CACV3678

IN THE COURT OF APPEAL FOR SASKATCHEWAN

ON APPEAL FROM QUEEN'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE OF SASKATOON
Q.B.G. NO. 1175 OF A.D. 2018

BETWEEN:

**RANDY KOROLUK**

APPELLANT

AND:

**KPMG INC., PRIMEWEST MORTGAGE INVESTMENT CORPORATION, DAN ANDERSON, TOM ARCHIBALD, FRANCIS BAST, DOUGH FRONDALL, MIKE HOUGH, WILL OLIVE, TOM ROBINSON, IRENE SEIFERLING, ERNST & YOUNG INC.**

RESPONDENTS

AND:

**DIRECTOR OF CORPORATIONS, CANADA REVENUE AGENCY, P.I. FINANCIAL, DONALD ZEALAND, GRANITE ENTERPRISES, DEBBIE GLORIA BURWASH**

NON-PARTIES

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# BRIEF OF LAW ON BEHALF OF KPMG INC., Liquidator of PrimeWest Mortgage Investment Corporation

**(Motion to Quash Appeal)**

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## Introduction

1. KPMG Inc. files this brief of law in its capacity as liquidator (the "Liquidator") of PrimeWest Mortgage Investment Corporation ("PrimeWest" or the "Corporation") in support of its motion requesting this appeal be quashed as disclosing no right of appeal.

2. The primary issue on the Appeal is whether the class action QBG 1727 of 2018 (the "Class Action") is subject to the Amended and Restated Order of the Honourable Mr. Justice Gabrielson, dated November 25, 2019, (the "Liquidation Order") pursuant to Article 1.1 (b) of said order and the Claims Process Order which incorporated the same. The Class Action is directed against PrimeWest's directors for their alleged misconduct in their roles as directors of the Company. Article 1.1(b) of the Liquidation Order defines "Claim" for the purposes of the Liquidation Order as follows:

   (b) **any existing or future right of any Person against any one or more of the Directors which arose or arises as a result of such Director's position, supervision, management or involvement as a Director or otherwise in any other capacity in connection with the Corporation**, whether such right, or the circumstances giving rise to it, arose before or after the Effective Date and whether enforceable in any civil, administrative or criminal proceeding…. [emphasis added].

3. We request that this motion to quash be granted with costs of this motion payable to the Liquidator.

## Facts and Procedural History

4. On June 12, 2018, Merchant Law Group LLP ("MLG") filed the Class Action pursuant to *The Class Actions Act*,[1] by Randy Koroluk on behalf of himself and other members of a class, being shareholders of PrimeWest, against the defendants, who were or are members of the board of directors for PrimeWest, as well as Ernst & Young Inc. ("Ernst & Young") as auditor of PrimeWest (the "Class Action"). As of

[1] *The Class Actions Act*, SS 2001, c-12.01

June 10, 2020, the Appellant had yet to serve all of PrimeWest's directors named in the Class Action or Ernst & Young.

5. On October 9, 2019, PrimeWest brought an originating application pursuant to ss 204(8), 210, 215, and 216 of *The Business Corporations Act*,[2] seeking approval of a plan for the voluntary liquidation and dissolution of the Corporation (the "Originating Application"). Included in the Originating Application was a draft Order with the Liquidation Plan for PrimeWest appended thereto as Schedule "A" (the "Liquidation Plan").

6. Following service of the Originating Application, MLG opposed the draft Order, on behalf of the Class Action claimants, arguing that the directors of PrimeWest should not be permitted to avoid potential legal liability in the Class Action by virtue of the Corporation having sought voluntary liquidation and dissolution. In support of this position, on October 25, 2019, Mr. Anthony Merchant, Q.C., wrote to the lower Court with the following "primary" submissions:

…

> The Liquidation Application being made today concerns only one Applicant, being PrimeWest Mortgage Investment Corporation, which corporation is seeking relief under the *Business Corporations Act*.
>
> MLG acts as counsel for Randy Koroluk, who is the plaintiff in a proposed class proceeding commenced in Regina on June 12, 2018. The original Statement of Claim for the same class action can be found at Exhibit "M" of the Affidavit of Marlene Kaminsky, sworn on October 9, 2019 (although an Amended Statement of Claim was filed on December 3, 2019, and that Amended Claim has not been placed before the Court by the Applicant). **The same class proceedings, being *Koroluk v. Anderson et al.*, has not named the Applicant Corporation (PrimeWest) as a Defendant -- and any reference to Mr. Koroluk's action (being QBG 1727 of 2018, Judicial Centre of Regina) should be remove [sic] from any Order, Plan, or other documentation that may be approved by the Court (or employed by the Liquidator).**

[2] *The Business Corporations Act*, RSS 1978, c B-10 [*Business Corporations Act*].

> The claims made in Mr. Koroluk's action include assertions that the individual defendants to his class action acted recklessly or inappropriately, in their personal capacities. Respectfully, there are allegations of malfeasance by these individual defendants and whether the Applicant Corporation is appropriately entitled to seek liquidation, does not obviate the legal liability of individual defendants in a separate piece of litigation.
>
> …
>
> Amongst other things, whether valid indemnification agreements existed or not, at times relevant to the Koroluk class action, is immaterial (and would be immaterial to any plaintiff). Any defendant might have a hold-harmless or indemnification agreement regarding a specific type of liability, but that is an issue to be worked out *between an indemnifier and indemnified party* – i.e. the possible existence of an indemnification agreement (from a solvent or insolvent indemnifier) does not result in a Court simply striking a given party as a defendant in a lawsuit.
>
> If the Applicant Corporation meets the legal standards and test for an Order of voluntary liquidation and dissolution, the Court may find that such a liquidation order should be granted. But the individual defendants to Mr. Koroluk [sic] class action are not seeking (and cannot seek) under the *Business Corporations Act* on [sic] order for voluntary liquidation and dissolution.
>
> The suggestion by the Applicant that the individual defendants to the Koroluk Action can obviate their legal liabilities (without the allegations in Mr. Koroluk's class action being tried) simply because the Application seeks voluntary liquidation, is inappropriate and respectfully is an approach that should be rejected by this Court.
>
> The Applicant has not (and to MLG's knowledge cannot) put before the Court any applicable case law for that suggested approach, i.e.: granting to individual defendants to another action (where an Applicant Corporation is not even a co-defendant) a full discharge of their legal liabilities.
>
> ALL OF WHICH IS RESPECTFULLY SUBMITTED TO THIS HONOURABLE COURT [emphasis added].

7. On October 31, 2019, a hearing took place before Gabrielson J. regarding the Originating Application. In attendance were Ian Sutherland and Craig Firth as counsel for PrimeWest, Scott Spencer as counsel for Donald Zealand, a former CEO

of PrimeWest, and Tony Merchant, Q.C. and Evatt Merchant as counsel for the Class Action claimants.

8. Following this hearing, the lower Court issued the Order of Gabrielson J., dated October 31, 2019 (the "original Liquidation Order"), wherein Article 14 of the draft Order was revised at Mr. Merchant's request to remove reference to the directors of PrimeWest, as follows:

> No Proceeding shall be commenced or continued against any of the former or current officers ~~or directors~~ of the Corporation with respect to any Claim, except with leave of this Court.

9. However, Mr. Merchant did not at that hearing request the removal of the reference to the Class Action contained at Article 2(b) of that draft Order which read:

> 2. **For greater certainty, the definition of "Claim" in the Liquidation Plan and this Order includes but is not limited to**:
>
> (a) the following Court of Queen's Bench actions in which the Corporation is named as a defendant or defendant-by-counterclaim, as the case may be:
>
> (i) QB No. 1559 of 2017;
>
> (ii) QB No. 1889 of 2018;
>
> (iii) QB No. 1395 of 2018;
>
> (b) **the Court of Queen's Bench action commenced against certain current and former directors of the Corporation in QBG No. 1727 of 2018** [emphasis added].

10. Further, Mr. Merchant also did not request any amendment to the definition of "Claim" as contained in the Liquidation Order, which is defined as:

> (a) any right of any Person against the Corporation in connection with any indebtedness, liability or obligation of any kind of the Corporation and any interest accrued thereon or costs payable in respect thereof, whether liquidated, unliquidated, reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any claim made or asserted against the Corporation

through any affiliate or associate or any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future with respect to any matter, action, cause or chose in action; and

(b) **any existing or future right of any Person against any one or more of the Directors which arose or arises as a result of such Director's position, supervision, management or involvement as a Director or otherwise in any other capacity in connection with the Corporation**, whether such right, or the circumstances giving rise to it, arose before or after the Effective Date and whether enforceable in any civil, administrative or criminal proceeding…. [Emphasis added]

11. On November 4, 2019, Mr. Merchant wrote counsel for PrimeWest to request an amendment to the original Liquidation Order, stating:

> We should jointly return to the Court for rectification under the slip rule. Perhaps you have noticed that the Order of October 31, 2019 unwittingly leaves the liquidation plan lame, contradictory, and embarrassing.
>
> Mr. Justice Gabrielson has in effect decided that QBG No. 1727 of 2018 be excluded from the liquidation proceedings, but it is still included in paragraph 2(b) of the Order.
>
> This will cause problems when the liquidator seeks Court approval for the claims process. If the class action is not resolved before dissolution, the plan leaves your client with no option but to settle. Consider paragraph 8 of the Order in light of Thursday's proceedings.
>
> Paragraph 2(b) of the Order needs to be deleted.
>
> We will apply. Will you consent?

12. On November 6, 2019, counsel for PrimeWest replied to Mr. Merchant, stating that, although Mr. Merchant's characterization of the original Liquidation Order was "rejected in its entirety", Mr. Merchant's proposed amendment would be accommodated:

> I am in receipt of your correspondence of November 4, 2019 wherein you request a further amendment to the form of Order that has been granted by Mr. Justice Gabrielson. Specifically, you have asked that Section 2(b) of the Order be deleted in its entirety.

> **I am not going to comment further on your characterization of the current form of Order as referenced in your most recent letter other than to state that we reject it in its entirety**. Having said that, it is very much the goal of PrimeWest Mortgage Investment Corporation to focus its remaining resources on an orderly liquidation in as expeditious and efficient manner as possible and so **my instructions are to accommodate your request as it does not appear to be actively harmful to the process**.
>
> Given that no other party appears to be impacted by it my suggestion is that we simply correspond with the Court and advise that the request for the change has been made and agreed to without further comment. Obviously, it is in the best interests of all stakeholders to minimize ongoing court applications and this would appear to be the most effective mechanism to accommodate your request at the least possible cost and inconvenience to the parties.
>
> If you are in agreement then please execute the attached Consent Order. **The only change that has been made is that referenced in this correspondence.** Immediately upon receipt of the executed Order, I will request that the Registrar post the Order in front of Mr. Justice Gabrielson and, assuming that he is comfortable with proceeding in this manner, will then arrange to issue and serve the Order on the entire service list. Conversely, if the court is not comfortable and a formal application is required then we will make the appropriate arrangements in that regard. [Emphasis added]

13. Following the filing of the above-referenced consent order, the lower Court issued the Amended and Restated Order of the Gabrielson J., dated November 25, 2019, (the “Liquidation Order”) with Mr. Merchant’s requested change to Article 2(b).

14. On December 19, 2019, the Liquidator filed the first report of the liquidator, dated December 18, 2019, and a notice of application also dated December 18, 2019, wherein it sought an order approving a claim's process order (the “Claims Process Order”). The application was served upon all parties referred to in the service order including the Appellant. On January 10, 2020, Gabrielson J. approved the Claims Process Order as filed. The Claims Process Order did not remove the Class Action from the Claims Process Order or the need to file a proof of claim in respect to it.

15. PrimeWest's directors have filed proofs of claim with the Liquidator against PrimeWest pursuant to identical indemnity agreements they had with the Company (the "Indemnity Agreements"). The Indemnity Agreements provided, *inter alia*:

> **1.1 Definitions**
>
> In this Agreement, the following words shall have the following meanings:
>
> (a) "Expenses" means all costs, charges and expenses, including (i) an amount paid to settle or dispose of an action or to satisfy a judgment or an award, (ii) all damages, whether punitive, exemplary or otherwise including penalties or fines levied, and (iii) all legal, professional or advisory fees and disbursements; and
>
> (b) "Proceeding" means any actual or threatened civil, criminal, administrative, regulatory, investigative or other proceeding (including a proceeding by way of an action, claim, suit, arbitration, application, complaint, assessment, reassessment or other process and an action by or on behalf of any Subject Business to procure a judgment in its favour) in which the Indemnified Party is involved because of his or her association as a director or officer or in a similar capacity with the Subject Businesses.
>
> **1.2 Indemnity Undertaking:**
>
> Except when prohibited by law and subject to the provisions of this Agreement, the Corporation shall indemnify the Indemnified Party against all Expenses reasonably incurred by the Indemnified Party in respect of any Proceeding.
>
> **1.3 Indemnification Exceptions**
>
> Notwithstanding section 1.2, the Corporation shall not indemnify the Indemnified Party unless:
>
> (a) the Indemnified Party acted honestly and in good faith with a view to the best interests of the Corporation, or, as the case may be, to the best interests of the other Entity for which the Indemnified Party acted as director or officer or in a similar capacity at the Corporation's request; and
>
> (b) in the case of any criminal or administrative action or proceeding that is enforced by a monetary penalty, the Indemnified Party had reasonable grounds for believing that his or her conduct was lawful.

16. On January 15, 2020, the Liquidator wrote a letter to Mr. Merchant stating that "Randy Koroluk had been identified by the liquidator as a creditor" of PrimeWest and must file a proof of claim on or before the claims bar date (March 10, 2020, as set out in the Claims Process Order).

17. On January 30, 2020, Mr. Merchant delivered to counsel for the Liquidator an appearance day notice requesting that the lower Court direct that the Class Action be excluded from the within liquidation proceedings (the “Liquidation Proceedings”); however, this appearance day notice was not advanced in a timely manner and the Liquidator was compelled to bring its own application requesting the advice and directions of the lower Court in order that it may continue to carry out its court-supervised mandate.

18. On July 7, 2020, Gabrielson J. issued the lower Court’s fiat rejecting Mr. Merchant’s submission that the Class Action was excluded from the Liquidation Proceedings pursuant to the Liquidation Order and interpreted his previous order as follows:

    (a) The representative plaintiff in the class action QBG 1727 of 2018, Randy Koroluk and the members of the class action he represents, are not excluded from the liquidation proceedings in QBG 1455 of 2019.

19. On July 22, 2020, the proposed Appellant served a motion and a draft notice of appeal on the parties listed on the service list.

20. However, on July 27, 2020, the Registrar of the Saskatchewan Court of Appeal, Melanie Baldwin, Q.C., emailed Mr. Merchant to advise that he had failed to file his motion and provided instructions on how he might appropriately file the same:

    Mr. Merchant,

    I have your letter of July 22, 2020. It appears that you have served a Notice of Appeal and wish to file that Notice of Appeal (you have provided proof of service effective July 22, 2020, a copy of the decision that you wish to appeal and payment of the $200 filing fee).

    It also appears that you have served a Notice of Motion for Leave to Appeal returnable August 12, 2020, although you have not provided payment to file that document.

> Neither the Notice of Appeal nor the Notice of Motion for Leave to Appeal has been efiled.
>
> As is evident from the conflicting opinions of counsel in this case, the issue of whether leave is required is often quite complex. Unless I am aware of case law that is directly on point that I can refer counsel to, I cannot assist with the determination of whether leave is required. I am not aware of such case law in this instance.
>
> If you wish to file the Notice of Motion for Leave to Appeal, you should efile it and pay the $25 filing fee. The Notice of Appeal would then be treated as a draft notice of appeal and we would return or hold your cheque for $200 pending determination of the issue of leave. If you do not intend to seek leave, please confirm this and we will upload the Notice of Appeal and process your payment.

21. On August 5, 2020, Ms. Baldwin followed-up with Mr. Merchant to determine how the Appellant wished to proceed.

22. After further follow-up with Mr. Merchant, Ms. Baldwin advised that the motion had been filed as of August 7, 2020:

> Mr. Merchant,
>
> Your application for leave to appeal was filed on Friday, August 7, 2020 and is returnable on Wednesday, August 12, 2020. Under *The Court of Appeal Rules*, an application must be filed at least three clear days before the return date.
>
> We have a long chambers list filling two days this week and this, coupled with the late filing, means that the chambers judge is not prepared to hear the application.
>
> Please select a new return date, ideally after consulting with counsel for the other parties to the application. Our next several upcoming chambers dates in Regina are Wednesday, August 26, Wednesday, September 9 and Wednesday, September 23, 2020. Once you have selected a new chambers date, please let us know.
>
> You should also likely serve and file a memorandum of law in support of the application at least three clear days before the new chambers return date.

23. On August 6, 2020, the Appellant filed two Proofs of Claim for the Class Action with the Liquidator pursuant to the Claims Process Order and within the extended deadline set by Gabrielson J.[3]

**Issues**

24. **Leave to Appeal**: Section 8 of *The Court of Appeal Act, 2000* provides that no appeal lies to the Court of Appeal from an interlocutory decision of the Court of Queen's Bench unless leave to appeal is granted.[4] Gabrielson J.'s fiat clarifies that the Class Action is included in the Liquidation Order and gives a 30-day extension for the Appellant to file a proof of claim; however, it does not determine any rights of the Appellant within the Liquidation Proceedings. Is this an interlocutory decision for which leave to appeal is required?

25. **Sufficient Merit**: A proposed appeal lacks sufficient merit where it is *prima facie* destined to fail in any event, having regard to the nature of the issues.[5] The Appellant requests to re-argue his position that, although the Liquidation Order defines "Claim" as "any existing or future right of any Person against any one or more of the Directors…", this definition does not include the proposed Class Action against these same directors. Does the Appeal have sufficient merit?

26. **Sufficient Importance**: An appeal may have sufficient importance where it raises a new or uncertain issue or transcends the particular in its implications.[6] The Appellant argues that the lower Court misinterpreted its own order and then asks this Honourable Court for an alternative interpretation of the same order. Is the proposed Appeal of sufficient importance?

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[3] Supplemental Report of the Liquidator for the Court of Appeal, dated August 21, 2020 [Supplemental Report of the Liquidator].
[4] *The Court of Appeal Act*, 2000, SS 2000, c C-42.1, s 8 [*Court of Appeal Act*].
[5] *Rothmans, Benson & Hedges Inc. v Government of Saskatchewan*, 2002 SKCA 119 at para 6, 227 Sask R 121 [*Rothmans*] (**Tab 1**).
[6] *Ibid* at para 6.

27. **Unreasonableness:** Leave to appeal *nunc pro tunc* is unavailable where the Appellant has acted unreasonably in failing to pursue leave to appeal. The Appellant asserts that s. 242 of the *Business Corporations Act* "confers an unlimited right of appeal,"[7] however, this misreading of the legislation has already been directly contradicted by both this Court and the Supreme Court of Canada.[8] Has the Appellant acted unreasonably in pursuing an appeal without first seeking leave?

28. **Delay occasioned by failure to seek leave to appeal:** Leave to appeal *nunc pro tunc* may similarly be unavailable where the failure to seek leave to appeal in the first instance has occasioned delay. Instead of expeditiously pursuing this appeal, the Appellant unsuccessfully sought to solicit a favourable opinion from this Court that leave was not required.[9] Has the Appellant's failure to seek leave to appeal caused delay?

## Argument

### I. The Appellant is required to apply for leave.

#### A. Gabrielson J.'s order was interlocutory because it did not dispose of any substantive rights of the Appellant and preserved his ability to prosecute the Class Action within the Liquidation Proceedings.

29. The Appellant requires leave to appeal pursuant to section 8 of the *Court of Appeal Act*. This section provides that no appeal lies to the Court of Appeal from an interlocutory decision of the lower Court unless leave to appeal is granted:

> 8(1) Subject to subsection (2), no appeal lies to the court from an interlocutory decision of the Court of Queen's Bench unless leave to appeal is granted by a judge or the court.
>
> (2) Leave to appeal an interlocutory decision is not required in the following cases:

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[7] Appellant's Notice of Motion, dated July 22, 2020, in CACV3680 at para 1(e).
[8] *Rimmer v Adshead*, 2003 SKCA 19 at para 6, 232 Sask R 68 [*Adshead*] (**Tab 2**); *Kelvin Energy Ltd. v Lee*, [1992] 3 SCR 235 (*sub nom Loewen, Ondaatje, McCutcheon & Co. Ltd. c Sparling*, 1992 CarswellQue 126) [*Kelvin Energy* cited to WL] (**Tab 3**).
[9] *Koroluk v KPMG Inc*., 2020 SKCA 106 [*Koroluk*] (**Tab 4**).

> (a) cases involving:
>
> > (i) the liberty of an individual;
> > (ii) the custody of a minor;
> > (iii) the granting or refusal of an injunction; or
> > (iv) the appointment of a receiver;
>
> (b) other cases, prescribed in the rules of court, that are in the nature of final decisions.[10]

30. In *Saskatchewan Medical Assn. v Anstead*, this Court held that "[i]t has long been the law in this jurisdiction that orders which do not finally dispose of the 'substantive issue' in an action are not final but interlocutory."[11] We submit that the issue of whether the proposed Class Action proceeds through the Liquidation Proceedings is not a substantive issue in that action. Put another way, none of the allegations contained in the proposed Class Action were decided in Gabrielson J.'s decision.

31. This Court in *Saskatchewan Medical Assn.* also held that "an order is final when, if allowed to stand, it finally disposes of the rights of the parties".[12] Notably, Gabrielson J.'s decision expressly extended the timeline for the Appellant to file a proof of claim with the Liquidator and, thereby, continued to prosecute the Class Action albeit within the Liquidation Proceedings. The decision also does not decide on any rights that the Appellant may have within the Liquidation Proceedings. Further, this Court has recently cited with approval the Nova Scotia Court of Appeal's decision in *Raymond v Brauer*, where that Court held that a decision dismissing an application for summary judgment was interlocutory because it did not bring the claim to an end, notwithstanding that it deprived the party seeking summary judgment of the right to have the claim disposed of in that way.[13] Similarly, Gabrielson J's decision has only deprived the Appellant of proceeding with the proposed Class Action outside the Liquidation Proceedings.

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[10] *Court of Appeal Act*, s 8.
[11] *Saskatchewan Medical Assn. v Anstead*, 2016 SKCA 143 at para 56 [*Saskatchewan Medical Assn*] (**Tab 5**)
[12] *Ibid* at para 56.
[13] *Raymond v Brauer*, 2015 NSCA 37, 358 NSR (2d) 219 (**Tab 6**).

32. Although the Appellant has asserted that "Liquidator's [*sic*] have almost unfettered discretion"[14] within the Liquidation Proceedings, this assertion is not supported by either the Liquidation Order or the Claims Process Order. Specifically, pursuant to s 20(b) of the Claims Process Order, the Appellant would be permitted to dispute any decision by the Liquidator to disallow or revise his Claim by application to the lower Court. Notably, pursuant to s 22 of the Claims Process Order, the two Proofs of Claim already filed by the Appellant (discussed further below) are currently being referred to the lower Court for a determination.[15]

33. That being the case, Mr. Merchant's submission that the Liquidation Proceedings provide "no access to a trusted decision-making process"[16] constitute an attack on the integrity and impartiality of the lower Court. No attempt has been made by Mr. Merchant to explain his mistrust in the integrity and impartiality of the Liquidation Proceedings and, therefore, such a submission is without merit.

**B. Section 242 of *The Business Corporations Act* is not applicable because the lower Court made no order expressly pursuant to this legislation, but instead clarified its prior Liquidation Order in accordance with *The Queen's Bench Rules*.**

34. Admittedly, s 242 of the *Business Corporations Act* does provide a statutory right of appeal:

> An appeal lies to the Court of Appeal from any order made by a court under this Act.[17]

35. But the above wording limits such right of appeal to those orders made expressly under powers conferred under the *Business Corporations Act*. This interpretation was confirmed in *Kelvin Energy*,[18] wherein the Supreme Court of Canada had the opportunity to consider the right of appeal under the almost identically worded s.

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[14] Submission of Mr. Anthony Merchant, Q.C., dated August 20, 2020 in CACV3680, at para 2 [Merchant's Submissions].
[15] Supplemental Report of the Liquidator at p 54.
[16] Merchant's Submissions at para 2.
[17] *Business Corporations Act*, s 242.
[18] *Supra* note 8.

249 of the *Canada Business Corporations Act*.[19] It held that the right of appeal under the same applied only to orders rendered pursuant to powers expressly conferred by the *Canada Business Corporations Act*:

> 35 The scope of s. 249 *C.B.C.A.* is thus clearly circumscribed. Any judgment, whether interlocutory or final, will be appealable as of right provided it was made pursuant to a power expressly conferred by the *Canada Business Corporations Act*. That being so, it becomes essential to determine the legislative origin of the power exercised by the trial judge…[20]

36. Further, in *Rimmer v. Adshead*, Jackson J.A. held that statutes which grant a right of appeal with respect to "orders made under or pursuant to" said statutes only provide a right of appeal where the impugned order is made pursuant to a power expressly conferred by the legislation in question.[21] Jackson J.A. further clarified that such power must be exercised to the exclusion of the variety of interlocutory decisions which may be made under *The Queen's Bench Rules*.[22]

37. Here, Gabrielson J. clarified and provided direction on the correct interpretation of his prior Liquidation Order. Notably, the Appellant relied upon Rule 10-11 of *The Queen's Bench Rules* in requesting such clarification and direction from the lower Court. Rule 10-11 provides that the Court may make a further or other order where it is necessary for the Court to make certain the judgment pronounced can be carried out. Accordingly, it cannot be argued the authority exercised by Gabrielson J. to interpret his prior order was dependant on the *Business Corporations Act* or any particular provision thereof.

38. Therefore, the Appellant does not have any statutory right of appeal in this instance.

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[19] *Canada Business Corporations Act*, RSC 1985, c. C-44, s 249.
[20] *Kelvin Energy*, *supra* note 8 at para 35.
[21] *Supra* note 8 at para 6.
[22] *Ibid* at para 8.

## II. Further, leave to appeal should not be granted *nunc pro tunc* because the Appeal lacks sufficient merit and importance, and the Appellant has acted unreasonably and occasioned delay.

39. In *Poffenroth Agri Ltd. v. Brown*,[23] Justice Kalmakoff summarized this Court's jurisprudence regarding the granting of leave to appeal *nunc pro tunc*. Kalmakoff J.A. noted "[t]he Court's power to grant leave to appeal *nunc pro tunc* is an extraordinary power that is to be used sparingly so as not to defeat the general purpose of the leave requirement."[24] Kalmakoff J.A. continued by setting out the test for obtaining leave *nunc pro tunc*:

> The first consideration, in that respect, is whether the proposed appeal meets the criteria for granting leave set out in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2002 SKCA 119, 227 Sask. R. 121 (Sask. C.A.) [*Rothmans*]. If it does not meet the *Rothmans* criteria, then leave to appeal should not be granted *nunc pro tunc*. If, however, leave would be granted under *Rothmans*, then the Court looks to such considerations as to whether the appellant acted reasonably in not seeking leave, and whether there has been undue delay occasioned by the failure to seek leave (see, for example, *Cowessess*, at paras 33-34).[25]

40. Essentially, the *Rothmans* criteria referred to by Kalmakoff J.A. are whether the proposed appeal has: (a) sufficient merit; and (b) sufficient importance to warrant the granting of leave. Before leave to appeal is to be granted, the criteria must weigh decisively in favour of leave being granted. In *Rothmans*, Cameron J.A. provided the test that must be met to grant leave to appeal:

> 6 The power to grant leave has been taken to be a discretionary power exercisable upon a set of criteria which, on balance, must be shown by the applicant to weigh decisively in favour of leave being granted: *Steier v. University Hospital*, [1988] 4 W.W.R. 303 (Sask. C.A.)(Sask. C.A., *per* Tallis J.A. in chambers). The governing criteria may be reduced to two each of which features a subset of considerations provided it be understood that they constitute conventional considerations rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of merit and importance**,** as follows:

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[23] 2020 SKCA 68 [*Poffenroth*] [emphasis added] (**Tab 7**).
[24] *Ibid* at para 44.
[25] *Ibid.*

First: Is the proposed appeal of sufficient merit to warrant the attention of the Court of Appeal?

- Is it *prima facie* frivolous or vexations?

- Is it *prima facie* destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?

- Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?

- Is it apt to add unduly or disproportionately to the cost of the proceedings?

Second: Is the proposed appeal of sufficient importance to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?

- does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?

- does it raise a new or controversial or unusual issue of practice?

- does it raise a new or uncertain or unsettled point of law?

- does it transcend the particular in its implications?[26]

41. In *Royal Bank v. Paulsen & Son Excavating Ltd.,* Richards CJA confirmed that the test for leave to appeal, set out in *Rothmans*, applies with equal force to applications for leave to appeal in bankruptcy and insolvency matters and rejected "establishing special tests for granting leave to appeal for distinct subject matters or practice areas."[27] We submit that this rationale should also be applied to liquidation proceedings.

**A. Because the Appellant has already filed two Proofs of Claim in the Liquidation Proceedings, the Appeal is now moot.**

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[26] *Rothmans*, *supra* note 5 at para 6.
[27] *Royal Bank v Paulsen & Son Excavating Ltd.*, 2012 SKCA 101 at para 12, 399 Sask R 283 (**Tab 8**).

42. As part of the Court of Appeal's determination of the relative merits of the appeal, it is permitted to consider whether the same is now moot in light of the proceedings. In *Radiology Associates of Regina Medical PC Inc. v. Sun Country Regional Health Authority*, this Court summarized the test for mootness as set out by the Supreme Court of Canada:

> 15 In *Borowski*, the Court declared when the doctrine of mootness applies and when a Court will decline to decide a case on the basis of mootness:
>
> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.
>
> *Borowski* also established the basic framework for considering when a court should decline to hear a matter because of the doctrine of mootness:
>
> > First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.[28]

43. Here, the Appellant has submitted two Proofs of Claim pursuant to the Claims Process Order and has thereby submitted to the Liquidation Proceedings. Evidence of these two Proofs of Claim is found in the most recent Supplemental Report of the Liquidator, dated August 21, 2020, and, as such, said proofs are properly admitted as matters of public record that arose post-liquidation.[29] Accordingly, we submit that the "tangible and concrete dispute" in the present case has disappeared. Further, any decision of this Court on the merits "will not have the effect of resolving some controversy which affects the rights of the parties" because the submission of the two Proofs of Claim now effectively places the Class Action within the Liquidation

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[28] *Radiology Associates of Regina Medical PC Inc. v Sun Country Regional Health Authority*, 2016 SKCA 57 at para 15, [2016] 10 WWR 662 [*Radiology Associates*] (**Tab 9**).
[29] *Basegmez v Akman*, 2018 ONSC 812 at para 9, 141 OR (3d) 549 (**Tab 10**).

Proceedings regardless of any further argument on the interpretation of the Liquidation Order.

44. Further, this is not a case where this Court should exercise its discretion to decide the Appeal, notwithstanding that it is moot. On this point, this Court has summarized the applicable non-exhaustive or discrete guidelines for whether courts should exercise such discretion as follows:

    (a) the adversarial nature of the case;
    (b) judicial economy;
    (c) an appreciation of the proper role of judiciary; and
    (d) the interests of justice.[30]

45. Focusing on the latter two considerations, this Court has noted that "the Court must demonstrate sensitivity to the effectiveness or efficacy of judicial intervention."[31] Here, the Appellant is attempting, through this appeal, to reserve the right to opt out of the Liquidation Proceedings at some future date. Notably, the Appellant did not apply for a stay of the lower Court's decision in order to forestall the application of the extended deadline provided by Gabrielson J. for filing his proof of claim. As such, the intent of proceeding with the Appeal, despite having already filed two Proofs of Claim with the Liquidator, is obvious: to avoid having to prosecute his Class Action within the Liquidation Proceedings should the Appellant unliterally decide that it is no longer convenient.

46. It is our position that the above described potential for mischief and abuse of process supports this Court avoiding the exercise of its residual discretion to decide this now moot issue. In *Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking Ltd.* (cited by this Court in *Radiology Associates*), the Yukon Territory Court of Appeal considered the appropriateness of reconsidering a declaration from the

[30] *Radiology Associates*, *supra* note 34 at paras 21-22.
[31] *Ibid* at para 28.

lower court that had already been acted on.[32] After acknowledging that such a reconsideration from the appellate court could impact a separate lawsuit started by the appellant, the Court commented upon the advisability of having granted a declaration in the first place, stating:

> I think mischief could easily result from actions just for declarations. I would expect no declaration would be made unless the Court is satisfied that the declaration will have some practical value.[33]

47. Further, the Yukon Territory Court of Appeal commented that it would "not lend the assistance of this Court to the appellant's attempt to cast off the results of the legal proceedings it supported."[34] Similarly, by filing proofs of claim with the Liquidator, the Appellant has now supported the Liquidation Proceedings and this Court should not support his attempt to now preserve a future right to cast off the results of the same by re-litigation on this point.

### B. Further, the issues raised in the Appeal lack sufficient merit based on the deferential standard of review to be applied and the existing caselaw.

48. The Supreme Court of Canada has recently commented on the scope of discretion that should be afforded to chambers judges in insolvency proceedings in the context of proceedings under the *Companies Creditors' Arrangements Act*,[35] stating:

> 53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 20).
>
> 54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee.

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[32] *Yukon (Department of Highways and Public Works) v P.S. Sidhu Trucking Ltd*., 2015 YKCA 5, 368 BCAC 26 [*P.S. Sidhu*] (**Tab 11**).
[33] *Ibid* at para 25, referring to Chief Justice McEachern's concurring opinion in *Horton Bay Holdings Ltd. v Wilks* (1991), 8 BCAC 68.
[34] *P.S. Sidhu*, *ibid* at para 35.
[35] *Companies Creditors' Arrangements Act*, RSC 1985, c C-36 [*CCAA*].

> In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 305 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc*."), at para. 20, are apt:
>
> > ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.[36]

49. As discussed in *Callidus*, an appellate court must refrain from substituting its own discretion in place of a motion judge's discretion. The function of the appellate court is one of review only. Discretionary decisions should only be subject to intervention where the judge acts arbitrarily, on a wrong principle, on an erroneous view of the facts, or where the appellate court is satisfied that there is likely to be a failure of justice as a result of the refusal.

50. Although these are liquidation proceedings rather than proceedings pursuant to the *CCAA*, the same reasoning in support of a deference-based approach applies. Gabrielson J. has presided over the four hearings in respect of this matter over a period of more than eight months.

51. Further, it is clear that the aspects of the lower Court's decision with which the Appellant takes issue are questions of mixed fact and law. Accordingly, this Court should only be interfering with Gabrielson J.'s decision in the face of obvious (palpable) and material (overriding) error.[37] Namely, the Appellant disagrees with the lower Court's interpretation of its own orders.

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[36] *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10 at paras 53-54 [*Callidus*] (**Tab 12**).
[37] *Housen v Nikolaisen*, 2002 SCC 33 at paras 5-6, 8, 10, [2002] 2 SCR 235, (**Tab 13**).

52. Directly assessing the grounds of appeal (as we have done below) leads to the conclusion that these grounds are clearly destined to fail. Although the Appeal presents 13 grounds of appeal, many of these grounds are overlapping:

> a. The learned Chambers Judge erred in that he determined that the action filed under QBG 1727 of 2018 should be included in the liquidation proceedings;
>
> b. The learned Chambers Judge erred in that he failed to consider or apply the law relating to exceptions to the rule in *Foss v Harbottle;*
>
> c. The learned Chambers Judge erred in that he failed to correctly interpret his own order pursuant to settled law;
>
> d. The learned Chambers Judge erred in that he overturned his own judgment regarding the exclusion of the class action when the law prohibited such amendment;
>
> e. The learned Chambers judge erred in that his determination arbitrarily amends the provisions of the Defendant directors' indemnity agreements;
>
> f. The learned Chambers judge erred in that he failed to consider that the Primewest Mortgage Investment Corporation ("Primewest") is under no obligation to indemnify the Defendant directors if the Directors failed to act honestly and in good faith with a view to the best interests of Primewest, which is a cause of action in the action filed under QBG 1767 [*sic*] of 2018;
>
> g. The learned Chambers judge erred in that he failed to consider that a court of competent jurisdiction has not approved the Defendant directors' indemnities, or that there is no privity of contract between the Plaintiff and Proposed Class in the action filed under QBG 1767 [*sic*] of 2016 [*sic*], and that the Plaintiff and Proposed Class can therefore not be subjected to any consequences of the indemnities;
>
> h. The learned Chambers Judge erred in that he, contrary to the law in *Bram Enterprises Ltd. v A. I. Enterprises Ltd.,* 2014 SCC 12, sacrificed legal certainty in commercial law for individual idiosyncrasies;
>
> i. The learned Chambers Judge erred in that he held that action filed under QBG 1767 [*sic*] of 2018 must be deemed to have been abandoned against Ernst & Young when the issue had not been argued and there was an order extending the time for service on Ernst & Young until March 6, 2020 and orders after the expiration are permitted and intended, all being conjoined to some directors avoiding service;

J. The learned Chambers Judge erred in that he failed to consider or apply *The Queen's Bench Rules,* Sask QB Rules 2013, r 10-11;

I. The learned Chambers Judge erred in that he failed to hold that the Liquidator's attempt to re-litigate the issue was an abuse of process;

m. That the learned Chambers Judge erred in that he failed to consider or hold that the Liquidator was estopped by *res judicata* or barred by issue estoppel from re-litigating the issue of the exclusion of the class action; and

n. The learned Chambers Judge erred in that he failed to consider or determine that the Liquidator is in breach of its obligations.

**1. *Grounds a, c, d, l, and m: The lower Court correctly interpreted both the Liquidation Order and the Claims Process Order as including the Class Action.***

53. Grounds a and c of the Appeal assert that Gabrielson J. misinterpreted the Liquidation Order, and grounds d, l, and m of the Appeal are dependent on such a finding. As such, we intend to solely address Gabrielson J.'s correct interpretation of the Liquidation Order which necessarily forecloses any argument on the remaining grounds of appeal on this issue.

54. As held by this Court in *Campbell v. Campbell*, interpreting the provisions of a court order involves examining the pleadings of the action in which it is made, its language and the circumstances in which the order was granted:

> 14 As a preliminary matter, let me deal with the father's argument that the review clause must be construed similar to a clause in a contract. The review clause is not a contract and resort to contractual interpretation and principles is misplaced. Once the review clause was incorporated into the judgment it became part of a court order and principles regarding interpretation of court orders apply.
>
> 15 These principles have been set forth in a number of cases. In *Sutherland v. Reeves*, 2014 BCCA 222, 61 B.C.L.R. (5th) 308 (B.C. C.A.), Bauman C.J.B.C. stated:
>
> > [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, **whether by consent or awarded in an adjudicated disposition**, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, **the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.**
>
> [Emphasis added.]

As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.

16 In *Sans Souci Ltd. v. VRL Services Ltd.*, [2012] UKPC 6 (Jamaica P.C.), Lord Sumption reached the same conclusion:

> [13] ... The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.

17 In *Sharpe, Re*, [1992] FCA 616 (Australia Fed. Ct.), the Court stated:

> [20] ... even if a judgment is not ambiguous, it is nevertheless proper (if not essential) in construing it to have regard to the factual context in which the judgment was given and that this context includes the pleadings, the reasons for the judgment and the course of evidence at the trial.[38]

[38] *Campbell v Campbell*, 2016 SKCA 39 at paras 14-17, 476 Sask R 185 (**Tab 14**).

55. In interpreting the Liquidation Order, Gabrielson J. first considered the definition of "Claim" provided at Article 1.1(b) which includes:

> (b) any existing or future right of any Person against any one or more of the Directors which arose or arises as a result of such Director's position. supervision, management or involvement as a Director or otherwise in any other capacity in connection with the Corporation, whether such right, or the circumstances giving rise to it, arose before or after the Effective Date and whether enforceable in any civil, administrative or criminal proceeding,
>
> but does not include an Equity Claim; ...

56. Gabrielson J. then went on to consider the surrounding circumstances, namely: (a) the removal of the word "directors" from paragraph 14 of the Liquidation Order; and (b) the removal of explicit reference to the Class Action from paragraph 2(b) of the Liquidation Order.

57. In discussing the impact of removing the word "directors" from paragraph 14 of the Liquidation Order, Gabrielson J. correctly observed:

> [38] At the time of the hearing at which the original order for the liquidation of Prime West was granted on October 31, 2019, Mr. Merchant objected to the original order which read:
>
> > No Proceedings Against Directors or Officers
> > 14. No Proceeding shall be commenced or continued against any of the former or current officers of the Corporation with respect to any Claim except with leave of this Court.
>
> [39] Mr. Merchant objected to having the word "directors" included in para. 14 which he submitted would prevent him from continuing with the class action which he had brought on behalf of Mr. Koroluk in QBG 1727 of 2018, Judicial Centre of Regina. Mr. Merchant suggested that the class action was not brought against Prime West and that any reference to the class action should be removed from the liquidation order.
>
> [40] The Court proposed to the parties that the order be amended to remove the word "directors" from para. 14 and all parties at the hearing advised that the order could then issue. The order excluded the reference to a proceeding against the directors being barred. That would not mean that the planned liquidation would not take place.

58. Notably, Gabrielson J. was the presiding Chambers judge at the above October 31st hearing wherein Mr. Merchant made his submission about removing the word "directors" from paragraph 14 of the Liquidation Order.

59. Gabrielson J. then moved on to considering the impact, if any, of the removal of explicit reference to the proposed Class Action from paragraph 2(b) of the Liquidation Order. Here, he correctly observed that "Mr. Merchant, on behalf of the class action, and Mr. Sutherland, on behalf of PrimeWest, disputed then and still dispute, their rationale for signing the consent… is not clear why the reference to the class action was removed from the amended and restated order." However, in *Campbell*, this Court held that "the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made."[39]

60. Accordingly, Gabrielson J. continued his consideration of the surrounding circumstances of the Liquidation Order, specifically the Claims Process Order:

> [44] The Claims Process Order makes it clear that a proof of claim must be filed in respect to every claim that is identified by the liquidator. In this case, the liquidator has identified the class action as well as the claim for contribution and indemnity by the directors in respect to the class action as potential claims against the assets of PrimeWest. **The liquidation order would be meaningless as far as determining the issues necessary for the winding up of Prime West if it could be held up until final adjudication on the class action.** The statement of claim in the class action has not even been served on all the named defendants. Furthermore, a review of the class action file does not indicate any steps have been taken towards certification even though the action was commenced in 2018. Finally, the class action could take years to proceed to any judgment. The question of priority as between any judgment or settlement in the class action and the directors or the auditor can be determined by the liquidator or by court order at a later date [emphasis added].

61. Considering the clear wording of the Liquidation Order, the pleadings, and the surrounding circumstances –namely the Liquidation Proceedings– this ground of appeal is clearly destined to fail.

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[39] *Ibid* at para 15.

62. Further, as stated above, grounds d, l, and m of the Appeal are based on the false assumption that the Liquidation Order excluded the proposed Class Action from the Liquidation Proceedings:

> d. The learned Chambers Judge erred in that he overturned his own judgment regarding the exclusion of the class action when the law prohibited such amendment;
>
> l. The learned Chambers Judge erred in that he failed to hold that the Liquidator's attempt to re-litigate the issue was an abuse of process;
>
> m. That the learned Chambers Judge erred in that he failed to consider or hold that the Liquidator was estopped by *res judicata* or barred by issue estoppel from re-litigating the issue of the exclusion of the class action;

Of course, none of the above grounds of appeal have any merit when one removes this incorrect assumption. Accordingly, these grounds of appeal are destined to fail.

### 2. *Ground j: There is no basis to assert that Gabrielson J. did not rely on Rule 10-11 to provide further direction on the Liquidation Order and the Appellant simply disagrees with the direction provided.*

63. The entirety of the Appellant's argument before the lower Court was based on the mistaken assumption that the Liquidation Order excluded the Class Action from the Liquidation Proceedings. The Appellant's reliance on Rule 10-11 for further direction from the lower Court on the extent and applicability of the Liquidation Order was therefore misguided. Rule 10-11 reads as follows:

> **10-11**(1) Subject to subrule (2), the Court may make a further or other order and give further or other remedy that the Court considers may be required if in an action:
>
> (a) a judgment has been pronounced or an order has been made and the judgment or order has been formally drawn up and entered; and
>
> (b) it subsequently appears that further directions are necessary in order to insure to the party entitled to the benefit of the judgment or order the remedy to which he or she is entitled, whether costs or otherwise.
>
> (2) The Court may give further or other remedy only if it does not necessitate any variation of the judgment or order as to any matter decided by the original judgment or order.

64. In *Montreal Trust Co. v. Williston Wildcatters Corp*., this Court has held that Rule 10-11 "does not give the court jurisdiction to change the substance of the judgment or order."[40] Accordingly, Rule 10-11 could not be relied upon by the Appellant to change the substance of the Liquidation Order to exclude the Class Action; however, it could be relied upon by Gabrielson J. to confirm that the Liquidation Order included the proposed Class Action because this direction was already present in the wording and substance of the Liquidation Order.

65. Therefore, this ground of appeal is destined to fail.

### 3. *Grounds e, f, g: Gabrielson J. appropriately avoided making any summary determinations on the merits of the Class Action or the future applicability of the Indemnity Agreements.*

66. Neither party applied to the lower Court seeking a summary determination regarding the merits of the Class Action or the ultimate applicability of the Indemnity Agreements. As discussed above, the Appellant applied under Rule 10-11 seeking further direction under the Liquidation Order in the form of an appearance day notice. Similarly, the Liquidator sought direction and a declaration that the Class Action constituted a "Claim" pursuant to the Liquidation Order and subject to the Claims Process Order.

67. The Claims Process Order expressly incorporates the "Claims Process" as defined in Article 1.1 of the Liquidation Order, which provides a three-step process for dealing with actions potentially impacting the assets of PrimeWest, namely:

> "Claims Process" means the process established by the Liquidator and approved by the Court for the identification, resolution and barring of Claims, including, among other things, the issuance of a final order of the Court establishing the Claims;

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[40] *Montreal Trust Co. v Williston Wildcatters Corp*., 2009 SKCA 85 at para 40, 337 Sask R 95 (wherein the Court was interpreting the former iteration of Rule 10-11, namely, Rule 344) (**Tab 15**).

68. As such, Gabrielson J. considered the competing applications at the first stage of the Claims Process i.e. the identification of potential claims against the assets of PrimeWest. Under these circumstances, Gabrielson J. correctly determined that the proposed Class Action constituted a potential claim against the assets of PrimeWest and left determinations regarding the possible success of the same for another day:

> [44]…In this case, the liquidator has identified the class action as well as the claim for contribution and indemnity by the directors in respect to the class action as potential claims against the assets of PrimeWest. The liquidation order would be meaningless as far as determining the issues necessary for the winding up of Prime West if it could be held up until final adjudication on the class action….Finally, the class action could take years to proceed to any judgment. The question of priority as between any judgment or settlement in the class action and the directors or the auditor can be determined by the liquidator or by court order at a later date.

69. Further, Gabrielson J. would not have been able to make a final determination regarding the applicability of the Indemnity Agreements without summarily determining the allegations contained in the Class Action itself. Under the Indemnity Agreements, PrimeWest's directors are entitled to indemnification from the company regarding "any actual or threatened civil, criminal, administrative, regulatory, investigative or other proceedings…in which [they are] involved because of his or her association as a director or officer or in a similar capacity with [PrimeWest]." Such indemnification would include:

> …all costs, charges and expenses, including (i) an amount paid to settle or dispose of an action or to satisfy a judgment or an award, (ii) all damages, whether punitive, exemplary or otherwise including penalties or fines levied, and (iii) all legal, professional or advisory fees and disbursements.

70. Although the Indemnification Agreements include an honesty and good faith requirement, without adjudicating the claims as contained in the Class Action alleging a lack thereof, Gabrielson J. was not in a position to make those determinations. Accordingly, it was entirely appropriate that he avoided making such determinations at this initial stage in the Liquidation Proceedings.

**4. *Grounds i and n: These grounds of the Appeal misinterpret and misstate Gabrielson J.'s decision.***

*(a) Firstly, the Appellant has confused the lower Court's summarization of the parties' positions as its own findings, which is clearly not the case.*

71. The Appellants have erroneously stated that Gabrielson J. made the following determination:

> The learned Chambers Judge erred in that he held that action filed under QBG 1767 [*sic*] of 2018 must be deemed to have been abandoned against Ernst & Young when the issue had not been argued and there was an order extending the time for service on Ernst & Young until March 6, 2020 and orders after the expiration are permitted and intended, all being conjoined to some directors avoiding service.

He did not make such a determination and, instead, summarized the position of Ernst & Young as follows:

> **Position of Ernst & Young Inc.**
> [23] Ernst & Young has never been served with the statement of claim in QBG1727 of 2018. It only became aware of the claim when it was contacted by the liquidator in January 2020. A claim against Ernst & Young as auditor of Prime West may only be made by the company, not the shareholders. The time for service of this claim expired in 2019 and the claim must be therefore deemed to have been abandoned against Ernst & Young. To protect its position, Ernst & Young has filed a contingent proof of claim pursuant to the Claims Process Order. The proof of claim cannot be determined until the underlying action has been heard. It makes sense to have both actions heard together.

72. Notably, Gabrielson J. also summarized the positions of the Appellant, the Liquidator, and PrimeWest's directors. As with the lower Court's summarization of the Appellant's position, there is nothing in the actual ruling of Gabrielson J. to suggest that he adopted the position of Ernst & Young. Accordingly, the lower Court's summarization of the parties' positions only demonstrates that Gabrielson J. was capable of entertaining different positions without necessarily adopting same.

73. As such, this ground of appeal is without merit.

*(b) Secondly, the Appellant has argued that the lower Court failed to consider or determine that the Liquidator breached its obligations, but this argument ignores paragraphs 25 to 34 of the decision directly addressing this issue.*

74. The last ground of appeal put forward by the Appellant is that the "learned Chambers Judge erred in that he failed to consider or determine that the Liquidator is in breach of its obligations."

75. With respect to the assertion that the lower Court failed to consider this question, Gabrielson J. directly addressed the obligations of the Liquidator by asking and then answering the following questions: (1) "What is the purpose of the liquidation and the role of the liquidator?"; (2) "What are the duties of the liquidator?" In answering these questions, Gabrielson J. held that "the liquidator, is bound to wind up the corporation and to act in place of the directors" and that "[t]he duties and powers of the liquidator are set out in ss 214 and 215 of *Act*." As such, the argument that the lower Court failed to consider the obligations of the Liquidator is without merit.

76. In considering whether the Liquidator acted in breach of said obligations, Gabrielson J. made the following observations:

> [32] In this case, once it was appointed as liquidator, and following the Claims Process Order, which had been ordered by the Court on January 10, 2020, KPMG determined that the claim brought by the representative plaintiff against the directors of the corporation was included in the definition of "claim" included in Article 1.1 of the liquidation plan. KPMG also determined the representative plaintiff and the class of shareholders he represents may be creditors of the corporation bound under para. 12 of the Claims Process Order. The liquidator, therefore, wrote a letter to Mr. Merchant, who was the solicitor for Mr. Koroluk, the representative plaintiff, requesting that Mr. Koroluk file a proof of claim on or before the claims bar date and suggested that if he did not do so, "the claim will be forever barred, estopped, enjoined, and extinguished."
>
> [33] Furthermore, proofs of claim have also been filed by the former directors of Prime West claiming indemnity from and against the corporation regarding the class action. A proof of claim has also been filed by Ernst & Young, a co-defendant in the class action. The liquidator had the power and the duty to consider the claim brought against the directors and Prime West in carrying out the liquidator's duties.

> [34] I am satisfied therefore that the liquidator had a duty to apply to the Court for direction in respect to the liquidation plan and the Claims Process Order. Neither the orders, nor the plan of liquidation specifically stated that the class action would not be included in the Claims Process Order.

77. Notably, these comments came in response to the Appellant's allegation that the Liquidator had "wrongfully" attempted to include the Class Action within the Liquidation Proceedings by "baiting" the Appellant into submitting a proof of claim. Beyond this, the Appellant made no attempt in his materials before the lower Court to discuss how such conduct fell outside the proper role of a liquidator or was inconsistent with same. Accordingly, based on the absence of any significant argument put forward by the Appellant on this point, the attack on Gabrielson J.'s detailed defence of the Liquidator's conduct is without merit.

### 5. *Grounds b, g, h: Gabrielson J. was correct to not address the irrelevant legal principles cited by the Appellant.*

78. The Appellant argues that the lower Court erred in failing to address areas of common law, specifically:

> b. The learned Chambers Judge erred in that he failed to consider or apply the law relating to exceptions to the rule in *Foss v Harbottle;*
>
> …
>
> h. The learned Chambers Judge erred in that he, contrary to the law in *Bram Enterprises Ltd. v A. I. Enterprises Ltd.,* 2014 SCC 12, sacrificed legal certainty in commercial law for individual idiosyncrasies;

79. Regarding the first case cited, the rule in *Foss v. Harbottle* provides that a shareholder of a corporation does not have a personal cause of action for a wrong done to the corporation.[41] An exception to the rule in *Foss v. Harbottle* is "made where a 'fraud on the minority' has been perpetrated and the wrongdoers are in control of the company." However, as stated above, none of the allegations contained in the proposed Class Action have been proven. Further, it would have been inappropriate for Gabrielson J. to apply this exception in light of his observation

[41] *Everest Canadian Properties Ltd. v Mallmann*, 2008 BCCA 276 at para 7, 258 BCAC 49 (**Tab 16**).

that “[t]he statement of claim in the class action has not even been served on all the named defendants.”

80. Regarding the second case cited –*Bram Enterprises Ltd. v A. I. Enterprises Ltd*.– this case has no application. The sentence referenced by the Appellant reads as follows: “The common law in the Anglo-Canadian tradition has generally promoted legal certainty for commercial affairs.”[42] In his brief of law before the lower Court, the Appellant used this sentence in argument as follows:

> In *Bram Enterprises Ltd. v A. I. Enterprises Ltd.,* 2014 sec 12, para 33 it was held that the Anglo-Canadian tradition promotes legal certainty in commercial affairs. The Exclusion Matter is a legal certainty. The drafting of the Action as a personal action was pursuant to settled law.

81. But this argument again incorrectly presumes that the exclusion of the Class Action by the Liquidation Order was a legal certainty when this was clearly not the case. Further, no argument was advanced by the Appellant addressing why excluding the proposed Class Action would promote “legal certainty in commercial affairs”. To the contrary. Gabrielson J. explained how such an exclusion would have the opposite effect.

82. Lastly, the Appellant has attempted to rely on the principle of privity of contract to argue that the proposed Class Action should have been excluded from the Liquidation Order:

> g. The learned Chambers judge erred in that he failed to consider that a court of competent jurisdiction has not approved the Defendant directors' indemnities, or that there is no privity of contract between the Plaintiff and Proposed Class in the action filed under QBG 1767 [*sic*] of 2016 [*sic*], and that the Plaintiff and Proposed Class can therefore not be subjected to any consequences of the indemnities;

83. Although we would concede that there is no privity of contract between the Appellant and PrimeWest pursuant to the Indemnity Agreements, the Appellant would still be subject to the Liquidation Order by virtue of prosecuting an action against the directors of PrimeWest. Essentially, the Appellant is attempting to apply the privity

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[42] *A. I. Enterprises Ltd. v Bram Enterprises Ltd.*, 2014 SCC 12 at para 33, [2014] 1 SCR 177 (**Tab 17**).

of contract doctrine to a court order where it has no application. Notably, the Appellant was a party to the Liquidation Order and is therefore subject to the consequences thereof.

### C. The Appeal lacks sufficient importance to warrant leave to appeal being granted.

84. The main purpose of appointing a liquidator is to wind up the corporation for the purpose of closing up the corporation's business, realizing its assets and distributing proceeds obtained among the creditors and shareholders of the corporation:

> The liquidator acts as a receiver and manager of the corporation (as well as of its assets) for the purpose of closing up the corporation's business, realizing its assets and making a legal distribution of those assets among the creditors and shareholders of the corporation. The similarity between bankruptcy and winding-up proceedings is that the **purpose of both is to get all of the estate of the corporation settled, both the claims for and against the estate, in the simplest and least expensive way, and to distribute the assets in the quickest possible way without incurring needless delay and expense by litigation in other courts**.[43]

85. Pursuant to this purpose, ss. 214 and 215 of the *Business Corporations Act* set out the duties and powers of the Liquidator which include the identification of potential claims against the property of PrimeWest. This legislation contemplates the liquidator proceeding "forthwith" and without undue delay in the identification of claims in order to facilitate the eventual distribution of assets in the "quickest possible way." As highlighted by Gabrielson J., the "liquidation order would be meaningless as far as determining the issues necessary for the winding up of PrimeWest if it could be held up until final adjudication on the class action."

86. In order to expeditiously determine the issues necessary for the winding up of PrimeWest, both the Liquidator and the Appellant sought direction from the lower Court on the interpretation of its prior Liquidation Order. Gabrielson J. provided the following timeline for the Appellant to bring his proposed Class Action within the Liquidation Proceedings:

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[43] Kevin McGuinness, *The Law and Practice of Canadian Business Corporations* (Markham: Butterworths Canada, 1999) at 1167, 1172 [emphasis added] (**Tab 19**).

(a) The representative plaintiff in the class action QBG 1727 of 2018, Randy Koroluk and the members of the class action he represents, are not excluded from the liquidation proceedings in QBG 1455 of 2019.

(b) Randy Koroluk, the representative plaintiff in the class action, is required by the terms of the Claims Process Order to file with KPMG a proof of claim within 30 days of the date of this order. The claims bar date found in the Claims Process Order is extended to August 7, 2020.

87. The Appellant has not advanced any argument, beyond that addressed below, to suggest that a prejudice would result from the Class Action being included in the Liquidation Proceedings. However, further delaying the process set out by the Court will unduly increase the costs of the liquidation, contrary to the purpose of the liquidation remedy and duties of the Liquidator as an officer of the Court, appointed pursuant to the *Business Corporations Act*.

88. While the Appellant has argued that the class he intends to represent would "lose any opportunity of meaningful recovery and [would be] defeated by the procedure of being included in the liquidation,"[44] this argument fails to explain why any judgment obtained against PrimeWest's directors would not be amenable to regular judgment enforcement measures against said directors. Further, no part of either the Liquidation Order or the Claims Process Order is cited in support of such a proposition and there is nothing in these orders limiting the right of judgment enforcement against PrimeWest's directors. By arguing that PrimeWest's directors should not be permitted to avoid personal liability through voluntary liquidation, the Appellant has put forward a straw man argument by refuting an argument that has never been advanced in these proceedings.

89. Further, the grounds of appeal are narrow and attack discretionary determinations of the presiding liquidation judge regarding the interpretation of his own orders. Specifically, the Appeal attacks Gabrielson J.'s interpretation of the Liquidation Order which Mr. Merchant modified and submitted with the consent of counsel for

[44] Merchant Submissions at para 3.

PrimeWest. These fact-specific issues have no meaningful precedential value in any future cases.

90. Therefore, leave to appeal should not be granted *nunc pro tunc* due to the relative lack of importance to the practice or the state of the law.

**D. The Appellant has acted unreasonably in failing to seek leave to appeal**

91. In the event this Court is satisfied that the Appeal has sufficient merit and importance to grant leave to appeal under *Rothmans*, it is submitted that, nonetheless, leave to appeal should not be granted *nunc pro tunc* as the Appellant has acted unreasonably in failing to seek leave to appeal.

92. In *Poffenroth*, Kalmakoff J.A. examined whether it was reasonable for the appellant in that matter to pursue a notice of appeal without first seeking leave in light of the state of the jurisprudence surrounding the nature of the order appealed from. Similarly, in *Cowessess First Nation v. Phillips Legal Professional Corporation*,[45] Jackson J.A. noted that the appellant in that case had made a concerted effort to comply with the Court's prior authorities and had satisfied himself the matter was a final one before commencing to file a notice of appeal.[46]

93. The same cannot be said to be the case here. The Appellant has flatly stated that they have an "unlimited right of appeal" provided by s. 242 of the *Business Corporations Act*.[47] Bearing in mind the nature of the decision appealed from, that being the lower court interpreting its own order by virtue of *The Queen's Bench Rules*, and bearing in mind the state of the law with respect to the scope of s. 242 as set out above, it is unreasonable to base an assertion of an "unlimited right of appeal" appeal as of right upon s. 242 in this case.

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[45] 2018 SKCA 101, 43 CPC (8th) 237 [*Cowessess*] (**Tab 18**).
[46] *Ibid* at para 33.
[47] Appellant's Notice of Motion, dated July 22, 2020, in CACV3680 at para 1(e).

94. Similarly, upon considering the jurisprudence set out above with respect to determining whether an order is final or interlocutory in nature, it cannot be said that the Appellant has acted reasonably in failing to seek leave. The jurisprudence leaves no doubt but that the decision appealed from is interlocutory. Apprehension about the implications of seeking leave to appeal where it may not be required (such as in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*)[48] cannot transmute the act of proceeding recklessly by notice of appeal in the face of jurisprudence to the contrary into a reasonable act.

95. It is clear that s. 242 of the *Business Corporations Act* is inapplicable, indeed the Appellant expressly relied upon Rule 10-11 in their submissions to the lower Court, and it is patent that the decision appealed from is interlocutory. Unlike *Cowessess*, there has been no attempt to comply with this Court's prior authorities, there has been disregard for them. That disregard has, in turn, occasioned delay in multiple ways, as discussed below.

### E. The Appellant has occasioned delay by failing to seek leave to appeal

96. In *Dutchak v. Dutchak*, in determining whether the time for filing for leave should be extended, the Court observed as follows:

> Appeals on interlocutory matters may hold up proceedings in the Court of Queen's Bench and are therefore dealt with by the Court on an expedited basis. Applicants for leave are expected to move with dispatch, and demonstrate the significance and merits of the issue to be appealed. In this case, it is also apparent that the applicant will have a right of appeal at a later stage in the proceedings, if the matter progresses and is not otherwise resolved.[49]

97. The foregoing decision was in the context of determining whether to enlarge the period provided for seeking leave to appeal but the *ratio* remains apt in this context. The point of requiring leave to appeal interlocutory decisions is expediency. This Court's process is designed to resolve questions about the appropriateness of granting leave on an expedited basis. The goal is to avoid waylaying the underlying

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[48] [1993] 6 WWR 1 (Sask CA).
[49] *Dutchak v Dutchak*, 2009 SKCA 89 at paras 12-13, 337 Sask R 46 (**Tab 19**).

action beyond the barest duration possible, unless sufficient merit and import be shown.

98. Consider, by contrast, the events which have preceded the within motion to quash. Gabrielson J.'s fiat was issued on July 7, 2020, and the Appellant served his application for a declaration waiving leave to appeal on the parties on July 21, 2020; however, he failed to file the same with the Court of Appeal. Counsel for the Appellant, Mr. Merchant, was advised by Ms. Baldwin as early as July 27, 2020, of the Appellant's failure to file his application. Despite this warning, the Appellant's application for a declaration waiving leave to appeal was only filed on August 7, 2020, or 11 days after being advised of the failure to file. Almost simultaneously, the Appellant filed two proofs of claim with the Liquidator on August 6, 2020, the second-to-last possible day on which to do so. The application for a declaration waiving leave (CACV3680) was heard on August 26, 2020 and the decision of Justice Barrington-Foote issued August 28, 2020.[50]

99. To date, nothing of procedural substance has been accomplished by way of proceeding with this appeal. Over two months have elapsed since the fiat of Gabrielson J. issued. Since then, the Appellant has attempted to circumvent the requirement to obtain leave to appeal, thus prolonging the life of a meritless notice of appeal, brought an unprecedented and baseless application for a retroactive judicial sanction of that same failure to obtain leave to appeal and has neglected to move the appeal forward with any form of dispatch. Against this backdrop, it must be remembered that while the Appellant has pursued this course of action, a liquidation is languishing and needless costs are being incurred. Had the Appellant applied for leave as the Liquidator submits is required and had advised the Appellant, this delay could have either been avoided, as the matter would have been disposed of in an expedited fashion or, if a chambers judge had been satisfied that the *Rothmans* criteria were met, the parties would at least have judicial assurance that the delay incurred is not for naught and a live issue requires resolution. It is

[50] See *Koroluk*, *supra* note 10.

therefore respectfully submitted that the delay occasioned by the Appellant's frivolous and unprecedented actions in respect of his earlier motion, coupled with the dilatory conduct which has come to define the Appellant's pursuit of the within appeal[51] should bar any resort to this Court's exercise of the extraordinary power that is granting leave *nunc pro tunc*.

## Conclusion

100. The Appellant disputes Gabrielson J.'s interpretation of the Liquidation Order as including the Class Action. The Liquidation Order defines "Claims" for the purposes of the Liquidation Proceedings as:

> (b) any existing or future right of any Person against any one or more of the Directors which arose or arises as a result of such Director's position. supervision, management or involvement as a Director or otherwise in any other capacity in connection with the Corporation, whether such right, or the circumstances giving rise to it, arose before or after the Effective Date and whether enforceable in any civil, administrative or criminal proceeding…

The original Liquidation Order was modified on two prior occasions and no explanation has been provided for Mr. Merchant's failure to object to the above wording and its clear implications regarding the Class Action. For all the reasons put forward herein, the Liquidator respectfully requests that this motion to quash be granted with costs against the Appellant.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** at the City of Saskatoon, in the Province of Saskatchewan, this 11th day of September, 2020.

**THE W LAW GROUP LLP**

PER: N Conlon
_____

**Mike Russell and Nick Conlon,**
**Solicitors for the Respondent, KPMG Inc.**

[51] To say nothing of the observation of Gabrielson J. regarding the Appellant's failure to pursue certification in the proposed Class Action, or the Appellant's failure to bring their underlying appearance day application forward to be heard.

**THIS DOCUMENT WAS DELIVERED BY**:


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TO: ALL RECIPIENTS LISTED ON THE SERVICE LIST

# TAB 1

2002 SKCA 119
Saskatchewan Court of Appeal

Rothmans, Benson & Hedges Inc. v. Saskatchewan

2002 CarswellSask 653, 2002 SKCA 119, [2002] S.J. No. 605, 117 A.C.W.S. (3d) 523, 227 Sask. R. 121, 287 W.A.C. 121

# ROTHMANS, BENSON & HEDGES INC.(PLAINTIFF / PROSPECTIVE APPELLANTS) and GOVERNMENT OF SASKATCHEWAN (DEFENDANT / PROSPECTIVE RESPONDENT)

Cameron J.A.

Heard: October 23, 2002
Judgment: October 23, 2002
Written reasons: October 24, 2002
Oral reasons: October 23, 2002
Docket: 624

Proceedings: allowing leave to appeal (2002), 2002 CarswellSask 653 (Sask. Q.B.)

Counsel: *Neil G. Gabrielson, Q.C., M. Ouellette*, for Applicants
*Thomson Irvine, R. Hischebett*, for Respondents

Subject: Civil Practice and Procedure; Constitutional

**Related Abridgment Classifications**

Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.b Application
XXIII.10.b.ii Grounds

Constitutional law
XIV Procedure in constitutional challenges
XIV.5 Miscellaneous

**Headnote**

Practice --- Practice on appeal — Leave to appeal — Application — Grounds
Section 6 of Tobacco Control Act, which is provincial legislation, prevents advertising, display, and promotion of cigarettes in retail premises in Saskatchewan where young persons are present — Tobacco Act, which is federal legislation, also regulates cigarette promotion, and is less restrictive than Tobacco Control Act — Cigarette manufacturer's application under R. 188 of Queen's Bench Rules for declaration that s. 6 of Tobacco Control Act is invalid was dismissed — Trial judge found that operation of doctrine of federal paramountcy does not invalidate s. 6 of Tobacco Control Act — Manufacturer brought application for leave to appeal — Application granted — Issue was one of general public importance — Issue affected all tobacco manufacturers — Sufficient merit existed to allow leave to appeal — Appeal was not destined to fail.

  

**Table of Authorities**

**Cases considered by *Cameron J.A.*:**

*Steier v. University Hospital*, [1988] 4 W.W.R. 303, 67 Sask. R. 81, 27 C.P.C. (2d) 18, 1988 CarswellSask 278 (Sask. C.A.) — followed

*Thompson Lands Ltd. v. Henry Kelly Tractor Ltd.*, 34 Sask. R. 246, 1984 CarswellSask 223 (Sask. C.A.) — considered

**Statutes considered:**

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

s. 2 — referred to

*Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1
Generally — referred to

s. 8 — referred to

*Tobacco Act*, S.C. 1997, c. 13
Generally — referred to

*Tobacco Control Act*, S.S. 2001, c. T-14.1
s. 6 — referred to

s. 7 — referred to

APPLICATION by manufacturer for leave to appeal from judgment reported at 2002 CarswellSask 577 (Sask. Q.B.), dismissing manufacturer's application for declaration that certain sections of Tabacco Act are invalid.

***Cameron J.A.*:**

1 Rothmans, Benson & Hedges Inc. seek leave to appeal a decision made by Mr. Justice Barclay in the course of an action brought by the company against the Government of Saskatchewan claiming the following declarations:

> 1. That section 6 of *The Tobacco Control Act*, S.S. 2001, c. T-14.1, governing the display of tobacco products in Saskatchewan, is inoperative in light of the provisions of the *Tobacco Act*, S.C. 1997, c. 13, concerning the marketing of tobacco products in Canada, and of the constitutional doctrine of federal paramountcy.
>
> 2. That sections 6 and 7 of *The Tobacco Control Act* are inconsistent with section 2 of the *Charter of Rights and Freedoms*, guaranteeing freedom of expression, and therefore of no force or effect.

2 Mr. Justice Barclay took up the first of these claims on an application by the company under Rule 188 of *The Queen's Rules*, leaving the second to be tried in the usual way. He decided that section 6 of *The Tobacco Control Act* of Saskatchewan is not in conflict with the *Tobacco Act* of Canada and, hence, not inoperative.

3 The application for leave to appeal is made pursuant of section 8 of *The Court of Appeal Act, 2000*, S.S. 2000, c.C-42.1, which reads thus:

> **8**(1) Subject to subsection (2), no appeal lies to the court from an interlocutory decision of the Court of Queen's Bench

  

unless leave to appeal is granted by a judge or the court.

(2) Leave to appeal an interlocutory decision is not required in the following cases:

(a) cases involving:

(i) the liberty of the individual;

(ii) the custody of a minor;

(iii) the granting or refusal of an injunction; or

(iv) the appointment of a receiver;

(b) other cases, prescribed by the rules of court, that are in the nature of final decisions.

4 The parties are of the common view the decision of Mr. Justice Barclay is an interlocutory decision requiring leave to appeal pursuant to section 8 of *The Court of Appeal Act, 2000*.

5 This is a new *Act*Cit came into force on November 1st, 2000Cbut many of its provisions constitute the re-enactment of former provisions or, in the case of section 8, the enactment in substance of former law derived from other sources, as in *Thompson Lands Ltd. v. Henry Kelly Tractor Ltd.* (1984), 34 Sask. R. 246 (Sask. C.A.). That being so, the jurisprudence pertaining to leave to appeal, as it existed before the *Act* came into force, continues to be relevant.

6 The power to grant leave has been taken to be a discretionary power exercisable upon a set of criteria which, on balance, must be shown by the applicant to weigh decisively in favour of leave being granted: *Steier v. University Hospital*, [1988] 4 W.W.R. 303 (Sask. C.A.)(Sask. C.A., *per* Tallis J.A. in chambers). The governing criteria may be reduced to twoCeach of which features a subset of considerationsCprovided it be understood that they constitute conventional considerations rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of **merit** and **importance,** as follows:

First: Is the proposed appeal of **sufficient merit** to warrant the attention of the Court of Appeal?

• Is it *prima facie* frivolous or vexations?

• Is it *prima facie* destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?

• Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?

• Is it apt to add unduly or disproportionately to the cost of the proceedings?

Second: Is the proposed appeal of **sufficient importance** to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?

• does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?

• does it raise a new or controversial or unusual issue of practice?

  

• does it raise a new or uncertain or unsettled point of law?

• does it transcend the particular in its implications?

7 With this in mind, I turn first to merit. Having regard for the decision in question, the nature of the issue, and the grounds of appeal set out in the proposed notice of appeal, I cannot say the proposed appeal is *prima facie* frivolous or pre-destined to fail. Nor, is it apt to delay the proceedings, for the trial of the remaining issue pertaining to the *Charter* will not proceed, if it proceeds at all, for quite some time; indeed the trial is a long way off. And relatively speaking, appeal at this stage of the proceedings in relation to the issue in question does not give rise to concerns about cost.

8 Turning to considerations of importance, Mr. Gabrielson made the following point on behalf of the applicant, a point that struck me as rather compelling: *The Tobacco Control Act* is new legislation affecting countless vendors of tobacco products in the Province, who are potentially subject to prosecution under the *Act*, and that the decision of Mr. Justice Barclay serves to set the legal standard for compliance, a standard that would remain in effect until the trial of the action and the appeal which would then follow. This is apt, he said, to be a very long time in light of several considerations, including the fact the *Charter* issue is being litigated elsewhere.

9 Needless to say, perhaps, the proposed appeal bears heavily on the proceedings. Indeed, it is potentially decisive of them, in the sense that if the appeal were allowed the action would be at an end, barring further appeal. And, of course, the subject- matter is of considerable general importance.

10 For these reasons, orally expressed in general on the hearing of the application, I was persuaded to allow the application and grant leave to appeal. The proposed notice of appeal sets out eight grounds, one of which, namely 4(a)(v), was objected to by Mr. Irvine on behalf of the Government, an objection I found to be well taken. Hence I struck this ground of appeal from the proposed order granting leave. Otherwise I directed that the proposed order issue.

11 As for costs, the costs of the application shall be costs in the cause, not the cause of action as whole, but the cause of action as it relates to the issue to go before the Court of Appeal.

*Application granted.*

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# TAB 2

2003 SKCA 19
Saskatchewan Court of Appeal

Rimmer v. Adshead

2003 CarswellSask 164, 2003 SKCA 19, [2003] W.D.F.L. 128, [2003] S.J. No. 129, 121 A.C.W.S. (3d) 593, 224 D.L.R. (4th) 372, 232 Sask. R. 68, 294 W.A.C. 68, 30 C.P.C. (5th) 97, 34 R.F.L. (5th) 137

# John Colin Rimmer (Appellant) and Donna Marie Adshead (Respondent)

Gerwing, Lane, Jackson JJ.A.

Heard: February 19, 2003
Judgment: February 19, 2003
Docket: 622

Counsel: *R. Bradley Hunter*, for Appellant
*W. Timothy Stodalka*, for Respondent

Subject: Family; Property

**Related Abridgment Classifications**

Family law
XVII Practice and procedure
XVII.6 Discovery
XVII.6.a Examination for discovery

Family law
XVII Practice and procedure
XVII.9 Procedure on appeal
XVII.9.e Miscellaneous

**Headnote**

Family law --- Family property on marriage breakdown — Practice and procedure — Practice on appeal — General
Husband and wife brought claim for division of family property as corollary relief to divorce — Chamber judge refused to grant order compelling wife to answer questions on examination for discovery, finding that solicitor-client privilege protected evidence which questions were designed to elicit — Husband appealed — Issue arose as to whether leave to appeal was required — Right of appeal in Divorce Act and Family Property Act is limited to those judgments or orders arising from power specifically conferred by those statutes, to exclusion of variety of interlocutory decisions which may be made under Rules of Court — Appeal found its authority in Court of Appeal Act — Leave was required for interlocutory matters not founded in Divorce Act.

Family law --- Family property on marriage breakdown — Practice and procedure — Discovery — General
Husband and wife brought claim for division of family property as corollary relief to divorce — Chamber judge refused to grant order compelling wife to answer questions on examination for discovery, finding that solicitor-client privilege protected evidence which questions were designed to elicit — Husband appealed — Leave to appeal dismissed — Answers were unlikely to reveal unexpected avenues of defence, claim or evidence — Answers could be anticipated or compensated for by short adjournment — No reason existed to grant leave.

**Table of Authorities**

**Cases considered by *Jackson J.A.*:**

*Cecconi v. Cecconi* (1977), 15 O.R. (2d) 142 (Ont. C.A.) — followed

*Double D Construction Ltd. v. Rocky Meadows Transport Ltd.*, 177 Sask. R. 264, 199 W.A.C. 264, 9 C.B.R. (4th) 272, 1999 CarswellSask 240 (Sask. C.A. [In Chambers]) — considered

*Dureault's Allied Sales Ltd. v. Courtyard Inns Ltd.*, 28 C.P.C. (2d) 206, 8 P.P.S.A.C. 225, 70 Sask. R. 77, 1988 CarswellSask 92 (Sask. C.A.) — considered

*Hay v. Crick*, 1999 CarswellSask 811 (Sask. C.A.) — referred to

*K. (H.) c. S. (D.)* (1988), 18 R.F.L. (3d) 66, 22 Q.A.C. 163, *(*sub nom. *Droit de la famille - 572)* [1989] R.J.Q. 22, *(*sub nom. *Droit de la famille - 572)* [1989] R.D.F. 180, 1988 CarswellQue 48, 1988 CarswellQue 326 (Que. C.A.) — not followed

*Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, *(*sub nom. *Kelvin Energy Ltd. v. Lee)* 97 D.L.R. (4th) 616, *(*sub nom. *Kelvin Energy Ltd. v. Lee)* [1992] 3 S.C.R. 235, *(*sub nom. *Kelvin Energy Ltd. v. Lee)* 51 Q.A.C. 49, 143 N.R. 191, 1992 CarswellQue 126, 1992 CarswellQue 126F (S.C.C.) — considered

*Rimmer v. Adshead*, 2002 SKCA 12, 2002 CarswellSask 19, [2002] 4 W.W.R. 119, 24 R.F.L. (5th) 159, 217 Sask. R. 94, 265 W.A.C. 94 (Sask. C.A.) — referred to

*Wygant v. Wygant*, 9 R.F.L. (2d) 257, 24 O.R. (2d) 678, 99 D.L.R. (3d) 154, 1979 CarswellOnt 390 (Ont. C.A.) — referred to

**Statutes considered:**

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44
Generally — referred to

s. 249 — referred to

*Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1
Generally — considered

s. 7(2) — considered

s. 7(3) — considered

s. 8(1) — referred to

*Divorce Act*, R.S.C. 1970, c. D-8
s. 17 — referred to

*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — considered

s. 21 — referred to

s. 21(1) — referred to

s. 21(6) — referred to

*Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2

  

Generally — referred to

*Family Property Act*, S.S. 1997, c. F-6.3
Generally — considered

s. 55 — referred to

*Personal Property Security Act*, S.S. 1979-80, c. P-6.1
s. 68 — referred to

*Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2
s. 66 — referred to

APPEAL by husband from judgment refusing to grant order compelling wife to answer questions on examination for discovery.

***Jackson J.A.*:**

1 This appeal arises in the context of a claim for a division of family property as corollary relief to divorce. It is an appeal from a chamber judge's decision refusing to grant an order compelling one party to answer questions on an examination for discovery. The learned chamber judge found that solicitor/client privilege protects the evidence which the questions were designed to elicit.

2 The first question is the applicable right of appeal for which there are three possible sources: (i) the *Divorce Act*[1]; (ii) *The Family Property Act*[2]; and (iii) *The Court of Appeal Act, 2000*.[3] The relevant provisions in the *Divorce Act* are:

> 21. (1) Subject to subsections (2) and (3), an appeal lies to the appellate court from any judgment or order, whether final or interim, rendered or made by a court under this Act.
>
> . . . . .
>
> (6) Except as otherwise provided by this Act or the rules or regulations, an appeal under this section shall be asserted, heard and decided according to the ordinary procedure governing appeals to the appellate court from the court rendering the judgment or making the order being appealed.

Section 55 of *The Family Property Act* provides:

> 55 An appeal lies to the Court of Appeal for Saskatchewan from any order or judgment made or given on or pursuant to an application pursuant to this Act.

Subsections 7(2) and (3) of *The Court of Appeal Act, 2000* provide:

> 7(2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:
>
> (a) of the Court of Queen's Bench or a judge of that court; and
>
> (b) of any other court or tribunal where a right of appeal to the court is conferred by an enactment.
>
> (3) If an enactment provides that there is no appeal from a decision mentioned in subsection (2) or confers only a limited right of appeal, that enactment prevails.

3 The significance of the question is this. If the right of appeal is grounded in *The Court of Appeal Act, 2000*, subsection 8(1) of that *Act* comes into play. It states that "no appeal lies to the court from an interlocutory decision of the Court of Queen's Bench unless leave to appeal is granted by a judge or the court." If the right of appeal is derived from *The Family*

  

*Property Act* or the *Divorce Act*, an appeal, whether interlocutory or final, may be made as of right because the governing statute may take precedence over subsection 7(2) of *The Court of Appeal Act, 2000* by virtue of subsection 7(3) of that *Act*.

4 There has been some debate about the meaning to be attributed to statutes which grant a right of appeal with respect to "orders made under or pursuant to" the statute in question. The Supreme Court of Canada considered this issue in the context of section 249 of the *Canada Business Corporations Act*[4] in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling*[5] In *Kelvin Energy Ltd.*, the Court held that language of this nature means any judgment, whether interlocutory or final, is appealable as of right, but only if it has been made pursuant to a power expressly conferred by the *Canada Business Corporations Act.*[6] The Court went on in the same paragraph to refer to the scope of section 21 of the *Divorce Act* not having been definitely settled and left that question open for another day.

5 Having reviewed the conflicting authorities on point, we do not follow *K. (H.) c. S. (D.)*,[7] but we are persuaded by the reasoning in *Cecconi v. Cecconi*.[8] We note that when *Cecconi* was decided, subsection 21(6) of the *Divorce Act* had not yet been added, which increases the strength of that decision.[9]

6 The words in question "order or decision made pursuant to this Act" in the *Divorce Act* and *The Family Property Act* can bear the meaning attributed to the same words in *Kelvin Energy Ltd.*, i.e., as granting a right of appeal, as of right, for orders and decisions made pursuant to a power expressly conferred by the Act in question. It does some harm to the words to speak of a procedural order, like the one before us, as having been made pursuant to the *Divorce Act* or *The Family Maintenance Act, 1997*.[10]

7 There are also good policy reasons to limit the right of appeal in this manner. Interlocutory appeals in family law matters, where delay can least be borne, can be used as an instrument of delay. These policy concerns would support limiting the right of appeal by the means chosen in *The Court of Appeal Act, 2000*.

8 For these reasons, we conclude that the right of appeal in the *Divorce Act* and *The Family Property Act* is limited to those judgments or orders arising from a power specifically conferred by those statutes, to the exclusion of the variety of interlocutory decisions which may be made under the Rules of Court. Accordingly, this appeal finds its authority in *The Court of Appeal Act, 2000*.

9 In coming to this conclusion, we have reviewed*Dureault's Allied Sales Ltd. v. Courtyard Inns Ltd.*[11] which held that a decision to order a trial of the issue was appealable as of right under section 68 of *The Personal Property Security Act.*[12] We also note that *Dureault's* was relied upon in support of an *obiter* comment in *Double D Construction Ltd. v. Rocky Meadows Transport Ltd.*[13] to the effect that the right of appeal in section 66[14] may extend to orders adjourning proceedings. We make no further comment on these decisions at this time.

10 As a consequence, we resolve the threshold issue in favour of the respondent: leave is required for interlocutory matters not founded in the *Divorce Act*. No one having seriously questioned that this is an interlocutory matter,[15] we turn to the next issue which is whether leave should be granted.

11 In considering whether leave should be granted, given our decision to convert this appeal into a leave application, we pass quickly to the merits. On this point, we have considered two matters: (i) the history of this file; and (ii) the nature of the questions and their relevance to Ms. Adshead's claim.

12 First, as to the history, we note that the original divorce petition was filed February 1, 2000. It was noted for default on May 9, 2000. An order was made opening up the noting for default on November 15, 2000. The answer and counter-petition were filed November 28, 2000. All this is more particularly set out in *Rimmer v. Adshead*[16] The examination for discovery out of which this appeal came was conducted on June 17, 2002. Thus, we find ourselves almost three years, from when the parties first began to settle their affairs, before examinations for discovery have been completed.

13 Second, our review of the questions has led us to conclude that the answers are unlikely to reveal unexpected avenues of defence, claim or evidence. In all likelihood, the answers can be anticipated or, if not, compensated for by a short adjournment. Ms. Adshead's counsel advised the Court in oral argument that his client was not denying that she had signed the agreement or that the certificate of independent legal advice had been given. Rather, relevance in this matter, at least at

  

this point, is to be considered in light of para. 5 of her affidavit dated October 20, 2000 which states that "I asked him to hold the copies of the agreement as I wished to consider my position based on the advice that he gave me."[17]

14 Having regard for all this, if we had been sitting as chamber judges, we would have probably refused leave. The presence of the parties before a division of the Court should not elevate the matter. We see no reason why leave should be granted. Accordingly, we refuse leave.

15 In refusing leave, we make no comment as to whether the chamber judge should have determined whether these communications were privileged. We do not affirm her fiat. Any questions of solicitor/client privilege are left to the unfettered discretion of the trial judge.

16 There will be no order as to costs.

*Order accordingly.*

Footnotes

1 R.S.C. 1985, c. 3 (2nd Supp.)

2 S.S. 1997, c. F-6.3, as am. by S.S. 2001, c. 51.

3 S.S. 2000, c. C-42.1.

4 R.S.C. 1985, c. C-44.

5 [1992] 3 S.C.R. 235 (S.C.C.).

6 *Ibid.* at 252.

7 (1988), 18 R.F.L. (3d) 66 (Que. C.A.).

8 (1977), 15 O.R. (2d) 142 (Ont. C.A.), at 144. See also *Wygant v. Wygant* (1979), 24 O.R. (2d) 678 (Ont. C.A.).

9 See section 17 of R.S.C. 1970, c. D-8.

10 S.S. 1997, c. F-6.2.

11 (1988), 70 Sask. R. 77 (Sask. C.A.).

12 S.S. 1979-80, c. P-6.1. Section 68 reads "[a]n appeal lies from an order, judgment or decision of a judge or the court to the Court of Appeal within the time and in accordance with the practice and procedure established in the rules of the Court of Appeal."

13 (1999), 9 C.B.R. (4th) 272 (Sask. C.A. [In Chambers]).

14 Section 66 replaced section 68 in *The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2.

  

15 See *Hay v. Crick*, [1999] S.J. No. 803 (Sask. C.A.).

16 (2002), 217 Sask. R. 94 (Sask. C.A.).

17 Appeal Book, p. 38a.

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# TAB 3

1992 CarswellQue 126
Supreme Court of Canada

Loewen, Ondaatje, McCutcheon & Co. c. Sparling

1992 CarswellQue 126F, 1992 CarswellQue 126, [1992] 3 S.C.R. 235, [1992] S.C.J. No. 88, 143 N.R. 191, 36 A.C.W.S. (3d) 362, 51 Q.A.C. 49, 97 D.L.R. (4th) 616, J.E. 92-1625, EYB 1992-67839

# Loewen, Ondaatje, McCutcheon & Co. Ltd., Appellant v. Frederick H. Sparling, Respondent and Kelvin Energy Ltd., Mis en cause and Jimmy S.H. Lee, Michael John Smith, Asiamerica Capital Ltd. and Asiamerica Equities Ltd., Mis en cause and Nalcap Holdings Inc., Mis en cause

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

Judgment: May 27, 1992
Judgment: October 29, 1992
Docket: 22131

Proceedings: On Appeal from the Court of Appeal for Quebec

Counsel: *Jack Greenstein, Q.C.*, for the appellant.
*Pierre Bourque, Q.C.*, and *Eugène Czolij*, for the respondent.
*Michel Robert, Q.C.*, for the *mis en cause* Nalcap Holdings Inc.

Subject: Corporate and Commercial

**Related Abridgment Classifications**

Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.D Orders for relief
III.3.e.ii.D.4 Interim orders

**Headnote**

Corporations --- Shareholders — Shareholders' remedies — Relief from oppression

No appeal from interlocutory judgment — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 249 — Code of Civil Procedure, R.S.Q. 1986, c. C-25, s. 397(4).

In a shareholders' oppression action, an issue arose as to whether a judgment authorizing the examination on discovery of certain persons was an "order" made under the Act within the meaning of s. 249. S. 249 provided that there was an appeal to the Court of Appeal from any order made under the Act. The Court of Appeal ruled that there was no appeal. On further

  

appeal, held, the appeal was dismissed. The provisions of the Code applied on a suppletive basis during the proceedings, unless Parliament expressly provided to the contrary in the Act. Parliament did not so provide. There was no appeal of the interlocutory judgment under the Code, without leave. It was not the intention of Parliament to give litigants in oppression actions greater appeal rights for interlocutory judgments than existed under provincial rules.

**English version of the reasons delivered by *Lamer C.J.*:**

1 I have read the reasons of Justice L'Heureux-Dubé and, while I concur in her conclusion, I cannot adopt quite the same reasoning. I am of the view that in the context of the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, the rules in the *Code of Civil Procedure*, R.S.Q., c. C-25, do not have a suppletive effect, since Parliament incorporated these rules into the *Canada Business Corporations Act* by s. 248 of that Act.

2 I do not in any way question the principle that, where the federal legislation is silent, provincial procedural legislation applies in a suppletive manner to matters falling within federal legislative jurisdiction. This principle applies only where the legislation is silent, however, and that is not the situation here. Parliament has expressly provided that in the context of the *Canada Business Corporations Act*, provincial rules of procedure will apply, and it is on account of this reference that the *Code of Civil Procedure* rules must be applied in Quebec, not because those rules are suppletive in nature.

3 It is true that in the circumstances of the instant appeal this distinction is of limited practical interest, since in the absence of the reference in s. 248 of the Act the rules set out in the *Code of Civil Procedure* would in any case have to be applied in Quebec on a suppletive basis. This Court's decision is liable to apply in other circumstances, however, where denial of the existence of a reference would have more significant consequences.

4 This having been said, it does not follow that the reasoning of Nichols J.A. of the Quebec Court of Appeal, [1990] R.J.Q. 1825, should be adopted. He considered that in s. 248 of the *Canada Business Corporations Act* Parliament had incorporated the *Code of Civil Procedure* rules in its own legislation [Translation] "...as if they were written therein" (p. 1829). He indicated that in such a case [Translation] "...the federal legislation should be read by interpreting its provisions in light of each other, as if the provincial rules were part of it" (p. 1830). Accordingly, in Nichols J.A.'s view, s. 249 of the *Canada Business Corporations Act*, which provides that "[a]n appeal lies to the court of appeal from any order made by a court under this Act", covers decisions made under the *Code of Civil Procedure*, which has been incorporated into the *Canada Business Corporations Act*, as well as decisions rendered specifically under that Act.

5 Although, like Nichols J.A., I consider that s. 248 of the *Canada Business Corporations Act* incorporates the rules of the *Code of Civil Procedure* into that Act, I do not agree with the interpretation proposed by Nichols J.A. of s. 249 of the *Canada Business Corporations Act*. In my opinion, Nichols J.A. is adopting an unduly literal interpretation of the phrase "this Act" in s. 249. There is indeed a rule of interpretation to the effect that the various provisions of a statute should be interpreted in light of each other. With respect, however, that rule should not be applied mechanically, and while it is true that the statute forms a unified whole, which is presumed to be coherent, it is also true that the Act should always be given the interpretation which will achieve its purpose.

6 In this connection, the only interpretation of s. 249 which seems to me to be consistent with the objects of the *Canada Business Corporations Act* is that which limits the appeal as of right provided for in that section to orders made pursuant to powers *specifically* conferred by the *Canada Business Corporations Act*, and excludes interlocutory judgments rendered pursuant to rules of procedure contained in the *Code of Civil Procedure which are of general application*. The incorporation of the rules set forth in the *Code of Civil Procedure* into the *Canada Business Corporations Act* does not make those rules any less general in scope and accordingly does not make orders made under those rules subject to the appeal as of right provided for in s. 249 of the *Canada Business Corporations Act*.

7 I concur in the analysis of L'Heureux-Dubé J. regarding the need to limit the right of appeal to the powers specifically conferred by the *Canada Business Corporations Act* in order to further the underlying purposes of the Act. In particular, I am of the view that Parliament did not intend to give the parties the right to appeal from all the interlocutory decisions which might be rendered during a proceeding, while at the same time seeking to provide a particularly fast and effective remedy for

  

certain classes of persons, including minority shareholders.

8 For these reasons, I would dismiss the appeal with costs.

**The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by *L'Heureux-Dubé J.*:**

9 This appeal concerns the interpretation of s. 249 of the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 ("*C.B.C.A.*"). In particular, the question is whether under that provision a judgment of the Quebec Superior Court authorizing an examination for discovery is appealable as of right.

**Facts**

10 In November 1988, Kelvin Energy Ltd. ("Kelvin") filed an amended application for an oppression remedy under s. 234 *C.B.C.A.* (now s. 241). During the months preceding the application Kelvin had purchased a large number of voting shares in Nalcap Holdings Inc. ("Nalcap") with a view to controlling it. Kelvin had also made a takeover bid which was opposed by the Nalcap management and its majority shareholders and which was quashed by the court shortly before the application was filed.

11 The application was heard on November 21, 1988 and was adjourned until January 4, 1989. It was alleged that two members of the board of directors, Jimmy Lee and Michael John Smith, had breached their fiduciary duties to Nalcap and its shareholders by persuading the board of directors to acquire shares of Paramount Funding Ltd. ("Paramount") from the appellant at a price above the market price. Kelvin asked that Lee and Smith be removed from the board of directors and that they repay Nalcap the money spent to purchase the shares of Paramount. On January 4, 1989 the parties informed the court that negotiations were under way to reach a settlement and it was possible that the action would be dropped. An adjournment was granted and a settlement between the parties was confirmed on January 11, 1989. Kelvin had negotiated the sale of all its Nalcap shares and so had no further interest in the proceeding. The court was not presented with any document setting out the terms of the settlement.

12 In his capacity as Director appointed to carry out the duties and to exercise the powers conferred upon him by the *Canada Business Corporations Act*, Sparling was a party to the proceedings from the outset because of his continuing interest in the affairs of Nalcap. When the possibility of settlement was first mentioned, his counsel reminded the court that s. 242(2) *C.B.C.A.* requires that the court approve any settlement or discontinuance of proceedings seeking an oppression remedy. He expressed concern that the rights of the other Nalcap shareholders might be neglected in the settlement concluded between the parties and obtained an order that the application be adjourned *sine die* and that Sparling be authorized to examine Lee and Smith out of court. The appellant was not present when these submissions were made and it was admitted that the court's authorization did not create any precedent binding on the appellant. Mr. Lee's deposition was taken on June 6, 1989.

13 Relying on this testimony, Sparling asked the court for authorization to summon two witnesses for an examination on discovery: the appellant's president Robert Atkinson and a Paramount representative, Stephen Sharpe. Gomery J. of the Quebec Superior Court granted the motion on January 4, 1990.

14 The appellant appealed from this decision and also filed an application for leave to appeal *de bene esse*. By a judgment dated February 9, 1990, Rothman J.A. of the Quebec Court of Appeal dismissed the application for leave to appeal as follows:

> [TRANSLATION] I am far from persuaded that the order made by Gomery J. is an appealable order. If it were appealable, I am convinced that it would be appealable *de plano* and not with leave to appeal pursuant to art. 29 C.C.P.

This decision was not appealed.

15 A motion by Sparling to dismiss the appeal brought as of right was allowed by the Court of Appeal, which dismissed the appellant's appeal on July 12, 1990. It is that judgment which is now appealed before us.

  

**Judgments**

***Superior Court (Montreal, No. 500-05-012429-880, January 4, 1990)***

16 By a judgment dated January 4, 1990, the Superior Court authorized the examination on discovery of Messrs. Atkinson and Sharpe. Referring to the *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"), Gomery J. wrote:

> Procedure in matters governed by the Act is left to the usual rules in effect in the province in which an application is presented, except to the extent that the court otherwise orders (s. 248). Art. 397(4) of the *Code of Civil Procedure* permits the examination of any person upon all facts relating to the issues between the parties, if the permission of the court is obtained.

After considering Sparling's responsibilities as Director appointed under the *Canada Business Corporations Act* and the fact that the settlement had not yet been submitted to the court, Gomery J. concluded that additional information could only clarify the order he would eventually be required to make under s. 242(2) *C.B.C.A.*

***Court of Appeal, [1990] R.J.Q. 1825***

17 Beauregard J.A. was of the view that the judgment on appeal was of the same nature as those referred to in *Doyle c. Sparling*, [1985] R.D.J. 645 (C.A. Que.), *Kruco Inc. v. Kruger*, [1986] R.D.J. 69 (C.A.), and *Kruger Inc. v. Kruco Inc.*, C.A. Montreal, No. 500-09-000151-886, April 29, 1988, J.E. 88-833, and granted the motion to dismiss the respondent's appeal (at p. 1827):

> [TRANSLATION] In my humble opinion, this judgment may be likened to an interlocutory judgment of the Superior Court authorizing one party to examine another or a third party so that the person's testimony may be used in the hearing on the principal issue. This type of judgment is a matter of pure procedure, is not of the type which the Superior Court is called upon to make pursuant to the powers it derives specifically from the *Canada Business Corporations Act*, and accordingly cannot be the subject of an appeal without leave of a judge of the Court.

18 Malouf J.A. concurred with Beauregard J.A.'s conclusion, but emphasized that the conclusion was consistent with the purpose of the provisions of the *Canada Business Corporations Act* (at p. 1828):

> By enacting sections 242 to 248 of the *Canada Business Corporations Act*, Parliament decided to grant relief to a certain class of people particularly minority shareholders. The Court is given extensive powers to correct any action that is "oppressive or fairly [*sic*] prejudicial to the applicant". Under section 248 the applica tion "may be made in a summary manner by petition, originating notice of motion, or otherwise as the rules of the court provide ...". I place much emphasis on the words "summary manner".
>
> Although section 249 permits an appeal from any order made by a Court under the Act, Parliament could not have intended that judgments of the nature rendered by the Court below would fall under this section. It is clear to me that Parliament intended to avoid unnecessary delays such as would occur if every interlocutory order was appealable *de plano*.

19 In his dissent, Nichols J.A. declined to follow the Court of Appeal's earlier decisions. He noted that, through s. 248 *C.B.C.A.*, Parliament had incorporated by reference the *Code of Civil Procedure* rules in the *Canada Business Corporations Act* (at pp. 1829-30):

> [TRANSLATION] By allowing a court to have recourse to the rules of procedure in effect in its province, Parliament in my opinion is incorporating those rules in its own legislation as if they were written therein.
>
> In that case, the federal legislation should be read by interpreting its provisions in light of each other, as if the provincial rules were part of it.

  

> Accordingly, when the legislation under review contains a provision as general as s. 249, stating that "(a)n appeal lies to the court of appeal from any order made by a court under this Act", an order made under a rule of practice or procedure incorporated in the legislation by reference also becomes an "order made by a court under this Act".

Nichols J.A. therefore concluded, unlike Beauregard and Malouf JJ.A., that the Superior Court judgment was appealable as of right.

**Issue**

20 The only issue in this Court is whether the judgment authorizing the examination on discovery of Messrs. Atkinson and Sharpe is an "order" made under the *Canada Business Corporations Act* within the meaning given to that expression in s. 249 *C.B.C.A.*

**Analysis**

21 Since this case raises the question of the applicability of the rules of the *Code of Civil Procedure*, I will first examine the general application of these rules in the framework of an action under the *Canada Business Corporations Act*. This approach will make clear both the choice made by Parliament, and the points at issue here.

***Application of the Rules of Civil Procedure***

22 The scope of the *Code of Civil Procedure* rules is well summarized by Maurice and Paul Martel:

> [TRANSLATION] The fundamental principle is the following: in Quebec it is the *Code of Civil Procedure* which takes precedence, unless there is an express provision to the contrary in the *Canada Business Corporations Act*. In the event of a conflict between the federal statute and the *Code of Civil Procedure*, the former must take precedence.

(*La compagnie au Québec*, vol. I, *Les aspects juridiques* (1990), at p. 798.21.)

23 The provisions of the *Code of Civil Procedure* therefore apply on a suppletive basis during the proceedings, unless Parliament has expressly provided to the contrary (*Doyle c. Sparling*, supra, at p. 648, and *Tsuru v. Montpetit*, Sup. Ct. Montreal, No. 500-05-011706-882, November 29, 1988, J.E. 89-217, at p. 12). Without attempting to list all the rules of civil procedure excluded by the *Canada Business Corporations Act*, it will suffice to mention by way of example arts. 55 and 59 regarding sufficient interest (as opposed to s. 238 *C.B.C.A.*) and arts. 65 and 152 dealing with security (as opposed to s. 242(3) *C.B.C.A.*: see *Tsuru v. Montpetit*, *supra*).

24 Further, s. 248 *C.B.C.A.* specifically mentions the rules of civil procedure. This provision reads as follows:

> *248.* [Summary application to court] *Where this Act states that a person may apply to a court, the application may be made* in a summary manner by petition, originating notice of motion, or *otherwise as the rules of the court provide, and subject to* any order respecting notice to interested parties or costs, or *any other order the court thinks fit*. [Emphasis added.]

25 With respect, I cannot concur in the view of Nichols J.A. that the foregoing section incorporates by reference the rules of the *Code of Civil Procedure* into the *Canada Business Corporations Act* so as to make orders made under the Code orders pursuant to the Act covered by s. 249.

26 On the one hand, s. 248 *C.B.C.A.* deals primarily with the procedure for making an application to the court (see the reasons of Cory J.A., as he then was, in *Sparling v. Royal Trustco Ltd.* (1984), 6 D.L.R. (4th) 682 (Ont. C.A.), at pp. 691-92, affirmed by this Court at [1986] 2 S.C.R. 537). It does not contain any express general reference. We may compare this with s. 4 of the *Bankruptcy Rules*, C.R.C. 1978, c. 368, which reads:

  

> 4. The practice of the court in civil actions or matters, including the practice in chambers, shall, in cases not provided for by the Act or these Rules, and so far as it is applicable and not inconsistent with the Act or these Rules, apply to all proceedings under the Act or these Rules.

27 On the other hand, s. 248 *C.B.C.A.* should be read in conjunction with s. 249 *C.B.C.A.* which, for reasons I shall discuss later, must be understood as applying only to judgments rendered pursuant to powers expressly conferred by the *Canada Business Corporations Act*. Thus, s. 248 confirms in explicit terms the essentially suppletive nature of the rules contained in the *Code of Civil Procedure*. That being the case as regards the right of appeal, it seems to me that the proper approach should be the following: it must be determined whether or not, in light of the relevant provisions of the *Canada Business Corporations Act*, the trial judgment is governed by the right of appeal set out therein. If the judgment is not so governed, the rules of civil procedure will apply on account of their suppletive nature. Following this approach, arts. 29 and 511 *C.C.P.*, which require leave of a judge of the Court of Appeal in the case of an interlocutory judgment, will govern the appeal from that judgment.

***The Trial Judgment and the Canada Business Corporations Act***

28 The following provisions of the *Canada Business Corporations Act*, found in Part XX, entitled "REMEDIES, OFFENCES AND PUNISHMENT", are relevant:

> *242.* ...
>
> (2) [Court approval to discontinue] An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given on such terms as the court thinks fit and, if the court determines that the interests of any complainant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the complainant.
>
> *249.* [Appeal] An appeal lies to the court of appeal from any order made by a court under this Act.

29 Additionally, arts. 29 and 511 *C.C.P.* govern appeals from an interlocutory judgment:

> *29.* An appeal also lies, in accordance with article 511, from an interlocutory judgment of the Superior Court or the Court of Québec but, as regards youth matters, only in a matter of adoption:
>
> (1) when it in part decides the issues;
>
> (2) when it orders the doing of anything which cannot be remedied by the final judgment; or
>
> (3) when it unnecessarily delays the trial of the suit.
>
> However, an interlocutory judgment rendered during the trial cannot be appealed immediately and it cannot be put in question except on appeal from the final judgment, unless it disallows an objection to evidence based upon article 308 of this Code or on section 9 of the Charter of human rights and freedoms (chapter C-12), or unless it allows an objection to evidence.
>
> Any judgment is deemed to be interlocutory which is rendered during the suit before the final judgment.
>
> *511.* An appeal lies from an interlocutory judgment only on leave granted by a judge of the Court of Appeal if he is of opinion that the case is one that is contemplated in article 29 and that the pursuit of justice requires that leave be granted; the judge must then order the continuation or suspension of the proceedings in first instance.

30 The cases relied on by the majority in the Court of Appeal hold that s. 249 *C.B.C.A.* applies only to judgments

  

rendered pursuant to powers expressly conferred by the Canada Business Corporations Act *Doyle c. Sparling**Kruco Inc. v. Kruger* and *Kruger Inc. v. Kruco Inc., supra*). Since the reasons in *Doyle* form the basis for the subsequent decisions, I will limit myself to a discussion of those reasons.

31 In that case, the Court of Appeal was dealing with an appeal from a trial judgment dismissing five preliminary exceptions made by the appellant. The latter argued that s. 249 *C.B.C.A.* (formerly s. 242) was drafted in broad enough language to cover any judgment rendered in proceedings instituted under the *Canada Business Corporations Act*. Montgomery J.A. rejected this argument (at p. 649):

> There is no question that the judgments *a quo* are interlocutory and that, under the *Code of Civil Procedure*, no appeal would lie against them without leave (article 511). The burden is then upon Appellant to show that there is some other applicable provision of law giving him the right to appeal without leave. I cannot find that he has established this. *The Canada Business Corporations Act appears to be designed, in part, to enable certain classes of people, notably minority shareholders, to take quick action to obtain an order to protect their rights. In my opinion, Parliament did not intend them to create the possibility of frustrating these rights by giving a greater right of appeal against interlocutory judgments than that granted by provincial law. We have here interlocutory judgments based on the Civil Code and the Code of Civil Procedure, not orders under the Act.* [Emphasis added.]

I entirely concur in this conclusion. In my opinion, this conclusion follows from an interpretation which is supported both by the wording of the pro vision and by the philosophy underlying the *Canada Business Corporations Act*.

*1. Section 249 C.B.C.A.*

32 First, it seems to me that this interpretation is the only one which is consistent with the actual language of s. 249 *C.B.C.A.* This section allows only for appeals of orders made "under this Act". Unlike certain provisions governing appeals in other federal statutes, this provision thus does not derogate from the provincial rules in broad and express language. By way of comparison I refer to s. 193 of the *Bankruptcy Act*, R.S.C., 1985, c. B-3. This provision reads as follows:

> *193.* Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (*a*) if the point at issue involves future rights;
>
> (*b*) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (*c*) if the property involved in the appeal exceeds in value five hundred dollars;
>
> (*d*) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (*e*) in any other case by leave of a judge of the Court of Appeal.

Bisson C.J., dissenting on another point, distinguished the two provisions by stressing the general nature of the foregoing section: *Cockfield Brown Inc. (Trustee of) v. Réseau de Télévision TVA Inc.* (1988), 70 C.B.R. (N.S.) 59, at p. 65. Unlike s. 249 *C.B.C.A.*, s. 193 of the *Bankruptcy Act* does not specify that the trial judgment must have been rendered under any particular piece of legislation.

33 However, the absence of any distinction based on the interlocutory or final nature of the judgment in question is a common feature of both provisions: *In re Plotnick Brothers Ltd.* (1961), 2 C.B.R. (N.S.) 126 (Que. Q.B.). The courts have thus confirmed that the scope of s. 249 *C.B.C.A.* is not lim ited to a *final* judgment rendered under a power expressly conferred by the Act: *McKechnie v. Équipement de pollution Hurum Ltée*, [1991] R.D.J. 6 (C.A.), *Bellman v. Western Approaches Ltd.* (1981), 17 B.L.R. 117 (B.C.C.A.), and *Ferguson v. Imax Systems Corp.* (1982), 38 O.R. (2d) 59 (Div. Ct.). In the last case, the judgment being appealed was interlocutory in nature and took the form of an order expressly provided for in s. 190(21) *C.B.C.A.* (formerly s. 184(21)). This made it appealable as of right. I therefore cannot subscribe to the appellant's arguments that this decision has moved away from Montgomery J.A.'s conclusion in *Doyle*. As I see it, the

  

interlocutory nature of the order is quite consistent with the language of s. 249 *C.B.C.A.*: the criterion it sets out is not whether the judgment in question is interlocutory or final, but the legislative origins of the power from which the judgment is derived.

34 *McKechnie v. Équipement de pollution Hurum Ltée, supra*, illustrates this principle. Dealing with an application for leave to appeal from a judgment rendered pursuant to s. 241(3)(*a*) *C.B.C.A.*, Brossard J.A. first reviewed the distinction analyzed above (at p. 8):

> [TRANSLATION] I would have had no hesitation in granting leave to appeal if this had been a judgment which by its nature required such leave.
>
> Unfortunately for the applicants, that is not the case. Section 249 of the *Canada Business Corporations Act* provides that an appeal lies from any order made under that Act. On many occasions in recent years, this Court has interpreted that provision as conferring a *de plano* right of appeal from any judgment rendered by virtue of the authority expressly conferred by the Act, as opposed to judgments rendered on points of procedure or in an interlocutory proceeding under the provisions of the *Code of Civil Procedure*.

After reviewing the principles set out in *Doyle c. Sparling* *Kruco Inc. v. Kruger, supra*, and the Court of Appeal decision now before this Court, Brossard J.A. concluded (at p. 8):

> [TRANSLATION] It seems beyond question in the case at bar that the order against which an appeal is sought is one made by virtue of the powers "specially" conferred on the trial judge by s. 241(3)(*a*), which reads as follows:
>
> > (3) In connection with an application under this section, the court may make any *interim* or final order it thinks fit including, without limiting the generality of the foregoing,
> >
> > (a) an order restraining the conduct complained of ...
>
> This judgment is therefore appealable as of right under s. 249 of the said Act.

35 The scope of s. 249 *C.B.C.A.* is thus clearly circumscribed. Any judgment, whether interlocutory or final, will be appealable as of right provided it was made pursuant to a power expressly conferred by the *Canada Business Corporations Act*. That being so, it becomes essential to determine the legislative origin of the power exercised by the trial judge. Counsel for the appellant relied heavily in this regard on s. 21 of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) (formerly s. 17), and on the interpretation to the effect that the legislative source of the power exercised does not affect the right of appeal *de plano* set out therein: see the opinion of Montgomery J.A. in *Martel v. Chassé*, [1975] C.A. 210, at p. 211; *Droit de la famille — 203*, [1985] C.A. 339, and *Droit de la famille — 572*, [1989] R.J.Q. 22 (C.A.). While expressing no opinion on this question, it does not seem that the scope of s. 21 has been definitely settled (see, for example, *Peacock v. Peacock*, Ont. C.A., November 13, 1969 (reproduced at 11 O.R. (2d) 764); *Gleeson v. Gleeson* (1976), 11 O.R. (2d) 757 (Div. Ct.); *Wygant v. Wygant* (1979), 99 D.L.R. (3d) 154 (Ont. C.A.), and *Cecconi v. Cecconi* (1977), 15 O.R. (2d) 142 (C.A.), at p. 144). Furthermore, if there were to be a jurisprudential dispute on this point, it would arise in the particular context of the *Divorce Act*. In the circumstances of the case at bar it does not appear necessary or desirable to go beyond the *Canada Business Corporations Act*.

36 In his argument in this Court, counsel for the appellant also pointed out that art. 397 *C.C.P.* does not provide for any examination on discovery at the request of a *mis en cause* (which Sparling was at trial). This provision reads as follows:

> *397. The defendant may*, before the filing of the defence and after one clear day's notice to the attorneys of the other parties, *summon to be examined before the judge or prothonotary upon all facts relating to the issues between the parties or to give communication and allow copy to be made of any document relating to the issues*:
>
> (1) the plaintiff, or his agent, employee or officer;
>
> (2) in any civil liability action, the victim, and any person involved in the commission of the act which caused the

  

> damage;
>
> (3) the person for whom the plaintiff claims as tutor or curator, or for whom he acts as prête-nom, or whose rights he has acquired by transfer, subrogation or other similar title;
>
> (4) *with the permission of the court and on such conditions as it may determine, any other person*.
>
> The examination must be held within the delay allowed for the filing of the defence, unless the permission of the judge, prothonotary or, in the case referred to in subparagraph 4 of the first paragraph, the court, is obtained. [Emphasis added.]

Counsel argued that, when this provision is considered along with the absence of *Code of Civil Procedure* provisions relating to the approval of an out-of-court settlement by the court, one is led to the conclusion that the legislative source of the trial judgment is to be found in s. 242(2) *C.B.C.A.*

37 I cannot agree. First, the presence of the word "defendant" in art. 397 *C.C.P.* does not have the effect of barring a *mis en cause* from relying on this provision. To say the contrary would amount to denying any concrete effect to art. 20 *C.C.P.*, which reads as follows:

> *20.* Whenever this Code contains no provision for exercising any right, any proceeding may be adopted which is not inconsistent with this Code or with some other provision of law.

38 Moreover, although the respondent was authorized to examine Atkinson and Sharpe in the gen eral context of an application for the approval of a settlement, this interlocutory judgment does not thereby become an order made under the *Canada Business Corporations Act*. The relationship between the power which is in fact exercised and the legislative source must, in my opinion, be much closer for s. 249 *C.B.C.A.* to apply. For example, if the trial judge had approved or rejected the proposed settlement, this would have been an order which, under s. 242(2) *C.B.C.A.*, derived its source from a power specifically conferred by the *Canada Business Corporations Act*. On the other hand, saying that an examination authorized to collect information on discovery is no different for the purposes of an appeal from an order provided for in the provision in question amounts to confusing means and ends. In the absence of any express provision to the contrary, those means remain covered by the *Code of Civil Procedure* rules. In the context of the case at bar, since the *Canada Business Corporations Act* does not specify the procedure to be followed to obtain the court's approval, arts. 20 and 397 *C.C.P.* apply on account of their suppletive nature.

39 I therefore conclude that this textual argument does not stand up to analysis. Quite apart from the wording of the provision, an examination of the philosophy underlying the *Canada Business Corporations Act* reinforces this conclusion.

*2. The Philosophy Underlying the Canada Busi- ness Corporations Act*

40 While the action under s. 241 *C.B.C.A.* was discontinued in this case, the remedy provided for in s. 241 *C.B.C.A.* occupies a special place in the *Canada Business Corporations Act*. That provision reads as follows:

> *241.*(1) [Application to court re oppression] A complainant may apply to a court for an order under this section.
>
> (2) [Grounds] If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (*a*) any act or omission of the corporation or any of its affiliates effects a result,
>
> (*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

  

> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.
>
> (3) [Powers of court] In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> (*a*) an order restraining the conduct complained of;
>
> (*b*) an order appointing a receiver or receiver-manager;
>
> (*c*) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
>
> (*d*) an order directing an issue or exchange of securities;
>
> (*e*) an order appointing directors in place of or in addition to all or any of the directors then in office;
>
> (*f*) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
>
> (*g*) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;
>
> (*h*) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
>
> (*i*) an order requiring the corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
>
> (*j*) an order compensating an aggrieved person;
>
> (*k*) an order directing rectification of the registers or other records of a corporation under section 243;
>
> (*l*) an order liquidating and dissolving the corporation;
>
> (*m*) an order directing an investigation under Par XIX to be made; and
>
> (*n*) an order requiring the trial of any issue.

D.H. Peterson summarizes the basis of this action as follows:

> The oppression remedy may be considered the *Charter of Rights and Freedoms* of corporate law. It is a relatively new creature of statute, so it is little developed. It is broad and flexible, allowing any type of corporate activity to be the subject of judicial scrutiny. The potential protection it offers corporate stakeholders is awesome. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the corporation against the ability of management to conduct business in an efficient manner. The remedy is appropriate only where, as a result of corporate activity, there is some discrimination or unfair dealing amongst corporate stakeholders, a breach of a legal or equitable right, or appropriation of corporate property.

(*Shareholder Remedies in Canada* (1989), § 18.1, at p. 18.1.)

41 This remedy thus requires an interpretation consistent with its purpose. Cory J.A., as he then was, summarized this principle in *Sparling v. Royal Trustco Ltd.*, *supra*, at p. 693:

> Here the *C.B.C.A.* has sought to provide a remedy. An interpretation which gives effect to the remedy is preferable to

  

> one which seeks to restrict or eliminate the remedial provision of the Act.

And at p. 694:

> Where a statute provides a remedy, its scope should not be unduly restricted. Rather, the courts should seek to provide the means to effect that remedy.

(See to the same effect *Re Ferguson and Imax Systems Corp.* (1983), 43 O.R. (2d) 128 (C.A.), at p. 137, and *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374.)

42 Further, as Malouf J.A. points out in his reasons, the fact that applications under the *Canada Business Corporations Act* may be made in a summary manner (s. 248 *C.B.C.A.*) is indicative of the legislative purpose. The procedural formalities are tied to the effectiveness underlying the remedy available to the aggrieved shareholder.

43 Finally, these rules cannot be separated from s. 242(2) *C.B.C.A.*, since, for the purposes of this provision, a discontinuance of the action gives rise to intervention by the court. The function assigned to the court derives from the same objective, which is the protection of the rights of shareholders:

> *In deciding whether or not to approve a proposed settlement under s. 235(2) [now 242(2)] of the Act, the Court must be satisfied that the proposal is fair and reasonable to all shareholders*. In considering these matters, the Court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.
>
> In cases such as this, it is not the Court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the Court's function to litigate the merits of the action. *I would also state that it is not the function of the Court to simply rubber-stamp the proposal*.
>
> *The Court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement*. [Emphasis added.]

(*Sparling v. Southam Inc.* (1988), 41 B.L.R. 22 (Ont. H.C.), at pp. 28-29.)

44 An interpretation whereby a judgment such as that in the present case falls within the right of appeal *de plano* conferred by s. 249 *C.B.C.A.*, seems to me at the very least to be inconsistent with the foregoing.

45 First, in view of the almost unlimited number of interlocutory judgments that may be rendered in the course of a proceeding, such an interpretation would be contrary to the legislature's primary objective of providing a fast and effective remedy to protect shareholders vulnerable to oppression by the majority. Second, when the function of the court under s. 242(2) *C.B.C.A.* is considered together with the correlative necessity of collecting information in advance, it is clear that this interpretation could only lead to an impeding if not a paralysation of the function vested in the judiciary.

46 On the contrary, an interpretation in keeping with the purpose of the *Canada Business Corporations Act* requires that the *de plano* appeal contribute to the ultimate objective of the accompanying action while taking into account *inter alia* the effective conduct of the proceeding. Limiting the scope of s. 249 *C.B.C.A.* to those judgments arising from a power specifically conferred by the *Canada Business Corporations Act*, to the exclusion of the variety of interlocutory decisions made under the *Code of Civil Procedure*, corresponds exactly with such an objective. This approach has the further merit of being consistent with the right of appeal by leave governed by arts. 29 and 511 *C.C.P.* As LeBel J.A. explains:

> [TRANSLATION] Each chapter of the *Code of Civil Procedure* is liable to give rise to various judicial decisions, and, from time to time, the wish to appeal and obtain a decision from another level of jurisdiction.
>
> The *Code of Civil Procedure* does not intend all such interlocutory decisions to be subject to appeal. It only makes provision for an appeal in the three cases described in art. 29. As we have seen, the decision in question must be one which in part disposes of the issue or which cannot be remedied by the final judgment or which entails unnecessary delay in the trial. *The right of appeal depends not on an abstract classification of judg ments, but on their concrete effect*

  

> *on the conduct of the proceeding*. [Emphasis added.]

("L'appel des jugements interlocutoires en procédure civile québécoise" (1986), 17 *R.G.D.* 391, at p. 399.) See also D. Ferland, B. Emery and J. Tremblay, *Précis de procédure civile du Québec* (1992), at pp. 29-33.

47 Moreover, this factor cannot be separated from the condition stated in art. 511 *C.C.P.* that the *pursuit of justice* must require that leave to appeal be granted. Accordingly, the relationship between the objective of the *Canada Business Corporations Act* and that of arts. 29 and 511 *C.C.P.* seems to me not only consistent but closely complementary.

48 Aside from the purpose of the *Canada Business Corporations Act*, the interpretation set out above is in keeping with sound judicial policy as it contributes to the effective administration of justice. Callaghan A.C.J.H.C. (as he then was) summarizes as follows the approach the courts should favour with respect to s. 242(2) *C.B.C.A.*:

> In approaching this matter, I believe it should be observed at the outset that the Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. *This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system*. [Emphasis added.]

(*Sparling v. Southam Inc.*, *supra*, at p. 28.)

49 Bearing in mind the inherent connection between the right of appeal and the effective conduct of the proceeding, I consider that this factor plays an equally key role in the context of s. 249 *C.B.C.A.* and the remedial actions associated with it.

**Conclusion**

50 For all these reasons I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitors of record:
Solicitors for the appellant: *Mackenzie Gervais*, Montréal.
Solicitors for the respondent: *Desjardins Ducharme*, Montréal.
Solicitors for the mis en cause Nalcap Holdings Inc.: *Langlois Robert*, Montréal.

# TAB 4

2020 SKCA 106
Saskatchewan Court of Appeal

Koroluk v. KPMG Inc.

2020 CarswellSask 423, 2020 SKCA 106

# Randy Koroluk (Applicant / Prospective Appellant / Applicant / Respondent / Plaintiff) and KPMG Inc. (Respondent / Prospective Respondent / Respondent / Applicant / Defendant) and PrimeWest Mortgage Investment Corporation, Dan Anderson, Tom Archibald, Francis Bast, Doug Frondall, Mike Hough, Wilson Olive, Tom Robinson, Irene Seiferling, Ernst & Young Inc. (Respondents / Prospective Respondents / Defendants) and Director of Corporations, Canada Revenue Agency, P.I. Financial, Donald Zealand, Granite Enterprises, Debbie Gloria Burwash (Non-parties / Non-parties)

Barrington-Foote J.A., In Chambers

Heard: August 26, 2020
Judgment: August 28, 2020
Docket: CACV3680

Counsel: E.F. Anthony Merchant, Q.C., for Randy Koroluk
Michael Russell, Nicholas Conlon, for KPMG Inc.
Amanda Quayle, Q.C., for Dan Anderson, Tom Archibald, Francis Bast, Doug Frondall, Mike Hough, Wilson Olive, Tom Robinson and Irene Seiferling
Donald Hanna, for Ernst & Young Inc.
No one for PrimeWest Mortgage Investment Corporation

Subject: Civil Practice and Procedure

**Headnote**

Civil practice and procedure

**Table of Authorities**

**Cases considered by *Barrington-Foote J.A., In Chambers*:**

*Iron v. Saskatchewan (Minister of the Environment & Public Safety)* (1993), [1993] 6 W.W.R. 1, 109 Sask. R. 49, 42 W.A.C. 49, 103 D.L.R. (4th) 585, 1993 CarswellSask 323 (Sask. C.A.) — considered

*Patel v. Whiting* (2020), 2020 SKCA 49, 2020 CarswellSask 198 (Sask. C.A.) — considered

*Re Harmon International Industries Inc.* (2020), 2020 SKCA 95, 2020 CarswellSask 387 (Sask. C.A.) — considered

*Saskatoon (City) v. Walmart Canada Corp.* (2016), 2016 SKCA 123, 2016 CarswellSask 615, 1 C.P.C. (8th) 380 (Sask. C.A.) — considered

2020 SKCA 106, 2020 CarswellSask 423

***Barrington-Foote J.A., In Chambers*:**

1 On July 23, 2020, Randy Koroluk filed a notice of appeal naming KPMG Inc., PrimeWest Mortgage Investment Corporation, Ernst & Young Inc. and several individuals as respondents (CACV3678). The notice of appeal alleged that a Chambers judge erred by granting an order [QB order] to include a proposed class action (QBG 1727 of 2018) which had been commenced in the Court of Queen's Bench in voluntary liquidation and dissolution proceedings relating to PrimeWest (QBG 1455 of 2019). When he filed the notice of appeal, Mr. Koroluk's counsel had been advised by counsel for KPMG Inc. that it was their position that leave to appeal was required.

2 On August 7, 2020, Mr. Koroluk filed a notice of motion in this Court which applied for a declaration that leave to appeal the QB order was not required and, in the alternative, that leave be granted if it was required. The notice of motion was filed under a cover letter to the Registrar from counsel for Mr. Koroluk, which explained that the application sought confirmation of the validity of the appeal as filed, and alternative relief.

3 A second file (CACV3680) was opened by the Registrar relating to Mr. Koroluk's application, which I heard on August 26, 2020. In his written submissions, counsel for Mr. Koroluk discussed principles that would, in his view, support the grant of leave to appeal. However, he also confirmed that the application was not an application for leave, as leave was not required. He pointedly reaffirmed that position at the hearing of the application. Indeed, he submitted that I should first decide whether leave was required and hear submissions as to whether leave should be granted only if I first decided it was.

4 The question of whether leave is required may be decided by a Chambers judge in the course of an application for leave. However, there has been no such application. Nor has there been an application by any of the respondents in CACV3678 asserting that leave is required. For that reason, I have no jurisdiction to grant the declaratory relief - essentially, an opinion as to an issue which has not been engaged - for which Mr. Koroluk has applied.

5 A prospective appellant must decide whether they believe leave to appeal is necessary. Mr. Koroluk concluded it was not, and for that reason, filed the notice of appeal despite having been advised that KPMG Inc. was of a different mind. His counsel confirmed that he did not seek leave after having filed a notice of appeal, as he was concerned with the potential impact of the reasoning in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* (1993), 103 D.L.R. (4th) 585 (Sask. C.A.) [*Iron* ], and related decisions of this Court.

6 That concern was understandable in light of the reasoning in *Iron* and subsequent cases, including *Saskatoon (City) v. Walmart Canada Corp.*, 2016 SKCA 123, 1 C.P.C. (8th) 380 (Sask. C.A.). I note the useful canvass of these authorities in *Patel v. Whiting*, 2020 SKCA 49 (Sask. C.A.) [*Patel* ], where Leurer J.A. dismissed an application for leave to appeal because leave was not required but granted the prospective appellant an extension of time to appeal. The prospective appellant requested that alternative relief at the hearing of his application. Justice Jackson applied *Patel* in *Re Harmon International Industries Inc.*, 2020 SKCA 95 (Sask. C.A.).

7 Here, Mr. Koroluk sought to resolve the question as to whether leave is required by having his cake and eating it too. He is not entitled to do so in this fashion. In the result, his application is dismissed with costs in the usual way.

**End of Document**



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# TAB 5

2016 SKCA 143
Saskatchewan Court of Appeal

Saskatchewan Medical Assn. v. Anstead

2016 CarswellSask 709, 2016 SKCA 143, 273 A.C.W.S. (3d) 86

# Saskatchewan Medical Association (Appellant / Respondent on Application to Strike Appeal / Defendant) And Keith Anstead (Respondent / Applicant on Application to Strike Appeal / Plaintiff)

Ottenbreit J.A., Caldwell J.A., Herauf J.A.

Heard: November 16, 2015
Judgment: November 9, 2016
Docket: CACV2660

Counsel: Shaunt Parthev, Q.C., C. Ryan Lepage, for Appellant
E.F. Anthony Merchant, Q.C., Jonathan Martin, for Respondent

Subject: Civil Practice and Procedure; Public

**Related Abridgment Classifications**

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iv Appeals

Civil practice and procedure
X Pleadings
X.1 General requirements
X.1.w Where constituting abuse of process

Civil practice and procedure
X Pleadings
X.9 Application to strike
X.9.g Miscellaneous

**Headnote**

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Appeals
Defendant Medical Assn. (defendant) was exclusive bargaining representative of physicians in province with respect to most fees paid to doctors under Saskatchewan Medical Care Insurance Act — Plaintiff was physician and representative plaintiff in class proceedings for physicians who were surgical assistants and who earned more than 50 percent of their income by providing surgical services and distinguishable from physicians who had offices and engaged in family practices and provided same surgical services part-time — Payment schedule negotiated by defendant with government paid class members lower fees than paid to office-based assistants providing same or similar services — Class poceeding was certified — Defendant was denied leave to appeal certification decision and defendant's application to strike class action claim based

  

on court lacking jurisdiction over subject matter of claim was dismissed — Defendant appealed; Plaintiff applied to strike appeal — Plaintiff's application granted; Appeal struck — To determine appeal on merits would encourage posturing and would be misuse of process of court in way that would bring administration of justice into disrepute — Defendant attempted to argue for second time that class proceeding was not sustainable because of lack of subject matter jurisdiction — Defendant's arguments in this appeal were in substantial part duplicative of core arguments it proffered in its application for leave to appeal certification decision and duplication created potential for inconsistent verdicts if appeal were heard — To determine appeal on merits would be to give defendant right of appeal as if application had been heard prior to certification as discrete matter and would undercut process of hearing judge to choose to manage resolution of issues before him in one hearing — Appeal was collateral attack on certification decision — Determining appeal on its merits would not promote finality of proceedings — Where certification application and preliminary application were heard together, and certification decision was appealed, defendant should have appealed decision on preliminary application at same time as certification decision and applied for leave to do so.

Civil practice and procedure --- Pleadings — Application to strike — Miscellaneous
Defendant Medical Assn. (defendant) was exclusive bargaining representative of physicians in province with respect to most fees paid to doctors under Saskatchewan Medical Care Insurance Act — Plaintiff was physician and representative plaintiff in class proceedings for physicians who were surgical assistants and who earned more than 50 percent of their income by providing surgical services and distinguishable from physicians who had offices and engaged in family practices and provided same surgical services part-time — Payment schedule negotiated by defendant with government paid class members lower fees than paid to office-based assistants providing same or similar services — Class action was certified — Defendant was denied leave to appeal certification decision and defendant's application to strike class action claim based on court lacking jurisdiction over subject matter of claim was dismissed — Defendant appealed; Plaintiff applied to strike appeal — Plaintiff's application granted; Appeal struck — To determine appeal on merits would encourage posturing and would be misuse of process of court in way that would bring administration of justice into disrepute — Defendant attempted to argue for second time that class proceeding was not sustainable because of lack of subject matter jurisdiction — Defendant's arguments in this appeal were in substantial part duplicative of core arguments it proffered in its application for leave to appeal certification decision and duplication created potential for inconsistent verdicts if appeal were heard — To determine appeal on merits would be to give defendant right of appeal as if application had been heard prior to certification as discrete matter and would undercut process of hearing judge to choose to manage resolution of issues before him in one hearing — Appeal was collateral attack on certification decision — Determining appeal on its merits would not promote finality of proceedings — Where certification application and preliminary application were heard together, and certification decision was appealed, defendant should have appealed decision on preliminary application at same time as certification decision and applied for leave to do so.

Civil practice and procedure --- Pleadings — General requirements — Where constituting abuse of process
Defendant Medical Assn. (defendant) was exclusive bargaining representative of physicians in province with respect to most fees paid to doctors under Saskatchewan Medical Care Insurance Act — Plaintiff was physician and representative plaintiff in class proceedings for physicians who were surgical assistants and who earned more than 50 percent of their income by providing surgical services and distinguishable from physicians who had offices and engaged in family practices and provided same surgical services part-time — Payment schedule negotiated by defendant with government paid class members lower fees than paid to office-based assistants providing same or similar services — Class action was certified — Defendant was denied leave to appeal certification decision and defendant's application to strike class action claim based on court lacking jurisdiction over subject matter of claim was dismissed — Defendant appealed; Plaintiff applied to strike appeal — Plaintiff's application granted; Appeal struck — To determine appeal on merits would encourage posturing and would be misuse of process of court in way that would bring administration of justice into disrepute — Defendant attempted to argue for second time that class proceeding was not sustainable because of lack of subject matter jurisdiction — Defendant's arguments in this appeal were in substantial part duplicative of core arguments it proffered in its application for leave to appeal certification decision and duplication created potential for inconsistent verdicts if appeal were heard — To determine appeal on merits would be to give defendant right of appeal as if application had been heard prior to certification as discrete matter and would undercut process of hearing judge to choose to manage resolution of issues before him in one hearing — Appeal was collateral attack on certification decision — Determining appeal on its merits would not promote finality of proceedings — Where certification application and preliminary application were heard together, and certification decision was appealed, defendant should have appealed decision on preliminary application at same time as certification decision and applied for leave to do so.

  

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*Danyluk v. Ainsworth Technologies Inc.* (2001), 2001 SCC 44, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 7 C.P.C. (5th) 199, 272 N.R. 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 34 Admin. L.R. (3d) 163, [2001] 2 S.C.R. 460, 2001 CSC 44 (S.C.C.) — referred to

*Fischer v. IG Investment Management Ltd.* (2013), 2013 SCC 69, 2013 CarswellOnt 17258, 2013 CarswellOnt 17259, 45 C.P.C. (7th) 227, 366 D.L.R. (4th) 1, 312 O.A.C. 128, 482 N.R. 80, *(*sub nom. *AIC Limited v. Fischer)* [2013] 3 S.C.R. 949 (S.C.C.) — referred to

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*Hoffman v. Monsanto Canada Inc.* (2007), 2007 SKCA 47, 2007 CarswellSask 190, 28 C.E.L.R. (3d) 165, [2007] 6 W.W.R. 387, 39 C.P.C. (6th) 267, 293 Sask. R. 89, 397 W.A.C. 89, 283 D.L.R. (4th) 190 (Sask. C.A.) — considered

*Hopkins v. Kay* (2014), 2014 ONCA 514, 2014 CarswellOnt 18886 (Ont. C.A.) — considered

*Hyatt Hotels of Canada Inc. v. Knuth* (October 6, 2016), Doc. CACV2925 (Sask. Q.B.) — referred to

*KJK Holdings Inc. v. Silcorp Ltd.* (1992), 90 D.L.R. (4th) 488, 100 Sask. R. 143, 18 W.A.C. 143, 1992 CarswellSask 248 (Sask. C.A.) — considered

*McIlkenny v. Chief Constable of the West Midlands* (1981), [1982] A.C. 529, [1981] 3 All E.R. 727, [1981] 3 W.L.R. 906, [1981] UKHL 13 (U.K. H.L.) — considered

*Moldowan v. S.G.E.U.* (1995), [1995] 8 W.W.R. 498, 126 D.L.R. (4th) 289, 134 Sask. R. 210, 101 W.A.C. 210, 1995 CarswellSask 86 (Sask. C.A.) — considered

*Moulton Contracting Ltd. v. British Columbia* (2013), 2013 SCC 26, 2013 CarswellBC 1158, 2013 CarswellBC 1159,

  

357 D.L.R. (4th) 236, 43 B.C.L.R. (5th) 1, [2013] 7 W.W.R. 1, 443 N.R. 303, *(*sub nom. *Behn v. Moulton Contracting Ltd.)* [2013] 3 C.N.L.R. 125, 333 B.C.A.C. 34, 571 W.A.C. 34, *(*sub nom. *Behn v. Moulton Contracting Ltd.)* [2013] 2 S.C.R. 227 (S.C.C.) — followed

*Mueller v. Dagenais* (2007), 2007 SKCA 31, 2007 CarswellSask 124, *(*sub nom. *Dagenais v. Dagenais)* 293 Sask. R. 39, *(*sub nom. *Dagenais v. Dagenais)* 397 W.A.C. 39 (Sask. C.A. [In Chambers]) — referred to

*Pfeil v. Simcoe & Erie General Insurance Co.* (1986), [1986] 2 W.W.R. 710, 45 Sask. R. 241, 24 D.L.R. (4th) 752, [1986] I.L.R. 1-2055, 1986 CarswellSask 188, 19 C.C.C. 91 (Sask. C.A.) — referred to

*Progressive Conservative Party of Saskatchewan v. Emsley* (2008), 2008 SKCA 155, 2008 CarswellSask 798 (Sask. C.A. [In Chambers]) — referred to

*Rollheiser v. Twigg* (2006), 2006 SKCA 57, 2006 CarswellSask 402, *(*sub nom. *Rollheiser v. Lockwood)* 279 Sask. R. 113, *(*sub nom. *Rollheiser v. Lockwood)* 372 W.A.C. 113 (Sask. C.A. [In Chambers]) — referred to

*Saskatchewan Medical Assn. v. Anstead* (2015), 2015 SKCA 19, 2015 CarswellSask 135 (Sask. C.A.) — referred to

*Stadnyk v. Saskatchewan* (2011), 2011 SKCA 30, 2011 CarswellSask 166 (Sask. C.A. [In Chambers]) — referred to

*Toronto (City) v. C.U.P.E., Local 79* (2003), 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 31 C.C.E.L. (3d) 216 (S.C.C.) — followed

*Tournier v. Constant-Daniels (Litigation Guardian of)* (2011), 2011 SKCA 103, 2011 CarswellSask 598, *(*sub nom. *F.R. v. D.T.)* 385 Sask. R. 41, *(*sub nom. *F.R. v. D.T.)* 536 W.A.C. 41 (Sask. C.A. [In Chambers]) — referred to

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, *(*sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CSC 46 (S.C.C.) — referred to

**Statutes considered:**

*Class Actions Act*, S.S. 2001, c. C-12.01
Generally — referred to

s. 6(1) — considered

s. 6(1)(a) — considered

s. 39(3) — considered

*Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1
s. 8(1) — considered

*Saskatchewan Medical Care Insurance Act*, R.S.S. 1978, c. S-29
Generally — referred to

**Rules considered:**

*Queen's Bench Rules*, Sask. Q.B. Rules
R. 99 — considered

*Queen's Bench Rules*, Sask. Q.B. Rules 2013
R. 3-14 — considered

  

R. 7-9(2)(a) — considered

**Regulations considered:**

*Saskatchewan Medical Care Insurance Act*, R.S.S. 1978, c. S-29
*Insured Services (Physicians) Payment Schedule Review Regulations, 1989*, R.R.S., c. S-29, Reg. 15

Generally — referred to

APPEAL by defendant from decision dismissing its application to strike class proceeding; APPLICATION by plaintiff to strike appeal.

***Ottenbreit J.A.*:**

## I. INTRODUCTION

1 The Saskatchewan Medical Association (SMA) appeals against the Queen's Bench Chambers decision dismissing its application under Rule 3-14 of *The Queen's Bench Rules* (Rule 3-14 decision) to strike a class action claim by Dr. Keith Anstead on the basis that the Court lacked jurisdiction over the subject matter of the claim. The Rule 3-14 decision was contained in and was part of a decision dated December 12, 2014 (*Anstead v. Saskatchewan Medical Assn.*, 2014 SKQB 406, [2015] 7 W.W.R. 535 (Sask. Q.B.) [*Certification Decision*]), granting certification of Dr. Anstead's class action. Dr. Anstead applies to strike the appeal. This Court heard oral argument on both the application to strike and the appeal proper and as well had the benefit of the parties' factums and supporting material on the appeal. For the reasons hereinafter set forth, this matter is determined by Dr. Anstead's application to strike the appeal. The appeal is struck.

## II. BACKGROUND

2 Dr. Anstead is a physician and is the representative plaintiff in a class action issued pursuant to *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*]. The class definition certified by the certification hearing judge may be summarized as physicians who are surgical assistants and who earn more than 50% of their income by providing surgical services. The members of the class are distinguishable from physicians who have an office where they engage in a family practice (office-based assistants), but provide the same or similar surgical services part-time.

3 The majority of medical compensation in the Province of Saskatchewan is paid pursuant to the Physician Payment Schedule (Payment Schedule) created by regulations pursuant to *The Saskatchewan Medical Care Insurance Act*, RSS 1978, c S-29 [*SMCIA*]. The Payment Schedule has the force of law. When a physician performs an insured medical service under the Payment Schedule he or she is entitled to receive payment for that service in accordance with the Payment Schedule.

4 SMA is the exclusive bargaining representative of all physicians in Saskatchewan in respect of most fees paid to doctors under the *SMCIA*. The pay scales for all surgical assistants are negotiated pursuant to an organizational and consultative framework set forth in the *SMCIA* and *The Insured Services (Physicians) Payment Schedule Review Regulations, 1989*, RRS c S-29 Reg 15 [*Regulations*], promulgated pursuant to the *SMCIA*. The *Regulations* establish a conjoint committee called the Minister's Medical Payment Schedule Review Committee (PSRC) comprised of up to five members appointed by the Minister of Health and up to five members appointed by the SMA. The purpose of the PSRC is to consult with the board of the SMA on behalf of the Minister regarding the Payment Schedule. No alteration of the Payment Schedule can be passed into regulation without this consultation.

5 In addition to the PSRC, the *SMCIA* also establishes a similarly conjoint Medical Compensation Review Committee (MCRC) the purpose of which is to prepare an agreement between the SMA and the Minister of Health regarding revisions to the Payment Schedule. The end product of this consultative process is usually an agreement that, amongst other things, modifies the Payment Schedule. This modification is achieved through a negotiated macro adjustment to the Payment

  

Schedule which is then extrapolated into the individual services set forth in the Payment Schedule.

6 SMA negotiated the Payment Schedule with the Government of Saskatchewan for all surgical assistants, both members of the class and office-based assistants. The Payment Schedule paid the class members lower fees than were paid to office-based assistants for providing the same or similar services. The different fees for the two categories of surgical assistants were agreed on and accepted by both SMA and the Government for what they considered to be appropriate policy considerations. The cause of action claimed by Dr. Anstead on behalf of the class is based on an alleged breach by SMA of its common law fiduciary duties and obligations of fairness and fair representation in negotiating the fees for the members of the class.

## III. BACKGROUND OF PROCEEDINGS BEFORE AND DECISION OF THE CHAMBERS JUDGE

7 Prior to the certification application being heard, SMA applied pursuant to *The Queen's Bench Rules* (Rule 3-14) to dismiss the claim for lack of subject matter jurisdiction. This application was made on the basis that the common law did not apply to the subject matter of medical compensation under the *SMCIA* and the *Regulations*, and that the *SMCIA* and the *Regulations* were a complete code which ousted the jurisdiction of the court on the subject matter of the class action.

8 SMA in its brief filed May 16, 2014, in support of its application to have the subject matter jurisdiction application heard in advance of the certification application, stated at paragraphs 32 and 33:

> 32. If the SMA is unsuccessful, then **the determination will resolve one of the critical issues (if not the most critical issue) faced by the parties under the ss. 6(1)(a) analysis of the *CAA*.** Should this Court decide that it has jurisdiction over the implementation of Medicare, the parties will be free to focus exclusively on the causes of action as pled in the Claim. Certification will be significantly more focused with concomitant time and cost savings. There will be no duplication of effort or analysis.
>
> 33. On the other hand, if the SMA is successful *this litigation is determinable immediately, on a solitary point of law, and on the record presently before the Court*. There will be no lingering collateral issues, and the determination will effectively deal with all potential proceedings of a similar nature in this jurisdiction as a matter of law.
>
> (Bold emphasis added, italic emphasis in original, footnotes omitted)

9 The judge assigned as the hearing judge for the class action ordered that the Rule 3-14 application be heard and determined at and as part of the certification application (see *Anstead v. Saskatchewan Medical Assn.*, 2014 SKQB 205 (Sask. Q.B.) at para 17, (2014), 449 Sask. R. 278 (Sask. Q.B.) [*Timing Decision*]). In the *Timing Decision*, the hearing judge in respect of the Rule 3-14 application said the following:

> [12] The court is reminded that its function, at this point in time, is not to determine the merits of the defendant (applicant's) submission that the issue its application raises is or is not jurisdictional in nature or that its position will ultimately be sustained at the certification application stage. The plaintiff (respondent) strongly argues that the applicant's characterization of the question raised by its application as "jurisdictional" is not a correct characterization — rather the issue raised, as properly characterized, is whether or not the plaintiff has a cause of action to support his claim. There is initial merit in both perspectives.
>
> [13] The applicant argues that the actions of the defendant which the plaintiff seeks to challenge in its claim are the product of a statutory scheme — the *Act*. The SMA submits the *Act* constitutes a "code" and the exercise, by the SMA, of its statutory rights, duties and obligations under the *Act* do not admit of challenge or review by the courts. That characterization, if it should ultimately prevail, would be characterized as jurisdictional.
>
> . . .
>
> [16] Firstly, this is not clearly nor uncontrovertedly a "jurisdictional issue" as the defendant urges in its application. There is the possibility that even if the defendant should be successful in persuading the court that the statutory procedures, available to the physician group that the plaintiff seeks to represent as a class in this action, constitute a code

  

> ousting the jurisdiction of the court over the subject matter of their complaints that may not be dispositive of the plaintiff's claim. There may still be scope to the position of the plaintiff, as reflected in the claim, that there is implied in this "statutory code" the obligation of the defendant, at law, to exercise its statutory rights, duties and obligations in good faith and consistent with a duty of fair representation. Failure of the SMA to do so, if that is established by the evidence and supported by the law, may constitute the basis for a cause of action and the foundation for the court's jurisdiction.
>
> [17] Since this application does not raise a clear question but rather at least two questions fundamental to the sustainability or otherwise of this action, the issue raised by the application is best determined at the certification hearing. At that hearing the court should have the benefit of any further or additional materials the parties may file to assist the court in its understanding of the full dimensions of this issue at law and in the facts and circumstances of these parties (and those others impacted by the SMA's exercise of its statutory representative responsibilities). The resultant impact that these additional materials may have upon the court's determination respecting the sustainability of the action and/or the certification of it as a class action can be more fully appreciated and assessed with the assistance of this information at the certification hearing stage.

10 In due course, the certification application and the Rule 3-14 application proceeded and the hearing judge concluded that the requirements of s. 6(1) of the *CAA* had been met and he certified the action. Embedded in the *Certification Decision* was the hearing judge's decision to dismiss SMA's subject matter jurisdiction application under Rule 3-14. It is a fair statement that, in coming to that decision, he did no separate analysis but relied upon his analysis and determinations made in respect of the cause of action requirement under s. 6(1)(a) of the *CAA*. Accordingly, it is necessary to set out some of that analysis for the purposes of this appeal.

11 The hearing judge succinctly set out the position of the parties:

> [47] In support of the "cause of action" analysis, the plaintiff argues that the *SMA Act*, in combination with the Bylaws passed by the SMA pursuant to the *SMA Act*, the *SMCIA* and the *SMCIA Regulations* passed pursuant to the *SMCIA*, all establish circumstances in which the SMA becomes the exclusive collective bargaining agent and representative of physicians in respect of the negotiation for and finalization of physician compensation for insured services which they perform. Because of this statutory and regulatory "exclusivity" framework, the legal ingredients exist that are necessary for the court to conclude that the SMA has a fiduciary duty and the legal obligations of fairness and fair representation to the physicians and any groups of them who they have the exclusive right, duty and obligation to represent.
>
> . . .
>
> [51] Based upon this construct, the defendant argues that any physician or group of physicians can and must obtain, and they are restricted to, the representation of their interests through the democratic representational rights which they have as contained in the Bylaws of the SMA. These include the establishment of a comprehensive and, it might be observed, complex structure of committees, the election of Directors of the SMA and ultimately election of physician representatives to the Representative Assembly. The defendant argues that these structures and processes define and address the only way physicians, or groups of them, can advance their positions and, in certain cases, their "grievances" with the rates of compensation that are negotiated on their behalf by the SMA for the insured services they provide. The SMA argues that such is the case with full-time surgical assistant physicians and the claim that they now seek to advance, not through these structures, but in this class action. In conclusion, the SMA argues that the causes of action advanced by the Claim do not exist, in law, nor does the court have jurisdiction in these circumstances.
>
> [52] This construct and analysis forms the very basis of, and led the SMA to file, its Notice of Application seeking a ruling and order from the court that it is without jurisdiction to consider the claim of the plaintiff and class in this proposed action. The SMA submits that since the legislation and its Regulations and the SMA Bylaws in question constitute a comprehensive code for the representation of physicians in compensation negotiations with the Government for insured services, aggrieved physicians are restricted to utilizing the internal mechanisms and structures of the SMA to address their grievances. Accordingly, the SMA argues, there is no right or cause of action that is legally extant or permissible nor is there any room for or exercise of jurisdiction by the court in the circumstances advanced by the Claim.

  

12 After reviewing the applicable statutory and regulatory framework under *SMCIA*, the hearing judge concluded:

> [68] The case presently sought to be certified by the court as a class action raises the very issues which were identified in the *Cameron* case and strenuously and fully argued before this Court in the context of, in particular, the s. 6(1)(a) "cause of action" requirements of the *Act*. As *Cameron* illustrates, the extension of the fiduciary duties and/or duties of fairness and fair representation recognized both at common law and now in many labour relation statutes where exclusive collective bargaining representational rights are conferred upon labour organizations (therefore giving rise to legal causes of action) arguably and convincingly raises the kind of claim that "the law has not yet recognized". The causes of action rai[s]ed by this Claim may well be the kind of novel, but arguable, claims that should be allowed to proceed to trial as recognized by the *Imperial Tobacco* case at para. 21.
>
> . . .
>
> [72] For the analysis undertaken and the reasons stated, I have concluded that for certification purposes, the plaintiff's Claim does raise and meet the criterion of s. 6(1)(a) of the *Act* disclosing a cause of action. That is to say, there exists a plausible basis for supposing the defendants could be liable to the claims of the Class within the meaning of the test set out in *Monsanto CA*.

13 With respect to Rule 3-14, the hearing judge concluded:

> [97] In view of the determinations made by me in respect of the application for certification, I also dispose of the ancillary applications that have been made to me in conjunction with the certification proceedings namely:
>
> > 1. The defendant's application to dismiss the plaintiff's claim for lack of jurisdiction is dismissed with costs awarded pursuant to Column IV of the court's tariff of costs to be agreed upon and failing agreement to be assessed by the Local Registrar upon application; ...

## IV. PROCEDURAL HISTORY AND BACKGROUND IN THIS COURT

14 The *Certification Decision* was issued December 12, 2014. On December 23, 2014, SMA filed an application seeking leave to appeal the *Certification Decision*. In the draft order filed by SMA in support of that application it asked that if leave were to be granted, the appeal be heard at the same time as the appeal taken from that part of the decision dismissing the Rule 3-14 application. At that time, there had not yet been any appeal of the Rule 3-14 decision.

15 On January 7, 2015, SMA caused to be issued a formal order from the Court of Queen's Bench containing the Rule 3-14 decision. On January 9, 2015, SMA filed its notice of appeal against that decision, initiating this appeal. The first three grounds in SMA's notice of appeal filed on this matter are as follows:

> (a) The Learned Chamber Judge erred by failing to conclude that there is no basis upon which the Respondent's alleged fiduciary duty can be established in the context of an exhaustive statutory scheme established for the provision of fee-for-service-medical services to the people of Saskatchewan, and the corresponding compensation of medical professionals in that scheme (i.e. Medicare);
>
> (b) The Learned Chamber Judge erred by failing to conclude that there is no basis upon which the Respondent's alleged duty of fair representation can be established in the context of Medicare;
>
> (c) The Learned Chamber Judge erred by failing to conclude that *The Saskatchewan Medical Care Insurance Act*, RSS 1978, C S-29 and its related and subordinate legislation is a comprehensive code in relation to matters of medical compensation and negotiation and, as such, ousts all putative common law duties in that regard; ...

  

These grounds set forth the argument that *SMCIA* is a comprehensive code which ousts the jurisdiction of the court.

16 The proposed notice of appeal filed on the application to obtain leave to appeal against the *Certification Decision* listed, *inter alia*, six grounds challenging the hearing judge's determination that an authentic cause of action had been shown under s. 6(1)(a) of the *CAA*. The first three of the six grounds of the proposed notice of appeal, except for the absence of the word "negotiation", are identical to the grounds in the notice of appeal in this matter.

17 On SMA's application for leave to appeal the *Certification Decision*, a substantial part of its written argument filed before the Chambers judge on the s. 6(1)(a) issue was that the *SMCIA* regime constituted a comprehensive code in relation to matters of medical compensation including the negotiation thereof and as such the common law was displaced. This Court denied leave (*Saskatchewan Medical Assn. v. Anstead*, 2015 SKCA 19 (Sask. C.A.)). Herauf J.A. in denying leave stated:

> [11] The SMA has essentially raised the same arguments on this leave application that were not accepted by the certification judge at the certification hearing. I have certainly not been convinced that the proposed appeal on the issue of the causes of action is of sufficient merit and sufficient importance to warrant determination by this Court at this time.

## V. ANALYSIS

18 Dr. Anstead applies to strike the appeal of SMA. He raises a number of arguments. He first submits that the issue of subject matter jurisdiction is intrinsically linked with the cause of action analysis under the *CAA*. He argues the hearing judge's decision under the cause of action analysis determines the jurisdiction issue because the issue of subject matter jurisdiction goes to the very question of whether under s. 6(1)(a) of the *CAA* a genuine cause of action is disclosed. Dr. Anstead argues that because the jurisdiction issue is subsumed in the cause of action analysis, leave to appeal is required and because SMA did not obtain leave the appeal should be struck.

19 He also argues that the appeal is *res judicata* or an abuse of process on the basis that even if subject matter jurisdiction is not completely overlapped by or subsumed in the s. 6(1)(a) analysis, the SMA has relied upon exactly the same arguments rejected on the application for leave to appeal the *Certification Decision* as they have in this appeal. Dr. Anstead argues that there are strong policy reasons for not allowing applications that raise issues identical to those that fall under the certification analysis to have a direct and separate right of appeal. He submits that the obvious intent of s. 39(3) of the *CAA* is to provide finality to a certification decision so that the parties can move forward.

20 Last, Dr. Anstead argues that the decision with regard to jurisdiction was interlocutory in the sense that it did not finally dispose of the claim and leave is required on that basis.

21 SMA submits that the Rule 3-14 decision was a discrete decision. Although made at the same time as the certification application it is not subsumed into the certification application nor is it an intrinsic part of the *Certification Decision*. SMA argues leave to appeal the Rule 3-14 decision is not required because it is final; not necessarily because it disposes of the main dispute between the parties, but because it disposes of an important *element* thereof: i.e., whether or not the Court has subject matter jurisdiction. Last, SMA submits there is no abuse of process or *res judicata* because the arguments respecting cause of action and the Rule 3-14 application are, by necessity, similar.

22 In my view, the core of this matter is whether it is an abuse of process to determine the appeal of the Rule 3-14 decision on its merits. Accordingly, I will approach the arguments of the parties in light of that doctrine. The broadness of the doctrine of abuse of process obviates any need to make determinations regarding issue estoppel or *res judicata*. I will, however, address the matter of whether leave is required to appeal the Rule 3-14 decision.

23 The doctrine of abuse of process has been explained and developed by Arbour J. in the oft quoted case of *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) [*CUPE*]. More recently, it has been summarized in *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26, [2013] 2 S.C.R. 227 (S.C.C.) [*Behn*]:

> [39] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of

  

the court's process: para. 35; see also P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243. Abuse of process was described in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, as "oppressive treatment". In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice". Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.

[40] The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that 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 [(C.A.)], at p. 358 ....
>
> 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. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process.
>
> [Emphasis added.]

[41] As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met. But it is not limited to preventing relitigation. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process: paras. 101-21. The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.

24 In *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152, 345 D.L.R. (4th) 152 (Sask. C.A.) [*Bear*], this Court said:

> [36] The doctrine of abuse of process reflects the inherent power of a judge to prevent an abuse of his or her court's authority. It is a flexible concept not restricted by the requirements of issue estoppel, such as those relating to privity. The doctrine can be engaged by a variety of circumstances including what might be called those concerning the "re-litigation" of issues or claims.
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> . . .
>
> [38] The need to maintain the integrity of the adjudicative process sits at the heart of the concept of abuse of process. The Supreme Court of Canada explained this point as follows in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77:
>
> > [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.

  

See also: *Cameco Corp. v. Insurance Co. of State of Pennsylvania*, 2010 SKCA 95, [2010] 10 W.W.R. 385per Cameron J.A. at paras. 47-50.

25 I turn now to Dr. Anstead's arguments that the appeal should be struck as they relate to abuse of process.

***A. The issue of subject matter jurisdiction is substantially identical to and goes to the very question of whether an authentic cause of action exists.***

26 Dr. Anstead submits that the issues on the Rule 3-14 application and the inquiry under s. 6(1)(a) of the *Act* are substantially identical and that the authentic cause of action determination under s. 6(1)(a) was also a determination of subject matter jurisdiction.

27 There are, admittedly, differences between the analysis of whether s. 6(1)(a) of the *CAA* has been satisfied and whether it has been shown the court lacks subject matter jurisdiction. The question to be determined under s. 6(1)(a) was, prior to *Pederson v. Saskatchewan*, 2016 SKCA 142 (Sask. C.A.), whether there was an authentic or genuine cause of action (*Hoffman v. Monsanto Canada Inc.*, 2007 SKCA 47 (Sask. C.A.) at para 53, (2007), 283 D.L.R. (4th) 190 (Sask. C.A.)). Such a determination is a procedural one in the context of determining if the class action as a whole is a preferable procedure (*Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at paras 30 and 34, [2013] 3 S.C.R. 949 (S.C.C.)). However, implicit in that determination must be a provisional decision that the certification does not fail under s. 6(1)(a) because of a lack of subject matter jurisdiction. That said, the finding there was an authentic or genuine cause of action is not a definitive statement in law that the court has subject matter jurisdiction. This is because such a finding merely determines if the statutory prerequisite has been met and is not made on the merits.

28 Such a determination under s. 6(1)(a) can be contrasted with the decision to strike the claim under Rule 3-14 for want of subject matter jurisdiction; the latter decision is on a point of law. It is a substantive decision capable of being decided on the merits.

29 SMA argues that on the certification application the jurisdiction issues were distinct from the cause of action issue. It submits that this is clear because it challenged the sustainability of the cause of action on the basis of not only subject matter jurisdiction but also on other bases. SMA blows hot and cold on this issue. In the brief filed in support of its application to have the Rule 3-14 application heard in advance of the certification, SMA referred to the subject matter jurisdiction issue as "one of the critical issues (if not the most critical issue) faced by the parties under the s. 6(1)(a) analysis of the *CAA*". It continued with this approach at the certification application hearing.

30 While the record discloses that SMA made other arguments challenging the existence of an authentic cause of action, the nub of its s. 6(1)(a) arguments were that the *SMCIA* created a complete code and as a result the court lacked subject matter jurisdiction. This is borne out by the written submissions of SMA on the certification application. SMA filed one brief of law encompassing both the certification application and the Rule 3-14 application. Included in this brief, at paragraphs 152-212, was an extended argument under the s. 6(1)(a) *CAA* requirement that posits, for the most part, that *SMCIA* is a complete code which ousts the common law jurisdiction of the courts or, alternatively, that the common law duties upon which Dr. Anstead based his claim conflict with *SMCIA* and cannot prevail. Pointedly, SMA submits at paragraph 153 that the comprehensive code arguments are ultimately dispositive of the certification application. I conclude from this that even though the issues under s. 6(1)(a) of the *CAA* and Rule 3-14 may not be identical, they are substantially similar and closely connected and SMA approached them in such a manner.

31 That the issues are substantially similar and closely connected is also borne out by the record in this Court on the application for leave to appeal the *Certification Decision*. At paragraph 87 of its brief filed in support of its leave application, SMA again argued that *SMCIA* is a comprehensive code that ousts the jurisdiction of the court and that this argument was ultimately dispositive of this class action. At paragraph 88 of that brief, in relation to whether the proposed appeal had sufficient merit regarding the cause of action analysis, SMA made a number of arguments. Included were the same three propositions in support of the comprehensive code argument that appear at paragraph 154 of SMA's certification/Rule 3-14 brief in the court below. Thereafter, SMA's brief provides, in summary form, the same jurisdictional arguments on the s. 6(1)(a) requirements put forward before the hearing judge.

  

32 The notice of appeal, material filed and arguments made by SMA on the leave to appeal the *Certification Decision* are substantially repeated in this appeal. SMA's notice of appeal on this matter and the proposed notice of appeal filed by SMA respecting the *Certification Decision* set out identical grounds regarding the jurisdictional issue. Paragraphs 73 and 74 of SMA's factum in this appeal make the same argument: that the courts have no jurisdiction to apply the common law because *SMCIA* is a comprehensive code. SMA again proffers the same three propositions in support of that argument as were made on the certification/Rule 3-14 application and the previous leave application.

33 The issue of subject matter jurisdiction was the core issue with respect to both the s. 6(1)(a) *CAA* determination and the Rule 3-14 determination by the hearing judge. Likewise, it was the core issue of the proposed appeal of the *Certification Decision* and is the core issue on this appeal as well.

34 The Court in *Behn* (para 41) made it clear that relitigation of an issue can be precluded under the abuse of process doctrine even where the requirements for issue estoppel are not met but the issues are sufficiently similar. As submitted by Dr. Anstead, SMA now attempts to argue for the second time in this Court that the class action is not sustainable because of lack of subject matter jurisdiction.

35 This, in my view, falls within the ambit of the doctrine of abuse of process in that SMA attempts, by this appeal, to relitigate, broadly speaking, the same issue as it did in the previous leave application.

36 Dr. Anstead argues that because the issues on the s. 6(1)(a) analysis and the Rule 3-14 application are similar, if his claim were now struck for want of subject matter jurisdiction in this Court it would be inconsistent with the *Certification Decision*. To provide some context to this argument, it is necessary to first review the procedural background in the Court below.

37 The hearing judge in his *Timing Decision* followed the approach favoured in this jurisdiction that, generally speaking, most preliminary applications should be heard at the same time as the certification application. This was explained by him:

> [9] Counsels' Briefs of Law and Replies illustrate numerous case examples of the variety of applications which one or other of the parties seek to have the court address in advance of or preliminary to the certification application in class action law suits. The plaintiff (respondent's) Brief points out that there are numerous case authorities that support the general proposition that the courts have strongly favoured having the certification application heard as the first substantive application in a class action law suit (often referred to as the "certification first" principle). Numerous Saskatchewan examples illustrate this policy approach. (See for example *Brooks v. Canada (Attorney General)*, 2008 SKQB 433, [2008] S.J. No. 670 (QL) at para. 5; *Alves v. MyTravel Canada Holidays Inc.*, 2009 SKQB 77, 335 Sask. R. 164, paras. 24 and 32-33; *Thorpe v. Honda Canada, Inc.*, 2009 SKQB 488, 357 Sask. R. 1, at para. 7; and *Bear v. Merck Frosst Canada & Co.*, 2010 SKQB 284, 360 Sask. R. 113, para. 1) The objectives of a class action procedure include economies of time, effort and expense, as well as uniformity of decision for persons similarly situated. The modern class action is designed to avoid, rather than encourage, the unnecessary filing of repetitious papers and motions. The court recognizes that motions to strike or similar interim applications can be effectively addressed by the court on the hearing of the certification application. The provisions of s. 6(1) of *The Class Actions Act*, S.S. 2001, c. C-12.01 sets out the criterion which the court is mandated to consider as part of the class action certification application. The very first of these, in subsection 6(1)(a), includes the requirement that the "pleadings disclose a cause of action".

38 The hearing judge carefully explained the reasons why the two applications should be heard together:

> [17] Since this application does not raise a clear question but rather at least two questions fundamental to the sustainability or otherwise of this action, the issue raised by the application is best determined at the certification hearing. At that hearing the court should have the benefit of any further or additional materials the parties may file to assist the court in its understanding of the full dimensions of this issue at law and in the facts and circumstances of these parties (and those others impacted by the SMA's exercise of its statutory representative responsibilities). The resultant impact that these additional materials may have upon the court's determination respecting the sustainability of the action and/or the certification of it as a class action can be more fully appreciated and assessed with the assistance of this information at the certification hearing stage.

  

39 The approach of the hearing judge suggests that the certification application and the Rule 3-14 application should be of one piece, i.e., that the Rule 3-14 application would be heard and determined "at and as part of the certification application". The absence of discrete reasons for the Rule 3-14 decision supports the view that the decisions are of one piece. It may reasonably be inferred from this that the hearing judge determined that the Rule 3-14 application spoke to the issue of sustainability of the class action. In this case, the hearing judge was correct to order that the applications be heard together.

40 Where the applications are heard together, it allows the hearing judge to effectively manage the various challenges to the sustainability of the class action that a defendant may bring. He or she can assess whether the matter will go forward on the basis of all the s. 6(1) requirements of the *CAA* having been met, or strike or stop the class action on the basis of any preliminary applications. This, as observed by the hearing judge, avoids a piecemeal approach to the determination of each of the parties' rights and ensures judicial economy. To this may be added that such an approach also avoids possible inconsistent determinations where the issues on the preliminary applications and an aspect of the certification application are identical or similar.

41 The benefit of hearing preliminary applications together with the certification application is especially evident where such an application relates to matters such as jurisdiction over the subject matter, striking the claim for one of the reasons mentioned in Rule 7-9(2)(a) of *The Queen's Bench Rules*, i.e., that it discloses no reasonable claim, or summary judgment applications where it is argued that the cause of action cannot succeed as a matter of law. Without setting forth a definitive list, such applications may raise issues which are identical to or form a substantive part of or, as SMA argues, is an important *element* of the s. 6(1)(a) issues.

42 That said, where warranted the hearing judge has the flexibility to decide that a preliminary application should be heard and determined in advance of the certification application. In such a case, the decision on such an application, whether it ends the class action or the class action remains extant, easily lends itself to be appealed as a discrete matter. An example of this *might* be an application under Rule 3-14 made on the basis of *territorial competence*, but that remains an unresolved issue. There is no danger of any inconsistency with a certification decision because it will be unlikely that a decision whether the requirements of s. 6(1) of the *CAA* have been met will be made while the decision on the preliminary application is under appeal. Here, the fact that the hearing judge ordered the two applications to be heard together and that the decision on both was merged in one set of reasons indicates that the hearing judge intended to avoid inconsistent determinations.

43 In light of the hearing judge's intention, there are a number of undesirable consequences for the administration of justice to determine SMA's appeal on the merits in the circumstances of this case. The first is that by filing a separate appeal on the Rule 3-14 application, SMA effectively attempts to circumvent the order of the hearing judge that the Rule 3-14 application be heard at the same time as the certification and the intention of the hearing judge that his decision on both be of one piece. To determine the appeal on the merits would be to give SMA a right of appeal as if the application had been heard prior to certification as a discrete matter and would undercut the process of the hearing judge to choose to manage resolution of the various issues before him in one hearing.

44 Determining the appeal on the merits would also encourage posturing. Defendants need only file a preliminary motion to strike the claim on some basis. If the hearing judge orders the applications be heard together and the defendant is not successful on the preliminary application and the action is certified, the defendant needs only to persuade the Court of Queen's Bench that issuance of a discrete order is appropriate and then file a discrete appeal of that application, as SMA has done in this case, to provide two opportunities to stop the class action arising out of essentially one decision. Such posturing is evident to some extent when one considers that approximately two weeks before SMA issued the Rule 3-14 order and filed its appeal of that order, SMA was already asking this Court, in its materials on the leave application on the *Certification Decision*, to have that appeal heard at the same time as the future and, at that point, unfiled Rule 3-14 appeal.

45 The filing of this appeal also fragments the litigation in this Court. The avoidance of duplication of time, effort and expense and the unnecessary filing of repetitious papers identified by the hearing judge for justifying hearing the applications together has unfortunately been thwarted in this Court. As explained previously, SMA's arguments in this appeal are in substantial part duplicative of the core arguments it proffered to this Court in its application for leave to appeal the *Certification Decision*.

  

46 Such duplication has created the potential for inconsistent verdicts if the appeal is heard. This Court has determined that SMA's challenge to the sustainability of the *Certification Decision* had insufficient merit for leave to appeal to be granted. Such a decision was made by taking into account SMA's subject matter jurisdiction arguments referable to the s. 6(1)(a) analysis. The net result of the dismissal of SMA's application for leave to appeal was that the class action was viable. To determine the SMA appeal against the Rule 3-14 decision raises the potential that this Court may make a determination that the class action is not viable because of lack of subject matter jurisdiction. It would be a curious state of affairs if after a detailed analysis under s. 6(1) was done, the action certified and leave to appeal the *Certification Decision* was dismissed that the certification could nevertheless be attacked and set aside in the course of a *second appeal* using essentially the same arguments on the same issue. This is what SMA has attempted to do by filing this appeal. This is an abuse of this Court's process and on this basis the appeal must be struck.

***B. Where the Certification Decision is final there should not be a further right of appeal on a preliminary application after certification.***

47 Dr. Anstead last argues that the intent and policy of s. 39(3) of the *CAA* is to provide finality to a certification decision and that the filing of an appeal of the Rule 3-14 decision offends that policy. There is merit to this. It is in the interests of the public and the parties that the finality of a decision can be relied on (*CUPE* at para 38; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.) at para 18, [2001] 2 S.C.R. 460 (S.C.C.) [*Danyluk*]).

48 The primacy of the certification process has been established in the jurisprudence for some time. In *Hoffman v. Monsanto Canada Inc.*, 2002 SKCA 120, 220 D.L.R. (4th) 542 (Sask. C.A.), the Court said:

> [28] In this case the timely determination of the certification application will advance the litigation without generating unnecessary motions and applications. If one of the purposes of the modern class action is designed to avoid, rather than encourage unnecessary filing of repetitious papers and motions, it is in the interest of all parties to have the "appropriateness of the class action determined at the outset by certification": See *Dutton*, *supra* at p. 552, paras. 33 and 38.
>
> [29] In this way, motions to strike or similar proceedings will be unnecessary since the Court can address such issues on the certification application. Once the certification application has been determined, the Court of Queen's Bench may make appropriate orders with respect to conduct of the litigation.

(See also *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para 33, [2001] 2 S.C.R. 534 (S.C.C.).)

49 In light of this general principle, where the *Certification Decision* is final because SMA has been unsuccessful in its attempts to appeal under s. 39(3), it would be inconsistent with the integrity of the *CAA* and the certification process to then allow the defendant another "bite at the cherry" (Binnie J. in *Danyluk* at para 18).

50 This appeal can be viewed as a collateral attack on the *Certification Decision*. Although collateral attack is a discrete common law concept, the elements of that concept can also be dealt with effectively as an aspect of abuse of process. In *CUPE*, Arbour J., quoting Lord Diplock in *McIlkenny v. Chief Constable of the West Midlands* (1981), [1982] A.C. 529 (U.K. H.L.):

> [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.

51 I also conclude that to determine this appeal on the merits invites this Court to participate in what, in substance,

  

amounts to a collateral attack on the finality of the *Certification Decision* in the circumstances of this case. This would undermine the interests of the public and parties that the finality of a decision can be relied upon and would be an abuse on that basis.

*Conclusion re: Abuse of Process*

52 On the basis that the issues at play in SMA's proposed appeal of the *Certification Decision* are sufficiently similar to the issues at play in this appeal, that there is the danger for inconsistent determinations in determining this appeal on the merits and that to do so would not promote finality of proceedings, I am satisfied that abuse of process has been established. To determine this appeal on the merits would misuse the process of the Court in a way that would bring the administration of justice into disrepute.

***C. Leave is Required***

53 Although my comments regarding abuse of process are determinative of this appeal, I turn now to the alternative basis on which this appeal must be struck. I do so in part because it has a bearing on the process and procedure of this Court. I say this because where a certification application and a preliminary application have been heard together, and the certification decision is being appealed, a defendant should appeal the decision on the preliminary application at the same time as the certification decision and apply for leave to do so. This is what the appellants failed to do. I will explain.

54 Section 8(1) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, requires leave to be granted to appeal against interlocutory decisions:

> 8(1) Subject to subsection (2), no appeal lies to the court from an interlocutory decision of the Court of Queen's Bench unless leave to appeal is granted by a judge or the court.

55 SMA argues that leave is not required. It submits the Rule 3-14 decision is final because it disposes of an important element of the main dispute. It proffers the case of *Hopkins v. Kay*, 2014 ONCA 514 (Ont. C.A.), for the proposition that refusal to dismiss an application that the courts lack jurisdiction over the subject matter in a certification action is a final order because it precludes the defendant from disputing the issue as the certification proceeds forward. In my view, determining whether a decision is interlocutory on the basis of whether it disposes of an "important element" of the main issue is not an approach consistent with the jurisprudence of this Court.

56 It has long been the law in this jurisdiction that orders which do not finally dispose of the "substantive issue" in an action are not final but interlocutory: *Beaver Lumber Co. v. Cain*, [1924] 3 W.W.R. 332 (Sask. C.A.), per Martin J.A. (as he then was) at 334. Conversely, an order is final when, if allowed to stand, it finally disposes of the rights of the parties: *Alexander Hamilton Institute v. Chambers* (1921), 65 D.L.R. 226 (Sask. C.A.), per Turgeon J.A. (as he then was) at 228. In *KJK Holdings Inc. v. Silcorp Ltd.* (1992), 90 D.L.R. (4th) 488 (Sask. C.A.), this Court approved the view that orders may be final for one purpose but interlocutory for another (per Cameron J.A. at 489).

57 This Court has treated decisions which decline to strike out an action as interlocutory and requiring leave (*Rollheiser v. Twigg*, 2006 SKCA 57, 279 Sask. R. 113 (Sask. C.A. [In Chambers]) (as beyond the jurisdiction of Queen's Bench); *Bartok v. Shokeir* (1998), 168 Sask. R. 280 (Sask. C.A. [In Chambers]) (as pleading a novel cause of action); *Progressive Conservative Party of Saskatchewan v. Emsley*, 2008 SKCA 155 (Sask. C.A. [In Chambers]) (as disclosing no reasonable cause of action)). This Court has also approached appeals under former Rule 99 of *The Queen's Bench Rules*, the predecessor to Rule 3-14, as requiring leave (*Moldowan v. S.G.E.U.* (1995), 126 D.L.R. (4th) 289 (Sask. C.A.); *Pfeil v. Simcoe & Erie General Insurance Co.* (1986), 24 D.L.R. (4th) 752 (Sask. C.A.)). Recently, this Court approached an appeal involving the adjournment of a Rule 3-14 application regarding territorial jurisdiction as requiring leave (*Hyatt Hotels of Canada Inc. v. Knuth* (October 6, 2016), Doc. CACV2925 (Sask. Q.B.)). Likewise, this Court has viewed decisions declining to dismiss an action as misconceived as interlocutory (*Mueller v. Dagenais*, 2007 SKCA 31, 293 Sask. R. 39 (Sask. C.A. [In Chambers]); *Cameco Corp. v. Insurance Co. of State of Pennsylvania*, 2009 SKCA 15, 324 Sask. R. 46 (Sask. C.A. [In Chambers]); *Tournier v. Constant-Daniels (Litigation Guardian of)*, 2011 SKCA 103, 385 Sask. R. 41 (Sask. C.A. [In Chambers])).

  

58 In contrast, decisions striking out a cause of action as barred by a limitation period have been viewed as final (*B. (D.) v. M. (C.)*, 2001 SKCA 129, 213 Sask. R. 272 (Sask. C.A.)) as have been decisions striking out a misconceived claim (*Stadnyk v. Saskatchewan*, 2011 SKCA 30 (Sask. C.A. [In Chambers])).

59 On the basis of this jurisprudence, the Rule 3-14 decision in this case does not finally dispose of the substantive issue of the certification and requires leave to appeal. It would have been final if it resulted in the class action being struck. Accordingly, the appeal of SMA is struck on this basis as well.

60 As a final point, SMA argues that striking the appeal leaves it with no further recourse on the comprehensive code issue and its effect on the class action. However, this is not so. Nowhere in his decision does the hearing judge actually say that. He merely dismisses the Rule 3-14 application. The hearing judge was not satisfied in his *Timing Decision* that the argument of a comprehensive code created by *SMCIA* was uncontrovertedly a jurisdictional issue in any event (at para 16). He determined that the Rule 3-14 application was one of two questions fundamental to the sustainability of the action. It may be inferred from the dismissal of the Rule 3-14 application that the hearing judge either determined that the matter of a comprehensive code was not a jurisdictional issue or that if it was, he was not satisfied the court did not have subject matter jurisdiction *for the purpose of determining whether the class action could be certified*. On either basis, he sustained the viability of the class action but left open the potential for the comprehensive code issue to be dealt with down the road as a possible defence to the action.

61 Dr. Anstead conceded that even if this Court struck SMA's appeal, it was still open to SMA to argue going forward on the certification that the cause of action has not been proven because of the comprehensive code issue, and the issue may be addressed as part of whether Dr. Anstead has established that SMA owed class members a duty of fair representation or fiduciary duties as set forth in the first common issue certified. We agree with this approach.

## VI. CONCLUSION

62 The motion to strike the appeal is allowed in the circumstances of this case because to deal with the appeal on its merits would be an abuse of process and also because SMA has failed to obtain leave to appeal. Therefore, it becomes unnecessary to consider the arguments on the appeal proper. The appeal is struck. There will be no order as to costs.

***Caldwell J.A.*:**
I concur.

***Herauf J.A.*:**
I concur.

*Application granted; Appeal struck.*

# TAB 6

2015 NSCA 37
Nova Scotia Court of Appeal

Raymond v. Brauer

2015 CarswellNS 283, 2015 NSCA 37, 1131 A.P.R. 219, 253 A.C.W.S. (3d) 258, 358 N.S.R. (2d) 219

# Paulette Raymond, Appellant v. Connie Brauer and Victor Harris, Respondent

Beveridge J.A.

Heard: April 16, 2015
Judgment: April 21, 2015
Docket: C.A. 432911

Counsel: Paulette Raymond, for herself
Connie Brauer, Victor Harris, Respondents, for themselves

Subject: Civil Practice and Procedure; Torts

**Related Abridgment Classifications**

Civil practice and procedure
XXIII Practice on appeal
XXIII.3 Notice of appeal
XXIII.3.e Miscellaneous

**Headnote**

Civil practice and procedure --- Practice on appeal — Notice of appeal — General principles
Plaintiff R brought action for defamation against defendants B and H — R was self-represented — R brought motions to set aside jury notice and for summary judgment — These motions were dismissed — R brought notice of appeal and appeared before court to set date for hearing — At hearing, judge alerted R to fact that appeal was from interlocutory judgment, and was therefore deficient — R wished to make submissions as to why her appeal was properly before court — Both parties made written submissions — Court ordered Notice of Appeal dismissed — Motions were clearly interlocutory, as they did not bring proceedings to end — R did not have right of appeal from interlocutory motion — R needed to apply for leave to appeal, and did not do so — R had problem pointed out to her but did not take any measures to correct problem — R instead insisted that judge was wrong in interpretation — R's proposal for stay of proceedings was counter to intentions of resolving interlocutory appeals quickly — R had sufficient understanding of proceedings, even though she did not have counsel — Appeal lacked merit — It was unusual, but appropriate, remedy to dismiss Notice of Appeal.

**Table of Authorities**

**Cases considered by *Beveridge J.A.*:**

*Anderson v. Cyr* (2014), 52 C.P.C. (7th) 47, 1092 A.P.R. 329, 345 N.S.R. (2d) 329, 66 M.V.R. (6th) 17, 2014 NSCA 51, 2014 CarswellNS 374, 372 D.L.R. (4th) 455 (N.S. C.A.) — referred to

*Anderson v. Queen Elizabeth II Health Sciences Centre* (2010), (sub nom. *Anderson v. QE II Health Sciences Centre)* 316 D.L.R. (4th) 193, 2010 CarswellNS 62, 2010 NSCA 7, (sub nom. *Anderson v. QE II Health Sciences Centre)* 912 A.P.R. 2627, (sub nom. *Anderson v. QE II Health Sciences Centre)* 287 N.S.R. (2d) 316 (N.S. C.A.) — referred to

  

*Cherny v. GlaxoSmithKline Inc.* (2009), 2009 CarswellNS 335, 2009 NSCA 68, *(*sub nom. *Cherny v. Glaxo Smith Kline Inc.)* 279 N.S.R. (2d) 192, *(*sub nom. *Cherny v. Glaxo Smith Kline Inc.)* 887 A.P.R. 192 (N.S. C.A.) — referred to

*Farrell v. Casavant* (2010), 2010 NSCA 71, 2010 CarswellNS 576, 933 A.P.R. 292, 294 N.S.R. (2d) 292 (N.S. C.A. [In Chambers]) — referred to

*Fawson Estate, Re* (2013), 87 E.T.R. (3d) 1, 2013 NSCA 54, 2013 CarswellNS 260, 1042 A.P.R. 329, 329 N.S.R. (2d) 329 (N.S. C.A.) — referred to

*Hendrickson v. Kallio* (1932), [1932] 4 D.L.R. 580, 1932 CarswellOnt 148, [1932] O.R. 675 (Ont. C.A.) — followed

*Islam v. Sevgur* (2011), 2011 NSCA 114, 2011 CarswellNS 889, *(*sub nom. *Sevgur v. Islam)* 983 A.P.R. 266, *(*sub nom. *Sevgur v. Islam)* 310 N.S.R. (2d) 266, 11 R.F.L. (7th) 83 (N.S. C.A.) — referred to

*Sinclaire v. Nicols* (1999), 216 N.B.R. (2d) 399, 552 A.P.R. 399, 1999 CarswellNB 362, 231 N.B.R. (2d) 60, 597 A.P.R. 60 (N.B. C.A.) — referred to

*V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd. / Groupe d'assurance canadienne generale Ltée* (1998), 1998 CarswellOnt 4909, 42 C.L.R. (2d) 241, *(*sub nom. *Mason (V.K.) Construction Ltd. v. Canadian General Insurance Group Ltd.)* 116 O.A.C. 272, *(*sub nom. *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.)* 42 O.R. (3d) 618 (Ont. C.A.) — referred to

*Van de Wiel v. Blaikie* (2005), 230 N.S.R. (2d) 186, 729 A.P.R. 186, 2005 NSCA 14, 2005 CarswellNS 23, 10 C.P.C. (6th) 162 (N.S. C.A. [In Chambers]) — followed

*Wall v. Horn Abbot Ltd.* (2006), 2006 NSCA 36, 2006 CarswellNS 110, 23 C.P.C. (6th) 354, *(*sub nom. *Wall v. 679927 Ontario Ltd.)* 770 A.P.R. 300, *(*sub nom. *Wall v. 679927 Ontario Ltd.)* 242 N.S.R. (2d) 300, 266 D.L.R. (4th) 449 (N.S. C.A.) — referred to

**Statutes considered:**

*Judicature Act*, R.S.N.S. 1989, c. 240
Generally — referred to

s. 34(a) — referred to

**Rules considered:**

*Nova Scotia Civil Procedure Rules*, N.S. Civ. Pro. Rules 2009
Generally — referred to

R. 90 — referred to

R. 90.40(2) — considered

HEARING as to status of plaintiff R's appeal from interlocutory motion judgments, in action against defendant B.

***Beveridge J.A.*:**

1 On April 16, 2015 I dismissed Ms. Raymond's Notice of Appeal (General) for non-compliance with the *Nova Scotia Civil Procedure Rules*. I briefly explained to Ms. Raymond why, and said written reasons would follow. These are they.

**Background**

  

2 While not all of the details are documented, the essential ones are known. Ms. Raymond is a plaintiff. She sued the respondents for defamation. There is a counter-claim.

3 Various motions were heard by The Honourable Justice Gregory Warner. At least two orders were issued by Justice Warner on September 30, 2014. One dismissed Ms. Raymond's motion to set aside a jury notice. The other dismissed Ms. Raymond's motion for summary judgment on evidence.

4 Ms. Raymond filed a Notice of Appeal (General) on October 31, 2014. In due course, she brought a motion for date and directions on March 3, 2015. The parties appeared before me on March 26, 2015 to deal with that motion. The respondents, for reasons that I need not repeat, opposed the setting of dates and asked that the appeal be dismissed.

5 On March 26, 2015, I alerted Ms. Raymond to the problem that the orders of Justice Warner that she wished to challenge in this Court appeared to be, at first glance, interlocutory in nature. If that were the case, her Notice of Appeal was filed out of time, and was deficient in a number of ways. Not the least of which was that there was no application for leave to appeal.

6 It was clear on March 26, 2015, Ms. Raymond understood that there is a difference between an interlocutory appeal and a general appeal filed as of right. She requested an opportunity to make submissions why her Notice of Appeal (General) was properly before the Court.

7 Dates were set for the filing of written submissions, and a return date of April 16, 2015. Ms. Raymond filed a brief on April 9, 2015. This brief requires separate comment.

***Brief of April 9, 2015***

8 Ms. Raymond identified three questions of law that she said arise on the overall question of a general appeal versus an interlocutory appeal. She wrote that they were:

> 1. What is the Standard of Review for the Appellate Court with regard to the interlocutory and substantive decisions? Are there similarities and differences?
>
> 2. What might be the legal ramifications be if the Court of Appeal were to consider "out of time" interlocutory / pretrial decisions, together with "in-time" substantive decisions in a General Appeal? Could there be a quality resolve?
>
> 3. Could the matter for Appellate review be stayed until pre-trial procedures have finished? Would either party suffer prejudice? Would a stay be reasonable? Would a stay be in the best interests of justice?

9 There is no need to offer details of Ms. Raymond's arguments, since they do not address the real issue: are the orders she seeks to appeal interlocutory (requiring an Application for Leave to Appeal) or are they final (hence appealable by way of a Notice of Appeal (General))?

10 Ms. Raymond acknowledged having consulted case law and reference works from a law library: Mike Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *The Advocates' Quarterly* 269; and Sopinka, John: Gelowitz, Mark A., *The Conduct of an Appeal*, 2nd ed., (Butterworths Canada Ltd., 2000).

11 On April 16, 2015, she referenced pages from the text, *The Conduct of An Appeal*, about the difficulties that have, at least historically, been encountered in resolving this question.

12 Nonetheless, Ms. Raymond framed her argument that the real issue was whether the matter was interlocutory or "substantive". Her submissions were therefore, unfortunately, not helpful. Nor do I find it necessary to delve into a discussion of the intricacies of the different standards of review that may, or may not, be applicable when this Court deals with an interlocutory appeal as opposed to an appeal of a final order.

  

13 Significantly, what Ms. Raymond asked for in her brief of April 9 was for "the Honourable Court to respectfully suspend judgment". On April 16, 2015, Ms. Raymond confirmed that what she wanted was an adjournment of my consideration whether her appeal proceedings were properly before this Court in order for her to bring a motion to stay her own appeal proceedings.

14 She offered in her brief of April 9 that her motion and brief in support of a stay would be filed by Friday, April 17, 2015. Ironically, she concluded her brief as follows:

> In my view, a ***stay*** will move this litigation forward expeditiously. This proposal is reasonable. Ideally, I think it will work for everyone.
>
> [Emphasis in original]

15 The respondents say her proposal is not reasonable. They vehemently opposed any adjournment of the proceedings, and asked that the appeal be dismissed.

**Analysis**

16 There are really two issues to address: are the orders of Justice Warner dated September 30, 2014 interlocutory or final in nature; if they are interlocutory, what are the consequences?

***Interlocutory vs. Final***

17 After decades of debate about how to distinguish between an interlocutory and final order, the definitive test was articulated by Middleton J.A. in *Hendrickson v. Kallio*, [1932] O.R. 675 (Ont. C.A.):

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties — the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the applications, but it is interlocutory if the merits of the case remain to be determined.
>
> p. 678[1]

18 This is the general governing test in Nova Scotia. In *Van de Wiel v. Blaikie*, 2005 NSCA 14 (N.S. C.A. [In Chambers]), Cromwell J.A., as he then was, reviewed the principles and provided a concise overview of the distinction between interlocutory and final orders. He wrote:

> [12] In general, an order is interlocutory which does not dispose of the rights of the parties in the litigation but relates to matters taken for the purpose of advancing the matter towards resolution or for the purpose of enabling the conclusion of the proceedings to be enforced: see *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303 (S.C.A.D.).
>
> [13] In *Irving Oil Ltd. v. Sydney Engineering Inc*. (1996), 150 N.S.R. (2d) 29 (C.A. Chambers), Bateman, J.A. considered the distinction between interlocutory and final orders. Although finding it unnecessary to conclusively determine the nature of the order in the case before her, she cited with approval the first edition of *The Conduct of an Appeal* by Sopinka and Gelowitz (1993) at p. 15 which described the distinction as follows:
>
> > Where such orders have a terminating effect on an issue or on the exposure of a party, they plainly "dispose of the rights of the parties" and are appropriately treated as final. Where such orders set the stage for determination on the merits, they do not "dispose of the rights of the parties" and are appropriately treated as interlocutory.

  

19 It is plain that the two orders of Justice Warner dated September 30, 2014 did not finally dispose of the matters in dispute between Ms. Raymond and the respondents.

20 One order dismissed Ms. Raymond's motion for summary judgment on the evidence. The terms of the Order reflect that she did not call any evidence on her own motion. The Order disposed of her motion for summary judgment, but not her overall claim against the respondents. That claim is still outstanding.

21 An order denying summary judgment is interlocutory since it does not bring the proceedings to an end (See for example: *Cherny v. GlaxoSmithKline Inc.*, 2009 NSCA 68 (N.S. C.A.) (¶ 6); *Sinclaire v. Nicols*, [1999] N.B.J. No. 394 (N.B. C.A.); *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd. / Groupe d'assurance canadienne generale Ltée*, [1998] O.J. No. 5291 (Ont. C.A.).

22 The other order dismissed Ms. Raymond's motion to set aside a jury notice. It also did not bring the proceedings to an end. The merits of the parties' competing claims are yet to be determined. There are any number of decisions by this Court that have found such orders to be interlocutory (see for example: *Anderson v. Cyr*, 2014 NSCA 51 (N.S. C.A.); *Anderson v. Queen Elizabeth II Health Sciences Centre*, 2010 NSCA 7 (N.S. C.A.); *Wall v. Horn Abbot Ltd.*, 2006 NSCA 36 (N.S. C.A.)).

23 The result is clear. The orders sought to be challenged by Ms. Raymond are interlocutory.

***What are the consequences?***

24 *Rule* 90.40(2) gives to me the discretion to dismiss an appeal if the appeal is not conducted in compliance with this *Rule* 90 for any reason. The formal words are:

> (2) A judge of the Court of Appeal may dismiss an appeal if the appeal is not conducted in compliance with this Rule 90 for any reason, such as, failing to comply with Rules respecting any of the following:
>
> (a) the form of the notice of appeal,
>
> (b) notifying a person of the appeal,
>
> (c) making a motion for directions,
>
> (d) setting the appeal down for a hearing,
>
> (e) filing the certificate of readiness.

25 Obviously a judge should be slow to dismiss an appeal for failure to comply with *Rules*. We enjoy a broad discretion to abridge or extend time limits, amend or permit the filing of amended documents, or to excuse compliance, and to otherwise give directions.

26 All of these powers should be exercised to ensure that proceedings are conducted justly, quickly and with a mind to the cost consequences to the parties, and to the overall administration of justice. Guidance for the exercise of discretions can be found in such cases as *Farrell v. Casavant*, 2010 NSCA 71 (N.S. C.A. [In Chambers]), *Islam v. Sevgur*, 2011 NSCA 114 (N.S. C.A.), and *Fawson Estate, Re*, 2013 NSCA 54 (N.S. C.A.).

27 In this case, the problem was not a minor difficulty with a form. Ms. Raymond had no right to appeal to this Court. She must apply for leave to appeal. The time to try to bring appeal proceedings in interlocutory matters is much shorter, as are the requirements to set down and prosecute the appeal.

28 Unfortunately, the Registrar's office should not have accepted the Notice of Appeal on October 31, 2014. However, when the problem was pointed out to Ms. Raymond, she did not seek to invoke any of the possible remedial measures that

  

might be invoked to try to overcome the flaw in her attempt to appeal the interlocutory orders.

29 Instead, she insisted that I was wrong. Her Notice of Appeal (General) was properly before the Court; the problem was that I did not understand the difference between interlocutory and final orders.

30 Furthermore, rather than try to remedy the problem, she announced her intention to move for a stay of her appeal proceedings. Interlocutory appeals are designed to be conducted quickly, not delayed by the prospective appellant.

31 I have also examined her proposed grounds of appeal. It is difficult to recognize even a glimmer of merit in her complaints of error. On her motion for summary judgment on evidence before Justice Warner, she produced no evidence. Section 34 (a) of the *Judicature Act*, R.S.N.S. 1989, c. 240 requires defamation actions to be tried by jury. She says the *Act* is somehow unconstitutional, and that the motion judge erred in not striking a jury "with respect to an equitable and prolonged reflective analysis by judge alone that would benefit the parties and minimize the risks".

32 In these unusual circumstances, I was satisfied that it was in the interests of justice to dismiss the Notice of Appeal.

*R's Notice of Appeal dismissed.*

Footnotes

[1] This same quote appears in the text that Ms. Raymond relied upon for her research and brought with her to court, John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal*, 2nd Ed. at p 15.

**End of Document** 

  

# TAB 7

2020 SKCA 68
Saskatchewan Court of Appeal

Poffenroth Agri Ltd. v. Brown

2020 CarswellSask 293, 2020 SKCA 68

# Poffenroth Agri Ltd. (Applicant / Proposed Appellant / Plaintiff) and Garret Brown (Respondent / Proposed Respondent / Defendant)

Caldwell J.A., In Chambers, Leurer J.A., In Chambers, Kalmakoff J.A., In Chambers

Heard: May 15, 2020
Judgment: June 3, 2020
Docket: CACV3601

Proceedings: Leave to appeal allowed, 2020 CarswellSask 74, 315 A.C.W.S. (3d) 657, 2020 SKQB 31 (Sask. Q.B.)

Counsel: Roger J. Baker, for Appellant
Ryan M. Kitzul, for Respondent

Subject: Civil Practice and Procedure

**Headnote**

Civil practice and procedure

**Table of Authorities**

**Cases considered by *Kalmakoff J.A., In Chambers*:**

*Abbott v. Collins* (2002), 2002 CarswellOnt 3487, 165 O.A.C. 272, 62 O.R. (3d) 99, 26 C.P.C. (5th) 273, 24 C.C.E.L. (3d) 219 (Ont. C.A.) — referred to

*B. (D.) v. M. (C.)* (2001), 2001 SKCA 129, 2001 CarswellSask 779, 213 Sask. R. 272, 260 W.A.C. 272 (Sask. C.A.) — referred to

*Ball v. Donais* (1993), 13 O.R. (3d) 322, 64 O.A.C. 85, 45 M.V.R. (2d) 319, 1993 CarswellOnt 23 (Ont. C.A.) — referred to

*Bank of Nova Scotia v. Schussler* (1980), 28 O.R. (2d) 161, 111 D.L.R. (3d) 509, 1980 CarswellOnt 1360 (Ont. H.C.) — distinguished

*Burtch v. Barnes Estate* (2006), 2006 CarswellOnt 2423, 20 M.P.L.R. (4th) 160, 209 O.A.C. 219, 80 O.R. (3d) 365, 27 C.P.C. (6th) 199 (Ont. C.A.) — distinguished

*Cowessess First Nation v. Phillips Legal Professional Corporation* (2018), 2018 SKCA 101, 2018 CarswellSask 611, 43 C.P.C. (8th) 237 (Sask. C.A.) — followed

*Fauser Energy Inc. v. Skjerven* (2019), 2019 SKCA 81, 2019 CarswellSask 407, 437 D.L.R. (4th) 345, [2020] 1 W.W.R. 635 (Sask. C.A.) — referred to

*Friendly City Ford Mercury Lincoln Sales Ltd. v. Dawe* (2000), 2000 CarswellOnt 4534 (Ont. C.A.) — distinguished

*Grant v. Saskatchewan Government Insurance* (2003), 2003 SKCA 17, 2003 CarswellSask 111, 227 Sask. R. 316, 287 W.A.C. 316 (Sask. C.A.) — referred to

*Hopkins v. Kay* (2014), 2014 ONCA 514, 2014 CarswellOnt 18886 (Ont. C.A.) — referred to

*Iron v. Saskatchewan (Minister of the Environment & Public Safety)* (1993), [1993] 6 W.W.R. 1, 109 Sask. R. 49, 42 W.A.C. 49, 103 D.L.R. (4th) 585, 1993 CarswellSask 323 (Sask. C.A.) — distinguished

*KJK Holdings Inc. v. Silcorp Ltd.* (1992), 90 D.L.R. (4th) 488, 100 Sask. R. 143, 18 W.A.C. 143, 1992 CarswellSask 248 (Sask. C.A.) — referred to

*M.J. Jones Inc. v. Kingsway General Insurance Co.* (2003), 2003 CarswellOnt 4594, 178 O.A.C. 351, 233 D.L.R. (4th) 285, 41 C.P.C. (5th) 52, 68 O.R. (3d) 131 (Ont. C.A.) — referred to

*Ontario First Nations (2008) Limited Partnership v. Ontario (Minister of Aboriginal Affairs)* (2013), 2013 ONSC 7141, 2013 CarswellOnt 18040, 118 O.R. (3d) 356 (Ont. S.C.J.) — distinguished

*PCL Construction Management Inc. v. Saskatoon (City)* (2020), 2020 SKCA 12, 2020 CarswellSask 42, 444 D.L.R. (4th) 433 (Sask. C.A.) — followed

*Popowich v. Saskatchewan* (1999), 177 Sask. R. 226, 199 W.A.C. 226, 174 D.L.R. (4th) 336, 1999 CarswellSask 272, [1999] 9 W.W.R. 96, 33 C.P.C. (4th) 346 (Sask. C.A.) — referred to

*Raymond v. Brauer* (2015), 2015 NSCA 37, 2015 CarswellNS 283, 1131 A.P.R. 219, 358 N.S.R. (2d) 219 (N.S. C.A.) — considered

*Reid v. Babchouk* (2004), 2004 SKQB 128, 2004 CarswellSask 468, 246 Sask. R. 155 (Sask. Q.B.) — considered

*Rekken Estate v. Health Region No. 1* (2012), 2012 SKCA 86, 2012 CarswellSask 668, 399 Sask. R. 241, 552 W.A.C. 241 (Sask. C.A.) — referred to

*Rimmer v. Adshead* (2002), 2002 SKCA 12, 2002 CarswellSask 19, [2002] 4 W.W.R. 119, 24 R.F.L. (5th) 159, 217 Sask. R. 94, 265 W.A.C. 94 (Sask. C.A.) — referred to

*Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2002), 2002 SKCA 119, 2002 CarswellSask 653, 227 Sask. R. 121, 287 W.A.C. 121 (Sask. C.A.) — followed

*Saskatchewan Medical Assn. v. Anstead* (2016), 2016 SKCA 143, 2016 CarswellSask 709 (Sask. C.A.) — followed

*Stadnyk v. Saskatchewan* (2011), 2011 SKCA 30, 2011 CarswellSask 166 (Sask. C.A. [In Chambers]) — referred to

*Stevenson Estate v. Bank of Montreal* (2011), 2011 SKCA 51, 2011 CarswellSask 285, 371 Sask. R. 198, 518 W.A.C. 198 (Sask. C.A.) — followed

*Van de Wiel v. Blaikie* (2005), 2005 NSCA 14, 2005 CarswellNS 23, 230 N.S.R. (2d) 186, 729 A.P.R. 186, 10 C.P.C. (6th) 162 (N.S. C.A. [In Chambers]) — followed

*Verdient Foods Inc. v. United Food and Commercial Workers, Local 1400* (2019), 2019 SKCA 137, 2019 CarswellSask 660 (Sask. C.A.) — considered

*Waldman v. Thomson Reuters Canada Ltd.* (2015), 2015 ONCA 53, 2015 CarswellOnt 857, 127 C.P.R. (4th) 401, 330 O.A.C. 142, 71 C.P.C. (7th) 33 (Ont. C.A.) — followed

**Statutes considered:**

  

*Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1
s. 7(2) — considered

s. 8 — referred to

s. 8(1) — considered

s. 8(2) — considered

**Rules considered:**

*Court of Appeal Rules*, Sask. C.A. Rules
R. 46.1(1)(a) — referred to

R. 71 — referred to

*Queen's Bench Rules*, Sask. Q.B. Rules 2013
Generally — referred to

R. 1-4(3) — considered

R. 4-49 — referred to

R. 4-49(2)(a) — referred to

R. 4-49(8) — referred to

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
Generally — referred to

On application from: 2020 SKQB 31, Regina

***Kalmakoff J.A., In Chambers*:**

**I. INTRODUCTION**

1 Poffenroth Agri Ltd. [PAL] is the plaintiff in a civil action in the Court of Queen's Bench for Saskatchewan. Garret Brown is the defendant. PAL attempted to discontinue its claim against Mr. Brown by filing a notice of discontinuance. A Queen's Bench judge struck the notice of discontinuance (*Poffenroth Agri Ltd. v. Brown*, 2020 SKQB 31 (Sask. Q.B.) [*Chambers Decision*]). PAL filed a notice of appeal from the *Chambers Decision*. Mr. Brown has applied to quash the appeal, taking the position that PAL was not entitled to appeal the *Chambers Decision* without first obtaining leave from this Court to do so.

2 This decision answers the question of whether the order that resulted from the *Chambers Decision* is final or interlocutory in nature and, thereby, determines whether or not PAL was required to seek leave to appeal.

3 For the reasons that follow, I have determined that the *Chambers Decision* is interlocutory in nature, meaning PAL must obtain leave of a judge or a panel of this Court to appeal. In the circumstances, however, I would dismiss Mr. Brown's application and grant PAL leave to appeal *nunc pro tunc*.

**II. BACKGROUND**

4 On May 8, 2019, PAL filed a claim in the Court of Queen's Bench for Saskatchewan in Regina, in which it sought

  

of the rights of the parties to have the matter heard and determined by the court. That is clearly a different factual situation than the present case. I also observe that, in each of these decisions, the analysis regarding the final or interlocutory nature of the decision was perfunctory. Moreover, no consideration appears to have been given to the question of whether the decisions under appeal would have been final or interlocutory if they had broken the opposite way. That is to say, none of the decisions upon which PAL relies appear to have analyzed the question of whether a decision *permitting* the action to continue would have been final or interlocutory. As *Sopinka* notes, a particular order may be final if granted and interlocutory if refused, and vice versa.

36 While the decision in *Burtch* is similar to the case at hand in the sense it involved an appeal from a decision finding a notice of discontinuance to be invalid, it also involved important factual differences that, in my view, make it distinguishable. Namely, it was the plaintiff in *Burtch* who had initially filed the notice of discontinuance and subsequently sought the declaration of invalidity. Furthermore, it does not appear from the decision that the respondent plaintiff had applied to quash the appeal on the basis that the appellant municipality required leave to appeal either aspect of the lower court's order. While the Court of Appeal raised with counsel the question of whether the order permitting the plaintiff to add the municipality as a defendant was interlocutory or final, it does not appear that a similar question was canvassed regarding the nature of the order determining the validity of the notice of discontinuance. As a result, the question whether the latter order was interlocutory or final was not the subject of a detailed analysis.

37 Therefore, notwithstanding the Ontario decisions upon which PAL relies, the principles enunciated in the jurisprudence weigh decisively, in the circumstances of this case, in favour of the conclusion that the *Chambers Decision* resulted in an interlocutory order and not a final order. I say this for three key reasons.

38 First, if allowed to stand, the *Chambers Decision* would not bring the dispute between the parties to an end. The litigation will continue.

39 Second, nothing in the *Chambers Decision* touched on the merits of PAL's claim against Mr. Brown or affected its ability to pursue the claim. In that respect, the *Chambers Decision*, as the Court said in *Van de Wiel*, relates to matters taken for the purpose of advancing the case toward resolution or setting the stage for a determination on the merits.

40 Third, the *Chambers Decision* does not determine a substantive right in a final and binding way. By that, I mean the decision does not irrevocably terminate PAL's right to discontinue the proceedings in the Saskatchewan action. As I read the *Chambers Decision*, there is nothing that precludes PAL from bringing another application under Rule 4-49 for leave to discontinue the action at another stage of the proceedings or if circumstances change. In that respect, the *Chambers Decision* determines only the *procedure* by which PAL can seek to discontinue the action, not its *right* to do so.

41 Accordingly, I conclude that the *Chambers Decision* was interlocutory in nature. Leave to appeal is required. This brings me to the next question.

***B. Should leave to appeal be granted nunc pro tunc?***

42 PAL argues, notwithstanding the fact it launched an appeal from an interlocutory decision without seeking leave, that this Court should now grant leave *nunc pro tunc*. It says its appeal is of sufficient merit and importance to meet the legal test for granting leave and that it has acted reasonably - even if incorrectly - in proceeding in the fashion it did, in light of what it believed to be the state of the law concerning the nature of the order under appeal.

43 Mr. Brown contends that this is not an appropriate case for this Court to take the extraordinary step of granting leave *nunc pro tunc*. He says PAL's appeal is neither meritorious nor important, as it amounts to nothing more than a collateral attack on the correctness of the decision that resulted in the *Alberta Order*.

44 The Court's power to grant leave to appeal *nunc pro tunc* is an extraordinary power that is to be used sparingly, so as not to defeat the general purpose of the leave requirement (*Cowessess* at para 33; *Grant v. Saskatchewan Government Insurance*, 2003 SKCA 17 (Sask. C.A.) at para 5, (2003), 227 Sask. R. 316 (Sask. C.A.)). The first consideration, in that respect, is whether the proposed appeal meets the criteria for granting leave set out in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2002 SKCA 119, 227 Sask. R. 121 (Sask. C.A.) [*Rothmans*]. If it does not meet the *Rothmans* criteria, then

  

leave to appeal should not be granted *nunc pro tunc*. If, however, leave would be granted under *Rothmans*, then the Court looks to such considerations as to whether the appellant acted reasonably in not seeking leave, and whether there has been undue delay occasioned by the failure to seek leave (see, for example, *Cowesses*, at paras 33-34).

45 As *Rothmans* instructs, determining whether to grant leave to appeal involves an exercise of discretion, guided by two key criteria: merit and importance. In order for leave to be granted, the proposed appeal must be of sufficient merit to warrant the attention of the Court of Appeal and of sufficient importance "to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal" (see *Verdient Foods Inc. v. United Food and Commercial Workers, Local 1400*, 2019 SKCA 137 (Sask. C.A.) at para 14 [*Verdient*]). The onus is on the applicant to demonstrate that these criteria, on balance, weigh decisively in favour of leave being granted.

46 As Leurer J.A. noted in *Verdient*, the merit criterion does not generally pose a significant obstacle:

> [15] The bar for testing merit is not set high. In *Rothmans*, Cameron J.A. posited the consideration to be whether the proposed appeal is "prima facie frivolous or vexatious" or "prima facie destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power" (at para 6).

47 The requirement to have regard to the scope of the right of appeal and the nature of the adjudicative framework means that, when determining whether a proposed appeal is "prima facie frivolous or vexatious" or "prima facie destined to fail", the Court must bear in mind the standard of review that would apply if the appeal were to proceed. In this case, the decision from which PAL seeks leave to appeal is a discretionary decision and, as such, the applicable standard of review is deferential. Appellate intervention is permitted only if the Chambers judge erred in principle, disregarded a material matter of fact, failed to act judicially, or rendered a decision that was so plainly wrong as to amount to an injustice (*Rimmer v. Adshead*, 2002 SKCA 12 (Sask. C.A.) at para 58, [2002] 4 W.W.R. 119 (Sask. C.A.); *Fauser Energy Inc. v. Skjerven*, 2019 SKCA 81 (Sask. C.A.) at para 55, [2020] 1 W.W.R. 635 (Sask. C.A.)).

48 The merit criterion also requires the Court to consider whether the proposed appeal is apt to unduly delay the proceedings or add unduly to their cost: *Rothmans* at para 6.

49 In my view, PAL's appeal clears the "*Rothmans* criteria" hurdle relating to merit. Even bearing in mind the applicable deferential standard of review, I cannot conclude that PAL's proposed appeal is prima facie destined to fail, as it raises allegations of error in principle or questions of law that have not been addressed previously by this Court. In addition, there is no basis to conclude that the appeal would unduly delay proceedings or add unduly to their cost, given the nature of the PAL's claim against Mr. Brown and the pace at which the action has progressed. In that respect, I note that PAL has already prepared and filed both its appeal book and its factum.

50 As to the importance criterion, *Rothmans* sets out the following subset of relevant considerations to guide the analysis of whether the proposed appeal is of sufficient importance to warrant determination by the Court of Appeal (at para 6):

> . . .
>
> • does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
>
> • does it raise a new or controversial or unusual issue of practice?
>
> • does it raise a new or uncertain or unsettled point of law?
>
> • does it transcend the particular in its implications?

51 In my view, consideration of these factors also weighs decisively in favour of granting leave to appeal in this case.

  

# TAB 8

2012 SKCA 101
Saskatchewan Court of Appeal [In Chambers]

Royal Bank v. Paulsen & Son Excavating Ltd.

2012 CarswellSask 741, 2012 SKCA 101, 225 A.C.W.S. (3d) 587, 399 Sask. R. 283, 552 W.A.C. 283

# Paulsen & Son Excavating Ltd., Appellant and Royal Bank of Canada, Respondent

Richards J.A.

Heard: October 15, 2012
Judgment: October 31, 2012
Docket: CACV2300

Proceedings: refusing leave to appeal *Royal Bank v. Paulsen & Son Excavating Ltd.* (2012), 2012 SKQB 267, 2012 CarswellSask 475, 92 C.B.R. (5th) 284 (Sask. Q.B.); additional reasons to *Royal Bank v. Paulsen & Son Excavating Ltd.* (2012), 2012 SKQB 8, 2012 CarswellSask 29, 75 C.B.R. (5th) 264, 388 Sask. R. 251 (Sask. Q.B.)

Counsel: Peter V. Abrametz, for Appellant
Mike Russell, for Respondent

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

**Related Abridgment Classifications**

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.C Leave by judge

**Headnote**

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Bank was secured creditor of P Ltd. — Order appointing M Ltd. as receiver of P Ltd.'s assets was made on bank's application and was later amended to permit M Ltd. to manage P Ltd.'s business — M Ltd. was discharged and in discharge order its accounts and fees were approved and confirmed — Taxation hearing was led and judge held that fees and disbursements of both M Ltd. and its counsel were fair and reasonable, passing account — P Ltd. sought to appeal taxation decision — P Ltd. originally proceeded on basis that it had right of appeal and because it had missed applicable appeal period, it sought extension of time in which to file its notice of appeal — Question arose as to whether P Ltd. needed leave to appeal and proceedings were adjourned — P Ltd. filed application for leave to appeal — Applications for leave to appeal and for extending time for filing notice of appeal were dismissed — All aspects of M Ltd.'s account were considered and reviewed with some care by Chambers judge who had considerable experience in this field — No basis was seen on which Court might be convinced to take issue with her assessment of situation — Proposed appeal did not raise issues of sort which warranted attention of Court — Disposition of case would ultimately turn very much on its own particular facts — P Ltd. had points that it proposed to make on appeal but they were not meritorious enough to permit conclusion that P Ltd. had arguable case within meaning of applicable case law.

**Table of Authorities**

**Cases considered by *Richards J.A.*:**

*Bank of Nova Scotia v. Saskatoon Salvage Co. (1954) Ltd.* (1983), 51 C.B.R. (N.S.) 167, 29 Sask. R. 285, 1983 CarswellSask 69 (Sask. C.A.) — followed

*Dutchak v. Dutchak* (2009), 2009 SKCA 89, 2009 CarswellSask 502, 464 W.A.C. 46, 337 Sask. R. 46 (Sask. C.A. [In Chambers]) — followed

*Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201, 198 O.A.C. 27 (Ont. C.A. [In Chambers]) — considered

*Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2002), 2002 CarswellSask 653, 227 Sask. R. 121, 287 W.A.C. 121, 2002 SKCA 119 (Sask. C.A.) — followed

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
Generally — referred to

s. 193 — considered

APPLICATIONS for leave to appeal and for extension of time in which to file notice of appeal.

***Richards J.A.*:**

**I. Introduction**

1 Paulsen & Son Excavating Ltd. (”Paulsen”) takes issue with the taxation of an account rendered by a receiver in proceedings pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “*Act*”).

**II. Background**

2 The Royal Bank was a secured creditor of Paulsen. An order appointing MNP Ltd. as receiver of Paulsen’s assets was made on the Bank’s application. The order was later amended to permit MNP to manage Paulsen’s business.

3 MNP was ultimately discharged. In the discharge order, the Court of Queen’s Bench approved and confirmed its accounts and fees, including its solicitor’s fees. This was done subject to Paulsen’s right to apply for taxation.

4 Paulsen then sought a taxation. It questioned the work of MNP and its legal counsel in various ways.

5 A taxation hearing was held. The Queen’s Bench judge addressed and dealt with each of the issues raised by Paulsen. She held that the fees and disbursements of both MNP and its counsel were fair and reasonable and, therefore, she passed the account.

6 Paulsen now seeks to appeal the taxation decision.

**III. Analysis**

7 This matter comes before me against the background of a somewhat unusual set of circumstances. Paulsen originally proceeded on the basi s that it had a right of appeal and, because it had missed the applicable appeal period, it sought an extension of the time in which to file its notice of appeal. When that matter came before one of my colleagues in Chambers, a question arose as to whether Paulsen could, in fact, appeal as of right or whether it needed leave to appeal. The proceedings were adjourned and Paulsen then filed an application for leave to appeal. As a result, I am faced with both an application for leave to appeal and an application to extend the time for filing a notice of appeal.

8 There is obviously an issue here about whether Paulsen can proceed on both the "leave to appeal" track and the "right to appeal" track at the same time. Nonetheless, in view of my conclusions with respect to the substantive merits of the two applications before me, I have chosen not to address that point or to comment on whether Paulsen does or does not have a right of appeal. (Accordingly, this decision should not be read as being either an endorsement or a disapproval of the two track approach taken by Paulsen. I have merely decided not to deal with that issue.) Simply put, and as explained below, if Paulsen needs leave to appeal I would deny leave and, if Paulsen has a right of appeal but needs to extend the time for filing a notice of appeal, I would deny the application for the extension.

9 Paulsen's rights of appeal are prescribed by s. 193 of the *Act*. It reads as follows:

> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.
>
> [Emphasis added]

10 A notice of appeal must be filed within 10 days after the decision being appealed from was rendered.

11 Having canvassed that bit of background, let me begin with the application for leave to appeal. Counsel suggested that my decision in this regard should be made with reference to the considerations explored in cases such as *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) which deal specifically with granting leave to appeal in bankruptcy matters.

12 I prefer, however, to proceed on the basis of the well -known and frequently endorsed principles laid out by Cameron J.A. in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2002 SKCA 119, 227 Sask. R. 121 (Sask. C.A.) at para. 6. It would not be useful, in my view, to set off on the path of establishing special tests for granting leave to appeal for distinct subject matters or practice areas. The general approach formulated by Cameron J.A. is broad enough to capture all of the relevant considerations both in this case and in others.

13 Accordingly, the issue of whether leave to appeal should be granted in the matter at hand must be resolved with reference to (a) whether the proposed appeal has sufficient merit to warrant the attention of the Court, and (b) whether the proposed appeal is of sufficient importance to proceedings before the Court, or the field of practice or the state of the law, or to the administration of justice generally to warrant determination by the Court.

14 I turn first to the merits of the proposed appeal. This, I think, is a problem for Paulsen. It points to three alleged defects in the decision of the Chambers judge: (a) MNP's account is so large as to be unreasonable, (b) MNP billed for time expended on the file before the receivership order was formally in place, and (c) MNP billed for some work done during a period when matters were stayed because of an appeal to this Court.

  

# TAB 9

2016 SKCA 57
Saskatchewan Court of Appeal

Radiology Associates of Regina Medical PC Inc. v. Sun Country Regional Health Authority

2016 CarswellSask 248, 2016 SKCA 57, [2016] 10 W.W.R. 662, 266 A.C.W.S. (3d) 285, 480 Sask. R. 1, 669 W.A.C. 1

# Radiology Associates of Regina Medical PC Inc., Appellant/Respondent (Plaintiff) and Sun Country Regional Health Authority, Respondent/Applicant (Defendant)

Jackson, Caldwell, Whitmore JJ.A.

Heard: March 10, 2016
Judgment: April 21, 2016
Docket: CACV2797

Proceedings: quashing appeal *Radiology Associates of Regina Medical PC Inc. v. Sun Country Regional Health Authority* (2015), 2015 CarswellSask 672, 2015 SKQB 330, R.W. Elson J. (Sask. Q.B.)

Counsel: David McWhinnie, Martin Sheard, for Appellant / Respondent
Deron Kuski, Q.C., Milad Alishahi, for Respondent / Applicant

Subject: Civil Practice and Procedure; Contracts

**Related Abridgment Classifications**

Civil practice and procedure
XXIII Practice on appeal
XXIII.17 Application to quash appeal
XXIII.17.b Miscellaneous

Civil practice and procedure
XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.b Successful party deprived of costs
XXIV.6.b.ii Grounds
XXIV.6.b.ii.G Procedural defects

**Headnote**

Civil practice and procedure --- Practice on appeal — Application to quash appeal — Miscellaneous
Plaintiff radiologists had contract to provide services to defendant hospital — Hospital believed that contract did not cover CT scans, and searched for another supplier to provide these — Radiologists claimed that CT scans were necessary part of contract — Radiologists moved for injunction to prevent tendering process by hospital — Motion was dismissed — Motion judge found that damages could remedy any breach of contract found — Radiologists appealed from judgment of motion judge — Hospital claimed that appeal was moot as hospital entered into contract with supplier for CT scans, after motion judgment — Hospital applied to quash appeal on this basis — Application granted — Appeal not decided — Hospital acted within rights to seek bid, after injunction was dismissed — In any event, appeal court could not give radiologists remedy that was sought — Appeal was properly considered moot — Granting declaration in face of mootness could prejudice trial decision — Court could not take on appeal in this form.

 

Civil practice and procedure --- Costs — Effect of success of proceedings — Successful party deprived of costs — Grounds — Procedural defects

Plaintiff radiologists had contract to provide services to defendant hospital — Hospital believed that contract did not cover CT scans, and searched for another supplier to provide these — Radiologists claimed that CT scans were necessary part of contract — Radiologists moved for injunction to prevent tendering process by hospital — Motion was dismissed — Motion judge found that damages could remedy any breach of contract found — Radiologists appealed from judgment of motion judge — Hospital claimed that appeal was moot as hospital entered into contract with supplier for CT scans, after motion judgment — Hospital applied to quash appeal on this basis — Application granted — Appeal not decided — Hospital acted within rights to seek bid, after injunction was dismissed — In any event, appeal court could not give radiologists remedy that was sought — Appeal was properly considered moot — Granting declaration in face of mootness could prejudice trial decision — Court could not take on appeal in this form — Hospital did not bring application to quash appeal until late in process — Radiologists had to file appeal book and factum as result — Notwithstanding success of hospital on application, it was appropriate to award costs to hospital on lowest available scale for appeal — Application to quash was granted with no order to costs.

**Table of Authorities**

**Cases considered by *Jackson J.A.*:**

*American Cyanamid Co. v. Ethicon Ltd.* (1975), [1975] A.C. 396, [1975] 1 All E.R. 504, [1975] F.S.R. 101, [1975] R.P.C. 531, 119 Sol. Jo. 136, [1975] 2 W.L.R. 316, [1975] UKHL 1 (U.K. H.L.) — considered

*Borowski v. Canada (Attorney General)* (1989), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232, 1989 CarswellSask 241, 1989 CarswellSask 465 (S.C.C.) — followed

*Burnaby (City) v. Trans Mountain Pipeline ULC* (2015), 2015 BCCA 78, 2015 CarswellBC 515, 34 M.P.L.R. (5th) 200, 370 B.C.A.C. 51, 635 W.A.C. 51 (B.C. C.A.) — considered

*Canadian Pioneer Petroleums Inc. v. Federal Deposit Insurance Corp.* (1984), [1984] 3 W.W.R. 765, 34 Sask. R. 51, 1984 CarswellSask 130 (Sask. C.A.) — referred to

*Carty v. Levy* (2015), 2015 ONSC 2200, 2015 CarswellOnt 4993 (Ont. S.C.J.) — considered

*Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2d) 142, 31 B.C.A.C. 161, 50 W.A.C. 161, 1993 CarswellBC 172 (B.C. C.A.) — considered

*Horton Bay Holdings Ltd. v. Wilks* (1991), 3 C.P.C. (3d) 112, 8 B.C.A.C. 68, 17 W.A.C. 68, 1991 CarswellBC 584 (B.C. C.A.) — considered

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*Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832* (1987), 38 D.L.R. (4th) 321, 73 N.R. 341, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* [1987] 3 W.W.R. 1, 46 Man. R. (2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, [1987] D.L.Q. 235, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 272 (S.C.C.) — followed

*Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership* (2011), 2011 SKCA 120, 2011 CarswellSask 678, [2012] 2 W.W.R. 659, 341 D.L.R. (4th) 407, 377 Sask. R. 78, 528 W.A.C. 78 (Sask. C.A.) — considered

*R. v. Morgentaler* (1988), [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, 26 O.A.C. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 31

  

C.R.R. 1, 82 N.R. 1, 63 O.R. (2d) 281 (note), 1988 CarswellOnt 954, 1988 CarswellOnt 45 (S.C.C.) — considered

*R. v. Smith* (2004), 2004 SCC 14, 2004 CarswellNfld 47, 2004 CarswellNfld 48, 17 C.R. (6th) 203, 181 C.C.C. (3d) 225, 235 D.L.R. (4th) 587, 317 N.R. 168, 235 Nfld. & P.E.I.R. 236, 699 A.P.R. 236, [2004] 1 S.C.R. 385 (S.C.C.) — considered

*RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 164 N.R. 1, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

*Ruby Trading S.A. v. Parsons* (2000), 2000 CarswellNat 2798, 194 D.L.R. (4th) 303, 264 N.R. 79, [2001] 2 F.C. 174, 2000 CarswellNat 3455 (Fed. C.A.) — referred to

*Sparling v. Northwest Digital Ltd.* (1991), 47 C.P.C. (2d) 124, 1991 CarswellBC 594 (B.C. C.A.) — considered

*Wahgoshig First Nation v. Ontario* (2013), 2013 ONSC 632, 2013 CarswellOnt 2909, 74 C.E.L.R. (3d) 8 (Ont. Div. Ct.) — considered

*Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking Ltd.* (2015), 2015 YKCA 5, 2015 CarswellYukon 9, 37 C.L.R. (4th) 177, 368 B.C.A.C. 26, 633 W.A.C. 26 (Y.T. C.A.) — considered

*Yukon Teachers' Assn. v. Yukon* (2011), 2011 YKCA 4, 2011 CarswellYukon 18, 307 B.C.A.C. 3, 519 W.A.C. 3 (Y.T. C.A.) — considered

**Statutes considered:**

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44
Generally — referred to

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 7 — considered

s. 15 — considered

*Criminal Code*, R.S.C. 1970, c. C-34
s. 251(4) — considered

s. 251(5) — considered

s. 251(6) — considered

APPLICATION by hospital to quash appeal of radiologists from judgment reported at *Radiology Associates of Regina Medical PC Inc. v. Sun Country Regional Health Authority* (2015), 2015 SKQB 330, 2015 CarswellSask 672 (Sask. Q.B.), dismissing radiologists' motion for injunction.

***Jackson J.A.*:**

**I. Introduction**

1 The Court has before it two matters. The first is an appeal from the decision in *Radiology Associates of Regina Medical PC Inc. v. Sun Country Regional Health Authority*, 2015 SKQB 330 (Sask. Q.B.). The second is an application to quash the appeal on the basis that it is moot.

  

2 The factual context and evidence are well laid out in the reasons of the learned Chambers judge such that only a summary is necessary at this point. The underlying dispute is with respect to the proper interpretation of a contract that currently binds Radiology Associates of Regina Medical PC Inc. to provide "diagnostic radiological services" to Sun Country Regional Health Authority. It is a peculiarity of the dispute that neither Radiology nor Sun Country wants to bring the contract between them to an end. Radiology wants to provide diagnostic radiological services to Sun Country and Sun Country wants Radiology to provide those services.

3 Sun Country, however, believes that its contract with Radiology *does not extend* to computed tomography services (known as CT scans or services) and, based on this belief, wanted to enter into a separate contract with another supplier for the provision of those services at its facility at St. Joseph's Hospital in Estevan, Saskatchewan. Radiology, on the other hand, says that its contract *does extend* to such services and that it is entitled — and indeed is professionally required — to perform those services.

4 Seeking a way out of this impasse, Radiology requested that the Court of Queen's Bench grant it an interlocutory injunction prohibiting Sun Country from continuing to seek or accept bids or quotations for the provision of CT services at St. Joseph's Hospital. Radiology contended that Sun Country's actions in requesting bids or quotations constitute a breach of its existing contract for the provision of radiological services.

5 In its notice of motion, Radiology requested an injunction in these terms:

> An interim and interlocutory injunction enjoining and restraining the respondent from:
>
> a. seeking, or continuing to seek, bids or quotations for the provision of Radiologist services in Sun Country as part of a request for quotations or any other tendering process;
>
> b. accepting or purporting to accept any bid or quotation for the provision of Radiologist services in Sun Country as part of any formal Request for Quotations or any other tendering process; and
>
> c. breaching its current contract with the applicant for Radiologist services until the trial of this proceeding or further order of this Court.

6 Sun Country agreed to forego proceeding with its tendering process until Radiology had the opportunity to seek injunctive relief.

7 The injunction application was heard by the Chambers judge on September 22, 2015, and the Chambers judge reserved his decision, which he released on October 21, 2015. He refused interlocutory injunctive relief.

8 After referring to *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (U.K. H.L.); *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) [*Metropolitan Stores*]; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) [*RJR-MacDonald*]; and *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120, [2012] 2 W.W.R. 659 (Sask. C.A.) [*Mosaic*], the Chambers judge made these findings and reached these conclusions:

> (a) Radiology's case "for breach of contract is certainly arguable, and goes beyond the threshold of a serious issue to be tried" (para 2);
>
> (b) an award of damages is adequate on a *prima facie* basis (para 50);
>
> (c) his preliminary assessment of the adequacy of damages as a remedy was not displaced by Radiology's specific arguments relating to its operations in Estevan or elsewhere (paras 52 to 68); and
>
> (d) given that Radiology had failed to establish a meaningful risk of irreparable harm, he did not consider it

  

necessary to address the balance of convenience (para 69).

9 Radiology appeals. Its principal argument is that the Chambers judge misinterpreted *Mosaic*. Radiology submits that *Mosaic* stands for two propositions relevant to this appeal: (i) the threshold for finding irreparable harm is low; and (ii) all three aspects of the tripartite test established by *RJR-MacDonald* and *Metropolitan Stores* must be considered, whether or not irreparable harm has been established. Radiology's second argument is that the Chambers judge erred in finding that no irreparable harm would be suffered.

10 Sun Country resists these arguments as the respondent to the appeal, but, in addition, and as a preliminary point, asks this Court to quash Radiology's appeal on the basis that it is moot. Because the appeal had already been perfected, the application to quash and the appeal were argued on the same day. Decisions with respect to both matters were reserved.

**II. Application to Quash the Appeal on the Basis of Mootness**

11 In support of its argument that the appeal is moot, Sun Country filed an affidavit of its President and Chief Executive Officer, Marga Cugnet, who attests that on October 22, 2015, Sun Country awarded a contract for CT services to Mayfair Diagnostics Regina. The parties then negotiated the terms of the contract, which led to its execution on January 29, 2016. The contract covers all CT services at St. Joseph's Hospital for a three-year period. The CT equipment, according to the affidavit of Ms. Cugnet, was intended to be put into operation under the new contract on or about February 22, 2016.

12 In light of this, Sun Country submits there is nothing left of the appeal as there is nothing left to enjoin. According to this argument, the application for an injunction seeks to prevent exactly what Sun Country has accomplished since the decision of the Chambers judge: (i) seeking, or continuing to seek, bids or quotations for the provision of radiologist services as part of a request for quotations; and (ii) accepting or purporting to accept any bid or quotation for the provision of radiologist services as part of any formal request for quotations. Sun Country acknowledges that Radiology also sought to enjoin it from breaching its current contract until the trial of this matter or further order of the court, but submits that this Court cannot give effect to this argument because to do so now — in these circumstances — would decide the very issue that must be decided at trial.

13 In addition to arguing that the appeal is moot, counsel for Sun Country asserts that this Court should not exercise its discretion to decide the appeal as the factors suggested by *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.) [*Borowski*], point away from hearing the appeal. Counsel for Radiology argues that if the Court finds the appeal is moot, it should go on to decide the appeal on the basis that a decision in its favour would be of assistance to it in its continued dealings with Sun Country.

***A. Is the appeal moot?***

14 Sun Country cites a series of decisions in support of its position that the appeal is moot:
(a) *Borowski*

Mr. Borowski attacked the validity of s. 251(4), (5) and (6) of the *Criminal Code*, RSC 1985, c C-46, relating to abortion on the ground that they contravened the life and security and the equality rights of the foetus, as a person, protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. All of s. 251, however, had been struck down by the Supreme Court of Canada before Mr. Borowski's appeal to that Court could be heard: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.) [*Morgentaler*]. The Supreme Court of Canada held that the appeal was moot and the Court should not exercise its discretion to hear it.

(b) *Sparling v. Northwest Digital Ltd.* (1991), 47 C.P.C. (2d) 124 (B.C. C.A.) (BCCA) [*Sparling*] Under the *Canada Business Corporations Act*, RSC 1985, c 44, the Director applied on October 27, 1990, for an order preventing certain shares from being voted at a meeting of the corporate respondent scheduled to take place on October 29, 1990. The application was heard and rejected on October 28, 1990. The shares were then voted on October 29, 1990. On appeal,

  

the Court declared the matter moot because the only relief sought was to prevent the voting of the shares at the October 29th meeting.

(c) *Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 31 B.C.A.C. 161 (B.C. C.A.) [*Galcor*]

A judge of the Supreme Court of British Columbia had ordered that Galcor was authorized to distribute to the limited partners all of the assets of the partnership, notwithstanding the outstanding claim of the plaintiffs. The plaintiffs applied to another judge of the Supreme Court to stay that order, but were refused. The plaintiffs then sought an injunction to prevent the order from being executed, which was refused by a third judge of the Supreme Court. The funds were distributed before the appeal could be heard some two years later. On appeal, the Court declined to hear the matter as the "complete answer [was] that what was done was with the authority and the imprimatur of the court."

(d) *Yukon Teachers' Assn. v. Yukon*, 2011 YKCA 4, 307 B.C.A.C. 3 (Y.T. C.A.) [*Yukon Teachers*]

A union successfully obtained an injunction preventing the Government of Yukon from dismissing an employee, but the employee was reinstated before the appeal could be heard. On the union's application, the appeal was declared moot.

(e) *Wahgoshig First Nation v. Ontario*, 2013 ONSC 632, 74 C.E.L.R. (3d) 8 (Ont. Div. Ct.) [*Wahgoshig FN*]

A company began drilling before consulting with the plaintiff First Nation. The First Nation obtained an interlocutory injunction enjoining the company from conducting any further exploration on lands without consultation and accommodation. The company and the Government of Ontario appealed that decision. Before the appeal could be heard, new legislation was proclaimed that had the same effect as the decision under appeal. The Divisional Court dismissed the appeal on the basis that it was moot and declined to hear the appeal.

(f) *Carty v. Levy*, 2015 ONSC 2200 (Ont. S.C.J.) [*Carty*]

A patient who was subject to a community treatment order applied to quash it, but the order expired before her application could be heard. The Court declared the matter moot.

(g) *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCCA 78, 370 B.C.A.C. 51 (B.C. C.A.) [*Burnaby*]

In parallel litigation in the superior courts in British Columbia and before the National Energy Board and the Federal Court, the City of Burnaby attempted to prevent a pipeline company from accessing a conservation area for testing purposes. The City was unsuccessful in both forums. The Chambers judge in the Supreme Court of British Columbia dismissed the application for an injunction on the basis that the dispute between Burnaby's bylaws and the National Energy Board's power to grant access for investigating a pipeline proposal was already at issue before the National Energy Board. The City of Burnaby was a party to the proceedings before the National Energy Board, and there was therefore no serious issue to be tried in the Supreme Court. By the time leave to appeal that decision had been sought in the Court of Appeal, the National Energy Board had ruled that, on the doctrines of paramountcy and interjurisdictional immunity, Burnaby's bylaws were inoperative for the purposes of interfering with the National Energy Board's power to grant access to the conservation area. With respect to the Supreme Court's decision, the City sought leave to appeal, which was denied. On an application to vary the order denying leave to appeal, the British Columbia Court of Appeal noted that the Federal Court of Appeal had dismissed an application for leave to appeal the National Energy Board decision and the testing had already taken place in accordance with the order of the National Energy Board.

15 In *Borowski*, the Court declared when the doctrine of mootness applies and when a Court will decline to decide a case on the basis of mootness:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.
>
> (Emphasis added, at 353)

  

*Borowski* also established the basic framework for considering when a court should decline to hear a matter because of the doctrine of mootness:

> First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

16 Applying *Borowski*, and the other authorities that Sun Country cites, it is clear any decision this Court might render on the merits "will not have the effect of resolving some controversy which affects the rights of the parties." The factual underpinning of the case has fundamentally changed and the Court cannot grant the remedy that Radiology seeks, such that the matter is now moot. Other authorities lead to the same conclusion.

17 In *Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking Ltd.*, 2015 YKCA 5, 368 B.C.A.C. 26 (Y.T. C.A.) [*Sidhu Trucking*], the Yukon Government asked the Supreme Court of Yukon to declare which of two competing bids had been submitted in time. The Court declared that CMF Construction Ltd. was the winning bidder. The other bidder, P.S. Sidhu Trucking Ltd., appealed and also brought an action against the government for breach of contract and negligent misrepresentation. On appeal from the declaratory judgment, the Court held that the matter was moot. Chiasson J.A., for the Court stated, "the *lis* before the court, whether the appellant's bid was timely, became moot once the contract was awarded to CMF" (para 24).

18 Similarly, in the within appeal, the *lis* before the Court, whether the injunction should be granted or not, became moot when Mayfair Diagnostics Regina's bid was accepted on October 22, 2015, and, if there were any doubt as whether it was moot on that date, all doubts were removed when the contract was executed on January 29, 2016: see also *Ruby Trading S.A. v. Parsons* (2000), 194 D.L.R. (4th) 303 (Fed. C.A.); and *IBM Canada Ltd. v. Almond*, 2015 ABCA 379, 26 Alta. L.R. (6th) 6 (Alta. C.A.).

19 If the Chambers judge made an error, it would be as a result of his failure to consider the third part of the test in *RJR-MacDonald* and *Metropolitan Stores* — either as a result of misreading the summary in *Mosaic* and not considering the overall tenor of the judgment or setting the bar too high with respect to what constitutes irreparable harm. Regardless, an essential part of weighing the balance of convenience is a consideration of the status quo. The status quo, however, has now changed such that neither this Court nor the Court of Queen's Bench can give Radiology the remedy it seeks. In short, the appeal is moot.

***B. Should this Court exercise its discretion to decide the appeal, notwithstanding it is moot?***

20 I also agree with Sun Country that this is not one of those cases where the Court should decide the appeal, even though the Court has reviewed the written submissions and heard oral argument. As this is the major thrust of Radiology's argument, I will explain this conclusion more fully.

21 In *Borowski*, the Supreme Court examined the basis upon which a court should exercise its discretion either to hear or to decline to hear a moot appeal. While the Supreme Court indicated it could not provide more than a "cogent generalization" in order not to "unduly fetter the court's discretion in future cases" (at 358), it nonetheless made it clear the discretion should be "judicially exercised with due regard for established principles." Those principles are frequently simplified to the following: (i) the adversarial nature of the case; (ii) judicial economy; and (iii) an appreciation of the proper role of the judiciary (see Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) at 108 [*Boundaries of Judicial Review*]). In considering these three factors, Sopinka J. stressed that the process is not mechanical: "the presence of one or two of the factors may be overborne by the absence of the third, and vice versa" (*Borowski* at 345). It is also clear that the lines between the factors are not distinct: some aspects of judicial economy also find voice in a consideration of the proper role of the judiciary (see Patrick Macklem and Eric Gertner, "*Re Skapinker* and the Mootness Doctrine" (1984), 6 SCLR 369 at 373).

22 Since *Borowski*, and in *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385 (S.C.C.), the Supreme Court has added a fourth category or factor that is referred to as "the interests of justice": see Lorne Sossin, "Mootness, Ripeness and the Evolution of

  

Justiciability" in Todd L. Archibald and Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2012* (Toronto: Carswell, 2012) 67 at 82-84 ["Mootness"]. In *R. v. Smith*, the Supreme Court considered whether to exercise its jurisdiction to hear an appeal from conviction of a deceased individual. Nonetheless, the considerations in that case have been applied in other spheres (see "Mootness"). In this particular appeal, the *R. v. Smith* analysis adds no more to the principles articulated in *Borowski*, and need not be considered further.

23 Of the three *Borowski* factors, it is useful to consider and dispense with any concern about the adversarial nature of the case. In *Borowski*, the Court stated, "the requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome" but "this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail" (at 358-359). The collateral consequences of an order can provide "the necessary adversarial context" (at 360) to enable the Court to hear the matter either through the presence of an intervenor or otherwise. Applying this particular principle to the situation in *Borowski*, Sopinka J. said he had "little or no concern about the absence of an adversarial relationship" because "the appeal was fully argued with as much zeal and dedication on both sides as if the matter were not moot" (at 363). The same can be said in this appeal. The appeal was argued fully before us.

24 The second broad factor, on which the mootness doctrine is based, as discussed in *Borowski*, is the need to conserve judicial resources. Sopinka J. outlined three circumstances where hearing a moot appeal might be warranted, notwithstanding issues of judicial economy: (i) where the case is "of a recurring nature but brief duration" (at 360); (ii) where the case raises an issue of public importance of which a resolution is in the public interest with respect to which the court weighs "the economics of judicial involvement" against "the social cost of continued uncertainty in the law" (at 361); and (iii) whether deciding the appeal would "have practical side effects on the rights of the parties" (at 364): also see "Mootness" at 76.

25 Considering the second factor, the Court has no concerns about the waste of judicial resources. By the time Sun Country filed its application to quash the appeal for mootness, Radiology's appeal had been perfected and was ready for hearing. In light of this, and as a matter of judicial economy, the Court made the determination that it would be of use to hear the appeal at the same time as it heard the application to quash to avoid calling the parties back and preparing for the same appeal twice.

26 The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The concern is that "[p]ronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch" (*Borowski* at 362). As an aspect of this rationale, Sopinka J. stated, "the Court should be sensitive to the extent that it may be departing from its traditional role" (at 363). He also explained that one element of this third factor is "the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention" (at 365).

27 The third rationale does not raise concerns that would preclude this Court from intervening. The Court is not being asked to depart from its traditional function or to tread on the legislative sphere.

28 Thus, while none of the specific *Borowski* factors impede the Court from deciding the appeal, an aspect of what Sopinka J. said in relation to the third factor is pertinent to this appeal: the Court must demonstrate sensitivity to the effectiveness or efficacy of judicial intervention.

29 In this appeal, it is clear that, if this Court found the Chambers judge had erred, the Court could not give Radiology the remedy it seeks: it cannot enjoin Sun Country's actions because they have already been performed. If the Court were disposed to decide the appeal, the only decision this Court could render is to say whether an injunction *should have been* granted. Radiology asks this Court, in essence, to grant a declaration in circumstances where no declaration would be granted in first instance. Further, granting such a declaration would have no readily apparent meaningful consequences for either side. It also could have the unintended effect of prejudicing the eventual outcome at trial.

30 In *Sidhu Trucking*, the Yukon Court of Appeal was asked to consider the correctness of a declaration at first instance. After concluding the matter was moot, as the declaratory opinion had already been acted upon, the Court commented upon the advisability of having granted a declaration in the first place. The Court in *Sidhu Trucking* referred to Chief Justice McEachern's concurring opinion in *Horton Bay Holdings Ltd. v. Wilks* (1991), 8 B.C.A.C. 68 (B.C. C.A.):

  

> [24] ... I think mischief could easily result from actions just for declarations. I would expect no declaration would be made unless the Court is satisfied that the declaration will have some practical value.

31 Similarly in this appeal, a declaration that the injunction should have been granted — if the Court had found error — will have no practical value and has much potential for mischief. Radiology clearly has a stake in the appeal. It wants this Court to decide the appeal in the expectation that it will be allowed, with the Court saying that the Chambers judge erred by not granting the injunction. Even though the Court cannot enjoin Sun Country from doing what it has already done, Radiology submits such a disposition would be of use to it in the event that Sun Country decides to carve out other parts of "diagnostic radiological services." In our view, the Court cannot take on this appeal on such a basis.

32 Having regard for these considerations, the Court declines to exercise its discretion to decide the appeal. In *Borowski*, in the absence of an application to quash, the Court dismissed the appeal on the basis of mootness (at 367). In this appeal, the respondent applied for an order quashing the appeal. In these circumstances, it would seem the appropriate order is to quash the appeal, which means no order need be made in relation to the appeal itself.

**III. Costs**

33 That leaves for consideration the question of costs. Costs orders are required for the two appearances in the Court of Appeal Chambers, which occurred prior to the appeal, plus the application to quash the appeal and for the appeal proper.

***A. Costs with respect to the pre-appeal Chambers motions***

34 The first Chambers date occurred on February 22, 2016, for the purposes of case managing the appeal and to hear the two applications that were before the Court: notably, Radiology's application to maintain the status quo, preventing Sun Country from proceeding with its contract with Mayfair Diagnostics Regina pending the appeal, and, secondly, Sun Country's application to quash the appeal. As the Chambers judge, I fixed February 24, 2016, as the date for hearing Radiology's application to maintain the status quo, and March 10, 2016, as the date for hearing the application to quash the appeal and the appeal. The costs from February 22, 2016, were left to the panel hearing the appeal.

35 On February 24, 2016, I heard Radiology's application to maintain the status quo and I reserved my decision until February 29, 2016. The affidavit of Ms. Cugnet was before me as the Chambers judge. After weighing the potential prejudice to the applicant of granting the order requested against the potential prejudice to the respondent, I concluded the relief should be denied. I left the question of costs to the panel hearing the appeal.

36 The determination of costs with respect to the above matters is relatively straightforward. The first Chambers hearing was in the nature of a case management hearing where both parties sought the directions of the Court. As such, each side should bear its own costs.

37 The second Chambers hearing resulted in an order in the favour of Sun Country. In light of the outcome of the application to quash, no apparent reason exists why Sun Country should not receive its costs of that application in the usual way. It is not entirely clear on what basis the Court could maintain a status quo that no longer existed — assuming that a Chambers judge would have the authority to grant an injunction that had been refused in the decision under appeal.

***B. Costs with respect to the application to quash and the appeal***

38 The decisions that Sun Country cited in support of its application to quash fall into two broad categories: cases where the legal underpinnings of the dispute have changed and cases where the factual basis has changed: these categories are discussed in *Boundaries of Judicial Review* at 106-108. *Borowski* and *Wahgoshig FN* are examples of the first type of case. All of the rest fall into the second category: the facts changed between the time of the application for an injunction and when the matter could be heard. The appeal before this Court on behalf of Radiology falls into this second category, but there is a difference.

  

39 In none of the decisions cited to us did the respondent on the application for the injunction — by its own actions — render the appeal moot. Either the respondent had the authority of the Court or a tribunal to do the act sought to be enjoined (*Galcor* or *Burnaby*) or the effluxion of time rendered the matter moot (*Carty*) or a member of the executive intervened to bring about the result sought by the applicant (*Yukon Teachers*).

40 *Sparling* comes closest to the within appeal in that the respondent corporation decided to proceed with a vote notwithstanding the Director's application, but, in that case, the date for the voting of the shares had been fixed before the application for an injunction had been filed. In this appeal, Sun Country chose to proceed with its tendering process. Granted, Sun Country had contemplated doing so before the application for the injunction had been made, but no external force compelled it to move forward when it did.

41 An appeal does not operate so as to bring about an injunction when none has been granted: see *Canadian Pioneer Petroleums Inc. v. Federal Deposit Insurance Corp.* (1984), 34 Sask. R. 51 (Sask. C.A.). Nor can an appeal act as a de facto injunction while an appellant takes its time to bring the matter on for a hearing before the Court of Appeal; however, in this appeal, the appellant acted with exceptional diligence.

42 The following chronology charts the progression of the appeal:

(a) October 21, 2015 — decision under appeal issued;

(b) November 5, 2015 — notice of appeal filed;

(c) December 3, 2015 — appeal book and factum of Radiology filed;

(d) January 8, 2016 — application to this Court for interim injunctive relief to preserve the status quo pending the determination of the instant appeal signed (but not filed until February 10, 2016);

(e) January 19, 2016 — email correspondence with the Registrar where counsel for Radiology indicated his desire to proceed with the application for interim injunctive relief as soon as possible and counsel for Sun Country wished to proceed with an application to quash for mootness as soon as possible;

(f) February 12, 2016 — notice of motion to quash appeal for mootness and affidavit of Ms. Cugnet filed;

(g) February 12, 2016 — Sun Country factum filed;

(h) February 22, 2016 — special date for hearing of the appeal fixed for March 10, 2016;

(i) February 24, 2016 — application to maintain the status quo heard;

(j) February 29, 2016 — fiat denying application to maintain the status quo; and

(k) March 10, 2016 — appeal heard.

43 Running parallel to the appeal process is Sun Country's progress with respect to its dealings with Mayfair Diagnostics Regina. The affidavit of Ms. Cugnet describes Sun Country and Mayfair Diagnostics Regina's contractual dealings between the beginning of October and the commencement of Mayfair Diagnostics Regina's operations under its new contract on February 22, 2016:

> 16. All bids were opened to confirm compliance [with respect to the Request for Quotations] in early October. After careful consideration and examination of the submissions, SCRHA confirmed on October 22, 2015 that the successful proponent was Mayfair Diagnostics Regina ("Mayfair") and commenced negotiations with Mayfair to conclude a formal contract. The award pursuant to the RFQ had been made and the formalization of the contract was all that remained to be dealt with.

  

17. After awarding the contract to Mayfair, SCRHA and Mayfair commenced negotiating all the specifics of the written agreement between the parties, as permitted by the RFQ.

18. Subsequent to the lengthy negotiations respecting the terms of the written agreement, on or about January 29, 2016, the agreement was finalized and executed by the parties.

19. The contract with Mayfair is for three (3) years and covers all CT services in St. Joseph's Hospital for that time period, but does not displace an existing agreement between SCRHA and RAR which is for other district radiological services, not CT services.

20. The CT scanner is set to be serving the community on or about February 22, 2016.

(Emphasis added)

44 Thus, while Radiology was actively pursuing its appeal, Sun Country was taking steps that had the direct and foreseeable consequence of rendering the appeal moot. Indeed, according to Ms. Cugnet's affidavit, the award was made to Mayfair Diagnostics Regina on October 22, 2015 — before the decision in the Court of Queen's Bench was rendered. Radiology incurred costs with respect to its appeal of that decision after that date, which are, thus, of no benefit to it.

45 The calculation of costs when a court declines to hear or declines to decide an appeal on the basis of the doctrine of mootness can be a complex process for which little guidance exists in the case law (see *Boundaries of Judicial Review* at 129 and 130). A court must be careful to avoid the possibility of encouraging a hearing on mootness where one is not required or otherwise influencing behaviour in the litigation process. Apart from *Borowski*, no costs were awarded in any of the decisions cited by Sun Country: in *Wahgoshig FN*, the Court made no decision as to costs, permitting the parties to file briefs if they so desired.

46 In *Borowski*, following the Court's decision in *Morgentaler*, the Crown applied to adjourn the *Borowski* appeal and was unsuccessful. The Supreme Court ultimately declared the appeal moot. When considering the question of costs, the Supreme Court determined that in lieu of applying to adjourn the appeal, the respondent should have moved to quash. Since the failure to do so caused the appellant the needless expense of preparing and arguing the appeal, the Court ordered the respondent to pay the appellant the costs of the appeal incurred after the adjournment had been denied. There are differences between *Borowski* and this appeal in that the intervening event rendering the appeal moot was outside of the control of the parties in that case, but not in the within appeal.

47 To Sun Country's credit, however, from January 19, 2016, it was actively trying to place the question of mootness before the Court — but nonetheless did not file its application to quash until February 12, 2016. Also to Sun Country's credit, it wanted to have its application to quash the appeal heard at an early date separate from the appeal — but, by the time it had made its request, Radiology had already been put to the expense of filing the appeal book and its factum.

48 Radiology, on the other hand, did not file its application to maintain the status quo until February 10, 2016. However, it remains unclear in this jurisdiction as to whether a judge alone could have granted the relief that Radiology sought if it had filed its application earlier (see The Honourable Stuart J. Cameron, *Civil Appeals in Saskatchewan: The Court of Appeal Act and Rules Annotated* (Regina: Law Society of Saskatchewan Library, 2015) at 143-148) and Sun Country vigorously contested the authority of a judge alone to grant such relief.

49 Balancing these considerations, it would seem appropriate that no order of costs should be made in relation to the mootness application, and Radiology should receive costs of the appeal on the lowest column of the Court of Appeal tariff.

**IV. Conclusion**

50 The application to quash the appeal is granted with no order as to costs. Radiology will have its costs of the appeal on Column 1 of the Tariff. Each party shall bear their own costs with respect to the February 22nd application for directions. Sun Country shall have its costs of the February 24th application.

  

***Caldwell J.A.*:**
I concur.

***Whitmore J.A.*:**
I concur.

*Application granted; costs awarded to hospital.*

# TAB 10

**Most Negative Treatment:** Check subsequent history and related treatments.

2018 ONSC 812
Ontario Superior Court of Justice (Divisional Court)

Basegmez v. Akman

2018 CarswellOnt 1655, 2018 ONSC 812, 141 O.R. (3d) 549, 288 A.C.W.S. (3d) 661, 81 B.L.R. (5th) 73

# VOLKAN BASEGMEZ, CEM BLEDA, BASEGMEZ ANIL RUKAN BASEGMEZ, BA&B CAPITAL INC., SERDAR KOCTURK and KAAN HOLDINGS INC. (Applicants / Respondents in Appeal) and ALI AKMAN, SAMM CAPITAL HOLDINGS INC. and TARN FINANCIAL CORPORATION (Respondents / Appellants)

Wilton-Siegel, F.L. Myers, Charney JJ.

Heard: January 30, 2018
Judgment: February 6, 2018
Docket: Toronto DC-594/17

Proceedings: affirming *Basegmez v. Akman* (2017), 2017 CarswellOnt 15457, 2017 ONSC 5370, Lederman J. (Ont. S.C.J. [Commercial List])

Counsel: E. Patrick Shea, Christopher Stanek, for Respondents
Geoff R. Hall, Adam Goldenberg, for Appellants
G. Azeff, for KPMG Inc., in its capacity as liquidator of Tarn Financial Corporation

Subject: Corporate and Commercial

**Related Abridgment Classifications**

Business associations
VI Changes to corporate status
VI.4 Winding-up
VI.4.d Under provincial Acts
VI.4.d.ii By order of court
VI.4.d.ii.B Under relief from oppression remedy

**Headnote**

Business associations --- Changes to corporate status — Winding-up — Under provincial Acts — By order of court — Under relief from oppression remedy
Company was incorporated partnership amongst parties that owned hotel, development lands and construction company involved in development — Respondent introduced applicants to investment opportunity — Applicants alleged that respondent then unilaterally created new class of shares to taking voting control of company, caused company to enter management contract with his corporation, used hotel capital to finance personal interests, and funnelled surplus cash offshore — Applicants' application for order winding up company was granted — Trial judge found there was no written shareholders agreement, but reasonable expectations of parties were set out in communications between parties and capital structure of company at time of initial investment — Trial judge found this structure prevented respondent from unilaterally passing resolutions — Trial judge found after receiving investment from applicants, respondent took steps to alter capital structure to secure absolute voting control and establish himself as sole director — Trial judge found respondent abused his

  

power by engaging in self-dealing transactions that diverted millions from company for his personal benefit — Trial judge found respondent's conduct clearly fell within meaning of oppression — Trial judge found partnership could not continue as there had been complete breakdown in trust, and applicants had no means at moment of assessing value of company — Trial judge found while winding up was drastic remedy, there was no apparent alternative, as applicants had justifiable lack of confidence in respondent's conduct and management of company and wanted out, and parties had been unable to reach any other agreement — Trial judge found liquidator was best equipped to deal with matter and was appointed — Respondent appealed — Appeal dismissed — There was evidence before trial judge to support findings of fact and court should not re-weigh evidence — Within scope of trial judge's discretion to remove respondent from management and control of business pending separation of parties, and to do so was prudent — Liquidation was proper remedy and trial judge did not err in ordering it as opposed to sale of shares — Trial judge considered other remedies and found none were appropriate — Liquidation sale provided assurance that parties would realize fair market value by exposing business to market place — Share purchase would leave loans outstanding.

**Table of Authorities**

**Cases considered by *F.L. Myers J.*:**

*Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481, 85 O.A.C. 29, 23 B.L.R. (2d) 286, 1995 CarswellOnt 1207 (Ont. C.A.) — referred to

*Tilley v. Hails* (1992), 6 B.L.R. (2d) 298, 7 O.R. (3d) 257, 1992 CarswellOnt 141 (Ont. Gen. Div.) — considered

*Wilson v. Alharayeri* (2017), 2017 SCC 39, 2017 CSC 39, 2017 CarswellQue 5230, 2017 CarswellQue 5231, 65 B.L.R. (5th) 169, 412 D.L.R. (4th) 387, [2017] 1 S.C.R. 1069 (S.C.C.) — considered

**Statutes considered:**

*Business Corporations Act*, R.S.O. 1990, c. B.16
Generally — referred to

s. 255 — referred to

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44
Generally — referred to

APPEAL by respondent from judgment reported at *Basegmez v. Akman* (2017), 2017 ONSC 5370, 2017 CarswellOnt 15457 (Ont. S.C.J. [Commercial List]), granting application to wind up company.

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

**Background**

1 The appellants appeal from the order of Lederman J. dated September 15, 2017 in which the court ordered the liquidation of Tarn Financial Corporation.

2 The parties Ali Akman, Serdar Kocturk, and Volkan Basegmez agreed to invest together in an operating hotel and a condominium development project. Tarn is the corporate vehicle for their business. The three investors agreed that Volkan Basegmez would contribute $6 million to Tarn in exchange for a 40% interest in the corporation; Serdar Kocturk would contribute $3 million for a 20% interest; and Ali Akman would contribute $4.3 million for a 40% interest. Akman was contributing proportionately less cash than the others. But he also agreed to contribute sweat equity by managing the investment on a day-to-day basis.

  

3 All of the shareholders' funds were advanced to Tarn by way of shareholder loans.

4 Justice Lederman accepted the claims made by Messrs. Kocturk and Basegmez that Mr. Akman had acted in a manner that was unfairly prejudicial to them or unfairly disregarded their interests by: (a) purporting to issue shares to himself to give him voting control of the corporation without the consent of the other shareholders; (b) causing Tarn to enter into transactions with Akman-controlled entities; and (c) using Tarn's funds for his own purposes. Justice Lederman ordered that Tarn be liquidated pursuant to the winding-up provisions of the *Business Corporations Act*, RSO 1990, c B16.

5 For the reason that follow, I agree with the findings and remedy ordered by Lederman J. Therefore, I would dismiss the appeal.

**Jurisdiction**

6 An appeal lies to this court under s. 255 of the *OBCA*.

**Standard of Review**

7 In *Wilson v. Alharayeri*, 2017 SCC 39 (S.C.C.), the Supreme Court of Canada discussed the standard of appellate review under analogous oppression provisions of the *Canada Business Corporations Act, RSC 1985, c C-44*,

> Three principles govern the applicable standard of review. First, absent palpable and overriding error, an appellate court must defer to the trial court's findings of fact. Second, an appellate court may intervene and substitute its own decision for the trial court's if the judgment is based on "errors of law . . . erroneous principles or irrelevant considerations". Third, even if it was not so based, an appellate court may intervene if the trial judgment is manifestly unjust. [Citations omitted.] 3

8 The court is granted very broad remedial authority to make such order as it thinks fit to remedy oppression under the *OBCA*. I accept Mr. Hall's legal submission that, in applying a remedy after finding oppression, the court is exercising a statutory discretion that is to be exercised on a principled basis. The goal is to remedy the oppressive acts found. The frequently repeated admonition from the leading case is that the court is to use a scalpel to tailor carefully the relief ordered to do no more than is necessary to remedy the oppressive conduct. The court is not wielding a battle axe to cleave the parties. See *Wilson*, at paras. 23 to 27 and *Naneff v. Con-Crete Holdings Ltd.* [1995 CarswellOnt 1207 (Ont. C.A.)], 1995 CanLII 959 at para 32. I also agree with Mr. Hall that winding-up and liquidation are considered only as a last resort when other less drastic remedies will not suffice. See *Wilson*, at paras. 23 and 57 and *Tilley v. Hails* [1992 CarswellOnt 141 (Ont. Gen. Div.)], 1992 CanLII 7563 at para. 45.

**Fresh Evidence**

9 As a preliminary matter, the respondents proffer as fresh evidence two recent reports of the liquidator appointed pursuant to Justice Lederman's order and a short affidavit. The reports discuss operational issues within the corporation and discuss the status of liquidation efforts. Mr. Goldenberg fairly concedes that information reported by the liquidator concerning the status of the liquidation is properly admitted as matters of public record that arose post-liquidation. They are not fresh evidence. However, he argues that information relating to the operations and financial position of Tarn in the pre-liquidation period is fresh evidence that is not properly admitted on this appeal.

10 Mr. Shea does not ask us to admit the pre-liquidation information for the purpose of the appeal itself. Rather, he says that, if we allow the appeal, the appellants are asking us to exercise afresh the discretion to craft an appropriate remedy. Should the court undertake that exercise, he argues, the extra information is highly relevant, was not reasonably available to the respondents before Lederman J., and may well affect the outcome. As we have decided to dismiss the appeal, there is no basis for admitting this fresh evidence and I have therefore disregarded the proposed fresh evidence in reaching my

  

# TAB 11

2015 YKCA 5
Yukon Territory Court of Appeal

Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking Ltd.

2015 CarswellYukon 9, 2015 YKCA 5, 249 A.C.W.S. (3d) 747, 368 B.C.A.C. 26, 37 C.L.R. (4th) 177, 633 W.A.C. 26

# Government of Yukon (Department of Highways and Public Works), Respondent (Petitioner) and P.S. Sidhu Trucking Ltd., Appellant (Respondent) and CMF Construction Ltd., Respondent (Respondent)

Chiasson, Schuler, Goepel JJ.A.

Heard: November 18, 2014
Judgment: February 6, 2015
Docket: Whitehorse 13-YU730

Proceedings: dismissing appeal as moot *Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking Ltd.* (2013), 2013 YKSC 105, 2013 CarswellYukon 104, 31 C.L.R. (4th) 218 (Y.T. S.C.)

Counsel: E. Olszewski, Q.C., for Appellant
P. Lawson, for Respondent, Government of Yukon
M. Preston, for Respondent, CMF Construction Ltd.

Subject: Civil Practice and Procedure; Contracts

**Related Abridgment Classifications**

Civil practice and procedure
XXII Judgments and orders
XXII.14 Declaratory judgments or orders
XXII.14.b Availability
XXII.14.b.iii Where question academic

Construction law
II Contracts
II.1 Building contracts
II.1.a Execution of formal contract
II.1.a.i Tendering process
II.1.a.i.I Miscellaneous

Judges and courts
XVII Jurisdiction
XVII.2 Superior courts
XVII.2.i Appellate court
XVII.2.i.iii Where issue becoming academic or moot

**Headnote**

Construction law --- Contracts — Building contracts — Execution of formal contract — Tendering process — Miscellaneous
Yukon government ("Yukon") issued tenders on July 10, 2013 for replacement of bridge — Tender closing date was set for 4

  

p.m. on August 15, 2013 — Agent for appellants, P.S., submitted bid at 3:59 p.m. but asked for it back if there was time — After being told he had up to 4:01 p.m., he took bid back, made change and re-submitted it at 4:00 p.m. — P.S.'s bid was lowest — Respondent CMF questioned timeliness of bid — Yukon asked court for declaration whether bid was submitted in time — Judge declared that P.S.'s bid was not submitted on time — Contract was awarded to CMF — P.S. appealed and brought action against Yukon for damages for breach of contract, or alternatively, negligent misrepresentation — Appeal dismissed — Since Yukon awarded CMF contract, direct issue before court was moot — Although timeliness of bid remained relevant to P.S.'s claim for breach of contract in its action, court would not exercise its discretion to determine issue — To do so would risk result akin to judicial embarrassment, in which Yukon had potential to face damages for following order of court — Advisory opinion should not have been provided — Courts reluctant to provide advisory opinions, absent clear lis and practical benefits for doing so — In current case, practical benefits of advisory opinion were suspect since further litigation was likely regardless of outcome and there was clear potential for judicial embarrassment.

Judges and courts --- Jurisdiction — Superior courts — Appellate court — Where issue becoming academic or moot
Yukon government ("Yukon") issued tenders on July 10, 2013 for replacement of bridge — Tender closing date was set for 4 p.m. on August 15, 2013 — Agent for appellants, P.S., submitted bid at 3:59 p.m. but asked for it back if there was time — After being told he had up to 4:01 p.m., he took bid back, made change and re-submitted it at 4:00 p.m. — P.S.'s bid was lowest — Respondent CMF questioned timeliness of bid — Yukon asked court for declaration whether bid was submitted in time — Judge declared that P.S.'s bid was not submitted on time — Contract was awarded to CMF — P.S. appealed and brought action against Yukon for damages for breach of contract, or alternatively, negligent misrepresentation — Appeal dismissed — Since Yukon awarded CMF contract, direct issue before court was moot — Although timeliness of bid remained relevant to P.S.'s claim for breach of contract in its action, court would not exercise its discretion to determine issue — To do so would risk result akin to judicial embarrassment, in which Yukon had potential to face damages for following order of court — Advisory opinion should not have been provided — Courts reluctant to provide advisory opinions, absent clear lis and practical benefits for doing so — In current case, practical benefits of advisory opinion were suspect since further litigation was likely regardless of outcome and there was clear potential for judicial embarrassment.

Civil practice and procedure --- Judgments and orders — Declaratory judgments or orders — Availability — Where question academic
Yukon government ("Yukon") issued tenders on July 10, 2013 for replacement of bridge — Tender closing date was set for 4 p.m. on August 15, 2013 — Agent for appellants, P.S., submitted bid at 3:59 p.m. but asked for it back if there was time — After being told he had up to 4:01 p.m., he took bid back, made change and re-submitted it at 4:00 p.m. — P.S.'s bid was lowest — Respondent CMF questioned timeliness of bid — Yukon asked court for declaration whether bid was submitted in time — Judge declared that P.S.'s bid was not submitted on time — Contract was awarded to CMF — P.S. appealed and brought action against Yukon for damages for breach of contract, or alternatively, negligent misrepresentation — Appeal dismissed — Since Yukon awarded CMF contract, direct issue before court was moot — Although timeliness of bid remained relevant to P.S.'s claim for breach of contract in its action, court would not exercise its discretion to determine issue — To do so would risk result akin to judicial embarrassment, in which Yukon had potential to face damages for following order of court — Advisory opinion should not have been provided — Courts reluctant to provide advisory opinions, absent clear lis and practical benefits for doing so — In current case, practical benefits of advisory opinion were suspect since further litigation was likely regardless of outcome and there was clear potential for judicial embarrassment.

**Table of Authorities**

**Cases considered by *Chiasson J.A.*:**

*Borowski v. Canada (Attorney General)* (1989), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232, 1989 CarswellSask 241, 1989 CarswellSask 465 (S.C.C.) — considered

*Bygo Inc. v. MacDonald, Dettwiler & Associates Ltd.* (2001), 2001 BCCA 327, 2001 CarswellBC 951 (B.C. C.A. [In Chambers]) — referred to

*Creston Moly Corp. v. Sattva Capital Corp.* (2014), 2014 SCC 53, 2014 CSC 53, 461 N.R. 335, 25 B.L.R. (5th) 1, 373 D.L.R. (4th) 393, [2014] 9 W.W.R. 427, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 59 B.C.L.R. (5th) 1, 358

  

B.C.A.C. 1, 614 W.A.C. 1 (S.C.C.) — considered

*Garcia v. Drinnan* (2013), 2013 CarswellBC 654, 2013 BCCA 53 (B.C. C.A.) — referred to

*Horton Bay Holdings Ltd. v. Wilks* (1991), 3 C.P.C. (3d) 112, 8 B.C.A.C. 68, 17 W.A.C. 68, 1991 CarswellBC 584 (B.C. C.A.) — considered

*R. v. Ron Engineering & Construction (Eastern) Ltd.* (1981), 1981 CarswellOnt 109, *(*sub nom. *Ron Engineering & Construction (Eastern) Ltd. v. Ontario)* 35 N.R. 40, 1981 CarswellOnt 602, 13 B.L.R. 72, 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111 (S.C.C.) — followed

*Tr'ondëk Hwëch'in v. Canada* (2004), 2004 YKCA 2, 2004 CarswellYukon 2, 193 B.C.A.C. 87, 316 W.A.C. 87, [2004] 2 C.N.L.R. 346 (Y.T. C.A.) — considered

**Rules considered:**

*Rules of Court*, O.I.C. 2009/65
R. 10 — considered

APPEAL by P.S. Sidhu Trucking Ltd. from judgment reported at *Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking Ltd.* (2013), 2013 YKSC 105, 2013 CarswellYukon 104, 31 C.L.R. (4th) 218 (Y.T. S.C.), from order finding that their tender was not submitted on time.

***Chiasson J.A.*:**

**Introduction**

1 This appeal raises issues of mootness and consideration of the appropriateness of providing declaratory legal opinions.

**Background**

2 The respondent issued tenders for the construction of the replacement of a bridge. The tender package included Instructions to Bidders-A, which included sections 1.5 and 2.5:

> 1.5 The bidder who wishes to withdraw a tender from consideration may do so by submitting a written withdrawal letter to the same address to which the tender was submitted, prior to tender closing time and the tender will be returned to the bidder intact.
>
> 2.5 In order to be considered, tenders must be received before the specified time. Tenders received after this time will not be considered regardless of the reason for their being late, and will be returned to the bidder unopened.

3 The Tender Form stated at s. 7:

> **TENDER CLOSING DATE:** (emphasis from original)
>
> 4:00 p.m., Local Time, 6th August 2013.

The closing date was changed by addendums to August 15, 2013. They referred to the closing time as "16:00 p.m. rather than 4:00 p.m."

4 A notice of tender was published on the respondent's "Online Tender Management System ('TMS')". It reflected the

  

change in date and specified the time for closing as "4:00 p.m. local time" and included the following:

> Submissions clearly marked with the above project title, will be received up to and including 4:00 p.m. local time, August 15, 2013, at Contract Services...

5 The TMS Terms and Conditions of Use included a warning at s. 5:

> You should not rely on the Site as your only means of obtaining information about bid opportunities or updates to bid opportunities.

Sections 15 and 16 stated:

> The service provided through the Site is provided "As Is" without guarantee, warranty, or representation, of any kind, including any warranty, guarantee, or representation as to its fitness for any particular purpose.
>
> Government of Yukon does not warrant, guarantee or represent that the Site is complete or that the information found on it is accurate, or that it will function without error, failure or interruption.

6 A public tender notice was published in a local newspaper stating:

> Submissions clearly marked with the above project title, will be received up to and including 4:00 PM local time, August 06, 2013...

7 The chambers judge set out relevant facts:

> [8] The following facts are taken from the affidavit of Ruben Bicudo, who was responsible for submitting the [appellant's] tender. I am going to read paras. 8 through 14:
>
> > 8. My son and I arrived at the Procurement Support Centre at approximately 3:55 p.m. At this point in time, the only item to complete on the Tender was to total the projected prices and insert the total into the bottom line on page 4 of the Tender.
> >
> > 9. I went up the stairs to the counter in the Procurement Support Centre. Using a small scientific calculator, I started to calculate the total of the Tender. As I reached item number 26 of page 3 of the Tender, the calculator went into exponential notation and then blanked out. I had 3 items [left] to add to complete the final total of the Tender. I asked the counter staff if they had a calculator. Becky MacKenzie advised that they did not have a calculator, but then stated that as long as the unit prices were all complete, along with the extensions, that they could calculate the final total.
> >
> > 10. I left the final amount blank on page 4 of the Tender, placed the Tender into the envelope, sealed it, and then handed the envelope to Becky MacKenzie, who was still behind the counter. She received and time stamped the Tender at 3:59 [p.m.] on August 15, 2013.
> >
> > 11. As I started to walk away, I thought I might have made an error in one of my calculations so I asked Becky MacKenzie if I could have the Tender back. She looked at me uncertainly but Pauline Stonehouse, who has worked at the Procurement Support Centre for at least 20 years, interjected and said that I could have the Tender back. I asked if I had time to do so. Pauline Stonehouse inserted a piece of paper into the Machine to get the time and then indicated that I did have time to take the Tender back.
> >
> > 12. Upon the confirmation of Pauline Stonehouse, and relying on her advice and experience, I took back the Tender on the assumption that it would be accepted if it was time stamped 4:00 pm. I was not looking at any clocks, including the YG Clock which was not visible from my viewpoint. I was relying on the reading of the Machine and the information and advice given to me by Pauline Stonehouse. I did not notice the YG Clock until later on, when I

  

passed it on my way to the conference room for the actual tender opening.

13. Either Becky MacKenzie or Pauline Stonehouse handed me back the Tender envelope and I quickly opened it, looked at it, and darkened a zero on item number 1 of the unit price table. Having ascertained that the Tender was correct, I put the Tender back into the envelope.

14. I then handed the envelope containing the Tender to the counter staff at the Procurement Support Centre to seal with tape, which they did. They then time stamped the Tender. The stamp on the Tender read 4:00 pm on August 15, 2013.

[9] The affidavit of Pauline Stonehouse, the Contract Coordinator for the [respondent], states the following at paras. 12, 13, and 14:

12. I overheard, am informed and do verily believe that:

• as the 4:00 pm deadline approached, Ruben Bicudo attended the counter at the Procurement Support Centre, and submitted a bid on behalf of [the appellant].

• Becky Mackenzie received the bid envelope and stamped it in the time stamp machine. The time [stamp] on the bid read 3:59 p.m.

• Mr. Bicudo started to leave the counter, but then turned around and asked for his bid back.

13. As I was coming out of my office, I noticed that Becky did not know what to do in response to Ruben's request for his bid back. Normally, we require requests for bids to be returned to be submitted in writing. Realizing that there was no time to follow that process, I checked the time on the time stamp machine to see if the bid deadline had passed. The time stamp machine [read]: 4:00 pm. Mr. Bicudo asked if he had time to review and resubmit his bid. I indicated to Mr. Bicudo that he had until the clock ticked 4:01 pm. I discarded the print-out from the time stamp machine.

14. One of us (Becky or I; I cannot recall) returned the bid envelope to Mr. Bicudo, who immediately tore it open. I did not notice what he did, if anything, to the document. Within a matter of seconds, Mr. Bicudo resubmitted the envelope. I received the envelope from him, taped it shut and then time-stamped a separate piece of paper which I then attached to the bid envelope. I used a new slip to show the date received rather than stamping the envelope [directly], as the envelope had been previously date stamped and I did not want to cause confusion. The new time stamp read 4:00 pm.

8 The appellant's bid was the lowest. A few days after the close of bidding, the second lowest bidder, CMF Construction Ltd. ("CMF"), questioned the timeliness of the appellant's bid.

9 In September 2013, the respondent brought an application seeking the following declarations:

A. confirming the precise closing time for the Tender for the Tatchun Creek Bridge Replacement; and

B. that the bid submitted on the Tatchun Creek Bridge Replacement Tender by [the appellant] was [or was not] submitted on time in accordance with the Tender.

10 CMF and the appellant consented to the respondent so proceeding because construction of the replacement bridge had to begin. In a section entitled "Facts Related to Outcome of this Petition", the respondent stated:

15. On September 9, 2013, both [CMF] and [the appellant] agreed to extend the acceptance period for the Tender to up to and including the third business day after the court delivers its ruling on the [respondent's] request for a court

  

declaration and any appeal thereof.

16. The [respondent] needs to make a decision on the Tender by mid- October in order to have the work done in a timely way.

11 In its response, the appellant sought a declaration that its bid was timely and compliant. CMF pleaded that the appellant's bid was out of time and not compliant.

12 On September 27, 2013, the judge ruled that the appellant's bid was not filed in time. The respondent awarded the contract to CMF.

13 On October 25, 2013, the appellant brought this appeal. It subsequently sued the respondent for breach of contract or, alternatively, negligent misrepresentation related to the conduct of the respondent's staff at the time of closing. CMF did not participate in the appeal to this Court.

**Trial decision**

14 The judge began his analysis with *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 (S.C.C.), and the formation of what is referred to as "Contract A" in the context of the tendering process. He quoted (at para. 10):

The tender submitted by the respondent brought contract A into life. This is sometimes described in law as a unilateral contract, that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, "I will pay you a dollar if you will cut my lawn". No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as the respondent has done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide.

15 The judge then stated that the first issue to be determined was "the precise closing time for the tender". He reasoned that:

[11] ... the Instructions to Bidders-A is clear in s. 2.5, where it states: "tenders must be received before the specified time." That time is clearly stated in the contract documents to be 4:00 p.m. To make it clear, s. 2.5 goes on to say, "Tenders received after this time will not be considered, regardless of the reason...". This means that tenders must be received by 3:59 p.m., and tenders received after 3:59 p.m. will not be considered. The wording, "regardless of the reason", in my view, is intended to refer to errors, misunderstandings, or [confusions] that occur, as it did here, where someone asked for a sealed, time-stamped bid to be returned, opens it, and writes something. I do not find the small print on the TMS notice of tender using the words, "up to and including 4:00 p.m." to be part of the contract documents. The TMS is an online document for convenience of bidders that was explicitly not warranted, guaranteed, or represented to be complete or accurate. The notice of tender in the *Whitehorse Star* newspaper is not a part of the contract. The contract documents are set out in s. 1.1 of the *Articles of Agreement*.

16 The judge then considered whether an irrevocable contract was formed when the appellant first submitted its bid:

[16] The second issue to be addressed is whether the [appellant's] bid, filed at 3:59 p.m. forms the Contract A and becomes irrevocable. That, perhaps, would have been the case if that was the end of the story. Unfortunately, Mr. Bicudo requested that the bid be returned, which is a clear breach of the [Instructions] to Bidders-A, which requires a written withdrawal letter in s. 1.5 before the tender will be returned, or the amendment procedure in [ss.] 2.6 to 2.9, which was not followed. In any event, the sealed bid was returned to Mr. Bicudo, torn open, and he "darkened a zero on item number 1".

  

> [17] While this may have been a perfectly innocent event, it is a clear breach of the [Instructions] to Bidders-A and calls into question both the fairness and integrity of the bidding process. While Mr. Bicudo may have relied on [the respondent's] staff, it was he who interfered with the bidding process. The result was that the [appellant's] bid was filed and date stamped 4:00 p.m., which is clearly not before 4:00 p.m.

17 The judge concluded that the appellant's bid was not filed in time according to the Instructions to Bidders-A "which required a filing time before 4:00 p.m."

**Positions of the parties**

18 In its factum, the appellant expressed the alleged errors of the judge as follows:

> 11. The learned Trial Judge made the following errors in finding that the Tender Opportunity closed at 3:59:59 pm:
>
> a. The learned Trial Judge erred in law in excluding or ignoring iterations of the Tender closing deadline which expressly stated that the Tender deadline was "up to and including 4:00 pm".
>
> b. The learned Trial Judge erred in fact and in law in determining that the Tender closing deadline was described with precise wording.
>
> c. The learned Trial Judge erred in fact and in law in excluding or ignoring jurisprudence confirming that when there is ambiguity regarding the closing of a tender deadline, the courts should give effect to the later deadline.
>
> d. The learned Trial Judge erred in fact and in law in excluding or ignoring:
>
> i. the [respondent's] own evidence that its practice would be to accept tenders submitted between 3:59:59 pm and 4:00:59 pm; and
>
> ii. that the [respondent's] conduct in respect of the Tender closing deadline was consistent with the evidence of its practice of accepting tenders submitted between 3:59:59 pm and 4:00:59 pm.
>
> 12. Alternatively, if the Tender Opportunity closed at 3:59:59 pm, the learned Trial Judge erred in fact and in law in determining that the Appellant's conduct after the Tender Opportunity closed constituted a breach of contract that rendered the Tender non-compliant.

19 At the hearing of this appeal, the appellant referred this Court to the recent decision of the Supreme Court of Canada in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.), and discussed the standard of care that should apply in this case to the construction of the tender documents.

20 The respondent stated its position as follows:

> 8. The following issues are raised in this appeal:
>
> a. Did the learned Trial Judge err in finding that the Tender Opportunity closed at precisely 4:00:00 p.m. such that bids received once the time stamp clock registered "4:00 p.m." were late?
>
> b. If the answer to the first question is "no", then did the learned Trial Judge err in finding that the Appellant's original bid could not be considered a valid bid for the purpose of the Tender Opportunity once it had been withdrawn and revised by the Appellant?
>
> 9. The Respondent takes no position on the first issue.

  

10. On the second, alternative issue, the Respondent submits that the learned Trial Judge made no error.

**Discussion**

21 At the hearing of this appeal, the Court raised the issue of mootness and questioned whether the trial court should have given an opinion. The appeal is moot because the contract was awarded and the work undertaken, but the parties note that the appellant's action against the respondent is pending. Insofar as it alleges breach of contract, a determination of whether the appellant's bid was timely is significant. This raises another concern.

22 Rule 10 of Yukon's Supreme Court *Rules of Court*, Y.O.I.C. 2009/65, authorizes the filing of a petition where "the sole or principal question at issue is alleged to be one of interpretation of [a] ... contract ...", but generally, courts are reluctant to give merely advisory opinions. Parties are expected to rely on their legal advisers, not the court, when deciding how to exercise rights. Usually, the court will require an active or imminent *lis* before providing an advisory opinion.

23 This was addressed by Mr. Justice Hall in *Tr'ondëk Hwëch'in v. Canada*, 2004 YKCA 2 (Y.T. C.A.):

> [11] I appreciate the point, made by counsel for the appellant, that this was an application for the construction or interpretation of a document ... However ... it appears to me that what was really being sought from the Supreme Court was something in the nature of an advisory opinion. I believe that the courts ought to be cautious in acceding to requests of this sort. A court may of course grant declaratory relief where no other relief is sought. But a court may properly exercise its discretion to refuse a declaration where the relief sought is not related to an existing and defined *lis*.

24 In the present case, although there was a potential *lis* in that CMF and the appellant both contended they were entitled to an award of the contract, the *lis* before the court, whether the appellant's bid was timely, became moot once the contract was awarded to CMF. In a separate action, the issue is pending awaiting a determination by this Court whether the judge in the present case was correct. In that sense it is contended that the appeal is not moot. This raises a different concern.

25 As Chief Justice McEachern observed in his concurring opinion in *Horton Bay Holdings Ltd. v. Wilks* (1991), 3 C.P.C. (3d) 112 (B.C. C.A.) at p. 120:

> I think mischief could easily result from actions just for declarations. I would expect no declaration would be made unless the Court is satisfied that the declaration will have some practical value.

26 In the present case, the practical value was to obviate the need for the respondent to decide whether the appellant's bid was filed on time, but whatever the court's opinion on the application for the declaration, the potential for litigation was unlikely to disappear. The probability was that whichever contractor did not get the job would sue. The practical value of the declaration was suspect. More importantly it raised the possibility, which has occurred, that the respondent would be exposed to a claim in contract based on following the court's advice. In my view, this raised circumstances akin to judicial embarrassment and militates against the appropriateness of the court providing a declaratory opinion in the circumstances of this case.

27 Judicial embarrassment arises when judicial proceedings lead to inconsistent findings: *Garcia v. Drinnan*, 2013 BCCA 53 (B.C. C.A.) at para. 7; *Bygo Inc. v. MacDonald, Dettwiler & Associates Ltd.*, 2001 BCCA 327 (B.C. C.A. [In Chambers]) at para. 17. In the present case, a judge held that the appellant's tender was late. In the pending action, the appellant asserts that its tender was not late. It can sustain that position only if this Court holds that the tender was delivered on time. That could lead to the respondent being condemned in damages for proceeding in accordance with an order of the Court.

28 In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), the Court laid down the basic framework for considering mootness. The appellant quotes from the case stating:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which

  

> raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.
>
> . . .
>
> First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

29 In my view, the "tangible and concrete dispute" in the present case has disappeared, but I am prepared to take into account the appellant's position that the judge's opinion is incorrect and that it was entitled to an award of the contract which it did not get.

30 The appellant refers to the three criteria stated in *Borowski* that guide a court's exercise of discretion whether to address a moot issue: whether there is an adversarial context; concern for judicial economy; whether the court is exercising its proper law-making function.

31 The adversarial context in this case is indirect, but Sopinka J. in *Borowski* accepted that collateral consequences could satisfy the first criterion. As to the second criterion, Sopinka J. observed at p. 360:

> The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action.

Arguably, this approach is apt in the present case.

32 In *Borowski*, the focus of the third criterion was on the relationship between the judiciary and the legislature and concern with the risk of the court improperly intruding into the domain of law makers. This is not directly relevant in the present case.

33 The factors stated in *Borowski* provide guidance for a court's exercise of discretion on whether to address a moot issue. I do not consider them to be exhaustive in that they are directed to the implications of a court doing so: will it resolve a dispute; will it respect judicial economy; will it extend beyond the court's proper law making function.

34 In the present case, a determination by this Court on whether the judge erred clearly has the potential to expose the respondent to a claim for damages because it followed the opinion of the Court. In this case, the issue is moot and there is a significant concern militating against the exercise of this Court's discretion to address the issue. To apply the collateral consequences approach risks a legally embarrassing result.

35 In my view, the legal opinion requested in the respondent's petition should not have been given, but all parties sought it. The appellant now seeks damages against the respondent for acting in accordance with that opinion. On this appeal, it seeks to establish the legal basis for doing so. On this appeal, that issue is *prima facie* moot. I would not lend the assistance of this Court to the appellant's attempt to cast off the results of legal proceedings it supported.

**Conclusion**

36 This appeal results from the well-intentioned efforts of the parties to obtain legal guidance to facilitate the construction of a time-sensitive public works' project. The Court acted to assist that effort. While understandable, the process was fraught with peril from the outset. Had the respondent obtained and acted on legal advice, it would have been in the same position in which it presently finds itself, but without the risk of judicial embarrassment. The appellant's contention that its tender was delivered in time would have been resolved in an appropriate *lis* together with the appellant's other contentions.

  

37 The appellant, which accepted the process, is not without recourse. It asserts that employees of the respondent acted improperly to its detriment and pursues damages accordingly. That controversy will be addressed in light of the judge's finding that the appellant's tender was late.

38 I would dismiss this appeal as moot.

***Schuler J.A.:***
*I agree:*

***Goepel J.A.:***
*I agree:*

*Appeal dismissed.*

# TAB 12

**Most Negative Treatment:** Check subsequent history and related treatments.

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, 317 A.C.W.S. (3d) 532

# 9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

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Subject: Civil Practice and Procedure; Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act

  

XIX.3 Arrangements
XIX.3.e Miscellaneous

**Headnote**

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers
Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to

  

vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

**Held:** The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

  

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple, un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à

  

contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

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Generally — referred to

s. 6(1) — referred to

APPEAL by debtor from judgment reported at *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), finding that debtor's scheme amounted to plan of arrangement and that funding request should be submitted to creditors for approval.

POURVOI formé par la débitrice à l'encontre d'une décision publiée à *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), ayant conclu que la proposition de la débitrice constituait un plan d'arrangement et que la demande de financement devrait être soumise aux créanciers pour approbation.

***Wagner C.J.C., Moldaver J.*** **(Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):**

**I. Overview**

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar

  

the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp-566 and 569).

  

# TAB 13

**Most Negative Treatment:** Check subsequent history and related treatments.

2002 SCC 33, 2002 CSC 33
Supreme Court of Canada

Housen v. Nikolaisen

2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 2002 CSC 33, [2002] 2 S.C.R. 235, [2002] 7 W.W.R. 1, [2002] S.C.J. No. 31, 10 C.C.L.T. (3d) 157, 112 A.C.W.S. (3d) 991, 211 D.L.R. (4th) 577, 219 Sask. R. 1, 272 W.A.C. 1, 286 N.R. 1, 30 M.P.L.R. (3d) 1, J.E. 2002-617, REJB 2002-29758

# Paul Housen, Appellant v. Rural Municipality of Shellbrook No. 493, Respondent

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

Heard: October 2, 2001
Judgment: March 28, 2002*
Docket: 27826

Proceedings: reversing [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126 (Sask. C.A.); reversed in part (1997), 161 Sask. R. 241, [1998] 5 W.W.R. 523, 44 M.P.L.R. (2d) 203 (Sask. Q.B.)

Counsel: *Gary D. Young, Q.C.*, *Denis I. Quon*, *M. Kim Anderson*, for Appellant
*Michael Morris*, *G.L. Gerrand, Q.C.*, for Respondent

Subject: Public; Civil Practice and Procedure; Torts; Tax — Miscellaneous; Municipal

**Related Abridgment Classifications**

Civil practice and procedure
VII Limitation of actions
  VII.9 Actions involving municipal corporations
    VII.9.a Non-repair of highways and streets
      VII.9.a.i Notice of claim and injury
        VII.9.a.i.C Failure to give notice
          VII.9.a.i.C.1 Reasonable excuse

Municipal law
XII Municipal liability
  XII.1 Negligence
    XII.1.a General principles

Municipal law
XII Municipal liability
  XII.4 Practice and procedure
    XII.4.a Actions
      XII.4.a.iii Notice of action

Transportation
VI Highways and streets
  VI.6 Maintenance and repair
    VI.6.b Duty to repair
      VI.6.b.iii To what duty extends
        VI.6.b.iii.D Traffic signs and signals

**Headnote**

Highways and streets --- Maintenance and repair — Duty to repair — To what duty extends — Traffic signs and signals
Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Even though impaired, driver was not driving recklessly such that he would have missed or ignored sign, if erected.

Municipal law --- Municipal liability — Negligence — General principles
Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Municipality knew or should have known of disrepair of road and was liable under s. 192 of Rural Municipality Act, 1989 — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Rues et autoroutes --- Entretien et remise en état — Obligation de remettre en état — Étendue de l'obligation — Panneaux de signalisation et signaux
Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Accident a eu lieu sur une portion dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Même si le conducteur avait les facultés affaiblies, il ne conduisait pas d'une façon téméraire qui l'aurait empêché de voir, ou qui lui aurait permis de faire abstraction, d'un panneau, s'il y en avait eu un.

Droit municipal --- Responsabilité municipale — Négligence — Principes généraux
Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Municipalité connaissait ou aurait dû connaître le mauvais état du chemin; elle était donc responsable en vertu de l'art. 192 de The Rural Municipality Act, 1989 — Accident a eu lieu sur une partie dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

The plaintiff was a passenger in a motor vehicle driven by N. The vehicle was involved in an accident, which rendered the plaintiff a quadriplegic. At trial, N was found negligent in taking the curve in the rural road at an excessive rate of speed while impaired. The evidence established that N had travelled the road three times in the same direction in the preceding 18 to 20 hours. The municipality was also found to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*. The trial judge held that it was reasonable to expect the municipality to erect and maintain a sign warning motorists of the hazard. The trial judge found that the plaintiff was 15 per cent contributorily negligent, the driver was 50 per cent liable and the municipality was 35 per cent liable. The Court of Appeal overturned the trial judge's finding that the municipality was negligent and dismissed the plaintiff's action against it. The plaintiff appealed.

**Held:** The appeal was allowed.

Per Iacobucci and Major JJ. (McLachlin C.J.C., L'Heureux-Dubé and Arbour JJ. concurring): The standard of review to be applied by an appellate court to the decision of the trial judge is that of palpable and overriding error. Palpable means "plainly seen". The standard of review for questions of law is that of correctness and for findings of fact is that of palpable and overriding error. There is a presumption of fitness in favour of the trial judge. The bases for deferring to the findings of fact of the trial judge are to limit the number, length and cost of appeals, to promote the autonomy and integrity of trial proceedings and to recognize the expertise of the trial judge and his or her advantageous position. The standard of palpable and overriding error also applies to the inferences of fact drawn by the trial judge. Questions of mixed fact and law which are findings of negligence should also be accorded great deference, except those which amount to an incorrect statement of the legal standard.

  

The municipality has a statutory obligation to keep the road in such a reasonable state of repair that those requiring to use it might, exercising ordinary care, travel upon it with safety. The trial judge considered the conduct of an ordinary or reasonable motorist approaching the curve in the road. The trial judge's reliance on the evidence of some witnesses as opposed to others was insufficient proof that she forgot, ignored or misconceived the evidence. The trial judge apportioned negligence between the driver and the municipality in a way that entailed a consideration of the ordinary driver. The trial judge did not adopt the de facto speed limit of 80 km/h as the speed of the ordinary motorist approaching the curve. The trial judge implicitly found that the curve could not be taken safely at greater than 60 km/h on a dry road and 50 km/h on a wet road. She did not commit a palpable and overriding error.

Section 192(3) of *The Rural Municipality Act, 1989* required the plaintiff to show that the municipality knew or should have known of the disrepair of the road before it could be found to have breached its duty of care under the Act. The issue was one of mixed fact and law. The existence of the prior accidents was simply a factor in finding that the municipality should have been put on notice with respect to the condition of the road. The trial judge based her conclusion on the perspective of a prudent municipal councillor and drew the inference that the municipality should have been aware of the permanent feature of the road which presented a hazard. The burden of proof was not shifted to the municipality. The municipality did not rebut the inference that it ought to have been aware of the danger. The trial judge's findings of fact on causation were reasonable and did not reach the level of a palpable and overriding error. The accident occurred at a dangerous part of the road where a warning sign should have been erected; driver N's degree of impairment increased his risk of not reacting even if there had been a sign; even so, N was not driving so recklessly that he would have been expected to miss or ignore a warning sign. The trial judge's judgment should be restored.

Per Bastarache J. (dissenting) (Gonthier, Binnie and LeBel JJ. concurring): The trial judge erred in law by failing to apply the correct standard of care to the municipality. The appellate court was entitled to conclude that inferences of fact made by the trial judge were clearly wrong. There is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by her and concluding that the inference was not reasonably supported by those facts. A trial judge's conclusions on questions of mixed fact and law in negligence actions need not be accorded deference in every case. The municipality's duty of care is limited to a duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. The mere existence of a hazard does not give rise to a duty to erect a sign. The fact that the hazard was hidden did not automatically give rise to the conclusion that it would pose a risk to a reasonable driver, nor did the expert testimony relied on support that finding. The trial judge's factual findings did not support the conclusion that the municipality was in breach of its duty. A more in-depth analysis of the state of the road was required. The Court of Appeal was correct in finding that the road was obviously not designed to accommodate travel at a general speed of 80 km/h or that drivers would be somehow fooled by the dual nature of the road. The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair of the road. The trial judge failed to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known. The municipality did not have actual knowledge of prior accidents, which had occurred on different portions of the road than the subject location. The mere occurrence of an accident did not indicate a duty to post a sign. The evidence indicated that the accident occurred as a result of N's level of impairment and not from any failure on the municipality's part. As the legislature had clearly imposed a statutory duty of care on the municipality, it was not necessary to find a common law duty of care. It was only reasonable to expect a municipality to foresee accidents which occurred as a result of the conditions of the road, not the conditions of the driver. The appeal should be dismissed.

Le demandeur est devenu quadriplégique après avoir été passager dans un véhicule à moteur, conduit par N, impliqué dans un accident. Lors du procès, il a été décidé que N avait fait preuve de négligence en abordant la courbe du chemin rural à une vitesse excessive alors qu'il avait les facultés affaiblies. La preuve a démontré que N avait emprunté trois fois ce chemin dans la même direction durant les 18 à 20 heures précédant l'accident. Il a aussi été décidé que la municipalité était fautive parce qu'elle avait manqué à son obligation de tenir la route dans un état raisonnable d'entretien tel qu'il était exigé par l'art. 192 de *The Rural Municipality Act, 1989*. La juge de première instance a statué qu'il était raisonnable de s'attendre à ce que la municipalité pose et maintienne en place des panneaux avertissant les automobilistes du danger. La juge a attribué 15 pour cent de la responsabilité au demandeur en raison de sa négligence concourante, 50 pour cent au conducteur et 35 pour cent à la municipalité. La Cour d'appel a infirmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente et elle a rejeté l'action intentée contre celle-ci par le demandeur. Ce dernier a interjeté appel.

**Arrêt:** Le pourvoi a été accueilli.

  

Iacobucci, Major, JJ. (McLachlin, J.C.C., L'Heureux-Dubé, Arbour, JJ., souscrivant): La norme de contrôle devant être appliquée par une cour d'appel à l'égard d'une décision du juge de première instance est celle de l'erreur manifeste et dominante. Manifeste signifie « évidente ». La norme de contrôle applicable aux questions de droit est la décision correcte; celle applicable aux conclusions de fait, l'erreur manifeste et dominante. Il existe en faveur du juge une présomption d'aptitude à juger. On doit faire preuve de retenue à l'égard des conclusions de fait tirées par la juge dans le but de: diminuer le nombre d'appels, leur durée et leur coût; favoriser l'autonomie et l'intégrité des procédures judiciaires; et reconnaître la compétence du juge de première instance ainsi que sa position avantageuse. La norme de l'erreur manifeste et dominante s'applique aussi aux inférences de fait tirées par le juge de première instance. Il faut aussi faire preuve d'une grande retenue à l'égard des questions mixtes de fait et de droit qui sont des conclusions de négligence, sauf à l'égard de celles qui sont équivalentes à une formulation incorrecte de la norme juridique.

La municipalité avait une obligation légale de tenir le chemin dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité. La juge de première instance a examiné le comportement d'un automobiliste normal ou raisonnable qui s'approche de la courbe du chemin. Le fait qu'elle ait retenu le témoignage de certains témoins seulement n'était pas suffisant pour démontrer qu'elle avait oublié, négligé ou mal interprété la preuve. La juge de première instance a réparti la responsabilité entre le conducteur et la municipalité d'une façon qui tenait compte du conducteur normal. Elle n'a pas accepté la limite de vitesse de facto de 80 km/h comme la vitesse de l'automobiliste normal qui s'approche de la courbe. La juge a implicitement conclu que la courbe ne pouvait être empruntée de façon sécuritaire à une vitesse plus grande que 60 km/h sur une route sèche et 50 km/h sur une route mouillée. Elle n'a pas commis d'erreur manifeste et dominante.

Selon l'art. 192(3) de *The Rural Municipality Act, 1989*, le demandeur devait prouver que la municipalité connaissait ou devait connaître le mauvais état de la route pour qu'il soit décidé que celle-ci avait manqué à son obligation de diligence prévue à la Loi. Il s'agissait d'une question mixte de fait et de droit. L'existence d'accidents antérieurs ne constituait qu'un des facteurs ayant mené à la conclusion que la municipalité aurait dû être avertie de l'état de la route. La conclusion de la juge de première instance était fondée sur le point de vue d'un conseiller municipal prudent et la juge a tiré l'inférence que la municipalité aurait dû connaître la caractéristique permanente du chemin qui était dangereuse. Le fardeau de preuve n'est pas devenu celui de la municipalité. La municipalité n'a pas réussi à repousser l'inférence qu'elle aurait dû connaître le danger. Les conclusions de fait de la juge de première instance relativement au lien de causalité étaient raisonnables et ne constituaient pas une erreur manifeste et dominante. L'accident a eu lieu sur une partie dangereuse du chemin, à un endroit où il aurait dû y avoir un panneau d'avertissement; le niveau de facultés affaiblies du conducteur, N, a augmenté le risque qu'il ne puisse réagir même s'il y avait eu un panneau; et, encore là, N ne conduisait pas de façon si téméraire que l'on aurait pu s'attendre à ce qu'il ne voie pas le panneau d'avertissement ou à ce qu'il l'ignore. Le jugement rendu par la juge de première instance devrait être rétabli.

Bastarache, J. (dissident) (Gonthier, Binnie, LeBel, JJ., souscrivant): La juge de première instance a commis une erreur de droit lorsqu'elle n'a pas appliqué la bonne norme de diligence raisonnable à l'égard de la municipalité. Le tribunal d'appel avait le droit de conclure que les inférences de fait tirées par la juge de première instance était évidemment erronées. Il n'y avait aucune différence entre conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a retenus et conclure que l'inférence n'était pas raisonnablement appuyée par ces faits-là. Il n'est pas nécessaire de faire preuve de retenue, dans tous les cas, à l'égard des conclusions du juge de première instance relatives aux questions mixtes de fait et de droit dans le cadre d'actions en négligence. L'obligation de diligence de la municipalité ne se limite qu'à un devoir de réparer, qui lui-même se limite à une norme permettant aux conducteurs faisant preuve de précautions normales de voyager en sécurité. La simple existence d'un danger ne donne pas lieu à une obligation de poser un panneau. Le fait qu'il s'agissait d'un danger caché ne soulevait pas automatiquement la conclusion qu'il poserait un risque pour le conducteur raisonnable et cette conclusion n'était pas non plus soulevée par le témoignage d'expert qui l'appuyait. Les conclusions de fait de la juge de première instance n'appuyaient pas la conclusion que la municipalité avait manqué à son obligation. Il aurait été nécessaire de faire une analyse plus poussée de l'état du chemin. La Cour d'appel a conclu à bon droit que le chemin n'était évidemment pas conçu pour y voyager à une vitesse générale de 80 km/h ou que les conducteurs seraient induits en erreur par la nature hybride du chemin. La juge de première instance a fait des erreurs de droit et des erreurs de fait manifestes et dominantes lorsqu'elle a décidé que la municipalité aurait dû connaître le mauvais état allégué du chemin. La juge n'a pas décidé s'il fallait prêter à la municipalité la connaissance requise en considérant cette question du point de vue d'un conseiller municipal prudent. La municipalité n'avait pas une connaissance réelle des accidents antérieurs, lesquels avaient eu lieu à des endroits différents sur le chemin de celui concerné. Le simple fait qu'un accident ait eu lieu n'établissait pas qu'il y avait une obligation de poser un panneau. La preuve démontrait que l'accident avait eu lieu à cause

  

du niveau de facultés affaiblies de N et non à cause d'un manquement de la municipalité. Puisque le législateur avait clairement imposé dans la loi une obligation de diligence à la municipalité, il n'était pas nécessaire de conclure à l'existence d'une telle obligation en vertu de la common law. Il était raisonnable de s'attendre à ce qu'une municipalité prévoie les accidents qui peuvent avoir lieu à cause des conditions de la route et non à cause de l'état du chauffeur. Le pourvoi devrait être rejeté.

**Table of Authorities**

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*Canada (Director of Investigation & Research) v. Southam Inc.*, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369, [1996] S.C.J. No. 116 (S.C.C.) — followed

*Canadian National Railway v. Muller* (1933), 41 C.R.C. 329, [1934] 1 D.L.R. 768 (S.C.C.) — referred to

*Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd.*, [1981] 1 S.C.R. 504, 56 C.P.R. (2d) 145, 35 N.R. 390, 122 D.L.R. (3d) 203, 1981 CarswellNat 582F (S.C.C.) — referred to

*Cork v. Kirby MacLean Ltd.*, [1952] 2 All E.R. 402 (Eng. C.A.) — followed

*Dubé v. Labar*, 36 C.C.L.T. 105, [1986] 3 W.W.R. 750, 68 N.R. 91, 42 M.V.R. 1, [1986] 1 S.C.R. 649, 2 B.C.L.R. (2d) 273, 1 Y.R. 81, 27 D.L.R. (4th) 653, 1986 CarswellYukon 4, 1986 CarswellYukon 13 (S.C.C.) — referred to

*Galaske v. O'Donnell*, [1994] 5 W.W.R. 1, [1994] 1 S.C.R. 670, 112 D.L.R. (4th) 109, 43 B.C.A.C. 37, 69 W.A.C. 37, 166 N.R. 5, 89 B.C.L.R. (2d) 273, 21 C.C.L.T. (2d) 1, 2 M.V.R. (3d) 1, 1994 CarswellBC 152, 1994 CarswellBC 1238, [1994] S.C.J. No. 28 (S.C.C.) — followed

*Goodman Estate v. Geffen*, [1991] 5 W.W.R. 389, 42 E.T.R. 97, *(*sub nom. *Geffen v. Goodman Estate)* [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, *(*sub nom. *Geffen v. Goodman Estate)* 81 D.L.R. (4th) 211, 127 N.R. 241, 1991 CarswellAlta 91, 1991 CarswellAlta 557, [1991] S.C.J. No. 53 (S.C.C.) — followed

*Gottardo Properties (Dome) Inc. v. Toronto (City)*, 1998 CarswellOnt 3004, *(*sub nom. *Gottardo Properties (Dome) Inc. v. Regional Assessment Commissioner, Region No. 9)* 111 O.A.C. 272, 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.) — followed

*Hodgkinson v. Simms*, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 1994 CarswellBC 438, 1994 CarswellBC 1245 (S.C.C.) — referred to

*Horsley v. MacLaren*, [1969] 2 O.R. 137, *(*sub nom. *Matthews v. MacLaren)* 4 D.L.R. (3d) 557 (Ont. H.C.) — referred to

*Ingles v. Tutkaluk Construction Ltd.*, 183 D.L.R. (4th) 193, 2000 SCC 12, 2000 CarswellOnt 447, 2000 CarswellOnt 448, 46 O.R. (3d) 736 (headnote only), 8 M.P.L.R. (3d) 1, 49 C.C.L.T. (2d) 1, 251 N.R. 63, 1 C.L.R. (3d) 1, 130 O.A.C. 201, [2000] 1 S.C.R. 298, [2000] S.C.J. No. 13 (S.C.C.) — referred to

*Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, 40 N.R. 4, 1981 CarswellBC 635, 1981 CarswellBC 635F (S.C.C.) — followed

*McLean v. McCannell*, [1937] S.C.R. 341, [1937] 2 D.L.R. 639, 1937 CarswellOnt 105 (S.C.C.) — considered

*Palsky v. Humphrey*, [1964] S.C.R. 580, 48 W.W.R. 38, 45 D.L.R. (2d) 655, 1964 CarswellAlta 36 (S.C.C.) — referred

  

to

*Partridge v. Langenburg (Rural Municipality)*, [1929] 3 W.W.R. 555, 24 Sask. L.R. 153, [1930] 1 D.L.R. 939, 1929 CarswellSask 95 (Sask. C.A.) — followed

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*Ryan v. Victoria (City)*, 1999 CarswellBC 79, 1999 CarswellBC 80, 50 M.P.L.R. (2d) 1, 234 N.R. 201, 168 D.L.R. (4th) 513, 117 B.C.A.C. 103, 191 W.A.C. 103, 40 M.V.R. (3d) 1, 44 C.C.L.T. (2d) 1, 59 B.C.L.R. (3d) 81, [1999] 6 W.W.R. 61, [1999] 1 S.C.R. 201, [1999] S.C.J. No. 7 (S.C.C.) — considered

*Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335, 1980 CarswellOnt 653, 1980 CarswellNat 653F, 1980 CarswellOnt 0653F (S.C.C.) — referred to

*Schwartz v. R.*, 17 C.C.E.L. (2d) 141, *(*sub nom. *Minister of National Revenue v. Schwartz)* 193 N.R. 241, *(*sub nom. *Schwartz v. Canada)* 133 D.L.R. (4th) 289, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, *(*sub nom. *Schwartz v. Canada)* [1996] 1 S.C.R. 254, 1996 CarswellNat 422, 1996 CarswellNat 422F (S.C.C.) — followed

*St-Jean c. Mercier*, 2002 SCC 15, 2002 CarswellQue 142, 2002 CarswellQue 143 (S.C.C.) — considered

*Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1, 1975 CarswellNat 385, [1976] 1 Lloyd's Rep. 153, 1975 CarswellNat 385F (S.C.C.) — followed

*Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 2 W.W.R. 609, 87 B.C.L.R. (2d) 1, 18 C.C.L.T. (2d) 209, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, *(*sub nom. *Toneguzzo-Norvell v. Savein)* 162 N.R. 161, *(*sub nom. *Toneguzzo-Norvell v. Savein)* 38 B.C.A.C. 193, *(*sub nom. *Toneguzzo-Norvell v. Savein)* 62 W.A.C. 193, *(*sub nom. *Toneguzzo-Norvell v. Savein)* [1994] R.R.A. 1, 1994 CarswellBC 101, 1994 CarswellBC 1232, [1994] S.C.J. No. 4 (S.C.C.) — followed

*Underwood v. Ocean City Realty Ltd.*, 12 B.C.L.R. (2d) 199, 1987 CarswellBC 69 (B.C. C.A.) — followed

*Van de Perre v. Edwards*, 2001 SCC 60, 2001 CarswellBC 1999, 2001 CarswellBC 2000, 204 D.L.R. (4th) 257, 94 B.C.L.R. (3d) 199, 19 R.F.L. (5th) 396, [2001] 11 W.W.R. 1, *(*sub nom. *P. (K.V.) v. E. (T.))* 275 N.R. 52, *(*sub nom. *K.V.P. v. T.E.)* 156 B.C.A.C. 161, *(*sub nom. *K.V.P. v. T.E.)* 255 W.A.C. 161, [2001] S.C.J. No. 60 (S.C.C.) — followed

*Woods Manufacturing Co. v. R.*, [1951] S.C.R. 504, 67 C.R.T.C. 87, [1951] 2 D.L.R. 465, 1951 CarswellNat 272 (S.C.C.) — considered

**Cases considered by *Bastarache J.*:**

*Bose Corp. v. Consumers Union of U.S. Inc.* (1984), 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502, 38 Fed. R. Serv. 3d 1421, 10 Media L. Rep. 1625 (U.S. Mass.) — considered

*Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 4 W.W.R. 194, 20 Admin. L.R. (2d) 1, 89 B.C.L.R. (2d) 1, 19 C.C.L.T. (2d) 268, [1994] 1 S.C.R. 420, 42 B.C.A.C. 1, 67 W.A.C. 1, 2 M.V.R. (3d) 43, 164 N.R. 161, 112 D.L.R. (4th) 1, 1994 CarswellBC 128, 1994 CarswellBC 1236, [1994] S.C.J. No. 20 (S.C.C.) — considered

*Canada v. Pharmaceutical Society (Nova Scotia)*, 15 C.R. (4th) 1, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 93 D.L.R. (4th) 36, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* [1992] 2 S.C.R. 606, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 43 C.P.R. (3d) 1, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 74 C.C.C. (3d) 289, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 10 C.R.R. (2d) 34, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 139 N.R. 241, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 114 N.S.R. (2d) 91, 1992 CarswellNS 15, 313 A.P.R. 91, 1992 CarswellNS 353, [1992] S.C.J. No. 67 (S.C.C.) — considered

*Canada (Director of Investigation & Research) v. Southam Inc.*, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368 (Eng.), 1997 CarswellNat 369 (Fr.), 1997

  

CarswellNat 368, 1997 CarswellNat 369, [1996] S.C.J. No. 116 (S.C.C.) — considered

*Diebel Estate v. Pinto Creek (Rural Municipality) No. 75*, *(*sub nom. *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality))* 149 Sask. R. 68, 1996 CarswellSask 584 (Sask. Q.B.) — considered

*Fafard v. Quebec (City)*, 55 S.C.R. 615, 39 D.L.R. 717, 1917 CarswellQue 8 (S.C.C.) — considered

*Galbiati v. Regina (City)* (1971), [1972] 2 W.W.R. 40, 1971 CarswellSask 93 (Sask. Q.B.) — considered

*Goodman Estate v. Geffen*, [1991] 5 W.W.R. 389, 42 E.T.R. 97, *(*sub nom. *Geffen v. Goodman Estate)* [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, *(*sub nom. *Geffen v. Goodman Estate)* 81 D.L.R. (4th) 211, 127 N.R. 241, 1991 CarswellAlta 91, 1991 CarswellAlta 557, [1991] S.C.J. No. 53 (S.C.C.) — considered

*Jaegli Enterprises Ltd. v. Ankenman* (1978), 95 D.L.R. (3d) 82, 1981 CarswellBC 726 (B.C. S.C.) — referred to

*Jaegli Enterprises Ltd. v. Ankenman*, 21 B.C.L.R. 155, *(*sub nom. *Taylor v. Ankenman)* 112 D.L.R. (3d) 297, 1980 CarswellBC 137 (B.C. C.A.) — referred to

*Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, 40 N.R. 4, 1981 CarswellBC 635, 1981 CarswellBC 635F (S.C.C.) — considered

*Jennings v. Cronsberry*, *(*sub nom. *R. v. Jennings)* [1966] S.C.R. 532, 57 D.L.R. (2d) 644, 1966 CarswellOnt 61 (S.C.C.) — considered

*Just v. British Columbia*, 1 C.C.L.T. (2d) 1, [1989] 2 S.C.R. 1228, 18 M.V.R. (2d) 1, [1990] 1 W.W.R. 385, 41 B.C.L.R. (2d) 350, 103 N.R. 1, 64 D.L.R. (4th) 689, 41 Admin. L.R. 161, [1990] R.R.A. 140, 1989 CarswellBC 234, 1989 CarswellBC 719, [1989] S.C.J. No. 121 (S.C.C.) — considered

*Kolesar v. Jeffries* (1977), *(*sub nom. *Joseph Brant Memorial Hospital v. Koziol)* [1978] 1 S.C.R. 491, 2 C.C.L.T. 170, *(*sub nom. *Kolesar v. Joseph Brant Memorial Hospital)* 15 N.R. 302, 77 D.L.R. (3d) 161, 1977 CarswellOnt 448, 1977 CarswellOnt 465 (S.C.C.) — considered

*Levey v. Rodgers (Rural Municipality)*, [1921] 3 W.W.R. 764, 15 Sask. L.R. 31, 63 D.L.R. 452, 1921 CarswellSask 185 (Sask. C.A.) — referred to

*Moge v. Moge* (1992), [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 30 W.A.C. 161, 43 R.F.L. (3d) 345, 145 N.R. 1, [1993] R.D.F. 168, 1992 CarswellMan 143 (Eng.), 1992 CarswellMan 222 (Fr.), [1992] S.C.J. No. 107 (S.C.C.) — considered

*Nelson v. Waverley (Rural Municipality No. 44)*, 65 Sask. R. 260, 1988 CarswellSask 140 (Sask. Q.B.) — considered

*Nielsen v. Kamloops (City)*, [1984] 5 W.W.R. 1, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, 54 N.R. 1, 11 Admin. L.R. 1, 29 C.C.L.T. 97, 8 C.L.R. 1, 26 M.P.L.R. 81, 66 B.C.L.R. 273, 1984 CarswellBC 476, 1984 CarswellBC 821 (S.C.C.) — considered

*Parkland No. 31 (County) v. Stetar* (1974), [1975] 1 W.W.R. 441, [1975] 2 S.C.R. 884, 3 N.R. 311, 50 D.L.R. (3d) 376, 1974 CarswellAlta 131, 1974 CarswellAlta 196 (S.C.C.) — referred to

*Partridge v. Langenburg (Rural Municipality)*, [1929] 3 W.W.R. 555, 24 Sask. L.R. 153, [1930] 1 D.L.R. 939, 1929 CarswellSask 95 (Sask. C.A.) — considered

*Ryan v. Victoria (City)*, 1999 CarswellBC 79, 1999 CarswellBC 80, 50 M.P.L.R. (2d) 1, 234 N.R. 201, 168 D.L.R. (4th) 513, 117 B.C.A.C. 103, 191 W.A.C. 103, 40 M.V.R. (3d) 1, 44 C.C.L.T. (2d) 1, 59 B.C.L.R. (3d) 81, [1999] 6 W.W.R. 61, [1999] 1 S.C.R. 201, [1999] S.C.J. No. 7 (S.C.C.) — considered

*Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335, 1980 CarswellOnt 653, 1980 CarswellNat 653F, 1980 CarswellOnt 0653F (S.C.C.) — referred to

  

*Schwartz v. R.*, 17 C.C.E.L. (2d) 141, *(*sub nom. *Minister of National Revenue v. Schwartz)* 193 N.R. 241, *(*sub nom. *Schwartz v. Canada)* 133 D.L.R. (4th) 289, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, *(*sub nom. *Schwartz v. Canada)* [1996] 1 S.C.R. 254, 1996 CarswellNat 422, 1996 CarswellNat 422F (S.C.C.) — considered

*Shupe v. Pleasantdale (Rural Municipality)*, [1932] 1 W.W.R. 627, 1932 CarswellSask 25 (Sask. C.A.) — considered

*St-Jean c. Mercier*, 2002 SCC 15, 2002 CarswellQue 142, 2002 CarswellQue 143 (S.C.C.) — considered

*Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1, 1975 CarswellNat 385, [1976] 1 Lloyd's Rep. 153, 1975 CarswellNat 385F (S.C.C.) — considered

*Swinamer v. Nova Scotia (Attorney General)*, 19 C.C.L.T. (2d) 233, 20 Admin. L.R. (2d) 39, 112 D.L.R. (4th) 18, 129 N.S.R. (2d) 321, 362 A.P.R. 321, [1994] 1 S.C.R. 445, 2 M.V.R. (3d) 80, 163 N.R. 291, 1994 CarswellNS 3, 1994 CarswellNS 433 (S.C.C.) — referred to

*Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 2 W.W.R. 609, 87 B.C.L.R. (2d) 1, 18 C.C.L.T. (2d) 209, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, *(*sub nom. *Toneguzzo-Norvell v. Savein)* 162 N.R. 161, *(*sub nom. *Toneguzzo-Norvell v. Savein)* 38 B.C.A.C. 193, *(*sub nom. *Toneguzzo-Norvell v. Savein)* 62 W.A.C. 193, *(*sub nom. *Toneguzzo-Norvell v. Savein)* [1994] R.R.A. 1, 1994 CarswellBC 101, 1994 CarswellBC 1232, [1994] S.C.J. No. 4 (S.C.C.) — considered

*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 25 C.C.E.L. (2d) 153, 144 D.L.R. (4th) 385, *(*sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15)* 98 O.A.C. 241, [1997] 1 S.C.R. 487, 44 Admin. L.R. (2d) 1, 97 C.L.L.C. 220-018, *(*sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15)* 208 N.R. 245, 1997 CarswellOnt 244, 1997 CarswellOnt 245, [1997] L.V.I. 2831-1, [1997] S.C.J. No. 27 (S.C.C.) — considered

*Van de Perre v. Edwards*, 2001 SCC 60, 2001 CarswellBC 1999, 2001 CarswellBC 2000, 204 D.L.R. (4th) 257, 94 B.C.L.R. (3d) 199, 19 R.F.L. (5th) 396, [2001] 11 W.W.R. 1, *(*sub nom. *P. (K.V.) v. E. (T.))* 275 N.R. 52, *(*sub nom. *K.V.P. v. T.E.)* 156 B.C.A.C. 161, *(*sub nom. *K.V.P. v. T.E.)* 255 W.A.C. 161, [2001] S.C.J. No. 60 (S.C.C.) — considered

*Williams v. North Battleford (Town)* (1911), 16 W.L.R. 301, 4 Sask. L.R. 75 (Sask. C.A.) — considered

**Statutes considered by *Iacobucci, Major JJ.*:**

*Highway Traffic Act*, S.S. 1986, c. H-3.1
Generally — referred to

*Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1
Generally — considered

s. 192 — considered

s. 192(3) — considered

**Statutes considered by *Bastarache J.*:**

*Criminal Code*, R.S.C. 1985, c. C-46
Generally — referred to

*Highway Traffic Act*, S.S. 1986, c. H-3.1
Generally — referred to

s. 33(1) — considered

s. 33(2) — considered

  

s. 44(1) — considered

*Highway Traffic Act*, R.S.O. 1960, c. 172
Generally — referred to

*Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1
Generally — considered

s. 192 — considered

s. 192(1) — considered

s. 192(2) — considered

s. 192(3) — considered

**Words and phrases considered**

**PALPABLE**

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

The common element in each of these definitions is that palpable is plainly seen.

**Termes et locutions cités**

**MANIFESTE**

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

L'élément commun de ces définitions est qu'une chose « manifeste » est une chose qui est « évidente ».

APPEAL by plaintiff from judgment reported at 2000 SKCA 12, 2000 CarswellSask 50, [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126, [2000] S.J. No. 58 (Sask. C.A.), allowing appeal by municipality from finding of liability for negligence.

POURVOI du demandeur à l'encontre du jugement publié à 2000 SKCA 12, 2000 CarswellSask 50, [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126, [2000] S.J. No. 58 (Sask. C.A.), qui a accueilli le pourvoi de la municipalité à l'encontre de la conclusion l'ayant déclarée responsable vu sa négligence.

***Iacobucci, Major JJ.*:**

**I. Introduction**

1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's

  

reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

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

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

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

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

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

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

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

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

### *A. Standard of Review for Questions of Law*

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

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

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice

  

> becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

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

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

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

***B. Standard of Review for Findings of Fact***

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.), at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12 (S.C.C.), at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.) , at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

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

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

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

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

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

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

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

  

# TAB 14

2016 SKCA 39
Saskatchewan Court of Appeal

Campbell v. Campbell

2016 CarswellSask 180, 2016 SKCA 39, [2016] 8 W.W.R. 631, [2016] W.D.F.L. 3282, [2016] S.C.J. No. 149, 264 A.C.W.S. (3d) 694, 399 D.L.R. (4th) 265, 476 Sask. R. 185, 666 W.A.C. 185, 78 R.F.L. (7th) 64

# Shaun Norman Campbell, Appellant (Petitioner) and Kristin Ann Campbell, Respondent (Respondent)

Ottenbreit, Herauf, Whitmore JJ.A.

Heard: September 24, 2015
Judgment: March 22, 2016
Docket: CACV2663

Counsel: Sherry L. Fitzsimmons, for Appellant
Tiffany M. Paulsen, Q.C., for Respondent

Subject: Contracts; Family

**Related Abridgment Classifications**

Family law
X Custody and access
X.11 Variation of custody order
X.11.a Material change in circumstances

**Headnote**

Family law --- Custody and access — Variation of custody order — Factors to be considered — Material change in circumstances
Father and mother were separated in September 2009 and divorced in February 2012 — Father and mother entered into interspousal agreement in relation to custody, parenting time, child support and other issues in 2011 when their twins were seven years old — Terms of interspousal agreement with respect to parenting arrangements were incorporated into consent divorce judgment, child support and parenting order — Pursuant to order, primary residence for children was with mother — Father applied to vary terms of order — Chambers judge found that father had not discharged onus on him to demonstrate material change that adversely affected needs of children — Father appealed judgment dismissing application to vary parenting arrangements set forth in consent divorce judgment dated January 5, 2012 — Appeal allowed — Review clause of interspousal agreement created second avenue for review and avoided necessity of proving material change in circumstances — Party relying on review clause had onus of proving that current parenting arrangement was no longer meeting needs of children — Chambers judge failed to determine whether evidence as whole allowed for better fulfillment of children's needs — Assessment of needs of children in accordance with review clause was required.

**Table of Authorities**

**Cases considered by *Ottenbreit J.A.*:**

*Balzer v. Balzer* (2003), 2003 CarswellOnt 6398 (Ont. S.C.J.) — considered

 

*Gordon v. Goertz* (1996), [1996] 5 W.W.R. 457, 19 R.F.L. (4th) 177, 196 N.R. 321, 134 D.L.R. (4th) 321, 141 Sask. R. 241, 114 W.A.C. 241, [1996] 2 S.C.R. 27, *(*sub nom. *Goertz c. Gordon)* [1996] R.D.F. 209, 1996 CarswellSask 199, 1996 CarswellSask 199F (S.C.C.) — followed

*Kemery v. Kemery* (2012), 2012 SKCA 130, 2012 CarswellSask 850, 405 Sask. R. 231, 563 W.A.C. 231, 30 R.F.L. (7th) 87 (Sask. C.A.) — considered

*Miglin v. Miglin* (2003), 2003 SCC 24, 2003 CarswellOnt 1374, 2003 CarswellOnt 1375, 34 R.F.L. (5th) 255, 224 D.L.R. (4th) 193, 302 N.R. 201, 171 O.A.C. 201, [2003] 1 S.C.R. 303, 66 O.R. (3d) 736, 2003 CSC 24 (S.C.C.) — referred to

*O'Reilly's Irish Bar Inc. v. 10385 Nfld. Ltd.* (2006), 2006 NLCA 26, 2006 CarswellNfld 124, 255 Nfld. & P.E.I.R. 292, 768 A.P.R. 292 (N.L. C.A.) — referred to

*Sans Souci Ltd. v. VRL Services Ltd.* (2012), [2012] UKPC 6 (Jamaica P.C.) — considered

*Sappier v. Francis* (2004), 2004 NBCA 70, 2004 CarswellNB 514, 2004 CarswellNB 515, 8 R.F.L. (6th) 218, *(*sub nom. *F. (S.) v. S. (L.))* 276 N.B.R. (2d) 183, *(*sub nom. *F. (S.) v. S. (L.))* 724 A.P.R. 183 (N.B. C.A.) — considered

*Sather v. McCallum* (2006), 2006 ABCA 290, 2006 CarswellAlta 1271, 32 R.F.L. (6th) 233 (Alta. C.A.) — considered

*Sharpe, Re* (1992), [1992] FCA 616 (Australia Fed. Ct.) — considered

*Sutherland v. Reeves* (2014), 2014 BCCA 222, 2014 CarswellBC 1661, 61 B.C.L.R. (5th) 308, 357 B.C.A.C. 46, 611 W.A.C. 46 (B.C. C.A.) — considered

*Wiegers v. Gray* (2008), 2008 SKCA 7, 2008 CarswellSask 10, 47 R.F.L. (6th) 1, [2008] 4 W.W.R. 225, 307 Sask. R. 117, 417 W.A.C. 117, 291 D.L.R. (4th) 176 (Sask. C.A.) — followed

**Statutes considered:**

*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to

s. 9(2) — considered

s. 17(5) — considered

APPEAL from judgment dismissing application to vary parenting arrangements set forth in consent divorce judgment.

***Ottenbreit J.A.*:**

**I. Introduction**

1 Shaun Norman Campbell (the father) appeals a Court of Queen's Bench Chambers decision dated December 17, 2014, dismissing an application to vary parenting arrangements set forth in a consent divorce judgment dated January 5, 2012. For the reasons hereinafter set forth, the appeal is allowed.

**II. Facts and Background**

2 The father and Kristin Ann Campbell (the mother) were separated in September 2009 and divorced in February 2012. They have twin daughters, Hailey and Hanna, now aged 12. The mother and the father entered into an interspousal agreement

  

interests of the children.

In other words, if the threshold of a material change has been crossed only then should the judge consider the best interests of the children with reference to that change.

13 With this in mind, I turn to the analysis of the review clause.

14 As a preliminary matter, let me deal with the father's argument that the review clause must be construed similar to a clause in a contract. The review clause is not a contract and resort to contractual interpretation and principles is misplaced. Once the review clause was incorporated into the judgment it became part of a court order and principles regarding interpretation of court orders apply.

15 These principles have been set forth in a number of cases. In *Sutherland v. Reeves*, 2014 BCCA 222, 61 B.C.L.R. (5th) 308 (B.C. C.A.), Bauman C.J.B.C. stated:

> [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
>
> > [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
> >
> > [Emphasis added.]
>
> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.

16 In *Sans Souci Ltd. v. VRL Services Ltd.*, [2012] UKPC 6 (Jamaica P.C.), Lord Sumption reached the same conclusion:

> [13] ... The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.

17 In *Sharpe, Re*, [1992] FCA 616 (Australia Fed. Ct.), the Court stated:

> [20] ... even if a judgment is not ambiguous, it is nevertheless proper (if not essential) in construing it to have regard to the factual context in which the judgment was given and that this context includes the pleadings, the reasons for the judgment and the course of evidence at the trial.

18 With this jurisprudence in mind, I will examine the language of the order, the pleadings and the circumstances in which the order was made. I turn, first, to the language of the review clause. A plain reading of the review clause and the presence of the word "or" in the second line of the clause shows that the clause is disjunctive and, on its face, contains two possibilities for review of the parenting arrangement: (a) a material change in circumstances affecting the children, or (b) the current parenting arrangement is no longer meeting the children's needs. The second part of the review clause would be

  

# TAB 15

2009 SKCA 85
Saskatchewan Court of Appeal

Montreal Trust Co. v. Williston Wildcatters Corp.

2009 CarswellSask 499, 2009 SKCA 85, [2009] 10 W.W.R. 458, 179 A.C.W.S. (3d) 1073, 337 Sask. R. 95, 464 W.A.C. 95

# The Long Riders Rig Corporation, Capital Developments Corp., Spalding G. Wathen Investments Ltd., The Fresno San Andreas Oil Corporation, and Gopher Oil & Gas Company Ltd. (Appellants / Defendants / Plaintiffs by Cross-Claim) and Montreal Trust Company (Respondent / Cross Appellant / Plaintiff) and T.D.L. Petroleums Inc. (Respondent / Defendant / Defendant by Cross-Claim) and Herc Oil Corp., and Fast Trucking Service Ltd. (Respondents / Defendants) and Williston Wildcatters Corporation and 600131 Saskatchewan Ltd. (Non-Parties)

Blackfire Oil Inc. (Appellant / Defendant) and Montreal Trust Company (Respondent / Cross Appellant / Plaintiff)

Vancise, Jackson, Richards JJ.A.

Heard: May 26, 2009
Judgment: August 4, 2009
Docket: 1545

Proceedings: reversing *Montreal Trust Co. v. Williston Wildcatters Corp.* (2007), 2007 SKQB 411, 2007 CarswellSask 642, (sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 308 Sask. R. 147 (Sask. Q.B.)

Counsel: John M. Williams for Appellants, Long Riders Rig Corporation, Capital Developments Corp., Spalding G. Wathen Investments Ltd., Fresno San Andreas Oil Corporation, Gopher Oil & Gas Company Ltd., Blackfire Oil Inc.
Aaron A. Fox, Q.C. for Respondents, T.D.L. Petroleums Inc., Herc Oil Corp., Fast Trucking Services Ltd.
Reginald A. Watson, Q.C. for Respondent, Montreal Trust Company

Subject: Natural Resources; Property; Civil Practice and Procedure; Estates and Trusts

**Related Abridgment Classifications**

Civil practice and procedure
XXII Judgments and orders
XXII.16 Amending or varying
XXII.16.c After judgment entered
XXII.16.c.v Miscellaneous

Natural resources
III Oil and gas
III.5 Oil and gas leases
III.5.e Termination of lease
III.5.e.v Miscellaneous

Remedies
I Damages
I.15 Practice and procedure

  

I.15.g Appeals
I.15.g.i Grounds for appeal
I.15.g.i.A Error of law

**Headnote**

Natural resources --- Oil and gas — Oil and gas leases — Termination of lease — Miscellaneous
T Inc. farmed 12-8 well lease out to L Corp.'s predecessor, which drilled and operated offset well 11-8, paying T Inc. royalties — Trustee of title to 12-8, M Co., brought action against T Inc.; trial judge found that lease had terminated, that T Inc. breached farmout agreement, and that drilling and operation of 11-8 was trespass continuing until November 2001, and awarded M Co. damages based on royalty of 18 per cent less 12.5 per cent already paid, ordered T Inc. to pay damages out of gross overriding royalty, and awarded L Corp. judgment equal to 5.5 per cent gross revenues, plus pre-judgment interest — Meanwhile, parties agreed on consent order that L Corp. would continue production and pay 12.5 per cent royalty to M Co. and post-September 2001 production proceeds into court less costs, so that, by July 2007, there was $324,834.28 in trust account and $126,275.71 net well revenues plus interest in respect of September 2001 to June 2003 production, held in court — On M Co.'s appeal, appellate court found trespass period was from January 1990 to March 1992 and that L Corp. operated well with M Co.'s express leave and license from March 1992 until November 2001 — Trial judge heard M Co.'s application for directions concerning payout of funds in court and in trust and found that, among other things, M Co. was entitled to 12.5 per cent royalty, L Corp. was entitled to production costs, and T Inc. had no interest subsequent to November 2001 when interests reverted to M Co., so M Co. was entitled to post-November 2001 revenue — L Corp. appealed and M Co. cross-appealed — Appeal allowed; cross-appeal dismissed — Trial judge substantively modified granted and perfected judgments — Issued judgment was only to be amended where there was error in drawing up or where oral judgment did not express court's intentions — Appellate court did not award M Co. net production proceeds for period of leave and license or for period after consent order but confirmed trial judge's findings that M Co.'s damages were limited to what it would have received as royalty — As appellate court limited damages to 12.5 per cent royalty, trial judge erred in finding M Co. entitled to revenue realized after November 2001 — Trial judge failed to appreciate that appellate court altered his judgment and that he was to apply and direct payment as per appellate judgment, not determine whether division according to original arrangement was fair or equitable — There was no basis for T Inc. sharing in revenue during license and consent order period — Funds and interest in court after paying M Co.'s judgment were to be paid to L Corp. for distribution to well participants as per respective interests, with M Co. receiving $40,769.91 from T Inc. as agreed or from funds in court, pursuant to judgment with respect to 11-8.

Civil practice and procedure --- Judgments and orders — Amending or varying — After judgment entered — Miscellaneous
T Inc. farmed 12-8 well lease out to L Corp.'s predecessor, which drilled and operated offset well 11-8, paying T Inc. royalties — Trustee of title to 12-8, M Co., brought action against T Inc.; trial judge found that lease had terminated, that T Inc. breached farmout agreement, and that drilling and operation of 11-8 was trespass continuing until November 2001, and awarded M Co. damages based on royalty of 18 per cent less 12.5 per cent already paid, ordered T Inc. to pay damages out of gross overriding royalty, and awarded L Corp. judgment equal to 5.5 per cent gross revenues, plus pre-judgment interest — Meanwhile, parties agreed on consent order that L Corp. would continue production and pay 12.5 per cent royalty to M Co. and post-September 2001 production proceeds into court less costs, so that, by July 2007, there was $324,834.28 in trust account and $126,275.71 net well revenues plus interest in respect of September 2001 to June 2003 production, held in court — On M Co.'s appeal, appellate court found trespass period was from January 1990 to March 1992 and that L Corp. operated well with M Co.'s express leave and license from March 1992 until November 2001 — Trial judge heard M Co.'s application for directions concerning payout of funds in court and in trust and found that, among other things, M Co. was entitled to 12.5 per cent royalty, L Corp. was entitled to production costs, and T Inc. had no interest subsequent to November 2001 when interests reverted to M Co., so M Co. was entitled to post-November 2001 revenue — L Corp. appealed and M Co. cross-appealed — Appeal allowed; cross-appeal dismissed — Trial judge substantively modified granted and perfected judgments — Issued judgment was only to be amended where there was error in drawing up or where oral judgment did not express court's intentions — Appellate court did not award M Co. net production proceeds for period of leave and license or for period after consent order but confirmed trial judge's findings that M Co.'s damages were limited to what it would have received as royalty — As appellate court limited damages to 12.5 per cent royalty, trial judge erred in finding M Co. entitled to revenue realized after November 2001 — Trial judge failed to appreciate that appellate court altered his judgment and that he was to apply and direct payment as per appellate judgment, not determine whether division according to original arrangement was fair or equitable — There was no basis for T Inc. sharing in revenue during license and consent order period

  

— Funds and interest in court after paying M Co.'s judgment were to be paid to L Corp. for distribution to well participants as per respective interests, with M Co. receiving $40,769.91 from T Inc. as agreed or from funds in court, pursuant to judgment with respect to 11-8.

Remedies --- Damages — Practice — Appeals — Grounds for appeal — Error of law — Miscellaneous
T Inc. farmed 12-8 well lease out to L Corp.'s predecessor, which drilled and operated offset well 11-8, paying T Inc. royalties — Trustee of title to 12-8, M Co., brought action against T Inc.; trial judge found that lease had terminated, that T Inc. breached farmout agreement, and that drilling and operation of 11-8 was trespass continuing until November 2001, and awarded M Co. damages based on royalty of 18 per cent less 12.5 per cent already paid, ordered T Inc. to pay damages out of gross overriding royalty, and awarded L Corp. judgment equal to 5.5 per cent gross revenues, plus pre-judgment interest — Meanwhile, parties agreed on consent order that L Corp. would continue production and pay 12.5 per cent royalty to M Co. and post-September 2001 production proceeds into court less costs, so that, by July 2007, there was $324,834.28 in trust account and $126,275.71 net well revenues plus interest in respect of September 2001 to June 2003 production, held in court — On M Co.'s appeal, appellate court found trespass period was from January 1990 to March 1992 and that L Corp. operated well with M Co.'s express leave and license from March 1992 until November 2001 — Trial judge heard M Co.'s application for directions concerning payout of funds in court and in trust and found that, among other things, M Co. was entitled to 12.5 per cent royalty, L Corp. was entitled to production costs, and T Inc. had no interest subsequent to November 2001 when interests reverted to M Co., so M Co. was entitled to post-November 2001 revenue — L Corp. appealed and M Co. cross-appealed — Appeal allowed; cross-appeal dismissed — Trial judge substantively modified granted and perfected judgments — Issued judgment was only to be amended where there was error in drawing up or where oral judgment did not express court's intentions — Appellate court did not award M Co. net production proceeds for period of leave and license or for period after consent order but confirmed trial judge's findings that M Co.'s damages were limited to what it would have received as royalty — As appellate court limited damages to 12.5 per cent royalty, trial judge erred in finding M Co. entitled to revenue realized after November 2001 — Trial judge failed to appreciate that appellate court altered his judgment and that he was to apply and direct payment as per appellate judgment, not determine whether division according to original arrangement was fair or equitable — There was no basis for T Inc. sharing in revenue during license and consent order period — Funds and interest in court after paying M Co.'s judgment were to be paid to L Corp. for distribution to well participants as per respective interests, with M Co. receiving $40,769.91 from T Inc. as agreed or from funds in court, pursuant to judgment with respect to 11-8.

**Table of Authorities**

**Cases considered by *Vancise J.A.*:**

*Boe v. Boe* (1987), 1987 CarswellSask 44, 6 R.F.L. (3d) 383, 57 Sask. R. 7, 66 C.B.R. (N.S.) 143 (Sask. Q.B.) — followed

*Co-operative Trust Co. of Canada v. Twelfth Building Ltd.* (1983), 25 Sask. R. 218, 1983 CarswellSask 297 (Sask. Q.B.) — followed

*Gilmour v. Gilmour* (1994), 1994 CarswellSask 283, [1995] 3 W.W.R. 137, 9 R.F.L. (4th) 365, 128 Sask. R. 113, 85 W.A.C. 113 (Sask. C.A.) — followed

*Kuziak v. Romuld* (1966), 58 W.W.R. 462, 60 D.L.R. (2d) 286, 1966 CarswellSask 57 (Sask. C.A.) — referred to

*Montreal Trust Co. v. Williston Wildcatters Corp.* (2003), 2003 CarswellSask 534, [2004] 3 W.W.R. 574, 2003 SKQB 360, *(*sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 239 Sask. R. 57 (Sask. Q.B.) — considered

*Montreal Trust Co. v. Williston Wildcatters Corp.* (2004), 2004 SKCA 116, 2004 CarswellSask 583, 26 C.C.L.T. (3d) 1, 23 R.P.R. (4th) 106, [2005] 4 W.W.R. 20, *(*sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 254 Sask. R. 38, *(*sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 336 W.A.C. 38, 243 D.L.R. (4th) 317 (Sask. C.A.) — referred to

*Montreal Trust Co. v. Williston Wildcatters Corp.* (2007), 2007 SKQB 411, 2007 CarswellSask 642, *(*sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 308 Sask. R. 147 (Sask. Q.B.) — considered

  

*Storey v. Zazelenchuk* (1985), 40 Sask. R. 241, 1985 CarswellSask 539 (Sask. C.A.) — referred to

**Rules considered:**

*Queen's Bench Rules*, Sask. Q.B. Rules
R. 344 — considered

APPEAL by lessee of mineral lease and CROSS-APPEAL by trust company from judgment reported at *Montreal Trust Co. v. Williston Wildcatters Corp.* (2007), 2007 SKQB 411, 2007 CarswellSask 642, (sub nom. *Montreal Trust Co. v. T.D.L. Petroleums Inc.)* 308 Sask. R. 147 (Sask. Q.B.), awarding additional money to trust company.

***Vancise J.A.*:**

**Introduction**

1 The issue on this appeal is straight forward. Did Justice Gerein err in giving directions to the parties on their entitlement to certain monies held in court, and in the trust account of one of the parties' lawyer, which represents the net proceeds of the sale of the production of an oil well operated by the Long Riders Group ("Long Riders"). The answer however is not so straight forward.

2 Long Riders contends that Gerein J. erred and exceeded his jurisdiction by, in effect, modifying his earlier judgments as modified by this Court, rather than giving directions for the payout of the monies as requested by some of the parties.

3 The application for directions and this appeal are arguably the last proceedings in a legal battle that began some 12 years ago. To adequately deal with the issues, it is necessary to set out the factual chronology and findings of Chief Justice Gerein (as he then was) and the findings of this Court in some detail.

4 At bottom, the issue will be determined by what this Court decided in its decision dated September 3, 2004 and whether Justice Gerein correctly interpreted that judgment.

**Historical Summary**

5 Montreal Trust is the trustee of the mineral title to the subject well located on L.S.D. 11 of Section 8, Township 4, Range 33-W1st (hereinafter "11-8") for several beneficial owners pursuant to the Grinnan Hughes Royalty and Mineral Trust Agreement of 1952.

6 The mineral rights were subject to a petroleum and natural gas lease which provided for the payment of a 12.5% royalty. In 1955, the lessee drilled a successful oil well on L.S.D. 12 ("12-8 well"). The lease was continued by "production" pursuant to its terms. T.D.L. obtained the leasehold interest in the 12-8 well. Production from the 12-8 well ceased in 1990.

7 In March of 1991, T.D.L., believing the lease was still in effect, entered into a farmout agreement with Williston Wildcatters Corporation, the predecessor to Long Riders. T.D.L. covenanted in the farmout agreement that the 1952 lease was valid and as a result, Williston undertook to drill an offset well by May of 1991 and, if successful, to pay an overriding royalty to T.D.L. in exchange for an interest in the lease. Williston, and its successor Long Riders, believed they had a valid lease. They were unaware of the nonproduction of the 12-8 well. Williston and Long Riders drilled the 11-8 well in May of 1991 on the mistaken belief that they had the legal right to do so.

8 Montreal Trust questioned the validity of the lease by reason that T.D.L. had not worked to continue production on the 12-8 well. Notwithstanding the doubt about the validity of the lease, they continued to grant Long Riders the right to operate the 11-8 well and to produce and sell the production as and from March 11, 1992. That well continued to produce until June of 2003 when it was shut-in at the request of Montreal Trust.

  

> [11] The position of the defendant, T.D.L. Petroleums Inc., is that it is entitled to be paid its gross overriding royalty throughout the entire time under consideration. It is acknowledged that T.D.L. Petroleums Inc. is responsible for payment of [Montreal Trust's] damages and that it will be deducted from any entitlement.
>
> [12] The position of the defendants, The Long Riders Rig Corporation and the other defendants, the working interest partners, (henceforth "The Long Riders Group"), is that T.D.L. Petroleums Inc. has no entitlement to any monies following the trespass period. At the same time, with the exception of damages, the entitlement of [Montreal Trust] is confined to its royalty of 12.5%. All other monies should be paid out to The Long Riders Group.

38 The Long Riders' appeal specifically raises the issue of the authority of a court to amend a judgment which has been formally issued. It is common ground that the position at common law is that that should only occur in two instances:

> 1. Where there has been an error or a slip in the drawing up the formal judgment; or,
>
> 2. Where the oral judgment does not express the clear intention of the Court. See: *Storey v. Zazelenchuk* (1985), 40 Sask. R. 241 (Sask. C.A.); *Kuziak v. Romuld* (1966), 60 D.L.R. (2d) 286 (Sask. C.A.).

39 Queen's Bench Rule 344 provides the basis on which the applications for directions were made. That section reads as follows:

> Where in any action a judgment has been pronounced or an order has been made and such judgment or order has been formally drawn up and entered and it shall subsequently appear that further directions are necessary in order to insure to the party entitled to the benefit of such judgment or order, as to costs or otherwise, the relief to which he is entitled, the court may make such further or other order and give such further or other relief as the nature of the case may require; provided that such further or other relief does not necessitate any variation of the said judgment or order as to any matter decided by the original judgment or order.

40 The Court of Queen's Bench has interpreted this rule as being consistent with the common law power of the court to amend its judgment after the formal order has been issued. Mr. Justice Noble in *Co-operative Trust Co. of Canada v. Twelfth Building Ltd.*[7] described the effect of the rule in these terms:

> [9] ...As I read the rule it only applies where it is necessary for the court to give further directions in order to make certain the judgment pronounced can be carried out. This makes eminent sense because if the wording of the judgment or order is not clear enough to enforce in a practical way either as to its intent and purpose or as to costs, the whole court proceeding might be rendered impotent. Thus the rule allows the court to clarify or vary a judgment or order formally entered as to costs or otherwise but it does not give the court jurisdiction to change the substance of the judgment or order. The proviso at the end of R. 344 draws a line between varying or amending a judgment or order to make certain it is enforceable by the victorious litigant or to clarify and amend to insure the winner gets the relief the court intended by its words and varying or changing the overall result intended by the court *i.e.* to make a substantial change in the court's obvious meaning.

41 We agree with these comments. See also: *Boe v. Boe*,[8] in which Grotsky J. held that the "further and other" relief contemplated by Rule 344 is granted only for ensuring the party the relief for which it was entitled under the judgment. Mr. Justice Grotsky found the court cannot change the substance of the judgment or vary the judgment. An application for directions cannot be turned into an application to vary even assuming such right existed.

42 In *Gilmour v. Gilmour*[9] this Court held that an order which constitutes the variation of the original judgment of a matter already decided will be set aside. This applied even where the Court has expressly reserved jurisdiction to provide directions in the formal judgment, as was the case here. See: *Boe v. Boe*, *supra.*

43 Mr. Justice Gerein correctly identified the issue in his fiat when he stated:[10]

  

# TAB 16

**Most Negative Treatment:** Recently added (treatment not yet designated)
**Most Recent Recently added (treatment not yet designated):** 0956375 B.C. Ltd. v. Regional District of Okanagan-Similkameen | 2020 BCSC 743, 2020 CarswellBC 1221 | (B.C. S.C., May 13, 2020)

2008 BCCA 276
British Columbia Court of Appeal

Everest Canadian Properties Ltd. v. Mallmann

2008 CarswellBC 1373, 2008 BCCA 276, [2008] 10 W.W.R. 60, [2008] B.C.W.L.D. 5136, [2008] B.C.W.L.D. 5137, [2008] B.C.W.L.D. 5147, [2008] B.C.W.L.D. 5148, [2008] B.C.J. No. 1258, 167 A.C.W.S. (3d) 291, 167 A.C.W.S. (3d) 305, 258 B.C.A.C. 49, 294 D.L.R. (4th) 622, 434 W.A.C. 49, 46 B.L.R. (4th) 198, 82 B.C.L.R. (4th) 230

# Everest Canadian Properties Ltd., Everest Investors 12, L.P., Everest Investors 15, L.P., Everest Investors 16, L.P., Everest Del Cano Investors, L.P., Everest HCA Investors, L.P., and Everest DC EDC Investors, L.P. (Appellants / Plaintiffs) and CIBC World Markets Inc./Marchés Mondiaux CIBC Inc. (Respondent / Defendant)

Newbury, Hall, Frankel JJ.A.

Heard: May 5-7, 2008
Judgment: July 3, 2008*
Docket: Vancouver CA034941

Proceedings: affirming *Everest Canadian Properties Ltd. v. Mallmann* (2007), 2007 BCSC 312, 2007 CarswellBC 469, [2007] 8 W.W.R. 209, 70 B.C.L.R. (4th) 358 (B.C. S.C.)

Counsel: D. Gooderham for Appellants
H. Poulus, Q.C., P. Price for Respondent

Subject: Corporate and Commercial; Civil Practice and Procedure

**Related Abridgment Classifications**

Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.i Derivative actions
III.3.e.i.A At common law
III.3.e.i.A.5 Miscellaneous

Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.g Pleadings
V.3.g.iv Application to strike
V.3.g.iv.B Standing to bring action

Civil practice and procedure

III Parties
III.4 Standing

Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.f Striking out for absence of reasonable cause of action
X.2.f.i General principles

**Headnote**

Business associations --- Specific corporate organization matters — Shareholders — Shareholders' remedies — Derivative actions — At common law — Miscellaneous issues
Plaintiffs held shares in real estate investment trust ("REIT") formed under laws of Maryland — Defendant trustees rejected plaintiffs' bid for all outstanding shares of trust and, relying in part on advice provided by defendant bank, accepted offer from another source to buy all trust's assets — Plaintiffs brought action against trustees and bank — Action was not framed as derivative or representative one — Bank's application to strike statement of claim was granted and action was dismissed as against bank — Plaintiffs appealed — Appeal dismissed — Lex fori, rather than law of Maryland, was properly applied to question of whether plaintiffs had standing — Maryland REIT was not ordinary trust — While Maryland REIT was not corporation, it had several characteristics of corporation, including substantial powers to act as separate legal person — As plaintiffs' alleged losses, if proven, would be entirely derivative of losses suffered by REIT, action did not fall within "personal claim" exception to rule in Foss v. Harbottle and pleadings did not disclose reasonable cause of action against bank — While plaintiffs submitted that action should be converted to representative one rather than striking action, adding all other shareholders as parties to litigation would not change fact that their claims were derivative — Proper plaintiff in respect of wrong done to corporation or association was corporation or association.

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — Pleadings — General principles
Plaintiffs held shares in real estate investment trust (REIT) formed under laws of Maryland — Defendant trustees rejected plaintiffs' bid for all outstanding shares of trust and, relying in part on advice provided by defendant bank, accepted offer from another source to buy all trust's assets — Plaintiffs brought action against trustees and bank — Action was not framed as derivative or representative one — Bank's application to strike statement of claim was granted and action was dismissed as against bank — Plaintiffs appealed — Appeal dismissed — Lex fori, rather than law of Maryland, was properly applied to question of whether plaintiffs had standing — Maryland REIT was not ordinary trust — While Maryland REIT was not corporation, it had several characteristics of corporation, including substantial powers to act as separate legal person — As plaintiffs' alleged losses, if proven, would be entirely derivative of losses suffered by REIT, action did not fall within "personal claim" exception to rule in Foss v. Harbottle and pleadings did not disclose reasonable cause of action against bank — While plaintiffs submitted that action should be converted to representative one rather than striking action, adding all other shareholders as parties to litigation would not change fact that their claims were derivative — Proper plaintiff in respect of wrong done to corporation or association was corporation or association.

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — General principles
Plaintiffs held shares in real estate investment trust (REIT) formed under laws of Maryland — Defendant trustees rejected plaintiffs' bid for all outstanding shares of trust and, relying in part on advice provided by defendant bank, accepted offer from another source to buy all trust's assets — Plaintiffs brought action against trustees and bank — Action was not framed as derivative or representative one — Bank's application to strike statement of claim was granted and action was dismissed as against bank — Plaintiffs appealed — Appeal dismissed — Lex fori, rather than law of Maryland, was properly applied to question of whether plaintiffs had standing — Maryland REIT was not ordinary trust — While Maryland REIT was not corporation, it had several characteristics of corporation, including substantial powers to act as separate legal person — As plaintiffs' alleged losses, if proven, would be entirely derivative of losses suffered by REIT, action did not fall within "personal claim" exception to rule in Foss v. Harbottle and pleadings did not disclose reasonable cause of action against bank — While plaintiffs submitted that action should be converted to representative one rather than striking action, adding all other shareholders as parties to litigation would not change fact that their claims were derivative — Proper plaintiff in respect

  

of wrong done to corporation or association was corporation or association.

Civil practice and procedure --- Parties — Standing
Plaintiffs held shares in real estate investment trust (REIT) formed under laws of Maryland — Defendant trustees rejected plaintiffs' bid for all outstanding shares of trust and, relying in part on advice provided by defendant bank, accepted offer from another source to buy all trust's assets — Plaintiffs brought action against trustees and bank — Action was not framed as derivative or representative one — Bank's application to strike statement of claim was granted and action was dismissed as against bank — Plaintiffs appealed — Appeal dismissed — Lex fori, rather than law of Maryland, was properly applied to question of whether plaintiffs had standing — Maryland REIT was not ordinary trust — While Maryland REIT was not corporation, it had several characteristics of corporation, including substantial powers to act as separate legal person — As plaintiffs' alleged losses, if proven, would be entirely derivative of losses suffered by REIT, action did not fall within "personal claim" exception to rule in Foss v. Harbottle and pleadings did not disclose reasonable cause of action against bank — While plaintiffs submitted that action should be converted to representative one rather than striking action, adding all other shareholders as parties to litigation would not change fact that their claims were derivative — Proper plaintiff in respect of wrong done to corporation or association was corporation or association.

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*Baniuk v. Carpenter (No. 2)* (1987), 85 N.B.R. (2d) 385, 1987 CarswellNB 328, 217 A.P.R. 385 (N.B. C.A.) — referred to

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*Pender v. Lushington* (1877), 6 Ch. D. 70 (Eng. Ch. Div.) — referred to

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*Corporations and Associations*, Maryland Code, Title 8
Generally — referred to

*International Trusts Act*, R.S.B.C. 1996, c. 237
Sched., Article 6 — considered

*Joint Stock Companies Act*, 1844 (7 & 8 Vict.), c. 111
Generally — referred to

*Trade Union Act*, 1871 (34 & 35 Vict.), c. 31
Generally — referred to

**Rules considered:**

*Federal Rules of Civil Procedure*, 28 U.S.C., Appendix
R. 23.1 — referred to

*Rules of Court, 1990*, B.C. Reg. 221/90
R. 5(11) — referred to

R. 18A — referred to

APPEAL by plaintiffs from judgment reported at *Everest Canadian Properties Ltd. v. Mallmann* (2007), 2007 BCSC 312, 2007 CarswellBC 469, [2007] 8 W.W.R. 209, 70 B.C.L.R. (4th) 358 (B.C. S.C.), granting defendant's application to strike statement of claim.

***Newbury J.A.*:**

1 The primary question raised by this appeal is whether the venerable rule of corporate law enunciated in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Eng. V.-C.), applies in general to a real estate investment trust ("REIT") formed under the laws of Maryland. As will be seen, a Maryland REIT combines the framework of a trust with many of the features of a corporation. The beneficiaries of the REIT, who are referred to as shareholders, hold shares that represent "transferable unit[s] of beneficial interest in the trust"; the REIT is managed by a board of trustees who are elected annually by shareholders; and it holds its assets and can sue and be sued in its own name. In this case, the shares of the REIT, Del Cano

  

Properties Trust ("Del Cano"), were widely held, and a bid made by the appellants (collectively called "Everest") for some, and later all, outstanding shares placed it "in play". Ultimately, Del Cano's trustees, relying in part on advice provided by the respondent herein ("CIBC"), accepted an offer from another source to buy all the Trust's assets. The Trust was wound up (as was required under its constating document, the Declaration of Trust), and its shareholders, including Everest itself, received approximately $7,352 (U.S.) per share — a substantial premium above what Everest's offer would have yielded.

2 A year later, Everest sued the trustees of Del Cano and CIBC, alleging that the sale had taken place at an improvidently low price, and that the board's failure to address certain alleged procedural deficiencies meant that it had not had the authority to carry out the sale. Everest sought an order "directing the Trustees to restore the Trust Property to the Trust" (a remedy now conceded to be impossible); an order directing the Trustees to restore Everest's "proportionate share of the Trust Property" to the plaintiffs; an accounting; equitable compensation; disgorgement; and damages generally. CIBC was also alleged to have breached a fiduciary duty owed to shareholders and to have provided "knowing assistance" to the trustees, and remedies similar to those sought against the trustees, including the restoration of the Trust Property, were sought against the advisor.

3 The action was not framed as a derivative or representative one, but Everest took the position that in accordance with normal trust principles, it could sue as a beneficiary of the Trust for damage it had suffered by reason of the defendants' alleged breaches of duty. CIBC responded by invoking the rule in *Foss v. Harbottle*, and applied to have the action struck out as against it. The summary trial judge below, Madam Justice Ross, held that the rule *did* apply in this case, and granted CIBC's application. Her reasons are reported at 2007 BCSC 312 (B.C. S.C.). For reasons indexed as 2007 BCSC 311 (B.C. S.C.), she also dismissed Everest's claims as against the trustees. Our reasons on the appeal of that part of her order are indexed as 2008 BCCA 275 (B.C. C.A.) and the reader is referred to them for a more detailed review of the factual background to both appeals.

**The Claims Against CIBC**

4 At para. 27 of its statement of claim, Everest referred to the duties undertaken by CIBC when it agreed in October 2001 to act as the financial advisor to Del Cano in connection with a possible sale of its shares or assets. These responsibilities included evaluating and responding to any "Proposed Transaction" (a term that included Everest's offer to acquire all the shares of the Trust); assisting the trustees in identifying any "Alternative Transaction"; providing a fairness opinion with respect to any Proposed Transaction; and generally assisting the trustees "in discharging the Trust's and the Trustees' duties to the Beneficiaries." Everest pleaded that as an advisor to the Trust and the trustees, CIBC owed a duty of care and a fiduciary duty to the beneficiaries (i.e., the shareholders of the Trust), including Everest. Paras. 37-8 and 88-92 of the Statement of Claim, which I have appended to these Reasons, contain the material portions of its allegations of breach of duty.

5 CIBC joined issue with all of Everest's allegations, denying that it owed a duty of care or fiduciary duty to the plaintiffs as alleged or at all. According to its statement of defence, if a duty of care or loyalty was owed by CIBC, such duty had been discharged; CIBC had not been motivated by any improper purpose or knowingly assisted the trustees in any breach of duty; and the sale price received by the Trust for the assets had not been improvidently low. Accordingly, neither Del Cano nor Everest had suffered any loss.

6 In January 2006, CIBC applied to have the statement of claim struck as disclosing no reasonable cause of action. Ross J. dismissed this application [2006 CarswellBC 354 (B.C. S.C.)] on the basis that, as she stated at para. 7 of her later reasons, it was not possible to determine whether the Rule in *Foss v. Harbottle* applied in the absence of evidence with respect to the law of Maryland. On May 10, 2006, CIBC applied under Rule 18A for a declaration that the action as pleaded violated the rule in *Foss v. Harbottle* and an order dismissing the action as against CIBC. It adduced the expert evidence of some Maryland attorneys concerning the nature of a Maryland REIT, and Everest did the same. I will review that evidence after examining the rule in *Foss v. Harbottle*, the exceptions thereto and its application in some modern Canadian cases.

**Foss v. Harbottle**

7 It is a striking fact that during the entire hearing of this appeal, which was said to turn on the rule in *Foss v. Harbottle*,

  

none of the counsel before us referred to the case itself. In fairness, the reasoning of Vice-Chancellor Wigram is couched in highly technical and rather arcane language which makes it difficult to extract one clear "rule". Many subsequent cases and many more academic writers, however, have extracted two basic principles which were stated by Jenkins L.J. in *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 (Eng. C.A.):

> The rule in *Foss v. Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right. [At 1066-7; emphasis added.]

8 Jenkins L.J. noted that there were exceptions to the rule. The first is made where a "fraud on the minority" has been perpetrated and the wrongdoers are in control of the company. In these circumstances, "the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others." (At 1067.) Otherwise, the grievance would never reach the court as the wrongdoers would not allow the company to sue. A second exception applies where the act complained of could be sanctioned only by a special majority of shareholders. If the rule were applied in those circumstances, Jenkins L.J. observed:

> ... a company which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which according to its own regulations could only be done by special resolution. [*Ibid*.]

9 As the Court also noted, the rule does not apply in respect of a cause of action that 'belongs to' an individual member of the corporation or association personally. In such cases, *Foss v. Harbottle* "has no application at all, for the individual members who are suing sue, not in the right of the [corporation or other association], but in their own right to protect from invasion their own individual rights as members." (*Ibid*.) It is this "exception" that is particularly difficult to delineate in particular fact situations. (Compare, for example, *MacDougall v. Gardiner* (1875), 1 Ch. D. 13 (Eng. C.A.) with *Pender v. Lushington* (1877), 6 Ch. D. 70 (Eng. Ch. Div.), as discussed by Paul L. Davies, *Gower's Principles of Modern Company Law* (6th ed., 1997), at 660-5.) The exception was found to be applicable in *Edwards v. Halliwell* to an action brought by two members of a trade union on behalf of themselves and all other members. They sought to sue two members of the executive committee of the union who, the plaintiffs alleged, had passed a resolution increasing the union dues of employed members, in contravention of the union's rules, which required the approval of such resolution by a two-thirds majority. The union, which was presumably in the control of the alleged wrongdoers, was joined as a defendant. *Foss v. Harbottle* did not block the plaintiffs' action, which the Court characterized as intended to "protect from invasion their own individual rights as members." (*Ibid*.)

10 The foregoing "exceptions" to the rule were historically treated as rigid categories, notwithstanding the suggestion, which accords with traditional equitable principles, made in *Foss v. Harbottle* itself that in a case involving injury to a corporation by some of its members for which no adequate remedy existed other than an action by individual shareholders "in their private characters", the interests of justice would prevail over "technical rules respecting the mode in which corporations are required to sue." (At 203.) At the turn of the present century, however, the House of Lords seemed to suggest in *obiter dicta* that another exception might be made where a company suffers loss but has no cause of action to sue to recover that loss. In those circumstances, it was said, a shareholder might sue in respect of it (if he or she had a cause of action) even though the loss complained of was the diminution in value of his or her shares: *Johnson v. Gore Wood & Co.*, [2000] UKHL 65, [2001] 1 All E.R. 481 (U.K. H.L.), at para 44, *per* Lord Bingham.

  

# TAB 17

**Most Negative Treatment:** Recently added (treatment not yet designated)
**Most Recent Recently added (treatment not yet designated):** Cobble Hill Holdings Ltd. v. Cowichan Valley (Regional District) | 2020 BCSC 1217, 2020 CarswellBC 2026 | (B.C. S.C., Aug 18, 2020)

2014 SCC 12, 2014 CSC 12
Supreme Court of Canada

Bram Enterprises Ltd. v. A.I. Enterprises Ltd.

2014 CarswellNB 17, 2014 CarswellNB 18, 2014 SCC 12, 2014 CSC 12, [2014] 1 S.C.R. 177, [2014] S.C.J. No. 12, 1079 A.P.R. 1, 21 B.L.R. (5th) 173, 237 A.C.W.S. (3d) 551, 366 D.L.R. (4th) 573, 416 N.B.R. (2d) 1, 453 N.R. 273, 48 C.P.C. (7th) 227, 7 C.C.L.T. (4th) 1, J.E. 2014-212

# A.I. Enterprises Ltd. and Alan Schelew, Appellants and Bram Enterprises Ltd. and Jamb Enterprises Ltd., Respondents and Attorney General of British Columbia, Intervener

McLachlin C.J.C., LeBel, Fish, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: May 22, 2013
Judgment: January 31, 2014
Docket: 34863

Proceedings: affirming *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.* (2012), *(*sub nom. *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.)* 1001 A.P.R. 215, *(*sub nom. *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.)* 387 N.B.R. (2d) 215, 2012 NBCA 33, 2012 CarswellNB 194, 2012 CarswellNB 195, 350 D.L.R. (4th) 601, 96 C.C.L.T. (3d) 1, 2 B.L.R. (5th) 171 (N.B. C.A.)

Counsel: Richard J. Scott, Q.C., for Appellants
Charles A. LeBlond, Q.C., Marie-France Major, for Respondents
J. Gareth Morley, Christina Drake, for Intervener

Subject: Torts; Corporate and Commercial; Civil Practice and Procedure

**Related Abridgment Classifications**

Torts
XI Interference with economic relations
XI.1 Elements of tort
XI.1.e Use of unlawful means

**Headnote**

Torts --- Interference with economic relations — Elements of tort — Use of unlawful means
Group of family members, through their companies, owned apartment building — Majority of them wanted to sell it, but one did not — He took series of actions to thwart sale, and result was that ultimate sale price was nearly $400,000 less than it otherwise might have been — When majority sued to recover loss, main question was whether defendants, dissenting family member and his company, were liable for what trial judge referred to as tort of unlawful interference with economic relations — Trial judge found defendants liable, and appellate court upheld result, although for significantly different reasons — Defendants appealed — Appeal dismissed — With respect to issue of scope of liability for tort of causing loss by unlawful

  

means, in light of history and rationale of tort and taking into account where it fit in broader scheme of modern tort liability, tort should be kept within narrow bounds — It will be available in three-party situations in which defendant commits unlawful act against third party and that act intentionally causes economic harm to plaintiff — For purposes of unlawful means tort, defendant's means are "unlawful" if they support civil action for damages or compensation by third party, or would do so except for fact that third party did not suffer any loss as result of defendant's acts — There was no requirement that these acts not be otherwise actionable by plaintiff against defendant, and "unlawfulness" requirement was not subject to principled exceptions — Alleged misconduct of defendants in this case was not unlawful and so they could not be held liable on basis of unlawful means tort, but trial judge made strong findings that dissenting family member breached his fiduciary obligations as director of family companies and trial judge's award should be upheld on that basis.

Délits civils --- Interférence dans les relations économiques — Éléments du délit — Utilisation de moyens illégaux
Personnes apparentées étaient, par sociétés interposées, propriétaires d'un immeuble d'habitation — Majorité d'entre elles voulait vendre l'immeuble, mais une s'y opposait — Par diverses mesures, le parent dissident a fait obstacle à la vente, de sorte que le prix de vente final était inférieur de près de 400 000 $ à ce qu'il aurait pu être — Action intentée par la majorité des membres de la famille pour recouvrer cette perte a principalement posé la question de savoir si les défendeurs (le parent dissident et sa société) avaient engagé leur responsabilité pour avoir commis ce que le juge de première instance a appelé le délit d'atteinte illégale aux rapports économiques — Juge de première instance a conclu à la responsabilité des défendeurs et la Cour d'appel a confirmé le résultat, mais pour des motifs totalement différents — Défendeurs ont formé un pourvoi — Pourvoi rejeté — En ce qui a trait à la question du champ de la responsabilité afférente à l'infliction d'une perte par un moyen illégal, il était impératif de le circonscrire étroitement, compte tenu de l'histoire et du fondement de ce délit ainsi que de la place qu'il occupe dans la sphère globale de la responsabilité délictuelle moderne — On ne pourra l'invoquer qu'en des situations mettant en cause trois parties où le défendeur accomplit contre un tiers un acte illégal dans l'intention de causer un préjudice économique au demandeur — S'agissant du délit d'atteinte par un moyen illégal, est « illégal » le moyen utilisé par le défendeur si le tiers peut l'invoquer au soutien d'un recours civil en compensation financière ou le pourrait s'il avait subi une perte en raison des actes du défendeur — Il n'était pas nécessaire que les actes commis ne fournissent pas au demandeur d'autre cause d'action contre le défendeur, et le critère du caractère « illégal » n'admettait pas d'exceptions de principe — Bien que la conduite reprochée aux défendeurs en l'espèce n'était pas illégale et que ces derniers ne pouvaient donc pas être tenus responsables sur le fondement du délit d'atteinte par un moyen illégal, le juge de première instance a néanmoins tiré de solides conclusions selon lesquelles le parent dissident avait manqué à ses obligations fiduciaires à titre d'administrateur des sociétés familiales, et il convenait de maintenir le montant des dommages-intérêts qu'il a accordés sur ce fondement.

A group of family members, through their companies, owned an apartment building. The majority of them wanted to sell it, but one of them did not. He took a series of actions to thwart the sale. The result was that the ultimate sale price was nearly $400,000 less than it otherwise might have been. When the majority sued to recover this loss, the main question was whether the defendants, the dissenting family member and his company, were liable for what the trial judge referred to as the tort of unlawful interference with economic relations.

The trial judge found the defendants liable. He concluded that they had unlawfully and intentionally interfered with the economic relations between the majority owners and the prospective purchasers. He found that their conduct qualified as unlawful because it lacked any legal justification.

The New Brunswick Court of Appeal upheld this result, although for significantly different reasons. The Court of Appeal held that the acts of the defendants did not meet the general requirement that they be unlawful because they did not provide any basis for a civil suit by the prospective purchasers. The Court of Appeal held, however, that liability could be imposed on the basis of a "principled exception" to this requirement. The defendants appealed.

**Held:** The appeal was dismissed.

Per Cromwell J. (McLachlin C.J.C., LeBel, Fish, Rothstein, Karakatsanis, Wagner JJ. concurring): With respect to the issue of the scope of liability for the tort of causing loss by unlawful means, in light of the history and rationale of the tort and taking into account where it fit in the broader scheme of modern tort liability, the tort should be kept within narrow bounds. It will be available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. For the purposes of the unlawful means tort, the defendant's means are "unlawful" if they support a civil action for damages or compensation by the third party, or would do so except for the fact that the third party did not suffer any loss as a result of the defendant's acts. There was no requirement that these acts not be

  

otherwise actionable by the plaintiff against the defendant, and the "unlawfulness" requirement was not subject to principled exceptions.

The alleged misconduct of the defendants in this case was not unlawful and so they could not be held liable on the basis of the unlawful means tort. However, the trial judge made strong findings that the dissenting family member breached his fiduciary obligations as a director of the family companies and the trial judge's award should be upheld on that basis. While the dissenting family member's company was not a fiduciary, the dissenting family member was its sole director and shareholder and it was therefore liable for knowing assistance in the breach of fiduciary duty and knowing receipt of the proceeds of the breach.

Des personnes apparentées étaient, par sociétés interposées, propriétaires d'un immeuble d'habitation. La majorité d'entre elles voulait vendre l'immeuble, mais une s'y opposait. Par diverses mesures, le parent dissident a fait obstacle à la vente. En conséquence, le prix de vente final était inférieur de près de 400 000 $ à ce qu'il aurait pu être. L'action intentée par la majorité des membres de la famille pour recouvrer cette perte a principalement posé la question de savoir si le parent dissident et sa société — les défendeurs — avaient engagé leur responsabilité pour avoir commis ce que le juge de première instance a appelé le délit d'atteinte illégale aux rapports économiques.

Le juge de première instance a conclu à la responsabilité des défendeurs. Il a estimé qu'ils avaient illégalement et intentionnellement porté atteinte aux rapports économiques entre les propriétaires majoritaires et les acheteurs potentiels. Selon le juge de première instance, leur conduite pouvait être qualifiée d'illégale parce qu'elle ne se justifiait pas sur le plan juridique.

La Cour d'appel du Nouveau-Brunswick a confirmé le résultat, mais pour des motifs très différents. Elle a jugé que le critère général du caractère illégal n'était pas respecté parce que les actes des défendeurs ne pouvaient fonder une poursuite civile de la part des acheteurs potentiels. La Cour d'appel a toutefois estimé qu'on pouvait reconnaître leur responsabilité en application d'une « exception de principe » à ce critère. Les défendeurs ont formé un pourvoi.

**Arrêt:** Le pourvoi a été rejeté.

Cromwell, J. (McLachlin, J.C.C., LeBel, Fish, Rothstein, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : En ce qui a trait à la question du champ de la responsabilité afférente à l'infliction d'une perte par un moyen illégal, il était impératif de le circonscrire étroitement, compte tenu de l'histoire et du fondement de ce délit ainsi que de la place qu'il occupe dans la sphère globale de la responsabilité délictuelle moderne. On ne pourra l'invoquer qu'en des situations mettant en cause trois parties où le défendeur accomplit contre un tiers un acte illégal dans l'intention de causer un préjudice économique au demandeur. S'agissant du délit d'atteinte par un moyen illégal, est « illégal » le moyen utilisé par le défendeur si le tiers peut l'invoquer au soutien d'un recours civil en compensation financière ou le pourrait s'il avait subi une perte en raison des actes du défendeur. Il n'était pas nécessaire que les actes commis ne fournissent pas au demandeur d'autre cause d'action contre le défendeur, et le critère du caractère « illégal » n'admettait pas d'exceptions de principe.

La conduite reprochée aux défendeurs en l'espèce n'était pas illégale et ces derniers ne pouvaient donc pas être tenus responsables sur le fondement du délit d'atteinte par un moyen illégal. Toutefois, le juge de première instance a tiré de solides conclusions selon lesquelles le parent dissident avait manqué à ses obligations fiduciaires à titre d'administrateur des sociétés familiales, et il convenait de maintenir le montant des dommages-intérêts qu'il a accordés sur ce fondement. Parce que le parent dissident en était le seul administrateur et actionnaire, sa compagnie a engagé sa responsabilité, bien qu'elle ne fût pas elle-même fiduciaire, pour avoir aidé en connaissance de cause à commettre des manquements à l'obligation fiduciaire et pour avoir reçu en connaissance de cause le produit de ces manquements.

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**Words and phrases considered:**

**unlawful means**

. . . for the purposes of the unlawful means tort, the defendant's means are "unlawful" if they support a civil action for damages or compensation by the third party, or would do so except for the fact that the third party did not suffer any loss as a result of the defendant's acts. There is no requirement that these acts not be otherwise actionable by the plaintiff against the defendant and there are no exceptions to the scope of the liability imposed by this approach.

**Termes et locutions cités :**

**moyen illégal**

[S]'agissant du délit d'atteinte par un moyen illégal, est « illégal » le moyen utilisé par le défendeur si le tiers peut l'invoquer au soutien d'un recours civil en compensation financière ou le pourrait s'il avait subi une perte. Il n'est pas nécessaire que les actes commis ne fournissent pas au demandeur d'autre cause d'action contre le défendeur, et aucune exception ne s'applique au cadre de responsabilité défini suivant ce raisonnement.

APPEAL by defendants from judgment reported at *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.* (2012), 1001 A.P.R. 215, 387 N.B.R. (2d) 215, 2012 NBCA 33, 2012 CarswellNB 194, 2012 CarswellNB 195, 350 D.L.R. (4th) 601, 96 C.C.L.T. (3d) 1, 2 B.L.R. (5th) 171 (N.B. C.A.), dismissing defendants' appeal from judgment in which defendants were found liable.

POURVOI formé par les défendeurs à l'encontre d'un jugement publié à *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.* (2012), 1001 A.P.R. 215, 387 N.B.R. (2d) 215, 2012 NBCA 33, 2012 CarswellNB 194, 2012 CarswellNB 195, 350 D.L.R. (4th) 601, 96 C.C.L.T. (3d) 1, 2 B.L.R. (5th) 171 (N.B. C.A.), ayant rejeté l'appel interjeté par les défendeurs à l'encontre

  

d’un jugement ayant conclu à leur responsabilité.

***Cromwell J.*:**

**I. Overview**

1 A group of family members, through their companies, owned an apartment building. The majority of them wanted to sell it, but one of them did not. He took a series of actions to thwart the sale. The result was that the ultimate sale price was nearly $400,000 less than it otherwise might have been. When the majority sued to recover this loss, the main question was whether the dissenting family member and his company were liable for what the trial judge referred to as the tort of unlawful interference with economic relations.

2 While this tort is far from new, its scope is unsettled and needs clarification. There is not even any generally accepted nomenclature for the tort. It is variously referred to as “unlawful interference with economic relations”, “interference with a trade or business by unlawful means”, “intentional interference with economic relations”, or simply “causing loss by unlawful means”. I will refer to it by either the latter name or simply as the “unlawful means” tort.

3 The uncertainty surrounding the unlawful means tort is reflected in the different approaches taken by the trial judge and the Court of Appeal in this case. The trial judge found the dissenting family member and his company liable. They had, he concluded, unlawfully and intentionally interfered with the economic relations between the majority owners and the prospective purchasers. Their conduct qualified as unlawful because it lacked any legal justification. The New Brunswick Court of Appeal upheld this result, although for significantly different reasons. The acts of the dissenting family member and his company did not meet the general requirement that they be unlawful because they did not provide any basis for a civil suit by the prospective purchasers. However, liability could be imposed on the basis of a “principled exception” to this requirement.

4 Before us, the main issue concerns the scope of liability for this tort and, in particular, what the unlawfulness requirement means. If the tort does not apply to these facts, we must also decide whether liability may be imposed on the basis of the breach of fiduciary duty of the dissenting family member as a director of the majority corporations.

5 In summary, the issues and my conclusions are these:

A. What is the scope of liability for the tort of causing loss by unlawful means?

In light of the history and rationale of the tort and taking into account where it fits in the broader scheme of modern tort liability, the tort should be kept within narrow bounds. It will be available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. (Other torts remain relevant in two-party situations, such as for example, the tort of intimidation.)

(1) What sorts of conduct are considered “unlawful” for the purposes of this tort?

Conduct is unlawful if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it. The alleged misconduct of the defendants in this case was not unlawful in this sense and therefore they cannot be held liable on the basis of the unlawful means tort.

(2) Is the tort available only if there is no other cause of action available to the plaintiff against the defendant in relation to the alleged misconduct?

In my view the answer to this question is no.

(3) Should the “unlawfulness” requirement be subject to principled exceptions?

The answer to this question is also no in my view.

  

could to pursue the interest of A I Enterprises and ... were well aware that their actions would cause harm to Jam[b] & Bram": trial reasons, at para. 287. Although he went on to find that the harm caused was not incidental to the pursuit by the defendants of their legitimate self-interest, this same conclusion could apply to a great deal of legitimate competitive activity in the marketplace. That, it seems to me, suggests the need for a limited role for the unlawful means tort.

33 A third point also favours a limited role for this tort. The common law in the Anglo-Canadian tradition has generally promoted legal certainty for commercial affairs. That certainty is easily put in jeopardy by adopting vague legal standards based on "commercial morality" or by imposing liability for malicious conduct alone: see Deakin, Johnston and Markesinis, at pp. 472-73. The majority in *Allen*, for example, rejected the view that "malice" was a sufficient basis for liability on the basis that it was too vague a notion to be applied by the courts: pp. 118-19, *per* Lord Herschell, and pp. 152-53, *per* Lord Macnaghten; see also Deakin, Johnston and Markesinis, at p. 472; *OBG Ltd.*, at para. 14, *per* Lord Hoffmann. Regulating commercial activity should not, it has been said, depend on the "idiosyncrasies of individual judges": *Mogul Steamship* (H.L.), at p. 51, *per* Lord Morris.

34 A final consideration supports a limited scope for this tort: the risk inherent in the economic torts generally that they will undermine legislated schemes favouring collective action in, for example, labour relations and interfere with fundamental rights of association and expression. At one time, the common law of tort was ready — and many would say overready — to intervene to prevent economic coercion in the context of industrial disputes. The common law's approach in this area led to legislative intervention to grant greater freedom to labour unions by enacting immunities to specific economic torts, in legislation modelled on the U.K. *Trade Disputes Act, 1906*, 6 Edw. 7, c. 47, and successor legislation: Deakin, Johnston and Markesinis, at p. 474; G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at para. 11.340. Writing about the experience in England, Deakin, Johnston and Markesinis observe that despite the intention underlying the creation of these immunities, the courts at times expanded economic tort liability which had the effect of "'outflanking' the immunities provided by statute .... At times it has seemed that the courts ... were engaged in a battle of wits with the parliamentary draftsman, to see which side could develop the optimal formula for widening or for narrowing liability respectively": p. 474. This history draws attention to the risk that expanded liability for the economic torts may be used to undermine legislative choices and perhaps even constitutionally protected rights of expression and association: see, e.g., P. Elias and K. Ewing, "Economic Torts and Labour Law: Old Principles and New Liabilities" (1982), 41 *Cambridge L.J.* 321; B. Adell, "Secondary Picketing after *Pepsi-Cola*: What's Clear, and What Isn't?" (2003), 10 *C.L.E.L.J.* 135. A narrow and clear definition of the scope of liability reduces this risk.

35 All of these factors, in my view, point to the wisdom of viewing the unlawful means tort as one of narrow scope.

**(b) Rationale of the Unlawful Means Tort**

36 As Hazel Carty wisely said, "the scope of this tort can only be established by clarifying its rationale so that there is a principled definition of unlawful means": *An Analysis of the Economic Torts* (2nd ed.), at p. 102. Unfortunately, there is no consensus about what that rationale is or should be. Scholars have remarked that there is no single unifying principle underlying the economic torts generally and that the unlawful means tort in particular is "radically under-theorized": see, e.g., Deakin, Johnston and Markesinis, at p. 473; Neyers, at p. 233; B. Kain and A. Alexander, "The 'Unlawful Means' Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2010* (2010), 33, at p. 162. Identifying the tort's rationale is therefore far from a straightforward task. But, although there may be no clear rationale as a matter of historical fact, we can consider what rationale best reflects the modern role that the tort should play in the broader scheme of civil liability.

37 There are several possible rationales for the tort but they are mostly variations on two themes: see, e.g., Neyers, at pp. 220-33, and Kain and Alexander, at pp. 162-74. The first — what I will call the "intentional harm" rationale — focuses on the fact that harm has been intentionally inflicted. This rationale supports the creation of new tort liabilities in order to reach clearly excessive and unacceptable intentional conduct: see, e.g., Carty, *An Analysis of the Economic Torts* (2nd ed.), at p. 104. The second, and in my view the preferred rationale, focuses on extending an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct. I will call this the "liability stretching" rationale. The focus of the tort on this understanding is not on enlarging the basis of civil liability, but on allowing those intentionally targeted by already actionable wrongs to sue for the resulting harm. On either rationale, the tort is, at its core, a tort of intention. The main difference is that on the "intentional harm" rationale, the intention

  

# TAB 18

2018 SKCA 101
Saskatchewan Court of Appeal

Cowessess First Nation v. Phillips Legal Professional Corporation

2018 CarswellSask 611, 2018 SKCA 101, 300 A.C.W.S. (3d) 642, 43 C.P.C. (8th) 237

# Cowessess First Nation No. 73 (Applicant / Respondent / Applicant) and Phillips Legal Professional Corporation, Mervin Phillips, and Nathan Phillips (Respondents / Appellants / Respondents) and Saskatchewan Ministry of Justice (Intervenor)

Jackson, Whitmore, Schwann JJ.A.

Heard: October 5, 2018
Judgment: December 21, 2018
Docket: CACV3263

Counsel: T. Joshua Morrison, Al Brabant, for Applicant
W. Timothy Stodalka, for Respondents
Macrina Badger, for Non-party, Attorney General

Subject: Civil Practice and Procedure; Public

**Related Abridgment Classifications**

Civil practice and procedure
XXIII Practice on appeal
XXIII.3 Notice of appeal
XXIII.3.a Form and content

Professions and occupations
IX Barristers and solicitors
IX.5 Fees
IX.5.f Accounting and refunding by solicitor
IX.5.f.v Appeals from assessment or review

**Headnote**

Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Appeals from assessment or review
Client was First Nation for which law firm had acted for number of years — After leadership of client changed, client brought application to have law firm's prior accounts totalling in excess of $800,000 taxed despite passage of time — Chambers judge granted application and referred some 67 bills to local registrar for taxation pursuant to s. 67(1)(a)(iii) of Legal Profession Act, 1990 — Chambers judge also awarded client $20,000 for costs on solicitor-client basis — Law firm appealed without seeking leave to appeal — Client brought application for order quashing notice of appeal on basis that order appealed from was interlocutory and leave was required — Application dismissed — Order made pursuant to s. 67(1)(a)(iii) of Act was final order since it finally disposed of rights of parties, so leave was not required — Order disposed of law firm's right to contest jurisdiction of local registrar to assess bills after expiry of 30-day period mentioned in s. 67(1)(a)(i) of Act — There was no authority that would allow law firm to include appeal from chambers judgment in any subsequent stage of process — It was not enough to classify order as interlocutory simply by saying that it was "step in the process".

 

Civil practice and procedure --- Practice on appeal — Notice of appeal — Form and content
Client was First Nation for which law firm had acted for number of years — After leadership of client changed, client brought application to have law firm's prior accounts totalling in excess of $800,000 taxed despite passage of time — Chambers judge granted application and referred some 67 bills to local registrar for taxation pursuant to s. 67(1)(a)(iii) of The Legal Profession Act, 1990 — Chambers judge also awarded client $20,000 for costs on solicitor-client basis — Law firm appealed without seeking leave to appeal — Client brought application for order quashing notice of appeal on basis that it was vexatious and abuse of process — Application dismissed — While notice of appeal was lengthy and disorganized, length and disorganization alone had not yet been sufficient to quash appeal as frivolous and vexatious — Determining all issues that were truly at stake in appeal would require much work, but counsel for law firm advised he was not seeking to file appeal factum longer than 40 pages — Further, law firm's counsel assured all would become clear once factum was developed — This assurance was relied on, though decision was not intended to constrain hearing panel from exercising its discretion to control its own process, including with respect to costs.

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*KJK Holdings Inc. v. Silcorp Ltd.* (1992), 90 D.L.R. (4th) 488, 100 Sask. R. 143, 18 W.A.C. 143, 1992 CarswellSask 248 (Sask. C.A.) — referred to

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**Statutes considered:**

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*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
s. 69(1) — considered

  

*Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1
s. 7(2)(a) — considered

s. 8 — considered

s. 9(5) — considered

*Legal Profession Act, 1990*, S.S. 1990-91, c. L-10.1
s. 67(1)(a) — considered

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R. 46.1(1)(b) — considered

R. 46.1(1)(d) — considered

*Queen's Bench Rules*, Sask. Q.B. Rules 2013
R. 3-49 — considered

R. 13-30(2) — considered

**Words and phrases considered:**

**interlocutory order**

It is in the very nature of an "interlocutory" order that it is subsumed by the resolution of the main dispute between the parties

APPLICATION by client for order quashing law firm's notice of appeal on basis that judgment appealed from was interlocutory and leave was required or that notice of appeal was vexatious and abuse of process.

***Jackson J.A.*:**

**I. Introduction**

1 This application raises the question of whether an order made pursuant to s. 67(1)(a)(iii) of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1, referring a series of lawyer's bills for assessment to the local registrar, after the expiry of 30 days after the client's receipt of the bill, is an interlocutory or final order. If it is an interlocutory order, no appeal lies to this Court unless leave has been granted pursuant to s. 8 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, or the Court is prepared to grant leave *nunc pro tunc*. Resolution of the matter is significant for the parties as the amount of the contested bills exceeds $800,000 and the bills span more than a two-year period.

 

determination made under s. 67(1)(a)(iii) would not be "incidental" to the local registrar's decision — it fixes the scope of the local registrar's jurisdiction. (Also see Rule 12 of *The Court of Appeal Rules* and pages 53 to 56 of *CA Annotated* for a discussion of s. 9(5)).

25 Nor could it be considered incidental to the resolution of the originating application made to the Chambers judge. It was the whole of the dispute that was before him. It is in the very nature of an "interlocutory" order that it is subsumed by the resolution of the main dispute between the parties. Here, that is not the case.

26 Every appeal must be brought from the final decision of the litigation in question (*Civil Procedures* at 76-128 and 76-129). Only in exceptional circumstances does an interlocutory appeal survive the final judgment: *Andrews v. Canadian Northern Railway*, [1918] 2 W.W.R. 331 (Sask. C.A.); *Wozny v. Kasky* (1960), 23 D.L.R. (2d) 626 (B.C. C.A.); *Sinclair Canada Oil Co. v. Great Northern Oil Co.* (1967), 66 D.L.R. (2d) 258 (Sask. C.A.); and *Kitchen v. Kitchen* (1984), 34 Sask. R. 295 (Sask. C.A.). If this Court did classify the *Chambers Decision* as interlocutory, and if leave were not granted, the decision to refer would effectively be unappealable.

27 In direct response to Cowessess's arguments, it is not enough to classify an order as interlocutory simply by saying that it is "a step in the process". Not all final orders bring the dispute to an end. A review of the decisions mentioned in *CA Annotated* (at 48) and *Civil Procedures* (at 76-139 to 76-146) make that plain: see, for example, *Popowich v. Saskatchewan* (1999), 177 Sask. R. 226 (Sask. C.A.), where, in finding an order requiring disclosure of documents to be final, Vancise J.A. wrote, "In my opinion, the order the appellant is appealing is, as between the appellant and the respondent, a final order. It is not interlocutory. It is determinative of the issue, that is disclosure, as between these parties one of whom is not a party to the action. The matter is therefore properly before this court" (at para 3).

28 Similarly, in *Mitchell v. Mitchell* (1996), 144 Sask. R. 223 (Sask. C.A.), Bayda C.J.S. (in Chambers) confirmed this Court's jurisprudence that an order removing a firm of solicitors from a particular litigation file is a final order. While these two decisions involve what could be considered "non-parties", *Civil Procedures* speaks to this: "the fact that there are outstanding issues for other proceedings does not make a final order interlocutory" (at 76-124 to 76-125), and "the mere involvement of the non-party does not make an otherwise interlocutory order, final" (at 76-126).

29 Nor does the analogy with s. 67(1)(a)(i) carry much weight. The issue of whether a s. 67(1)(a)(i) order is final is not before us. Further, no statutory limits affect a Chambers judge's discretion under s. 67(1)(a)(i). Subclause 67(1)(a)(i) does not expand the limitation period for assessing a lawyer's accounts past 30 days from the client's receipt of the bill based on the determination of what is "in the interests of justice".

30 I recognize the similarity between an order under s. 67(1)(a)(iii) and other orders of the Court of Queen's Bench that grant leave to proceed in that court: for example, see *Avco Financial Services Canada Ltd. v. Little* (1990), 85 Sask. R. 1 (Sask. C.A.) (an order granting a creditor leave to sue a bankrupt creditor in Queen's Bench under s. 69(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3); *Newgrade Energy Inc. v. Kubota America Corp.* (1991), 97 Sask. R. 32 (Sask. C.A.), leave to appeal to SKCA refused, (1991), 97 Sask. R. 32 (Sask. C.A.) (an order granting leave to commence an action for damages for tort committed outside the province); *Bank of Nova Scotia v. Span West Farms Ltd.*, 2003 SKCA 35, 232 Sask. R. 279 (Sask. C.A.) (an order by a Queen's Bench judge granting leave to appeal to Queen's Bench from a decision of an arbitrator under *The Arbitration Act, 1992*, SS 1992, c A-24.1). Such orders have been held in this jurisdiction to be interlocutory: see *CA Annotated* at 48. Those orders, however, can be considered true gateway orders to the Court of Queen's Bench, from which there will be a full right of appeal. In this case, as I have indicated, the right of appeal from the decision of the officer of the court, upon whom the Court of Queen's Bench confers jurisdiction under s. 67(1)(a)(iii), is limited.

31 In reaching the conclusion that this is a final order, I have not overlooked what the Chambers judge said with respect to whether the parties could submit affidavits on information and belief. That decision is not before us at this time. Further, as Cameron J.A. stated for the Court in *KJK Holdings Inc. v. Silcorp Ltd.* (1992), 90 D.L.R. (4th) 488 (Sask. C.A.), orders may be final for one purpose but interlocutory for another.

32 Thus, I conclude that the *Chambers Decision* is final and leave to appeal is not required. I would, however, in any event, grant leave *nunc pro tunc*.

  

**III. Whether Leave Should Be Granted Nunc Pro Tunc**

33 The Court's jurisdiction to grant *nunc pro tunc* orders is sparingly exercised, so as not to defeat the general purpose of the leave requirement: *Grant v. Saskatchewan Government Insurance*, 2003 SKCA 17 (Sask. C.A.) at para 5, (2003), 227 Sask. R. 316 (Sask. C.A.). Nonetheless, if I had not found this *Chambers Decision* to be final, I would have granted leave *nunc pro tunc*. Counsel for the Law Firm made a concerted decision to comply with this Court's prior authorities. He was satisfied that the matter was a final one. He thought that if he applied in Chambers for leave, he ran the risk of the Court asserting its jurisdiction under *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* (1993), 103 D.L.R. (4th) 585 (Sask. C.A.) (leave to appeal to the SCC denied, [1993] 3 S.C.R. vii (S.C.C.)), and refusing leave, if it is a final order. There has been no delay, other than that occasioned by the fact that neither party has acted particularly promptly with respect to obtaining the issuance of the *Chambers Decision*.[2]

34 I appreciate that, instead of granting leave *nunc pro tunc*, I could extend the time to allow the Law Firm to apply in Chambers for leave; but, in my view, applying the test in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2002 SKCA 119 (Sask. C.A.) at para 6, (2002), 227 Sask. R. 121 (Sask. C.A.), I have no doubt but that leave would be granted in any event, having regard for the importance of the appeal to the Law Firm, the sheer volume of accounts and the arguability of at least some of the grounds of appeal. Requiring the matter to be considered by a single judge in Chambers of this Court would only increase the cost and length of these proceedings.

35 The fixing of the breadth of the jurisdiction of the local registrar should be settled before embarking upon what may be an arduous task. Counsel advises the Court that the difference between confining the local registrar's jurisdiction to the 30-day period, mentioned in s. 67(1)(a)(i), and extending it back to 2013, will require many days of work on behalf of the local registrar. The parties should know for certain whether that work is required.

**IV. Application to Quash on the Basis that the Notice of Appeal Is an Abuse of Process**

36 Cowessess is not seeking to quash the notice of appeal on the grounds that it is devoid of merit, but rather on the grounds that it is, in its opinion, so lengthy and disorganized that Cowessess would be prejudiced if the appeal proceeds and it is required to respond to it.

37 The notice of appeal raises 53 grounds of appeal, plus 39 sub-grounds, and is over 13 pages in length. According to Cowessess, the notice of appeal leaves the reader with a complete lack of certainty as to what the central issues are.

38 Length and disorganization alone have not, to date, been sufficient to quash an appeal as frivolous and vexatious. Much work, however, will be required to determine all of the issues that are truly at stake in this appeal. Counsel for the Law Firm, who did not draft the notice of appeal, advises the Court he is not seeking to file an appeal factum of any greater length than 40 pages. Further, he assures the Court that all will become clear once the factum is developed. In declining to quash the appeal, I am relying on this assurance in the full expectation that this will indeed be the case. The Court's decision in this regard is not intended, in any way, to constrain a future panel of the Court from exercising its discretion to control its own process, including with respect to costs. This aspect of the application is dismissed on that basis.

**V. Conclusion**

39 The application is dismissed with costs in the usual way.

***Whitmore J.A.*:**
I concur.

***Schwann J.A.*:**
I concur.

*Application dismissed.*

 

# TAB 19

2009 SKCA 89
Saskatchewan Court of Appeal [In Chambers]

Dutchak v. Dutchak

2009 CarswellSask 502, 2009 SKCA 89, [2009] W.D.F.L. 4462, 180 A.C.W.S. (3d) 13, 337 Sask. R. 46, 464 W.A.C. 46

# Leon Edward Dutchak (Applicant / Proposed Appellant) and Sharon Irene Dutchak (Respondent / Proposed Respondent)

Jackson J.A.

Heard: July 22, 2009
Judgment: August 13, 2009
Docket: 1778

Counsel: Leon Dutchak for himself
Doreen K. Clark for Respondent

Subject: Civil Practice and Procedure; Family; Property

**Related Abridgment Classifications**

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**Headnote**

Civil practice and procedure --- Practice on appeal — Interlocutory or final orders — Interlocutory orders — Leave to appeal
Wife brought claim for distribution of family property following breakdown of marriage — Wife brought interim application; on April 29, 2009, husband was ordered to disclose information on assets and income (para. 1 of order) and to pay $20,000 to

  

wife as interim distribution of family property (para. 2) — Husband was also ordered to provide copies of income tax returns and notices of assessment (para. 3), further and better particulars with respect to inventory (para. 4), and to pay solicitor-and-client costs of $1,000 (para. 5) — On May 20, 2009, husband applied for order extending time to apply for leave to appeal order of April 29 — Application dismissed — Paragraphs 1 to 4 of order of April 29 were interlocutory in nature — Pursuant to s. 8 and 9(3) of Court of Appeal Act, husband was required to file leave to appeal paras. 1 to 4 within 15 days of decision, which he did not do — Nor had husband demonstrated any basis upon which Court should exercise its discretion to extend time to apply for leave to appeal — With respect to para. 2 of order, husband had not demonstrated that he had sufficiently arguable case — Notice of motion to extend time to appeal was not supported by any useful affidavit evidence — Husband failed to provide any disclosure that would permit consideration of what proportion $20,000 bore to balance of property to be distributed — Nor had husband established that interim distribution would not be capable of adjustment in ultimate distribution of property, if error were to be found — While costs order in para. 5 may not have been interlocutory in nature, husband had made no submissions addressing merits of decision — Moreover, Court was not inclined to grant application to extend time to apply for leave with respect to costs order alone.

Civil practice and procedure --- Judgments and orders — Final or interlocutory — Interlocutory judgment or order — What constituting — For purpose of appeal

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Family law --- Family property on marriage breakdown — Practice and procedure — Practice on appeal — General principles

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**Table of Authorities**

**Cases considered by *Jackson J.A.*:**

  

*Bank of Nova Scotia v. Saskatoon Salvage Co. (1954)* (1983), 51 C.B.R. (N.S.) 167, 29 Sask. R. 285, 1983 CarswellSask 69 (Sask. C.A.) — followed

*Bird Construction Co. v. Maier* (1949), 1949 CarswellSask 16, [1949] 1 W.W.R. 920 (Sask. C.A.) — followed

*Conley v. Conley* (1985), 47 Sask. R. 279, 1985 CarswellSask 411 (Sask. C.A.) — referred to

*Iron v. Saskatchewan (Minister of the Environment & Public Safety)* (1993), 1993 CarswellSask 323, [1993] 6 W.W.R. 1, 109 Sask. R. 49, 42 W.A.C. 49, 103 D.L.R. (4th) 585 (Sask. C.A.) — referred to

*Joynt v. Topp* (1962), 40 W.W.R. 248, 36 D.L.R. (2d) 591, 1962 CarswellSask 55 (Sask. C.A.) — followed

*McKay v. Mannix* (2007), 2007 SKCA 93, 2007 CarswellSask 511, *(*sub nom. *Mannix v. McKay)* 307 Sask. R. 154, 42 R.F.L. (6th) 45, *(*sub nom. *Mannix v. McKay)* 417 W.A.C. 154 (Sask. C.A.) — referred to

*Montreal Trust Co. of Canada v. Toronto Dominion Bank* (2003), 2003 SKCA 14, 2003 CarswellSask 108 (Sask. C.A. [In Chambers]) — followed

*P.G.R. Films Ltd. v. Sooter Studios Ltd.* (1994), 123 Sask. R. 301, 74 W.A.C. 301, 1994 CarswellSask 346 (Sask. C.A.) — followed

*Rimmer v. Adshead* (2003), 34 R.F.L. (5th) 137, 224 D.L.R. (4th) 372, 30 C.P.C. (5th) 97, 2003 SKCA 19, 2003 CarswellSask 164, 232 Sask. R. 68, 294 W.A.C. 68 (Sask. C.A.) — referred to

*Royal Bank v. G.M. Homes Inc.* (1982), 1982 CarswellSask 274, 25 Sask. R. 6 (Sask. C.A.) — followed

*Treeland Motor Inn Ltd. v. Western Assurance Co.* (1983), 5 C.C.L.I. 61, 40 C.P.C. 340, [1984] 2 W.W.R. 285, 4 D.L.R. (4th) 370, 30 Sask. R. 154, 1983 CarswellSask 212 (Sask. C.A.) — followed

**Statutes considered:**

*Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1
s. 8(1) — considered

s. 9(3) — considered

s. 9(6) — considered

*Family Property Act*, S.S. 1997, c. F-6.3
Generally — referred to

Pt. IV — referred to

s. 55 — considered

*Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01
s. 38 — referred to

**Rules considered:**

*Court of Appeal Rules*, Sask. C.A. Rules
Generally — referred to

R. 71 — considered

**Tariffs considered:**

  

*Court of Appeal Rules*, Sask. C.A. Rules
Tariff of Costs, Sched. I "A", column 2 — referred to

APPLICATION by husband to extend time to apply for leave to appeal.

***Jackson J.A.*:**

1 Over two years ago, Ms. Sharon Dutchak brought a claim for a distribution of family property following the breakdown of her marriage. It is alleged that her husband, Mr. Leon Dutchak: (i) maintains investments in excess of $800,000; (ii) farms over six quarters of land in his own name; (iii) farms an additional three quarters owned jointly with another; and (iv) maintains a cow-calf operation. The three school-age children reside with Ms. Dutchak. No significant distribution of property has been made to date.

2 On April 25, 2009, Ms. Dutchak, the respondent on this application, brought an application in Chambers for orders compelling Mr. Dutchak to disclose information regarding assets and income, and to arrange for his lands to be appraised. After hearing argument on Ms. Dutchak's application, Kraus J. ordered that Mr. Dutchak:

> 1. provide all of the information listed in the Notice to Disclose dated April 27, 2007, to the petitioner's solicitor no later than May 31, 2009;
>
> 2. pay $20,000.00 to Sharon Irene Dutchak by May 31, 2009, as an interim distribution of the family property, and that part of the funds are to be utilized to pay for an appraisal of the home quarter and farmlands that comprise part of the family property;
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> 3. provide copies of his income tax returns and his Notices of Assessment or Re-Assessment, as the case may be, for 2007 and 2008, to Ms. Dutchak's solicitor no later than May 31, 2009;
>
> 4. provide further and better particulars by May 31, 2009 with respect to a detailed inventory of livestock and grain from the beginning and to the end of the years, 2002, 2003, 2004, 2005 and 2006, as well as a detailed inventory of livestock and grain for 2007 and 2008; and
>
> 5. pay solicitor/client costs of $1,000.00 to Ms. Dutchak's solicitor no later than June 30, 2009.

This order was issued on April 29, 2009.

3 On May 20, 2009, Mr. Dutchak applied in Court of Appeal Chambers for an order extending the time to apply for leave to appeal. The attached draft notice of appeal provides, in material part, as follows:

> 2. THAT the whole of the judgment (or order) or the following parts are being appealed: [blank]
>
> 3. THAT the source of the Appellant's right of appeal and the court's jurisdiction to entertain the appeal is: misconduct
>
> 4. THAT the appeal is taken upon the following grounds: to be supplied.

4 A preliminary issue arises as to the applicable appeal period for an appeal from the order of Kraus J., which in turn depends on whether the order is interlocutory in nature. If it is interlocutory, Mr. Dutchak is beyond the time to appeal as the appeal period is 15 days for appeals from interlocutory orders. Mr. Dutchak filed his appeal some 20 days after the order issued.

5 It is Ms. Dutchak's position that leave is required based on ss. 8 and 9(3) of *The Court of Appeal Act, 2000*, S.S. 2000,

  

> 71 The court or a judge may enlarge or abridge the time periods fixed by these rules or by order on such terms as the case may require. The order enlarging or abridging the time may be made before or after the fixed time period has expired. (Forms 3a and 3b)

11 Applications to extend or enlarge an appeal period are governed by the framework of principle established by *Bird Construction Co. v. Maier*, [1949] 1 W.W.R. 920 (Sask. C.A.); *Joynt v. Topp* (1962), 40 W.W.R. 248 (Sask. C.A.); *Royal Bank v. G.M. Homes Inc.* (1982), 25 Sask. R. 6 (Sask. C.A.); *Bank of Nova Scotia v. Saskatoon Salvage Co. (1954)* (1983), 29 Sask. R. 285 (Sask. C.A.); *Treeland Motor Inn Ltd. v. Western Assurance Co.* (1983), 4 D.L.R. (4th) 370 (Sask. C.A.); *P.G.R. Films Ltd. v. Sooter Studios Ltd.* (1994), 123 Sask. R. 301 (Sask. C.A.) at para. 4; and *Montreal Trust Co. of Canada v. Toronto Dominion Bank*, 2003 SKCA 14 (Sask. C.A. [In Chambers]) at para. 3. That framework requires the applicant to persuade the Court that leave should be granted.

12 According to these decisions, in determining whether leave should be granted the applicant must persuade the Court that: (i) there is a reasonable explanation for the delay; (ii) he or she possessed a *bona fide* intention to appeal within the time limited for appeal; (iii) there is an arguable case to be made to a panel of the Court; and (iv) there will be no prejudice to the respondent, if leave is granted beyond what would be incurred in the usual appeal process. In any given case, one or more factors may be more important than another.

13 While these principles were developed in the context of determining whether an appeal period from a final order should be enlarged, the principles stated above are even more pertinent in the context of an appeal from an interlocutory matter. When the extension of time is being sought with respect to an interlocutory matter, the applicant has the double hurdle of demonstrating that the application for leave should be heard late as well as persuading the Court that leave should be granted at all. Appeals on interlocutory matters may hold up proceedings in the Court of Queen's Bench and are therefore dealt with by the Court on an expedited basis. Applicants for leave are expected to move with dispatch, and demonstrate the significance and merits of the issue to be appealed. In this case, it is also apparent that the applicant will have a right of appeal at a later stage in the proceedings, if the matter progresses and is not otherwise resolved.

14 Applying these principles to this application, the principal aspect that must be considered is whether Mr. Dutchak has demonstrated that he has a sufficiently arguable case to justify leave being granted. The notice of motion to extend time to appeal is not supported by any affidavit evidence that is useful on this application. Mr. Dutchak has failed to provide any disclosure that would permit a consideration of what proportion the $20,000.00 bears to the balance of the property to be distributed, or whether this interim distribution would not be capable of adjustment in any ultimate distribution of the property, if error were to be found. Indeed, when questioned, on the application, as to the order of magnitude of the farming operation in which he is engaged, Mr. Dutchak evaded the question. The application with respect to para. 2 of the order of Kraus J. is, therefore, dismissed.

15 With respect to paras. 1, 3 and 4 of the order, Mr. Dutchak has not demonstrated any basis upon which I should exercise my discretion to enlarge the time to apply for leave to appeal.

16 I will now turn to consider Mr. Dutchak's application to appeal the solicitor-and-client costs order. While such an order may not be interlocutory, I need not decide the issue as Mr. Dutchak has applied for leave. (See: *Iron*, *supra*.) Given that I have not granted him leave to extend the time to apply for leave with respect to the balance of the order, I am not inclined to do so in relation to the costs order alone. He has made no submissions addressing the merits of the decision. Given the context in which the order was made, it is difficult to conceive of an argument on his behalf. I am also cognizant that, having refused leave with respect to the balance of the order under appeal, it is possible that s. 38 of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01 applies, but I do not need to make a determination in that respect. I, therefore, dismiss his application to extend the time in relation to this aspect of the order, as well.

17 Mr. Dutchak's application resulted in two appearances by Ms. Dutchak's counsel and necessitated the preparation of three briefs of law. While the Court makes every effort to assist unrepresented litigants, Mr. Dutchak's lack of understanding has significantly increased his wife's legal costs, while he has not incurred any such costs. Accordingly, costs on this application are fixed in accordance with Column 2 of the Court of Appeal Tariff at $1,500.00 payable within 60 days.

*Application dismissed.*

# TAB 20

# Chapter 11

# WINDING-UP AND DISSOLUTION

## A. INTRODUCTION

**§11.1** The winding-up of a corporation is the process by which the ongoing operations of a corporation are brought to an end, its assets are realized, its liabilities discharged, the persons liable to contribute to any shortfall are identified and collected from and in connection therewith all necessary accountings are made, and disputes concerning it are settled or otherwise resolved. The winding-up process is sometimes called "liquidation,"[1] reflecting the fact that the process normally results in the conversion of all assets of the corporation into money, and hence every winding-up is conducted by a corporate operative known as the liquidator. The basic duties of the liquidator are to get in and realize the property of the corporation, to pay its debts and distribute any amount remaining after their payment among its shareholders.

**§11.2** There are several different procedures that may be followed in the liquidation of a corporation. The Ontario *Business Corporations Act*[2] ("OBCA") and the *Canada Business Corporations Act*[3] ("CBCA") allow the shareholders to institute and control the process of liquidation and also provide for liquidation under the control and supervision of the court. There are effectively three methods of liquidation contemplated under both the OBCA and the CBCA. A court liquidation may be instituted by the corporation itself (in which case it has a voluntary character) or by the court on the application of a shareholder, creditor or other person authorized under the legislation (in which case the liquidation is involuntary or compulsory in nature). A liquidation may also begin as a voluntary, shareholder-driven proceeding, but may then be continued under court supervision. But liquidation may also take place completely outside the framework of the OBCA and the CBCA. Where a corporation is insolvent, its business may be liquidated under the provisions of the *Bankruptcy and Insolvency Act*,[4] either by way of assignment into bankruptcy (voluntary) or on petition by a creditor (involuntary). Finally, a corporation may be liquidated informally under

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1 The terms "winding-up" and "liquidation" are synonymous.

2 R.S.O. 1990, c. B.16, as amended.

3 R.S.C. 1985, c. C-44, as amended.

4 R.S.C. 1985, c. B-3, as amended.

disposal of its assets are taken from the directors and placed in the hands of the liquidator.[13] The liquidator acts as a receiver and manager of the corporation (as well as of its assets) for the purpose of closing up the corporation's business, realizing its assets and making a legal distribution of those assets among the creditors and shareholders of the corporation.[14] The similarity between bankruptcy and winding-up proceedings is that the purpose of both is to get all of the estate of the corporation settled, both the claims for and against the estate, in the simplest and least expensive way, and to distribute the assets in the quickest possible way without incurring needless delay and expense by litigation in other courts.[15]

**§11.11** A liquidator appointed by the shareholders under subsection 193(2) of the OBCA is seen to act as the agent of the shareholders — that is, the shareholders generally, rather than any individual shareholder. The shareholders may remove the liquidator by an ordinary resolution passed at a meeting called for that purpose.[16] In general, where the shareholders vote to remove a liquidator, they must appoint a replacement. However, section 194 of the Act provides that the shareholders of the corporation may delegate to a committee of inspectors the power of appointing the liquidator and filling vacancies in appointments.

**§11.12** Aside from the power to appoint a replacement liquidator and the power to approve arrangements with creditors, the precise role of the inspectors is vague. In practice, they tend to exercise much the same function as the inspectors in a bankruptcy. Important matters will invariably be referred to the inspectors by the liquidator for their opinion. However, the OBCA itself is very vague as to the nature of their responsibilities.[17] In England, the incorporators have the following powers by statute:

- to fix the remuneration of the liquidator;
- to sanction continuance of the powers of the directors;
- to sanction payments to creditors and the compromise of claims;
- to sanction a reconstruction of the company;
- to determine what books and records should be kept by the company, and to approve the disposal of books and records of the corporation;
- to give instructions concerning the interim investment of funds.

At least some of these powers are inconsistent with the Ontario legislation. For instance, subsection 193(2) of the Act empowers the shareholders of a corpora-

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[13] *Re Farrows Bank Ltd.*, [1921] 2 Ch. 164 (C.A.), *per* Lord Sterndale M.R.

[14] *Partington v. Cushing* (1906), 3 N.B. Eq. 322 (S.C.).

[15] See, generally, *Re Toronto Wood & Shingle Co.* (1894), 30 C.L.T. 353 (H.C.), *per* the Master in Ordinary, at p. 356.

[16] OBCA, s. 196.

[17] Under subsection 227(2), the inspectors may approve the depository into which money of the corporation is paid