerns of fairness in a specific case" (para. 38). Why?

"[A] system of law built on what a particular court … thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law" (para. 38). This statement might seem surprising, given that the courts often base their reasoning on "fairness," invoked generically and without more detail. For example, fairness is a criterion for determining whether abuse of process should operate to prevent a party from relitigating an issue (when mutuality is lacking), and whether a decision-maker's behaviour gives rise to a "reasonable apprehension of bias."[1] Should the courts take La Forest J's words more seriously and more often, or are there important grounds for distinguishing questions about jurisdiction from ones involving bias and *res judicata* (and perhaps other issues)?

"[R]ule 17.02 is purely procedural in nature and does not by itself establish jurisdiction in a case" (para. 43). What does this mean?

Notice that *Muscutt* considered "the constitutional validity of the provisions of the Ontario rules on service outside the province" (para. 44). *Muscutt* did not ask whether the RSC test was constitutionally required, but only whether, as applied there, the test was unconstitutional (and held that it was not). Thus *Muscutt* was not a case about the RSC test as a constitutional requirement.

Muscutt's main contribution was to produce a detailed list of factors bearing on a court's exercise of jurisdiction (the most detailed list that any Canadian court had generated, up to

[1] For abuse of process, see CUPE Local 79, para. 44 (on "procedural fairness" and the preservation of the courts' integrity) & paras. 37-39 (on fairness to parties). For reasonable apprehension of bias, see, e.g., Baker v. Canada, [1999] 2 SCR 817, paras. 45-48 (stating that the duty to act fairly simply *is* the duty to act "in a manner that does not give rise to a reasonable apprehension of bias," and ending with the conclusion that "the notes of Officer Lorenz demonstrate a reasonable apprehension of bias").

that point). The factors are given in *Van Breda*, para. 48. The list ultimately provoked a significant amount of criticism, not least because *Muscutt* implies that the factors deserve roughly equal weight, and because some of the factors seem better suited to a consideration of FNC.

Sharpe J.A., who wrote *Muscutt*, revised the list when *Van Breda* was appealed to the OCA (see paras. 52-64 here). The main effect of this exercise was to treat the factors (1) and (2) as the most important and distinct ones, to merge (3) and (4) and to treat the result as an "analytical tool" rather than as a distinct factor, and to treat most of the others as optional or as analytical tools. The test proposed by Sharpe J.A. would also have given presumptive effect to a number of the bases for serving parties *ex juris*, specified in R. 17.02. The Supreme Court adopted Sharpe J.A.'s approach with some modification. The provinces nevertheless remain "free to develop different solutions and approaches, provided that they abide by the territorial limits of the authority of their legislatures and their courts" (para. 71).

Why is it "a particular challenge" that decisions about jurisdiction "are usually interlocutory decisions made at the preliminary stages of litigation" (para. 72)?

Order and fairness are sometimes treated as distinct and potentially conflicting goals. What is said in para. 73 to suggest that they might also be seen as interrelated?

The test set out here seeks to distinguish "the factors … that link the subject matter of the litigation and the defendant to the forum and … the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity" (para. 79). In your view, does the test achieve this goal?

Evidence of a party's "presence" in the jurisdiction, including evidence that a party conducts business there, has always been considered a legitimate ground for exercising jurisdiction over that party. Advertising isn't necessarily enough because "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction" (para. 87). Does this seem like a desirable constraint, or does it inappropriately allow people to derive benefits from commercial activity in a jurisdiction, while remaining immune to liability there?

Commentators have disagreed as to whether jurisdiction should be based on "damage sustained" in a province (para. 89). What are the arguments for and against?

Notice that some torts (such as defamation) are deemed to occur wherever the defamatory statement is "published" (that is, communicated to others). For example, in *Barrick Gold Corp. v. Lopehandia*, 2003 CarswellOnt 6075 (S.C.J.), the court held that the plaintiff, based in Ontario, could sue here for defamatory statements posted on the internet by a resident of B.C.: "the defamatory statements are available in Ontario for downloading; and there is evidence that they have been downloaded in Ontario. Therefore, the libelous statements have been published in Ontario, and the tort has been committed here" (para. 16). In *Black v. Breeden*, 2012 SCC 19, decided around the same time as *Van Breda*, the Court endorsed this view: "It is well established in Canadian law that the tort of defamation occurs upon

publication of a defamatory statement to a third party. In this case, publication occurred when the impugned statements were read, downloaded and republished in Ontario by three newspapers" (para. 20). (Although each republication constituted a new defamatory act, the Court suggests that jurisdiction here would have been proper even without the republication.) Does this approach seem reasonable to you, or should more be required in internet defamation cases?

The Court recaps the 4 presumptive factors in para. 90. Para. 91 lists considerations bearing on new presumptive factors. Do you find this list helpful? Imagine that someone in Egypt publishes, without authorization, a novel by an Ontario-based writer, and sells copies in Egypt. The presumptive factors in para. 90 do not apply. Which (if any) of the ones in para. 91 would help? What more would you want to know, in using that list?

The presumptive effect of a factor on the list can be rebutted by a showing, on the defendant's part, that despite that factor, a RSC does not exist (paras. 95-97). For example, parties might meet in Ontario to enter into a contract that has no other connection with Ontario. Assume that this happens, and that in performing her duties, the plaintiff decides, without informing the defendant, to perform some of them in Ontario (which the contract neither contemplates nor forbids). Later, for unrelated reasons, she sues for breach. Putting aside the question of whether an Ontario court would actually have jurisdiction, how would the burdens be allocated among the parties? What burden-shifting structure would you expect to see, as the pleadings proceed?

If a party raises two claims, one of which triggers jurisdiction on presumptive factor, while the other does not, how should the court determine whether jurisdiction is proper?

Among the considerations listed for the FNC analysis (para. 105), most are self-explanatory. However, "the law to be applied to issues in the proceeding" is not. What does this consideration involve?

Why does the Court make a point of noting that "the evidence was not the same in *Van Breda* and *Charron*"? (para. 113).

The defendant's advertising was insufficient to create a RSC in *Van Breda* (para. 114). Why was Denis's role sufficient to overcome this problem? Assume that Denis was based in Vancouver, not Ottawa. Would that change the outcome?

As to the FNC analysis, "the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba" (para. 118). Would the burden on the defendants be far heavier if they were required to attorn in Ontario? If so, should that matter?

In rehearsing the facts of *Charron*, the Court notes that "Club Resorts had an active presence in Ontario" (para. 120). Why not just use this to determine jurisdiction in *Van Breda*? After all, the two cases were heard at the same time.

Disney Enterprises Inc. v. Click Enterprises Inc.

Disney Enterprises Inc., Columbia Pictures Industries, Inc., Universal City Studios Productions LLLP, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Warner Bros. Entertainment Inc. and Metro-Goldwyn-Mayer Studios Inc. (Applicants) and Click Enterprises Inc. and Philip G. Evans (Respondents)

Ontario Superior Court of Justice

Heard: March 15, 2006; Judgment: April 5, 2006

APPLICATION by plaintiffs for recognition and enforcement of New York judgment.

***Lax J.*:**

1 ”The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation.”[FN1]

2 So begins a judgment of the majority of the Ontario Court of Appeal addressing the issue of defamation on the Internet. The application before me is the issue of wrongful commercial activity on the Internet. I am asked to recognize and enforce a judgment granted by the United States District Court for the Southern District of New York awarding damages of $US 468,442.17 against the respondents, Ontario residents, for copyright infringement and unfair competition. The issue turns on whether the New York court properly exercised jurisdiction for activities that originate in Ontario and take place on the Internet. Is there a “real and substantial connection” to New York in a borderless Internet world?

Factual Basis for the Action

3 The subject matter of the action was the infringement of the plaintiffs’ copyright and/or exclusive reproduction and distribution rights in certain films. The websites, *FlicksUnlimited.com*, *FlicksIncorporated.com*, *DownloadFreeFilms.com*, *HQMovies.net* and *GetMoviesOnline.com* were registered to the respondents with a registrant address on Sorauren Avenue in Toronto, Ontario. Philip Evans is the President and sole officer of Click Enterprises Inc., an Ontario Corporation.

4 These websites advertised for sale a variety of memberships that provided consumers with tools or technology to simplify and streamline the process of downloading copyrighted films as well as on-line support to those subscribers who sought assistance in downloading specific films they were having trouble locating. The websites prominently feature testimonials from “happy members” in Canada, the United Kingdom and the United States, for example, from John, USA:

> I'm a movie fan! Before *HQMovies*, I could only afford to buy about 2-3 new movies each month. But now when I have been a member with you for a month I have already downloaded 40 movies! Its amazing. I never thought of these ways to get movies before. I thank you a lot!

5 The websites appeared as "sponsored links" on well-known search engines such as Google, leading users who searched queries for popular motion pictures to their sites. The websites employed "pull-down" menus that identified hundreds of the applicants' films by name creating the impression that the respondents were authorized to facilitate the distribution of the applicants' films on the Internet. They represented that the use of their services was "100% legal", but offered their customers the opportunity to purchase "Evidence Shredder" software to eliminate traces of web browsing and file usage history and destroy evidence of downloading infringing content from a personal computer.

6 In effect, the respondents conducted an Internet retail business for profit that facilitated the illegal copying and downloading of copyrighted motion pictures.

Procedural History of the Action

7 An Ontario process server personally served the respondents with the Summons and Complaint in accordance with the United States Federal Rules of Civil Procedure. Sufficiency of service is not disputed. The respondents did not appear to dispute either the merits of the complaint or the United States' District Court's jurisdiction to deal with the matter.

8 After the respondents were noted in default, Mr. Evans wrote to Magistrate Judge Katz denying liability personally or corporately, but indicating that for financial reasons, the respondents were unable to defend the action. In his letter, he acknowledged that he was "the person behind" Click and that a New York resident had purchased a membership from his website. However, he stated that a Delaware corporation, Click Enterprises Inc. (Delaware), who was not a party to the lawsuit, was the corporation that received payments for the involved websites.

9 The applicants brought an Application for entry of Default Judgment and served the respondents. The Application presented evidence from two U.S.-based Internet Payment Service Providers, Paycom Billing Services Inc. ("Paycom") and Internet Billing Company ("iBill"). The evidence of Paycom showed that Click Enterprises Inc., a Canadian corporation, was a sponsored merchant maintaining an account with it for sales made through a number of websites, including those described above. Paycom made payments of $465,250.75 to an account of Click Enterprises Inc. at the Bank of Nova Scotia in Toronto, Ontario. iBill made payments to Click Enterprises Inc. of $3,191.42. These amounts together represent the judgment granted by United States District Judge Barbara S. Jones on March 25, 2005.

Jurisdiction of the US Court

10 A foreign judgment will be recognized in Ontario if it is a final *in personam* judgment for a definite sum of money given by a court that had jurisdiction to issue the judgment. This

judgment meets the requirements for enforcement in Ontario if the court issuing judgment properly exercised jurisdiction in the action.

11 In *Morguard Investments Ltd. v. De Savoye*,[FN2] it was established that the courts of one province or territory should recognize and enforce the judgments of another province and territory, if that court had properly exercised jurisdiction in the action. In *Beals v. Saldanha*,[FN3] the Supreme Court of Canada endorsed the *Morguard* principles, holding that they equally apply to judgments that issue from courts that are outside Canada. The determination of the proper exercise of jurisdiction by a court depends on two principles: the need for "order and fairness" and the existence of a "real and substantial connection" to either the cause of action or the defendant.[FN4]

"Order and Fairness"

12 The need for order and fairness is met if the originating court had reasonable grounds for assuming jurisdiction where the participants to the litigation are connected to multiple jurisdictions.[FN5]

13 The subject matter of the action was damages for copyright infringement and unfair competition pursuant to the *United States Copyright Act*, 17 U.S.C. §101 *et seq*. and the *Lanham Act*, 15 U.S.C. §§ 1125. The plaintiffs are Delaware corporations with their principal place of business in California, whose films are distributed throughout the United States and elsewhere. The defendants are resident in Ontario, but owned or controlled the interactive websites through which subscription agreements were sold to residents of the United States, including residents of New York, that facilitated the illegal downloading of the films. Our courts recognize a sufficient connection for taking jurisdiction where Canada is either the country of transmission or the country of reception: *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*.[FN6] There were reasonable grounds for the United States District Court for the Southern District of New York to assume jurisdiction.

"Real and substantial connection"

14 A court will have properly exercised jurisdiction in an action if it had a real and substantial connection with either the subject matter of the action or the defendant. No distinction is drawn between a judgment after trial and a default judgment absent "unfairness or other compelling reason."[FN7] The respondents have alleged neither and neither exists in this case.

15 What then is a "real and substantial connection"? In *Morguard*, the court variously described a real and substantial connection as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties" and "with the action".[FN8]

16 According to *Beals*, the "real and substantial connection" test requires a "significant connection" between the cause of action and the foreign court:

> [32] ... a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. (at p.17)

17 Under the approach adopted by the majority in *Beals*, any unfairness to a defendant will be dealt with on the basis of *forum non conveniens* in the foreign forum or invoking defences to the enforcement of the foreign judgment.

. . .

19 It is evident that . . . the application of the "real and substantial connection" test will vary with the circumstances. As Sharpe J.A. said in *Muscutt v. Courcelles*,[FN9] the test is "deliberately general to allow for flexibility in its application" and "it cannot be reduced to a fixed formula". Faced with a deliberately general test, it is appropriate to review the considerations that led to it.

20 *Morguard* altered the old common rules for the recognition and enforcement of interprovincial judgments. LaForest J. recognized that "modern states cannot live in splendid isolation" (p.1095) and " ... the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner" (p. 1096).

21 Although Canada's constitution does not include a "full faith and credit" clause as in the United States or Australia, it was his view that the application of the traditional approach to enforcement of the judgments of sister provinces was inconsistent with common citizenship, mobility rights, economic integration and a common market for goods, services and capital. Moreover, any unfairness to a defendant was minimized by Canada's integrated system of justice under which the federal government appoints superior court judges and their judgments are ultimately subject to review by a unitary and unifying Supreme Court.

22 Central to the decision in *Morguard* to modernize the common law rules was the doctrine of comity. …

23 In *Socan*, the court had to decide where copyright infringement occurs and applied the "real and substantial connection" test as developed in *Morguard* and *Beals*. The court also relied on the language of LaForest J. in *Tolofson v. Jensen*[FN11] and said, "[t]he test reflects the underlying reality of 'the territorial limits of law under the international legal order' and respect for the legitimate actions of other states inherent in the principle of international comity."[FN12] In *Socan*, the court concluded that copyright infringement occurs in Canada where there is a real and substantial connection between this country and the communication in issue. It recognized that either the country of transmission or the country of reception may take jurisdiction over a transmission linked to its territory:

> In terms of the Internet, relevant connecting factors would include the *situs* of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances and the nature of the dispute.[FN13]

24 *Morguard*, *Beals* and *Socan* signal a new direction for our courts, but as Binnie J. observed in *Socan*, it can be problematic to apply a jurisdictional legal concept to activities that take place through a medium that has no jurisdiction:

> The issue of the proper balance in matters of copyright plays out against the much larger conundrum of trying to apply national laws to a fast-evolving technology that in essence respects no national boundaries ...The issue of global forum shopping for actions for Internet torts has scarcely been addressed. ... E-commerce is growing. Internet liability is thus a vast field where the legal harvest is only beginning to ripen.[FN14]

25 The metaphor of the unripened harvest is particularly apt as I was referred to only one decision that directly addresses the issue before me. In *Braintech Inc. v. Kostiuk*,[FN15] the British Columbia Court of Appeal refused to enforce a Texas judgment for Internet defamation against a B.C. resident where the plaintiff, a Nevada corporation domiciled in British Columbia, but doing business in the United States, brought an action in Texas. The B.C. resident's only connection with Texas was "passive posting" on an Internet bulletin board. There was no proof that anyone in Texas had actually looked at it. There was no allegation that the defendant had a commercial purpose.

26 In this case, Click Enterprises had a commercial purpose that utilized the Internet to enter the United States to carry out its activities. It contracted with payment service providers in the United States to process Internet payments on its websites. Initially, Click contracted through a Canadian corporation and after VISA changed its regulations, it incorporated Click Enterprises Inc. (Delaware) so that payments were made through it. The manner in which these payments were processed is of less interest than where they originated and where they were received.

27 The respondents submit that the payment service providers were collecting payments worldwide and not only in the United States. While this may be true, it is inescapable that Click was making its services available to residents of the United States who wished to illegally download American films. The majority of the testimonials on the respondents' websites are from subscribers in the United States and demonstrate that this occurred. It would not surprise anyone that the consumers of American films are Americans, not exclusively, but certainly in large numbers. There is little doubt that the payments made their way from subscribing customers in the United States to Click's bank account in Toronto. Further, by offering their subscribers the opportunity to purchase "Evidence Shredder" software, the respondents were clearly aware of the illegal nature of their business and the infringing conduct of their customers.

28 The respondents further submit that there is only a tenuous connection to New York, that it is a "random" jurisdiction and that the "real and substantial connection" test is not met. I do not agree. If the action had been brought in a jurisdiction with little or no connection to the genre of American films or to the language or culture of the residents of New York, this argument would be more convincing. *Moran v. Pyle National (Canada) Ltd.*.[FN16] is a products liability case, but the reasoning at p. 409 applies:

> By tendering his products in the marketplace directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm *as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods*. (emphasis added)

29 When activities are conducted on the Internet, they have the potential to cause harm anywhere and everywhere. The respondents' websites were available 'through normal distributive channels' to the residents of New York and their products caused harm there. There was no juridical advantage to commencing the action in New York. In my view, this was not only an appropriate jurisdiction in which to bring the action, but one that was arguably fairer to the respondents than if it had been brought as it might have been, in a more geographically remote jurisdiction such as California.

30 Jurisdiction in the United States District Court was established on the basis of the subject matter of the action. Jurisdiction over the defendants was established on the basis that they had continuous and ongoing business contacts with residents of New York through their interactive websites, which were targeted at residents of this state. The plaintiffs chose the United States District Court for the Southern District of New York as the venue for the action on the basis that a substantial part of the events and omissions giving rise to the claims occurred within its Judicial District and that venue lay in that District under federal rules in the United States. Once jurisdiction is established, there is no reason for this court to look behind the choice of venue so long as it is not fanciful.

31 I am satisfied that the respondents had a "real and substantial connection" to New York and that the applicants have satisfied the test they must meet.

32 Having concluded that the United States District Court for the Southern District of New York properly exercised jurisdiction in the action, I must consider whether any defences to recognition and enforcement of the judgment have been established.

Defences

33 There are three defences: (1) fraud; (2) failure of natural justice; and (3) public policy.

Fraud

34 The defence of fraud is narrow and places the burden on the defendant to demonstrate either that there was fraud that misled the New York court into assuming jurisdiction or that there are new and material facts suggesting fraud that were previously undetectable through the exercise of reasonable diligence.[FN17] No defence of fraud is raised.

Natural Justice

35 The enforcing court must ensure that the defendant is granted a fair process that guarantees basic procedural safeguards. Where the foreign legal system is similar to our own, as it is here,

the assessment is not a difficult one.

36 In this case, the Summons and Complaint was personally served on both respondents. Service was in accordance with the United States Federal Rules of Civil Procedure respecting service *ex juris* and included service of the Summons and Complaint, Individual Practices of Magistrate Judge Theodore H. Katz, Individual Practices of Judge Barbara S. Jones, Procedures for Electronic Case Filing, the Guideline for Electronic Filing and 3rd Amended Instructions for Filing an Electronic Case or Appeal. Electronic filing procedures can enhance access to the court system and particularly in the case of a foreign defendant. Three months after the claim was served, the respondents were noted in default. The respondents admit they had knowledge of the action. They were also served with the Application for Default Judgment and had knowledge that the applicants were seeking a judgment in the amount of $US 468,442.17.

37 There is no defence on the ground of procedural unfairness.

Public Policy

38 This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. This turns on whether the foreign law is contrary to our view of basic morality.[FN18]

39 Like fraud, the public policy defence is a narrow one. In *Beals*, the majority rejected this defence in circumstances where an award of damages by a Florida jury (including punitive damages) was considerably greater than would have been awarded in Canada for similar acts and enforcement would lead to the defendants' bankruptcy. The court held that the public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in the foreign jurisdiction would not yield comparable damages in Canada.

40 Further, as section 7 of the *Canadian Charter of Rights and Freedoms* does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, the Supreme Court of Canada did not accept that s. 7 should shield a Canadian resident from the enforcement of a foreign judgment: "The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment."[FN19]

41 In short, severe hardship is not a basis for the defence. To the extent that financial hardship is raised as a defence, I must reject it.

Disposition

42 The application is granted . . .

2012 ONSC 4747
Ontario Superior Court of Justice
Colavecchia v. Berkeley Hotel Ltd.

Sandro Colavecchia and Christene De Gasperis, Plaintiffs and The Berkeley Hotel Limited, Defendant

R. Goldstein J.
Heard: August 16, 2012
Judgment: August 17, 2012

Counsel: Michael A. Cohen, for Plaintiffs
Susan Keenan, for Defendant

MOTION by hotel located in United Kingdom to dismiss tort action commenced against it in Ontario for lack of jurisdiction.

***R. Goldstein J.*:**

1 The Plaintiffs live in Toronto. In February 2011 they decided to book a short holiday in the United Kingdom. The plaintiff Christene DeGasperis, using her TD Visa card, made a reservation online for the defendant Berkeley Hotel in London ("*the Hotel*"), a very upscale establishment. On October 26, 2011 the plaintiffs checked into the Hotel. The next day, the plaintiff Sandro Colavecchia, Ms. DeGasperis's husband, was injured when he slipped and fell in the bathroom of their hotel room. Ms. DeGasperis called for a taxi and transported him to a hospital where he was treated for his injuries. The plaintiffs returned to Ontario the next day. Mr. Colavecchia has been under the treatment of an Ontario doctor for the injuries he has sustained. He is a chef. He runs his own catering business. He claims that he has lost income and enjoyment of life as a result of his injuries.

2 The Plaintiffs have sued the Hotel in Ontario. The Hotel has not yet filed a defence. Instead, the Hotel brings a motion to dismiss the action for lack of jurisdiction in the Superior Court of Ontario. I agree that there is no real and substantial connection with Ontario. Although it is not necessary for me to decide this point, even had I found that there is jurisdiction in this Court, I would still have dismissed the action on the basis that the United Kingdom is the proper forum for the litigation. Accordingly, the Hotel's motion is granted and the action is dismissed for the reasons that follow.

3 The courts of Ontario will have jurisdiction on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum: *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.) at para. 82. The objective factors identified by the Supreme Court of Canada are as follows (*Van Breda* at para 89):

(a) the defendant is domiciled or resident in the province;
(b) the defendant carries on business in the province;
(c) the tort was committed in the province; and
(d) a contract connected with the dispute was made in the province.

4 In my view, none of these factors applies. The plaintiffs do not suggest that the Hotel was domiciled or resident in Ontario, or that the tort was committed in Ontario (although they argue that by reason of Mr. Colavecchia's injuries he has sustained damages in Ontario). The plaintiffs rely on the presumptive connecting factors that the defendant carries on business in the province, and that a contract connected with the dispute was made in the province.

5 The plaintiffs rely on two cases that were decided prior to *Van Breda*. In *Noble v. Carnival Corp.* [2006 CarswellOnt 2116 (Ont. S.C.J.)], 2006 CanLII 11441 the plaintiff was employed as a tour manager with Seabourn Cruise Line. She was assigned to work on a Cunard ship. While the ship was docked in St. Petersburg, Russia, she was injured in an automobile accident during a site inspection. She sued the various defendants in Ontario. None of the defendants was an Ontario corporation. Sachs J. applied the test set out by the Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128 (Ont. C.A.) and found that Ontario had jurisdiction.

6 I have some doubts as to whether Sachs J. would have decided *Noble* the same way in 2012 as she did in 2006, given the Supreme Court's extensive changes to the test for jurisdiction. For example, in following *Muscutt*, Sachs J. found that since the plaintiff lived in Ontario and received most of her medical treatment in Ontario, she had suffered pain and suffering in Ontario. That was an element of the *Muscutt* test. The Supreme Court in *Van Breda* very specifically rejected damages as a presumptive connecting factor (para. 89):

> **89** The use of damage sustained as a connecting factor may raise difficult issues. For torts like defamation, sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained. In other cases, the situation is less clear. The problem with accepting unreservedly that if damage is sustained at a particular place, the claim presumptively falls within the jurisdiction of the courts of the place, is that this risks sweeping into that jurisdiction claims that have only a limited relationship with the forum. An injury may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor.

7 In any event, the facts in *Noble* are very distinguishable from the facts here. The plaintiff in Noble had an employment relationship with at least one of the defendants, which Sachs J. deemed of some importance.

8 The plaintiffs also rely on *Sidlofsky v. Crown Eagle Ltd.* [2002 CarswellOnt 3620 (Ont. S.C.J.)], 2002 CanLII 10208 (Ont.Sup.Ct.). In that case the plaintiff was injured at a Holiday Inn in Jamaica. He sued the Holiday Inn, a Tennessee corporation, as well as Sunquest, the Ontario tour operator from whom the package holiday had been purchased. It appears that Sunquest merely argued *forum non conveniens*, but Holiday Inn argued that Ontario had no jurisdiction. Backhouse J. found that Ontario had jurisdiction as Holiday Inn had been the agent for Sunquest in Jamaica. As well, it had an indemnity agreement and advertised in Ontario.

9 I also have some doubts as to whether Backhouse J. would have decided *Sidlofsky* the same way in 2012 as in 2002 given the Supreme Court's decision in *Van Breda*. For example, the Supreme Court commented at paragraph 87 that active advertising in the jurisdiction or access to a website would not be enough to establish that a defendant was carrying on business. In any

event, *Sidlofsky* is distinguishable from the facts in this case. Like Dr. Charron, the Sidlofsky's purchased a package holiday from an Ontario tour operator, which was responsible for all aspects of the Sidlofsky's stay in Jamaica.

10 There is no doubt that *Noble* and *Sidlofsky* were good law prior to *Van Breda*. I do not believe the Plaintiffs are right to rely on them now.

11 I turn now to determining whether the presumptive connecting factors relied on by the plaintiffs can be applied here.

Does the Hotel carry on business in Ontario?

12 In order to understand the plaintiffs argument that the Hotel carries on business it is necessary to set out some further facts. Ms. DeGasperis booked the hotel through the TD Visa Travel Rewards website. She logged on, conducted a search for a hotel in London, and based on the results she selected the Hotel. The electronic invoice indicates that Ms. DeGasperis booked The Berkeley Hotel in Knightsbridge, London, on February 1, 2011 for a stay from October 26 to October 30, 2011. She paid for the hotel by redeeming travel points worth $2500.00. Since the total bill for the hotel was $2571.18, her TD Visa card was charged $71.18. Mr. Cohen argues that the Hotel carries on business in Ontario by virtue of its connection with the TD travel rewards website.

13 As I noted earlier, the Hotel is located in London, in the United Kingdom. London is its only location. It has no office or other premises in Ontario. There was no evidence that Hotel employees regularly visit Ontario, or that the Hotel engaged in a marketing campaign to specifically target Ontario residents.

14 In *Van Breda*, Ms. Van Breda was injured while on holiday in Cuba at a resort managed by Club Resorts. Her husband, Victor Berg, was a professional squash player. Mr. Berg did not have a typical tourism arrangement. He had an arrangement with Club Resorts where he would provide two hours of tennis lesson per day in exchange for room and board for him and his spouse at the hotel. The arrangement had been made via one Mr. Denis (another defendant) who specialized in recruiting professionals for Club Resorts and others. In the companion case, Charron, the plaintiff was a doctor who had drowned while scuba diving at one of Club Resorts properties.

15 The Court found in both cases that Club Resorts was carrying on business in Ontario. In the case of Ms. Van Breda's husband, he entered into a special contract specifically aimed at recruiting racquet professionals. For the purposes of the Charron matter, the Court found that Club Resorts specifically marketed to Ontario residents. Indeed, a significant amount of its business came from holiday travellers from Ontario. As well, Club Resorts had the physical benefit of an office in Ontario and its employees frequently travelled to Ontario for business purposes. In other words, Club Resorts was specifically in the business of marketing and organizing tours from wintery Ontario to its properties in the sunny Caribbean.

16 In this case, the Hotel does not have an office or employees in Ontario. There is no evidence that it markets specifically to Ontario residents. The Hotel was one of many hotels that

came up on the TD Visa Travel Rewards website. The TD Visa Travel Rewards website seems nothing more than a search engine for those who want to use their travel points — on any hotel that has a relationship with TD Visa Travel Rewards. The plaintiffs provided a screenshot of their search result for hotels in London. The search resulted in dozens of hotels.

17 At best, TD Visa Travel Rewards is merely a booking agent of the hotel. I do not think that is enough to create the principal-agent relationship that the plaintiffs suggest. I think it is quite obvious that a boutique hotel in a foreign jurisdiction would make it possible to book through websites like TD Visa Travel Rewards specifically so that it does *not* have to carry on business in a foreign jurisdiction. Since the Web is everywhere, on the plaintiff's theory, every hotel in the world that can be booked through the Web does business everywhere. If the interaction between Ms. DeGasperis and the Hotel through a Canadian booking website was enough to be "carrying on business" it would amount to a form of universal jurisdiction. I point to the Supreme Court's statement at paragraph 87 of *Van Breda*:

> **87** Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction.

18 The evidence is clear that Ms. DeGasperis merely accessed a website. It is true that the Court left the door open to e-trade, but it strikes me that this is the type of case that the Supreme Court had in mind when it stated that mere access to a website is not sufficient to establish that a defendant carries on business.

19 Accordingly, I find that the Hotel does not carry on business in Ontario.

Was a contract connected with the dispute made in Ontario?

20 Mr. Cohen's argument that the Hotel carries on business in Ontario is intimately connected to the argument that the contract connected with the dispute was made in Ontario. He argues that by logging into the TD Travel Rewards Website, the plaintiff Ms. DeGasperis made a contract with the Hotel in Ontario. I disagree. My reading of the electronic invoice is that, at best, the plaintiffs had a contract with TD for TD to make a booking with the Hotel.

21 In order for there to be a valid contract the elements of offer, acceptance, and consideration must be present: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomas Reuters Canada Ltd., 2011).

22 The offer, acceptance, and intention all indicate privity of contract between TD Visa Travel Rewards and the plaintiffs. I do not see any offer and acceptance between the Hotel and

the Plaintiffs — I do see it between TD Visa and the Plaintiffs. It does not seem that there was any connection or negotiation between the plaintiffs and the Hotel until the Plaintiffs checked in. As for consideration, the Plaintiffs largely paid with TD Travel Rewards points that were obviously accumulated with a TD Visa card. I think it is obvious that the plaintiffs collected TD travel rewards points so that they could use them through the TD Visa Travel Rewards service. I seriously doubt (and certainly there was no evidence to suggest) that the plaintiffs points could be redeemed directly with the Hotel. The remainder of $78.18 was paid in Canadian dollars. It may be that the actual contract was between the Plaintiffs and the Hotel, but the one-page electronic invoice does not show that. I think it is a much stronger argument that the contract was formed when the plaintiffs actually checked into the Hotel in London and that the legal aspects of their stay was governed by the U.K. equivalent of the *Innkeeper's Act*.

23 Even if there was a contract that was entered into between the Hotel and the Plaintiffs in Ontario, it was merely for accommodations. The contract has nothing to do with the dispute between the parties, which is a classic action for negligence. Accordingly, I find that there was no contract connected with the dispute that was created in Ontario.

Forum Non Conveniens

24 The parties contest whether Ontario is the proper jurisdiction for this case, even if I were to find that there is jurisdiction. Since I have decided that there is no jurisdiction, it is not necessary for me to decide this point. Had I found jurisdiction I would still have granted the motion as I have no hesitation in saying that the United Kingdom is the appropriate jurisdiction.

Disposition

25 The motion is granted and the action is dismissed with costs to the moving party. If the parties are unable to agree on an amount, the defendant Hotel may file submissions within 14 days of this Judgment. The responding plaintiffs may file submissions after a further 10 days.

Motion granted.

Colavecchia v. Berkeley Hotel Ltd. – comments & questions

Colavecchia is one of the few post-*VB* cases to present the question of whether a court should assume jurisdiction where the RSC would depend on an online contract. It is unlike the cases involving libel or copyright infringement, which the courts have handled by reasoning that the injury occurs wherever the material is downloaded. The court explains in para. 12 that "Ms. DeGasperis booked the hotel through the TD Visa Travel Rewards website," and the court concludes that Ms. DeGasperis did not engage in a transaction directly with the hotel, but rather that she was in privity only with TD Visa . On that ground, the court rejects the argument that "a contract connected with the dispute was made in the province."

Does that result seem persuasive to you? If yes, should the result be different if Ms. DeGasperis had made the booking by going to a website maintained by the hotel, and paying for it through that website?

Assume for the sake of argument that the presumptive factor involving "a contract connected with the dispute" would operate in the plaintiff's favour, in the case of a website maintained by the hotel. What if the hotel anticipates that result, and seeks to circumvent it by sending customers to a third-party website, in order to pay for a booking? In other words, the hotel will let you enter all of the information for the booking (dates, type of room, etc.), but then, when it comes to paying for the booking, they send all of the information, including the price, to a third party website, so that there is no contract formed with them. Should that prevent the application of this presumptive factor?

"In order for there to be a valid contract the elements of offer, acceptance, and consideration must be present" (para 21). What work does this sentence do in the court's analysis? According to the court, which of the elements of a valid contract were lacking, such that no contract was formed in Ontario?

"The remainder of $78.18 was paid in Canadian dollars" (para. 22). Should the plaintiffs have placed more stress on this detail, and if so to what end?

According to the court (para. 24), "Even if there was a contract that was entered into between the Hotel and the Plaintiffs in Ontario, it was merely for accommodations. The contract has nothing to do with the dispute between the parties, which is a classic action for negligence. Accordingly, I find that there was no contract connected with the dispute that was created in Ontario." But *Van Breda* itself says (para. 89), that in a tort claim, a factor that presumptively confers jurisdiction is that "a contract connected with the dispute was made in the province"; in other words, *VB* suggests that the party does not need to allege breach of K in order for this factor to apply. Is the court right to say that even if the contract was "entered into … in Ontario," the contract was not "connected with the dispute" because the contract was "merely for accommodations"? Is there some other assumption at work here, that explains why the court refused to consider this as a presumptive factor for the plaintiffs?

Assume that the court is right in concluding that any contract formed in Ontario was "merely for accommodations" and therefore "has nothing to do with the dispute." What kind of claim might the plaintiffs raise, that would be sufficiently connected to a contract for accommodations, such that this factor should be sufficient to confer jurisdiction?

Case Name:
Davydiuk v. Internet Archive Canada

Between
Daniel Davydiuk, Plaintiff, and
Internet Archive Canada and Internet Archive, Defendants

[2014] F.C.J. No. 1066
2014 FC 944

Federal Court
Toronto, Ontario

McVeigh J.
Heard: April 6, 2014.
Judgment: October 6, 2014.

Counsel:

Mr. James Philpott, Mr. Adam Weissman, for the Plaintiff, Daniel Davydiuk.

Mr. Ren Bucholz, Mr. Brent Kettles, Mr. Aaron Pearl, for the Defendants, Internet Archive Canada and Internet Archive.

JUDGMENT AND REASONS

1 McVEIGH J.:-- Internet Archive ("Internet Archive") is appealing an order of Prothonotary Aalto dated November 27, 2013. In that order the Prothonotary dismissed Internet Archive's motion for a permanent stay of the proceedings brought by Daniel Davydiuk in Ontario. The Prothonotary found the Court had jurisdiction to hear the claim, and the circumstances in this case favoured hearing the claim in Canada. Internet Archive argues that the matter should be heard in California, United States.

2 I am dismissing this appeal after a review of the matter on a *de novo* basis.

I. Background

3 A series of pornographic works comprising films, photos, and a series of performances broadcast over the internet (collectively "the works") were performed by Daniel Davydiuk between 2002 and 2003. The works were created and filmed by Intercan, a Montreal, Quebec company. Included in the works are two pornographic videos that he performed in, and a number of unfixed performances by Daniel Davydiuk done on a semi-weekly basis for a year. The works were distributed only by Intercan on their own websites. Those websites include: Squirtz.com; Viedeoboys.com; Montrealboyslive.com; Im1pass.com; Jeremyroddick.com; Videoboyshardcore.com; Imdi.com; Ianfanclub.com; Porninamillion.com.

4 In 2003, Daniel Davydiuk decided not to work in the pornographic industry and stopped working for Intercan. He began negotiations with Intercan to have the works removed from their websites. Intercan and Daniel Davydiuk entered into an agreement on May 22, 2009 to transfer all copyright in the works it produced to Daniel Davydiuk and to remove all the works from its websites, cease using and destroy the works in its possession or control. Daniel Davydiuk paid $5,000.00 to Intercan in consideration. As of May 29, 2009, all the materials were removed from Intercan's websites.

5 In March of 2009, Daniel Davydiuk found that the works were being hosted on some archiving websites belonging to Internet Archive. Internet Archive is a non-profit, public benefit corporation in California. Internet Archive owns and operates the "Wayback Machine" where pages of Intercan's websites had been taken, recreated and can be accessed by the public. Internet Archive included the works at issue in the Wayback Machine, however the parties disagree whether the works were deleted and blocked from the Wayback Machine. Internet Archive Canada is a federally incorporated Canadian company with a registered office of 215 Carlton Street in Toronto, Ontario

6 The "Wayback Machine" is a collection of websites accessible through the websites "archive.org" and "web.archive.org". The collection is created by software programs known as crawlers, which surf the internet and store copies of websites, preserving them as they existed at the time they were visited. According to Internet Archive, users of the Wayback Machine can view more than 240 billion pages stored in its archive that are hosted on servers located in the United States. The Wayback Machine has six staff to keep it running and is operated from San Francisco, California at Internet Archive's office. None of the computers used by Internet Archive are located in Canada.

7 Between April 2009 and August 2009, Daniel Davydiuk made multiple requests to Internet Archive, seeking the removal of the works from numerous "web.archive.org" internet pages hosted by Internet Archive. Internet Archive ultimately granted these requests after they informed Daniel Davydiuk that he had to do *Digital Millennium Copyright Act* ("DMCA") notices for the works to come down. Daniel Davydiuk complied and did the Notices under DMCA.

8 In 2011, Daniel Davydiuk made further requests to Internet Archive seeking the removal of the works from additional "archive.org" websites. On May 19, 2011, Internet Archive advised that the works had been deleted from Internet Archive's website however the next day Daniel Davydiuk found the works still on Internet Archive's website. Daniel Davydiuk's evidence is that after much discussion, on October 31, 2011, Internet Archive confirmed that they would not delete all the works from the website and would retain the files containing the works. Internet Archive denies that that they still retain copies. Daniel Davydiuk has had to negotiate with other organizations to have works deleted that Internet Archive has distributed to other websites internationally.

9 On March 8, 2013, Daniel Davydiuk filed a statement of claim in the Federal Court naming Internet Archive and Internet Archive Canada as Defendants. In his claim, he alleges the Defendants infringed his copyright and committed other acts prohibited under the *Copyright Act*, RSC, 1985, c C-42, by reproducing the works on websites located on the internet domains "archive.org", "waybackarchive.org" and "bibalex.org" ("Archive Domains") that he submits are owned and controlled by the Defendants.

10 Daniel Davydiuk does not know the nature of the relationship between the two Defendants named in the statement of claim but submits collectively both Defendants own, operate, and control the above mentioned Archive Domains.

II. Issues

11 The issues in the present application are as follows:

A. Should this appeal of a Prothonotary's decision proceed on a *de novo* basis because the Prothonotary's discretion was exercised on a wrong legal principle such that the decision is clearly wrong?

B. If the appeal should be heard *de novo*, does this Court have jurisdiction to hear the infringement claim?

III. Analysis

A. *Should this appeal of a Prothonotary's decision proceed on a de novo basis because the Prothonotary's discretion was exercised on a wrong legal principle such that the decision is clearly wrong?*

12 If the discretionary decision of a Prothonotary is final, then the trial level court will review the matter on a *de novo* basis. If it is an interlocutory decision, then the trial level Court will review on a reasonableness basis. However, if the Prothonotary's decision is clearly wrong, I hear the matter on a *de novo* basis (*Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425 (*Aqua-Gem*) (CA) and confirmed by *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27).

13 The Federal Court of Appeal in *Aqua-Gem* discussed examples of different decisions made by Masters in Canada that could be considered to be final because they were vital to the determination of the matter. The Court of Appeal concluded:

> ...such orders ought to be disturbed on appeal only where it has been made to appear that:
>
> (1) they are clearly wrong, in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
>
> (2) in making them, the Prothonotary improperly exercised his discretion on a question vital to the final issue of the case.

In each of these classes of cases, the Motions Judge will not be bound by the opinion of the Prothonotary; but will hear the matter de novo and exercise his or her own discretion.

14 In this case, as was in *Aqua-Gem*, the decision of Prothonotary Aalto could be considered interlocutory but only because he decided the action would continue and he would not grant the stay. Had the Prothonotary decided to issue a stay, it would have been a final decision as the case would not proceed in Canada. So in essence, it doesn't matter whether in this case that the matter is proceeding or is stayed, as the Prothonotary's order is a decision that was vital. I will hear the appeal on a *de novo* basis.

B. *Does the Court have jurisdiction to hear the infringement claim?*

15 The motion before the Prothonotary was a motion to stay the action. The Court can exercise its discretion and stay a matter pursuant to section 50 of the *Federal Courts Act*, RSC 1985 c F-7, if

(a) the claim is proceeding in another court or jurisdiction or (b) if there is any other reason it is in the interest of justice that the proceedings are stayed.

16 The motion falls within paragraph 50(1)(b) because Internet Archive submits that the Court, in the interests of justice, has no jurisdiction to hear the matter and asks for a permanent stay. Internet Archive argues that in the alternative, even if the Court has jurisdiction, then the doctrine of "*forum non conveniens*" if applied shows that in the interests of justice, the action should still be stayed because California, United States is the place it should be heard.

17 First, I must decide if the court has jurisdiction to hear the matter and then I must decide whether or not it will decline to exercise its jurisdiction.

18 To determine the outcome, the Prothonotary undertook a real and substantial connection analysis and then proceeded to do a *forum non conveniens* analysis.

(1) Real and Substantial Connection

19 Prothonotary Aalto relied on *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 (*SOCAN*), when he found the evidence of "making [the information] accessible in Canada" amounted to a sufficient nexus existing between Internet Archive Canada and Internet Archive to establish jurisdiction in Canada.

20 Both parties agree that the Prothonotary correctly used *SOCAN* to establish jurisdiction as the test for "real and substantial" connection. They disagree with the Prothonotary's finding that there is a real and substantial connection to Canada. Internet Archive argues that the Prothonotary's error was that Daniel Davydiuk did not establish any of the connecting factors mentioned in paragraphs 60 to 63 of *SOCAN*.

(2) Connection Factors

21 Internet Archive argues that as a content provider, host, or intermediary, none of the *SOCAN* connecting factors connects Internet Archive to Canada but in fact connect to San Francisco, California. Internet Archive submits that there is no evidence that anyone other than Daniel Davydiuk and his copyright agent ever received the works in Canada via the Wayback Machine. Internet Archive argues that Daniel Davydiuk must show that someone actually did receive the transmission - that it is not enough that there is a mere possibility that someone might receive a transmission,

22 Daniel Davydiuk submits that the real and substantial connection was made when Internet Archive's Wayback Machine copied the works that were created in and posted on Canadian websites and then transmitted them back to Canada.

23 Evidence in support of Daniel Davydiuk's position includes but is not exhaustive:

* In cross examination Christopher Butler, Office Manager of Internet Archive, admitted that the websites they captured are not just American based websites and include Canadian websites;

* Internet Archive Canada is wholly owned by Internet Archive and Internet Archive Canada only serves Internet Archive;

* Internet Archive Canada promotes Internet Archive's archiving service and they can post and modify Internet Archive's website without permission from Internet Archive;

* Internet Archive Canada receives all its funding from Internet Archive so directs control over the company;

* Internet Archive has staff physically located and operating in Canada.

24 Another connecting factor is that Internet Archive Canada and Internet Archive are not arms-length companies. Evidence was filed by both parties of the corporate nature and responsibilities of the parties. At the hearing both Internet Archive Canada and Internet Archive were represented by the same lawyer without a conflict when he was asked.

25 I find the non-arms length nature of the relationship between Internet Archive and Internet Archive Canada to be a factor establishing a connection to Canada.

(3) Rebuttable Presumption of Jurisdiction

26 Internet Archive submitted that the Prothonotary further erred by not applying *Club Resorts Ltd v Van Breda*, 2012 SCC 17 (*Van Breda*). Internet Archive argues that the Prothonotary erred by jumping to *forum non conveniens* missing the *Van Breda* step.

27 Internet Archive submits that *Van Breda* requires that the Plaintiff, as the party arguing that the Court should assume jurisdiction, must objectively establish a real and substantial connection to Canada. Once established, then there is a rebuttable presumption of jurisdiction. The party that challenges the jurisdiction can produce facts that "demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum, or points only to a weak relationship between them" (*Van Breda*, above, at 95). Only then, Internet Archive argues, should the Prothonotary proceed to look at the doctrine of *forum non conveniens*.

28 The *Van Breda* case dealt with torts and fundamental principles of conflict of laws (private international law) and did not deal with a copyright infringement on the internet. At paragraph 85, Justice LeBel wrote:

The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.

29 I find as did the Prothonotary that when dealing with a factual situation like this regarding the internet, that *SOCAN* can be relied on as the test *Van Breda* is not as helpful as the factors the Supreme Court listed are applicable to determine the proper jurisdiction for an international tort.

30 What is helpful in *Van Breda* is that the Supreme Court does talk of factors to consider (not a complete list but one that will need to be reviewed in the future). The SCC said "abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial "connection for the purposes of the law of conflicts." The Prothonotary did not just exercise his discretionary authority but found actual connecting factors so he was alive and alert to *Van Breda*.

31 Prothonotary Aalto using *SOCAN* found that "there is evidence of not just collecting the information in Canada but making it accessible in Canada". In addition there is a nexus between Internet Archive and Internet Archive Canada to find jurisdiction to hear it in Canada. Further, *SOCAN* at paragraph 63 lists a connection factor "...where Canada is the country of transmission or the country of reception."

32 I find that Internet Archive did reach into Canada to the Intercan website when they requested the web pages. Whether it was automated or not does not affect my finding. The action of "following a link" or "requesting pages" as described by Internet Archive requires Internet Archive to reach out to the Canadian servers that subsequently transmit back to the United States. The request and return transmission is not done with permission or on consent. The Canadian public can access the webpage and have it transmitted back to Canada. This is exactly the evidence Daniel Davydiuk provided the Court.

33 Internet Archive argues that only Daniel Davydiuk or his copyright agent were able to access the material and that it was only an "incidental inclusion" of the material on their website. But there is no requirement in *SOCAN* to provide evidence of a third party accessing the copyrighted material as Internet Archive appears to suggest.

34 Daniel Davydiuk and his copyright agent were able to request the works from Wayback Machine while they were in Canada and the works were transmitted back to them in Canada. This is sufficient for this early determination.

35 In reference to a trademark matter, in *HomeAway.com, Inc v Hrdlicka,* 2012 FC 1467 at para 22, Justice Roger T. Hughes found that a trademark simply appearing on a computer screen in Canada constituted use and advertising in Canada. I would apply the same rationale that two people accessing a website in Canada constitutes access in Canada.

36 On these facts, it seems unfair to ask Daniel Davydiuk to obtain or access the same pornographic works that he has been trying for years to remove from the public domain. Simply to prove at this early stage in the litigation that others can access the pornographic works seems like a needless step when I have evidence that the works were able to be accessed in Canada. In no way am I deciding anything other than the *de novo* appeal of a Prothonotary's decision not to grant the stay motion. I will leave it to the trial judge to determine infringement even if Daniel Davydiuk is the only one to access the works for which he himself owns the copyright.

(4) Forum non conveniens

37 The Prothonotary determined Canada amounted to a convenient forum in this instance. Relying on the factors in *Breeden v Black,* 2012 SCC 19, for determining *forum non conveniens*. He found the following factors favored proceeding with the Plaintiff's claim in Canada: (1) the Plaintiff's witnesses he named and is entitled to call, are all in Canada, (2) the applicable law is in Canada, and the Plaintiff is entitled to that benefit, (3) the interests of justice favoured the Plaintiff not being forced to litigate his claim in a foreign jurisdiction, and (4) the cost of litigating the claim in California favoured the Plaintiff. Though the Prothonotary did find that some of the factors favoring Canada being the forum were tenuous at best.

38 Internet Archive argues that this is not the forum for this matter to proceed. Internet Archive relies on the non-exhaustive set of factors in *Van Breda* to determine if Canada is the proper forum.

39 Daniel Davydiuk argues that the facts show that the Federal Court is the proper forum to hear the matter.

40 I note that Justice LeBel in both *Breeden* and *Van Breda* wrote that the discretionary decision of the motions judge when considering *forum non conveniens* is afforded deference unless there was a clear error of law or error on determination of the facts. In *Breeden*, in particular, he wrote that the *forum non conveniens* analysis does not require each factor to point to a single jurisdiction:

> The *forum non conveniens* analysis does not require that all the factors point to a single forum or involve a simple numerical tallying up of the relevant factors. However, it does require that one forum ultimately emerge as *clearly* more appropriate. The party raising forum non conveniens has the burden of showing that his or her forum is *clearly* more appropriate. *Breeden*, at 37.

41 As Internet Archive raised the doctrine of *forum non conveniens*, then Internet Archive has the burden to show that the alternative forum is "clearly more appropriate" as stated above in *Van Breda*. It is not simply that there is a more appropriate forum elsewhere but that *clearly* the forum is more appropriate. Internet Archive must show:

> "that it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute. *Van Breda*, at 109.

(5) Comparative convenience and expense for parties and witnesses

42 Internet Archive submitted evidence that their witnesses are all located in the United States. Daniel Davydiuk and his copyright lawyer reside in Montreal, Canada. There was no proof filed of the residence of the other witnesses that were the owners of Intercan who were the former owners of the works. Daniel Davydiuk argued it would be too expensive to litigate this matter in the United States. Internet Archive countered by arguing he did not provide evidence of the cost of litigating in the United States. Internet Archive is a separate corporate entity from Internet Archive Canada. Internet Archive Canada is located in Toronto and scans books and does not create, maintain or operate the Wayback machine. Counsel did confirm that at the hearing he was representing both the American and the Canadian corporation but that the Canadian company had no position. Internet Archive has staff physically located and operating in Canada.

(6) Applicable Law

43 Canada's *Copyright Act* is applicable but I have little evidence from Internet Archive of the applicable law other than brief glimpse of DMCA in the context of takedown notices in the past.

(7) Avoidance of a multiplicity of proceedings and conflicting decisions

44 Daniel Davydiuk used the DMCA in the past at the direction of Internet Archive. Internet Archive argued that because Daniel Davydiuk relied on this Act in the States in the past that it is possible a second hearing on the same issues would be necessary.

45 Internet Archive did comply with the "take down" notices that were granted to Daniel Davydiuk under the DMCA.

(8) Enforcement of judgment

46 No evidence from the parties of this factor.

(9) Fairness to the parties

47 Daniel Davydiuk argued it would be too expensive to litigate this matter in the United States. Internet Archieve countered by arguing he did not provide evidence of the cost of litigating this in the United States. Daniel named several witnesses that reside in Canada and they gave proof of Daniel's take home pay as being $25,000.00 annual. Evidence was given that Internet Archive's 2009 Federal Tax statement said they had a total net asset of $5,485,762.00 USD.

48 When all the factors are canvassed, some favour California as a forum and some favour Canada but in the end, California is not *clearly more appropriate* so Internet Archive did not meet the burden.

49 I do not find that Internet Archive showed that California was clearly more appropriate so that the Court would decline to exercise jurisdiction.

IV. CONCLUSION

50 I find that there is a real and substantial connection between the action and Canada, and I find that this Court has jurisdiction. I find that Internet Archive has not demonstrated that California is clearly a more appropriate forum for the hearing of the action so the Court will not decline to exercise its jurisdiction.

51 The result of my analysis is the same result that the Prothonotary came to. The motion to dismiss the order of Prothonotary Aalto is dismissed.

52 I asked the parties to come to an agreement regarding costs and they agreed that costs should be in the amount of $5,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The order dismissing the Defendants' motion is upheld and this appeal is dismissed;

2. Costs are awarded to the Plaintiff (Daniel Davydiuk) in the amount of $5,000.00 payable by the Defendants' forthwith.

McVEIGH J.

Toews v. First Choice Canada Inc.,

2014 ABQB 784

9 On January 14, 2009, the Toews entered into an online contract with First Choice (the "Holiday Contract") from their home computer in Edmonton for the purchase of a superior all-inclusive vacation package at the Palladium Hotel. The vacation package was paid for with VISA through the First Choice booking website at selloffvacations.com, and included airfare, hotel accommodation, all food and beverages (alcoholic and non-alcoholic), entertainment, taxes, and gratuities for a nine day stay at the Palladium Hotel.

[*Things went badly there … Ms. Toews swallowed a bottle of cleaning fluid, which was unmarked and appeared to be water. She had to be hospitalized*.]

24 The Defendants argue that the contract between the Toews and the Palladium Hotel was made in Mexico upon check-in at the hotel. They take the position that since the contract was made in Mexico, it cannot be a presumptive factor. To the extent that a contract was made with the Palladium Hotel upon check-in, I agree that this contract was not made in Alberta and cannot be a connecting factor.

25 The Toews entered into the Holiday Contract from their home computer in Edmonton. The terms and conditions of the Holiday Contract state in the "Arbitration of all Disputes" clause that Ontario law is to apply in determining any dispute, controversy or claim." However, this clause appears to be overruled by admissions of First Choice in the Mary Carter Agreement — specifically, that Alberta law is to apply as opposed to Ontario law and that litigation may continue through the courts as opposed to arbitration. Therefore, I find that the Holiday Contract was made in Alberta and is to be governed by the laws of Alberta. This appears to be uncontested by the parties.

[*The defendants relied on* Colavecchia*, among other cases*.]

46 With the greatest of respect to the Ontario Supreme Court, the *Colavecchia* case is not binding on this Court. It appears to take a narrower view of the *Van Breda* principles than other Canadian court decisions. *Colavecchia* suggests that one must be a party to the contract, and engage in proper offer, acceptance and consideration to satisfy this presumptive factor, but nowhere in *Van Breda* does this appear to be required. The test for this presumptive factor has much broader and relaxed wording. The Plaintiffs in the case at bar do not argue that they made a contract directly with the Palladium Hotel or Desarrollos. **Rather, they argue that a contract made in Alberta is *connected* with the dispute and alleged tort.**

47 The *Van Breda* factors were created specifically for tort cases. **It is difficult to discern what tort disputes a contract might raise to meet the presumptive factor other than the type contemplated in *Colavecchia*.** The slip and fall occurred in the hotel bathroom which was part of the accommodation services purchased by the plaintiff through the contract. With respect, it would appear that the negligent act in the *Colavecchia* case **arose specifically out of the contract contemplated in the dispute.**

48 The facts that gave rise to the action in *Van Breda* are similar to the facts in this case. The plaintiff suffered injuries on a beach in Cuba. An action in tort and in contract was brought in Ontario against a number of parties, including Club Resorts Ltd., who managed the hotel where the accident occurred. Despite the fact that the contract was not between the plaintiff and Club Resorts, the motion judge and the Court of Appeal concluded that the contractual relationship between the plaintiff's spouse, Mr. Berg, and Club Resorts, through a Mr. Denis, created a sufficient connection between the claim and Ontario. Mr. Denis, who operated a specialized travel agency known as Sport au Soleil, had an agreement with Club Resorts under which he found tennis and squash professionals and sent them to Club Resorts hotels. In exchange for bed and board at a resort, each professional would give a few hours of instruction to guests of the hotel during his or her stay. The Court concluded that the events giving rise to the claim flowed from the relationship created by the "contract," which was essentially a letter signed by Mr. Denis and addressed to Mr. Berg, confirming the details of the agreement made with Club Resorts Ltd. The Supreme Court of Canada held that Ontario courts could assume jurisdiction over the action against Club Resorts.

2016 ABQB 130
Alberta Court of Queen's Bench
Toews v. First Choice Canada Inc.
2016 CarswellAlta 435, 2016 ABQB 130, [2016] A.W.L.D. 1372, [2016] A.W.L.D. 1373, 264 A.C.W.S. (3d) 367, 37 Alta. L.R. (6th) 359

Kerry Toews, Todd Toews and Her Majesty the Queen In Right of Alberta, As Represented by the Minister of Health, Respondents (Plaintiffs) and First Choice Canada Inc. Operating Under the Trade Names Signature Vacations and Selloffvacations.Com, Signature Vacations, Selloffvacations.Com, Grand Palladium Vallarta Resort & Spa, Formerly Known As Palladium Vallarta Resort & Spa, Fiesta Hotel Group Resorts, Fiesta Hotels & Resort SL, Fiesta Bavaro Hotels, S.A., Punta Mita Servicios S.C., Desarrollos Dine S.A. de C.V. dba Hotel Palladium Vallarta, Dominican Entertainment (Luxembourg) S.A.R.L., Dominican Entertainment S.A.R.L. and Dominican Entertainment S.A. and ABC Ltd., Appellants (Defendants)

J.J. Gill J.

Heard: February 4, 2016
Judgment: March 4, 2016

Counsel: Kevin P. Feehan, Q.C., Sara E. Hart, for Respondents / Plaintiffs
Bruce Churchill-Smith, Q.C., Justine Blanchet, for Appellants / Defendants, Grand Palladium Vallarta Resort & Spa, Desarrollos Dine S.A. de C.V., et al
Ryan Krushelnitzky, Sharon Stefanyk, for Defendants, First Choice Canada Inc., et al
Kelly J. Robinson, for Defendants, Dominican Entertainment, et al

***J.J. Gill J.*:**

I. Introduction

1 This appeal arises as a result of a claim for personal injury allegedly suffered by the Plaintiff/Respondent, Kerry Toews ("Mrs. Toews"), while vacationing at the Palladium Vallarta Hotel and Spa, located in Punta de Mita, Mexico on February 9th, 2009.

2 The Plaintiffs/Respondents, Kerry Toews, Todd Toews and her Majesty the Queen in Right of Alberta (the "Toews"), have claimed against a number of Defendants, including the Grand Palladium Resort and Spa, formerly known as Palladium Vallarata resort and Spa ("Palladium"), Desarrollos Dine, S.A. de C.V. dba Hotel Palladium Vallarta ("Desarrollos").

3 On December 11th, 2012, Palladium and Desarrollos filed an application before the presiding Master in Chambers pursuant to Rule 3.68 of the Alberta Rules of Court, Alta Reg 124/2010 ("Rules of Court"), asking for a stay of the action against them for lack of jurisdiction. In the alternative, Palladium and Desarrollos sought an Order staying this action on the grounds that Mexico is the appropriate forum.

4 The matter was heard on November 12, 2014, and on December 19, 2014, Master Schulz found (the "Master's Decision") that Alberta Courts have the jurisdiction to hear this matter, and further found Alberta the most convenient forum for this matter. This is an appeal of the Master's Decision by the Defendants/Appellants, Palladium and Desarrollos.

II. Background

5 There are extensive affidavits and transcripts of questioning on affidavits filed in this matter. The majority of the key facts are not in dispute. The summary of facts contained in the Respondent's Brief sets out many of the facts relevant to this application, a part of that summary is reproduced in this judgement.

1. Parties to the Action

6 The Plaintiffs/Respondents, Mrs. Kerry Toews and Mr. Todd Toews, are individuals residing in the City of Edmonton, in the Province of Alberta.

7 On January 14, 2009, the Toews entered into a contract online, from their home in Edmonton, Alberta with the Defendants (not a party to this appeal), First Choice Canada Inc., Operating Under the Trade Names Signature Vacations and Selloffvacations.Com, ("First Choice").

8 The contract was for the purchase of a superior all-inclusive vacation package at Palladium ("the Holiday Contract"). The Palladium resort is located in Punta de Mita, Mexico.

9 The vacation package was paid for with a VISA card, through the First Choice booking website, at selloffvacations.com. The package included airfare, hotel accommodation, all food, all beverages (both alcoholic and non-alcoholic), entertainment, taxes, and gratuities for the nine-day stay at the Palladium Hotel.

10 First Choice, is a federally incorporated company which provides holiday and travel services in the Province of Alberta. It is registered extra-provincially in the Province of Alberta, and has a registered office located in Calgary, Alberta.

11 Palladium, is an all-inclusive holiday resort located in Punta de Mita, Mexico. It is wholly owned by Desarrollos, which is a Mexican corporation.

12 Although there is a dispute on this issue, it appears that at all material times, Palladium *either* had a contract with First Choice, as alleged by First Choice, *or alternatively*, as outlined in paragraph 17 of this decision, Desarollos had a contract with the Defendants (not a party to this appeal), Dominican Entertainment (Luxembourg) S.A.R.L, Dominican Entertainment S.A.R.L, and Dominican Entertainment S.A.; ("Dominican"), as alleged by Palladium and Desarrollos.

13 In turn, Dominican had a contract with First Choice ("the Booking Contract"), for the sale of all-inclusive hotel rooms to individual vacationers at Palladium. Palladium's all-inclusive hotel rooms are sold through third party providers and not to individual vacationers.

14 Palladium is one of many hotels that form part of the Defendant (not a party to this appeal), Fiesta Hotel Group Resorts, Fiesta Hotels & Resort Sl, and Fiesta Bavaro Hotels ("Fiesta").

Fiesta is a partial owner of Promintur BV. Promintur BV wholly owns the Defendants, Desarrollos and Dominican.

15 Promintur BV is located in the Netherlands. Desarrollos and Dominican are both a part of the family of corporate entities which form the Fiesta and Palladium hotel groups: see attached corporate chart prepared by the Appellants (*Appendix A*).

16 The Defendant (not a party to this appeal), Punta Mita Servicios S.C. ("Punta Mita") is a Mexican company, with which Desarrollos had a contract for the provision and payment of employees, in particular the housekeeping staff who worked at Palladium.

17 Desarrollos, is the 100% owner of Palladium. According to the version of contracts indicated by Pere Vidal, the corporate representative of Palladium and Desarrollos, it was through Desarrollos that the all-inclusive hotel rooms at Palladium were sold. His evidence is that Desarrollos had a contract with Dominican for the sale of the all-inclusive hotel rooms at Palladium. The contract between Desarrollos and Dominican is governed by the laws of the Dominican Republic. At no time was a hotel room booked independently of the all-inclusive food, beverage, entertainment and activity package included with the room booking.

18 Upon check-in on February 7, 2009 ("the Mexican Contract"), staff at the Palladium Hotel provided the Plaintiffs/Respondents, the Toews, with a Palladium Vallarta Resort & Spa Services Guide. The Services Guide contained the following information (quoting verbatim):

> **Mini bar**
>
> Mini bar is stocked on daily basis with 2 water bottles and 3 soft drink cans. Additional drinks have a cost of $20.00 Mexican pesos.
>
> **Water**
>
> Tap water is being chlorinated and refined but it is not suitable for drinking. Thank you for check [sic] that all faucets are closed before leaving the room.

2. Mary Carter Agreement between Toews and First Choice

19 As of October 15, 2014, the Plaintiffs/Respondents, the Toews, and the Defendant (not a party to this appeal), First Choice, entered into a Mary Carter Agreement. Pursuant to which, First Choice remains a fully participating party to this action. In the Mary Carter Agreement, First Choice admits that (quoting verbatim):

. . .

> 2 (a) Signature Vacations and Selloffvacations.com are registered trade names of First Choice Canada Inc. in the Province of Alberta and First Choice carries on business in the Province of Alberta through those trade names;
>
> (b) The defendants, First Choice, have been properly served in the Province of Alberta with the Statement of Claim and the Amended Statement of Claim in the action;

(c) The defendants, First Choice, have attorned to the jurisdiction of the Province of Alberta by the filing of a Statement of Defence in Alberta on June 16, 2011; and

(d) On or about January 14, 2009, the defendants, First Choice, entered into a contract in the Province of Alberta with the plaintiffs, Toews, for a vacation package including airfare, hotel accommodations, and all food, beverages, entertainment, taxes and gratuities for a 9 day stay at the defendant 'superior all-inclusive' Four Star Palladium Vallarta Resort & Spa located in Puerto Vallarta, which contract is governed by the laws of Alberta.

3 The defendants, First Choice, admit that they have a real and substantial connection between Alberta and the facts upon which the plaintiffs' claim in this Action is based, and that the Non-Settling Defendants, although outside Alberta, are necessary or proper parties to this Action brought against the defendants, First Choice, who were served in Alberta.

. . .

3. Incident of February 9, 2009

20 In this action, the Plaintiffs/Respondents, the Toews, make the following allegations:

a) On the evening of February 9, 2009, Mrs. Toews swallowed a portion of the contents of an unmarked, unlabeled water bottle that Mr. Toews had taken out of the mini-bar fridge located in their hotel room. Both Mr. and Mrs. Toews believed that it was a bottle of drinking water.

b) The bottle did not contain water. Rather, it contained a caustic, clear, odourless, alkaline substance presumably used for cleaning purposes. This identification was made later by the ALS Laboratory Group, located in Edmonton, Alberta.

c) The substance that Mrs. Toews ingested caused burning and required emergency medical treatment. She underwent an endoscopy procedure in a Mexican hospital, which disclosed a severe injury to her esophagus as well as a gastric injury. She was quickly air-lifted to Edmonton, where she underwent extensive treatment, and eventually, an esophagostomy operation that removed the majority of her injured esophagus. Mrs. Toews has had over 87 surgical procedures to date as a result of her injuries.

21 This action was subsequently commenced against all the Defendants, alleging breach of contract(s) and breach of implied warranties. The issues in this action include whether any or all of the Defendants breached the contracts and the implied warranties in the contracts, in relation to the quality of the goods purchased, in particular, the water bottles in the mini-bar fridge. Other issues are whether any or all of the Defendants were negligent, grossly negligent, or in breach of other common law or statutory duties, due to their alleged failure in ensuring the safety of all beverages and bottles purchased by the Toews as a part of their all-inclusive vacation package.

4. Summary of Contracts between the parties

22 A useful summary of the alleged contracts involved in the sale of the holiday package at Palladium to the Toews is contained in the attached diagram prepared by the Respondents *(Appendix B)*.

III. Issues

23 Two issues are germane to this appeal:

1. Do Alberta Courts have jurisdiction over this Action?

2. If Alberta Courts have jurisdiction, is Alberta the most convenient forum in which to hear this action?

IV. Standard of Review

24 Both parties submit that the standard of review on an appeal of a Masters decision is correctness and fresh evidence can be admitted as the appeal is considered a hearing *de novo*. I agree.

V. Legal Framework

25 This appeal raises the issue of jurisdiction over an action. In *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.) [Van Breda], the Supreme Court addressed issues of jurisdiction arising from inter-jurisdictional disputes. The real and substantial connection test is now well-established as the common law test for a court to assume jurisdiction over a claim (at para 67). The party arguing that a Court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum (at para 80). At para 90, the Supreme Court of Canada enumerated a number of presumptive connective factors that entitle a Court to assume jurisdiction over a dispute, in cases concerning a tort:

> To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, prima facie, entitle a court to assume jurisdiction over a dispute:
>
> (a) the defendant is domiciled or resident in the province;
>
> (b) the defendant carries on business in the province;
>
> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province.

26 This list of presumptive connective factors is not closed (at para 100). When addressing the issue of jurisdiction, legislatures and courts across the county may adopt various solutions to meet constitutional requirements and the objectives of efficiency and fairness (at paras 68, 71).

27 The presumption of jurisdiction is rebuttable, but the burden of rebutting the presumption rests on the party challenging the assumption of jurisdiction (at para 95).

VI. Analysis of Issues

1. Do the Alberta Courts have jurisdiction over this action?

28 **Master Schulz found that Alberta's jurisdiction was established by a real and substantial connection between the Plaintiffs/Respondents, the Toews, and the Defendants/Appellants, Palladium and Desarrollos. Master Schulz found a presumptive connecting factor, that a contract connected with the tort was made in Alberta. Master Schulz was also satisfied that the presumptive factors under Rule 11.25(3) (b) & (i) were established.**

29 The Appellants/Defendants, Palladium and Desarrollos, submit that none of the presumptive connecting factors apply to this case. They submit that the primary issues in this appeal are "whether or not there is a contract connected with the dispute that was made in the Province" and if the Plaintiff has established a new presumptive connecting factor.

30 The Appellants/Defendants, Palladium and Desarrollos, submit that no contract connected to the dispute was made in Alberta. In the alternative, if one or more of these contracts constitutes a presumptive connecting factor, then the presumption is rebutted on the facts of this case.

31 The Appellants/Defendants, Palladium and Desarrollos, note that in *Van Breda*, the Court analyzed two companion cases with two distinct fact patterns: *Charron Estate v. Village Resorts Ltd and Van Breda v. Village Resorts Ltd.* They suggest that the facts of the *Charron* case are analogous to this case.

32 In *Charron*, there was no contract connected to the dispute; the Defendant was found to be carrying on a business in Ontario. The Appellants/Defendants, Palladium and Desarrollos, submit that in this case there is no evidence that they were carrying on business in Alberta or that First Choice was acting as their agent in Alberta.

33 The Appellants/Defendants, Palladium and Desarrollos, also point to the fact that Palladium and Desarollos were not parties to the two contracts, the Holiday Contract and the Booking Contract, that were allegedly made in Alberta. They refer to a number of cases from other jurisdictions to support their position including the Nova Scotia Supreme Court's decision in *Brown v. Mar Taino S.A.*, 2015 CarswellNS 971 (N.S. S.C.).

34 **The Appellants/Defendants, Palladium and Desarrollos, argue that in order to constitute a presumptive connecting factor, the contract must create a relationship where the defendants owe a duty of care to the plaintiff.** They refer to *Colavecchia v. Berkeley Hotel Ltd.*, 2012 ONSC 4747 (Ont. S.C.J.); *Haufler (Litigation guardian of) v. Hotel Riu Palace Cabo San Lucas*, 2013 ONSC 6044 (Ont. S.C.J.); and *Wilson v. RIU*, 2012 ONSC 6840 (Ont. S.C.J.), where harm to the Plaintiff was not reasonably foreseeable because the Defendant was not a party to the relevant contract.

35 The Appellants/Defendants, Palladium and Desarrollos, argue that it is only through the Mexican Contract that the Toews acquired an enforceable right to stay at the hotel.

36 In summary, they argue that the only contracts entered into by Palladium or Desarrollos were either not connected to the dispute and/or were not made in Alberta.

A. Analysis

37 **The Appellants/Defendants, Palladium and Desarrollos, focus on the fact that they were not a party to either the Booking Contract (which is disputed) or the Holiday Contract. These are the two contracts that were clearly made in Alberta.**

38 **This submission is not persuasive. To be a presumptive connecting factor in relation to a tort, there is no requirement that the contract create a direct relationship with the defendant. Privity of contract is not a requirement. It is sufficient that the contract be "connected" to the tort.**

39 In *Van Breda* there was no contract between the plaintiff and the defendant. Rather, the "contract" which created jurisdiction, was a letter between the plaintiff's partner Mr. Berg, and Mr. Dennis who represented the defendant resort.

40 **The key aspect of a contract as a presumptive connecting factor, under the *Van Breda* test, is that a plaintiff's claim is "connected with", or under Rule 11.25 (3)(b) "relates to", a contract made in Alberta.**

41 In *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430 (S.C.C.) at pp 445-446, the Supreme Court interpreted a similar phrase, "relating to", from the Income Tax Act and concluded that these types of phrases import "the widest of any expression intended to convey some connection between two related subject matters". Alberta Courts have also emphasised that the phrase "related to" has a very broad meaning: *Calgary Mack Sales Ltd. v. Shah*, 2005 ABCA 304 (Alta. C.A.); *Dow Chemical Canada Inc. v. Nova Chemicals Corp.*, 2010 ABQB 524 (Alta. Q.B.); *Rochwerg v. Truster* (2002), 58 O.R. (3d) 687 (Ont. C.A.).

42 In this case the alleged tort arose as a result of Mrs. Toews drinking from a bottle, of what she assumed was water, in her hotel room. The reason that Mrs. Toews went to the hotel, and was ultimately in the hotel room where she drank the liquid, was because she had entered into the Holiday Contract with First Choice in Alberta. In addition, the only reason First Choice was in a position to sell the room and related services to the Toews was because it had entered into the Booking Contract in Alberta. **It is as a result of, or through, the contracts signed in Alberta that the Toews acquired the right to stay at Palladium Hotel and further acquired the right to be provided with food and beverages. These contracts clearly "relate to" or are "connected with" the Toews' claim against Palladium and Desarrollos**.

43 The Holiday Contract and the Booking Contract are a direct link to the Toews' journey to Mexico and to obtaining the room and services at the Palladium which resulted in the alleged tort and injuries. "But for" these contracts, the Toews would not have been in that hotel room at Palladium.

44 I also find that if one looks at *all* the relevant contracts involved in the sale of the holiday package at Palladium, and at the corporate relationships between the various contracting parties, it is obvious the that the Holiday Contract and the Booking Contract are relevant and directly connected to the issues and matters in dispute in this action. It is also clear that these contracts directly connect the Appellants/Defendants, Palladium and Desarrollos, to the action.

45 Also of significance, for Alberta Courts to have jurisdiction over a defendant, there is no requirement that the defendant carry on business within Alberta.

46 I conclude that the Respondents, the Toews, have established a real and substantial connection between the Toews and Palladium Hotel and Desarrollos based on the presumptive Van Breda connecting factor: that there is a contract, made in Alberta, which is connected with the tort. I am also satisfied that a real and substantial connection with Alberta has been established under Rule 11.25(3)(b).

B. Rule 11.25(3)(i)

47 The Respondents, the Toews, also submit that Rule 11.25(3)(i) applies in this case, because Palladium and Desarrolos are necessary or proper parties to the action brought against another person who was served in Alberta. Master Schulz agreed with this submission and found that Rule 11.25(3)(i) is a new presumptive connecting factor. The Appellants submit that Master Schulz erred by making this finding.

48 I have found that a presumptive connecting factor has been met by application of the fourth Van Breda criteria and under Rule 11.23(3)(b).

49 As a result, there is no need for this Court to consider the interpretation, applicability, enforceability or constitutionality of Rule 11.25(3)(i).

C. Has the Presumption of Jurisdiction been rebutted?

50 As noted at para 95 of *Van Breda*, the presumption of jurisdiction that arises is rebuttable:

[95] The presumption of jurisdiction that arises where a recognized connecting factor - whether listed or new - applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

51 In this case the Appellants/Defendants, Palladium and Desarrollos, have not established facts to rebut the presumption of jurisdiction. Rather, the facts establish a strong relationship between the subject matter of the litigation and Alberta. The contracts signed in Alberta are clearly relevant to the subject matter of the litigation. In addition, the Plaintiffs reside in Alberta and have no connection to Mexico.

52 Therefore, the Appellants/Defendants, Palladium and Desarrollos, have failed to rebut the presumption that the Alberta Courts have jurisdiction in this action.

D. Conclusion on Issue No. 1

53 The Respondents/Plaintiffs, the Toews, have established a real and substantial connection between the Toews and Palladium and Desarollos. The Appellants/Defendants, Palladium and Desarrollos, have failed to rebut the presumption that the Alberta Courts have jurisdiction in this action. Therefore, Alberta courts have jurisdiction in this matter.

2. Is Alberta the most convenient forum in which to hear this action?

54 Having found that a real and substantial connection exists, this Court must determine whether this court should nonetheless decline to exercise its jurisdiction because another court is a more appropriate forum.

55 The Appellants/Defendants, Palladium and Desarrollos, argue that this Court should decline to exercise jurisdiction because Mexico is the most convenient forum to hear this matter. In support of this position, the Appellants rely on the affidavits of Luis Fraguas sworn on Feb 1, 2013 and November 23, 2015. The Affidavits, state that a number of key witnesses are located in Mexico and these potential witnesses are expected to provide evidence required in Palladium and Desarrollo's defence of this claim. They further argue, these witnesses are likely Mexican residents that do not hold international travel documents. As a result, it would be difficult to have these individuals travel to Alberta to give evidence.

56 The Appellants/Defendants, Palladium and Desarrollos, rely on the factors outlined in *Pedwell v. Snc-Lavalin Inc.*, 2014 ABQB 309 (Alta. Q.B.), and in *Prince v. ACE Aviation Holdings Inc.*, 2014 ONCA 285 (Ont. C.A.). In particular, they point to the fact that Palladium carries on business in Mexico, and because the cause of action arose in Mexico, Mexican law will apply, therefore necessitating experts to interpret Mexican law if the matter were to proceed in Alberta.

A. Analysis

57 The burden of proof in a *forum non conveniens* argument rests on the Defendants, as was stated by the Supreme Court in *Van Breda* at paragraph 109:

... The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin.

58 Various factors have been enumerated in the case law that are relevant in determining the question of forum non conveniens: *Van Breda* at para 105; *Black v. Breeden*, 2012 SCC 19 (S.C.C.) at para 23; *Pedwell v. Snc-Lavalin Inc.*, 2014 ABQB 309 (Alta. Q.B.) at para 39.

59 The following factors are relevant to this case:

a) Location of the witnesses and parties and the comparative expense and convenience for these parties;

b) Avoidance of multiplicity of proceedings and conflicting decisions

c) The applicable law relating to the dispute, and what weight is to be given to legal issues in comparison to the factual issues; and

d) Juridical advantage for the plaintiff in Alberta, and the juridical disadvantage for the defendant in Alberta.

60 Each of these factors is analyzed below.

B. Location of the witnesses and parties and the comparative expense and convenience for these parties

61 The Plaintiffs/Respondents, the Toews, have identified a precise and lengthy list of witnesses, along with the type of evidence that each of these witnesses are expected to provide: The list is:

1. All the named Plaintiffs reside in the Province of Alberta;

2. Four fact liability witnesses reside in Alberta: Kerry, Todd, Bay and Jaden Toews;

3. One fact liability witness, the neighbour at Palladium, resides in British Columbia;

4. One Expert liability witness, the chemist who analyzed the substance ingested by Mrs. Toews, resides in Alberta: Dr. D.A. Birkholz;

5. Seven professional medical witnesses reside in Alberta: Dr. Nandanie Weerasinghe (GP), Dr. Alice Bedard (family medicine), Dr. Chris Keeling (dermatologist), Dr. Kenneth Stewart (thoracic and esophageal surgeon), Dr. Kim Boldt (dentist), Dr. Cynthia Blackman (psychologist), and Dr. Howard Saslove (psychologist); and

6. Four professional expert witnesses providing evidence relating to quantum of damages reside in Alberta: Dr. Brenda Munro (loss of housekeeping services capacity), Rashid Kashani (occupational therapy, functional capacity assessment and cost of future care), Dr. Alexander Jenkins (labour economist), and Bob McNally (quantification of the claims).

62 All of the witnesses identified as required for the Plaintiff's case, reside in either Alberta or British Columbia. Necessitating this large number of witnesses to travel to Mexico would be very expensive. The cost of proceeding with this action in Albera would be substantially lower than if these witnesses were required to travel to Mexico.

63 Conversely, the Appellants/Defendants, Palladium and Desarrollos, have provided a list of *potential* witnesses that they assert are required for the assessment of liability against them. Luis Farguas, the corporate representative of Palladium and Desarrollos, was cross examined on an

Affidavit he swore with respect to this list of witnesses. Under cross examination he confirmed that the Appellants/Defendants:

a) have not spoken to the witnesses;

b) cannot confirm which of these witnesses, if any, will be called at trial;

c) cannot identify what evidence, if any, these witnesses will be able to provide at trial;

d) are unable to confirm where these individuals reside; and

e) are presuming that these individuals will have relevant knowledge and are further presuming that these individuals do not have international travel documents.

64 The Appellants/Defendants, Palladium and Desarrollos, argue that it is far too early in the litigation to have clearly determined the final list of witnesses and the evidence that these witnesses will give. They further argue that it is sufficient, at this point, to identify potential witnesses.

65 This argument is unpersuasive, because the burden rests on the Appellants/Defendants in this forum non convenience argument: *Van Breda*; *Court v. Debaie*, 2012 ABQB 640 (Alta. Q.B.) at para 46. The Appellants/Defendants have not provided sufficient evidence with respect to this part of the analysis. The Plaintiffs/Respondents have provided clear evidence on this issue.

66 Therefore, this factor favours Alberta as being the most convenient forum.

C. Avoidance of multiplicity of proceedings and conflicting decisions

67 The Appellants, rely on *Currie v. Farr's Coach Lines Ltd.*, 2015 ONSC 2352 (Ont. S.C.J.), a case in which a number of Ontario and Michigan residents purchased bus tickets, from an American company, to go to New York. While in New York an accident occurred and many of them suffered injuries. The defendants, in that case, argued that Ontario was the forum conveniens. The court held that although it has jurisdiction because the tickets were purchased in Ontario, it declined to exercise jurisdiction because of the existing actions in New York, the applicability of New York Law and the desirability to avoid multiple proceedings.

68 This case can be distinguished on the basis that a large number of passengers commenced an action in New York, while a smaller number of passengers wanted to commence a later action in Ontario.

69 In this case, First Choice, one of the Defendants (not a party in this action), has attorned to the jurisdiction of Alberta. Therefore, the litigation against First Choice will proceed in Alberta.

70 If litigation is allowed in Mexico with respect to the Respondents, two proceedings would be required, one proceeding in Mexico against the Appellants/Defendants, Palladium and Desarrollos, and one proceeding in Alberta against the Defendants, First Choice.

71 In Van Breda at para 99, the Court addressed the issue of multiplicity of proceedings as follows:

> I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

72 Since the action against First Choice, will be heard in Alberta, in order to avoid multiplicity of proceedings and conflicting results, all claims should be heard in Alberta.

73 As a result, this factor favours Alberta as the most convenient forum.

D. The applicable law relating to the dispute, and what weight is to be given to legal issues in comparison to the factual issues?

74 Although the tort occurred in Mexico, Alberta law will apply to the two relevant contracts connected to this action, the Holiday Contract and the Booking Contract. These contracts will be the basis for the breach of implied conditions and misrepresentation claims by the Plaintiffs. Neither party has provided evidence with respect to the difficulty of proving either country's laws. This is therefore a neutral factor.

E. Juridical advantage for the plaintiff in Alberta, and the juridical disadvantage for the defendant in Alberta

75 The Plaintiffs/Respondents, the Toews, argue that it will be:

> ... virtually impossible for the Plaintiffs to get a fair hearing and an appropriate quantification of damages for their injury claim in Mexico, due to the extreme difficulties with the Mexican justice system, including the extreme difficulties experienced by the Plaintiffs to date with effecting service of pleadings in this action, and the overall likelihood of corruption and an unfair disposition of the claim.

76 There is no evidence to support the allegation of potential corruption and I cannot take judicial notice of this fact. Furthermore, although there is evidence of difficulties in service of documents, it is not enough to find that the Mexican justice system will result in an unfair disposition of the claim. Due to a lack of evidence of any juridical advantage or disadvantage in either jurisdiction, this is a neutral factor.

F. Conclusion on Issue No. 2

77 Due to the location of the witnesses, and the need to avoid multiple proceedings, I am satisfied that the most appropriate forum is Alberta. The Appellants/Defendants, Palladium and Desarrollos, have failed to demonstrate that Mexico is a more appropriate forum for this action.

VII. Summary

78 I find that the Alberta Courts have jurisdiction over this action. The Plaintiffs/Respondents, the Toews, have established a real and substantial connection between the Toews and the Appellants/Defendants, Palladium Hotel and Desarrollos. I reach this conclusion on consideration of the *Van Breda* presumptive connecting factor: there is a contract made in Alberta, which is connected with the tort. I am also satisfied that the presumptive factor under Rule 11.25(3)(b) is established. The Appellants/Defendants, Palladium and Desarrollos, have failed to rebut these presumptions.

79 I am also satisfied that Alberta is the most convenient forum in which to hear this action based on the Application of *forum non conveniens*.

80 As such, the Master's Decision was correct. The Appellant's/Defendant's applications are therefore dismissed. The parties may speak to costs if they are unable to agree.

Appeal dismissed.

II.2. Injunctions

PRESERVATION OF RIGHTS IN PENDING LITIGATION

RULE 40: INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

HOW OBTAINED

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 40.01.

WHERE MOTION MADE WITHOUT NOTICE

Maximum Duration

40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (1).

Extension

(2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party. R.R.O. 1990, Reg. 194, r. 40.02 (2).

(3) An extension may be granted on a motion without notice for a further period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (3).

Labour Injunctions Excepted

(4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 40.02 (4).

UNDERTAKING

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party. R.R.O. 1990, Reg. 194, r. 40.03.

FACTUMS REQUIRED

40.04 (1) On a motion under rule 40.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 23.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 18.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 18.

(4) Revoked: O. Reg. 394/09, s. 18.

130 O.A.C. 369, 6 C.P.R. (4th) 57

Anne of Green Gables Licensing Authority Inc. v. Avonlea Traditions Inc.

Anne of Green Gables Licensing Authority Inc., Ruth MacDonald and David MacDonald and Heirs of L. M. Montgomery Inc., (Respondents/Moving Party) v. Avonlea Traditions Inc., (Appellant/Respondent)

Ontario Court of Appeal [In Chambers]

Charron J.A.

Heard: April 3, 2000
Judgment: April 4, 2000

MOTION by licensee for stay of injunction.

***Charron J.A.* (In Chambers):**

1 This action relates to a license agreement respecting merchandise sold by the appellant Avonlea Traditions Inc. bearing names and likeness to the character derived from the book "Anne of Green Gables", written by the late Lucy Maud Montgomery. For the purpose of this motion, it suffices to describe the respondents as the heirs of Lucy Maud Montgomery.

2 The respondents' action was allowed by Wilson J. on March 10, 2000 and a judgment was granted enjoining the appellant, allowing the respondents' claim for damages and dismissing the appellant's counterclaim.

3 The appellant filed a Notice of appeal on March 28, 2000 resulting in an automatic stay of the judgment for the payment of money under Rule 63.01(1) of the *Ontario Rules of Civil Procedure*.

4 The appellant moves under Rule 63.02 for a stay of that part of the injunction that enjoins it from "making, selling, offering for sale, distributing or otherwise dealing in any goods bearing the name ANNE OF GREEN GABLES, or other names or indicia under which the Defendant was previously licensed by the Plaintiffs or their predecessors" until the hearing of the appeal.

5 If the stay is granted, the appellant is willing to undertake "to keep full accounts of any dealing by it with its Anne merchandise falling within the scope of the injunction" and "if required", it "is prepared to pay into Court each month a reasonable percentage of its net sales for each month as security for any damages" which might be awarded in the event the appeal is not successful.

6 It is common ground between the parties that the appellant must meet the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 54 C.P.R. (3d) 114 (S.C.C.) in order to succeed on this motion. It is my view that the motion cannot succeed.

7 First, the appeal must present a serious issue for adjudication. The appellant, in its notice of appeal, essentially reiterates the arguments that it advanced at trial in defence of the respondents' claim. It is apparent from the extensive reasons delivered by the trial judge that all of the issues were fully canvassed and that many of the arguments were unsuccessful because they were simply not sustainable on the evidence. The appellant will have to contend with the same evidentiary basis, or lack thereof, on appeal. Therefore, to the extent that the appeal reiterates those same arguments, it is not apparent to me that it presents a serious issue to be determined.

8 Nonetheless, the court on this motion is not in a position to assess the merits of the appeal in any depth and, since some of the legal issues appear to be arguable, I am prepared to accept, for the purpose of this motion, that the appeal raises issues of sufficient merit to warrant consideration of the balance of the test.

9 As a second criterion, the appellant must show that it will suffer irreparable harm if the relief is not granted. Ms. Gallagher, who is the president and appears to be the directing mind of the appellant corporation, alleges that the continued injunction will force Avonlea Traditions Co. out of operation because 70% of its business deals with Anne of Green Gables products.

10 In response, the respondents submit that the appellant may go out of business anyway because of its financial difficulties. In fairness to the appellant, I recognize that there may be a certain circularity to this argument to the extent that the appellant's present financial difficulties may be due to the effect of the judgment. However, the record shows that the appellant's financial difficulties are not recent and indeed may not be resolved even if the appeal were to be successful and the injunction lifted.

11 On the long-standing nature of the financial difficulties, I note that the trial judge attributed the appellant's failure to pay royalties (almost from the beginning of the 1989 agreement between the parties) in part to the fact that "from the beginning Avonlea was under-capitalised and experienced financial difficulties."

12 As to the prospect that the financial difficulties will likely continue regardless of the outcome of the appeal, I note the following. The bank has demanded repayment of the sum of $333,825.33 on or before today's date by the appellant and Ms. Gallagher personally. There is no convincing evidence that the bank may be prepared to waive this demand in the event that a stay is granted. Further, the damages assessed at trial include an amount in excess of $200,000 in unpaid royalties that were admitted by the appellant to be owing as of January 1994. This admission was subject to certain defences raised at trial that were entirely unsuccessful as lacking any evidentiary basis. A few days ago, Ms. Gallagher admitted in her cross-examination that the appellant is probably not in a position even to pay the costs assessed by the trial judge. Hence, even if the appellant were successful on appeal in having the injunction lifted, the chances of any financial recovery appear to be slight.

13 Based on the material before the court, I am not satisfied that the irreparable harm that is envisaged is one that can be avoided if a stay is granted.

14 Finally, and perhaps most importantly, it is my view that the balance of convenience does not favour the appellant. I find much credence to the respondents' position that it is they who will suffer more harm if the *status quo* that was in existence at the time of judgment is restored.

15 At this point in time, the findings of the trial court must be taken to be *prima facie* correct. The trial judge has found that Ms. Gallagher held an irrational yet firm view that the respondents did not deserve payment of royalties as it was she who was exerting all of the effort and work. The trial judge also noted that at the heart of this lawsuit is a "very distorted sense of fairness" held by Ms. Gallagher that makes her totally unable to appreciate the respondents' point of view. In essence what Ms. Gallagher is seeking on this motion for her company is the ability to maintain a *status quo* that was found to be untenable at trial. There is evidence in the material that Ms. Gallagher has vowed that she will continue selling the products even if unsuccessful at trial. In fact, the appellant has continued to advertise and sell Anne of Green Gables products after the injunction was issued on March 10, 2000. No credible explanation has been offered to justify this conduct.

16 In all the circumstances, I accept the respondents' submission that if this situation is allowed to continue any longer, it will cause irreparable harm to the respondents. The respondents state that the appellant's long-standing and ongoing failure to pay royalties has impaired the ability of other licensees to fairly compete in the market place and has undermined the Authority's licensing program. Several licensees have threatened to discontinue paying royalties if the appellant is permitted to continue operating its business without paying royalties. Several other prospective licensees were awaiting the outcome of the action against the appellant before doing business with the respondents. While the judgment at trial would have undoubtedly restored the credibility of the respondents' licensing program, I accept the submission that a stay of the injunction at this point in the process would make the situation worse than it was before trial and that it would cause irreparable harm.

17 Finally, the appellant has offered no credible assurance that it could or even would abide by the terms of its undertaking. The undertaking is vague in its terms and could not be explained by Ms. Gallagher on her cross-examination. Further, the appellant's promise that it would in fact keep an accounting and pay monies into court is highly suspect given its exhibited attitude and past conduct with respect to the payment of royalties.

18 For these reasons, the appellant's motion is dismissed with costs. I make no comment with respect to the respondents' request for an order for security for costs. While this request was made in the factum, no motion was brought seeking this relief.

Motion dismissed.

Tornado ACS Canada Corp. v. Living Water (Pressure Wash Services) Ltd.

Tornado ACS Canada Corporation, Tornado ACS America Corporation, Saverio Montemarano and John Patrick Solmes (Moving Parties / Plaintiffs) and Living Water (Pressure Wash Services) Ltd., Living Water Advanced Cleaning Systems LLC, Eric Kazemi aka Iraj Kazemi-Seresht and Layla Sedigheh (Responding Parties / Defendants)

Ontario Superior Court of Justice

Heard: May 14, 2010; Judgment: May 25, 2010

***Edward Belobaba J.*:**

1 At the conclusion of the hearing on May 14, 2010, I advised counsel that the plaintiffs' motion for an interlocutory injunction and related relief is granted. Notwithstanding Mr. Khan's impassioned submissions, as I told both counsel and parties, this was not a difficult decision. The evidence and the equities clearly favoured the plaintiffs. I signed a draft Order and I promised written reasons within a few days. These are my reasons.

Overview

2 Iraj (Eric) Kazemi and his wife Layla Sedigheh (the correct spelling is Sedegheh) have owned and operated the Living Water Pressure Wash company for some 13 years.[FN1] As the name suggests, this is a water-pressure cleaning business. The company has eight employees. Eric is in charge.

3 In 2009, Eric learned about a unique "negative pressure" industrial cleaning system being manufactured in Germany called the Tornado that does not use water or chemicals. According to the plaintiffs, the Tornado is the only system of its kind currently in production in the world.

4 Eric contacted the German manufacturer, Systeco, and at the end of February, 2010, Living Water entered into a dealership agreement with the manufacturer becoming the exclusive distributor of the Tornado cleaning machine for Canada and the U.S.

5 Eric quickly realized that neither he nor Living Water had the financial or managerial resources to properly exploit this opportunity. He could not even afford to make the required minimum purchases. With the help of an intermediary and on the advice of his then business advisor, J.P. Solmes, Eric arranged to meet with Saverio Montemarano, a successful home builder and entrepreneur. Saverio was so impressed with the product demonstration that he immediately agreed to provide the investment and management that was needed. Two Tornado companies would be incorporated, one for the Canadian market and the other for the American market.[FN2]

6 On April 9, 2010 Eric and Layla, on behalf of Living Water Pressure Wash and Living Water Advanced Cleaning (a Nevada shell that Eric had hoped to use for the U.S. market), entered into an agreement with Saverio and J.P. (who had come on board to help develop the U.S. market). The defendants agreed to assign the Tornado dealer/distributorship agreement to the Saverio group for $2 million to be paid out to Eric in two streams: (1) $7500 per month commencing seven days after Systeco consented to the assignment; and (2) profit-based payments reflecting

45% of the Canadian company's profits and 35% of the American company's profits. The payments would continue until the promised $2 million had been paid in full - unless the Saverio group stopped marketing the Tornado technology in either Canada or the U.S. in which case the dealership rights would be reassigned to Eric or Layla or "as they may direct."

7 The $2 million amount stemmed from Eric's representation to Saverio that he had invested this amount "in the development and marketing of the Tornado [machine]." Saverio was sceptical about this statement but he agreed to accept it. Eric later explained on cross-examination that this representation was not true. What he meant to say was that he and his family had invested some $2 million in unbilled time and effort over the 13 years building up the Living Water company. A very different proposition altogether. Nonetheless, as Saverio makes clear in his affidavit, he is prepared to honour the commitment that was made: the two newly incorporated Tornado companies will make the $2 million payment as promised in the two streams as described above.

8 On the same day, April 9, 2010, the parties executed the assignment agreements that formally assigned the two dealer agreements for Canada and the U.S. to the two Tornado companies.

9 Three days later, on April 12, Eric advised Saverio and J.P. by email that he had spoken with his lawyer and the agreement had to be revised. Unless all of the needed revisions are made "we cannot move forward." When Saverio spoke to Eric the next day, Eric told him that he was not content with the agreements as executed - he wanted to be a partner with actual ownership in the new companies and not just the recipient of a payment stream that would be capped at $2 million. Eric thought he was getting a 35% and 45% ownership position in the two new companies and not simply that percentage of the profits. Saverio responded that he expected that everyone would abide by the agreements as executed.

10 Saverio has not spoken with or heard from Eric since this discussion.

11 In the days that followed, Saverio discovered that Eric was acting in breach of the April 9 agreements. Specifically: (1) Eric had made no effort to obtain Systeco's consent to the assignments; (2) he took possession of the three Tornado machines that had just arrived from Germany; and (3) he was using and marketing these machines in the Toronto area and thus directly competing with Tornado Canada (referred to in the agreement as Canadaco) in clear breach of section 15 of the agreement. [FN3] (The non-compete provision does not prevent Eric from continuing the conventional business of Living Water, only the use and marketing of the new Tornado technology.)

12 The plaintiffs - the two Tornado companies, Servio and J.P. - commenced an action for injunctive and monetary relief. They also brought this motion for an interlocutory injunction and for possession of the three newly-arrived Tornado machines. On April 30, Justice Cameron adjourned the motion to May 14 and in the interim ordered a "stand still" on both sides.

13 Systeco has taken a neutral position. It has expressed a willingness to work with either side. However, no further units will be shipped and no further steps will be taken until this motion has been adjudicated.

The position of the parties

14 The plaintiffs ask for an interlocutory injunction until trial restraining the defendants from breaching the non-compete provision, that is, restraining them from selling or marketing the Tornado technology to any third party. The plaintiffs have agreed to allow Eric and Living Water to use one of the Tornado machines for their own cleaning-business purposes, provided that they do not engage in any sales or marketing initiatives. The plaintiffs ask that the other Tornado machines in Eric's possession be returned to them immediately.

15 The defendants have not yet filed their statement of defence. They ask that the plaintiffs' motion be dismissed and that Servio be required to return the Tornado machine that was used in the demonstration at his office and is still in his possession.

16 The defendants submit that Eric and Layla were "tricked" into signing the April 9 agreements. They were led to believe that they would be partners and owners in the two Tornado companies. Instead, they were deceived and were forced under duress to accept a payment stream that would do no more than return their original $2 million investment and make Eric into a "lifetime serf" working for the new companies. The defendants submit that the April 9 agreements were unconscionable and cannot provide a basis for the interlocutory relief being sought by the plaintiffs.

Analysis

(1) The interlocutory injunction

17 The plaintiffs ask that the court enforce the non-compete provision. Where the moving party establishes a strong *prima facie* case that a breach of a negative covenant has occurred, the case law suggests that a court will enforce the covenant without much regard for irreparable harm or balance of convenience.[FN4] In my view, given that the defendant is challenging the content of the agreement, the more prudent approach is to apply the traditional three-step test as set out in *RJR-MacDonald*[FN5]

18 Before I do so, however, it may be useful to step back and consider what this dispute is all about. The defendants' complaint, and it may prove to be legitimate, is that they signed the agreements on the understanding or assumption that they would be shareholders in the two new Tornado companies and not just the recipients of a $2 million payment.

19 I pause to note that defendants are also concerned about the fact that Eric will become a "life-time serf" working for the two Tornado companies and that the promised $2 million stream of payments can stop at any time if Eric is fired for non-performance of his contractual duties or fails to demonstrate the validity of the $2 million representation.

20 Neither concern, in my view, is valid. I say this for the following reasons:

(i) There is nothing in the agreement that makes Eric a "life-time serf". The language in section 12 simply provides examples of how Eric's expertise will be used. The same agreement in section 15 assumes that Eric will also continue to spend time working at his

> own company, Living Water. …Eric's concerns about being fired or pushed out and not receiving the $2 million, while the plaintiffs continue to profit, are not valid.
> (ii) In any event, Saverio is on record confirming these points - that regardless of any ambiguity in the agreement, the $2 million payment stream is not connected to Eric's continuing employment or his demonstrating that this quantum was actually invested.

21 To return, then, to the main point. The defendants have not presented any credible evidence that today - just two months after having to borrow $11,000 from Saverio just to pay their bills - they are now ready, willing and financially able to assume responsibility for the North American distribution of the Tornado technology. There is no credible evidence before me that the defendants can do this. Their complaint, as I have already noted, is about not getting the promised ownership position. If they can prove this at trial, this will be a significant achievement. But the remedy, as I understand the defendants' intended pleading, will be rectification and/or a sizeable damages award. Not rescission. This backdrop is important for the three-step *RJR* analysis that follows.

22 *Is there a serious issue to be tried?* There is no dispute about this first point. The plaintiffs say the defendants have breached a non-compete provision that on its face is reasonable in scope and content. It does not restrict the defendants from engaging in a similar business; it merely restricts them from engaging in any business involving the Tornado. In fact, the clause expressly allows for the defendants to engage in offering other power washing systems or services. There is nothing unreasonable in this provision.[FN6] The defendants argue, amongst other things, that they were deceived and acted under duress when they signed the agreements herein. There are certainly serious issues for trial.

23 *Will the plaintiffs suffer irreparable harm if the interlocutory injunction is not granted?* Here again, in my view, the answer is yes. The Tornado cleaning machine is an exciting and unique technology. Apparently, it is one of a kind. However, there is no guarantee that this will remain so. It is obviously important to the plaintiffs to take full advantage of their "first mover" position in the market and begin marketing and selling the product immediately.

24 If the plaintiffs are required to wait a year or two until the contractual dispute is resolved at trial, another competing technology may well be on the market and their "first mover" advantage will be lost. Also, if the interlocutory injunction is refused there is a very real possibility that the defendants' earnest but under-funded efforts at promotion and distribution would dilute the brand and cause more damage than gain.

25 The loss of a "first mover" advantage in the sales and distribution of what appears to be a unique and highly desirable industrial cleaning system is not easily calculable. And even if an appropriate damage award could be calculated, the evidence seems clear that there is little to no chance that the defendants would be financially able to pay it.

26 All of this persuades me that the harm to the plaintiffs would indeed be irreparable if they were unable to preserve the contractual status quo until trial.

27 *Does the balance of convenience favour the granting of the injunctive relief sought by the plaintiffs?* In my view, it does. As already noted, there is no credible evidence before me that the defendants have the financial or managerial capability to resume their original role as exclusive distributors for the North American market. Their primary complaint is about their share of the pie; not about trying to get the pie back. If the defendants' position about promised ownership is accepted at trial, then the appropriate remedy will be some combination of contractual rectification and compensatory damages. The harm, in other words, is not irreparable. It is fully compensable. And there is no suggestion that the plaintiffs would be unable to honour their damages undertaking.

28 The defendants can reasonably wait until trial; the plaintiffs cannot. The balance of convenience clearly favours the plaintiffs.

29 I therefore have no difficulty concluding that the motion for an interlocutory injunction restraining the defendants from breaching the non-compete provision and otherwise interfering with the distribution of the Tornado product in the Canadian and U.S. markets should be granted.

(2) The four Tornado cleaning machines

30 One of the machines was left with Saverio following the demonstration in March. This machine was purchased and paid for prior to the execution of the April agreements. The plaintiffs agree that the defendants can continue to use this machine in the operation of their power washing business. I understand that this unit has now been returned to the defendants.

31 The other three machines were ordered by Eric before he signed the April agreements. However, it is clear on the evidence that these machines arrived on April 13, several days after the assignment agreements were executed and all rights title and interest in the dealership agreement, including the right to possess, sell or market the Tornado had been assigned to the plaintiffs. This obviously included the rights to these three machines.

32 The defendants have been using these new machines in breach of the non-compete provision. One example: according to the evidence of Darren Gradus, the CEO of 911 Restoration Eric gave them a Tornado machine for a demonstration for the Toronto Fire Services on April 16, 2010. The purpose of the demonstration was to obtain a contract to clean one of the Toronto Fire Services' fire houses. 911 Restoration was awarded the cleaning contract and paid the defendants a portion of the profits from the job for the use of the Tornado.

33 The plaintiffs' motion for interim possession under section 104 of the *Courts of Justice Act* and Rule 44 is granted. The plaintiffs shall reimburse the defendants for the purchase price paid by the latter, and the defendants shall immediately thereafter deliver possession of the three machines. I understand from counsel that this has now occurred.

Disposition

34 The plaintiffs' motion for an interlocutory injunction restraining breach of the non-competition clause and for interim possession of the three newly arrived Tornado cleaning

machines is therefore granted for these reasons. Order to go as per the draft Order signed at the conclusion of the hearing. . . .

FN1. In 2006, when Eric had some health concerns, he transferred ownership in the company to Layla and his son Navid. Layla, although educated as a health engineer in Iran, speaks little English and works with Eric "as required." She is primarily a housewife. Eric continues to run the company.

FN2. The parties also agreed that a third Tornado company would be incorporated in due course to market the technology in Turkey, Iran and the Arab Emirates. The agreement provided in section 17 that the "Arabia deal" was "not a priority" and would only be developed as and when Saverio so determined. Counsel have now advised me that the plaintiffs' interest is limited to Canada and the U.S. They have no interest in the "Arabia" market . Eric will be allowed to develop this market as a Tornado distributor if he wishes to do so.

FN3. Section 15 of the Agreement provides as follows: "Layla, Eric, Services and Systems shall not compete with Canadaco or Americaco with respect to the use or marketing of the Tornado ACS (or any improved successor equipment) without the consent of Canadaco or Americaco, as the case may be but shall not be restricted in offering any other power washing system or services."

FN4. *Singh v. 3829537 Canada Inc.*, [2005] O.J. No. 2402 (Ont. S.C.J.) at paras.53-62; *Hargraft Schofield LP v. Schofield*, [2007] O.J. No. 4400 (Ont. S.C.J.) at paras. 16-21; *Key Pos Business Systems Inc. v. Singh*, [2008] O.J. No. 1791 (Ont. S.C.J.) at paras.15-20.

FN5. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17 (S.C.C.) at paras. 76- 80.

FN6. *Miller v. Toews*, [1990] M.J. No. 643 (Man. C.A.), at 2; *Hargraft Schofield LP v. Schofield*, [2007] O.J. No. 4400 (Ont. S.C.J.) at para. 20.

II.3 Discovery; Privilege and Confidentiality

Rules 30 (Discovery); 30.01 (Deemed Undertaking); 31 (Examination for Discovery); 34 (Procedure on Oral Examinations)

RULE 30: DISCOVERY OF DOCUMENTS

INTERPRETATION

30.01 (1) In rules 30.02 to 30.11,

(a) "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form; and

(b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled. R.R.O. 1990, Reg. 194, r. 30.01 (1); O. Reg. 427/01, s. 12; O. Reg. 132/04, s. 6.

(2) In subrule 30.02 (4),

(a) a corporation is a subsidiary of another corporation where it is controlled directly or indirectly by the other corporation; and

(b) a corporation is affiliated with another corporation where,

(i) one corporation is the subsidiary of the other,

(ii) both corporations are subsidiaries of the same corporation, or

(iii) both corporations are controlled directly or indirectly by the same person or persons. R.R.O. 1990, Reg. 194, r. 30.01 (2).

SCOPE OF DOCUMENTARY DISCOVERY

Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (1); O. Reg. 438/08, s. 26.

Production for Inspection

(2) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (2); O. Reg. 438/08, s. 26.

. . .

Subsidiary and Affiliated Corporations and Corporations Controlled by Party

(4) The court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged. R.R.O. 1990, Reg. 194, r. 30.02 (4).

AFFIDAVIT OF DOCUMENTS

Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power. O. Reg. 438/08, s. 27 (1).

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location. R.R.O. 1990, Reg. 194, r. 30.03 (2); O. Reg. 438/08, s. 27 (2).

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit. R.R.O. 1990, Reg. 194, r. 30.03 (3); O. Reg. 438/08, s. 27 (3).

Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings. O. Reg. 653/00, s. 3; O. Reg. 438/08, s. 27 (4).

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial. R.R.O. 1990, Reg. 194, r. 30.03 (5).

INSPECTION OF DOCUMENTS

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power. R.R.O. 1990, Reg. 194, r. 30.04 (1).

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party. R.R.O. 1990, Reg. 194, r. 30.04 (2).

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a

time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection. R.R.O. 1990, Reg. 194, r. 30.04 (3); O. Reg. 575/07, s. 1.

Documents to be Taken to Examination and Trial

(4) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,

(a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and

(b) the trial of the action. R.R.O. 1990, Reg. 194, r. 30.04 (4).

Court may Order Production

(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party. R.R.O. 1990, Reg. 194, r. 30.04 (5).

Court may Inspect to Determine Claim of Privilege

(6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim. R.R.O. 1990, Reg. 194, r. 30.04 (6).

Copying of Documents

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at the party's own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy. R.R.O. 1990, Reg. 194, r. 30.04 (7).

Divided Disclosure or Production

(8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined. R.R.O. 1990, Reg. 194, r. 30.04 (8).

DISCLOSURE OR PRODUCTION NOT ADMISSION OF RELEVANCE

30.05 The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility. R.R.O. 1990, Reg. 194, r. 30.05.

WHERE AFFIDAVIT INCOMPLETE OR PRIVILEGE IMPROPERLY CLAIMED

30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,

(a) order cross-examination on the affidavit of documents;

(b) order service of a further and better affidavit of documents;

(c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and

(d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege. R.R.O. 1990, Reg. 194, r. 30.06.

DOCUMENTS OR ERRORS SUBSEQUENTLY DISCOVERED

30.07 Where a party, after serving an affidavit of documents,

(a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or

(b) discovers that the affidavit is inaccurate or incomplete,

the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents. R.R.O. 1990, Reg. 194, r. 30.07.

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION

Failure to Disclose or Produce Document

30.08 (1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,

(a) if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge; or

(b) if the document is not favourable to the party's case, the court may make such order as is just. R.R.O. 1990, Reg. 194, r. 30.08 (1); O. Reg. 504/00, s. 3.

Failure to Serve Affidavit or Produce Document

(2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may,

(a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;

(b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 30.08 (2).

PRIVILEGED DOCUMENT NOT TO BE USED WITHOUT LEAVE

30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge. R.R.O. 1990, Reg. 194, r. 30.09; O. Reg. 19/03, s. 7.

PRODUCTION FROM NON-PARTIES WITH LEAVE

Order for Inspection

30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

(a) the document is relevant to a material issue in the action; and

(b) it would be unfair to require the moving party to proceed to trial without having discovery of the document. R.R.O. 1990, Reg. 194, r. 30.10 (1).

Notice of Motion

(2) A motion for an order under subrule (1) shall be made on notice,

(a) to every other party; and

(b) to the person not a party, served personally or by an alternative to personal service under rule 16.03. R.R.O. 1990, Reg. 194, r. 30.10 (2).

Court may Inspect Document

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue. R.R.O. 1990, Reg. 194, r. 30.10 (3).

Preparation of Certified Copy

(4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original. R.R.O. 1990, Reg. 194, r. 30.10 (4).

Cost of Producing Document

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise. O. Reg. 260/05, s. 5.

DOCUMENT DEPOSITED FOR SAFE KEEPING

30.11 The court may order that a relevant document be deposited for safe keeping with the registrar and thereafter the document shall not be inspected by any person except with leave of the court. R.R.O. 1990, Reg. 194, r. 30.11.

RULE 30.1: DEEMED UNDERTAKING

APPLICATION

30.1.01 (1) This Rule applies to,

(a) evidence obtained under,

(i) Rule 30 (documentary discovery),

(ii) Rule 31 (examination for discovery),

(iii) Rule 32 (inspection of property),

(iv) Rule 33 (medical examination),

(v) Rule 35 (examination for discovery by written questions); and

(b) information obtained from evidence referred to in clause (a). O. Reg. 61/96, s. 2; O. Reg. 627/98, s. 3.

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1). O. Reg. 61/96, s. 2.

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. O. Reg. 61/96, s. 2; O. Reg. 575/07, s. 4.

Exceptions

. . .

Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just. O. Reg. 61/96, s. 2; O. Reg. 263/03, s. 3.

RULE 31: EXAMINATION FOR DISCOVERY

DEFINITION

31.01 In rules 31.02 to 31.11,

"document" has the same meaning as in clause 30.01 (1) (a). R.R.O. 1990, Reg. 194, r. 31.01.

FORM OF EXAMINATION

31.02 (1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court. R.R.O. 1990, Reg. 194, r. 31.02 (1).

(2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise. R.R.O. 1990, Reg. 194, r. 31.02 (2).

WHO MAY EXAMINE AND BE EXAMINED

Generally

31.03 (1) A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (2) to (8). R.R.O. 1990, Reg. 194, r. 31.03 (1); O. Reg. 438/08, s. 28 (1).

On Behalf of Corporation

(2) Where a corporation may be examined for discovery,

(a) the examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee; and

(b) the examining party may examine more than one officer, director or employee only with the consent of the parties or the leave of the court. O. Reg. 132/04, s. 7.

On Behalf of Partnership or Sole Proprietorship

(3) Where an action is brought by or against a partnership or a sole proprietorship using the firm name,

(a) each person who was, or is alleged to have been, a partner or the sole proprietor, as the case may be, at a material time, may be examined on behalf of the partnership or sole proprietorship; and

(b) the examining party may examine one or more employees of the partnership or sole proprietorship only with the consent of the parties or the leave of the court. O. Reg. 132/04, s. 7.

Requirements for Leave

(4) Before making an order under clause (2) (b) or (3) (b), the court shall satisfy itself that,

(a) satisfactory answers respecting all of the issues raised cannot be obtained from only one person without undue expense and inconvenience; and

(b) examination of more than one person would likely expedite the conduct of the action. O. Reg. 438/08, s. 28 (2).

In Place of Person under Disability

(5) Where an action is brought by or against a party under disability,

(a) the litigation guardian may be examined in place of the person under disability; or

(b) at the option of the examining party, the person under disability may be examined if he or she is competent to give evidence,

but where the litigation guardian is the Children's Lawyer or the Public Guardian and Trustee, the litigation guardian may be examined only with leave of the court. R.R.O. 1990, Reg. 194, r. 31.03 (5); O. Reg. 69/95, ss. 18-20.

. . .

WHEN EXAMINATION MAY BE INITIATED

Examination of Plaintiff

31.04 (1) A party who seeks to examine a plaintiff for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after delivering a statement of defence and, unless the parties agree otherwise, serving an affidavit of documents. R.R.O. 1990, Reg. 194, r. 31.04 (1).

Examination of Defendant

(2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after,

(a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or

(b) the defendant has been noted in default. R.R.O. 1990, Reg. 194, r. 31.04 (2).

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TIME LIMIT

Not to Exceed Seven Hours

31.05.1 (1) No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court. O. Reg. 438/08, s. 29.

Considerations for Leave

(2) In determining whether leave should be granted under subrule (1), the court shall consider,

(a) the amount of money in issue;

(b) the complexity of the issues of fact or law;

(c) the amount of time that ought reasonably to be required in the action for oral examinations;

(d) the financial position of each party;

(e) the conduct of any party, including a party's unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;

(f) a party's denial or refusal to admit anything that should have been admitted; and

(g) any other reason that should be considered in the interest of justice. O. Reg. 438/08, s. 29.

SCOPE OF EXAMINATION

General

31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

(a) the information sought is evidence;

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or

(c) the question constitutes cross-examination on the affidavit of documents of the party being examined. R.R.O. 1990, Reg. 194, r. 31.06 (1); O. Reg. 438/08, s. 30 (1).

Identity of Persons Having Knowledge

(2) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 31.06 (2).

Expert Opinions

(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and

(b) the party being examined undertakes not to call the expert as a witness at the trial. R.R.O. 1990, Reg. 194, r. 31.06 (3); O. Reg. 438/08, s. 30 (2); O. Reg. 453/09, s. 1.

. . .

FAILURE TO ANSWER ON DISCOVERY

Failure to Answer Questions

31.07 (1) A party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question if,

(a) the party or other person refuses to answer the question, whether on the grounds of privilege or otherwise;

(b) the party or other person indicates that the question will be considered or taken under advisement, but no answer is provided within 60 days after the response; or

(c) the party or other person undertakes to answer the question, but no answer is provided within 60 days after the response. O. Reg. 260/05, s. 7.

Effect of Failure to Answer

(2) If a party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question as described in subrule (1), the party may not introduce at the trial the information that was not provided, except with leave of the trial judge. O. Reg. 260/05, s. 7.

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INFORMATION SUBSEQUENTLY OBTAINED

Duty to Correct Answers

31.09 (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,

(a) was incorrect or incomplete when made; or

(b) is no longer correct and complete,

the party shall forthwith provide the information in writing to every other party. R.R.O. 1990, Reg. 194, r. 31.09 (1).

Consequences of Correcting Answers

(2) Where a party provides information in writing under subrule (1),

(a) the writing may be treated at a hearing as if it formed part of the original examination of the person examined; and

(b) any adverse party may require that the information be verified by affidavit of the party or be the subject of further examination for discovery. R.R.O. 1990, Reg. 194, r. 31.09 (2).

Sanction for Failing to Correct Answers

(3) Where a party has failed to comply with subrule (1) or a requirement under clause (2) (b), and the information subsequently discovered is,

(a) favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or

(b) not favourable to the party's case, the court may make such order as is just. R.R.O. 1990, Reg. 194, r. 31.09 (3).

DISCOVERY OF NON-PARTIES WITH LEAVE

General

31.10 (1) The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation. R.R.O. 1990, Reg. 194, r. 31.10 (1).

Test for Granting Leave

(2) An order under subrule (1) shall not be made unless the court is satisfied that,

(a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;

(b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and

(c) the examination will not,

(i) unduly delay the commencement of the trial of the action,

(ii) entail unreasonable expense for other parties, or

(iii) result in unfairness to the person the moving party seeks to examine. R.R.O. 1990, Reg. 194, r. 31.10 (2).

. . .

USE OF EXAMINATION FOR DISCOVERY AT TRIAL

Reading in Examination of Party

31.11 (1) At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of,

(a) the adverse party; or

(b) a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise,

if the evidence is otherwise admissible, whether the party or other person has already given evidence or not. R.R.O. 1990, Reg. 194, r. 31.11 (1); O. Reg. 260/05, s. 8.

Impeachment

(2) The evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness. R.R.O. 1990, Reg. 194, r. 31.11 (2).

Qualifying Answers

(3) Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the trial judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced. R.R.O. 1990, Reg. 194, r. 31.11 (3).

Rebuttal

(4) A party who reads into evidence as part of the party's own case evidence given on an examination for discovery of an adverse party, or a person examined for discovery on behalf or in place of or in addition to an adverse party, may rebut that evidence by introducing any other admissible evidence. R.R.O. 1990, Reg. 194, r. 31.11 (4).

Party under Disability

(5) The evidence given on the examination for discovery of a party under disability may be read into or used in evidence at the trial only with leave of the trial judge. R.R.O. 1990, Reg. 194, r. 31.11 (5).

Unavailability of Deponent

(6) Where a person examined for discovery,

(a) has died;

(b) is unable to testify because of infirmity or illness;

(c) for any other sufficient reason cannot be compelled to attend at the trial; or

(d) refuses to take an oath or make an affirmation or to answer any proper question,

any party may, with leave of the trial judge, read into evidence all or part of the evidence given on the examination for discovery as the evidence of the person examined, to the extent that it would be admissible if the person were testifying in court. R.R.O. 1990, Reg. 194, r. 31.11 (6).

(7) In deciding whether to grant leave under subrule (6), the trial judge shall consider,

(a) the extent to which the person was cross-examined on the examination for discovery;

(b) the importance of the evidence in the proceeding;

(c) the general principle that evidence should be presented orally in court; and

(d) any other relevant factor. R.R.O. 1990, Reg. 194, r. 31.11 (7).

Subsequent Action

(8) Where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former action may be read into or used in evidence at the trial of the subsequent action as if it had been taken in the subsequent action. R.R.O. 1990, Reg. 194, r. 31.11 (8).

EXAMINATIONS OUT OF COURT

RULE 34: PROCEDURE ON ORAL EXAMINATIONS

APPLICATION OF THE RULE

34.01 Rules 34.02 to 34.19 apply to,

(a) an oral examination for discovery under Rule 31;

(b) the taking of evidence before trial under rule 36.01, subject to rule 36.02;

(c) a cross-examination on an affidavit for use on a motion or application under rule 39.02;

(d) the examination out of court of a witness before the hearing of a pending motion or application under rule 39.03; and

(e) an examination in aid of execution under rule 60.18. R.R.O. 1990, Reg. 194, r. 34.01.

BEFORE WHOM TO BE HELD

34.02 (1) An oral examination to be held in Ontario shall be held at a time and place set out in the notice of examination or summons to a witness, before a person assigned by,

(a) an official examiner;

(b) a reporting service agreed on by the parties; or

(c) a reporting service named by the examining party. O. Reg. 171/98, s. 8.

(2) A person who objects to being examined at the time or place set out in the notice of examination or before a person assigned under subrule (1) may make a motion to show that the time, place or person is unsuitable for the proper conduct of the examination. O. Reg. 171/98, s. 8.

(3) If a motion under subrule (2) is dismissed, the court shall fix the responding party's costs on a substantial indemnity basis and order the moving party to pay them forthwith, unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable. O. Reg. 171/98, s. 8; O. Reg. 284/01, s. 8.

PLACE OF EXAMINATION

34.03 Where the person to be examined resides in Ontario, the examination shall take place in the county in which the person resides, unless the court orders or the person to be examined and all the parties agree otherwise. R.R.O. 1990, Reg. 194, r. 34.03.

HOW ATTENDANCE REQUIRED

Party

34.04 (1) Where the person to be examined is a party to the proceeding, a notice of examination (Form 34A) shall be served,

(a) on the party's lawyer of record; or

(b) where the party acts in person, on the party, personally or by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (1); O. Reg. 739/94, s. 2 (1); O. Reg. 575/07, s. 20 (1).

Person Examined on Behalf or in Place of Party

(2) Where a person is to be examined for discovery or in aid of execution on behalf or in place of a party, a notice of examination shall be served,

(a) on the party's lawyer of record; or

(b) on the person to be examined, personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (2); O. Reg. 575/07, s. 20 (2).

Deponent of Affidavit

(3) Where a person is to be cross-examined on an affidavit, a notice of examination shall be served,

(a) on the lawyer for the party who filed the affidavit; or

(b) where the party who filed the affidavit acts in person, on the person to be cross-examined, personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (3); O. Reg. 739/94, s. 2 (2); O. Reg. 575/07, s. 1.

Others

(4) Where the person to be examined,

(a) is neither a party nor a person referred to in subrule (2) or (3); and

(b) resides in Ontario,

the person shall be served with a summons to witness (Form 34B), personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (4).

. . .

Person Outside Ontario

(7) Rule 53.05 (summons to a witness outside Ontario) applies to the securing of the attendance for examination of a person outside Ontario and the attendance money paid or tendered to the person shall be calculated in accordance with the *Interprovincial Summonses Act*. R.R.O. 1990, Reg. 194, r. 34.04 (7).

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NOTICE OF TIME AND PLACE

Person to be Examined

34.05 (1) Where the person to be examined resides in Ontario, he or she shall be given not less than two days notice of the time and place of the examination, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 34.05 (1).

Every Other Party

(2) Every party to the proceeding other than the examining party shall be given not less than two days notice of the time and place of the examination. R.R.O. 1990, Reg. 194, r. 34.05 (2).

EXAMINATIONS ON CONSENT

34.06 A person to be examined and all the parties may consent to the time and place of the examination and,

(a) to the minimum notice period and the form of notice; or

(b) to dispense with notice. R.R.O. 1990, Reg. 194, r. 34.06.

WHERE PERSON TO BE EXAMINED RESIDES OUTSIDE ONTARIO

Contents of Order for Examination

34.07 (1) Where the person to be examined resides outside Ontario, the court may determine,

(a) whether the examination is to take place in or outside Ontario;

(b) the time and place of the examination;

(c) the minimum notice period;

(d) the person before whom the examination is to be conducted;

(e) the amount of attendance money to be paid to the person to be examined; and

(f) any other matter respecting the holding of the examination. R.R.O. 1990, Reg. 194, r. 34.07 (1).

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Examining Party to Serve Transcript

(7) The registrar shall send the transcript to the lawyer for the examining party and the lawyer shall forthwith serve every other party with the transcript free of charge. R.R.O. 1990, Reg. 194, r. 34.07 (7); O. Reg. 575/07, s. 1.

PERSON TO BE EXAMINED TO BE SWORN

34.08 (1) Before being examined, the person to be examined shall take an oath or make an affirmation and, where the examination is conducted in Ontario, the oath or affirmation shall be administered by an official examiner or by a person authorized to administer oaths in Ontario. R.R.O. 1990, Reg. 194, r. 34.08 (1).

(2) Where the examination is conducted outside Ontario, the oath or affirmation may be administered by the person before whom the examination is conducted, a person authorized to administer oaths in Ontario or a person authorized to take affidavits or administer oaths or affirmations in the jurisdiction where the examination is conducted. R.R.O. 1990, Reg. 194, r. 34.08 (2).

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PRODUCTION OF DOCUMENTS ON EXAMINATION

Interpretation

34.10 (1) Subrule 30.01 (1) (meaning of “document”, “power”) applies to subrules (2), (3) and (4). R.R.O. 1990, Reg. 194, r. 34.10 (1).

Person to be Examined Must Bring Required Documents and Things

(2) The person to be examined shall bring to the examination and produce for inspection,

(a) on an examination for discovery, all documents in his or her possession, control or power that are not privileged and that subrule 30.04 (4) requires the person to bring; and

(b) on any examination, including an examination for discovery, all documents and things in his or her possession, control or power that are not privileged and that the notice of examination or summons to witness requires the person to bring. R.R.O. 1990, Reg. 194, r. 34.10 (2).

Notice or Summons May Require Documents and Things

(3) Unless the court orders otherwise, the notice of examination or summons to witness may require the person to be examined to bring to the examination and produce for inspection,

(a) all documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privileged; or

(b) such documents or things described in clause (a) as are specified in the notice or summons. R.R.O. 1990, Reg. 194, r. 34.10 (3); O. Reg. 438/08, s. 31.

Duty to Produce Other Documents

(4) Where a person admits, on an examination, that he or she has possession or control of or power over any other document that is relevant to a matter in issue in the proceeding and is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination, and if not, within two days thereafter, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 34.10 (4); O. Reg. 453/09, s. 2.

RE-EXAMINATION

On Examination for Discovery

34.11 (1) A person being examined for discovery may be re-examined by his or her own lawyer and by any party adverse in interest to the examining party. R.R.O. 1990, Reg. 194, r. 34.11 (1); O. Reg. 575/07, s. 3.

On Cross-Examination on Affidavit or Examination in Aid of Execution

(2) A person being cross-examined on an affidavit or examined in aid of execution may be re-examined by his or her own lawyer. R.R.O. 1990, Reg. 194, r. 34.11 (2); O. Reg. 575/07, s. 3.

Timing and Form

(3) The re-examination shall take place immediately after the examination or cross-examination and shall not take the form of a cross-examination. R.R.O. 1990, Reg. 194, r. 34.11 (3).

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OBJECTIONS AND RULINGS

34.12 (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded. R.R.O. 1990, Reg. 194, r. 34.12 (1).

(2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing. R.R.O. 1990, Reg. 194, r. 34.12 (2).

(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the court. R.R.O. 1990, Reg. 194, r. 34.12 (3).

34.13 Revoked: O. Reg. 171/98, s. 10.

IMPROPER CONDUCT OF EXAMINATION

Adjournment to Seek Directions

34.14 (1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,

(a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;

(b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;

(c) many of the answers to the questions are evasive, unresponsive or unduly lengthy; or

(d) there has been a neglect or improper refusal to produce a relevant document on the examination. R.R.O. 1990, Reg. 194, r. 34.14 (1).

Sanctions for Improper Conduct or Adjournment

(2) Where the court finds that,

(a) a person's improper conduct necessitated a motion under subrule (1); or

(b) a person improperly adjourned an examination under subrule (1),

the court may order the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and the court may fix the costs and make such other order as is just. R.R.O. 1990, Reg. 194, r. 34.14 (2).

SANCTIONS FOR DEFAULT OR MISCONDUCT BY PERSON TO BE EXAMINED

34.15 (1) Where a person fails to attend at the time and place fixed for an examination in the notice of examination or summons to witness or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that he or she is required to produce or to comply with an order under rule 34.14, the court may,

(a) where an objection to a question is held to be improper, order or permit the person being examined to reattend at his or her own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;

(b) where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party's proceeding or strike out the party's defence;

(c) strike out all or part of the person's evidence, including any affidavit made by the person; and

(d) make such other order as is just. R.R.O. 1990, Reg. 194, r. 34.15 (1).

(2) Where a person does not comply with an order under rule 34.14 or subrule (1), a judge may make a contempt order against the person. R.R.O. 1990, Reg. 194, r. 34.15 (2).

EXAMINATION TO BE RECORDED

34.16 Every examination shall be recorded in its entirety in question and answer form in a manner that permits the preparation of a typewritten transcript of the examination, unless the court orders or the parties agree otherwise. R.R.O. 1990, Reg. 194, r. 34.16.

TYPEWRITTEN TRANSCRIPT

34.17 (1) Where a party so requests, the official examiner or person who recorded an examination shall have a typewritten transcript of the examination prepared and completed within four weeks after receipt of the request. R.R.O. 1990, Reg. 194, r. 34.17 (1).

(2) The transcript shall be certified as correct by the person who recorded the examination, but need not be read to or signed by the person examined. R.R.O. 1990, Reg. 194, r. 34.17 (2).

(3) As soon as the transcript is prepared, the official examiner or person who recorded the examination shall send one copy to each party who has ordered and paid for a transcript and, if a party so requests and pays for it, shall provide an additional copy for the use of the court. R.R.O. 1990, Reg. 194, r. 34.17 (3).

FILING OF TRANSCRIPT

Party to Have Transcript Available

34.18 (1) It is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the court. R.R.O. 1990, Reg. 194, r. 34.18 (1).

Filing for Use on Motion or Application

(2) Where a party intends to refer to a transcript on the hearing of a motion or application, a copy of the transcript for the use of the court shall be filed in the court office where the motion or application is to be heard, at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 34.18 (2); O. Reg. 171/98, s. 11; O. Reg. 394/09, s. 14.

(3) The party may file a copy of a portion of the transcript if the other parties consent. R.R.O. 1990, Reg. 194, r. 34.18 (3).

Filing for Use at Trial

(4) A copy of a transcript for the use of the court at trial shall not be filed until a party refers to it at trial, and the trial judge may read only the portions to which a party refers. R.R.O. 1990, Reg. 194, r. 34.18 (4).

VIDEOTAPING OR OTHER RECORDING OF EXAMINATION

34.19 (1) On consent of the parties or by order of the court, an examination may be recorded by videotape or other similar means and the tape or other recording may be filed for the use of the court along with the transcript. R.R.O. 1990, Reg. 194, r. 34.19 (1).

(2) Rule 34.18 applies, with necessary modifications, to a tape or other recording made under subrule (1). R.R.O. 1990, Reg. 194, r. 34.19 (2).

1. **LP: Substantial Purpose or Predominant Purpose? *Waugh v. British Rw. Bd.*, [1980] A.C. 521 (H.L.)**

> My Lords, the appellant's husband was an employee of the British Railways Board. A locomotive which he was driving collided with another so that he was crushed against a tank wagon. He received injuries from which he died. . . . [T]his appeal arises out of an interlocutory application for discovery by the board of a report called the 'joint inquiry report,' made by two officers of the board two days after the accident. This was resisted by the board on the ground of [LP].
> …
> [The LP] is sometimes ascribed to the exigencies of the adversary system of litigation under which a litigant is entitled within limits to refuse to disclose the nature of his case until the trial. …. This argument cannot be denied some validity even where the defendant is a public corporation whose duty it is … to place all the facts before the public and to pay proper compensation to those it has injured. A more powerful argument to my mind is that everything should be done in order to encourage anyone who knows the facts to state them fully and candidly - as Sir George Jessel M.R. said, to bare his breast to his lawyer: Anderson v. Bank of British Columbia (1876) 2 Ch.D. 644 ,699. This he may not do unless he knows that his communication is privileged.
>
> [But there is a countervailing interest in favour of disclosure, because] in accident cases '... the safety of the public may well depend on the candour and completeness of reports made by subordinates whose duty it is to draw attention to defects': Conway v. Rimmer [1968] A.C. 910 , *per* Lord Reid, at p. 941. …
>
> So … while privilege may be required in order to induce candour in statements made for the purposes of litigation it is not required in relation to statements whose purpose is different - for example to enable a railway to operate safely.
> … [T]he due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence, but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation. At the lowest such desirability of protection as might exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available. …
>
> It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly: as to this I agree with Barwick C.J. in Grant v. Downs, 135 C.L.R. 674 , and in substance with Lord Denning M.R. While fully respecting the necessity for the Lords Justices to follow previous decisions of their court, I find myself in the result in agreement with Lord Denning's judgment. I would allow the appeal and order disclosure of the joint report.

2. Privilege Logs and Reasons for Asserting Privilege: *Grossman v. Toronto General Hospital* (1983), 41 O.R. (2d) 457

1 The action arises out of the death of Howard Grossman who is claimed to have been lost while a patient in the Toronto General Hospital (the hospital). It is alleged that his body was discovered after 12 days in an air duct shaft in the hospital.

2 The defence entered by the hospital for itself and its staff amounts to a general traverse. Not even the death was directly admitted.

3 That document gave a hint of what was in store for plaintiffs. The hospital's affidavit on production (the affidavit) revealed only one thing the hospital had no objection to producing: the deceased's hospital record.

. . .

17 Defendants' position is essentially this: plaintiffs have failed to establish that any documents exist that should be produced other than the deceased's medical record …. When I expressed surprise that a 12-day search for a missing patient in a hospital would not have produced one scrap of paper relevant to the issues in this law suit Mrs. Farrer replied that any such piece of paper would be privileged, the hospital having retained solicitors at a very early point.

18 That may be so. It may be a proper basis for a claim of privilege for any and all documents other than the one thing produced voluntarily and the others forced out of defendants' hands by reason of the motion before the Master …. However, no one could have told from reading defendants' original affidavit whether or not that claim was justified. The answer made in the second part of the first schedule is a mere boiler-plate calculated to conceal all and any documents from inspection. The result was to deprive opposing counsel of any basis for challenging the privilege claimed. Equally, if a challenge had been made, no Court could have decided it, without resorting to ordering production to the Court of all the documents referred to in the second part of the first schedule. Since no one could have known from reading the schedule what documents are referred to, that would have been an order made in the dark.

19 The Rules of Practice are designed to facilitate production, not frustrate it. …

20 [The rule now embodied in R. 30.03] requires that documents to which objection is taken be "set forth" in the schedule. Defendants' response to that requirement sets forth nothing at all: it merely states in general terms why nothing need be set forth. …

22 … The integrity of the system depends upon the willingness of lawyers to require full and fair discovery of their clients. The system is, in a sense, in the hands of the lawyers. The opportunity for stonewalling and improper concealment is there. Some solicitors grasp it. They will make only such production as can be forced from them. That is bad practice. It can work real injustice. It causes delay and expense while the other side struggles to see that which they had a right to see from the first. In such a contest the advantage is to the long purse. The worst consequence is that the strategy is sometimes successful, giving its perpetrators a disreputable advantage. The practice must be condemned. It if were widespread it would undermine the trial system.

…

26 It has equally always been the case that sufficient information must be given of documents for which privilege is claimed to enable a party opposed in interest to be able to identify them. It is not, however, necessary to go so far as to give an indirect discovery. Williston and Rolls continue, at p. 898:

Where privilege is claimed a description of the documents must be given sufficient to identify them and to enable an order for their production to be enforced if the claim of privilege is bad, but no details need be given which would enable the opposite party to discover indirectly the contents of the documents. …

42 Modern Courts strongly favour disclosure. Whatever the practice might have been in the dark ages of the forms of action, one has only to read Latchford J's. decision in Henderson v. Mercantile Trust Co. (1922), 52 O.L.R. 198 (H.C.), to know what the rule has been here for many years [p. 202]:

> It is, I think, greatly to be desired that each party to any litigation should know - so far as it may properly be known - the exact position occupied by his opponent and the precise nature of every document likely to strengthen or weaken that position. All discovery is directed to that end, and the tendency of our Courts in modern times is to widen all avenues to discovery.

3. Does "Lawyering up" Necessarily Mean Immunizing from Discovery? *R. v. McCarthy Tétrault* (1992), 95 D.L.R. (4th) 94 [*Re Search Warrant Executed on the Offices of McCarthy Tétrault, Toronto*]

1 This is a ruling under s. 160(8) of the *Provincial Offences Act*, R.S.O. 1990, c. P. 33, with respect to whether a claim of solicitor-client privilege should be sustained in respect of a number of documents seized pursuant to a search warrant issued under s. 158(1) of the Act. Under the authority of the warrant, the documents were seized from the law firm of McCarthy Tétrault on April 14, 1992. In accordance with the provisions of s. 160(1) and (2) of the Act, the investigators who conducted the search did not examine or make copies of any documents, but rather permitted them to be placed in a sealed envelope which has been filed, unopened, with the clerk of this court.

B. The Relevant Facts

2 Neil Rickey is an investigator with the Ontario Ministry of the Environment ... The investigation which he has been conducting concerns alleged spills of wastes at the Lafarge Canada Inc. cement plant at Bath, Ontario. Donald Stafford is the environmental and process quality manager for Lafarge at the Bath facility. The law firm of McCarthy Tétrault was at all material times retained by Lafarge Canada Inc. to provide legal advice. The solicitor at McCarthy Tétrault who is responsible … is Douglas Thompson. The applicants … assert that the documents in issue are protected from seizure by solicitor-client privilege. …

3 On July 29 and 30, 1991, Mr. Thompson attended a meeting at the Bath facility. Mr. Stafford was present … as was the environmental director for Lafarge Canada's American parent, and … senior managers of the Lafarge group of companies. According to the affidavit which Mr. Thompson filed in support of this application, "the purpose of the meeting was to receive confidential information and provide legal advice concerning the compliance of the Bath facility with applicable environmental statutes, regulations and policies." Mr. Thompson further deposed that during the course of the meeting confidential discussions also took place regarding a potential prosecution in relation to a coal storage settling pond at the Bath facility. The only notes of the meeting were taken by Thompson. He deposed "that the documents for which Lafarge claims privilege are notes and memoranda prepared by me of confidential communications between me and my client, and confidential communications from my client, which were prepared for the purpose of receiving information and providing or recording the provision of ... legal advice" in relation to the facility's compliance with the relevant legal requirements. …

5 The claim of privilege made by the applicants is resisted by the Crown on the basis that while Mr. Thompson is a solicitor, and Lafarge Canada Inc. is his client, the purpose of the meeting on July 29 and 30 was not to obtain Mr. Thompson's "legal" advice, and any documents generated for use at this meeting or developed as a result of the meeting were not intended to be confidential. …

8 In *Solosky v. Canada* (1979), 50 C.C.C. (2d) 495 (S.C.C.) after setting out that statement from *Wigmore*, Dickson J. stated, at p. 507:
There are exceptions to the [SCP]. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach ...

9 The requirement that the advice sought be "legal" advice is fundamental to the privilege. In *Minter v. Priest*, [1930] A.C. 558, Lord Buckmaster stated at p. 568:
The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship, but outside the boundary *the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client affords no protection.* [Emphasis added.]

12 [Here, the parties disagree as to] the nature and incidence of the burden of proof with respect to a claim of privilege. Mr. Berger, for the Crown, submitted that the onus is on the party asserting the privilege to establish all the elements of it on a balance of probabilities. Mr. Bryant, for the applicants, submitted that in relation to whether the communication was between a solicitor and his or her client, the party asserting the privilege bears both an evidential burden and the burden of persuasion, the latter requiring proof on a balance of probabilities. He submitted, however, that once the status of the parties to the communication is established, the party asserting the privilege need only adduce *some* evidence in relation to the remaining requirements of the privilege in order to shift to the opposing party the burden of disproving those requirements. In addition, he submitted, the burden to be met by the party seeking disclosure was proof beyond a reasonable doubt. …

21 It is a general rule — albeit one perhaps more honoured in the breach — that the party asserting a fact must prove it. For the reasons set out above, I am satisfied that this rule should be applied to a determination of a claim of solicitor-client privilege. Consequently, on this application, the applicants must establish, on a balance of probabilities, that the criteria for the privilege as set out in *Solosky v. Canada*, supra, exist.
…
25 The elasticity of the term "environmental audit" is well recognized. In "Confidentiality in Environmental Auditing", 1 J.E.L.P. 1, Paul Edwards states, at pp. 5-6:

> The objectives or purposes of an environmental audit will vary widely. In fundamental terms, the purposes of most audits will be those described by Environment Canada; that is, to verify compliance with legal requirements and with the organization's own policies and standards. Some audits, however, will be for the sole purpose of assessing legislative compliance. Others may be designed to assist facility management in improving their performance, to assess risks, or to identify potential cost savings ...
>
> The term "environmental audit" is not a term of art, and somewhat loosely describes a spectrum of activities. Some corporations deliberately avoid using the term "audit"; others employ it deliberately in order to establish credibility with outside agencies. Other terms that are sometimes

used to describe similar activities include: environmental site assessment, evaluation, survey and review.

…

27 It is clear that characterizing an exercise as an environmental audit does not, in itself, answer the question of whether the information communicated to a solicitor as part of the exercise is privileged. Thus, the relevant inquiry in the case at bar is not whether the meeting on July 29 and 30 at the Bath facility should or should not be termed an environmental audit, but rather whether the exercise that was conducted at that meeting was truly conducted for the bona fide purpose of obtaining legal advice from Mr. Thompson.

…

30 With respect to the particular circumstances of the case at bar, Mr. Berger submitted that the meeting at the Bath facility was an environmental audit, conducted for internal corporate purposes, rather than an assessment of Lafarge's compliance with the law. He submitted that the information developed at such an audit would necessarily be intended to be shared widely, not only within the company but, if the company's written environmental policy is to be taken seriously, with persons outside of the company. He characterized Mr. Thompson's evidence as an ex post facto recasting of the purpose of the meeting in order to shelter the company behind a solicitor-client privilege.

31 There is little in the record before me to support those submissions. The strongest circumstance in the Crown's favour is the reminder notice sent in advance of the meeting to the apparent participants, including Mr. Thompson. It described the meeting as an environmental audit, and Thompson's role as "the keeper and recorder of the information developed," and it made no reference to the obtaining of a legal opinion. However, Mr. Thompson was confronted with that document in cross-examination, and he was adamant that it did not reflect accurately the role which it was clearly understood that he was to play at the meeting. He testified that immediately following the meeting he prepared a written opinion which was circulated only to those who had attended. He testified that this document was contained in the sealed packet, available for the court's perusal.

32 Mr. Thompson was a credible witness. In addition, I have now had the opportunity of reviewing the document he prepared for his client as well as the related documents which were placed in the sealed envelope. In my opinion, they confirm Mr. Thompson's evidence as to the purpose of the meeting and his role in it. I accept his evidence. Whatever may be the legitimate general concerns of regulatory agencies with respect to the role of solicitors in environmental audits, there is no reason, on the facts of this case, not to take Mr. Thompson's evidence at face value.

33 As a practical matter, the rejection of the Crown's submission that the purpose of the meeting with Mr. Thompson was other than to obtain legal advice disposes of the Crown's related submission that the communications were not intended to be confidential. I find, based on the affidavit and viva voce evidence of Mr. Thompson, that they were so intended.

E. Disposition

34 For the foregoing reasons, I find that the claim of solicitor-client privilege, which has been made in relation to documents seized from the law firm of McCarthy Tétrault on April 14, 1992, has been established, and the claim is accordingly sustained.

35 In order to preserve the confidentiality of the documents while at the same time preserving the status quo pending any appeal from this ruling, I order that the documents remain sealed and in the possession of the clerk of this court pending further order of this court, or any other court having jurisdiction over these proceedings, on application brought by any of the parties.

Minister of Justice (Appellant) and Sheldon Blank (Respondent) and Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners)

Supreme Court of Canada
McLachlin C.J.C., Bastarache, Binnie, Deschamps, Fish, Abella, Charron JJ.
Judgment: September 8, 2006

Proceedings: affirming [2005] 1 F.C.R. 403

Counsel: Graham Garton, Q.C., Christopher M. Rupar for Appellant
Sheldon Blank for himself

Fish J.:

I

1 This appeal requires the Court, for the first time, to distinguish between two related but conceptually distinct exemptions from compelled disclosure: the solicitor-client privilege and the litigation privilege. They often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time or meaning.

2 More particularly, we are concerned in this case with the litigation privilege, with how it is born and when it must be laid to rest. And we need to consider that issue in the narrow context of the Access to Information Act, R.S.C. 1985, c. A-1 ("Access Act"), but with prudent regard for its broader implications on the conduct of legal proceedings generally.

3 This case has proceeded throughout on the basis that "solicitor-client privilege" was intended, in s. 23 of the Access Act, to include the litigation privilege which is not elsewhere mentioned in the Act. Both parties and the judges below have all assumed that it does.

4 As a matter of statutory interpretation, I would proceed on the same basis. The Act was adopted nearly a quarter-century ago. It was not uncommon at the time to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the Act. And it explains as well why, despite the Act's silence in this regard, I agree with the parties and the courts below that the Access Act has not deprived the government of the protection previously afforded to it by the legal advice privilege and the litigation privilege: In interpreting and applying the Act, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

5 In short, we are not asked in this case to decide whether the government can invoke litigation privilege. Quite properly, the parties agree that it can. Our task, rather, is to examine the defining characteristics of that privilege and, more particularly, to determine its lifespan.

6 The Minister contends that the solicitor-client privilege has two "branches", one concerned with confidential communications between lawyers and their clients, the other relating to information and materials gathered or created in the litigation context. The first of these branches, as already indicated, is generally characterized as the "legal advice privilege"; the second, as the "litigation privilege".

7 Bearing in mind their different scope, purpose and rationale, it would be preferable, in my view, to recognize that we are dealing here with distinct conceptual animals and not with two

branches of the same tree. Accordingly, I shall refer in these reasons to the solicitor-client privilege as if it includes only the legal advice privilege, and shall indeed use the two phrases — solicitor-client privilege and legal advice privilege — synonymously and interchangeably, except where otherwise indicated.

8 As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.

9 The Minister's claim of litigation privilege fails in this case because the privilege claimed, by whatever name, has expired: The files to which the respondent seeks access relate to penal proceedings that have long terminated. By seeking civil redress for the manner in which those proceedings were conducted, the respondent has given them neither fresh life nor a posthumous and parallel existence.

10 I would therefore dismiss the appeal.

II

11 The respondent is a self-represented litigant who, though not trained in the law, is no stranger to the courts. He has accumulated more than ten years of legal experience first-hand, initially as a defendant and then as a petitioner and plaintiff. In his resourceful and persistent quest for information and redress, he has personally instituted and conducted a plethora of related proceedings, at first instance and on appeal, in federal and provincial courts alike.

12 This saga began in July 1995, when the Crown laid 13 charges against the respondent and Gateway Industries Ltd. ("Gateway") for regulatory offences under the Fisheries Act, R.S.C. 1985, c. F-14, and the Pulp and Paper Effluent Regulations, SOR/92-269. The respondent was a director of Gateway. Five of the charges alleged pollution of the Red River and another eight alleged breaches of reporting requirements.

13 The counts relating to reporting requirements were quashed in 1997 and the pollution charges were quashed in 2001. In 2002, the Crown laid new charges by way of indictment — and stayed them prior to trial. The respondent and Gateway then sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers.

14 This appeal concerns the respondent's repeated attempts to obtain documents from the government. He succeeded only in part. His requests for information in the penal proceedings and under the Access Act were denied by the government on various grounds, including "solicitor-client privilege". The issue before us now relates solely to the Access Act proceedings. We have not been asked to decide whether the Crown properly fulfilled, in the criminal proceedings, its disclosure obligations under R. v. Stinchcombe, [1991] 3 S.C.R. 326 (S.C.C.). And in the record before us, we would in any event be unable to do so.

15 In October 1997, and again in May 1999, the respondent requested from the Access to Information and Privacy Office of the Department of Justice all records pertaining to his prosecution and the prosecution of Gateway. Only some of the requested documents were furnished.

16 Additional materials were released after the respondent lodged a complaint with the Information Commissioner. The Director of Investigation found that the vast majority of the

remaining documents were properly exempted from disclosure under the solicitor-client privilege.

17 The respondent pursued the matter further by way of an application for review pursuant to s. 41 of the Access Act. Although the appellant relied on various exemptions from disclosure in the Access Act, proceedings before the motions judge focussed on the appellant's claims of solicitor-client privilege in reliance on s. 23 of the Access Act.

18 On the respondent's application, Campbell J. held that documents excluded from disclosure pursuant to litigation privilege should be released if the litigation to which the record relates has ended (Blank v. Canada (Department of Justice), 2003 CarswellNat 5040, 2003 FCT 462 (F.C.)).

19 On appeal, the Federal Court of Appeal divided on the duration of the privilege. Pelletier J.A., for the majority on this point, found that litigation privilege, unlike legal advice privilege, expires with the end of the litigation that gave rise to the privilege, "subject to the possibility of defining ... litigation ... broadly" (2004 FCA 287, at para. 89). He therefore held that s. 23 of the Access Act did not apply to the documents for which a claim of litigation privilege is made in this case because the criminal prosecution had ended. . . .

III

21 Section 23 of the Access Act provides:

> The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

22 The narrow issue before us is whether documents once subject to the litigation privilege remain privileged when the litigation ends.

23 According to the appellant, this Court has determined that litigation privilege is a branch of the solicitor-client privilege and benefits from the same near-absolute protection, including permanency. But none of the cases relied on by the Crown support this assertion. The Court has addressed the solicitor-client privilege on numerous occasions and repeatedly underlined its paramount significance, but never yet considered the nature, scope or duration of the litigation privilege.

. . .

25 It is evident from the text and the context of these decisions, however, that they relate only to the legal advice privilege, or solicitor-client privilege properly so called, and not to the litigation privilege as well.

26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and

third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)

R.J. Sharpe, "Claiming Privilege in the Discovery Process", in Law in Transition: Evidence, [1984] Special Lect. L.S.U.C. 163, at pp. 164-65.

29 . . . [T]he decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege . . .

30 American and English authorities are to the same effect . . .In the United States communications with third parties and other materials prepared in anticipation of litigation are covered by the similar "attorney work product" doctrine. This "distinct rationale" theory is also supported by the majority of academics . . .

31 Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. But treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both.

32 Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see Alberta Treasury Branches v. Ghermezian (1999),

242 A.R. 326, 1999 ABQB 407 (Alta. Q.B.). A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the sine qua non of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

33 In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

34 The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

35 Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary," to use the language of the U.S. Supreme Court in Hickman, at p. 516.

36 I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege …

37 Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

38 As mentioned earlier, however, the privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim" (at para. 89): see Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 90 A.R. 323 (Alta. C.A.).

39 At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

40 As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (Sharpe, p. 165). This purpose, in the context of s. 23 of the Access Act must take into account the nature of much government litigation. In the 1980s, for example, the federal government confronted litigation across Canada arising out of its urea formaldehyde insulation program. The parties were different and the specifics of each claim were different but the underlying liability issues were common across the country.

41 In such a situation, the advocate's "protected area" would extend to work related to those underlying liability issues even after some but not all of the individual claims had been disposed of. There were common issues and the causes of action, in terms of the advocate's work product, were closely related. When the claims belonging to that particular group of causes of action had all been dealt with, however, litigation privilege would have been exhausted, even if subsequent disclosure of the files would reveal aspects of government operations or general litigation strategies that the government would prefer to keep from its former adversaries or other requesters under the Access Act. Similar issues may arise in the private sector, for example in the case of a manufacturer dealing with related product liability claims. In each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process.

IV

42 In this case, the respondent claims damages from the federal government for fraud, conspiracy, perjury and abuse of prosecutorial powers. Pursuant to the Access Act, he demands the disclosure to him of all documents relating to the Crown's conduct of its proceedings against him. The source of those proceedings is the alleged pollution and breach of reporting requirements by the respondent and his company.

43 The Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born.

44 The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a prima facie showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

46 Finally, in the Court of Appeal, Létourneau J.A., dissenting on the cross-appeal, found that the government's status as a "recurring litigant" could justify a litigation privilege that outlives its common law equivalent. In his view, the "[a]utomatic and uncontrolled access to the government lawyer's brief, once the first litigation is over, may impede the possibility of effectively adopting and implementing [general policies and strategies]" (para. 42).

47 I hesitate to characterize as "[a]utomatic and uncontrolled" access to the government lawyer's brief once the subject proceedings have ended. In my respectful view, access will in fact be neither automatic nor uncontrolled.

48 First, as mentioned earlier, it will not be automatic because all subsequent litigation will remain subject to a claim of privilege if it involves the same or related parties and the same or related source. It will fall within the protective orbit of the same litigation defined broadly.

49 Second, access will not be uncontrolled because many of the documents in the lawyer's brief will, in any event, remain exempt from disclosure by virtue of the legal advice privilege. In practice, a lawyer's brief normally includes materials covered by the solicitor-client privilege because of their evident connection to legal advice sought or given in the course of, or in relation to, the originating proceedings. The distinction between the solicitor-client privilege and the litigation privilege does not preclude their potential overlap in a litigation context.

50 Commensurate with its importance, the solicitor-client privilege has over the years been broadly interpreted by this Court. In that light, anything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged.

51 I hasten to add that the Access Act is a statutory scheme aimed at promoting the disclosure of information in the government's possession. Nothing in the Act suggests that Parliament intended by its adoption to extend the lifespan of the litigation privilege when a member of the public seeks access to government documents.

52 The language of s. 23 is, moreover, permissive. It provides that the Minister may invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours more government disclosure, not less.

53 The extended definition of litigation, as I indicated earlier, applies no less to the government than to private litigants. As a result of the Access Act, however, its protection may prove less effective in practice. The reason is this. Like private parties, the government may invoke the litigation privilege only when the original or extended proceedings are pending or apprehended. Unlike private parties, however, the government may be required under the terms of the Access Act to disclose information once the original proceedings have ended and related proceedings are neither pending nor apprehended. A mere hypothetical possibility that related proceedings may in the future be instituted does not suffice. Should that possibility materialize — should related proceedings in fact later be instituted — the government may well have been required in the interim, in virtue of the Access Act, to disclose information that would have otherwise been privileged under the extended definition of litigation. This is a matter of legislative choice and not judicial policy. It flows inexorably from Parliament's decision to adopt the Access Act. Other provisions of the Access Act suggest, moreover, that Parliament has in fact recognized this consequence of the Act on the government as litigator, potential litigant and guardian of personal safety and public security.

54 For example, pursuant to s. 16(1)(b) and (c), the government may refuse to disclose any record that contains information relating to investigative techniques or plans for specific lawful investigations or information the disclosure of which could reasonably be expected to be injurious to law enforcement or the conduct of lawful investigations. And, pursuant to s. 17, the government may refuse to disclose any information the disclosure of which could reasonably be expected to threaten the safety of individuals. The special status of the government as a "recurring litigant" is more properly addressed by these provisions and other legislated solutions. In addition, as mentioned earlier, the nature of government litigation may be relevant when determining the boundaries of related litigation where multiple proceedings involving the government relate to common issues with closely related causes of action. But a wholesale expansion of the litigation privilege is neither necessary nor desirable.

55 Finally, we should not disregard the origins of this dispute between the respondent and the Minister. It arose in the context of a criminal prosecution by the Crown against the respondent. In criminal proceedings, the accused's right to discovery is constitutionally guaranteed. The prosecution is obliged under Stinchcombe to make available to the accused all relevant information if there is a "reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence ..." (p. 340). This added burden of disclosure is placed on the Crown in light of its overwhelming advantage in resources and the corresponding risk that the accused might otherwise be unfairly disadvantaged.

56 I am not unmindful of the fact that Stinchcombe does not require the prosecution to disclose everything in its file, privileged or not. …In criminal proceedings, as the Court noted in Stinchcombe:

> The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. [p. 340]

57 On any view of the matter, I would think it incongruous if the litigation privilege were found in civil proceedings to insulate the Crown from the disclosure it was bound but failed to provide in criminal proceedings that have ended.

V

58 The result in this case is dictated by a finding that the litigation privilege expires when the litigation ends. I wish nonetheless to add a few words regarding its birth.

59 The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in Waugh v. British Railways Board, [1979] 2 All E.R. 1169 (U.K. H.L.). It has been adopted in this country as well. . . .

60 I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. As Royer has noted, it is hardly surprising that modern legislation and case law

> [TRANSLATION] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend to limit the scope of this privilege [that is, the litigation privilege]. [para. 1139]

Or, as Carthy J.A. stated in Chrusz:

> The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. [p. 331]

61 While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and

reciprocal disclosure which is the hallmark of the judicial process. In this context, it would be incongruous to reverse that trend and revert to a substantial purpose test.

62 A related issue is whether the litigation privilege attaches to documents gathered or copied — but not created — for the purpose of litigation. This issue arose in Hodgkinson, where a majority of the British Columbia Court of Appeal, relying on Lyell v. Kennedy (No. 3) (1884), 27 Ch. D. 1 (Eng. C.A.), concluded that copies of public documents gathered by a solicitor were privileged. McEachern C.J.B.C. stated:

> It is my conclusion that the law has always been, and in my view, should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production. [p. 142]

63 This approach was rejected by the majority of the Ontario Court of Appeal in Chrusz.

64 The conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect.

VI

65 For all of these reasons, I would dismiss the appeal. The respondent shall be awarded his disbursements in this Court.

Appeal dismissed.

The Court goes on for a good while about s.23 of the *Access to Information Act* before actually quoting that provision, at the outset of section III. It's just as well to read that first, since it makes much of the earlier discussion easier to follow.

Usually, when questions about the Litigation Privilege arise, the parties are engaged in litigation. In the normal scenario, (1) A sues B; (2) that litigation ends; and (3) in a later lawsuit (involving at least one of them) a party seeks material that A or B used to prepare for litigation (e.g., notes of witness statements, physical or documentary evidence, etc). Assume C now sues A, and wants some information of this sort. It's not enough for C to say it would be useful or interesting. It has to be *relevant* to a claim or defense raised by C; that is, it has to help C *support* the claim or defense. Doubtless, information about A's mode of preparing for trial would give valuable strategic information to C, but that's not a basis for seeking material formerly subject to the LP. The question of relevance is an aspect of the law of evidence, and won't be addressed here, but it's important to see that even where the LP has expired, this doesn't mean it's all available to C. Legal memos or other documents prepared by lawyers (even if not subject to the SCP) are almost never available, because they're hardly ever relevant. Of course, if a document is covered by the LP and the SCP, then it remains unavailable because the SCP doesn't expire.

On the other hand, the *Access to Information Act* doesn't require any pending litigation that renders A's information relevant to a claim or defense. Where the government was a party, members of the public may request material (once the LP has expired) without a legal claim that makes the requested information relevant.

Therefore: (1) as a general matter, among private litigants, it's rare that a party even has a reasonable basis for requesting any LP-covered material, because it usually isn't relevant (and of course the requesting party must show that the LP has expired); whereas (2) when the government was a party, there are 2 routes: (a) relevance to a claim or defense in a later proceeding; or (b) idle curiosity.

The Court refers briefly to *Stinchcombe*, which requires the government, in a criminal prosecution, to give the accused all evidence in its custody that is not "clearly irrelevant" to the case. This very important (and intentionally broad) protection against government abuse in criminal prosecutions would receive a fair amount of time in a course on criminal procedure.

* * *

The Court emphasizes (para. 2) that the question of the litigation privilege (LP) here is posed only in relation to the Access Act. What do you see, in the course of the discussion, showing that the analysis here relates specifically to the Access Act, in a fashion that would not apply similarly in the course of regular litigation?

Why does it matter whether the SCP and LP are described as two "branches" (para. 6) or as "distinct conceptual creatures" (para. 7)?

How did the Crown originally proceed against B? How did those proceedings end? What was B's next move? What claims did he raise?

What rationale distinguishes the SCP from the LP?

According to the explanation quoted from Sharpe J.A. in para. 28, what material would be covered by the LP but *not* by the SCP? What would be covered by the SCP but not the LP?

Why, in this account, is the adversarial nature of the litigation process so important in understanding the basis of the LP?

According to the Court, "[c]onfidentiality, the sine qua non of the solicitor-client privilege, is not an essential component of the litigation privilege." Why not?

The Court emphasizes that the LP expires only when the litigation is over, and that an "enlarged definition" is required to explain that requirement. What is the enlarged definition? Does that definition apply in the same fashion to the government and private parties, or do the examples given here suggest that the definition would apply differently?

The Court says its decision will not give parties " '[a]utomatic and uncontrolled' access to the government lawyer's brief." Why not?

Blank here requests precisely the kinds of materials that, it was noted above, are rarely available to litigants seeking to breach the LP. Why should they be available here?

What procedure does the Court suggest, in cases where a party alleges actionable misconduct against another?

The Court shows some concern (para. 53) that when there is "[a] mere hypothetical possibility that related proceedings may in the future be instituted," and so the government is required to disclose information under the Access Act, and then "related proceedings in fact later [are] instituted," the government will have put itself at a disadvantage. What solution is proposed?

What other specific exemptions from the disclosure does the Court note (para. 54)? In your view should this material be exempt from disclosure under the Access Act?

Near the end, the Court considers whether the LP should cover only those materials prepared with litigation as a "dominant purpose" or whether it should extend to those for which litigation was a "substantial purpose." Notice that the latter standard (which the Court rejects) would serve to protect more material as under the privilege. Why doesn't the Court use that standard? In your view, is this the right decision?

The Court also speculates on – but refuses to resolve – the question of whether the LP covers "documents gathered or copied — but not created — for the purpose of litigation" (para. 62). What solution is adopted here?

Notice that the authority cited, on the question of legal skill used to assemble a collection of relevant documents, is an 1884 Chancery case ("Ch. D." = Chancery Decisions). Assuming that a 19th century case is going to be a useful authority on this, why (would you guess) the decision comes from Chancery rather than from a common-law court?

The Court says that "assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files." What does this mean?

On the analysis here, should Blank get everything in the government's file relating to the charges for the regulatory offences?

Given that this case arose under the Access Act (and since the Court goes to some pains to emphasize that detail) does the analysis here leave open questions that you'd have expected to see addressed, if it arose in the course of private litigation? Assume that A v B is now definitely over and there is no related litigation pending or in contemplation. C now sues B. Would you expect to see any issues recurring regularly, in that context, that aren't provided for here? Or would you instead think that because of the breadth of the Access Act, a case arising in that context would likely cover more territory than a case between private litigants?

RE: Lindsay E. Chancey, and Yulistya Dharmadi

Ontario Superior Court of Justice

Heard: April 5, April 27 and June 26, 2007; Judgment: July 20, 2007.

1 **MASTER R. DASH** (endorsement):-- This motion calls into issue whether a communication between a paralegal and his client is privileged. Neither counsel have been able to find any previous authority that answers this question. I am asked to consider paralegal-client communications as protected by a class privilege, similar to solicitor-client privilege, or in the alternative as protected from disclosure by applying the four-part Wigmore analysis.

2 The defendant was involved in a motor vehicle accident and retained a paralegal to defend her on a Highway Traffic Act ("HTA") charge. She was subsequently named as a defendant in this civil action arising out of personal injuries suffered by the plaintiff in the accident. Liability for the accident is in issue. In this motion to compel the defendant to answer questions refused at discovery, the plaintiff seeks disclosure of communications between the defendant and the paralegal relating to the circumstances of the accident.

3 The defendant retained a paralegal to defend her on the HTA charges because she could not afford to retain a lawyer. The motion raises issues of access to justice. It is also timely given the very recent regulation of paralegals coming into effect in Ontario.

BACKGROUND

The Accident and Retainer of the Paralegal

4 On November 14, 2001 the defendant's vehicle struck the plaintiff's vehicle in an intersection while the plaintiff was making a left-hand turn. The plaintiff alleges that the defendant disobeyed a red traffic signal, but this is disputed. The defendant was charged with careless driving under the Highway Traffic Act ("HTA") arising out of the accident. She retained a paralegal, Ben Kouwenhoven, to represent her in defence of her HTA charge, in the course of which she discussed the circumstances of the accident with him. Mr. Kouwenhoven is a former police officer who works as a paralegal with Provincial Offences Information and Traffic Ticket Service, commonly known by the acronym POINTTS, representing persons charged with HTA offences. The defendant, with Mr. Kouwenhoven's assistance, pleaded guilty to a lesser HTA offence.

The Questions Refused

5 At her examination for discovery on January 10, 2006 plaintiff's counsel asked the defendant for the name, address and phone number of the person she retained at POINTTS. This was refused, but was ultimately answered during the course of this motion. Plaintiff's counsel also asked for "the complete POINTTS file." This was taken under advisement and subsequently refused. That refusal is the subject matter of this endorsement.

Relevance and Litigation Privilege

6 When the motion was first before me on April 5, 2007 I addressed the issues of relevance and litigation privilege. On the issue of relevance, the defendant confirmed at her discovery that when she met with the paralegal she explained to him her recollection of what had happened in the accident. I held as follows: "As liability is in issue, any statements made by the defendant as to the facts of the accident have a semblance of relevance, such as may be contained in the paralegal's file. The paralegal is a person reasonably expected to have knowledge of the occurrence of the accident within the meaning of rule 31.06(2)." On the issue of litigation privilege, the defendant admitted at her discovery that the only reason she went to see the paralegal was to "defend the ticket." I held as follows on the issue of litigation privilege: "Litigation privilege does not apply as the quasi-criminal proceeding for which privilege may have been claimed has come to an end and it is not a closely related proceeding' to this action." The recent Supreme Court of Canada decision in *Blank v. Canada*[2] is authority for the proposition that litigation privilege which may have existed over information obtained for the dominant purpose of the defence of a criminal proceeding does not continue after the termination of that criminal proceeding and cannot protect against disclosure of that information in a subsequent civil action arising out of the same incident.

Evidence to Support Paralegal-Client Privilege

7 The defendant also asserted a privilege "as analogous to a solicitor-client privilege." I declined to deal with that issue on April 5th, as there was no evidentiary record to support the claim for privilege or to meet the four elements that must be addressed to satisfy the Wigmore test. The defendant had not obtained the paralegal's file nor listed in her affidavit of documents any communications with the paralegal. I opined that "whether communications with a paralegal respecting defence of a provincial offence is privileged is a serious issue" and requires an evidentiary foundation. I therefore adjourned the motion to allow supporting evidence on the privilege issue and I further ordered the defendant to serve a further and better affidavit of documents listing all of the paralegal's documents in Schedule A or B as she deemed appropriate. I then determined other refusals unrelated to the subject matter of these reasons.

8 A further and better affidavit of documents was served on April 16, 2007 listing in Schedule B two letters to the defendant from the paralegal and the paralegal's business card. The matter next came before me on April 27. Although factums had been filed, no evidence was proffered to support either a newly recognized class privilege or to meet the four Wigmore criteria to establish privilege on a case-by-case basis. I therefore granted a further adjournment to June 26 for the purpose of obtaining such evidence, possibly from the defendant and from the paralegal.

9 Subsequently affidavits were filed by both the defendant and by Mr. Kouwenhoven.

10 The defendant avers that she contacted POINTTS because she was told by an acquaintance that they had extensive experience in representing people in court on HTA charges and because it would be "more affordable" than hiring a lawyer to protect her interests. She believed "that the role of the paralegal was similar to that of a lawyer, but that a paralegal would be cheaper." She claims Mr. Kouwenhoven advised her he was a paralegal with expertise regarding HTA

offences. She met with him on several occasions, was "candid and truthful" and "discussed the issues related to the offence openly, with the expectation that he would protect my rights ..." She "believed and understood that whatever she shared with Mr. Kouwenhoven was to be held in confidence and would not be disclosed to anyone." She claims she "would not have disclosed pertinent information to Mr. Kouwenhoven if I knew this information would be disclosed ... to someone else without my consent, including the Plaintiff in the herein action" who could use such information against her.

11 Mr. Kouwenhoven states that he has worked at POINTTS for the last 21 years as a paralegal and has handled thousands of cases in court, including HTA cases. He was previously a police officer with Toronto Police Services for seven years. He claims to understand and appreciate "the principle of confidentiality between clients and their legal representatives in court" as well as "the nature of our legal system as an adversarial one requiring a legal representative to advocate for a client." He questioned the defendant about the accident "with the expectation that the content of our conversation was and would remain private and confidential, which is how I treat all my clients." He believed that the defendant was open and frank with him and that "she expected our conversations to remain private and confidential." He is of the view that "if my clients cannot expect that what they tell me in confidence would remain private and confidential, that they would not be as open and frank with me about the details of a car accident or other incident that they were involved in." He claims that without all of the important details he would be unable "to advocate and represent a client in court to the fullest of my abilities" which in turn would prejudice his relationship with his clients and his clients' rights to a fair trial.

12 Mr. Kouwenhoven opines: "POINTTS provides competent legal services at affordable rates. I believe that many people in our society are not able to afford to hire a lawyer, therefore the services that we provide enables more people to access the court and justice system ... It is also my belief that without POINTTS, many people would not have any legal representation. I believe that the volume of clients that POINTTS has attests to the need for paralegals like ourselves offering affordable legal services."

13 Mr. Kouwenhoven wrote to the defendant on a number of occasions to keep her informed of the status of her case. Those letters are now listed in Schedule B to the defendant's further and better affidavit of documents and privilege is asserted. They have been produced to me for inspection to assist in the determination of the validity of any claim to privilege. Having reviewed the letters they clearly contain a communication as to the giving of legal advice with respect to the HTA proceedings. They contain relevant information respecting the disposition of the charges. I must determine if the letters (and any other communications with the paralegal respecting the facts surrounding the accident) are protected from disclosure by privilege, either by way of class privilege or by applying the Wigmore criteria on a case-by-case basis.

CLASS PRIVILEGE

14 What is a privilege? The principles underlying privilege from disclosure have been stated thus:

> The common law principles underlying the recognition of privilege from disclosure are simply stated. They proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth"[3]

What is a Class Privilege?

15 "There are currently two recognized categories of privilege: relationships that are protected by a class privilege and relationships that are not protected by a class privilege but may still be protected on a case-by-case' basis."[4] The basis for a class privilege, as distinct from a case-by-case privilege, has been stated as follows:

> The parties have tended to distinguish between two categories: a "blanket", prima facie, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a prima facie presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence ... The term "case-by-case" privilege is used to refer to communications for which there is a prima facie assumption that they are not privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" ... which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case.[5]

16 If a communication is made between parties that are covered by a class privilege, the communication will be excluded without satisfying the Wigmore criteria and it is up to the party seeking production to prove an exception. If it is not covered by a class privilege, the communication will not be excluded unless the party asserting privilege satisfies the Wigmore criteria on a case-by-case basis. It has been stated thus:

> A class privilege entails a prima facie presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an overriding interest commands disclosure. In order for the privilege to attach, compelling policy reasons must exist, similar to those underlying the privilege for solicitor-client communications, and the relationship must be inextricably linked with the justice system ... In a case-by-case privilege, the communications are not privileged unless the party opposing disclosure can show they should be privileged according to the fourfold utilitarian test elaborated by Wigmore.[6]

17 What makes a class privilege? "For a relationship to be protected by a class privilege, thereby warranting a prima facie presumption of inadmissibility, the relationship must fall within a traditionally protected class."[7] However that does not mean that the categories of classes are closed or that the only manner of protecting information as privileged is by application of the Wigmore test. New classes may be established on a principled basis:

> This is not to say that the Wigmore criteria are now "carved in stone", but rather that these considerations provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court. Nor does this preclude the identification of a new class on a principled basis.[8]

The Rationale for Solicitor-Client Communications as a Class Privilege

18 Solicitor-client privilege is one of the best-known long-standing recognized classes of privilege.[9] The reasons that solicitor-client privilege has long been recognized as a class privilege have been stated in many ways by the Supreme Court of Canada, but it always comes down to its inexorable relationship to the legal system itself. A few examples of such expression are as follows:

> The prima facie protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication.[10]

> The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself. The solicitor-client relationship is a part of that system, not ancillary to it ... It is this distinctive status within the justice system that characterizes the solicitor-client privilege as a class privilege, and the protection is available to all who fall within the class.[11]

19 For the legal system to function effectively and justly, a client must be able to speak with candour to his lawyer without fear that their communications will be divulged. This has been stated in several ways:

> The law is complex. Lawyers have a unique role. Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client. The need to protect the privilege determines its immunity to attack.[12]

> Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it.

> Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.[13]

20 Based on this analysis, the Supreme Court refused to recognize a class privilege for religious communications (also known as priest-penitent privilege) primarily because "religious communications, notwithstanding their social importance, are not inextricably linked with the justice system in the way that solicitor-client communications surely are."[14] The court required that each such communication be subjected to a case-by-case analysis applying the Wigmore criteria. Similarly a class privilege was not recognized between counsellor and sexual assault victim and production of records between them was to be determined on a case-by case basis.[15] A summary of relationships held not to be protected by privilege are set out as follows:

> Other confidential relationships are not protected by a class privilege, but may be protected on a case-by-case basis. Examples of such relationships include doctor-patient, psychologist-patient, journalist-informant and religious communications. The Wigmore test, containing four criteria, has come to govern the circumstances under which privilege is extended to certain communications that are not traditionally-recognized class privileges.[16]

21 In each of these examples where a class was not recognized, a party sought production of records of confidential communications between an individual and his priest, doctor, counsellor or a journalist, which communications were relevant to an issue in a legal proceeding, but the communications themselves were not part of, inexorably linked with or integral to the functioning of the legal system itself. Communications between a solicitor and his client on the other hand are directly related to the legal process and are an integral part of the legal system.
Does the Same Rationale Apply to Paralegal-Client Communications?

22 Prima facie it appears that the rationale for granting class privilege to communications between a solicitor and his client made in the course of giving legal advice applies equally to communications between a paralegal and his client in the course of giving legal advice. Although the lawyer may be giving advice respecting a criminal proceeding or a civil action in the Superior Court, whereas a paralegal is giving advice respecting a provincial offence or a civil action in a small claims court, both equally require full and candid communication between those needing legal advice and those able to provide it so that the legal rights of the client may be protected, and the communications in both are inexorably linked to the very legal system that seeks the disclosure. The relationship between a client and his or her paralegal, just as the relationship with his or her lawyer "stretches beyond the parties and is integral to the workings of the legal system itself."

23 If privilege is not extend[ed] to communications between a paralegal and his client substantial issues will be created respecting access to justice. It will mean that clients who can afford lawyers will have their communications protected, but those who cannot afford lawyers, and who retain a paralegal at much less cost to represent them, will not have their communications protected. It would create a two-tier system of justice.

24 The problem however is with the definition and qualifications of a paralegal. For example, if I am charged with careless driving and I retain a lawyer to represent me, my communications with my lawyer are protected by a class privilege. The argument follows, if in the same situation I hire a more affordable paralegal to represent me, my communications with the paralegal should be no less protected. However, although Ontario is in the process of regulating paralegals, none are licensed as of yet and certainly not at the time the defendant consulted Mr. Kouwenhoven. What if I hire "John Doe, Paralegal" who has had no training and is subject to no regulatory requirements, but has "hung up a shingle?" Should those communications be protected? As an even more extreme example, what if I ask my friend or relative to represent me as agent on the charge? Should those communications be protected?

25 It is critical for recognition of a class that the participants in that class are specific identifiable actors:

> At common law, the main condition for a class privilege to be recognized in favour of certain communications is that the category of actors be limited to specific people. The solicitor-client class privilege, for example, involves definite actors: one is a qualified lawyer and the other is the client ... The protection [of the privilege] however, does not extend to communications with persons who are not duly qualified legal advisers even though the advice they might give is legal in nature.[17]

The court in that case was determining if privilege attached to communications with a "psychotherapist". It held that in the case of lawyers and doctors it is not difficult to determine the individual to whom the communication was made because of "state regulation of these professions", however it is not easy to resolve who is a psychotherapist. They added:

> The court's need for truth will not permit a privilege that is so broad that almost every communication to any individual is covered.[18]

Regulation of Paralegals

26 Historically, judges have lamented over the problems caused by unregulated paralegals appearing in courts. In *R. v. Lemonides*[19] an accused sought to overturn his conviction for dangerous driving on the basis that his representation by a paralegal resulted in a miscarriage of justice. Wein J., in the course of discussing problems respecting representation by a non-lawyer stated:

> Given the lack of any legislative standards governing paralegals and agents ... any provincial trial Court would be understandably reluctant to permit the appearance of agents on Criminal Code matters without a full inquiry as to whether the accused understands the potential implications of such representation. In this regard, I have considered the material filed [which] gives a detailed picture of the magnitude and scope of the problems presented by agents. These include, but are not by any means limited to, the lack of any governing body to oversee the qualification, education, practice and discipline of agents, the lack of any ethical responsibilities to the Court, and the lack of protections such as solicitor-client privilege ... The picture painted by the material filed is one that fairly suggests that the administration of justice could well be brought into disrepute by the continuing lack of legislative control in this area.[20]

27 The Legislature and the Law Society have heeded the call sent out by *R. v. Lemonides* and similar cases[21] to address the historical problem of unregulated agents appearing before the courts by creating a regulatory environment for paralegals including licensing, standards and a code of conduct that closely resembles the Rules of Professional Conduct governing lawyers.

28 The *Access to Justice Act*[22] (the "Act") contains as Schedule C thereto amendments to the *Law Society Act* and related amendments to other acts. The Act received royal assent on October 19, 2006. In accordance with the Act, on May 1, 2007 the Law Society of Upper Canada became responsible for the regulation of paralegals, referred to as persons licensed to provide legal services in Ontario (contrasted with a licence to practice law which is reserved to lawyers). A person provides legal services if he or she "engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person" and this includes giving "advice with respect to the legal interests ... of the person" and "represent[ing] a person in a proceeding before an adjudicative body."[23] The Law Society is required to ensure that all persons who provide legal services "meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide."[24] In doing so the Society "has a duty to act so as to facilitate access to justice for the people of Ontario." The Society is to create bylaws to regulate paralegals, to prescribe classes of licence, to restrict the areas of law in which a licensee may practice and to create a licensing procedure. "It is a requirement for the issuance of every licence ... that the applicant be of good character."[25] No person other than a licensee shall hold himself out as a person who may provide legal services (subject to exceptions).[26] The Act provides for a review of a licence if the licensee has failed to meet standards of professional competence and such failure includes deficiencies in the licensee's knowledge, skill or judgment. The Society in such cases may suspend a licence or take other corrective action. There is a complaints process. Professional liability insurance is required. The Society may make grants from the Compensation Fund to mitigate losses sustained in consequence of a licensee's dishonesty.

29 It is worth noting that the Act amends the *Provincial Offences Act* to allow the court to bar any person other than a licensee from appearing as a representative if the court finds that the person is not competent to represent the person for whom he appears.[27] As a corollary, it appears that a court may not bar a paralegal who is licensed from appearing on provincial offences.

30 At its Convocation in March 2007 the Law Society approved Paralegal Rules of Conduct ("Rules") as developed by the Paralegal Standing Committee. The Rules deal with a paralegal's duties to clients, to tribunals, to other licensees and to the Law Society and focuses on the paralegal's ethical and professional obligations. They are based on and substantially mirror the duties and obligations of lawyers as set out in the Rules of Professional Conduct. They include, for example, obligations respecting integrity, civility, undertakings, competency, dishonesty, confidentiality, conflicts of interest (general avoidance, acting against clients, joint retainers and transfers between paralegal firms), doing business with and borrowing from a client, preservation of client's property, withdrawal of representation, duties as advocate to clients, tribunals and others, communication with witnesses, fees (reasonableness, contingency fees, fee splitting), sharp practice, courtesy (offensive communications, unwarranted criticism of other licensees, prompt response to communications), financial responsibility, restrictions on advertising,

compulsory errors and omissions insurance, reporting misconduct and conduct unbecoming a paralegal.

31 Of greatest importance to this motion the Rules provide with respect to confidentiality:

> **3.03 Confidentiality**
>
> **Confidential Information**
>
> 3.03(1) A paralegal shall, at all times, hold in strict confidence all information concerning the business and affairs of a client acquired in the course of their professional relationship and shall not disclose any such information unless expressly or impliedly authorized by the client or required by law to do so.
>
> (2) The duty of confidentiality under subrule (1) continues indefinitely after the paralegal has ceased to act for the client, whether or not differences have arisen between them.
>
> (3) The paralegal shall keep the client's papers and other property out of sight, as well as out of reach, of those not entitled to see them.

The Rules provide for permitted disclosure when required by law or by order of a tribunal, to prevent risk of death or serious bodily harm, to defend against allegations made against the paralegal and to collect fees. The requirement that a paralegal keep communications confidential is analogous to the requirement that lawyers do likewise.

32 The Law Society has now developed a licensing bylaw that includes an application process, a requirement for mandatory educational standards and for mandatory licensing examinations. There are provisions for experienced practicing paralegals to apply for grandfather status (to exempt educational requirements) if they apply between May 1 and October 31, 2007. It is expected that the first licences will be issued in the spring of 2008. The bylaws provide exemptions to the requirement for licensing, which include certain in-house paralegals, those supervised by a lawyer, employees of legal aid clinics and similar workers. A person need not be licensed as a paralegal if they are not in the business of providing legal services and occasionally provide assistance to a friend or relative for no fee.

33 Therefore to answer the questions posed earlier as to what is a paralegal, the answer in my view is a paralegal licensed by the Law Society to provide legal services. That would satisfy the criterion of an identifiable group. It would not include "John Doe, Paralegal" who hangs up a shingle but has not qualified for licensing, nor would it include a person who assists a friend or relative in court in responding to a provincial offences charge. Only licensed paralegals would have the benefit of any class privilege respecting paralegal-client communications.

Conclusions: Should there be a Class Privilege for Paralegal-Client Communications?

34 In my view there is no principled reason why communications between a paralegal and his client should not be subject to the same class privilege as exists between a solicitor and his client. Both are subject to similar rules of conduct including obligations of confidentiality. Both are now regulated and licensed by a governing body that ensures standards of competence and imposes and enforces ethical obligations. The historical reasons for recognizing a class privilege over solicitor-client communications apply with equal vigour to paralegal-client communications. Both require full and candid communication from the client to his legal advisor to ensure competent and fair representation before the court or tribunal. The relationship and the

communications between a paralegal and his client are as essential to the effective operation of the legal system as those between a solicitor and his client. Such communications are inextricably linked with the very legal system which desires the disclosure of the communication. The paralegal-client relationship, no less than the solicitor-client relationship, is a part of that system, not ancillary to it.

35 "It is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate ... the law of privilege may evolve to reflect the social and legal realities of our time."[28] It has been stated that:

> The common law must develop in a way that reflects emerging Charter values ... One such value is the interest affirmed by s. 8 of the Charter of each person in privacy. Another is the right of every person embodied in s. 15 of the Charter to equal treatment and benefit of the law.[29]

36 The Paralegal Rules of Conduct provide that the Rules be interpreted in a way that recognizes that "a paralegal, as a provider of legal services, has an important role to play in a free and democratic society and in the administration of justice."[30]

37 Paralegals are typically trained and experienced to represent clients within a narrow range of legal cases, such as defending clients charged with provincial offences or representing clients in small claims court and a variety of administrative tribunals. At the present time they may represent clients before courts or tribunals only where agents are specifically permitted to appear.[31] In those areas where paralegals are entitled to represent clients they are often more affordable than lawyers and the matters often involve less serious issues, such as traffic tickets, small claims and tenants' rights. Those are the very areas where many clients can ill afford the cost of a lawyer. Paralegals fill an affordability gap in delivering legal services in such matters and provide access to justice and legal representation where clients could not afford to retain a lawyer and would otherwise proceed unrepresented. Without paralegals, such persons would not have the treatment and benefit of the law that is equal to those who could afford to retain a lawyer. The failure of the court to protect as confidential communications between paralegal and client sends a message to the public that there is a "two-tier" justice system in effect. As noted, the *Access to Justice Act* provides that the Law Society in regulating paralegals "has a duty to act so as to facilitate access to justice for the people of Ontario."[32]

38 The problem with recognizing a class privilege respecting paralegal-client communications at this time, as previously noted, is that a class requires specific identifiable actors. Lawyers are specific and identifiable as the Law Society has long regulated them, it is only members of the Law Society (now persons licensed by the Law Society to practise law) who can be considered as a lawyer and it is only communications with such persons that are protected by solicitor-client privilege. Paralegal licensing is in progress, but as of this date there are no licensed paralegals. Applications by experienced paralegals for grandfather status is in process, no examinations have yet been given and it is not expected that any paralegals will be licensed before the spring of 2008. In any event, the retainer of and the communications with Mr. Kouwenhoven took place in late 2001 and early 2002, long before passage of the Act or the development of the Paralegal

Code of Conduct. Although I have no doubt Mr. Kouwenhoven is an experienced and competent paralegal respecting the defence of HTA charges, he was not and is not a paralegal licensed by the Law Society. I have no information whether he has yet applied.

39 In my view there is no principled reason why a class privilege should not be extended to paralegal-client communications, however it must be restricted to communications with an identifiable group, namely paralegals licensed by the Law Society. Since the paralegal with whom the defendant communicated was not a licensed paralegal, no class privilege can be said to apply. No declaration should be made at this time, on the facts of this case, with respect to the existence of a class privilege over paralegal-client communications. Such determination should be made at a time when it is supported by an appropriate factual matrix. In other words, determination of the existence of a class privilege over paralegal-client communications should be determined in a proceeding in which privilege is claimed over communications between a paralegal licensed by the Law Society and his client. I therefore decline to apply a class privilege over communications between the defendant and Mr. Kouwenhoven.

THE WIGMORE ANALYSIS

40 Even though no class privilege applies, that is not the end of the matter in determining whether the communications between the defendant and Mr. Kouwenhoven are protected from disclosure. They may be protected on a case-by-case basis:

> Other confidential relationships are not protected by a class privilege, but may be protected on a case-by-case basis ... The Wigmore test, containing four criteria, has come to govern the circumstances under which privilege is extended to certain communications that are not traditionally-recognized class privileges"[33]

41 The case-by-case analysis can be applied to relationships that previously were not protected by the traditional forms of class privilege and can evolve to meet changing social and legal realities:

> While the circumstances giving rise to a privilege were once thought to be fixed by categories defined in previous centuries ... it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate ... The applicable principles are derived from those set forth in Wigmore ... It follows that the law of privilege may evolve to reflect the social and legal realities of our time.[34]

42 In determining whether privilege should be accorded to a particular document or class of documents, I must consider "the circumstances of the privilege alleged, the documents and the case". The court need not examine every document, and may rely solely on the affidavit evidence as to the nature of the information and its relevance, however it may do so if necessary to the proper determination of the claim.[35]

43 What does privilege on a case-by-case basis involve?

> The term "case-by-case" privilege is used to refer to communications for which there is a prima facie assumption that they are not privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" ... which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case.[36]

44 The four "Wigmore criteria" that the court must examine on a case-by-case basis to determine whether a specific communication should be excluded from disclosure is summarized as follows:

(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[37]

45 It will be necessary to examine each of these criteria in turn.

(1) *The Communications Must Originate In A Confidence That They Will Not Be Disclosed*

46 The defendant sought legal advice from Mr. Kouwenhoven with respect to the HTA charge and in doing so spoke fully, honestly and candidly about the facts of the accident. Mr. Kouwenhoven gave her legal advice on her charge, represented her in court respecting the charge and forwarded written reports as to the status of the charge. Both the defendant and Mr. Kouwenhoven have given affidavit evidence that each expected that the communications between them would remain confidential and not be disclosed. The defendant would not have divulged pertinent information if she knew it was going to be disclosed to others. None of this evidence was challenged by cross-examination. Clearly most clients would expect their legal representative, be it lawyer or paralegal, to treat their discussions as confidential. The first criterion is met.

(2) *The Confidentiality Must Be Essential To The Full And Satisfactory Maintenance Of The Relation Between The Parties*

47 As Mr. Kouwenhoven stated in his affidavit, "if my clients cannot expect that what they tell me in confidence would remain private and confidential ... they would not be as open and frank with me about the details of a car accident or other incident that they were involved in." He

claims that without all of the important details he would be unable "to advocate and represent a client in court to the fullest of my abilities" which in turn would prejudice his relationship with his clients and his clients' rights to a fair trial. Clearly, a "full and satisfactory" relationship must be one in which the paralegal is able to represent the client to the best of his abilities. Full and candid disclosure is essential to allow the paralegal to carry out that task. Since the client would not be candid with the paralegal if fearful that the communications might be disclosed, the element of confidentiality is essential to the full and satisfactory maintenance of the relation between client and paralegal. If a paralegal file and communication were subject to production, a core element of that relationship would be vitiated, rendering the relationship ineffective.

48 That confidentiality is critical to the relationship between paralegal and client is now specifically mandated by the Paralegal Rules of Conduct which provides:

> A paralegal shall, at all times, hold in strict confidence all information concerning the business and affairs of a client acquired in the course of their professional relationship and shall not disclose any such information unless expressly or impliedly authorized by the client or required by law to do so.[38]

The second criterion is met.

(3) *The Relation Must Be One Which In The Opinion Of The Community Ought To Be Sedulously Fostered*

49 As I noted earlier, paralegals fill an affordability gap in the justice system by delivering legal services at a lower cost than that charged by lawyers on matters that typically involve less serious issues, such as provincial offences, small claims and tenants' rights. Those are the very areas where many clients can ill afford the cost of a lawyer. Paralegals provide access to justice and legal representation to clients who would otherwise proceed unrepresented. Such persons would not have the treatment and benefit of the law equal to those who could afford to retain a lawyer. Alternatively a person requiring legal assistance on a minor matter should not be required to retain a lawyer solely for the purpose of retaining privilege over their communications. Access to justice is obviously a goal to be sedulously fostered by the community. It promotes the right of every person embodied in s. 15 of the Charter to equal treatment and benefit of the law.

50 The Government of Ontario has recognized in the *Access to Justice Act* that paralegals play a pivotal role in the justice system. The Act imposes upon the Law Society in its development of rules for the regulation of paralegals "a duty to act so as to facilitate access to justice for the people of Ontario."[39] The Paralegal Rules of Conduct provide that the Rules be interpreted in a way that recognizes that "a paralegal, as a provider of legal services, has an important role to play in a free and democratic society and in the administration of justice."[40] The failure of the court to protect as confidential communications between paralegal and client sends a message to the public that there is a "two-tier" justice system in effect. Clearly the community has recognized that the relationship between a paralegal and client must be sedulously fostered. The third criterion is met.

(4) *The Injury That Would Inure To The Relation By The Disclosure Of The Communications Must Be Greater Than The Benefit Thereby Gained For The Correct Disposal Of Litigation*

51 It is clear that with liability in issue any statement made by the defendant as to the circumstances of the accident would be relevant to the determination of that issue and to the credibility of the defendant in the event of previous inconsistent statements. I have in fact already determined that such communications with Mr. Kouwenhoven would be relevant, but relevance is not the sole criteria. It is a question of balancing the benefit, or probative value of the communications in the search for the truth against the detrimental effect on the relationship between client and paralegal.

52 The actual documents listed are reporting letters from the paralegal as to the status of the charge and are taken from the defendant's own file. In themselves they add little to the search for the truth given the admission contained in the defendant's guilty plea. The paralegal's file has never been produced or listed in the affidavit of documents. I have no evidence, from Mr. Kouwenhoven or otherwise, as to whether or not a file exists, and if it exists why it was not produced when requested by the defendant pursuant to my April 5 order. In argument, defendant's counsel suggested that Mr. Kouwenhoven does not retain his notes or other file documents given the volume of his practice. I find this hard to believe, but if notes exist I need not examine the file to assume that any such notes might include a memorialization of the defendant's description of the accident as relayed to Mr. Kouwenhoven.

53 In my view, disclosure of the communications between the defendant and Mr. Kouwenhoven would have minimal benefit to the correct disposition of this action given that the outcome of the HTA proceeding has been disclosed and the defendant has pleaded guilty to a lesser charge. Further, the defendant is alive and has made herself for available for examination for discovery and she has answered the plaintiff's questions respecting the facts of the accident. While the communications would be relevant, they are of modest probative value in the search for the truth. I agree with the defendant that the plaintiff, in requesting the production of the communications in issue, is merely embarking on a fishing expedition. "Fishing expeditions are not appropriate where there is a compelling privacy interest at stake, even at the discovery stage."[41]

54 On the other hand, the relationship between paralegal and client would suffer substantial injury if the client could not be assured that his communications with his paralegal would be held in confidence. The paralegal can only provide effective and just representation if the client were able to speak to the paralegal about his legal problem and answer his questions fully, honestly and candidly. The defendant would be reluctant to speak candidly if she knew that her comments to Mr. Kouwenhoven could be disclosed to others, particularly to the plaintiff, her adversary in this action.

55 I would add that the injury to the relationship is not restricted to this defendant. Disclosure of communications would affect all parties who retain paralegals. It would restrain the candid flow of communication necessary for effective representation. It would afford greater rights to the privileged who are able to retain a lawyer and would impede access to justice for those

without means to do so. It would affect the manner in which all paralegals would have to carry on their practice, including Mr. Kouwenhoven, who represents thousands of clients. It would also affect the plaintiff in this case. The plaintiff herself retained a paralegal to represent her on her application for accident benefits. If the plaintiff were successful on this motion, the plaintiff's communications to her own paralegal about the injuries suffered in the motor vehicle accident could also be subject to possible disclosure. In my view, it would be a rare case where the benefit gained for the correct disposition of the litigation would outweigh the very significant detriment to the relationship between paralegal and client.

56 The defendant has satisfied the onus upon her to establish that the detriment to the relationship between client and paralegal by disclosure of her communications with Mr. Kouwenhoven is greater than any benefit that such disclosure would have to the correct disposition of this action. The fourth criterion is satisfied.

CONCLUSION

57 The communications between the client and paralegal, in the circumstances of this case, have satisfied all of the elements of the Wigmore test and in my view those communications are privileged and should be protected from disclosure. The plaintiff is not entitled to disclosure of the communications between the defendant and Mr. Kouwenhoven or any written memorialization thereof or any reports written by Mr. Kouwenhoven to the defendant or to the contents of Mr. Kouwenhoven's file. Once licensing of paralegals is in effect, the court may in an appropriate case revisit the idea of granting a class privilege to communications between a client and a paralegal licensed by the Law Society to provide legal services (paralegal-client privilege), rather than requiring the court to engage in a case-by-case analysis respecting each such communication.

[1] In *R. v. Lemonides*, 1997 CanLII 12291 (ON SC), [1997] O.J. No. 3562, 35 O.R. (3d) 611 (OCGD), as will be seen further in these reasons, Wein J. , in considering problems in allowing representation by paralegals in court proceedings included, without analysis, “the lack of protections such as solicitor-client privilege.” There were no communications between paralegal and client in that case for which production was sought and thus no need to consider whether any privilege would attach to such communications.
[2] *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39 at paragraphs 9, 36 to 39 and 43.
[3] *A.M. v. Ryan*, 1997 CanLII 403 (SCC), [1997] 1 S.C.R. 157, [1997] S.C.J. No. 13 at paragraph 19
[4] *R. McLure*, 2001 SCC 14 (CanLII), [2001] S.C.J. No. 13, 2001 SCC 14, [2001] 1 S.C.R. 445 at paragraph 27
[5] *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] S.C.J. No. 80, [1991] 3 S.C.R. 263 at paragraph 26
[6] *R. Beharriel*, 130 D.L.R. (4th) 422 (S.C.C.) at paragraphs 39-40 [7] *R. McLure*, supra, at paragraph 28
[8] *R. v. Gruenke*, supra, at paragraph 35 [9] *R. v. Gruenke*, supra, at paragraph 26 , *R. McClure*, supra, at paragraph 28
[10] *R. v. Gruenke*, supra, at paragraph 32 [11] *R. v. McLure*, supra, at paragraph 31
[12] *R. v. McLure*, supra, at paragraph 33 [13] *Blank v. Canada*, supra, at paragraph 26

[14] *R. v. Gruenke*, supra, at paragraph 32 [15] *R. v. Beharriel*, supra, at paragraph74
[16] *R. v. McLure*, supra, at paragraph 29 [17] *R. v. Beharriell*, supra, at paragraph 70
[18] *R. v. Beharriell*, supra, at paragraph 72 [19] *R. v. Lemonides*, 1997 CanLII 12291 (ON SC), [1997] O.J. No. 3562, 35 O.R. (3d) 611 (OCGD) [20] *R. v. Lemonides*, *supra, paragraph 77*
[21] For example *R. v. Lawrie & Pointts Ltd.*, (1987), 59 O.R. (2d) 161 (C.A.) [22] *Access to Justice Act*, 2006, S.O. 2006, c. 21 [23] Ibid, section 2(10) [24] Ibid, section 7 [25] Ibid, section 23 [26] Ibid, section 22
[27] Ibid, section 131 [28] *A.M. v. Ryan*, supra, at paragraph 20 and 21 [29] *A.M. v. Ryan*, supra, at paragraph 30
[30] Paralegal Rules of Conduct, Rule 1.03(b)
[31] It is unknown whether the Law Society will expand the types of cases for which paralegals may represent clients.
[32] Section 7 [33] *R. v. McLure*, supra, at paragraph 29 [34] *A.M. v. Ryan*, supra, at paragraph 20 and 21
[35] *A.M. v. Ryan*, supra, at paragraph 39 [36] *R. v. Gruenke*, supra, at paragraph 26
[37] *R. v. McLure*, supra, at paragraph 29 [38] Paralegal Rules of Conduct, Rule 3.03(1)
[39] *Access to Justice Act*, supra, section7 (amended *Law Society Act* section 4.2(2))
[40] Paralegal Rules of Conduct, Rule 1.03(b) [41] *A.M. v. Ryan*, supra, at paragraph 37

Chancey v. Dharmadi – notes and questions

What was the procedural event that raised the issue addressed here? How far had the litigation proceeded?

Dash M. observes that the dispute "raises issues of access to justice." What are those issues? What bearing do those issues turn out to have on the resolution of this dispute? (That is, what role do they play in the ultimate result presented here?)

In the previous case, D. was charged with careless driving. What did she plead guilty to? Does it matter?

The accident happened in Nov. 2001. Dash M. does not mention when C. filed her statement of claim, but given that the examination for discovery occurred in Jan. 2006, one might guess that the claim was filed not long before. Why (would you guess) was C's claim not time-barred?

Dash M had previously ruled (as noted in para 6) that "Litigation privilege does not apply as the quasi-criminal proceeding for which privilege may have been claimed has come to an end and it is not a closely related proceeding' to this action." Why doesn't this action qualify as "closely related"?

D. is quoted (para. 10) as saying that she wouldn't have consulted Mr. K. unless she expected their discussion would be "held in confidence and would not be disclosed to anyone." Whose words would you guess these are? Does it matter?

The rather long block quotation in para. 15 is provided (ostensibly) to explain "the basis for a class privilege." What turns out to be the basis, according to the quotation?

What would it take, according to the language quoted in para. 16, to justify invading a class privilege? If you extracted the relevant language to create a test, what would the test look like?

How, if at all, does the language in the quotation in para. 17 explain what constitutes a "principled basis" for the extension of a class privilege to a new class? If you sought to articulate a test to use, when deciding whether to make such an extension, what would the test look like?

After reviewing the rationales for the solicitor-client privilege, the court explains why certain other classes, whose communications are entitled to a blanket privilege in other jurisdictions, are not similarly protected here. What are these classes, and why are they not entitled to blanket protection? In your view, is this a persuasive rationale for consigning them to the Wigmore box, where they must be examined on a case-by-case basis each time?

Dash M. observes (para. 22) that it would appear, "prima facie," that paralegals should be treated like lawyers in the context. Why? Assuming that this an application of the "principled basis" for extension, mentioned earlier, what is the principle?

Why do the "definition and qualifications of a paralegal" qualify the prima facie conclusion? How, if at all, does this explanation bear on the "principled basis"?
Among the details relating to paralegal licensing, the court mentions a provision involving confidentiality. Given that, at the time of this judgment, those requirements were all prospective, how does this help in the analysis?

The court observes that without an analogous class privilege for lawyers and paralegals, there would be 'a "two-tier" justice system in effect.' What, practically, would be the effect of the distinction?

After determining that Mr, K. does not fall within the privileged class, Dash M. turns to the Wigmore analysis (paras. 40 ff). Given that the affidavits of D. & Mr. K. were clearly written to satisfy the first 2 Wigmore criteria, it is hardly surprising that the court deals rapidly with both questions. What considerations inform the court's treatment of the 3d question?

As to the last prong of the Wigmore test, Dash M. explains that "[i]tt is a question of balancing the benefit, or ***probative value*** of the communications in the search for the truth ***against the detrimental effect*** on the relationship between client and paralegal" (para. 51). Dash M., having seen the "reporting letters" between C. & K. as the previous case was proceeding, states that they "add little to the search for the truth given the admission contained in the defendant's guilty plea," and that if any notes exist, they would presumably "include a memorialization of the defendant's description of the accident as relayed to Mr. Kouwenhoven" (para. 52). Dash M. then offers several reasons for doubting that disclosure of any of this information would help C in her search for the truth. What reasons does he offer? Do you find these persuasive?

In considering the detrimental effect of disclosure, does Dash M. focus on the relationship between C & K, or between clients and paralegals generally? Which one should he focus on, in your view?

III. Class Actions, Group Rights

Class Proceedings Act, 1992

S.O. 1992, CHAPTER 6

Definitions

1. In this Act,

"common issues" means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

"court" means the Superior Court of Justice but does not include the Small Claims Court;

"defendant" includes a respondent;

"plaintiff" includes an applicant. 1992, c. 6, s. 1; 2006, c. 19, Sched. C, s. 1 (1).

Plaintiff's class proceeding

2. (1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class. 1992, c. 6, s. 2 (1).

Motion for certification

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff. 1992, c. 6, s. 2 (2).

. . .

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

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

(e) there is a representative plaintiff or defendant who,

(i) would 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, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences 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 subclass members requires that they be

separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would 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, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

…

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

Certain matters not bar to certification

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members. 1992, c. 6, s. 6.

Refusal to certify: proceeding may continue in altered form

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or notice of application; and

(c) make any further order that it considers appropriate. 1992, c. 6, s. 7.

Contents of certification order

8. (1) An order certifying a proceeding as a class proceeding shall,

(a) describe the class;
(b) state the names of the representative parties;
(c) state the nature of the claims or defences asserted on behalf of the class;
(d) state the relief sought by or from the class;
(e) set out the common issues for the class; and

(f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out. 1992, c. 6, s. 8 (1).

Subclass protection

(2) Where a class includes a subclass whose members have claims or defences 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 subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass. 1992, c. 6, s. 8 (2).

…

Opting out

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order. 1992, c. 6, s. 9.

Where it appears conditions for certification not satisfied

10. (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate. 1992, c. 6, s. 10 (1).

Proceeding may continue in altered form

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties. 1992, c. 6, s. 10 (2).

…

Discovery

Discovery of parties

15. (1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding. 1992, c. 6, s. 15 (1).

Discovery of class members with leave

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members. 1992, c. 6, s. 15 (2).

. . .

Examination of class members before a motion or application

16. (1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court. 1992, c. 6, s. 16 (1).

. . .

Notice of certification

17. (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section. 1992, c. 6, s. 17 (1).

…

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;
(b) the nature of the relief sought;
(c) the size of the individual claims of the class members;
(d) the number of class members;
(e) the places of residence of class members; and
(f) any other relevant matter. 1992, c. 6, s. 17 (3).

Idem

(4) The court may order that notice be given,

(a) personally or by mail;
(b) by posting, advertising, publishing or leafleting;
(c) by individual notice to a sample group within the class; or
(d) by any means or combination of means that the court considers appropriate. 1992, c. 6, s. 17 (4).

…

Contents of notice

(6) Notice under this section shall, unless the court orders otherwise,

(a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
(b) state the manner by which and time within which class members may opt out of the proceeding;
(c) describe the possible financial consequences of the proceeding to class members;
(d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
(e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
(f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
(g) describe the right of any class member to participate in the proceeding;
(h) give an address to which class members may direct inquiries about the proceeding; and
(i) give any other information the court considers appropriate. 1992, c. 6, s. 17 (6).

Solicitations of contributions

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements. 1992, c. 6, s. 17 (7).

. . .

Statistical evidence

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if

the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics. 1992, c. 6, s. 23 (1).

…

Notice

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

(a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;
(b) complied with subsections (4) and (5); and
(c) complied with any requirement to produce documents under subsection (7). 1992, c. 6, s. 23 (3).

Contents of notice

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

(a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;
(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or
(c) was derived from reference material generally used and relied on by members of an occupational group. 1992, c. 6, s. 23 (4).

Idem

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

(a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and
(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced. 1992, c. 6, s. 23 (5).

Cross-examination

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information. 1992, c. 6, s. 23 (6).

Production of documents

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure. 1992, c. 6, s. 23 (7).

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

…

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

. . .

Judgment distribution

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate. 1992, c. 6, s. 26 (1).

Idem

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court. 1992, c. 6, s. 26 (2).

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant. 1992, c. 6, s. 26 (3).

Idem

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order. 1992, c. 6, s. 26 (4).

Idem

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined. 1992, c. 6, s. 26 (5).

Idem

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding. 1992, c. 6, s. 26 (6).

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate. 1992, c. 6, s. 26 (7).

…

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court. 1992, c. 6, s. 26 (10).

…

Limitations

28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;
(b) an amendment that has the effect of excluding the member from the class is made to the certification order;
(c) a decertification order is made under section 10;
(d) the class proceeding is dismissed without an adjudication on the merits;
(e) the class proceeding is abandoned or discontinued with the approval of the court; or
(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. 1992, c. 6, s. 28 (1).

Idem

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of. 1992, c. 6, s. 28 (2).

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

…

Appeals

Appeals: refusals to certify and decertification orders

30. (1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding. 1992, c. 6, s. 30 (1).

Appeals: certification orders

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court. 1992, c. 6, s. 30 (2); 2006, c. 19, Sched. C, s. 1 (1).

Appeals: judgments on common issues and aggregate awards

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members. 1992, c. 6, s. 30 (3).

. . .

Fees and disbursements

32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

…

Agreements for payment only in the event of success

33. (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

…

Definitions

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate;

"multiplier" means a multiple to be applied to a base fee. 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

. . .

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8). ….

John Hollick, Appellant v. The City of Toronto, Respondent and Friends of the Earth, West Coast Environmental Law Association, Canadian Association of Physicians for the Environment, the Environmental Commissioner of Ontario and the Law Foundation of Ontario, Intervenants

Supreme Court of Canada

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour JJ.

Heard: June 13, 2001; Judgment: October 18, 2001

The judgment of the court was delivered by **McLachlin C.J.C.:**

1 The question raised by this appeal is whether the appellant has satisfied the certification requirements of Ontario's Class Proceedings Act, 1992, S.O. 1992, c. 6, and whether the appellant should accordingly be allowed to pursue his action against the City of Toronto as the representative of some 30,000 other residents who live in the vicinity of a landfill owned and operated by the City. For the following reasons, I conclude that the appellant has not satisfied the certification requirements, and consequently that he may pursue this action only on his own behalf, and not on behalf of the stated class.

I. Facts

2 The appellant Hollick complains of noise and physical pollution from the Keele Valley landfill, which is owned and operated by the respondent City of Toronto. The appellant sought certification, under Ontario's Class Proceedings Act, 1992, to represent some 30,000 people who live in the vicinity of the landfill, in particular:

> A. All persons who have owned or occupied property in the Regional Municipality of York, in the geographic area bounded by Rutherford Road on the south, Jane Street on the west, King Vaughan Road on the north and Yonge Street on the east, at any time on or after February 3, 1991, or where such person is deceased, the personal representative of the estate of the deceased person; and
>
> B. All living parents, grandparents, children, grandchildren, siblings, and spouses (within the meaning of s. 61 of the Family Law Act) of persons who were owners and/or occupiers . . .

The merits of the dispute between the appellant and the respondent are not at issue on this appeal. The only question is whether the appellant should be allowed to pursue his action as representative of the stated class.

3 Until 1983, the Keele Valley site was a gravel pit owned privately. It operated under a Certificate of Approval issued by the Ministry of the Environment in 1980. After the respondent purchased the site in 1983, the Ministry of the Environment issued a new Certificate of Approval. The 1983 Certificate covers an area of 375.9 hectares, of which 99.2 hectares are actual disposal area. The remainder of the land constitutes a buffer zone. The Certificate restricts Keele Valley to the receipt of non-hazardous municipal or commercial waste, and it sets out various other requirements relating to the processing and storage of waste at the site. It also provides for a Small Claims Trust Fund of $100,000, administered by the Ministry of the Environment, to cover individual claims of up to $5,000 arising out of "offsite impact".

4 The Ministry of the Environment monitors the Keele Valley site by employing two full-time inspectors at the site and by reviewing detailed reports that the respondent is required to file with the Ministry. In addition, the City of Vaughan has established the Keele Valley Liaison Committee, which is meant to provide a forum for community concerns related to the site. Until 1998, the appellant participated regularly at meetings of the Liaison Committee. Finally, the respondent maintains a telephone complaint system for members of the community.

5 The appellant's claim is that the Keele Valley landfill has unlawfully been emitting, onto his own lands and onto the lands of other class members:

> (a) large quantities of methane, hydrogen sulphide, vinyl chloride and other toxic gases, obnoxious odours, fumes, smoke and airborne, bird-borne or air-blown sediment, particulates, dirt and litter (collectively referred to as "Physical Pollution"); and
> (b) loud noises and strong vibrations (collectively referred to as "Noise Pollution").

The appellant filed a motion for certification on November 28, 1997. In support of his motion, the appellant pointed out that, in 1996, some 139 complaints were registered with the respondent's telephone complaint system. (Before this Court, the appellant submitted that "at least 500" complaints were made "to various governmental authorities between 1991 and 1996" (factum, at para. 7).) The appellant also noted that, in 1996, the respondent was fined by the Ministry of Environment in relation to the composting of grass clippings at a facility located just north of the Keele Valley landfill. In the appellant's view, the class members form a well-defined group with a common interest vis-à-vis the respondent, and the suit would be best prosecuted as a class action. The appellant seeks, on behalf of the class, injunctive relief, $500 million in compensatory damages and $100 million in punitive damages.

6 The respondent disputes the legitimacy of the appellant's complaints and disagrees that the suit should be permitted to proceed as a class action. The respondent claims that … "none of the air levels exceed Ministry of the Environment trigger levels". It notes that there are other possible sources for the pollution of which the appellant complains, including an active quarry, a private transfer station for waste, a plastics factory, and an asphalt plant. … The respondent also argues that the number of registered complaints — it says that 150 people complained over the six-year period covered in the motion record — is not high given the size of the class. Finally, it notes that, to date, no claims have been made against the small claims trust fund.

II. Judgments

7 The motions judge, Jenkins J., found that the appellant had satisfied each of the five certification requirements set out in s. 5(1) of the Class Proceedings Act, 1992: (1998), 27 C.E.L.R. (N.S.) 48 (Ont. Gen. Div.). He found that the appellant's statement of claim disclosed causes of action under s. 99 of the Environmental Protection Act, R.S.O. 1990, c. E. 19, and under the rule in Rylands v. Fletcher (1868), L.R. 3 H.L. 330 (U.K. H.L.); that the appellant had defined an identifiable class of two or more persons; that the issues of liability and punitive damages were common to the class; and that a class action would be the preferable procedure for resolving the complaints of the class. … Jenkins J. struck out the appellant's claim for injunctive relief on the ground that damages would be a sufficient remedy and rejected his claims under the

Family Law Act … on the grounds that the facts pleaded "cannot . . . establish a basis for a claim for loss of care, guidance, and companionship" (p. 62). Jenkins J. concluded that the appellant had satisfied the certification requirements of s. 5(1). Accordingly he ordered that the appellant be allowed to pursue his action as representative of the stated class.

8 The Ontario Divisional Court, per O'Leary J., overturned the certification order on the grounds that the appellant had not stated an identifiable class and had not satisfied the commonality requirement: (1998), 42 O.R. (3d) 473 (Ont. Div. Ct.). O'Leary J. interpreted the identifiable class requirement to require that "there be a class that can all pursue the same cause of action" against the defendant. He noted that "[t]o pursue such cause of action, the members of the class must have suffered the interference with use and enjoyment of property complained of in the statement of claim" (p. 479). O'Leary J. concluded that the appellant had not stated an identifiable class (at pp. 479-80):

> [T]he evidence does not make it likely that th[e] 30,000 [class members] suffered such interference. It cannot be assumed that the complaints made to Toronto make it likely that the landfill was the cause of the odour or thing complained about. . . . [E]ven if one were to assume that the Keele Valley landfill site was the source of all the complaints, 150 people making complaints over a seven-year period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with.

For the same reasons, he concluded that the appellant had not satisfied the commonality requirement, writing that "[b]ecause the class that was certified . . . bears no resemblance to any group that was on the evidence likely injured by the landfill operation, there are no apparent common issues relating to the members of the class" (p. 480). O'Leary J. set aside the certification order without prejudice to the plaintiff's right to bring a fresh application on further evidence.

9 The Court of Appeal for Ontario, per Carthy J.A., dismissed Hollick's appeal ((1999), 46 O.R. (3d) 257 (Ont. C.A.)), agreeing with the Divisional Court that commonality had not been established. … Carthy J.A. noted that the definition of a class should not depend on the merits of the litigation. However, he saw no bar to a court's looking beyond the pleadings to determine whether the certification criteria had been satisfied. "If it were otherwise", he noted, "any statement of claim alleging the existence of an identifiable group of people would foreclose further consideration by the court" (p. 264). Carthy J.A. acknowledged that a court should not test the existence of a class by demanding evidence that each member of the purported class have, individually, a claim on the merits. The court should, however, demand "evidence to give some credence to the allegation that . . . 'there is an identifiable class . . . '".

10 Carthy J.A. did not find it necessary to resolve the issue of whether the appellant had stated an identifiable class, because in his view the appellant had not satisfied the commonality requirement. In Carthy J.A.'s view, proof of nuisance was essential to each of the appellant's claims. Because a nuisance claim requires the plaintiff to make an individualized showing of harm, there was no commonality between the class members. Carthy J.A. wrote (at pp. 266-67):

> This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may

> or may not be able to hold the respondent liable for a nuisance. . . .
> No common issue other than liability was suggested and I cannot devise one that would advance the litigation.

Carthy J.A. dismissed the appeal, affirming the Divisional Court's order except insofar as it would have allowed the appellant to bring a fresh application on further evidence.

III. Legislation

11 Class Proceedings Act, 1992, S.O. 1992, c. 6

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

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

(e) there is a representative plaintiff or defendant who,

(i) would 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, on the common issues for the class, an interest in conflict with the interests of other class members.

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

IV. Issues

12 Should the appellant be permitted to prosecute this action on behalf of the class described in his statement of claim?

V. Analysis

…

14 The legislative history of the Class Proceedings Act, 1992, makes clear that the Act should be construed generously. …[I]n the latter part of the 20th century … complicated cases … were beginning to come before the courts. These cases reflected "[t]he rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs": Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46 (S.C.C.), at para. 26. They often involved vast numbers of interested parties and complex,

intertwined legal issues — some common to the class, some not. While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to devise ad hoc solutions to procedural complexities on a case-by-case basis: see Western Canadian Shopping Centres Inc., at para. 51. The Class Proceedings Act, 1992, was adopted to ensure that the courts had a … tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era.

15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. … [C]lass actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. … [I]t is essential … that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

16 It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": Report on Class Actions, supra, vol. III, at p. 862. [Nevertheless,] Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclose[] a cause of action": see … s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see … s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action …

17 With these principles in mind, I turn now to the case at bar. The issue is whether the appellant has satisfied the certification requirements set out in s. 5 of the Act. The respondent does not dispute that the appellant's statement of claim discloses a cause of action. The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b) …

18 A more difficult question is whether "the claims . . . of the class members raise common issues", as required by s. 5(1)(c) of the Class Proceedings Act, 1992. As I wrote in Western Canadian Shopping Centres Inc., the underlying question is "whether allowing the suit to

proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial . . . ingredient" of each of the class members' claims.

19 In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, is whether each of the putative class members does indeed have a claim — or at least what might be termed a "colourable claim" — against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues: see Western Canadian Shopping Centres Inc., at para. 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members"). In asserting that there is such a relationship, the appellant points to the numerous complaints against the Keele Valley landfill filed with the Ministry of Environment. In the appellant's view, the large number of complaints shows that many others in the putative class, if not all of them, are similarly situated vis-à-vis the respondent. For its part the respondent asserts that "150 people making complaints over a seven-year period does not make it likely that some 30,000 people had their enjoyment of their property interfered with" (Divisional Court's judgment, at pp. 479-80). The respondent also quotes the Ontario Court of Appeal's judgment (at p. 264), which declined to find commonality on the grounds that:

> [i]n circumstances such as are described in the statement of claim one would expect to see evidence of the existence of a body of persons seeking recourse for their complaints, such as, a history of "town meetings", demands, claims against the no fault fund, [and] applications to amend the certificate of approval . . .

20 The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an air plane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.

21 The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended …

22 The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. …The 1990 Report of the Attorney General's Advisory Committee … suggests that "[u]pon a motion for certification . . . , the representative plaintiff *shall* and the defendant *may* serve and file one or more affidavits setting forth the material facts upon which each intends to rely" (emphasis added) ... In my view the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.
…
25 … [T]he representative of the asserted class must show some basis in fact to support the certification order. … [T]hat is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence."). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s.5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists …

26 In my view the appellant has met his evidentiary burden here. Together with his motion for certification, the appellant submitted some 115 pages of complaint records, which he obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. The records of the Ministry of Environment and Energy document almost 300 complaints between July 1985 and March 1994, approximately 200 complaints in 1995, and approximately 150 complaints in 1996. The Metropolitan Works Department records document almost 300 complaints between July 1983 and the end of 1993. As some people may have registered their complaints with both the Ministry of Energy and the Metropolitan Works Department, it is difficult to determine exactly how many separate complaints were brought in any year. It is sufficiently clear, however, that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. … I conclude, therefore, that the appellant has shown a sufficient basis in fact to satisfy the commonality requirement.

27 I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(d). The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions — judicial economy, access to justice, and behaviour modification …Beyond that, however, the appellant and respondent part ways. In oral argument before this Court, the appellant contended that the court must look to the common issues alone, and ask whether the common issues, taken in isolation, would be better resolved in a class action rather than in individual proceedings. In response, the respondent argued that the

common issues must be viewed contextually, in light of all the issues — common and individual — raised by the case. The respondent also argued that the inquiry should take into account the availability of alternative avenues of redress.

28 The Report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation, and so on" … In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.

29 The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes,

> The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinction[] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

See Branch, supra, at § 4.690. I would endorse that approach.

30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see Federal Rules of Civil Procedure, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members") … I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, *given all of the circumstances of the particular claim*, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added) …

31 I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on" … In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

32 I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. As the Divisional Court noted, "[e]ven if one considers only the 150 persons who made complaints — those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.

33 Nor would allowing a class action here serve the interests of access to justice. The appellant posits that class members' claims may be so small that it would not be worthwhile for them to pursue relief individually. In many cases this is indeed a real danger. As noted above, one important benefit of class actions is that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all. I am not fully convinced, however, that this is the situation here. The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. Of course, the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action — even if the compensatory scheme promises to provide redress more quickly … The existence of such a scheme, however, provides one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns.

34 For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to determining whether a class action should proceed. As noted in Western Canadian Shopping Centres Inc., supra, at para. 29, "[w]ithout class actions, those who cause widespread but individually minimal harm might not

take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery". This concern is certainly no less pressing in the context of environmental litigation. Indeed, Ontario has enacted legislation that reflects a recognition that environmental harm is a cost that must be given due weight in both public and private decision-making: see Environmental Bill of Rights, 1993, S.O. 1993, c. 28; Environmental Protection Act, R.S.O. 1990, c. E.19. I am not persuaded, however, that allowing a class action here would serve that end. If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.

35 I would note, further, that Ontario's environmental legislation provides other avenues by which the complainant here could ensure that the respondent takes full account of the costs of its actions. While the existence of such legislation certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behaviour modification: see Environmental Bill of Rights, 1993, ss. 61(1) (stating that "[a]ny two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister") and 74(1) (stating that "[a]ny two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate minister"); Environmental Protection Act, ss. 14(1) (stating that "[d]espite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect"); 172(1) (stating that "[w]here a person complains that a contaminant is causing or has caused injury or damage to livestock or to crops, trees or other vegetation which may result in economic loss to such person, the person may, within fourteen days after the injury or damage becomes apparent, request the Minister to conduct an investigation"); and 186(1) (stating that "[e]very person who contravenes this Act or the regulations is guilty of an offence").

36 I conclude that the action does not meet the requirements set out in s. 5(1) of Ontario's Class Proceedings Act, 1992. Even on the generous approach advocated above, the appellant has not shown that a class action is the preferable means of resolving the claims raised here.
…

MARLENE C. CLOUD, GERALDINE ROBERTSON, RON DELEARY, LEO NICHOLAS, GORDON HOPKINS, WARREN DOXTATOR, ROBERTA HILL, J. FRANK HILL, SYLVIA DELEARY, WILLIAM R. SANDS, ROSEMARY DELEARY, and SABRINA YOLANDA WHITEYE (Plaintiffs / Appellants) and

THE ATTORNEY GENERAL OF CANADA, THE GENERAL SYNOD OF THE

ANGLICAN CHURCH OF CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON and THE NEW ENGLAND COMPANY (Defendants / Respondents)

Ontario Court of Appeal

Catzman, Moldaver, Goudge JJ.A.

Heard: May 10-11, 2004; Judgment: December 3, 2004

Proceedings: reversing *Cloud v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492, 2003 CarswellOnt 4630, 41 C.P.C. (5th) 226 (Ont. Div. Ct.); affirming *Cloud v. Canada (Attorney General)* (2001), 2001 CarswellOnt 3739, [2001] O.T.C. 767 (Ont. S.C.J.)

APPEAL by plaintiffs from judgment reported at *Cloud v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492, 2003 CarswellOnt 4630, 41 C.P.C. (5th) 226 (Ont. Div. Ct.) dismissing appeal from judgment dismissing motion for certification of action as class proceeding.

***Goudge J.A.*:**

Introduction

1 The appellants seek to bring this action on behalf of the former students of the Mohawk Institute Residential School, a native residential school in Brantford, Ontario, and their families. They seek to recover for the harm said to have resulted from attending the School. The action is against those said to be responsible for running the School, namely Canada, the Diocese of Huron and the New England Company.

2 The question before us is whether the action should be certified pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the CPA).

3 The motion judge and the majority of the Divisional Court found that the action should not be certified, primarily because they saw no identifiable class of plaintiffs and no common issues, and, therefore, a class action could not be the preferable procedure. Rather, they viewed the case as one in which the issues were almost exclusively unique to each student and hence required adjudication individual by individual.

4 Cullity J. dissented in the Divisional Court. He found that the criteria for certification set out in s. 5(1) of the CPA were met. He found that there were common issues of sufficient relative importance in the context of the action as a whole that it should be certified.

5 In a case like this … the primary challenge is to determine if there are common issues and then, in light of the almost inevitable individual issues, to assess the relative importance of those common issues in relation to the claim as a whole. That question is centre stage in this appeal.

6 Cullity J. decided in favour of certification. I agree with his conclusion and, in large measure, with his analysis. Thus, for the reasons that follow, I would allow the appeal and certify the action.

The Background

7 The legislative context for this appeal is found in s. 5(1) of the CPA. It provides that an action must be certified if certain specified criteria are met. The subsection reads as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would 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, on the common issues for the class, an interest in conflict with the interests of other class members.

8 The facts … centre on the Mohawk Institute Residential School … in Brantford near the Six Nations Reserve. The School began its existence in 1828 as a residential school for First Nations children. It was founded by the New England Company, an English charitable organization dating back to the 17th century, with the mission of teaching the Christian religion and the English language to the native peoples of North America.

9 The New England Company ran the School until 1922, when it leased the School to the federal government. Under the lease, Canada agreed to continue the School as an educational institution for native children and agreed to continue to train them in the teachings and doctrines of the Church of England. … The lease also entitled the New England Company to maintain some measure of control over the premises. It was renewed in similar terms in 1947 and ran until 1965, when the New England Company sold the School to Canada. Four years later, in 1969, the School closed.

10 This action covers the years from 1922 to 1969. During that time, there were 150 to 180 students at the School each year, ranging in age from 4 to 18 and split roughly equally between boys and girls. All were native children, that is Indians within the meaning of the *Indian Act*, R.S.C. 1906, c. 81, as amended. In all, approximately fourteen hundred native children attended the School in these years. They constitute the primary class of claimants proposed for this action. The appellants put forward two additional classes, a "siblings" class (namely the parents and siblings of the students) and a "families" class (namely their spouses and children).

11 The appellants are members of the various First Nations from which the students came. They allege that Canada, the New England Company and the Diocese of Huron, either singly or together, were responsible for the operation and management of the School.

12 Broadly put, their claim is that the School was run in a way that was designed to create an atmosphere of fear, intimidation and brutality. Physical discipline was frequent and excessive. Food, housing and clothing were inadequate. Staff members were unskilled and improperly supervised. Students were cut off from their families. They were forbidden to speak their native languages and were forced to attend and participate in Christian religious activities. It is alleged that the aim of the School was to promote the assimilation of native children. It is said that all students suffered as a result.

The Judgments Below

13 The statement of claim commencing this action was issued on October 5, 1998. It seeks damages on behalf of the students for breach of fiduciary duty, negligence, assault, sexual assault, battery, breach of aboriginal rights and breach of Treaty rights. Damages are also claimed on behalf of the siblings and families of the students for breach of fiduciary duty and for loss of care, guidance and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3. Finally, the statement of claim advances a claim for punitive damages.

14 In June of 2001, the appellants sought certification of the action pursuant to the CPA, although they excluded the claims for sexual assault from that request.

15 Haines J. dismissed the motion. He dealt in turn with each of the criteria for certification set out in s. 5(1) of the CPA. He found that it is plain and obvious that any claims arising from acts or omissions before May 14, 1953, when the *Crown Liability Act*, S.C. 1952-53, c. 30 came into effect, cannot succeed because the Superior Court of Justice has no jurisdiction to consider those claims. For the period from 1953 to 1969 he concluded that the pleadings were sufficient to disclose a cause of action for breach of fiduciary duty, for the torts alleged, and for breach of aboriginal rights, but not for breach of Treaty rights. Finally, he found it plain and obvious that the claims of the siblings and family members could not succeed.

16 The motion judge then examined whether there was an identifiable class and whether there were any common issues. He found neither, because … he could see no cause of action common to all the students who attended the school between 1922 and 1969. He found that the circumstances and experiences of the students were far too diverse to support the notion that the respondents owed identical duties to each student, nor could it be said that, to the extent these duties were breached against one, they were breached against all.

17 The motion judge then briefly addressed the preferability criterion. He concluded that it was not met because of the wide variety of important individual issues requiring independent inquiry, and thus certification would not serve the objectives of access to justice, judicial economy and behaviour modification.

18 Lastly, the motion judge found the appellants to be suitable representatives but the proposed litigation plan to be unworkable in that it sought a common minimum award of damages for each student who had attended the school.

19 In dismissing the motion for certification, the motion judge summed up his conclusion at para. 80:

> … [T]he statement of claim does disclose a cause of action with respect to certain claims of the student plaintiffs. …[H]owever … the plaintiffs have failed to establish there is an identifiable class and have failed to demonstrate their claims raise common issues. In the result, the motion for certification is dismissed.

20 On appeal, the majority of the Divisional Court upheld this conclusion. They agreed with the motion judge that the Superior Court of Justice has no jurisdiction over claims arising before May 14, 1953, and that the claims of family members under the *Family Law Act*, must fail because they are based on legislation first enacted in 1978 that cannot be given retroactive effect, as decided in this Court's decision in *Lafrance Estate v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1 (Ont. C.A.).

21 Although the majority noted that the motion judge found no common issues, they did not discuss either that conclusion or his finding that there was no identifiable class. Rather, they found it necessary to address only the preferability criterion in s. 5(1)(d) of the CPA. They concluded that there was no evidence of access to justice difficulties with individual students pursuing individual claims and no need to consider behaviour modification because residential schools are now a thing of the past in Canada. Most importantly, they concluded that no judicial economy would be achieved by certification because no matter how any common issues might be framed, their resolution would do nothing to avoid or limit the individual claims which would be inevitable, given the diverse experiences of each student. Finally, they said that a class action would be unfair to the defendants and would create an unmanageable trial.

22 Cullity J. dissented. He found each of the five criteria in s. 5(1) of the CPA to be satisfied, and concluded that the appeal should be allowed and the action certified.

…

25 … [H]e agreed with the motion judge that the claims in tort for breach of duty owed by the Crown directly to class members can only be advanced if they arose after May 14, 1953. Finally, he also agreed that the claim pursuant to the *Family Law Act* cannot stand.

26 He found that the requirement that there be an identifiable class was also met. He held that the members of the class of individuals who were students at the school between 1922 and 1969 could be ascertained by objective criteria rationally linked to the common issues he identified.

27 He also concluded that the families and siblings of the students both constituted identifiable classes, provided that the claim for breach of fiduciary duty owed to them by the Crown could be said to disclose a cause of action sufficient to meet the criterion in s. 5(1)(a).

28 He then turned to examine in more detail whether the claims of class members raised common issues as required by s. 5(1)(c). He began by describing the sizeable challenge faced by

the motion judge on this score, given that the litigation plan first presented by the plaintiffs proposed a list of fifty-three common issues. Many, such as how the operations of the school were funded, were drafted with such particularity that their resolution would be of little moment in the trial of these claims. He quite rightly pointed out that although class actions often require active and continual management of the proceedings by the court, plaintiffs' counsel nonetheless has the responsibility to establish that the criteria for certification are met, including the identification of common issues. Counsel cannot expect the judge on a certification motion to single-handedly fashion the common issues in order to meet the requirements of s. 5(1)(c).

29 By the time of the appeal to the Divisional Court, the appellants had reworked their list and were proposing eight more broadly framed common issues. Cullity J. found that with some further refashioning there were common issues sufficient to satisfy s. 5(1)(c). He placed considerable reliance on the reasons of the Supreme Court of Canada in *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) which were released after the decision of the motion judge here. He focused on the duty of care said to be owed to all members of the student class and the fiduciary duty owed both to them and the families and siblings classes. He found that the common issues could be defined in terms of these duties and their breach. He described his conclusion about the common issues at paras. 25 and 31 of his reasons:

> As in *Rumley*, they would include a failure to have in place management and operations procedures that would reasonably have prevented abuse and, in addition, issues similar to those described by the Court of Appeal in *Lafrance Estate* as the essence of the claims for breach of fiduciary duty against the Crown in that case: namely, whether "the very purpose of the Crown's assumption of control over the primary plaintiffs was to strip the Indian children of their culture and identity, thereby removing, as and when they became adults, their ability 'to pass on to succeeding generations the spiritual, cultural and behavioural bases of their people.'" . . . . .
>
> While I would not accept without modification the original formulation -- or the reformulation -- of the common issues proposed on behalf of the plaintiffs, such issues could, I believe, be defined in terms of the existence and breach of duties of care, and fiduciary duties, owed by the defendants to class members -- and the infringement of the aboriginal rights of the members -- with respect to the purposes, operations, management and supervision of the Mohawk Institute and with respect to each of the categories of harm referred to in paragraphs 51 and 52 of the statement of claim. The issues relating to the existence and breach by the Crown of duties of care in tort would be confined to conduct that occurred after May 13, 1953. I would also include as common issues the claim for punitive damages arising from any of the above breaches that are proven and the possibility of an aggregate assessment of damages.

30 He did, however, go on to reject the claim for vicarious liability, finding that because the claim addressed the conduct of particular employees towards particular students it could not qualify as a common issue.

31 Finally, he turned to the preferability requirement of s. 5(1)(d). He found that any deference owed to the motion judge on this issue was displaced because the preferability analysis can be properly done only in light of the common issues identified and the motion judge identified none. He went on to conclude that the trial of the common issues he identified would

be a fair, efficient and manageable method of advancing the claims pleaded and would be preferable to other procedures. Unlike his colleagues, he accepted the evidence of the vulnerability of class members and thus found that the objective of access to justice would be served to an appreciable extent by certification. However, he gave most weight to the judicial economy to be achieved by having one trial of the common issues rather than fourteen hundred.

32 In summary, he found that the focus of the trial of the common issues would be on the conduct of the respondents rather than on the precise circumstances of particular class members and that the existence of individual issues such as limitation periods or causation of harm to individual students was not enough to outweigh the conclusion that resolution of the common issues would significantly advance this action.

33 He concluded by finding that although the proposed litigation plan required reformulation in light of his findings, its deficiencies were not sufficient to deny the motion. He would have allowed the appeal, granted certification, and left the details of the litigation plan to be resolved by counsel under the supervision of the judge assigned to case manage the proceedings.

Analysis

34 With leave, the appellants appeal to this court, seeking an order setting aside the orders of the Divisional Court and the motion judge and certifying the action. They invite us to do so on the basis of the reasoning of Cullity J. which they fully endorse. They argue that all of the five of the criteria in s. 5(1) of the CPA are met and that the court must therefore certify. The respondents contest each of these, some more vigorously than others, most pointedly the preferability requirement.

35 Before addressing in turn each of these factors, it is helpful to repeat the full subsection and set out the principles applicable to its application as they have been developed by the Supreme Court of Canada and this court. Section 5(1) reads as follows: [*see para. 7*]

36 The Supreme Court of Canada has issued three important decisions to guide the development of class actions in Canada: *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.), and *Rumley*, supra. In *Hollick*, the Supreme Court of Canada had its first opportunity to enunciate the interpretive approach to be applied to the CPA in general and to its certification provisions in particular.

37 … McLachlin C.J.C. made clear that … the CPA should be construed generously and that an overly restrictive approach must be avoided in order to realize the benefits of the legislation … namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. She underlined the particular importance of keeping this principle in mind at the certification stage.

38 In addition, she emphasized that the certification stage is decidedly not meant to be a test of the merits of the action, but rather focuses on its form. As she said at para. 16, "The question

at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action."

39 For its part, this court has said that because of the expertise developed in this new and evolving field of class actions by the small group of judges across the province who have significant experience in hearing certification motions, an appellate court should proceed with deference and should restrict its intervention to matters of general principle. … This admonition is somewhat complicated in this particular case because both Haines J. and Cullity J. have been part of that small group.

40 It is against this backdrop then that the debate between the parties on each of the requirements of s. 5(1) must be considered.

The Cause of Action Criterion -- s. 5(1)(a)

41 … [T]his requirement will prevent certification only where it is "plain and obvious" that the pleadings disclose no cause of action, as that test was developed in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.)

42 Although the parties originally differed on whether that test is met here, by the time of argument in this court they had come to agree that the appellants' pleadings disclose the following causes of action within the meaning of that test:

(a) The claim for vicarious liability of the defendants over the full period of this action namely, 1922 to 1969 (although the appellants do not contest Cullity J.'s conclusion that these claims do not give rise to any common issue);
(b) The claim for breach of fiduciary duty owed to the members of the student class over the full time frame of the action;
(c) The claim for breach of fiduciary duty owed to the members of the families and siblings classes over the full time frame of the action (given this court's decision in *Lafrance Estate*, *supra*); and
(d) The claims for negligence of the defendants but only between 1953 and 1969.

43 I agree with the parties that these causes of action survive the test in s. 5(1)(a). Although it was not the subject of separate argument before us, I would reach the same conclusion concerning the claim for breach of the aboriginal rights of the members of the student class over the full time frame of the action, because this claim is so closely akin to the claim for breach of fiduciary duty.

44 On the other side of the coin, the appellants also now properly concede that the following claims cannot be proceeded with:

(a) The claims of the members of the families and siblings classes pursuant to the *Family Law Act*;
(b) The claims for negligence occurring before 1953; and
(c) The claims for breach of Treaty rights (which the motion judge found were not made out on the pleadings and which the appellants did not thereafter pursue).

The Identifiable Class Requirement -- s. 5(1)(b)

45 *Hollick*, *supra*, at para. 17, describes what is necessary to meet this requirement. The appellants are required to show that the three proposed classes are defined by objective criteria which can be used to determine whether a person is a member without reference to the merits of the action. In other words, each class must be bounded and not of unlimited membership. As well, there must be some rational relationship between the classes and the common issues. The appellants have an obligation, although not an onerous one, to show that the classes are not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues.

46 As I have said, Haines J. found that the appellants failed to establish any identifiable class. In my view, he applied the wrong test in doing so by requiring that all students fully share a cause of action. This is inconsistent with *Hollick*, *supra*, which makes clear that the shared interest need only extend to the resolution of the common issues. The application of a wrong test is an error in principle and the decision which results can attract no deference. For its part, the majority of the Divisional Court did not address the identifiable class issue. However Cullity J. found that the requirement in s. 5(1)(b) had been satisfied by the appellants.

47 In my view, he was correct in doing so. The appellants satisfy all the dimensions of this requirement. Membership in the student class is defined by the objective requirement that a member have attended the school between 1922 and 1969. Membership in the families class requires that a person meet the objective criterion of being a spouse, common law spouse or child of someone who was a student. Likewise the siblings class is defined as the parents and siblings of those students. None of the three proposed classes is open-ended. Rather all are circumscribed by their defining criteria. All three classes are rationally linked to the common issues found by Cullity J. in that it is the class members to whom the duties of reasonable care, fiduciary obligation and aboriginal rights are said to be owed and they are the ones who are said to have experienced the breach of those duties. Finally, because all class members claim breach of these duties and … they all suffered at least some harm as a result, these classes are not unnecessarily broad. All class members share the same interest in the resolution of whether they were owed these duties and whether these duties were breached. Any narrower class definition would necessarily leave out some who share that interest. Thus I conclude that the identifiable class requirement is met.

The Common Issues Requirement -- s. 5(1)(c)

48 As with each of the criteria in s. 5(1) the common issues requirement must be discretely addressed and satisfied for the action to be certified. However, … this analysis will often overlap with that required by other factors in s. 5(1). Indeed in some cases these inquiries may be somewhat interdependent. For example, the identification of common issues will often depend in part upon the definition of the identifiable class and vice versa. This particular interrelationship is reflected in the requirement that there be some rational relationship between the identifiable class and the common issues. Hence the discussion of common issues must have in mind the identifiable class, just as the discussion of identifiable class proceeded in light of the common issues.

49 Moreover, like the other criteria in s. 5(1), save for the disclosure of a cause of action, the common issues criterion obliges the class representative to establish an evidentiary basis for concluding that the criterion is met. McLachlin C.J.C. put it this way in *Hollick*, *supra*, at para. 25: "In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action."

50 *Hollick* also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

51 *Hollick* also explains the legal test by which the common issues requirement is to be assessed. After dealing with the identifiable class factor, the Supreme Court addressed this question at para. 18:

> … [T]he underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim". Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial...ingredient" of each of the class members' claims.

52 This requirement has been described by this court as a low bar. … Indeed this description is consistent with the commonality finding in *Hollick* itself. The class action proposed there was on behalf of some thirty thousand people who lived in the vicinity of a landfill site that was alleged to cause harm through noise and physical pollution. The Supreme Court found that the issue of whether the site emitted pollutants into the air met the test of s. 5(1)(c) because each class member would have to show this or see his claim fail. The Court did not see this conclusion to be at all undermined by the fact that this common issue was but one aspect of the liability issue and a small one at that. It clearly accepted that after the trial of the common issue the many remaining aspects of liability and the question of damages would have to be decided individually. Yet it found the commonality requirement to be met.

53 In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.

54 Neither the reasons of the motion judge nor those of the majority of the Divisional Court reflect this approach to the commonality assessment. The motion judge focused on those aspects of the claim that in his view would require individual determination … Although he did not have the benefit of the Supreme Court decision in *Hollick*, *supra*, he did not analyze what parts of the claim could be said to be common as explained in that decision. Moreover, in my view, he erred

in his ultimate conclusion that there were no common issues. For its part, the majority of the Divisional Court felt it unnecessary to address this criterion.

55 On the other hand, I think Cullity J. approached the commonality issue correctly and reached the right result. … [R]ather than focusing on how many individual issues there might be … Cullity J. analyzed whether there were any issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims.

56 Relying on *Rumley*, he found that a substantial part of each claim was the alleged breach of the various legal duties said to be owed to all class members. For the student class these duties are framed in negligence, fiduciary obligation and aboriginal rights. For the other two classes the claim is one of fiduciary obligation. The need to determine the existence of these duties and whether they were breached in respect of all class members is a significant part of the claim of each class member. Finally, he found that the claim for an aggregate assessment of damages for the breaches found and the claim for punitive damages for the respondents' conduct also met the commonality requirement. Thus he found that s. 5(1)(c) was met.

57 The appellants urge us to adopt Cullity J.'s conclusion. On the other hand the respondents attack it in several ways.

58 The respondents' basic challenge is that the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial. I do not agree. Cullity J. focused on the appellants' claim of systemic breach of duty, that is whether, in the way they ran the School, the respondents breached their lawful duties to all members of the three classes. In my view, this is a part of every class member's case and is of sufficient importance to meet the commonality requirement. It is a real and substantive issue for each individual's claim to recover for the way the respondents ran the School. … [T]he fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure.

59 The respondents also argue that the claim of systemic negligence in running the School cannot serve as a common issue because the standard of care would undoubtedly change over time as educational standards change. However, in my view this argument is answered by *Rumley*, which was also a claim based on systemic negligence in the running of a residential school for children. There the Supreme Court found that the class action proceeding is sufficiently flexible to deal with whatever variation in the applicable standard of care might arise on the evidence. In that case the claim covered a forty-two year period. Here, in analogous circumstances, the negligence claim covers only sixteen years, from 1953 to 1969.

60 The respondents also say that the affidavit material shows that many of the appellants and other class members did not suffer much of the harm alleged, such as loss of language and culture. They argue that this underlines the individual nature of these claims and negates any commonality. Again, I disagree. There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents

owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was, and whether the respondents breached those duties constitute common issues for the purposes of s. 5(1)(c).

61 Equally the respondents' assertion of limitations defences does not undermine the finding of common issues. In the context of these issues, these defences must await the conclusion of the common trial. They can only be dealt with after it is determined whether there were breaches of the systemic duties alleged and over what period of time and when those breaches occurred. Only then can it be concluded when the limitations defence arose. Moreover, because an inquiry into discoverability will undoubtedly be a part of the limitations debate and because that inquiry must be done individual by individual, these defences can only be addressed as a part of the individual trials following the common trial. As with other individual issues, the existence of limitations defences does not negate a finding that there are common issues.

62 The respondents other than Canada also argue that, at least for them, the finding of common issues by Cullity J. is undermined by their assertion that their proximity to Canada in exercising control over the operation of the School varied over time. Again, I disagree. At best that assertion may provide these respondents with a defence to the appellants' claims in the common trial for certain periods of time. Nonetheless the common issues remain and require resolution.

…

65 …[A]t para. 33 of *Rumley*, the Supreme Court made clear that the comparative extent of individual issues is not a consideration in the commonality inquiry although it is obviously a factor in the preferability assessment. ... A weighing of the relative importance of the common issues and the remaining individual issues is necessarily an important part of the preferability inquiry. I do not think that the CPA contemplates a duplication of that task as part of the commonality inquiry. ... Thus the extent of individual issues that may remain after the common trial in this case does not undermine the conclusion that the commonality requirement is met.

66 I therefore agree that the appellants have met the commonality requirement. A significant part of the claim of every class member focuses on the way that the respondents ran the School. It is said that their management of the School created an atmosphere of fear, intimidation and brutality that all students suffered and hardship that harmed all students. It is said that the respondents did this both by means of the policies and practices they employed and because of the policies and practices they did not have that would reasonably have prevented abuse. Indeed, it is said that their very purpose in running the School as they did was to eradicate the native culture of the students. It is alleged that the respondents breached various legal duties to all class members by running the School in this way.

67 In the affidavits of the ten representative plaintiffs there is a clear showing of some basis in fact supporting this description of the way in which the School was run. Although their cross-examinations support the conclusion that students were not all treated the same way and did not all experience the same suffering, the appellants have shown some basis in fact for their assertion that the management and operation of the School raises the common issues required for certification by s. 5(1)(c). They have met their evidentiary burden.

68 The appellants acknowledge that if they are successful in the common issues trial it will be necessary to separately establish causation of harm and quantification of damages for each individual class member for all three classes.

69 Nevertheless, it is my view that whether the respondents owed legal obligations to the class members that were breached by the way the respondents ran the School is a necessary and substantial part of each class member's claim. No individual can succeed in his or her claim to recover for harm suffered because of the way the respondents ran the School without establishing these obligations and their breach. The common trial will take these claims to the point where only causation and harm remain to be established. In my view it will adjudicate a substantial part of each class member's claim by doing so. Hence the appellants have met the commonality requirement.

70 I also agree with Cullity J. that in a trial of these common issues the claims for an aggregate assessment of damages and punitive damages are properly included as common issues. The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by each individual member. Indeed, this is consistent with s. 24 of the CPA. As well, given that the common trial will be about the way the respondents ran the School and their alleged purpose in doing so, it can also properly assess whether this conduct towards the members of the three classes as a whole should be sanctioned by means of punitive damages.

71 In summary, I agree with Cullity J. that the appellants have met the requirements set by s. 5(1)(c) of the CPA. The focus of the common trial will be on the conduct of the respondents as it affected all class members, and how and for what purpose they ran the School. Although evidence from individuals that speaks to the respondents' systemic conduct may be relevant to this, findings of causation and extent of harm must await the individual trials to follow.

72 As the class action proceeds, the judge managing it may well determine that the common issues should be restated with greater particularity in light of his or her experience with the class proceeding. To permit that process to unfold with flexibility, at this stage. I would state the common issues in general terms, as follows:

> (1) By their operation or management of the Mohawk Institute Residential School from 1953 to 1969 did the defendants breach a duty of care owed to the students of the School to protect them from actionable physical or mental harm?
>
> (2) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the students of the School to protect them from actionable physical or mental harm, or the aboriginal rights of those students?
>
> (3) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the families and siblings of the students of the School?
>
> (4) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all class members of each class as part of the common trial?

(5) If the answer to any of these common issues is yes, were the defendants guilty of conduct that justifies an award of punitive damages?
(6) If the answer to that is yes, what amount of punitive damages is awarded?

The Preferable Procedure Requirement -- s. 5(1)(d)

73 As explained by the Supreme Court of Canada in *Hollick*, *supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice, and behaviour modification and must consider the degree to which each would be achieved by certification.

74 *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

75 At para. 30 of that decision the Court also makes clear that the preferability requirement in s. 5(1)(d) of the CPA can be met even where there are substantial individual issues and that its drafters rejected the requirement that the common issues predominate over the individual issues in order for the class action to be the preferable procedure. This contrasts with the British Columbia legislation in which the preferability inquiry includes whether the common issues predominate over the individual cases.

76 In Ontario it is nonetheless essential to assess the importance of the common issues in relation to the claim as a whole. It will not be enough if the common issues are negligible in relation to the individual issues. The preferability finding in *Hollick* itself was just this and the requirement was therefore found not to be met. That decision tells us that the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.

77 Neither the motion judge nor the majority of the Divisional Court properly addressed this vital aspect of the preferability inquiry and thus their conclusion cannot stand. As Cullity J. said, the determination of whether, in the context of the entire claim, the resolution of the common issues will significantly advance the action can only be done in light of the particular common issues identified. Here the motion judge found none and therefore could not make this assessment. The majority of the Divisional Court did not address the common issues requirement but simply stated its conclusion that any attempt to formulate common issues in terms of systemic negligence would not significantly advance the litigation given the numerous individual claims. With respect, without an articulation of what the common issues are, any assessment of their relative importance in the context of the entire claim cannot be properly made. It would risk a conclusion based not on relative importance but simply on the existence of a large number of individual issues. It would also preclude any appellate review.

78 On the other hand, as I have outlined, Cullity J. found that in the context of the entire claim the resolution of the common issues he found would significantly advance the action and that otherwise the preferability requirement was met. I agree with that conclusion.

79 As they did with the common issues, the respondents contest this finding in several different ways. Here too their primary attack is that the vast majority of issues require individual determination. They say that these issues involve individual acts of abuse, different perpetrators, unique individual circumstances both before and after attendance at the school widely varying impacts and damage claims, and an array of different limitations, triggers and discoverability issues. They argue that the common issues are negligible in comparison and that their resolution will not significantly advance the action.

80 I do not agree. An important part of the claims of all class members turns on the way the respondents ran the School over the time frame of this action. The factual assertion is both that the respondents had in place policies and practices, such as excessive physical discipline, and that they failed to have in place preventative policies and practices, such as reasonable hiring and supervision, which together resulted in the intimidation, brutality and abuse endured by the students at the School. It is said that the respondents sought to destroy the native language, culture and spirituality of all class members. The legal assertion is that by running the School in this way the respondents were in breach of the various legal obligations they owed to all class members. Together these assertions comprise the common issues that must be assessed in relation to the claim as a whole.

81 I agree with Cullity J. that whether framed in negligence, fiduciary obligation or aboriginal rights the nature and extent of the legal duties owed by the respondents to the class members and whether those duties were breached will be of primary importance in the action as framed. If class members are to recover, they must first succeed on this issue. It is only at that point that individual issues of the kind raised by the respondents would arise. Save for those relating to limitations they are all aspects of harm and causation, both of which the appellants acknowledge they will have to establish individual by individual. The limitations questions are all individual defences, which the appellants also acknowledge will require individual adjudication.

82 The resolution of these common issues therefore takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. This moves the action a long way.

83 The common issues are fundamental to the action. They cannot be described as negligible in relation to the consequential individual issues nor to the claim as a whole. To resolve the debate about the existence of the legal duties on which the claim is founded and whether these duties were breached is to significantly advance the action.

84 This assessment is not quantitative so much as qualitative. It is not driven by the mere number of individual adjudications that may remain after the common trial. The finding in *Rumley* demonstrates this. The class there was defined as students at the residential school between 1950 and 1992 who reside in British Columbia and claimed to have suffered injury, loss, or damages as a result of misconduct of a sexual nature occurring at the school. The

common issues were defined very similarly to those in this case. The Supreme Court recognized that following their resolution, adjudication of injury and causation would be required individual by individual. Although the number of individual adjudications appears to have been uncertain, the time frame of the action alone suggests that it might be relatively high. Yet the Court was able to conclude that the common issues predominated over those affecting only individual class members, which is a consideration required by the British Columbia legislation. This as an even higher standard than that set for preferability under the CPA, namely that viewed in the context of the entire claim, the resolution of the common issues must significantly advance the action. However, in both cases the assessment is a qualitative one, not a comparison of the number of common issues to the number of individual issues.

85 In this case that qualitative assessment derives from the reality that resolving the common issues will take the action a long way. That assessment is also informed in an important way by the considerations of judicial economy and access to justice. Because residential schools for native children are no longer part of the Canadian landscape, the third objective of class proceedings, namely behaviour modification, is of no moment here.

86 However, I think that a single trial of the common issues will achieve substantial judicial economy. Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes. As Cullity J. said, a single trial would make it unnecessary to adduce more than once evidence of the history of the establishment and operation of the School and the involvement of each of the respondents.

87 Access to justice would also be greatly enhanced by a single trial of the common issues. I do not agree with the majority of the Divisional Court that there is nothing in the record to sustain this conclusion. The affidavit material makes clear that the appellants seek to represent many who are aging, very poor, and in some cases still very emotionally troubled by their experiences at the school. Cullity J. put it this way at para. 46 of his reasons:

> While the goal of behavioural modification does not seem to be a value that would be achieved to any extent by certification, I am satisfied that the vulnerability of members of the class -- as evidenced by the uncontradicted statements in the affidavits sworn by the representative plaintiffs -- is such that the objective of providing access to justice would be served to an appreciable extent. Each of the representative plaintiffs referred to the poverty of many of the former students, their inability to afford the cost of individual actions and the effect such proceedings would have on the continuing emotional problems from which they suffer as a result of their experiences at the Mohawk Institute. These statements were not challenged on cross-examination and, unlike my colleagues, I see no reason to reject their truth or their significance.

88 In short, I think that the access to justice consideration strongly favours the conclusion that a class action is the preferable procedure. The language used by the Chief Justice in *Rumley* at para. 39 is equally apt to this case:

> Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.

89 The respondents also attack Cullity J.'s preferability finding by saying that a class action would be unfair to them and would create an unmanageable proceeding. I do not agree. The common issues require resolution one way or the other. It is no less fair to the respondents to face them in a single trial than in many individual trials. Nor, at this stage, is there any reason to think that a single trial would be unmanageable. The common issues centre on the way the respondents ran the School and can probably be dealt with even more efficiently in one trial than in fourteen hundred.

90 That conclusion is not altered even if one takes into consideration the individual adjudications that would follow. The fact of a number of individual adjudications of harm and causation did not render the action in *Rumley* unmanageable and does not do so here. Moreover, the CPA provides for great flexibility in the process. For example, s. 10 allows for decertification if, as the action unfolds, it appears that the requirements of s. 5(1) cease to be met. In addition, s. 25 contemplates a variety of ways in which individual issues may be determined following the common issues trial other than by the presiding trial judge. Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim.

91 Lastly, the respondents argue that Cullity J. was wrong because the class action is not preferable to other means of resolving class members' claims. They support this position with fresh evidence filed in this court describing the alternative dispute resolution system that has been put in place by Canada to deal with claims of those who attended native residential schools.

92 Even if we were to admit this fresh evidence I do not agree that this ADR system displaces the conclusion that the class action is the preferable procedure. It is a system unilaterally created by one of the respondents in this action and could be unilaterally dismantled without the consent of the appellants. It deals only with physical and sexual abuse. It caps the amount of possible recovery and, most importantly in these circumstances, compared to the class action it shares the access to justice deficiencies of individual actions. It does not compare favourably with a common trial.

93 Thus I conclude that each of the respondents' attacks must fail and that Cullity J. was correct to find that the appellants have met the preferability requirement.

The Workable Litigation Plan Requirement -- s. 5(1)(e)(ii)

94 Although it was not strenuously pursued in oral submissions, the respondents also argue in their factums that the action cannot be certified because the appellants have not yet produced a workable litigation plan.

95 I do not agree that the appellants' certification motion should fail on this basis. The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings due to its failure to provide for when limitations issues will be dealt with or how third party claims are to be accommodated can be addressed under the supervision of the case management judge once the pleadings are complete. Most

importantly, nothing in the litigation plan exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure.

Conclusion

96 I conclude that the appellants have shown that their action satisfies all the requirements of s. 5(1) of the CPA. It must therefore be certified and remitted to the supervision of the Superior Court judge assigned to manage the action.

97 That judge will undoubtedly face significant challenges as this class action unfolds. If they prove insurmountable, the CPA provides remedies. However, the CPA also provides the judge with much flexibility in addressing these challenges and assessing them at this stage of the proceedings, I am not persuaded that they cannot be satisfactorily met within this form of proceeding.

98 I would therefore allow the appeal, set aside the orders of the Divisional Court and the motion judge and substitute an order certifying the action consistent with these reasons.

Cloud et al v. Canada (Attorney General) – questions

What claims did the plaintiffs raise in their statement of claim?

The claims are for harms that occurred between 1922 and 1969. The statement of claim was filed in 1998. Why weren't all the claims time-barred?

Which requirements for certification were not met, according to the motion judge?

Why, according to the Divisional Court, wasn't a class action the preferable mode of resolution?

Cullity J. went to some trouble, in his dissent, to specify the common issues in a way that would satisfy s. 5(1)(c). As a general matter (putting aside the nature of the dispute) is it desirable for judges to propose this kind of solution if the plaintiffs themselves have not formulated their claims in a way that satisfies the statutory requirements? Does it matter whether this happens on appeal (as here) or whether the motion judge does this? If you represented the defendant in such a case, how might you respond?

What were the common issues, according to Cullity J.?

The Court of Appeal has counseled deference to "the expertise developed in this new and evolving field of class actions by the small group of judges across the province who have significant experience in hearing certification motions." What is the significance of this observation, in this case?

As explained here, what does the requirement of an "identifiable class" involve? If the lower court has erred on this point, what is the standard of review?

"[T]he identification of common issues will often depend in part upon the definition of the identifiable class and vice versa." Why?

As you already know, a showing of commonality "does not entail any assessment of the merits at the certification stage," and the requirement is supposed to be "a low bar." Does *Cloud* offer any further clarification of this requirement?

According to the defendants-respondents, "the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial" (para. 58). This echoes the reasoning of *Hollick*, where the point was raised in relation to judicial economy, not commonality. What is the court's answer here?

"[T]he respondents' assertion of limitations defences does not undermine the finding of common issues" (para. 61). The argument on this point was that different limitations periods might apply to different claims and perhaps to different class members. Why was that not sufficient basis for contesting commonality?

"[T]he comparative extent of individual issues is not a consideration in the commonality inquiry although it is obviously a factor in the preferability assessment" (para. 65). Why is that the right place for this question?
If commonality is meant to be such a "low bar," why does the court spend so much time on it? Presumably one of the virtues of having a low bar is that it's easy to tell whether the requirement has been met.

How did the plaintiffs-appellants show "some basis in fact" for their claims?

Before specifying the three goals that usually provide the focus of the court's evaluation of preferability, the Court notes that "the preferability requirement has two concepts at its core" (para. 73). What are they and how do they relate to the three goals? Do they help to clarify the analysis?

Though not expressly labeled as an analysis of the "judicial economy" requirement, the court is apparently addressing that question in the statement that when "viewing the common issues in the context of the entire claim," the question is whether "their resolution will *significantly advance* the action" (emphasis added) (para. 77, see also paras. 78-79, and the summation in para. 32 of Cullity J's analysis). This explanation has been frequently cited by other courts, and has been taken by many commentators to articulate the gist of the "judicial economy" requirement. Why is this not simply a question about commonality, rather than judicial economy? What are the most obvious alternatives to this way of framing the evaluation of judicial economy? What other hints does the court offer, in showing what counts as "significantly advancing" the action?

Access to justice, in the context of the preferability inquiry, is usually understood in terms of economies of scale. That is, it's usually taken to mean that when legitimate claims would not be litigated individually, but become economically viable when aggregated, this goal has been served. That is why, for example, *Hollick* (in para. 33) dwelt on the question of whether some claims were "so large as to provide sufficient incentive for individual action." Here, the court offers several other grounds for concluding that access to justice would be served – grounds that are quite distinct from the "economy of scale" approach. What are the other reasons given here? Should these be applied more generally when the question of "access to justice" is posed? (They rarely are.) What are some other contexts in which these reasons might apply? Imagine a case in which neither "judicial economy" nor "behaviour modification" would be achieved, but access to justice would be facilitated on these grounds (though not because of any "economy of scale" that results). In your view, should this ground, by itself, be sufficient to make a class action the preferable mode of resolution?

Behaviour modification receives almost no attention here – it is raised parenthetically in the block quotation in para. 87. Why is that?

The defendants-respondents also contest preferability because there's a new "alternative dispute resolution system … to deal with claims of those who attended native residential schools" (para. 91). This approach served, in *Hollick*, to defeat certification. Why doesn't it

work here? If the court's rationale for discounting the significance of the ADR system makes sense, isn't this a rationale that will usually apply to any such system? When wouldn't it apply?

"The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress," and the need to amend it should not count against the appellants. (para 95). This is what courts usually say when such an objection is raised. Efforts to defeat certification on that ground are almost never successful.

Hollick, perhaps ironically, is invariably cited for the proposition that that CPA's provisions must be construed generously. Contrasting *Cloud* and *Hollick*, what do you see as the major differences in the courts' approaches to construing the statute?

Paul Cassano and Benjamin Bordoff (Plaintiffs / Appellants) and The Toronto-Dominion Bank (Defendant / Respondent)
Ontario Court of Appeal
Winkler C.J.O., Rosenberg, Lang JJ.A.

Heard: October 3, 2007; Judgment: November 14, 2007

Proceedings: reversing Cassano v. Toronto Dominion Bank (2006), 35 C.P.C. (6th) 84 (Ont. Div. Ct.); affirming Cassano v. Toronto Dominion Bank (2005), 9 C.P.C. (6th) 291 Ont. S.C.J.)

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APPEAL by plaintiff of judgment reported at Cassano v. Toronto Dominion Bank (2006), 35 C.P.C. (6th) 84, 2006 CarswellOnt 4337 (Ont. Div. Ct.), affirming rejection of plaintiff's motion for certification.

Winkler C.J.O.:

Introduction

1 This appeal arises from the dismissal of a certification motion under the Class Proceedings Act, 1992, S.O. 1992. c. 6 ("CPA"). The underlying claim involves foreign currency transactions conducted with credit cards issued by the respondent (defendant), the Toronto-Dominion Bank ("TD"). The central claim of the appellants (plaintiffs) is that TD breached its contract with the holders of its Visa credit cards by charging undisclosed and unauthorized fees in respect of those foreign currency transactions. Specifically, the plaintiffs allege that there are three components to the fees that TD charged its Visa cardholders for foreign currency transactions during the putative class periods and that two of these, a "conversion fee" and an "issuer fee", were undisclosed and unauthorized under the terms of the relevant cardholder agreements.

2 On March 9, 2005, the motion judge, Cullity J., dismissed the motion to certify the action as a class proceeding under the CPA. Based on the claim as pleaded by the plaintiffs, the motion judge held that certification would only be appropriate if compensatory damages could be determined on a class-wide basis. Finding that damages could not be assessed in that manner, the motion judge concluded that the common issues requirement under s. 5(1)(c) of the CPA could not be met because the common issues he could identify were insignificant in the context of each class member's claim as a whole. This in turn led him to conclude that the action did not meet the preferable procedure requirement under s. 5(1)(d) of the CPA. Accordingly, he dismissed the motion for certification. The plaintiffs' appeal to the Divisional Court was dismissed on July 10, 2006 by way of a brief endorsement.

3 In my view, the motion judge's analysis of the common issues and preferable procedure criteria in this case reflects an error of law that requires intervention by this court. For the following reasons, I would allow the appeal, set aside the orders of the Divisional Court and the motion judge, and substitute an order granting the motion for certification.

The Facts

4 The plaintiff, Dr. Paul Cassano, was a TD Visa cardholder. As with all other TD Visa customers, his card was issued pursuant to a standard cardholder agreement. On October 11, 1994, Dr. Cassano used his Visa card to pay for hotel charges in New York in the amount of US$563.36. On his TD Visa credit card statement, this amount was converted to CA$766.62. The hotel mistakenly charged his card twice and so he was given a credit. However, instead of being credited in the amount of CA$766.62, his credit card statement showed that he was credited with CA$745.44 for the second mistaken charge.

5 On July 12, 1997, Dr. Cassano commenced a putative class proceeding relating to the difference between charges and credits for foreign currency transactions. After some amendments to the statement of claim, including the addition of Dr. Benjamin Bordoff as a second plaintiff, the claim was refined and the plaintiffs now allege that TD's undisclosed practice of incorporating a "conversion fee" and an "issuer fee" in respect of every foreign currency transaction during the proposed class periods was unauthorized by the terms of the relevant standard cardholder agreements between TD and its cardholders. The amended claim was brought on behalf of a putative class of cardholders of both consumer and commercial credit cards. The plaintiffs seek judgment for the total amount of the unauthorized fees that TD collected.

6 Foreign currency transactions are specifically addressed under the terms of the cardholder agreements in effect from time to time between TD and its cardholders. The claim brought by Dr. Cassano is based on the terms of the 1991 cardholder agreement ("Cardholder Agreement"). The pertinent provisions for the purposes of this appeal are as follows:

> Signature on, retention or use of any charge card issued ... will confirm agreement between the Cardholder and The Toronto-Dominion Bank (the "Bank") as follows:
> *Cardholder Responsibility*
> 2. a) The Cardholder will pay to the Bank the Indebtedness, fees and all other charges in respect of the use of the Card ...
> *Annual Fee and Service Fees*
> 5. The Cardholder shall pay the Bank ... [an] ... annual fee for the Account ... This annual fee is specified in the Disclosure Statement. The Cardholder shall also pay the Bank service fees for services provided by the Bank for the Account, the Card, or Twin Cheques, as shown in the Disclosure Statement or as notified to the Cardholder from time to time.
> *Foreign Currency Transaction*
> 10. Foreign currency transactions are converted to Canadian dollars at the exchange rate determined by the Bank on the date when the Bank credits or debits each transaction to the Account. This rate may be different from the rate in effect on the date of the transaction.
> *Amendment of Agreement*
> 14. This Agreement and the information contained in the Disclosure Statement may be amended at any time by the Bank by giving notice in writing of the amendment to the Cardholder ... Use of the Card ... following notification of an amendment to this Agreement shall be deemed to be acceptance by the Cardholder of such amendment ...

7 It is common ground between the parties that there were three components to the TD foreign exchange rate:

i) a "basic conversion rate" which was set daily by Visa International;
ii) an additional 1% "conversion fee"; and
iii) an "issuer fee" of 0.4% from 1987 to October 1994, 0.65% from November 1994 to October 2002 and 1% thereafter.

8 The parties disagree over whether the reference in paragraph 10 of the Cardholder Agreement to the "exchange rate determined by the Bank" is sufficiently broad to encompass all three components. The plaintiffs contend that it is not and that the conversion and issuer fee components represent undisclosed, and therefore unauthorized, fees in breach of the Cardholder Agreement. TD conversely asserts that the terms of the Cardholder Agreement provide a broad discretion to determine the exchange rate to be applied to foreign currency transactions. Therefore, TD submits that there is no requirement for additional disclosure relating to the components making up the foreign exchange rate, with the result that there was no breach of contract during the putative class periods. In any event, TD claims that paragraph 5 of the Cardholder Agreement permits it to charge the conversion fee and issuer fee as "service fees".

9 As of September 1, 2001 and June 1, 2003 respectively, TD's consumer and commercial cardholder agreements were amended to expressly include disclosure of the conversion fee and issuer fee as part of the currency exchange cost.

The Reasons of the Motion Judge

10 At the certification hearing, the motion judge considered whether the requirements for certifying a class action under s. 5(1) of the CPA were satisfied. That provision states:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
(a) the pleadings or the notice of application discloses a cause of action;
(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
(c) the claims or defences of the class members raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff or defendant who,
(i) would 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
(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

11 With respect to s. 5(1)(a), the motion judge had considerable, and understandable, difficulty in identifying the legal basis for the plaintiffs' claim. The original pleading asserted a claim based on unjust enrichment and a claim for an accounting. At the certification hearing, counsel for the plaintiffs relied only on the defendant's alleged breach of contract in charging unauthorized fees.

12 The motion judge found that the claim — read broadly and taken together with the provisions of the terms of the Cardholder Agreement and disclosure statements — sounded in breach of contract, even though these words appeared nowhere in the pleading. At para. 32 of his reasons, the motion judge noted:

> A court at trial might, however, think that the relevant question was whether there was an express or implied agreement that all fees charged would be disclosed. It is, in my opinion, clear from the amendments made to the statement of claim that the alleged failure to disclose the service fees charged on foreign currency transactions is of the essence of the claim that they were unauthorized. [Emphasis added.]

13 Turning to the requirement under s. 5(1)(b) that there be an identifiable class, the motion judge concluded that the proposed class definition was acceptable for certification purposes. The proposed class is defined as:

> All holders of:
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> (i) consumer TD Visa cards of any category and type up to September 1, 2001; and
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> (ii) commercial TD Visa cards of any category and type up to June 1, 2003
>
> who incurred credits or debits on such cards as a result of foreign currency transactions.

At para. 43 of his judgment, the motion judge noted that the definition "has the required rational connection with the claims pleaded and the proposed common issues. It also employs objective criteria that, notwithstanding the size of the class, should enable class members to be identified, and to self-identify."

14 With respect to the common issues requirement under s. 5(1)(c), the plaintiffs proposed the following seven common issues:

> Issue 1 — Did TD charge its cardholders an unauthorized fee or fees when converting the debits and credits incurred in a foreign currency to Canadian dollars? If so, when, why and what are the particulars?
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> Issue 2 — If the answer to Question 1 is "Yes", must TD account for the unauthorized fees? If so, why and to whom?
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> Issue 3 — Is TD liable in damages? If so, why and to whom?
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> Issue 4 — Should the damages for the class be assessed in the aggregate? If so, why, in what amount and how should the damages be distributed?
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> Issue 5 — Is TD liable to pay punitive damages? If so, why and to whom? Should the punitive damages be assessed in the aggregate? If so, why, in what amount and how should the punitive damages be distributed?
>
> Issue 6 — Should TD pay prejudgment and postjudgment interest? If so, should interest be simple [or] compound, at what rate(s), on what amount(s) and why and how should the interest be distributed?
>
> Issue 7 — Should TD pay the costs of administering and distributing any monetary judgment? If so, why and what amount should TD pay?

15 The motion judge found only Issue 1 to be acceptable. He accepted this issue because the resolution of it depended on the interpretation of the documents provided by TD to cardholders, which could be determined on a class-wide basis. He rejected Issue 2 in light of the indication by

the plaintiffs' counsel at the certification motion that their client did not seek an accounting of profits or restitution damages.

16 The motion judge gave lengthy reasons, which are considered in detail below, for concluding that Issues 3 and 4 were not acceptable. He found that the acceptance of Issue 3 would serve no purpose unless a claim for general compensatory damages for breach of contract is included in a certification order. In the motion judge's opinion, the court's ability on a common issues trial to determine the amount of general compensatory damages depends on whether Issue 4 is acceptable.

17 In considering Issue 4, the motion judge asked whether it was possible to make an aggregate assessment of the defendant's liability as contemplated by s. 24(1) of the CPA. This provision states:

> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
> (a) monetary relief is claimed on behalf of some or all class members;
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

18 At para. 50 of his judgment, the motion judge relied on the decision of the Divisional Court and the majority of this court in Chadha v. Bayer Inc. (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.), (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106 (S.C.C.), for the proposition that "a question relating to an aggregate assessment should not be included if, at the certification stage, the court can determine that one or more of the three preconditions [in s. 24(1)] could not be satisfied even if the other common issues were decided in favour of the plaintiff at trial." The motion judge concluded that s. 24(1)(c) could not be satisfied because the determination of the extent of each cardholder's loss would require proof on an individual basis of how each member of the class would have used his or her Visa card had he or she known of the fees that applied to foreign currency transactions. The motion judge thus rejected Issue 4 on the basis that there were no means by which to determine the defendant's liability to any of the class members without proof on an individual basis.

19 As for Issue 5, the motion judge found that there was the requisite minimum factual basis for including the issue of punitive damages in a certification order. However, he found that the determination of punitive damages required a consideration of compensatory damages, which he had rejected as a common issue. Ultimately, he concluded at para. 79 of his judgment that "[t]he effect of my refusal to include the claim for compensatory damages in the certification order is that neither liability for, nor the amount of, any such damages will be determined in these proceedings. In these circumstances, I do not see how the issue of punitive damages can properly be certified."

20 With regard to the preferable procedure requirement in s. 5(1)(d), the motion judge concluded that the resolution of the single issue he had identified as being potentially suitable for

certification — whether there was a breach of contract — would not advance the claims of the class members significantly for the reason that compensatory damages would have to be determined on an individual basis, and therefore, could not be managed efficiently on a class-wide basis.

21 In view of his findings with respect to the common issues and the question of preferable procedure, the motion judge held that the action could not be certified as a class proceeding. Consequently, he found it unnecessary to address the requirements in s. 5(1)(e) of the CPA.

The Reasons of the Divisional Court

22 A unanimous panel of the Divisional Court dismissed the plaintiffs' appeal. The court concluded that the motion judge made no palpable and overriding error in relation to his findings of fact, nor did he err on a question of law. In particular, the court held that the motion judge correctly described the cause of action and correctly analyzed the nature of the damages assessment that must flow from the breach of contract. In the view of that court at para. 5:

> What then followed inexorably was the finding that each cardholder making up the class would have to be canvassed to ascertain whether he or she, in the face of disclosure of all the fees to be charged by the bank, would choose to use the VISA card for foreign exchange transactions, and only if the reply was in the negative, would compensation flow. Clearly that is an unmanageable prospect for class action status.

Analysis

23 The motion judge is an experienced class action judge. His decision is entitled to substantial deference: see Markson v. MBNA Canada Bank (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 33, leave to appeal to S.C.C. requested, [2007] S.C.C.A. No. 346 (S.C.C.). The intervention of this court should be limited to matters of general principle: see Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 39, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50 (S.C.C.). However, legal errors by the motion judge on matters central to a proper application of s. 5 of the CPA displace the deference usually owed to the certification motion decision: see Hickey-Button v. Loyalist College of Applied Arts & Technology (2006), 267 D.L.R. (4th) 601 (Ont. C.A.) at para. 6.

24 I agree with the motion judge's conclusion that the requirements of ss. 5(1)(a) and (b) of the CPA are satisfied in this case. However, for the reasons as set out below, I do not agree with his analysis of the common issues requirement or the preferable procedure requirement under ss. 5(1)(c) and (d).

(i) Common issues and the breach of contract claim under s. 5(1)(c)

25 The motion judge held that Issue 1 raised an acceptable common issue of whether there was a breach of contract. He observed that the resolution of this question depended on the interpretation of the documents provided by TD to cardholders, which is a question that could be determined on a class-wide basis. I agree with the motion judge's conclusion that this common issue is acceptable.

(ii) Common issues and the assessment of damages under s. 5(1)(c)

(a) Whether the nature of the breach of contract requires an individual assessment of cardholder behaviour to quantify damages

26 The motion judge engaged in a lengthy consideration of how the nature of the breach of contract in this case might impact on the manner in which damages would be calculated. In fairness to the motion judge's analysis of the damages issue, he was left to consider the matter in the context of the pleading as it stood at the outset of the certification motion, which was not altered to clearly reflect the contractual basis for the plaintiffs' claim.

27 The motion judge requested further submissions from plaintiffs' counsel regarding whether they were seeking compensatory or restitutionary damages for breach of contract. Compensatory damages are the normal remedy in breach of contract cases and reflect the amount required to put the plaintiff, so far as money can do it, in the same situation as if the contract had been performed. In contrast, restitutionary damages are a discretionary remedy intended to disgorge the defendant of benefits received from his or her breach of contract. Restitutionary damages, which are measured by the defendant's gain, may be awarded in a case where the plaintiff has suffered no loss, or where the plaintiff's loss is less than the defendant's gain: see Attorney General v. Blake (2000), [2001] 1 A.C. 268 (U.K. H.L.)) and Bank of America Canada v. Mutual Trust Co., [2002] 2 S.C.R. 601 (S.C.C.).

28 Counsel for the plaintiffs took the position that it was immaterial whether compensatory or restitutionary damages were awarded for breach of contract in this case because the amounts would be the same, namely, the aggregate amount of the unauthorized fees collected by TD. In oral argument before the motion judge, plaintiffs' counsel indicated that he did not intend to seek an award of restitutionary damages because this was not a case where compensatory damages would be inadequate, which is a prerequisite for an award of restitutionary damages. The motion judge therefore proceeded on the basis that the remedies sought in the action did not include restitutionary damages.

29 The motion judge then considered whether compensatory damages could be calculated on an aggregate basis. Counsel for the plaintiffs argued that compensatory damages could be determined on a class-wide basis because the measure of compensatory damages is simply the amount of the unauthorized fees collected by TD. In contrast, counsel for the defendant submitted that the measure of compensatory damages is the amount that would place cardholders in the same situation as if disclosure of the unauthorized fees had been made. In order to determine whether losses had been incurred, it would be necessary to make an individual inquiry of each cardholder as to whether they would have behaved any differently if the fees had been disclosed.

30 The motion judge concluded that the defendant's position was correct. His reasoning is noted at paras. 55-7 of his judgment:

> The agreement between the Bank and cardholders differs from other contractual arrangements in that the Bank has a right to determine what charges will be made without the agreement of the other contracting parties. They, however, are under no compulsion to use the cards. What they have lost if fees are not disclosed — and if this is contractually

> required — is the freedom to choose whether to use the cards and to pay the fees. The flaw in the reasoning of plaintiff's counsel is, in my opinion, that it ignores the elements of choice that are inherent in the alleged terms of the contract between the parties. It treats the contract as if it imposed an absolute prohibition on charging the impugned fees. If it had done this, the measure of damages might well have been the amount of the fees. But if — as is the case on the interpretation of the plaintiff's pleading that I have accepted — the claim is that the breach consisted of charging the fees without prior disclosure, then the damages for which the defendant would be liable must put the cardholders in the same situation as if disclosure had been made. As Scrutton L.J. stated in Withers v. General Theatre Corp., [1933] 2 K.B. 536 (C.A.), at pages 548-9:
>
> > Now where a defendant has alternative ways of performing a contract at his option, there is a well-settled rule as to how the damages for breach of such a contract are to be assessed. ... The damages are assessed ... on the basis that the defendant will perform the contract in a way most beneficial to himself and not in the way that is most beneficial to the plaintiff.
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> In short, as the Bank would have been entitled to charge additional fees if these had been disclosed, the value that cardholders would have received if disclosure had been made, and the measure of the loss suffered by each of them, was the value of the choice that each was deprived of — the opportunity to decide whether to use a TD card and pay the additional fees for the purpose of foreign currency transactions, or to do otherwise. I accept the submission of defendant's counsel that this value could only be determined on an individual basis.
>
> Cardholders whose behaviour would not have been affected by the non-disclosure suffered no loss. Some cardholders might have ceased to use the card if they had known that fees were included in the exchange rate. Some might have continued to use the card, but less frequently, and the behaviour of others may have been unaffected by the disclosure. It cannot even be assumed that any of the cardholders would have behaved any differently. Without an individual determination, there would be no way of knowing how many fell into each of these categories or the aggregate loss for those, if any, who would have refrained from using — or limited their use of — the card.

31 In my view, the motion judge fell into error in concluding that the damages assessment flowing from the alleged breach of contract in this case would require an individual assessment of cardholder behaviour. In arriving at this conclusion, the motion judge relied on the approach to assessing damages that applies in cases where the defendant repudiates a contract that has alternative modes of performance. The governing principle in this type of case is that a defendant is entitled to have damages assessed on the basis that the defendant will perform the contract in the way that is most beneficial to himself and not in the way that is most beneficial to the plaintiff. That principle was first explained by Scrutton L.J. in Withers v. General Theatre Corp., [1933] 2 K.B. 536 (Eng. C.A.). It was adopted by the Supreme Court of Canada in Hamilton v. Open Window Bakery Ltd. (2003), [2004] 1 S.C.R. 303 (S.C.C.) at paras. 13-23 as a general principle for determining damages in cases where a defendant who wrongfully repudiated a contract had alternative modes of performing the contract.

32 …[Here,] the defendant did not have alternative modes of performing the contract … In Withers, Scrutton L.J. gave helpful examples of when this principle for assessing damages would apply at p. 549:

> A. undertakes to sell to B. 800 to 1200 tons of a certain commodity; he does not supply B. with any commodity. On what basis are the damages to be fixed? They are fixed in this way. A. would perform his contract if he supplied 800 tons, and the damages must therefore be assessed on the basis that he has not supplied 800 tons, and not on the basis that he has not supplied 1200 tons … The damages are assessed ... on the basis that the defendant will perform the contract in the way most beneficial to himself and not in the way that is most beneficial to the plaintiff.

…

33 In Hamilton v. Open Window Bakery Ltd., the plaintiff contracted to provide services to the defendant for 36 months. The contract provided the defendant with a right to end the contract after 18 months, upon giving three months' notice of the intent to terminate. …

…

35 The Supreme Court of Canada … stated …

> The assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract, i.e., the performance which was least burdensome for the defendant. …

36 In this case, the terms of the Cardholder Agreement do not provide alternative modes of performance that are in any way analogous to those considered in Withers and Open Window Bakery Ltd. The terms of the Cardholder Agreement do provide the defendant with an option of disclosing fees and amending the agreement. They do not, however, provide the defendant with an option of presenting cardholders with a hypothetical choice of asking what they would have done in the event that disclosure of certain fees had been made retroactively in accordance with the terms of the Cardholder Agreement. The motion judge fashioned such an option, and in so doing, he engaged in the tort-like approach to assessing damages that was … rejected by … the Supreme Court of Canada. In other words, the motion judge asked what would have happened if the defendant had not breached its contractual obligations, rather than asking whether the defendant had alternative means of complying with its existing contractual obligations.

37 Thus, I do not accept the motion judge's conclusion that a determination of compensatory damages in this case is an unmanageable prospect because of a need to assess how individual cardholders would have behaved had they known of the allegedly undisclosed fees. Reading his reasons in their entirety, it is clear that this error informed his ultimate conclusion that this action was not appropriate for certification as a class proceeding.

38 In my view, this is a case where the common issues trial judge could find, based on a review of the evidence, that it is appropriate to conduct an aggregate assessment of monetary relief under s. 24 of the CPA, as was contemplated by this court in Markson, supra. Alternatively, even if the trial judge were to conclude that an aggregate assessment of damages is inappropriate, the nature of the claim asserted is such that the provisions of the CPA might well be utilized so as to make a class proceeding under the statute the "preferable procedure for the resolution of the class members' claims": see Hollick v. Metropolitan Toronto (Municipality), [2001] 3 S.C.R. 158 (S.C.C.) at para. 29.

(b) Why the trial judge could find that this is an appropriate case for assessing damages on an aggregate basis under s. 24 of the CPA

39 This court recently considered the application of s. 24 of the CPA in Markson v. MBNA Canada Bank, supra. The issue in that case was whether a claim based on allegations that the defendant bank received interest on cash advances in violation of s. 347(1)(b) of the Criminal Code was suitable for certification as a class action. The alleged criminal rate of interest was imposed by the bank where a cardholder engaged in a particular combination of borrowing and repayment practices.

40 The motion judge, in reasons reported at (2004), 71 O.R. (3d) 741 (Ont. S.C.J.), refused to certify the proceeding because he found that the plaintiff's claims for restitution and breach of contract did not raise common issues and because a class proceeding was not the preferable procedure for pursuing the common issues that remained. The motion judge was of the view that factual investigations would be required to identify those cardholders who had in fact paid interest at a criminal rate and the amount they paid in excess of that rate. He reasoned that it would be necessary to examine millions of transactions individually in order to make such findings and concluded that the expense of this exercise would far exceed the benefit to the individual class members. The majority of the Divisional Court upheld his decision refusing to certify the proposed class action in reasons reported at (2006), 78 O.R. (3d) 38 (Ont. Div. Ct.).

41 In overturning the Divisional Court and granting the certification motion, Rosenberg J.A., speaking for the court, disagreed that it would be necessary for the trial judge to determine the extent of liability in relation to each member of the class. He concluded that ss. 23 and 24 of the CPA — provisions that the plaintiff relied on for the first time on appeal — offered a solution to the common issues problem posed by the restitution and damages for breach of contract claims.

42 In the present case, unlike in Markson, the determination of the common issue relating to the breach of contract question will determine liability to all members of the class, with the only possible remaining issue being that of damages. Despite this distinction, the comments in Markson related to the proper interpretation of s. 24 of the CPA are useful for present purposes. The provisions of s. 24 considered in Markson are as follows:

> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.
>
> (3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award on an average or proportional basis.

43 At paras. 44-45, Rosenberg J.A. wrote the following about s. 24(1):

> … at the certification stage the plaintiff need only establish that "there is a reasonable likelihood that the preconditions in section 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues."

In this case, conditions (a) and (c) pose no difficulty. With respect to (a), monetary relief is claimed on behalf of the class. As to condition (c), statistical sampling — as provided in s. 23 — can be employed to determine the aggregate or part of the defendant's liability without proof of individual claims. Thus, this condition is also satisfied.

44 As in Markson, in this case, condition (a) presents no difficulty. Monetary relief is claimed on behalf of the class.

45 In my view, there is a "reasonable likelihood" that condition (c) would also be satisfied. For the reasons given above, establishing the extent of TD's liability does not require making individual inquiries of cardholders to determine what they would have done if they had known of the fees. Rather, the aggregate of TD's liability may reasonably be expected to be capable of proof by resort to TD's records of the amount of fee income it collected during the relevant time frame.

46 To date, counsel for TD have refused to provide such a figure or confirm whether one exists. On an answer to a question taken under advisement on the cross-examination of the TD's representative, Mr. Geoffrey Butler, — "[t]o advise of the fees earned on foreign exchange transactions by the bank during the period from 1968 going forward" — counsel for TD stated that this amount is "[n]ot relevant. TD will not argue that the fees collected are less than the amount to prosecute the litigation." This non-response does not provide an evidentiary basis for concluding that the aggregate of the defendant's liability cannot be assessed without proof by individual class members.

47 Condition (b) remains to be considered. In Markson, Rosenberg J.A. concluded that this condition is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. In the present case, if a finding were made that there had been a breach of contract in relation to the charging of the fees, there would be no "questions of fact or law other than those relating to the assessment of monetary relief" remaining to be determined. The finding that there had been a breach of contract would make all such fees improper. Accordingly, the only assessment necessary would be to quantify the amount of the fees charged. That falls squarely within the contemplation of 24(1)(b).

48 Indeed, the only argument offered by TD on the motion below, and on this appeal, related not to the inapplicability of s. 24(1)(b) but rather to the costs associated with determining quantum by checking individual records. Mr. Butler deposed that the defendant retained copies of individual cardholder's statements from January 1985 to June 1998 on microfiche, which can be reviewed manually. Since June 1998, statement information is recorded both electronically and on microfiche. TD does not therefore argue that no relevant information is available, or that such

inquiry would relate to anything other than the assessment of monetary relief, but rather that the costs associated with reviewing the records and determining the amounts charged to each individual cardholder would be significant. Mr. Butler has estimated that it would take 1500 people about one year to identify and record the foreign exchange transactions on the cardholder statements that are available only on microfiche and that this would cost about $48,500,000.

49 The economic argument advanced by TD ignores the fact that the damages calculation would only be necessary if TD is found to have breached the contract with its cardholders. Therefore, the essence of TD's argument is that the recovery phase of the litigation, subsequent to a finding of liability, will cause it to incur significant expense. It would hardly be sound policy to permit a defendant to retain a gain made from a breach of contract because the defendant estimates its costs of calculating the amount of the gain to be substantial. A principal purpose of the CPA is to facilitate recovery by plaintiffs in circumstances where otherwise meritorious claims are not economically viable to pursue. To give any effect to the economic argument advanced by TD here would be to pervert the policy underpinning the statute.

50 Moreover, a similar economic argument was rejected by Rosenberg J.A. in Markson. His reasons at paras. 48-51 are instructive in this situation:

> Section 24(3) ... contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient. Condition (b) must be interpreted accordingly. In my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. Or, in the words of s. 24(1)(b), where the only questions of fact or law that remain to be determined concern assessment of monetary relief.
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> An example of such an award is found in Gilbert v. Canadian Imperial Bank of Commerce, [2004] O.J. No. 4260 (S.C.J.). In that case, on consent, Winkler J. certified a class proceeding and approved a settlement. The defendant CIBC was alleged to have charged undisclosed and unauthorized fees or charges in relation to foreign currency transactions on VISA accounts. The members of the class were defined as all persons in Canada issued one or more CIBC VISA cards on or before a certain date. There was apparently no attempt to identify those members of the class who had actually used their VISA cards to conduct transactions in foreign currency.
>
> In Gilbert, CIBC agreed to pay $16.5 million to settle the claims. Slightly less than $14 million was to be paid directly to class members in amounts ranging from 72 cents to $14.32. As Winkler J. observed at para. 15 these amounts were arbitrary and "[did] not purport to compensate class members in terms of actual amounts owing nor [did] they compensate only class members with valid claims". It would have been too costly and time consuming to determine liability and amount on an individual basis. Moreover, like in this case, in Gilbert, records were not available for a significant portion of the period in question. But, as Winkler J. said, at para. 15, "The CPA anticipates such a problem in s. 24(2) and (3) which provide that the court may order that an award be applied so that individual class members share in an award on an average or proportional basis and that the

> court shall consider whether it would be impractical or inefficient to identify class members entitled to share in the award or exact shares in making such a determination."

51 So too in this case, the trial judge may find it possible to resort to ss. 24(2) and (3) of the CPA in order to fashion a remedial order that avoids potential costs and inefficiencies that might arise from an attempt to determine the quantum of damages on an individual basis. Further, the class here is more limited than in Gilbert or Markson in that it does not include all TD Visa cardholders, but only those who used their cards for foreign currency transactions. In this case, the effect of the restrictive definition of the class, combined with the common issue of breach of contract, is that if the common issues judge decides that the imposition of the allegedly undisclosed fees was a breach of contract, then the defendant's liability will extend to each member of the plaintiff class.

52 Even in the event that a trial judge were not prepared to rely on ss. 24(2) and (3) to fashion a remedial order in this case, I note that the combined operation of ss. 24(4), (5) and (6) of the CPA authorize the court to require that class members submit individual claims in order to give effect to an aggregate award of damages. These provisions state:

> 24(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.
>
> (5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.
>
> (6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,
>
> (a) the use of standardized proof of claim forms;
>
> (b) the receipt of affidavit or other documentary evidence; and
>
> (c) the auditing of claims on a sampling or other basis.

The court thus has at its disposal mechanisms for receiving individual claims in order to give effect to an aggregate damages award in a case where the quantification of damages turns on an assessment of documentary, rather than testimonial, evidence.

53 For these reasons, in my view, the question of whether the damages can be assessed on an aggregate basis raises an acceptable common issue.

(iii) Preferable procedure and s. 5(1)(d)

54 The motion judge's conclusion that a class proceeding is not the preferable procedure flowed from his interpretation of the contract and his finding that it would be necessary to conduct individual examinations of class members to ascertain their subjective reaction to the undisclosed fees, as well as how, if at all, their credit card use would have been affected by their knowledge of these fees. In view of my conclusion that individual assessments of cardholder behaviour are not required to determine the extent of liability in this case, a class proceeding is clearly the preferable procedure, particularly where an aggregate assessment of damages under s. 24 is possible.

55 I am of the view, however, that even if the common issues judge were to determine that it is not appropriate to award aggregate damages in this case, a class action is still the preferable procedure in light of the governing principles that apply to the preferable procedure inquiry under s. 5(1)(d). These principles, which were articulated by the Supreme Court of Canada in Hollick, supra, were summarized in Markson at para. 69:

> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

56 Having regard to the first two of these principles, the court must consider judicial economy and the institutional capacity of the courts to efficiently address a matter of this potential size. It must also consider access to justice and the availability of any other remedial process to the putative class members. And finally, the court must consider the questions of general deterrence and accountability.

57 It seems to me that this is a case much like Markson, where Rosenberg J.A., at para. 5, concluded that a class proceeding "is not only the preferable procedure, but also the only viable procedure for remedying the alleged wrong and calling the alleged wrongdoers to account." The relatively small amounts of money that are likely to be at stake in individual claims and the disproportionately high costs associated with litigating claims on an individual basis overwhelmingly favour a class proceeding: see Markson at para. 72.

58 The third principle requires that the preferability determination be made by looking at the common issues in relation to the claim as a whole. The claim as a whole includes any individual issues as well as the common issues. The scheme of the CPA, which is a procedural statute, provides for the resolution of common issues and any individual issues that remain. The statute also provides for the assessment of damages on an individual or aggregate basis, as well as a series of options for the distribution of individual and aggregate damages.

59 In the present case, the resolution by the court of the common issue of whether there was a breach of contract is highly significant in relation to the other issues raised in this action. Both the defendant and the potential class members have an obvious interest in the determination of whether the fees charged for the foreign currency transactions were in breach of the relevant cardholder agreements.

60 Further, … the certification decision does not necessarily turn on whether damages can be assessed on an aggregate basis. … While the common issues trial is obviously an essential component of a class proceeding, it is not the whole of the proceeding. The statute is a powerful

procedural mechanism that permits the court to take a variety of approaches in resolving the claims of class members.

61 McLachlin C.J.C. in Hollick, supra, was alive to the fact that class actions typically call for a resolution of both common and individual issues. In addressing the preferable procedure requirement in s. 5(1)(d) of the CPA, the Chief Justice noted that the wording of s. 5(1)(d) calls for a determination as to whether "a class proceeding would be the preferable procedure for the resolution of the common issues." However, as she observed at para. 29, there will often be more to a class proceeding than the resolution of the common issues:

> The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" ... and not that a class action be the preferable procedure for the resolution of the class members' claims. . . .

62 What is sometimes overlooked in the focus on the common issues at the certification stage is that the CPA includes provisions permitting the use of modified procedures for conducting individual assessments of damages. The thrust of these provisions is to ensure that the court has the means to conduct cost-effective and timely determinations of individual issues following the common issues trial. As a result, the fact that damages may not be amenable to aggregate assessment at the conclusion of a common issues trial is not fatal to certification of a class proceeding.

63 Indeed, the resolution of individual issues is an essential element of many class proceedings and is crucial if there is to be an advancement of the goal of access to justice. Put another way, although the prospect of an aggregate assessment of damages is a factor in favour of certification, it is not a prerequisite. An action may well be certified as a class proceeding even in cases where individual assessments of damages in small amounts may be necessary. Absent this possibility, the purposes of the CPA would be seriously eroded.

64 Therefore, what is called for in addressing the preferable procedure requirement is to look not just at the common issues trial, but at the other procedural options for conducting the class action litigation pursuant to the CPA. In this regard, I note that s. 25 of the CPA confers broad jurisdiction on the common issues trial judge to fashion procedures to be followed where, among other things, damages cannot be assessed in the aggregate. This section deals specifically with individual participation in a class proceeding following a favourable determination on the common issues. Under its various subsections, the common issues trial judge has, inter alia, the authority to: direct a further trial (s. 25(1)(a)); appoint "one or more persons to conduct a reference" (s. 25(1)(b)); and give directions on the procedures to be followed (s. 25(2)). The broad jurisdiction of the common issues judge is amplified by s. 25(3), which provides that:

> 25. (3) In giving directions under [s. 25(2)], the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to the class members and the parties, and in so doing, the court may,
>
> (a) dispense with any procedural step that it considers unnecessary; and
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

65 In the case at bar, the key issue raised by the plaintiffs' claim is whether there was a breach of contract on the part of TD. If the trial judge finds that there was no breach, the litigation will be concluded. On the other hand, if TD is found to have breached its contract with its cardholders, the trial judge may determine that damages can be assessed either in the aggregate or on an individual basis.

66 If the individual approach to assessing damages is deemed to be appropriate, the assessment should still be straightforward and cost-effective. Given my rejection of the need for extensive inquiries of each cardholder as contemplated by the motion judge, in the event that there is a finding favourable to the class members on the breach of contract issue, all that remains is a relatively straightforward accounting exercise that can be accomplished either by the class members providing their credit card statements or by the defendant producing its records to show the amount of any charges and the individuals to whom any amounts owing should be paid.

67 The CPA also provides a range of options for distributing amounts awarded under ss. 24 or 25. For example, s. 26(2)(a) permits the court to require the defendant to distribute monetary relief directly to class members "by any means authorized by the court, including abatement and credit". I draw particular attention to s. 26(3), which states:

> 26. (3) In deciding whether to make an order under clause (2)(a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant. [Emphasis added.]

68 Evidently, the CPA provides a procedural mechanism on which the trial judge could rely to distribute amounts awarded under either s. 24 or s. 25. Thus, in my view, the preferable procedure requirement is satisfied in this case regardless of whether the assessment and distribution of damages, if necessary, are to be conducted on an aggregate or individual basis.

(iv) Representative plaintiff and litigation plan requirement under s. 5(1)(e)

69 As for the remaining certification requirements in s. 5(1)(e), there was nothing before this court to indicate that the adequacy of the proposed representative plaintiffs or their litigation plan was being seriously challenged. I would not expect that there will be any serious issue relating to s. 5(1)(e) of the CPA, but to comport with the statute, the requirements found in this provision must be addressed in the certification order.

(v) Recasting of the common issues

70 For the foregoing reasons, it is my view that the action is appropriate for certification as a class proceeding. However, the common issues as framed by the plaintiffs must be recast: see Kumar v. Mutual Life Assurance Co. of Canada (2003), 226 D.L.R. (4th) 112 (Ont. C.A.) at paras. 30-4.

71 There was some discussion during argument as to whether it was appropriate to refer to possible defences among the list of common issues. In my view, it is generally only appropriate to include such defences as common issues when they rise to the level of making a subclass

necessary under s. 5(2) of the CPA. Otherwise, setting out defences as common issues has the inherent risk of compromising the defendant's position at the common issues trial. Common issues are not intended to supplant pleadings. Moreover, the defendant at the common issues trial will unquestionably raise the defences that are also common by way of response to the allegations contained in the common issues.

72 Accordingly, I would frame the common issues as follows:

Issue 1 — Was TD in breach of the standard Cardholder Agreement by charging cardholders the conversion fee and issuer fee in respect of foreign currency transactions during the class period?

Issue 2 — If so, are there compensatory damages?

Issue 3 — Can the amount of compensatory damages, if any, be determined on an aggregate basis? If so, what is the amount of damages and how should they be distributed?

Issue 4 — Is TD liable to pay punitive damages? Should the punitive damages be assessed in the aggregate? If so, in what amount and how should punitive damages be distributed?

Issue 5 — If questions 1-3 are answered in the affirmative, should TD pay prejudgment and postjudgment interest? If so, in what amounts?

Issue 6 — Should TD pay the costs of administering and distributing any monetary judgment? If so why and in what amount?

C**onclusion**

73 I would allow the appeal, set aside the orders of the Divisional Court and the motion judge, and substitute an order granting the motion for certification on terms that are consistent with these reasons.

Appeal allowed.

Cassano v. TD Bank – comments & questions

In *Cassano*, a very experienced motion judge denied the motion for certification, and his decision was unanimously affirmed by the Divisional Court, only to be unanimously reversed by the OCA. This helps to show that how innovative, and (in 2007) still relatively untested, the provisions in ss. 23 & 24 are.

Generally, what kinds of cases seem ideal for the application of ss. 23 & 24? As a practical matter, what is the prerequisite that seems most likely to trigger the application of these sections?

What legal claims did the plaintiffs raise? What fees, in particular, did they challenge, and on what ground? What specifically did the plaintiffs point to, in the Cardholder Agreement, to support their argument? In your view, is the plaintiffs' argument persuasive? (Check your own Cardholder Agreement – some remain unchanged despite this litigation.)

Cullity J, the motion judge, held that compensatory damages could not be determined on a class-wide basis. According to him, why should this conclusion serve to defeat certification?

The OCA granted certification. Why didn't the court instead remit the case for a determination as to whether certification was appropriate?

Notice that the statement of claim, as originally filed, asserted claims of unjust enrichment and accounting. Assuming neither of these could be made out, on the alleged facts, do you think it was appropriate for the motion judge to read in a claim for breach?

The motion judge considered the applicability of s.24 of the CPA, and concluded that it could not be used to decide whether to certify the claims. Why not?

The motion judge asked the plaintiffs for supplementary arguments as to whether they were seeking compensatory or restitutionary damages. What is the difference and why should the answer have any significance here?

As it turns out, the opposing counsel had different ideas as to how compensatory damages should be measured. What's underlying the argument of the TD's counsel on this point?

According to the OCA, what was the basic error in the motion judge's account of the proper method of calculating damages?

The judgment is not very clear on the difference between this case and *Markson*. As best you can tell, what is the difference? Given what the court says about the difference between *Cassano* and *Markson*, should the decision to rely on s.24 be easier, harder, or simply based on different reasons that have no significance for comparative purposes? [That is: consider the question from the perspective of a plaintiffs' lawyer, who is thinking of bringing this case.

When seeking to persuade the court that the claim should be certified, and drawing on *Cassano* to support your position, can you legitimately say that if s.24 worked in *Cassano*, it's even more obviously applicable here, or can you only say that if it worked in *Cassano*, it could also work here?]

Notice that TD did not argue that individual damages couldn't be determined; rather, TD argued that the cost of determining individual damages would be time-consuming and expensive. What was the point of that argument, and what significance does it have in the court's analysis?

In pursuing this line of argument, the court notes that in Gilbert, the amounts paid to individual class members "were arbitrary and '[did] not purport to compensate class members in terms of actual amounts owing nor [did] they compensate only class members with valid claims'." That feature doesn't appear to bother the court here. Should it? What are the arguments for and against this method of paying damages? How, if at all, does the *CPA* itself help in addressing this issue?
After completing this step in the analysis, the court does contemplate a method, specified in the *CPA*, for calculating and awarding individual damages. How would that solution work?

Finally, the court also reasons that even if aggregate assessment weren't possible here, a class proceeding would still be preferable. Why?

Markson v. MBNA Canada Bank

Court of Appeal for Ontario,

Rosenberg, MacPherson and Rouleau JJ.A.

May 2, 2007

APPEAL from the judgment of the Divisional Court (Dunnet, Jennings, O'Driscoll JJ.), reported at (2005), 78 O.R. (3d) 39, [2005] O.J. No. 4625 (Div. Ct.), dismissing an appeal from the order of Cullity J., reported at (2004), 71 O.R. (3d) 741, [2004] O.J. No. 3226 (S.C.J.), refusing to certify an action as a class proceeding.

Linda Rothstein and Kirk M. Baert, for appellant.

William G. Horton and Jill M. Lawrie, for respondent.

The judgment of the court was delivered by

[1] **ROSENBERG J.A.**: -- The issue in this case is whether a claim based on allegations that a financial institution received interest on cash advances in violation of s. 347(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 is suitable for certification as a class action under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"). The alleged violation of s. 347(1)(b) turns on the fact that the defendant bank charges a flat fee (the transaction fee), in addition to compound interest, on every cash advance from its credit cards. Depending on other activity in the cardholder's account and the timing of repayment, it is possible that the interest rate calculated in accordance with s. 347 will exceed the 60 per cent maximum prescribed by s. 347. In these reasons I will refer to an effective annual interest rate exceeding 60 per cent as the criminal interest rate.

[2] The plaintiff seeks three types of relief. First, he seeks a declaration that the defendant's practice violates s. 347 and injunctive relief to prevent the defendant from continuing its practice. Second, he seeks damages for breach of contract and restitution for the amounts received by the defendant in excess of the permissible interest rate. Finally, he seeks punitive damages. [page324]

[3] Cullity J., an experienced class proceedings judge, refused to certify the class because the restitution and breach of contract claims did not raise common issues and because a class proceeding was not the preferable procedure with respect to the balance of the claims. His reasons are reported at (2004), 71 O.R. (3d) 741, [2004] O.J. No. 3226 (S.C.J.). A majority of the Divisional Court (Dunnet and Jennings JJ.) upheld that decision. O'Driscoll J., dissenting, would have overturned the decision and certified the class proceedings. Their reasons are reported at (2005), 78 O.R. (3d) 39, [2005] O.J. No. 4625 (S.C.J.).

[4] The fundamental question raised by the appeal is whether a class proceeding is appropriate where all members of the class are at risk of being charged a criminal interest rate and thus, potential beneficiaries of the declarative and injunctive relief sought, but only some of the members -- a much smaller number of the class -- were actually victims of the defendant's practice and thus, entitled to damages and restitution. A related issue is whether a class

proceeding is the preferable procedure where it is reasonable to conclude that some, perhaps many, might actually prefer that the alleged illegal practice continue rather than risk losing the benefit of taking cash advances on their credit card or having additional restrictions imposed on the size of the advances and repayment terms.

[5] For the following reasons I would allow the appeal, set aside the orders of the Divisional Court and the motion judge, and substitute an order granting the motion for certification. In short, it is my view that a trial judge could find that this is an appropriate case for an aggregate assessment of monetary relief under s. 24 of the CPA. Accordingly, that section, together with the statistical sampling methods permitted by s. 23, will meet the individual assessment problem identified by the motion judge. I am also of the view that the motion judge erred in principle in his analysis of whether a class proceeding is the preferable procedure. As the Chief Justice said in Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, at para. 29, "Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct." In my view, this is manifestly a case where a class proceeding is not only the preferable procedure, but also the only viable procedure for remedying the alleged wrong and calling the alleged wrongdoer to account.

The Facts

[6] The facts underlying this action are fully set out in the comprehensive reasons of the motion judge. I will, however, provide a [page325] brief summary of the relevant facts so that the legal issues can be properly understood. The defendant MBNA is a Schedule II bank under the Bank Act, S.C. 1991, c. 46. It issues MasterCard credit cards. Cardholders (or customers) can use their credit cards to make purchases and to obtain cash advances. The defendant charges a transaction fee for cash advances. At the applicable time, the transaction fee charged was the greater of $7.50 or 1 per cent of the cash advanced. For the purposes of the certification motion only, the defendant concedes that the transaction fee falls within the definition of interest in s. 347.

[7] In addition to the transaction fee, the cardholder is charged compound interest from the day the cash advance is made until it is paid off. While the cardholder is required to pay off a certain minimum amount outstanding on the credit card account each month, the cardholder is not required to pay down the account to zero every month. If a cardholder borrows less than $62.30, does not engage in any other transactions in the month, and pays off the cash advance, including the transaction fee and interest before the end of the month, the defendant will receive a payment of interest, as defined in s. 347, in excess of 60 per cent. Depending on how quickly the cardholder pays off the amounts owing, the effective annual interest rate can be astronomical, in the thousands of per cent.

[8] As this short explanation foreshadows, many variables influence whether or not the defendant receives interest at the criminal rate. The most important are the timing of repayment and other transactions on the account. For example, an isolated cash advance of $62.30, or more, will result in an effective annual interest rate of less than 60 per cent if the cardholder simply repays in accordance with the required minimum monthly payments. Similarly, if the cardholder uses the credit card to not only make cash advances but to purchase goods or services, which do

not attract a transaction fee, the effective interest rate on the account may or may not exceed 60 per cent. There are various combinations and permutations that affect the interest rate calculation.

[9] The defendant claims that there is no simple way to determine the interest rate that it charged its customers on various transactions. As of December 2003, it had approximately 2.5 million credit card accounts with current charging practices. Between January 2000 and December 2003, there were eight million cash advance transactions. Of these eight million cash advances, 17 per cent were for amounts less than $62. It has no electronically-preserved data for the period before January 2000 and therefore provided no data as to the number of cash advances for that period. The motion judge described the defendant's position in these terms at para. 36: [page326]

> It claims that it is not possible to determine from its database the effective annual interest rate received by it for each cash transaction and that this could be done only by manually and individually tracking each advance from the time it was made to the time it was repaid in full. Even then, assumptions would have to be made about the effect of multiple transactions in the accounts in order to determine when a particular advance was repaid in full.

[10] The plaintiff does not accept this position. The motion judge described his position in these terms at para. 37:

> From the information provided in the affidavits filed on behalf of the defendant, a forensic accountant retained by the plaintiff indicated that he was not satisfied of the accuracy and completeness of MBNA's assertion that it cannot determine, on an automated basis, the effective annual interest rate it received for each cash transaction. In his opinion, if his firm was able to review MBNA's systems with the co-operation and assistance of its staff, it would be able to determine if it is possible to identify the potential class members and devise a system to do this.

[11] As I will discuss later when dealing with the question of common issues for the restitution claim, it appears that the motion judge accepted the defendant's position. As he said at para. 55: "There is, in my judgment, insufficient evidence of the likelihood that an appropriate electronic system can be developed -- and of the cost of doing this -- to justify certification of the restitutionary issues."

[12] The defendant denies that its practice in respect of cash advances violates s. 347(1)(b). It relies on a voluntariness defence arising from the decision of the Supreme Court of Canada in Degelder Construction Co. v. Dancorp Developments Ltd., [1998] 3 S.C.R. 90, [1998] S.C.J. No. 75 and Garland v. Consumers' Gas Co., [1998] 3 S.C.R. 112, [1998] S.C.J. No. 76 ("Garland No. 1"). Those cases hold that there is no violation of s. 347(1)(b) where a payment of interest exceeding 60 per cent arises from a voluntary act of the debtor. The defendant submits that because the cardholder can determine when to pay back the cash advance, whether to make other purchases, how much to borrow and so on, any payment of interest at the criminal rate is voluntary. The defendant submits that this voluntariness defence applies to all of the impugned transactions.

The Reasons of the Motion Judge

[13] The motion judge noted that at least with respect to the representative plaintiff there was little controversy about the facts; that resolution of the claim would depend more on issues of law than issues of fact. As he said at para. 17, the principal issue would relate to the interpretation of s. 347 of the Criminal Code:

> The threshold question, that may determine the outcome of the litigation, is whether payments of excess interest on advances obtained pursuant to the [page327] cardholders agreement are necessarily to be considered voluntary. This is, I believe, a question of law as, essentially, it requires an elucidation of the definition provided by Major J. [in Degelder, supra].

[14] The motion judge then identified the central factual issues that would arise if the legal issues were determined in the plaintiff's favour. Factual investigations would be required to identify those cardholders who paid interest at a criminal rate and the amount paid in excess of 60 per cent in each case.1 However, he indicated that such investigations would be required only in respect of the claim for restitution. This distinction appears to have dominated the motion judge's reasons and ultimately led him to find that a class proceedings is not the preferable procedure.

[15] After reviewing the evidence in much greater detail than I have done here, the motion judge turned to the requirements for certification in s. 5 of the CPA. With respect to s. 5(1) (a) -- disclosure of a cause of action -- as the motion judge noted, this issue was to be determined on the basis of the pleadings, including the provisions of the cardholders agreement and disclosure statement that were to be considered incorporated into the amended statement of claim. He held that the s. 5(1)(a) requirement was made out in respect of the cause of action relating to the alleged violation of s. 347 and consequent unjust enrichment. He was also satisfied that a cause of action based on breach of contract was made out on the theory that the respondent failed to credit excess payments of interest to its customers.

[16] As the motion judge noted, the requirement in s. 5(1)(b) -- existence of a class -- posed a problem of under and over-inclusion. The original class proposed in the statement of claim was as follows:

> all persons who (i) hold or have held an MBNA Credit Card and (ii) paid, or have been charged, or will pay, or will be charged interest on Cash Advances on a MBNA Credit Card since MBNA commenced carrying on business in Canada, and the date of judgment in this matter.

[17] While this definition might suffice in respect of the claims for declaratory and injunctive relief, it was over-inclusive because it would include a large number of cardholders who never paid interest at the alleged criminal rate because they (i) never took cash advances or (ii) repaid their advances in a manner that did [page328] not trigger a criminal interest rate. These cardholders would have no restitution claim and, presumably, for the same reason no claim for breach of contract.

[18] The motion judge was also of the view that the definition could be criticized as under-inclusive because it excludes existing cardholders "who have not, and do not, pay interest within the defined period but may do so thereafter" (para. 38).

[19] In the end, the motion judge rejected the defendant's argument that the defined class was over-inclusive. He did so, it seems, on the theory that each member of the proposed class was potentially at risk of being charged a criminal interest rate and that there was no way to define the class more narrowly. The proposed definition had the advantage of allowing potential class members to identify themselves without running afoul of the rule that the class must be defined without reference to the merits of the claim. Thus, the motion judge rejected an alternative definition of the class that had been proposed by the plaintiff and would have restricted the class to those cardholders who made interest payments in excess of an effective annual rate of 60 per cent.

[20] The motion judge did, however, reformulate the original class definition because of a concern that the definition did not refer to persons who obtained cash advances after the date on which notice of certification was given. Accordingly, at para. 43, he proposed the following definition:

> All persons in Canada who, at any time before the date [or the last of the dates] on which notice of certification is given pursuant to the order of this Court, hold or have held, an MBNA credit card on which cash advances could be obtained.

[21] The motion judge held that the common issues requirement prescribed in s. 5(1)(c) was met only with respect to the claims for a declaration and an injunction. Accordingly, at para. 60, he restated and reduced the original 12 common issues proposed to the following:

1. Has MBNA received interest in excess of an effective annual rate of 60 per cent on cash advances made under agreements or arrangements with class members?
2. If so, were, and are, class members entitled to withhold payment of such excess interest:
(a) because MBNA'S receipt of such excess interest would be in violation of s. 347 of the Criminal Code; or
(b) pursuant to such agreements or arrangements?
3. Should MBNA be [e]njoined from charging, or receiving and not crediting, excess interest in the future?
4. Should the class be awarded punitive damages against MBNA? [page329]

[22] The motion judge was of the view that issues concerned solely with the rights of class members to restitution "would not advance the proceeding sufficiently in view of the likelihood that it will be necessary to review the transactions of each cardholder in order to identify those who paid interest at a criminal rate, the amount of such payments and the variables that affected the rate in each case" (para. 53). In Appendix "A" I have set out the common issues proposed by the plaintiff before the motion judge. Some of the common issues rejected by the motion judge were: whether the defendant was required to pay to the class, as restitution, the transaction fees or, alternatively, the interest it has received from the class that exceeds an effective annual interest rate of 60 per cent and whether the cash advance transaction fee was incurred voluntarily by the class so as to give rise to a defence of voluntariness.

[23] The motion judge's finding that there were not appropriate common issues in respect of the restitution claim depended, in part, on his view that since it was unlikely that an electronic system could be developed to identify the transactions on which an effective interest rate exceeding 60 per cent was paid, the case would disintegrate into manually examining millions of transactions. Even if some kind of electronic system could be developed, the expense of this exercise would far exceed the benefit to the individual class members given the plaintiff's concession that restitution to individual cardholders would be in the neighbourhood of $7.50. Accordingly, the motion judge refused to certify the proceeding in respect of the issues directed solely at the restitutionary claims.

[24] The motion judge then addressed s. 5(1)(d), the question of preferable procedure, in relation to the balance of the claims. He seems to have found that a class proceeding would meet the goals of access to justice and behaviour modification. He did not expressly deal with the third goal -- judicial economy. Rather, he found that the preferable procedure requirement was not met in relation to the claims for declaratory and injunctive relief because if the action succeeded, the defendant would be required to comply with the law and compliance with the law would reduce the credit options available to consumers. The basis for this finding was in an affidavit filed by the defendant. In short, the defendant asserted that to avoid receiving a criminal interest rate on transactions it could preclude customers from drawing less than a certain amount and repaying the advance before a certain date. In the result, customers would end up with fewer options and would be required to pay greater amounts of interest. As the motion judge put it at para. 67: "Given the declaratory and injunctive nature of the relief sought by the plaintiff, the right to [page330] opt out would provide cold comfort to class members who would prefer to pay less interest than to participate, as private citizens, in the enforcement of s. 347 of the Criminal Code."

[25] The motion judge considered that it would still be open to the plaintiff to pursue the litigation in his individual capacity, but it was not appropriate to force other consumers to join in the proceeding. As he said at para. 68:

> Mr. Markson is free to pursue his objective in his individual capacity but that does not mean that the court should subject cardholders in general to the proceedings when there are reasons why they might well consider orders for the declaratory and injunctive relief as not in their best interests if they were informed of the likely consequences, and there is no evidence to the contrary.

[26] In the result, the motion judge refused to certify the proceeding in relation to the claims for a declaration and an injunction. He nevertheless went on to consider the final criterion, the presence of an appropriate representative plaintiff. The principal challenge to Mr. Markson as an appropriate representative plaintiff rested with the defendant's assertion that it had a defence to his claim that might not apply to the class as a whole based on evidence from which it could be inferred that the plaintiff had deliberately set out to create a transaction that resulted in him paying an effective rate of interest in excess of 60 per cent. The motion judge dealt with this issue at length and resolved the issue in the plaintiff's favour. Since this is not an issue on the appeal I will simply say that I agree with the motion judge's analysis.

[27] The motion judge did not expressly deal with whether the plaintiff had proposed an acceptable litigation plan. Again, however, this is not an issue on the appeal.

The Reasons of the Divisional Court

(a) The majority

[28] Writing for the majority of the Divisional Court, Dunnet J., Jennings J. concurring, agreed with the motion judge. At para. 47, she interpreted the reasons of the motion judge as holding that each cash advance transaction, including its surrounding circumstances, "would have to be reviewed in order to determine whether interest at an effective annual rate in excess of 60 per cent was received by each cardholder, the quantum of such excess in each case, whether that receipt arose as a result of a voluntary act and whether, ultimately, the test for unjust enrichment in each case could be established". She held that the record before the motion judge disclosed that notwithstanding resolution of the proposed common issues, individual issues would have to be decided before the defendant's liability to any class member could [page331] be determined. Consequently, she concluded, at para. 49, that "the [plaintiff] failed to demonstrate that a common trial would adjudicate a substantial part of each class member's claims and thus failed to meet the commonality requirement regarding the restitutionary claims".

[29] The majority of the Divisional Court also agreed with the motion judge's analysis of preferable procedure respecting the restitutionary claims and the claims for injunctive and declaratory relief. In particular, the majority concluded, at para. 71, that the motion judge was "entitled to consider the potential negative consequences of a class action to class members when weighing alternative procedures".

(b) O'Driscoll J. (dissenting)

[30] O'Driscoll J., dissenting, held that the motion judge erred in several respects. First, he committed the error identified by this court in Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 660, by finding common issues in relation to some but not all of the causes of action notwithstanding the causes of action substantially overlapped. O'Driscoll J. held at para. 43 of his reasons that:

> Far from being unrelated and disparate claims, in my view, the claim grounded in an alleged breach of s. 347 of the Code and the claim grounded in breach of contract and calling for restitution all revolve around whether the respondent received interest exceeding the rate allowed in s. 347 of the Code from the appellant and other members of the class when the cardholders obtained cash advances on their individual cards.

[31] Accordingly, the motion judge erred in separating these issues; the plaintiff had provided a sufficient basis to conclude that a resolution of common issues relating to breach of contract and restitution would, in a significant way, advance those claims. The motion judge also erred in finding that a class proceeding was not the preferable procedure because:

-- Individual actions would be cost prohibitive given the small amounts in issue for any individual. Thus, a class proceeding meets the goal of access to justice.

-- There was no undertaking from the defendant that it would stop its method of charging on cash advances. A class proceeding therefore meets the goal of behaviour modification.
-- The defendant's "in terrorem" argument about the sanctions it would impose upon its customers if it were forced [page332] to comply with the law is not a matter for the court, but for Parliament2 and the marketplace (para. 55).

[32] Further, O'Driscoll J. was unimpressed with the argument that the plaintiff was not a suitable representative plaintiff. As he said at para. 34, "In a 'clean hands' competition between these parties, in my view, the appellant would win in a walk." He concluded, at para. 60, that "this case fits perfectly into the mould designed for class proceedings". He would therefore have allowed the appeal and certified the class action with the common issues identified by the plaintiff, which have been reproduced in Appendix "A".

Analysis

(a) Introduction

[33] This court has repeatedly held that the decisions of experienced judges, like the motion judge in this case, are entitled to substantial deference. Accordingly, as was said in Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, 247 D.L.R. (4th) 667 (C.A.), at para. 39, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 50, this court "should restrict its intervention to matters of general principle".

[34] As indicated, the motion judge found that the following requirements of s. 5 of the CPA had been made out:
-- Disclosure of a cause of action (5(1)(a)) in relation to unjust enrichment based on a violation of s. 347 and breach of the cardholders agreement;
-- Existence of a class (5(1)(b));
-- Common issues (5(1)(c)) in relation to claims for injunctive and declaratory relief and punitive damages; and
-- Acceptable representative plaintiff (5(1)(e)).

[35] I agree with the motion judge with respect to those issues decided in the plaintiff's favour. Accordingly, I will address only the common issues criterion in relation to the claims for restitution and breach of contract, and the question of preferable procedure. [page333] In my view, the motion judge erred in principle with respect to the preferable procedure issue. I am also of the view that by recasting its case to take advantage of ss. 23 and 24 of the CPA, the plaintiff has met the concerns of the motion judge and the Divisional Court regarding common issues for the restitution and breach of contract claims.

(b) Common issues and the claims for restitution and breach of contract

[36] The fundamental problem underlying the question of issues common to the claims for restitution and breach of contract is that the defendant has structured its affairs such that it is practically impossible to determine the extent of its breach of s. 347 of the Criminal Code. In framing the issue in this way, I should not be taken as having found that the defendant

deliberately structured its affairs to avoid a possible class proceeding or a finding that it violated s. 347. The fact remains, however, that the effect of the defendant's accounting practices is that the precise extent of any violation of s. 347 can be determined only at great cost.

[37] While the plaintiff continues to assert that it may be possible to design a computer programme that could determine the extent of the alleged breach of s. 347 and identify the individual cardholders who would be entitled to restitution or damages for breach of contract, I have not been persuaded that the motion judge's finding to the contrary is unreasonable. Accordingly, if the millions of transactions have to be examined individually, the motion judge is undoubtedly correct that those claims are not suitable for certification; the time and cost to determine the size of the liability in relation to each member of the class would overwhelm the common issues. However, if the motion judge is correct in finding that each transaction would have to be examined individually, the allegedly illegal conduct of the defendant will continue and its customers will receive no remedy for the previous violations.

[38] On appeal to this court the plaintiff for the first time submitted that ss. 23 and 24 of the CPA offer a solution to the common issues problem with respect to the restitution and breach of contract claims. The relevant provisions are as follows:

> 23(1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.
>
> . . . . . [page334]
>
> 24(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.
>
> (3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

[39] Provided the defendant is not prejudiced, it is open to a plaintiff to recast its case to make it more suitable for certification: see Kumar v. Mutual Life Assurance Co. of Canada, [2003] O.J. No. 1160, 226 D.L.R. (4th) 112 (C.A.), at paras. 30-34 and Rumley v. British Columbia,

[2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, 205 D.L.R. (4th) 39, at para. 30. In sum, that is what has occurred here. While the plaintiff has not abandoned its position that it may be possible to design a computer programme to identify those customers who actually paid a criminal interest rate, he now suggests that in the alternative, an aggregate monetary award can meet the commonality concerns. The defendant has not shown how it has been prejudiced by this change in the plaintiff's position.

[40] The statistical sampling authorized by s. 23 cannot be used to determine the defendant's liability. Rather, s. 23 provides a means "of determining issues relating to the amount or distribution of a monetary award". Similarly, this court held in Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27 (C.A.), at para. 49, leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 106, that s. 24 "is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage".

[41] If the common issues relating to the application for a declaration and injunctive relief were to be determined in the plaintiff's favour, the trial court will have found that the defendant received interest in excess of an effective annual rate of 60 per cent on cash advances. Thus, liability to some class members will have been established. At least some members of the class would therefore be entitled to a remedy, either by way of restitution or [page335] damages for breach of contract. In my view, those two findings -- liability and entitlement to a remedy -- are sufficient to trigger the application of ss. 23 and 24.

[42] As I have said, because of the way the defendant has structured its affairs it is practically impossible to determine the extent of its breach of s. 347. Once the common issues are resolved, it would be possible to review the statements of each individual cardholder and calculate the cardholder's damages. The vast number of accounts to be reviewed and the small potential award in each case are such that it is impractical and inefficient to do so. Sections 23 and 24 provide a means of avoiding the potentially unconscionable result of a wrong eluding an effective remedy.

[43] Pursuant to s. 24(1), the section applies if: (a) monetary relief is claimed on behalf of some or all class members; (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) the aggregate or a part of the defendant's liability to some or all class members can be reasonably determined without proof of individual claims. In my view, this is a case where the aggregate liability to all members of the class can be reasonably determined.

[44] The difficult issue in this case is whether s. 24 can apply where, as here, it is alleged that whether or not an individual was affected by a breach of contract or violation of the Criminal Code can only be done on a case-by-case basis. This depends on an interpretation of s. 24(1). Section 24 has received relatively little attention in the reported cases: see e.g., Serhan Estate v. Johnson & Johnson, [2006] O.J. No. 2421, 269 D.L.R. (4th) 279 (Div. Ct.), at paras. 136-39. However, I agree with Cullity J. in Vezina v. Loblaw Companies Ltd., [2005] O.J. No. 1974, [2005] O.T.C. 365 (S.C.J.), at para. 25 that at the certification stage the plaintiff need only establish that "there is a reasonable likelihood that the preconditions in section 24(1) of the CPA

would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues".

[45] In this case, conditions (a) and (c) pose no difficulty. With respect to (a), monetary relief is claimed on behalf of the class. As to condition (c), statistical sampling -- as provided for in s. 23 -- can be employed to determine the aggregate or part of the defendant's liability without proof of individual claims. Thus, this condition is also satisfied.

[46] This leaves condition (b). Can it be said that no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability? The defendant submits that [page336] liability turns on individual assessments and therefore, resolution of common issues concerning the alleged breach of s. 347 and breach of contract would not establish its liability to any particular customer. If the defendant is correct, the kind of action sought to be pursued in this case will almost never be capable of certification. Large institutions allegedly receiving large amounts of illegal profits from millions of small transactions will effectively be immunized from suit.

[47] Condition (b) in s. 24(1) must be interpreted in light of the other parts of the section, and in particular, in light of s. 24(3). It is a basic tenet of statutory interpretation that any provision of a statute must be interpreted having regard to the entire context, as explained in Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[48] Section 24(3) provides, in part, that, "In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award." The subsection therefore contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient. Condition (b) must be interpreted accordingly. In my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. Or, in the words of s. 24(1)(b), where the only questions of fact or law that remain to be determined concern assessment of monetary relief.

[49] In the context of this case, if the plaintiff can establish that the defendant administered its cash advances in a manner that violated s. 347 and/or breached its contract with its customers, it will have established potential liability on a class-wide basis. Each member of the class would be entitled to declaratory and injunctive relief. The only matter remaining would be the application of the decision on the common issues to the specific account activity of each class member to determine that class member's entitlement to monetary relief. Section 23 can be used to calculate the global damages figure. Section 24 can be used to find a way to distribute the aggregate sum to class members. It may be that in the result some class members who did not [page337] actually suffer damage will receive a share of the award. However, that is exactly the result

contemplated by s. 24(2) and (3) because “it would be impractical or inefficient to identify the class members entitled to share in the award”.

[50] An example of such an award is found in Gilbert v. Canadian Imperial Bank of Commerce, [2004] O.J. No. 4260, [2004] O.T.C. 902 (S.C.J.). In that case, on consent, Winkler J. certified a class proceeding and approved a settlement. The defendant CIBC was alleged to have charged undisclosed and unauthorized fees or charges in relation to foreign currency transactions on VISA accounts. The members of the class were defined as all persons in Canada issued one or more CIBC VISA cards on or before a certain date. There was apparently no attempt to identify those members of the class who had actually used their VISA cards to conduct transactions in foreign currency.

[51] In Gilbert, CIBC agreed to pay $16.5 million to settle the claims. Slightly less than $14 million3 was to be paid directly to class members in amounts ranging from 72 cents to $14.32. As Winkler J. observed at para. 15, these amounts were arbitrary and “[did] not purport to compensate class members in terms of actual amounts owing nor [did] they compensate only class members with valid claims”. It would have been too costly and time consuming to determine liability and amount on an individual basis. Moreover, like this case, in Gilbert, records were not available for a significant portion of the period in question. But, as Winkler J. said, at para. 15, “The CPA anticipates such a problem in s. 24(2) and (3) which provide that the court may order that an award be applied so that individual class members share in an award on an average or proportional basis and that the court shall consider whether it would be impractical or inefficient to identify class members entitled to share in the award or exact shares in making such a determination.”4

[52] By resort to ss. 23 and 24 in this case it will be possible for the trial court to deal with the problem identified by the motion judge in para. 57 of his reasons that “the cost of investigating, and analyzing, the details of each cardholder’s transactions with MBNA -- 8 million since 2000 -- and processing the claims of those who are found to have paid interest at a criminal rate, might well be quite disproportionate in relation to the amounts recoverable”. [page338]

[53] In my view, this case, like Gilbert, is the very kind of case which s. 24 was designed to deal with because it is impractical and inefficient to identify specific recipients. Such an award is consistent with the recommendations of the Ontario Law Reform Commission in its Report on Class Actions (Toronto: Ministry of the Attorney General, 1982) at 572:

> We therefore recommend that, where the court makes an aggregate assessment, but the circumstances render impracticable the determination of those class members entitled to share in the award or the exact share that should be allocated to particular class members, the court should be empowered to order that the members of the class are entitled to share in the award on an average or proportional basis where the failure to do so would deny recovery to a substantial number of class members who have been injured.

[54] I do not consider this application of the CPA inconsistent with the decisions of the Supreme Court of Canada, such as Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J.

No. 67. In that case, the plaintiff could establish that only a very small proportion of the class had actually complained about the pollution. The court nonetheless found that the common issues requirement was satisfied: see para. 26 of Hollick.5 The court went on to find that the case for certification failed because the preferable procedure requirement was not met.

[55] Nor does this application of the CPA offend this court's holding in Chadha, supra, or Pearson v. Inco Ltd. (2006), 78 O.R. (3d) 641, [2005] O.J. No. 4918 (C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 1. In Chadha, the plaintiff adduced no evidence that the result of the defendants' allegedly illegal acts were passed through to the consumers who made up the proposed class. That is not an issue in this case. There is no question that the allegedly illegal fees were passed on to the class members and received by the defendant. The only serious issue is how many members of the class actually suffered an economic loss. This issue can be addressed by ss. 23 and 24.

[56] In Pearson, supra, at para. 77, the court stated that s. 24 might apply if the plaintiff could "show that every member of the class was adversely affected by the disclosure of the nickel pollution by Inco". However, that is how the Pearson case was cast by the plaintiff in this court and the court was not required to consider the full scope of the application of s. 24.

[57] Accordingly, in addition to the common issues identified by the motion judge in relation to the claims for declaratory and [page339] injunctive relief, there are common issues relating to the claims for restitution and breach of contract as follows:
(a) If MBNA received interest in excess of an effective annual rate of 60 per cent on cash advances made under agreements or arrangements with class members, is MBNA required to repay to the class, as restitution, the transaction fees it received from the class, or alternatively, the interest it has received from the class that exceeds an effective annual rate of 60 per cent interest?
(b) Are the terms of the paragraph headed "Interest" of the Cardholder Agreement a bar to the class claim?
(c) Has MBNA breached its contracts with the class by making interest payable that exceeds an effective annual rate of 60 per cent, within the meaning of s. 347 of the Criminal Code?
(d) Has MBNA breached its contracts with the class by failing to credit their accounts with the interest it has received that exceeds an effective annual rate of 60 per cent?
(e) Do provincial Statutes of Limitations have any application to claims of unjust enrichment flowing from interest charged or received in contravention of s. 347 of the Criminal Code?

[58] If these issues are determined in favour of the class, the trial judge will be able to resort to ss. 23 and 24 of the CPA to resolve the issues of quantum and distribution of the monetary award. Section 26 provides a shopping list of methods for distributing an award under s. 24, including abatement and credit to class members by the defendant (s. 26(2)(a)). That said, the trial judge might nevertheless find, pursuant to s. 24(4) that individual claims need to be made to give effect to the order. If so, it may well be that the trial judge will be asked to exercise the power under s. 10 of the CPA to "amend the certification order, . . . decertify the proceeding or . . . make any other order it considers appropriate".

[59] Strictly speaking it is not necessary to state the possibility of an aggregate damage award as a common issue: see Healey v. Lakeridge Health Corp., [2006] O.J. No. 4277, 38 C.P.C. (6th) 145 (S.C.J.), at para. 102. However, I think it is appropriate to do so in this case, given the importance of the issue. I would state the issue as follows: [page340]

Can the amount of restitution and damages for breach of contract be determined on an aggregate basis? If so, in what amount?

[60] There is one further issue that requires consideration in relation to the problem of common issues -- the voluntariness defence. The defendant has taken slightly inconsistent positions in relation to the voluntariness defence. On the one hand, counsel asserted that voluntariness was a complete defence to all of the claims, and on the other, stated that the issue would have to be determined on a case-by-case basis. The motion judge did not directly address this issue.6 However, in his subsequent decision in McCutcheon v. The Cash Store Inc. (2006), 80 O.R. (3d) 644, [2006] O.J. No. 1860 (S.C.J.), the motion judge explained that he did not consider voluntariness to be an issue that would have to be determined on an individual basis. At para. 67 of McCutcheon, he said the following in relation to this case:

> The facts of Markson differed from those of this case in that there were several variables that could affect whether the interest charged exceeded a criminal rate and a number of these were within the control of the debtors. While, in view of these variables, an examination of the individual facts of each transaction would be required to determine whether interest at a criminal rate had been received and the extent, if any, of the defendants' unjust enrichment, the threshold question whether, and in what circumstances, the payments at such a rate were voluntary depended, as here, on the terms of the agreements between the parties and could therefore be accepted as a common issue.

[61] The so-called voluntariness defence arises from the decisions of the Supreme Court of Canada in Degelder, supra, and Nelson v. C.T.C. Mortgage Corp., [1984] B.C.J. No. 3161, 16 D.L.R. (4th) 139 (C.A.), affd [1986] 1 S.C.R. 749, [1986] S.C.J. No. 35. In Degelder, at para. 34, Major J. held that "[t]here is no violation of s. 347(1)(b) [the provision at issue in this case] where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement" (emphasis in original).

[62] In this case, the defendant submits that since the cardholder controls the amount of the cash advance and the amounts and period of repayment (subject only to certain minimum payment requirements) and whether or not to engage in other transactions [page341] (i.e., credit card purchases) affecting the ultimate interest rate paid, the voluntariness defence protects it from liability under s. 347(1)(b).

[63] Hoy J. considered the question of the voluntariness defence in the context of a class proceeding in Smith v. National Money Mart Co., [2007] O.J. No. 46, 37 C.P.C. (6th) 171 (S.C.J.).7 The claim in National Money Mart concerned an allegation that the defendants received a criminal rate of interest on "payday loans". At the time the loan is advanced to the customer, the customer provides a personal cheque payable to the lender for a period ending one

day after the stated due date of the loan (being the day before the borrower's payday). If the customer is able to pay off the loan before the due date by paying the principal amount and the accumulated interest (at a rate of 59 per cent per annum), there is no cheque cashing fee. If, however, the lender needs to pay off the loan by cashing the personal cheque, certain cheque cashing and other fees are triggered, potentially also triggering a criminal interest rate if those fees come within the definition of interest in s. 347. As in this case, the National Money Mart defendants argued that the voluntariness defence was applicable and would have to be determined on an individual basis. Hoy J. held that application of the voluntariness defence was a common issue. As she pointed out, in Garland No. 1 the Supreme Court of Canada did not approach the voluntariness issue on a case-by-case basis: see also Bodnar v. Cash Store Inc., [2006] B.C.J. No. 1171, 55 B.C.L.R. (4th) 53 (C.A.), at paras. 11-12.

[64] I agree with the reasons of Hoy J. in National Money Mart and the motion judge that the voluntariness defence could be accepted as a common issue. The defendant may well be right that since the customer can choose the amount of the cash advance, when to repay it and whether to make additional credit purchases, the payment of interest at a criminal rate arises from a voluntary act of the debtor. However, that defence would apply across the class. It is not apparent to me why decisions, such as the date of repayment, would give rise to a voluntariness defence in one case and not another. At least at this stage, I cannot see why it will be necessary to determine the application of the defence on an individual basis. Accordingly, in my view, the possible availability of a voluntariness defence does not stand in the way of certification. I would therefore include the following as a common issue: [page342]

> If MBNA received interest at an effective annual rate in excess of 60 per cent on cash advances made under agreements or arrangements with class members, did payment of interest at that rate arise from the voluntary acts of the class members so as to give rise to a "voluntariness defence" thereby precluding a violation of s. 347 of the Criminal Code of Canada?

[65] To conclude on this aspect of the case, in my view there are common issues in relation to the claims for restitution and breach of contract. In fairness to the motion judge and the Divisional Court, I have reached this conclusion because of the application of ss. 23 and 24 of the CPA, matters that were not raised before those courts.

(c) Preferable procedure

[66] Even though the motion judge found that there were common issues in relation to the claims for injunctive and declaratory relief, he held that a class proceeding was not a preferable procedure because if the action was successful and the defendant was forced to comply with the law, its customers would end up with fewer options and would be required to pay greater amounts of interest. Yet, the motion judge recognized that the plaintiff could pursue an individual action. In my view, the motion judge erred.

[67] First, the findings of the motion judge are fundamentally inconsistent. If the plaintiff did pursue an individual action and obtained a declaration or injunction I cannot imagine why the consequence would be any different than a class proceeding. Surely, the defendant bank would

comply with the injunction or conduct its business in accordance with the declaration and stop violating the law, not just in relation to this plaintiff, but for all of its customers. Thus, whether the issue were pursued as an individual action or a class proceeding, the customers would be deprived of certain options.

[68] The only significant result of refusing to allow this action to go forward as a class proceeding but permitting the plaintiff to pursue his individual action is that the defendant, even if found to have violated the Criminal Code and breached its contract with its customers, will not be required to disgorge the illegal profit. In the result, customers will not only lose the options referred to by the motion judge, but they will also receive no recompense for past illegal acts by the defendant. In my view, this is not a reasonable result. To a similar effect see 1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2002), 62 O.R. (3d) 535, [2002] O.J. No. 4781 (S.C.J.), at para. 45, affd (2004), 70 O.R. (3d) 182, [2004] O.J. No. 865 (Div. Ct.).

[69] Second, in my view, the motion judge erred in failing to apply the criteria for preferable procedure as articulated by the Supreme Court of Canada. A succinct statement of the applicable [page343] principles is set out in Hollick, supra, at paras. 27 to 31. I would summarize those principles as follows:
(1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
(2) “Preferable” is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
(3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

[70] As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.

[71] As I have said, the motion judge appears to have accepted that a class proceeding would meet the goals of behaviour modification and access to justice. For the reasons that follow, I agree with that conclusion. The defendant has said that it will continue to conduct business in a manner that may violate the law until presumably the law is changed or it is required to stop by court order. A class proceeding would therefore meet the goal of behaviour modification. While presumably an individual action that resulted in an injunction or declaration would achieve the same result, a class proceeding, unlike an individual action, will also have the advantage of requiring the defendant to account for the economic harm it has caused. As Doherty J.A. observed in Hickey-Button v. Loyalist College of Applied Arts & Technology, [2006] O.J. No. 2393, 267 D.L.R. (4th) 601 (C.A.), at para. 58, “Accountability is an important first step toward behaviour modification.”

[72] In my view, access to justice overwhelmingly favours a class proceeding. The amounts involved are so small that no litigant would have an interest in pursuing an individual claim. The legal and other fees to pursue the claim would be hugely disproportionate to the amounts in issue in any individual [page344] claim. No other viable procedure has been identified to resolve the claims.

[73] The goal of judicial economy also favours a class proceeding. Admittedly, maximum judicial economy will result if this action is not certified, in that no claim would be advanced at all.8 However, this result hardly strikes me as what the courts had in mind in terms of judicial economy. Moreover, it would be an overly rigid interpretation of the CPA and inconsistent with the instruction in Hollick, supra, at para. 15 that "courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters". I agree with Winkler J. in 1176560 Ontario Ltd., supra, at para. 45 that:

> Arguments that no litigation is preferable to a class proceeding cannot be given effect. If there is any basis to this argument, it is subsumed in the cause of action element of the test for certification.

[74] Thus, judicial economy should focus on the relationship of the common issues to the other issues in the case. Viewed from this perspective, a class proceeding is not inconsistent with judicial economy. If I am right that the voluntariness defence can be determined on a class-wide basis and that ss. 23 and 24 can resolve the issues of quantum and distribution of the monetary award, the entire case will be determined by resolution of the common issues. It will not be necessary to engage in trials of any individual issues. A class proceeding in this case would achieve litigation efficiency in the sense referred to in the Report of the Attorney General's Advisory Committee on Class Action Reform (Ontario: Ministry of the Attorney General, 1990) at 15, in providing "an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of the many."

[75] A class proceeding will be a fair, efficient and manageable way of advancing the claim. It may be that some customers of the defendant would prefer that it continue to have the right to break the criminal law (if it is doing so), in order to offer its customers some added advantages. In this sense, allowing the plaintiff to pursue a class proceeding may be seen as unfair to some of the customers. In an organized society however, I do not see this as the kind of fairness concern that should prevent a court from intervening. Rather, the concern should be whether the defendant is acting in accordance with the law. As Iacobucci J. said in [page345] Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, at para. 57, "As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime."

Conclusion

[76] I would allow the appeal, set aside the orders of the Divisional Court and the motion judge, and substitute an order granting the motion for certification on terms that are consistent with these reasons. The case should be remitted to the supervision of the Regional Senior Justice or such judge as he directs to manage the action.

APPENDIX “A”

COMMON ISSUES PROPOSED BY THE PLAINTIFF
BEFORE THE MOTION JUDGE

At para. 45 of his reasons, the motion judge enumerated the following as the proposed common issues:

(a) is the cash advance transaction fee “interest” for the purpose of calculating the effective annual interest under s. 347 of the Criminal Code;

(b) in what circumstances does MBNA charge interest at a rate in excess of an effective annual interest rate of 60 per cent;

(c) in what circumstances does MBNA receive interest at a rate in excess of an effective annual interest rate of 60 per cent;

(d) did MBNA receive interest at a rate in excess of 60 per cent, and if so, how much;

(e) if so, is MBNA required to pay to the class, as restitution, the transaction fees it received from the class, or alternatively, the interest it has received from the class that exceeds an effective annual rate of 60 per cent interest;

(f) is the cash advance transaction free incurred voluntarily by the class, so as to give rise to a defence of “voluntariness” to the allegation that the interest received by MBNA exceeds the maximum permitted by s. 347 of the Criminal Code of Canada;

(g) do the class members pay the cash advance transaction fee voluntarily, so as to give rise to a defence of “voluntariness” to the allegation that the interest received by MBNA exceeds the maximum permitted by s. 347 of the Criminal Code of Canada;

(h) are the terms of the paragraph headed “Interest” of the cardholder agreement a bar to the class claim;

(i) has MBNA breached its contracts with the class by making interest payable that exceeds an effective annual rate of 60 per cent, within the meaning of s. 347 of the Criminal Code;

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(j) has MBNA breached its contracts with the class by failing to credit their accounts with the interest it has received that exceeds an effective annual rate of 60 per cent;

(k) do provincial statutes of limitations have any application to claims of unjust enrichment flowing from interest charged or received in contravention of s. 347 of the Criminal Code; and

(l) is the class entitled to punitive damages?