COURT OF APPEAL FILE NO. CA44448

COURT OF APPEAL

ON APPEAL FROM the order of Madame Justice Fitzpatrick of the British Columbia Supreme Court pronounced on the 1st of May, 2017

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND:

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND:

IN THE MATTER A PLAN OF COMPROMISE AND ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREE COAL CORP., NEW WOLVERINE COAL CORP., AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

APPELLANT

BOOK OF AUTHORITIES OF THE RESPONDENT, WALTER CANADA GROUP
VOLUME 2 of 3

United Mine Workers of America 1974 Pension Plan and Trust

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TAB 8A

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.,*** 2006 BCSC 1102

Date: 20060714
Docket: S041353
Registry: Vancouver

Between:

Minera Aquiline Argentina SA

Plaintiff

And:

IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.

Defendants

Before: The Honourable Madam Justice Koenigsberg

Reasons for Judgment

Counsel for the Plaintiff:	G. Nathanson, Q.C. S.R. Schachter, Q.C. J. MacInnis
Counsel for the Defendants:	M.P. Carroll, Q.C. D. Geoffrey Cowper, Q.C. Brent Meckling J. Horswill
Date and Place of Trial:	October 11, 12, 14, 17-21, 25-27 November 7-10, 16-18, 21-24, 28-30 December 1-2, 5-9, 2005 Vancouver, B.C.

INTRODUCTION

[1] On February 3, 2003, IMA Exploration Inc. ("IMA") announced it had found a "Bonanza Grade Silver – Copper – Lead Discovery in Patagonia, Argentina." The area of the discovery and the staked claims covering it were named the "Navidad Project."

[2] Although the announcement and subsequent publicity surrounding the discovery did not mention its dominant provenance, the discovery was made as a result of reviewing data obtained by IMA from Newmont Mining Corporation ("Newmont") during a due diligence site visit.

[3] IMA was a potential purchaser of a mining property called "Calcatreu" owned by Newmont along with several other mining companies including the ultimate purchaser, the plaintiff in these proceedings, Minera Aquiline Argentina SA ("Aquiline"). Each potential purchaser, including the defendant, IMA, signed a Confidentiality Agreement before receiving access to data and the Calcatreu mining site for the purpose of evaluating it. The plaintiff obtained ownership of the data used by IMA to make the discovery as a result of being the successful purchaser of Calcatreu.

[4] In 1989, the Supreme Court of Canada ordered Lac Minerals, as a result of it having obtained a mining property through the unlawful use of Corona Resources' confidential information, to hold in trust for Corona what had become a billion dollar mine. In this case, the plaintiff also alleges the unlawful use of its confidential

information by the defendants and seeks the same order in respect of the Navidad Project.

[5] The plaintiff alleges that the defendant IMA, and its wholly owned subsidiary Inversiones Mineras Argentinas S.A. ("Inversiones") the other corporate defendant, unlawfully used confidential geological information obtained from Newmont's owner during IMA's due diligence site visit in respect of Calcatreu, to discover and stake the Navidad Project.

BACKGROUND AND THE PLAYERS

Development of Calcatreu and the Confidential Data

[6] The events which give rise to this claim begin in the late 1990s. At that time, Normandy Mining Corporation ("Normandy"), a large multi-national gold mining company with its head office in Australia, was the indirect owner of Minera, the entity holding title to the Calcatreu mining claims. Minera carried on mining exploration work in Argentina with funds loaned to it by Normandy.

[7] In or about 1997, La Source Development S.A. ("La Source"), an Argentine company that had been incorporated by a former joint venture partner of Normandy, staked three mineral claims in the Rio Negro province of Argentina believed to be prospective for gold. Thereafter, Minera staked additional claims adjacent to the claims that had been staked by La Source. The claims staked by La Source and Minera became known as Calcatreu.

[8] By 1999, La Source's role was as a bare title holder of three mineral claims. The related mining project was wholly controlled and managed by Minera.

[9] Calcatreu is located in southern Rio Negro Province and northern Chubut Province, near Minera's office in the small town of Jacobacci, located in the southern part of Rio Negro.

[10] It is helpful to have an understanding of some mineral exploration tools that guide geologists in conducting exploration to assist in understanding the matters at issue. It is very rare for a geologist to discover a major mineral deposit.

[11] At the earliest stage of exploration, large areas can be reviewed with a variety of techniques, such as satellite imagery, large-scale geological mapping, or geophysical surveys. This work may permit a geologist to formulate a regional geological model in respect of the mineral of interest. A regional model will identify the type of geological structures which may be associated with that particular mineral.

[12] In the case of the Patagonia area of Argentina (which covers three states in southern Argentina – Rio Negro, Chubut, and Santa Cruz), the regional model for gold is described as "epithermal". This model describes the process by which gold deposits that had been identified in the Patagonia area were created. This model does not fit the Navidad Project because that project contains a unique silver-lead deposit.

[13] A regional model can be related to certain features on specially prepared satellite images that can then lead a company to a more specific location within a large regional area. A more specific location can lead, depending upon what is

found, to a refinement of the regional model, such that the relationship between local and regional models is interactive and ongoing.

[14] Stream sediment sampling is an exploration tool which is typically used at the earlier stages of exploration once a large area has been identified through prior techniques such as geological modelling. Stream sediment sampling requires geologists go into the field to take samples within the identified area. Satellite images can be used to locate stream basins in drainage areas within the area to be explored. In this way, large areas can be explored in the field in a cost effective manner. For example, one would not spend money drilling in an area that had not already been defined by other exploration tools.

[15] Between 1998 and 2001, Minera did exploration work in Rio Negro and northern Chubut, within and around Calcatreu. This work, including the stream sediment sampling, resulted in databases of technical information, which were available in the Jacobacci office.

[16] The stream sediment sampling conducted by Minera within and around Calcatreu consisted of approximately 500 samples and was referred to as "BLEG B data". The BLEG B samples were primarily located in the Rio Negro Province.

[17] BLEG refers to a Normandy stream sediment sampling methodology; it is an acronym for "bulk leach extractable gold", which is a process for extracting all of the gold and other elements associated with gold such as silver from a small sample of material.

[18] Prior to 2001, as a result of other exploration work within Calcatreu, Minera had identified a gold resource referred to as "Vein 49". Minera had also identified some exploration potential within the boundaries of Calcatreu, but outside of Vein 49.

[19] By 2001, Vein 49 was thought to consist of 500,000 ounces of gold resource, which was not large enough for Normandy to justify developing a mining project. Normandy's threshold for development of a mine was five million ounces of gold resource. Normandy loaned funds to Minera to enable it to engage in further regional geochemical exploration work within, adjacent to, and south of Calcatreu for the purpose of locating additional resources to supplement or enhance Calcatreu such that it would be economic to mine there. This new exploration was known as "Project Generation".

[20] At the beginning of 2001, Minera commenced work on Project Generation and continued until a decision was made to sell Calcatreu in 2002. The Project Generation work consisted of stream sediment sampling in Chubut, adjacent to and primarily south of Calcatreu. Locations of stream sediment sampling sites were identified with the assistance of satellite imagery.

[21] As part of Project Generation, various geologists were sent to the field over many months to collect stream sediment samples from various locations identified by specific coordinates. The stream sediment samples were sent by Minera to Normandy's laboratory in Perth, Australia, where the samples were analysed. The results were then sent to Minera, to Normandy, and to a joint venture partner of Normandy, as well as to the geologists who had done the work. The data resulting

from Project Generation consisted of approximately 1000 samples and is referred to as the "BLEG A data" (and in the Statement of Claim as the "Regional Exploration Data").

[22] Geochemical sampling requires a statistical analysis because it is intended to provide a comparison between sample results. An individual sample result on its own is not meaningful. Statistically, most of the results represent typical low-concentration background results showing the usual, and therefore unremarkable, presence of mineralized material that is generally present in a particular area. These background readings are not indicative of a mineralized deposit. However, some samples may give significantly higher readings as compared to a statistically determined background. These higher readings are referred to as "anomalies" or "anomalous" results. Anomalous results are often duplicated by retesting the remains of the sample material from the tested sample that was anomalous.

[23] Statistically, the larger the database of stream sediment samples, the more meaningful the analysis of the background and the identification of any anomalies. To consider only a portion of a database could, therefore, be quite misleading. Given the statistical nature of the analysis, anomalies are often identified in percentiles; for example, as anything above the 98th percentile or by concentrations of minerals that are tied to percentiles.

[24] An anomalous reading or a cluster of anomalies may well indicate the presence of a mineralized deposit. When a significant anomaly or cluster of anomalies is identified, a geologist can then go to the location of the relevant samples to find the source of the anomaly because it is presumed that the

mineralized material washed into the drainage system from a particular location or source.

[25] By 2002, Minera had all of the BLEG B and the BLEG A data in digital form available in the Jacobacci office. This data had been generated by Minera over approximately four years. None of the BLEG B or BLEG A data was in the public domain. It is agreed that it was only disclosed to IMA during the course of IMA's due diligence evaluation of the possible purchase of Calcatreu.

[26] The BLEG A data was put into an Excel format, which can be depicted on a satellite image map or other map so that locations and results are plotted using colour-coding or sizing to show the difference between sample results; for example, larger symbols depict the anomalies.

[27] The BLEG A data was depicted on a satellite image map, which was on the wall in the Jacobacci office. It depicted data sampling points in an area approximately 40 km to the south of Calcatreu.

[28] In or about the spring of 2002, Newmont, the world's largest gold mining company with a head office in Denver, Colorado, acquired Normandy. Newmont held meetings in March 2002, in Chile to formulate, among other things, its Latin American priorities after the acquisition. At these meetings, Minera's president and others described the Calcatreu resource and Project Generation to the attendees. Nick Green, President of Newmont, was present, along with company geologists, Aquilera and Worland. Carlos Cuburu (a geologist and the only remaining employee

of Minera) attended as did Bruce Harvey, the Director of Latin American exploration for Newmont.

[29] Mr. Worland made a PowerPoint presentation at the meeting which included a reference to Newmont's "exploration methodology" in respect to Bleg A and the fact that the express purpose of the exploration was to "add to Calcatreu Resource." The corresponding map in the PowerPoint presentation places a box around the Project Generation area and identifies Calcatreu within that region. In respect of this slide, Mr. Cuburu testified at trial:

> Q Do you recall any discussion about adding to the Calcatreu resource in the meeting?
>
> A The presentation given by Rohan Worland, in fact, did aim at incorporating new geological resources to be added to the Calcatreu project.

[30] Some time after the Santiago meeting, Newmont made it known that it did not want to continue operating in Argentina. Calcatreu did not meet Newmont's size requirements, and Newmont believed there were higher priorities for exploration elsewhere.

[31] By the time Mr. Worland's final report on Project Generation was received by Harvey and others, the decision had already been made by Newmont to cease work in Argentina.

[32] Mr. Worland's report was prepared on July 30, 2002. It was Worland and Achilles Aquilera who collected the samples in the area that later became known as the Navidad Project. In his report, Worland commented on the gold anomalies in the BLEG A data and also commented on silver anomalies in the "Sacanana" area

which was the name he gave to the area that is now known as the Navidad Project. Worland gave the gold anomalies higher priority than the silver anomalies and described the silver anomalies in the Sacanana area as "medium" targets for follow-up but not for immediate staking.

[33] Harvey testified that he expected that the Project Generation information, that is, the BLEG A data, would be information available to people looking at Calcatreu in order to evaluate the project.

The Sale Process of Calcatreu

[34] The person in charge of the sale process for Calcatreu was Esteban Crespo, an employee of Newmont who resided in Quito, Ecuador, and was Newmont's manager of Latin American lands. He asked Nick Green, the president of Minera, to prepare an information brochure to be provided to prospective purchasers after they signed a Confidentiality Agreement. With minimal assistance from Cuburu, Green prepared such an information brochure in July 2002 ("the Brochure").

[35] The Brochure was accompanied by a CD which contained a digital version of the maps and figures referred to in the Brochure. Neither the Brochure nor the CD associated with it (the "Bid Package") contained any raw technical data.

[36] The Brochure contained, in part, the following information in its introduction:

> The Information Brochure is designed to give the reader an overview of the exploration carried out over the Calcatreu Project between its discovery in 1997 and July 2002…
>
> In parallel with the prospect work, Normandy also collected 429 BLEG stream sediment samples. The work highlighted a number of anomalies, which have yet to receive detailed follow-up …

[37] The BLEG samples referred to in the Brochure were a large portion of the BLEG B data, which was the data located within Calcatreu.

[38] The regional context of Calcatreu was referenced in the Brochure. In section 9, the Brochure referred to "Regional Mines, Project and Prospects". The authors referred to an operating mine and to various land packages assembled by others. Reference was also made to the former Angela mine, located approximately 50 km east of Calcatreu, which had operated between 1978 and 1992.

[39] In section 10.7, the authors referred to regional geochemistry:

> From 1998 Normandy initiated a regional BLEG (Bulk Leach Extractable Gold) stream sediment survey over the Calcatreu Project area....Some 429 samples were collected, which were analysed at a Normandy Exploration Laboratory, located in Perth, Australia.
>
> A statistical analysis based upon an examination of log normal cumulative probability plots of Au, Ag and Cu, led to the recognition of the following anomalous thresholds; ...
>
> The gold results of the survey are presented in Figure 45.
>
> A number of anomalies were identified that were not associated with the known areas of mineralization ....
>
> Outside of the anomalous samples associated with the known areas of mineralization and the contaminated samples from creeks draining the Angela Mine Road, there are a number of anomalous creeks that have not been adequately explained.

[40] As noted, the BLEG B samples represented data depicted in Figure 45 in the Brochure were found primarily within the present boundaries of Calcatreu; however some of those samples were taken outside those boundaries in areas that had previously been staked by Minera but later relinquished and in other areas outside of the boundaries of Calcatreu.

[41] In cross-examination, Cuburu testified as to his views on the contents of the brochure and whether it made it possible to sell Calcatreu. He testified: "It was sufficient, perhaps, for the needs of some companies and insufficient for others."

[42] Various potential purchasers executed the Confidentiality Agreement and received the bid package. Some of them chose to visit the Jacobacci office and the Calcatreu site. Some of these potential bidders requested various types of additional digital raw data, which was then provided to them. The evidence was undisputed that it is typical in the due diligence process for potential bidders to ask for additional information to permit them to analyse the data and come to their own conclusions in respect of it prior to making a bid. IMA, alone among other potential bidders, requested that Mr. Cuburu provide copies of the BLEG A data, as well as, like other bidders, various other digital data.

IMA'S INTEREST IN CALCATREU AND ACCESS TO THE BLEG DATA

[43] IMA is a junior mining company based in Vancouver, B.C. and engaged in the business of acquiring and exploring of mineral properties. It is active primarily in Argentina and Peru and has been focused in Argentina since 1993. IMA has a strong presence in Argentina, where it holds interests in a number of exploration properties. In particular, IMA controls a portfolio of five groups of properties which cover over 217,000 hectares. These properties are located primarily in the Patagonia region of Argentina.

[44] IMA's interest in Calcatreu was solicited by Bruce Harvey of Newmont. In response to the solicitation, IMA readily agreed to review project data under a Confidentiality Agreement, which it signed on September 6, 2002.

[45] IMA sent three of its representatives, including Paul Lhotka, a British Columbia geologist then residing in Argentina who was in charge of the due diligence team, to conduct due diligence in respect of the Calcatreu sale. For that purpose, these representatives made arrangements to visit the project office in Jacobacci and to tour the Calcatreu site from September 20 to 22, 2002. The person they dealt with in respect of due diligence was Carlos Cuburu.

[46] Prior to the first site visit, Patterson contacted Crespo and had a brief discussion. Crespo advised that maps and geochemical data were being sent to Vancouver. Patterson was advised on September 12, 2002 that there would be a complete data set on site and that IMA would have access to it on a site visit.

[47] By September 16, 2002, Patterson advised Lhotka that IMA had received the maps which were attached to the Brochure but had not received any geochemistry.

[48] On September 17, 2002, Lhotka responded to Patterson, in part as follows:

> When you say no geochem. Do you mean no surface sample data of any kind or just no multi-element stuff. It would be critical to get all surface sample data as that combined with geophysics is the key to areas not drilled or tested by single holes…
>
> ***
>
> My gut feeling is that you should be emailing me anything that looks useful. After today it will be a serious pain in the ass and may be very expensive to get until I return to Mendoza. Have you got a list of what you received? That would be great as then I know in a pinch at least one of us has it. If for instance head office sent one set of maps to Jacobacci then there will be no way Carlos [Cuburu] will part with

them. As to digital data Latinos tend to be tight with data and just cause head office is giving it out does not mean that he will be keen to.

[49] The sale of Calcatreu was taking place at a time of increased interest in the Chubut Province by explorationists, and IMA was one of several exploration companies actively searching there for targets and potential resources. It had employed a number of geologists to provide it with advice in relation to Argentina and it had directed much of its resources to looking for potential resources in Argentina and in the Chubut Province specifically. It was continuing to do so when it reviewed Calcatreu and it had under consideration some areas that fell within the area covered by the regional BLEG A data. At that time, all of IMA's claims in the Province of Chubut were located in western Chubut, although it had conducted some field work in central Chubut and had identified areas for further consideration in eastern Chubut. The southern portion of Calcatreu is located in north-central Chubut, as is what is now called Navidad. Navidad is south and east of Calcatreu.

[50] In his examination for discovery, which was adopted at trial, Lhotka gave evidence concerning the purpose of the visit to the Jacobacci office and his instructions to the two geologists who accompanied him on that first visit in September 2002:

1678 Q All right. You were doing that at the request of IMA?

A Yes, sir.

1679 Q For the purpose of?

A the Calcatreu project.

1680 Q You didn't have any other reason to go and see Mr. Cuburu, did you?

A No, I didn't know him previously and had no other reason.

***

1780 Q So apart from the general discussion about dividing the work up so it could be done efficiently, do you recall any more specific discussion before you got to the Jacobacci office?

A Yes, I would have generally advised both of the geologists there was a confidentiality agreement.

1781 Q You say you would have. Do you specifically recall that?

A I'm quite sure that I did.

1782 Q Why are you quite sure of that?

A It's good practice and I try to do things right.

1783 Q Why is it good practice?

A Because they are going to be viewing confidential information and they have to be aware of that.

1784 Q Did you tell them that anything they see during the course of their visit to the office and the site was confidential and they should treat it as confidential?

A That would be the normal situation.

1785 Q All right. That's what you recall telling them; isn't it?

A Yes, that would be what you would expect going to do a site exam, yes. That's what you would expect.

1786 Q That's what you recall telling them?

A Yes, sir.

1787 Q That's how you intended to govern your own conduct; isn't it?

A Yes, sir.

[51] During the first site visit, Lhotka visited the property and attended at the Minera office in Jacobacci. Cuburu and Lhotka met in Cuburu's office, and Lhotka

observed the satellite map on the wall that showed the early progress of Project Generation (the BLEG A data). The map showed the location of all of the points sampled, but only partial results for gold. Some of the sample points were within Calcatreu, but most were in north-central Chubut, outside of the Calcatreu boundaries. The map also showed sample locations in the area that was later staked by IMA as the Navidad Project, but no results in respect of those locations for either gold or silver.

[52] This satellite map caught Lhotka's interest and was briefly discussed by Cuburu and Lhotka while they were in the office. Mr. Cuburu's uncontradicted evidence was that the only discussion of the BLEG A data on the first site visit took place in front of the map and consisted of speaking "about regional geological characteristics about the structures that control the possible mineralizations but always in general terms, not in terms of results."

[53] Cuburu explained the nature of Project Generation in general terms to Lhotka. They also discussed a property, in the region around Calcatreu, owned by David Jorge. Gold sample results from the David Jorge property were also depicted on the satellite map. Lhotka had visited the David Jorge property in February 2002. Thereafter, the parties discussed the work within Calcatreu. Lhotka asked Cuburu if he could have the BLEG A data, which was the data associated with the satellite map on the wall. He was told that Cuburu would have to check with Crespo for permission to provide the BLEG A raw data.

[54] The undisputed evidence at trial was that Cuburu asked if he could provide the BLEG A data to Lhotka in a telephone call with Crespo after the first site visit by

IMA. In a follow-up call, Crespo, after discussing it with Bruce Harvey, told him to give IMA free access to all data, which Cuburu understood to include the BLEG A data. Crespo's evidence was that he did not recall Project Generation or BLEG A at the time and does not, therefore, recall giving express authorization to release the BLEG A data. He does recall giving Cuburu authorization to give raw data to all potential bidders. He assumed all data would be requested and provided only in the context of the evaluation of Calcatreu for the purpose of making a bid.

[55] As a result of its review of the information obtained at the first site and office visit, IMA was concerned about the economic viability of Calcatreu but decided that Lhotka should make a second site visit accompanied by Keith Patterson, IMA's manager of exploration. In anticipation of that visit, Lhotka emailed Cuburu on October 16, 2002, seeking certain other digital data. Some of this data was provided to him on October 17, 2002.

[56] Patterson and Lhotka arrived at Jacobacci on October 31, 2002. They toured the Calcatreu site and met with Cuburu; in particular in his office on the morning of November 2, 2002. During a meeting lasting several hours that morning, they discussed drill intercept data concerning Vein 49, and Lhotka asked for, and Cuburu provided, various technical data in digital form, which Lhotka then downloaded to his laptop. The last set of digital data that Lhotka requested was the BLEG A data, which Cuburu provided in the same manner.

[57] At the time the BLEG A data was given to Lhotka, there was no discussion of confidentiality by either party.

STAKING NAVIDAD

[58] Some four weeks after obtaining the BLEG A data and about four weeks after it declined to bid on Calcatreu, Lhotka reviewed the BLEG A data. The review immediately revealed a cluster of exceptional silver-lead anomalies, the same anomalies identified by Mr. Worland and labelled as "medium targets" for Normandy/Newmont. Lhotka reported his review to IMA's head office and IMA staked a mineral claim in Chubut on December 6, 2002, prior to visiting the property covered by the cluster of silver anomalies in the BLEG A data. This is the claim which was later publicly described by IMA as the Navidad Project.

[59] In 2003, IMA staked further claims solely as a consequence of having staked the Navidad Project. These additional claims, together with the Navidad Project, are referred to collectively in the Statement of Claim as the "Navidad Claims". To put these other claims in context, most of the exploration work by IMA to date has been on the Navidad Project, or the first claim staked by IMA on December 6, 2002.

THE CONFIDENTIALITY AGREEMENT

[60] The first issue to be determined is whether the regional BLEG A data was covered by the Confidentiality Agreement.

[61] It is not disputed that the regional geological information encompassed in the BLEG A data was not expressly referenced in the Confidentiality Agreement nor in the Information Brochure.

[62] It is the plaintiff's position that the BLEG A data is covered by the Confidentiality Agreement by necessary implication because it is data made available during the site visit and because it relates to evaluating a possible transaction concerning Calcatreu.

[63] The relevant sections of the Confidentiality Agreement are set out below:

> THIS AGREEMENT is made as of September 6, 2002 by and between Newmont Mining Corporation, a Delaware corporation, on behalf of LaSource Development, a French corporation and Minera Normandy Argentina S.A. an Argentinean corporation, whose address is 1700 Lincoln Street, Denver, Colorado, U.S.A. 80203 (collectively "Newmont") and IMA Exploration Inc., a Canadian corporation, whose address is 709-837 W. Hastings St. Vancouver, Canada ("Reviewer") (Newmont and Reviewer are collectively called the "Participants").
>
> Reviewer is interested in reviewing certain confidential information in relation to exploration and mining rights at Newmont's Calcatreu Project in the Rio Negro and Chubut Provinces, Argentina, which are further described on the attached Exhibit "A", for the purpose of evaluating a possible transaction concerning such project (the "Project").
>
> In connection with Reviewer's review of the Project, Newmont may provide to Reviewer certain financial, operating, technical, geological and other information (the "Confidential Information") concerning the Project. Confidential Information in this Agreement will include all communications, whether written, electronically stored or delivered, or oral, of any kind, between the Participants relating to the Project, any observations made by Reviewer during site visits or tours, and any and all information, reports, analyses, studies, compilations, forecasts or other materials prepared by Reviewer relating to the Project which contains or otherwise reflects such information.
>
> In consideration of Newmont providing Confidential Information to Reviewer, the Participants agree as follows:
>
> 1. **Use of Confidential Information**. The Participants agree that Confidential Information provided by Newmont to Reviewer will be used by Reviewer or Reviewer's Representatives only for the purpose of the Project and that the Confidential Information will otherwise be kept confidential by Reviewer and their Representatives. For purposes of this Agreement, "Representatives" means Reviewer and its

directors, officers, employees, consultants, agents, accountants, legal counsel, bankers and those of its direct and indirect wholly-owned subsidiaries and parent companies.

(a) any of such Confidential Information may be disclosed to Reviewer's Representatives who need to know such information for the purpose of the Project (it being agreed that each such Representative will be informed by Reviewer of the confidential nature of such information and the terms of this Agreement and will agree to be bound by the terms of this Agreement and further, that Reviewer will be responsible for any breach of this Agreement by its Representatives); and

...

4. **Portions of Confidential Information Not Applicable To This Agreement**. This Agreement will terminate or become inoperative with respect to any portion of the Confidential Information if:

...

(c) Reviewer can establish that such information was developed by it independently of any disclosure by Newmont or was available to Reviewer on a non-confidential basis prior to its disclosure by Newmont; or

...

5. **Termination**. Except as provided herein, this Agreement and all obligations hereunder will terminate and be of no further force or effect on the date that is the **second anniversary** of the date hereof (the "Termination Date"). Within 30 days of written request by Newmont, made at any time before or after the Termination Date, Reviewer will return all Confidential Information received by it from Newmont and all copies or reproductions thereof, and will destroy all information, reports, analyses, studies, forecasts, compilations and other documents prepared by or on behalf of Reviewer that contain or otherwise reflect Confidential Information.

...

8. **Acquisition Restrictions**. During the term of this Agreement, neither Reviewer or any of its subsidiaries or any of its subsidiaries or affiliates will acquire, directly or indirectly, any mining claims, permits, concessions or other property situated

within **two (2) kilometers** from and parallel to all exterior boundaries of the Project.

...

16, **Entire Agreement**. This Agreement contains the sole and entire agreement between Newmont and Reviewer relating to the Project, and its other subject matter; it supersedes any prior and contemporaneous agreements, commitments, representations, and discussions, whether oral or written, express or implied, relating to the Project, all of which are hereby terminated in their entirety as of the date of this Agreement and all confidential information under which is hereby deemed to be Confidential Information under this Agreement. No promise or inducement not expressly provided for herein has been made, given or relied upon by the parties ad consideration for this Agreement. This Agreement and its *express* limitations on the use of Confidential Information are in lieu of any other *express or implied* limitations that may exist at law or in mining industry practice. This Agreement shall not be construed to create between the parties any fiduciary relationship or any other special relationship of trust or confidence not expressly provided for herein.

...

18. **Headings**. The headings set out in this Agreement are inserted for convenience and will not affect the construction or meaning hereof.

The Meaning of the Agreement

[64] Before turning to a discussion of the terms of the Confidentiality Agreement, it is important to recognize that all Newmont's private business information was, by its nature, confidential. This included geological, technical, operating, and financial information. In the ordinary course, this information would not be available to IMA or anyone else. There is no dispute about this.

[65] Cuburu understood all of a company's technical data is confidential. This view was shared by other geologists who testified. Lhotka testified that he always

kept information that he generated for his clients confidential. Patterson also understood that geologists were required to keep information they generated for the companies they worked for confidential.

[66] The construction of the Confidentiality Agreement should be viewed through the lens of its business purpose, which was to permit interested parties to have access to confidential information of the vendor to allow them to evaluate a possible acquisition of Calcatreu while, at the same time, protecting the confidentiality of the vendor's proprietary information.

[67] Prospective purchasers had unrestricted access to the site personnel (Cuburu) and to the site itself. They were free to ask whatever questions they thought necessary for their evaluation, and to request documents to assist in that evaluation. The plaintiff's position is that any information provided to IMA, in response to any request by that company that could reasonably be viewed by the vendor as relating to IMA's evaluation of Calcatreu, was confidential information within the meaning of the Agreement.

[68] The defendants submit that to interpret the Confidentiality Agreement as applying to data not specifically listed or referenced would undermine the mining exploration business. The defendants noted that any potential bidder wants to know the type and scope of information provided pursuant to a Confidentiality Agreement so that there will be no unintended interference with its own exploration efforts. As the defendant pointed out, IMA had a pre-existing interest in the general region of Calcatreu and in part of the area covered by some of the BLEG A data. I accept that

this position of the defendant provides a relevant consideration in interpreting the Agreement. However, IMA did not have an active sampling program nor any claims anywhere near Calcatreu or what became Navidad.

[69] The plaintiff's position is that the "Project" covered by the Agreement is not solely defined by reference to the description of the mining claims in Exhibit "A". Rather, the Project is defined by reference, not only to the Calcatreu Project itself, but to the possible transaction that a Reviewer might enter into concerning such a project, as set out in the first paragraph of the Confidentiality Agreement. This interpretation is supported by Clause 1(a) of the Agreement which provides in part:

> Use of Confidential Information. The Participants agree that Confidential Information provided by Newmont to Reviewer will be used by Reviewer or Reviewer's Representatives only for the purpose of the Project and that the Confidential Information will otherwise be kept confidential by Reviewer and their representatives ...

[70] The Confidential Information can therefore only be used for the purpose of the Project. The phrasing in this section is relied upon by the plaintiff to mean that the "Project" means the review of information by the Reviewer for the purpose of evaluating a possible transaction.

[71] That interpretation is also supported by the latter portion of the second clause of the Agreement, which includes the definition of "Confidential Information":

> In connection with Reviewer's review of the Project, Newmont may provide to Reviewer certain financial, operating, technical, geological and other information (the "Confidential Information") concerning the Project. Confidential Information in this Agreement will include all communications, whether written, electronically stored or delivered, or oral, of any kind, between the Participants relating to the Project, any observations made by Reviewer during site visits or tours, and any and all information, reports, analyses, studies, compilations, forecasts or

> other materials prepared by Reviewer relating to the Project which contains or otherwise reflects such information.

[72] It is important to note the placement of the defined term, "Confidential Information", which follows a reference to the fact that Newmont may provide to the Reviewer certain information "[i]n connection with Reviewer's review of the Project". It is therefore submitted by the plaintiffs that "Confidential Information" is that information provided to IMA in connection with IMA's review of the project – that is, it was information provided to IMA in the course of, and in the context of, such review.

[73] The plaintiff submits that this construction of the Agreement is consistent with the business purpose of the transaction. Newmont was willing to provide information to IMA in connection with its review of the project – information which is proprietary and not available to the public – on the basis that IMA agreed that it would only use the information for review purposes, and would maintain its confidentiality, subject to the exceptions noted in clause 4 of the Agreement.

[74] The broad construction contended for by the plaintiff is consistent with the use of such terms as "concerning the Project" and "relating to the Project". These terms are extremely broad in scope and should be construed, says the plaintiff, in the context of this Agreement, as applying to any information that was provided in the context of IMA's evaluation of a possible transaction concerning Calcatreu.

[75] The plaintiff relies on, and I accept as apposite, the following authorities: ***R. v. Nowegijick***, [1983] 1 S.C.R. 29, 144 D.LR. (3d) 193, Dickson J. (as he then was) said, in an oft-quoted passage:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" and "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

[76] In ***Slattery (Trustee of) v. Slattery***, [1993] 3 S.C.R. 430, 106 D.L.R. (4th) 212 (S.C.C.), Iacobucci J. said this:

> The connecting phrases used by Parliament in s. 241(3) [of the *Income Tax Act*] are very broad. The confidentiality provisions are stated not to apply *in respect of* proceedings *relating* to the administration or enforcement of the Income Tax Act.
>
> The phrase "in respect of" was considered by this court in *Nowegijick v. Canada* (1983), 144 D.L.R. (3d) 193 at p. 200, [1983] 1 S.C.R. 29, [1983] C.T.C. 20:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject- matters.
>
> **In my view, these comments are equally applicable to the phrase "relating to".** *The Pocket Oxford Dictionary*, 7th ed. (1984) defines the word "relation" as follows:
>
> > ... what one person or thing has to do with another, way in which one stands or is related to another, kind of connection or correspondence or contrast or feeling that prevails between persons or things...
>
> So, both the connecting phrases of s. 241(3) suggest that a wide rather than narrow view should be taken when considering whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*. [emphasis added]

[77] These authorities support the plaintiff's interpretation of the Agreement and are inconsistent with the narrow construction contended for by the defendants.

[78] The defence submits that the scope of the information intended to be covered by the Confidentiality Agreement is that "relating to the "Project" as narrowly construed." The defendant says the Project is defined by reference to Exhibit A which is a listing of the Calcatreu claims. The defendant says that the BLEG A data is not "related to" or "concerning" the Project for five reasons:

(1) it was not referenced in the Information Brochure;

(2) it was not provided to any other bidders;

(3) it does not cover the geographic area of Calcatreu (as defined by Exhibit A);

(4) it covers an extensive area outside the "area of interest" specified in the Agreement; and,

(5) Lhotka did not review the data as part of his due diligence.

[79] The defendant also points out that the actual data represented by the BLEG A data points was not kept at the Jacobacci office, and suggests that that is another reason why the BLEG A data was not contemplated as being relevant to the purchase of Calcatreu.

[80] Although each of the points 1-4 made by the defendants suggests that the BLEG A data was not relevant to an evaluation of the purchase of Calcatreu, several experts called by each side agreed that regional exploration data like the BLEG A data could be relevant or desirable when evaluating a known resource.

[81] Central, in my view, to finding that the BLEG A or any regional exploration data may be relevant to evaluating the purchase of this mining property is the fact that Normandy undertook the geochemical survey, which in its first phase, resulted

in developing the BLEG A data, for the express purpose of potentially adding to the Calcatreu gold property.

[82] The defendants submitted that given that the BLEG A was not specifically referenced by Newmont in the Bid Package, nor in the Confidentiality Agreement, it was understood by both Cuburu and Lhotka that the reason Lhotka wanted to see the data was to further his interest in his general regional exploration, not for his evaluation of Calcatreu.

[83] Lhotka says the defendants did not expect to see the BLEG A in the Jacobacci office. In this regard, the defendants rely in part on evidence from the experts as to what the industry custom or common practice with respect to what will be found in a "data room" such as the Jacobacci office. The evidence that there is, in fact, an industry custom was far from compelling. However, there was some non-specific evidence from several of the experts that each might not expect to see "unrelated" data in the "data room" (begging the question as to whether the BLEG A data could be considered "unrelated data"). The best such evidence in this case was the evidence of David Watkins, the defendants' expert who stated on cross-examination as follows:

> Q And some of the proprietary data that vendors make available to bidders for an exploration asset are regional -- is regional data, regional exploration data?
>
> A I would not expect a seller to show regional exploration data that was proprietary without -- **without protecting it as would be done under a conventional confidentiality agreement** with an area of interest.

> Q **Yes. Well, I'm not going to get into what a contract means, but can we go this far: you wouldn't expect a vendor who is going to be selling an exploration asset to make regional data available without there being some kind of protection for confidentiality?**
>
> A **I agree with that statement, yes.**
>
> [emphasis added]

[84] The full answer to the defendant's submission, however, is the evidence of Mr. Lhotka and Mr. Patterson coupled with that of Mr. Cuburu, Mr. Crespo, and Mr. Harvey. I find that each thought that the request for the BLEG A data – in the circumstances – was in furtherance of IMA's due diligence evaluation of Calcatreu.

[85] Evidence of Mr. Lhotka's state of mind at the time that he received the BLEG A data on his computer and before he contemplated opening the data can be found in his own evidence at his examination for discovery prior to trial:

> Q All right, so when he gave you the diskette did you assume he was giving you information for the purpose of your evaluation?
>
> A Yes Sir.

[86] At trial, when this discovery evidence was put to Mr. Lhotka, he testified that he did give that answer, and when asked if it was true, he stated "Yes Sir, I am not sure. I am not sure what I thought at the time." In my view, Mr. Lhotka's evidence on discovery is more consistent with all of the evidence, including all of his, and is more reliable, having been taken at a time when Mr. Lhotka apparently had a clearer memory of his thoughts and assumptions at the relevant time.

[87] Mr. Cuburu's evidence with regard to his intention was that he understood that the BLEG A data was to be given as part of the evaluation. There is no

question that he considered that it had some kind of different status from the raw data included in the information brochure. On the other hand, he clearly felt he had to ask permission before providing it and when he was given permission, there is no indication that he thought that permission was anything other than a decision of management to include the BLEG A data to make the deal more attractive to IMA.

[88] When pressed, both testified that any permission to provide access to data to a bidder on Calcatreu and specifically to IMA given the business discussions between the two companies, was given in the context of "free access" to assist in the evaluation of the property.

[89] In addition, there was no evidence given by the witnesses from Newmont, none of whom had any real interest in this litigation, that anyone intended for IMA to have access to any data while carrying out IMA's due diligence other than to evaluate the purchase of Calcatreu.

[90] With regard to reason five put forward by the defence, I find that the fact that Mr. Lhotka did not review the data as part of his due diligence cannot be evidence that it was not germane to that due diligence. Rather, the overwhelming evidence was that before Mr. Patterson and Mr. Lhotka left the Jacobacci site, they each had tentatively decided they were not going to recommend the purchase. It was as they drove away that they came to that conclusion. In no way can Mr. Lhotka's failure to examine the data before so deciding be compelling evidence of its lack of relevance. In effect, I conclude, he had decided he would not recommend the purchase despite having received the BLEG A data to review as part of that decision-making process.

[91] In Mr. Lhotka's own email to Patterson on November 20, 2002, after he received the data and after he knew IMA was not going to bid on Calcatreu before he opened the data, he queried whether the Confidentiality Agreement precluded him from looking at the data. He said:

> IMA recently also acquired the BLEG database of Calcatreu which includes regional sampling in Chubut in this area. The confidentiality agreement IMA signed with Newmont would allow IMA to acquire land more than 2 kilometres distant from lands included the CA [Confidentiality Agreement], but it is unclear to me if such confidential data could be used to acquire lands outside the 2 km boundary.

The Area of Interest Clause

[92] Further, says the defendant, clause 8 of the Agreement represents an "Area of Interest Clause," which defines or limits the restriction on the use of confidential information under the Agreement if BLEG A is such confidential information.

[93] Clause 8 of the Agreement provides as follows:

> **Acquisition Restrictions.** During the term of this Agreement, neither Reviewer or any of its subsidiaries or affiliates will acquire, directly or indirectly, any mining claims, permits, concessions or other property situated within two (2) kilometers from and parallel to all exterior boundaries of the Project.

[94] I note, however, that Clause 8 makes no reference to Confidential Information. It appears to be an independent covenant by which a Reviewer covenants not to, directly or indirectly, acquire any mining claims, etc. within two kilometres of the Project, even if the Reviewer discovered those claims through independently developed exploration.

[95] The plaintiff relies on an article entitled *Confidentiality and Dispositions in the Oil and Gas Industry*, by Hardwicke-Brown, (1997) 2 Alta. L. Rev. 356, in which the author analyses issues in negotiating and drafting confidentiality agreements. At p. 387, under the heading "Area of Exclusion Covenant", the author states:

> Perhaps the most contentious aspect of a confidentiality agreement is a requirement that the confidant enter into an area of exclusion covenant. This is an attempted duplication of the remedy granted by the courts to Corona in the *Lac Minerals* case. **The difference is that the area of exclusion covenant is effective, notwithstanding that there may not have been any improper use of confidential information by the confidant in the acquisition of the interest that is subject to the covenant.** [emphasis added]

[96] Thus, says the plaintiff, any suggestion that this acquisition restriction defines an "area of interest" is without merit. In particular, there is nothing in Clause 8 that limits in any way the covenant in Clause 1 restricting the use of the Confidential Information. I agree with this interpretation of Clause 8.

[97] The contract in this case has to be interpreted objectively to ascertain the intentions of the parties from the language of their Agreement. It is submitted that the Agreement on its face supplies the objective evidence of the purpose and object of the parties. The narrow construction of the Agreement contended for by the defendants — that the restriction on the use of confidential information is limited to the area of the staking restriction— would have the effect of preventing purchasers from obtaining information that would inform their evaluation of a possible acquisition. No reasonable vendor would provide information outside the restricted area, even if that information would assist potential buyers in evaluating whether

other potential resources might be available, if that information would not of necessity be treated as confidential.

[98] It is important to bear in mind that the purpose of the Confidentiality Agreement is to protect proprietary information and to maintain its confidentiality in respect of all bidders who may be interested in considering the evaluation of Calcatreu, whether or not they ever make a bid or are successful in acquiring it. This is not a Purchase Agreement that will define the assets to be sold and the terms and conditions of such sale.

[99] The most compelling submission of the defendants, in my view, is that if the BLEG A data is covered by the Confidentiality Agreement without being specifically referenced anywhere in the Bid Package or the Confidentiality Agreement, any bidder could inadvertently run afoul of the Confidentiality Agreement in carrying out their own explorations. For instance, if IMA had not asked to see the data, and did not have notice that Normandy had it, but later made the Navidad discovery, it still could not stake it without risking an allegation of breach of the Agreement.

[100] However, Clause 4(c) of the Confidentiality Agreement appears to provide protection to the potential purchaser to prevent that eventuality. Clause 4(c) provides an exemption clause from the prohibition on the use of information defined as confidential in the Agreement. It states:

> 4. **Portions of Confidential Information Not Applicable To This Agreement**. This Agreement will terminate or become inoperative with respect to any portion of the Confidential Information if:
>
> ...

> (c) Reviewer can establish that such information was developed by it independently of any disclosure by Newmont or was available to Reviewer on a non-confidential basis prior to its disclosure by Newmont; or
>
> ...

[101] I find, thus, that so long as IMA did not use the confidential data of Newmont, it was free to pursue its interests in the region using its own data or public information. That is, using information not received from Newmont for the purposes of evaluating Calcatreu, IMA was free to stake anywhere outside the two kilometre boundary established by Clause 8.

[102] Mr. Patterson testified that as a reviewer under a Confidentiality Agreement, he would be concerned to know the type of information that is going to be produced pursuant to the Confidentiality Agreement so as not to have any unintended interference with his own exploration efforts. Mr. Patterson testified that had he been warned that the scope of the information that might be provided went far beyond the boundaries of the "area of interest" he would have had to consider very carefully whether that represented a potential interference with IMA's own exploration efforts. In my view, while generally this appears to be a reasonable consideration and consistent with the evidence of some of the experts, it has little relevance on the facts here.

[103] Mr. Lhotka was the IMA representative most familiar with IMA's on-the-ground exploration in the Chubut Province. He was on a due diligence visit to Calcatreu and understood that "everything" he saw or observed was covered by the Confidentiality Agreement. He advised the two junior geologists who accompanied him of that fact.

While visiting Calcatreu, he noticed the data points on the map in the Jacobacci office and discussed them generally with Mr. Cuburu. He was not offered the data – he asked for it. After receiving it, he still believed it was not only confidential but that the use of it by IMA may be covered by the Confidentiality Agreement. In other words, if IMA intended to imminently explore and stake in the area covered by the BLEG A data, Mr. Lhotka surely would not have asked to see the data during his site visit.

[104] The defendants also rely on the actions of Newmont in asserting that the BLEG A data was not covered by the Confidentiality Agreement. It is pointed out that Newmont not only did not include the BLEG A data in the Information Brochure, or specifically reference it in the Confidentiality Agreement, but also assigned no value to it. As late as March of 2002 the very anomalies so obvious to Mr. Lhotka as "exciting" were presented at a Newmont meeting and noted only as "medium targets" to be followed up at a later time. Further, Mr. Crespo had no memory of the BLEG A data, although he attended the meeting, and Newmont assigned no specific value to the data when it included it in the share sale to the plaintiff. Thus, says the defendant, Newmont did not consider the data valuable, and that is why it was prepared to give IMA "free access" to it. The defendants argued that Newmont waived any restriction on its use by IMA because Newmont wished to maintain good relations with IMA and intended to perhaps do a deal with IMA involving properties of IMA's in Peru, which was one of the countries Newmont was moving into as it left Argentina.

[105] Both of the principals of Newmont gave evidence on these points. Their evidence was consistent that by the time of the first site visit by IMA, Newmont had no interest in doing a deal with IMA in relation to its Peru properties. Further, by the time of the first site visit, each of the requests by IMA for special consideration (such as exclusivity) as a bidder on Calcatreu had been refused by Newmont.

[106] IMA and Newmont had had some business connections in the past, and it was expected by Newmont that they would continue to have a good business relationship in the future without giving IMA any special consideration on the bidding or deal making on Calcatreu. Finally, both Mr. Crespo and Mr. Harvey testified that when they were asked if IMA could have the BLEG A data on its second site visit, they considered that IMA should be given free access to all data it required in performing its due diligence before bidding on Calcatreu. Each, for different reasons, believed the data, regardless of exactly which data was being asked for and given, was to be given only within the context of the Calcatreu evaluation and for no other reason. It is significant that Newmont is not only not a party to this litigation but also appears to have no interest in its outcome. I accept without hesitation the truthfulness of the evidence of both Mr. Crespo and Mr. Harvey on this point.

[107] There was no evidence, at any time, given by any witness, that a confidential data set would be "given" without consideration from one company to another without any immediate business reason. There was no issue that the cost of the development of the BLEG A data was high – in the many hundreds of thousands of

dollars. It is simply not plausible on the evidence in this case to find that the BLEG A data was simply given away.

[108] The defence also argued with some force that the reason Mr. Lhotka noticed and asked for the BLEG A data was that Mr. Lhotka was a "data pig," as Mr. Cowper put it – this is not a pejorative description in the industry and is apparently a commonly shared characteristic of exploration geologists. I do not accept that this characteristic negates my findings made on the basis of his own words, that Mr. Lhotka sought the data in pursuance of his evaluation of Calcatreu. However, it may explain, in part, the ease with which he brushed aside his doubts and reinterpreted events from his site visit to allow himself to open and use data that he knew or strongly suspected was not available for use for staking by IMA.

[109] Thus, I find that the BLEG A data in the full context of the Confidentiality Agreement was covered by the words "relating to" and "concerning" the Project. I so find for the following reasons: First, the words "relating to" and "concerning the project" are words of broad interpretation generally, and nothing in the Agreement compels a more narrow meaning. Second, Clause 8 has no direct reference to the use of confidential information. Third, the term "confidential information" is defined broadly in the second and third paragraphs of the Agreement. I find that there is no ambiguity in the contract with regard to the meaning and scope of "Confidential Information".

[110] I find that if there was an ambiguity, despite the potential operation of the *contra proferentum* rule, the parties to the contract understood and so acted in

relation to each other that all data observed or given during the site visits by IMA was confidential information to be used solely for the purpose of evaluating Calcatreu.

[111] Thus, the use by IMA of the BLEG A data to find and stake Navidad was in breach of the Confidentiality Agreement.

CONFIDENTIALITY AT COMMON LAW

[112] Based on my findings that the Confidentiality Agreement applies to the BLEG A data and that IMA's use of it to stake Navidad constitutes a breach of contract, it is unnecessary for me to consider the plaintiff's alternative claim to relief pursuant to extra-contractual obligations arising at common law. However, as much evidence and many days of trial were dedicated to that issue, I provide the following analysis and findings on the common law breach of confidentiality claim.

[113] It must first be acknowledged that Clause 16 of the Confidentiality Agreement constitutes an entire agreement with respect to data defined as "Confidential Information" under the agreement. Clause 16 specifically excludes a relationship of confidence, other than as provided for in the agreement. However, to the extent that the Confidentiality Agreement does not apply, the exclusion clause within it cannot operate to exclude a common law duty of confidentiality in respect of data received outside the agreement.

[114] Thus, the plaintiff submits that the defendant IMA owed the plaintiff a duty of confidence at common law that it breached in causing its subsidiary, Inversiones, to

stake the Navidad Area Claims in reliance on data provided to it during due diligence relating to Calcatreu.

[115] The evidence is neither straightforward nor overwhelmingly clear on this issue. If it were, it is unlikely that this case would have occupied in excess of six weeks of court time. Although the parties' understanding of the meaning of the confidentiality of the data at the time it was asked for by Lhotka and provided by Cuburu is likely one of the determining factors in the resolution of this action, at the time the data was given it appears to have had minimal importance to the parties, and their memories are not fully reliable guides as to what exactly took place and why. It may therefore be helpful at this point to summarize the essential facts and my finding about them, in relation to the common law claim.

[116] There is no issue that IMA signed the Confidentiality Agreement that covered the Calcatreu project before being allowed access to any data belonging to Newmont, it was understood that the business purpose of the Agreement was to permit interested parties to have access to Newmont's confidential information to allow them to evaluate a possible acquisition of Calcatreu while at the same time protecting the confidentiality of Newmont's proprietary information.

[117] It was only after signing the Confidentiality Agreement that the data package (within which the BLEG A data was not included) was distributed to interested buyers who, if they wished to proceed to the next step, could then arrange for a site visit. At that point, in going to the site having signed the Confidentiality Agreement,

the buyer would be permitted a detailed review with unconstrained access to all data.

[118] At the time of trial, it was not contested that the BLEG A data was obtained during IMA's site visit. IMA's representative, Paul Lhotka, testified that his sole purpose for being at the site and at the plaintiff's field office in Jacobacci was to evaluate Calcatreu for its potential acquisition by IMA. Part of Mr. Lhotka's experience as a geologist carrying out due diligence visits included knowledge of general obligations of confidentiality. Further, at the time of trial, the nature of the BLEG A data was conceded to be proprietary data and inherently confidential.

[119] Thus the factual issue for the common law claim revolves around whether the receipt of the BLEG A data during the site visit, which data is not specifically covered by the Confidentiality Agreement, but which is conceded to be confidential in nature, would disentitle the defendant from using the data in order to further its own exploration efforts.

[120] When asked about communications between IMA and Newmont regarding the provision of information for the purposes of evaluating Calcatreu, IMA's Mr. Patterson, to whom Mr. Lhotka was reporting about his evaluation and his site visits, testified as follows:

> Q And you expected him [Lhotka] to attend at the site and to ask whatever information he required in order to do the evaluation.
>
> A That's correct.
>
> Q And you hoped that the vendor, that was obviously interested in selling the property, would be cooperative and helpful in that regard; is that correct?

A I assumed they would be.

[121] Other testimony to the same effect is as follows:

Q You expected Newmont to provide information which you thought would assist in the evaluation of the Calcatreu project.

A I did.

Q And you assumed that to the extent they didn't give you all you wanted, you would ask for it and they would probably give you that too?

A I assumed that would be the case.

[122] In addition, Mr. Patterson's evidence of his relations with Mr. Crespo, Newmont's person in charge of the Calcatreu sale, is to similar effect:

Q All right. Did Mr. Crespo say to you words to the effect: look, whatever information you need to evaluate the property we'll make available?

A I'm not sure in exactly those words. I'm not sure if he directly assured me that we would get everything we need, but he certainly didn't raise any flags that certain areas might be off limits.

[123] Finally, Mr. Patterson's expectations of Mr. Lhotka's freedom to ask for information and to supplement the bid package were captured in the following questions and answers read in as part of the plaintiff's case:

Q So I take it you left it to Mr. Lhotka to request information that he wanted for the evaluation?

A I left it to Mr. Lhotka to do the evaluation and if in order to do that he – if in the course of doing that he found that there had been work done that wasn't documented in the bid package, of course he's going to ask for that information. You know, that's quite normal.

[124] Mr. Lhotka's own expectations and understanding regarding the confidentiality of information received at a site visit is clear from the instructions he admits to having provided to the junior geologists accompanying him; that is, that all they observed and received must be treated as confidential.

[125] The uncontradicted evidence of the circumstances surrounding the transfer of BLEG A data from Cuburu (on behalf of Newmont) to Lhotka (on behalf of IMA) is important, in my view, in considering the intention of the parties, as well as in weighing each witness's evidence.

[126] Both Cuburu and Lhotka appeared to me to be sincere, honest witnesses doing their best to answer questions about what each had thought and done at the time of the transfer. Each, however, is retrieving and reconstructing memory through the lens of contested litigation. It is important to acknowledge that at the time of the transfer, the actual transfer of the data and the circumstances surrounding it were not thought to be of great importance to either party. Certainly, neither had any sense that the BLEG A data was significant in the way it turned out to be.

[127] It is in this context that I comment that the recollection of each of the main players, that is Mr. Cuburu, Mr. Lhotka, Mr. Patterson, and even Mr. Crespo who gave permission for the data to be transferred, must be viewed as some part recollection and a significant part reconstruction. I know of no sinister motive for the giving of evidence by reconstruction. It is both commonplace and necessary for

anyone asked to give evidence of past events to do so in part by reconstructing what is likely to have happened.

[128] The review of data at the field office took place in Mr. Cuburu's office. Mr. Lhotka acknowledged in testimony that he considered Mr. Cuburu's office a "data room" and acknowledged that in going into Mr. Cuburu's private office, he expected that he would be seeing confidential information pertaining to Calcatreu. Although he also testified that he did not expect to see the BLEG A data points, this statement is obviously reconstructed in hindsight.

[129] Lhotka further acknowledged that a data room often is not an actual physical room or location and that it can often be very informal. A data room can be a report or a compilation of information; it varies depending on the circumstances. Mr. Lhotka stated that his understanding of the data room is that "it contains data or information or reports relevant to the asset or property being sold."

[130] Mr. Lhotka testified that on the first site visit he noted the map on the wall; it was actually on the door of the office with a large number of data points in the Province of Chubut. IMA had "some interests" considerably further away from Calcatreu but still in the Province of Chubut. I find that Mr. Lhotka asked on that first visit if the information depicted on the map was available. He was told that Newmont would have to give permission.

[131] At the time, Mr. Lhotka did not suggest that because the data points he was interested in were well outside the boundaries of Calcatreu, he was surprised that

they were shown on a map available to him in the site office where he was doing his due diligence. In fact, he in no way, either at that time or at any other time, indicated that such information would not be relevant to his review of Calcatreu.

[132] In contrast, on the same first visit, Mr. Lhotka recalled that during the office part of the visit – in the "data room" with the map – Mr. Cuburu showed him some rock samples from outside the "project." Mr. Lhotka testified that he told Mr. Cuburu that he shouldn't be showing those rock samples because they weren't relevant to the Calcatreu review.

[133] There was some controversy at trial over whether that exact conversation took place. Mr. Cuburu testified that he did not recall the conversation about the rock samples, although he did recall that he had rock samples (as opposed to a "file" with rock sample data) from well outside Calcatreu in his office on display. He doubted that Mr. Lhotka cautioned him about showing rock samples from outside Calcatreu because the samples would not be of importance in giving confidential information; they were just samples of different mineralization and rocks from several places that could act as comparators with rock samples from within Calcatreu.

[134] There was likewise some confusion during the trial about whether Mr. Lhotka, in recalling that he was freely shown data outside the "project" during his site visit, was in fact recalling seeing and discussing those displayed rock samples, not rock sample data unconnected to Calcatreu. Resolution of that issue is not possible on the state of the evidence. However, what is relevant to the issue at hand is what

sign-posts were evident to each of Mr. Cuburu and Mr. Lhotka about the confidentiality of all the information made available to IMA. In that regard, based on Mr. Lhotka's evidence that he told Mr. Cuburu that he should not show him files or rock samples from far outside Calcatreu, I infer that Mr. Lhotka had in his mind, whether he expressed the thought or not, that he was being shown confidential data freely that was unconnected to his evaluation of Calcatreu and that he felt compelled to indicate that to Mr. Cuburu.

[135] It is significant therefore that when asking for the raw data relating to data points on the map (the BLEG A data), Mr. Lhotka did not feel compelled to question why such information would be shown in the data room. Nor did he indicate that his request for the data that corresponded to the points on the map was of no relevance to his evaluation of Calcatreu.

[136] In my view, this supports the plaintiffs' contention that Mr. Lhotka did not think it was irrelevant to the evaluation of Calcatreu, or at the very least, he considered that the BLEG A map data points were covered by an obligation of confidentiality as part of his evaluation.

[137] This same state of mind is again reflected in his November 20, 2002, email to Mr. Patterson set out in full earlier in these reasons at para. 91 in which he queried whether it was appropriate for him to open the BLEG A data on his computer. The email makes no reference to any doubt as to what Cuburu intended as to confidentiality or to any confusion on Lhotka's part in that regard. The email is the

best evidence of what Lhotka understood. He described the regional or BLEG A data as being "of Calcatreu" and as "confidential data".

[138] Based on all of this evidence, I have no hesitation in finding that Mr. Lhotka understood that everything he observed and any data he obtained must be treated as confidential – essentially because a confidentiality agreement had been signed and because he was aware of the common law issues surrounding the use of confidential information as explained in the ***Lac Minerals*** case. He testified as follows:

> Q Now, prior to visiting the Calcatreu Claim, did you have occasion in your work with IMA to be concerned about the ***Lac Minerals*** case and its implications for any work you were doing for IMA?
>
> A Yes sir, I did mention it in one memo for IMA.

[139] When Mr. Patterson and Mr. Lhotka left the site in November of 2002 with the BLEG A data and the other data they obtained that day, they had essentially already decided that as a result of their evaluation they would not be recommending that IMA make a bid on Calcatreu. Subsequently they did not make a bid. It was close to one month later when Mr. Lhotka was reviewing other projects, and in particular, the exploration of possible claims somewhat to the north and west of the area covered by the BLEG A data points, that he thought about looking at the BLEG A data he had obtained from Newmont. He sent off the email of November 20, 2002, to IMA's management querying whether it was appropriate for IMA to use the BLEG A data given its confidential nature. He received no response whatsoever.

[140] Curiosity appears to have overcome him, and he opened the data and immediately noticed the anomalies, which led him to immediately seek permission to stake the area covered by those anomalies. When queried at trial as to what changed between the time that he sent the email indicating that he considered the data was confidential and therefore potentially unusable for exploration by IMA and the time he determined to open the data, he acknowledged that nothing had changed except that he "resolved" his doubt by deciding that the circumstances in which he received the data would allow him to open it.

[141] When Crespo or Harvey, on behalf of Newmont, instructed Cuburu to give Lhotka free access to data, neither considered whether the raw data being requested was inside or outside the boundaries of Calcatreu as defined in the Confidentiality Agreement. Both assumed that the raw data being sought was to assist IMA in evaluating Calcatreu and formulating a bid. In particular, Mr. Crespo did not realize that data separate from the data contained or referenced in the Information Brochure existed or that the BLEG A data was in any way not directly connected to the Calcatreu sales process. Thus, the most probable inference to be drawn from Newmont giving Cuburu permission to provide "free access" to the BLEG A data was to encourage IMA to purchase Calcatreu.

[142] In summary, the overwhelming weight of the evidence from both Mr. Patterson and Mr. Lhotka was that obtaining the BLEG A data was for the purpose of evaluating Calcatreu. This is the only reasonable interpretation of their words and actions at the time they asked for and received the data. They knew it was

confidential information. They knew they were being given it because they had signed a Confidentiality Agreement and were very interested in a potential purchase. Both Mr. Patterson and Mr. Lhotka acknowledged in their evidence that each understood Newmont was providing the data in furtherance of encouraging IMA's purchase of Calcatreu. Although some answers provided at trial skated away from this acknowledgment, it is the evidence I accept as the most probable true reflection of what each thought when they asked for and obtained the BLEG A data.

[143] The evidence from Newmont's representatives bears no other interpretation. They, too, understood that the BLEG A data was provided to IMA to encourage them to bid on Calcatreu.

[144] Thus, in my view, Mr. Lhotka was mistaken when he concluded that "such confidential information could be used by IMA to acquire lands". I conclude that he did not act dishonestly when he opened the data since before he opened the data he could not know what he would find. Rather, I speculate that his geologist's curiosity overcame his more cautious and better informed nature and, hearing nothing from head office, he took a chance.

[145] I cannot conclude that IMA's head office management were quite so honestly mistaken. In repeated public pronouncements right up to just before this trial, they denied that the BLEG A data was the sole basis for IMA's Navidad "discovery."

[146] Although that was finally admitted at trial, IMA's early protestations that the Navidad "discovery" was made from its own data sources and field geology were

plainly untrue. At best this represented wishful thinking and at worst deliberate dishonesty.

[147] IMA's conduct after making the discovery is, however, irrelevant to my finding that IMA, through Mr. Lhotka and Mr. Patterson, knew or should have known that the BLEG A data was not theirs to use to stake Navidad.

[148] The applicable test for breach of confidence adopted by the Supreme Court of Canada in ***Lac Minerals*** contains three elements:

(a) that the information conveyed was confidential;

(b) that it was communicated in confidence; and,

(c) that it was misused by the party to whom it was communicated.

Based on the above review of the evidence, it is clear that this test has been met.

[149] The defendants properly conceded at trial that the BLEG A data was by nature confidential information. A commonly cited consideration of what constitutes confidential information is the following passage from Lord Greene in ***Saltman Engineering Co., Ltd. v. Campbell Engineering Co. Ltd.*** (1948), 65 R.P.C. 203 at 215 (Eng. C.A.):

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential must, I apprehend, *apart from contract*, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus

> produced a result which can only be produced by somebody who goes through the same process. [emphasis added]

[150] In ***Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*** (2005), 36 B.C.L.R. (4th) 254, 2005 BCCA 5, Southin J.A. (concurring in a result) considered the facts of ***Lac Minerals*** and stated at paras. 45-48:

> On the facts of that case, one can pose this question: would Corona have communicated their geographical findings and so forth to Lac if it had known Lac would itself go out and acquire the Williams' property to Corona's exclusion? The answer is patently "no".
>
> When the answer to such a question is "no", the information can fairly be called "confidential".
>
> ...
>
> The question of what constitutes "confidential information" within the *Lac* formulation, could also be put this way: if an honourable man in Lac's position, upon being asked before receiving the information, "if we cannot make a deal, will you use without our consent what we tell you to enrich yourself?" would answer, "Of course not, the information is confidential," the information fairly falls under the rubric "confidential".

[151] With respect to the second condition of confidentiality, whether the information was communicated in confidence, the words of Megarry J. (as he then was) in ***Coco v. A.N. Clark (Engineers) Ltd.***, [1969] R.P.C. 41, [1968] F.S.R. 415 (Ch.D.) are relevant:

> It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence...

[152] I have found that there is evidence that Newmont placed relatively little value on the Project Generation data in general and the BLEG A data in particular. However, "relatively" is the key word. There was no evidence to support the proposition that it was of no value to them as contended by the defendants. The only specific evidence of its "relative" value was that of Mr. Crespo who acknowledged that he should have obtained consideration for the Project Generation data when Calcatreu was sold – it was a mistake not to. That it was of value as proprietary information costing hundreds of thousands of dollars to develop is sufficient to find that its "relative" value does not distinguish this case from the scenario Megarry J. described in ***Coco***.

[153] Once the first two elements of breach of confidence have been established, and it has been shown that the defendants have used confidential information, the burden shifts to the defendants to demonstrate that their use was a permitted use. In ***Lac Minerals***, La Forest J. stated at para. 139:

> In establishing a breach of a duty of confidence, the relevant question to be asked is, "what is the confidee entitled to do with the information?" and not, "to what use he is prohibited from putting it?" Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use.

[154] Given my findings as to what each of the parties knew and understood at the time the data was transferred from Newmont to IMA, the answer in this case is that IMA was entitled to use the BLEG A data for the sole purpose of evaluating the purchase of Calcatreu.

[155] The defendants have failed to discharge their burden of showing that their use of the data to stake Navidad was a permitted use. In fact, Lhotka adopted the following evidence from his examination for discovery, which further belies any suggestion that he resolved his doubt or even considered himself qualified to resolve the issue as to whether the data could be lawfully used to stake new claims:

> 2242 Q Right. Did you have any discussion at the time of this particular telephone call on November 28th, 2002, about whether IMA was entitled to use this data to stake that cateo?
>
> A I think we felt that at that point after finding the anomaly, as exploration geologists we didn't really have much choice that we were going to stake it...
>
> 2243 Q Right. In other words, forget the legalities, you've got something -- well, I shouldn't put it in that way.
>
> A I hope not.
>
> 2244 Q As an exploration geologist you'd come across something fantastic and you wanted to tie it up right away; correct?
>
> A I think a prudent exploration geologist would stake that anomaly, and I had previously pointed out in earlier e-mails it was unclear of November the 20th [a reference to the email of that date], that had not been clarified and under the circumstances I felt the prudent thing to do as an exploration geologist was to stake it. **And somebody should look at that issue or whether it was an issue but it wasn't me; I'm not qualified to do that.**
>
> [emphasis added]

[156] On November 22, 2002, Lhotka advised Patterson that he was preparing a field program for Daniel Bussandri using images and "BLEG". Lhotka advised Bussandri that he could use the BLEG A data to search for the source of the silver

anomalies notwithstanding that there had been no resolution of the issue. Lhotka adopted the following evidence from his discovery:

> Q All right. Do you tell him in that note that the BLEG data can be used?
>
> A Yes, I do.
>
> Q Why were you telling him that?
>
> A I'd previously written a memo, I believe, dated November 20th where I raised it as a possible issue for IMA. But I can't raise it as a possible issue for Bussandri, Daniel Bussandri a field geologist. He is either going to use it or he is not and I hadn't an answer and so I told him to use it.

[157] In the result, I find that IMA used the BLEG A data to "discover" and stake the Navidad project and that use was in breach of its common law duty of confidence to Newmont and through Newmont to the plaintiff.

THE CONFLICT OF LAWS ISSUE

[158] As is readily apparent in the above analysis, I have applied the law of this province to determine the issue of whether IMA's use of the BLEG A data constituted a breach of confidence at common law. I have found that British Columbia law is applicable after careful consideration of the defendant's pleadings in para. 31 of its Amended Statement of Defence, which states as follows:

> In the alternative, if the silver/lead BLEG data is not governed by the Confidentiality Agreement, but is nonetheless confidential in nature, which is denied, IMA's use of the data and any remedies arising are governed by the laws of Argentina, which do not permit or allow for a constructive trust remedy over the Navidad property, any assets related thereto, or the shares of IMA in IMA Holdings Corp.

[159] The analysis that follows deals with the applicability of Argentine law to IMA's use of confidential data and any remedies arising. The issues raised here engage an ever-evolving area of conflict of laws. As will become apparent by the end of these reasons the determination of the questions raised depends on the characterization of the matter to which the rules apply.

How should the claim be characterized?

[160] The defendant submits that Argentine law must apply to the breach of confidence claim because the claim involves the title to a foreign immovable, and there is a long-standing rule of private international law that a court does not have jurisdiction to act directly on immovables outside its borders.

[161] The usual rule in conflict of law situations is that the forum court characterizes the claim according to its own laws. However, whether property is considered moveable or immovable is an exception to that general rule and depends on how the property is characterized in the *lex situs,* the law of the place where the property is located: Castel & Walker, ***Canadian Conflict of Laws***. 6th ed. Looseleaf: Rel. 3, March, 2006 (Markham: LexisNexis Canada Inc, 2005) at §22.1.

[162] Witnesses expert in the law of Argentina were called: Two on behalf of the defendant, Mssrs. Bianchi and Naon, and one by the plaintiff, Mr. Lucero, relating to mining law and confidential information. All were highly qualified to provide expert evidence of the law of Argentina. Expert witnesses from both parties agreed that mining claims are considered immovables in Argentina and that the Argentine court has exclusive jurisdiction over the title to such claims.

[163] The rule against assuming jurisdiction over a foreign immovable is based partly on the principle that courts should strive to avoid making an order that risks coming into conflict or calling into question the authority of a foreign sovereign nation, especially with respect to sovereign territory. It is also based partly on the recognition that foreign courts will insist on exclusive jurisdiction over land situate within their country's borders, so may refuse to recognize or enforce an order respecting the title to foreign land. Generally, where the court cannot grant an effective judgment or an enforceable remedy, it should decline jurisdiction over the dispute: ***Catania v. Giannattasio*** (1999), 174 D.L.R. (4th) 170, 118 O.A.C. 330 at para. 11 (Ont. C.A.).

[164] The plaintiff disputes that the claim in this case is a claim of title over foreign land. The plaintiff submits that when characterizing the issues to determine the applicable choice of law, the courts must consider the true nature of the claim, not the nature of the remedy sought: Castel & Walker, §32.1. According to the plaintiff, the rule discussed above does not apply to this case because the claim is not properly characterized as an *in rem* claim affecting title to foreign land. Instead, the plaintiff describes it as an *in personam* claim in equity for the wrongful appropriation of the mining claims through a breach of confidence. As such, the plaintiff says, the claim fits into a limited but long-recognized exception to the rule prohibiting the court from dealing with a claim affecting title to foreign land: ***Duke v. Andler,*** [1932] S.C.R. 734 at 739, [1932] 4 D.L.R. 529.

[165] To understand the distinction drawn by the plaintiff, I find assistance in the words of John Stevens in *Restitution or Property? Priority and Title to Shares in Conflicts of Laws* (1996), 59 Modern Law Review 741 at 744-745, an article cited by the plaintiffs with respect to the appropriate choice of law for remedies, but one which is equally useful in determining the nature of the claim the plaintiff has advanced. Mr. Stevens wrote that, "[t]he real distinction ... is between claims which are founded on an autonomous principle of unjust enrichment and claims which are founded upon proprietary entitlement."

[166] A claim founded on proprietary entitlement, as described by Mr. Stevens, is a claim that the defendant holds property subject to a pre-existing right or interest in that property belonging to the plaintiff. In essence, it is a claim that the plaintiff has a right in the property that it wishes the court to recognize. The principle of territoriality prohibits this court from passing judgment on such a claim based on the general rule that the Argentine courts have exclusive jurisdiction to determine the validity of title to immovables located in that country.

[167] However, that is not the claim the plaintiff has advanced. It has advanced a claim "founded on an autonomous principle of unjust enrichment." The plaintiff does not say that the title to the mineral claims in the Navidad region truly belongs to it, nor does it ask this court to declare the defendants' title invalid. The plaintiff merely argues that the defendant should be ordered to give up its title because that title was obtained wrongfully through a breach of confidence.

[168] The case is therefore distinguishable from ***Catania v. Giannattasio*** and other cases cited by the defendant in which Canadian courts have found that they lacked the jurisdiction necessary to adjudicate on the title to foreign land.

[169] The problem of confusing a claim attacking the validity of a foreign title and a claim for unjust enrichment caused by a breach of duty can be seen in our Court of Appeal's judgment in ***Mountain West Resources Ltd. v. Fitzgerald*** (2002), 6 B.C.L.R. (4th) 97 (C.A.). The Chambers judge had declined jurisdiction over the claim relating to mineral rights in Nevada by applying the rule against jurisdiction over foreign immovables as a blanket rule for cases involving foreign land. The appellant argued, as the plaintiff does in this case, that the claim did not raise issues of title to the mineral claims, but rather raised questions of equity arising from the defendant's alleged breach of fiduciary duty and the duties owed under the ***Company Act***. Thus, the appellant argued that the court below was not asked to make a decision *in rem,* but only a decision *in personam* against the defendant. The Court of Appeal held that the Chambers judge had failed to appreciate the distinction, and as a result, returned the case to the court below so that the claims could be dealt with appropriately. See also ***War Eagle Mining Co. v. Robo Management Co.*** (1995), 13 B.C.L.R. (3d) 362, [1996] 2 W.W.R. 504 (S.C.).

[170] The Ontario Court of Appeal provided a helpful description of the *in personam* exception in ***Catania v. Giannattasio***. Although on the facts of that case, the exception was found to be inapplicable, the Court of Appeal stated at para. 12:

> Admittedly, as Smith J. points out in *Duke v. Andler*, a long line of authorities has held that Canadian courts have jurisdiction to enforce

> rights affecting land in foreign countries if these rights are based on contract, trust or equity and the defendant resides in Canada. In exercising this jurisdiction, Canadian courts are enforcing a personal obligation between the parties. In other words, they are exercising an *in personam* jurisdiction. This *in personam* jurisdiction is an exception to the general rule that Canadian courts have no jurisdiction to decide title to foreign land. The exception recognizes that some claims may have both a proprietary aspect and a contractual aspect [and I would add, an equitable aspect]. Canadian courts, however, will exercise this exceptional *in personam* jurisdiction only if four criteria are met. These four criteria ... are discussed by McLeod [McLeod, ***The Conflict of Laws***, (Calgary: Carswell, 1983) at 321-325]:
>
> > In order to ensure that only effective *in personam* jurisdiction is exercised pursuant to the exception, the courts have insisted on four prerequisites:
> >
> > (1) The court must have *in personam* jurisdiction over the defendant. The plaintiff must accordingly be able to serve the defendant with originating process, or the defendant must submit to the jurisdiction of the court.
> >
> > (2) There must be some personal obligation running between the parties. The jurisdiction cannot be exercised against strangers to the obligation unless they have become personally affected by it...
> >
> > (3) The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment.
> >
> > (4) Finally, the court will not exercise jurisdiction if the order would be of no effect in the *situs*. Thus, jurisdiction will be declined if the *lex situs* prohibits effective enforcement of the decree. This requirement seems reasonable in the abstract since the *lex situs* has ultimate control over the immovable. The mere fact, however, that the *lex situs* would not recognize the personal obligation upon which jurisdiction is based will not be a bar to the granting of the order.

[171] Professor McLeod's analysis of the *in personam* exception has been adopted by this court in ***Forsythe v. Forsythe*** (1991), 33 R.F.L. (3d) 359, [1991] B.C.J. No. 2101 (QL) (S.C.).

[172] The plaintiff contends that its claim in this action meets the four prerequisites set out by Professor McLeod. In particular, the plaintiff argues forcefully that an equitable order against the defendants does not require the supervision of the Argentine courts because it can be supervised and enforced in this court through contempt proceedings should that become necessary.

[173] The defendants dispute all but the first prerequisite, but do not seriously dispute the second as it relates to the defendant IMA. On that point, they argue only that Inversiones, as co-defendant, owes no obligation of any kind to the plaintiff because it did not receive the BLEG A data and did not use it. However, I accept the plaintiff's submission on this point and find that because Inversiones is wholly owned and controlled by IMA and, indeed, is run out of IMA's Vancouver office, the obligation arising from IMA's receipt of confidential data extends to Inversiones and prevents Inversiones from any unauthorized use of the data. In such circumstances, it cannot be said that there is no personal obligation running between Inversiones and the plaintiff sufficient to meet the second prerequisite.

[174] The defendants rely primarily on their submission that the plaintiff cannot meet the third and fourth prerequisites because the remedies sought in this action cannot be supervised by this court, and the order would be ineffective because the Argentine courts would refuse to enforce it. They argue that any order that compels the defendants to transfer their interest in the mineral claims to the plaintiff would necessarily require the involvement of the Argentine courts and land registration system to make the transfer effective. In that respect, they rely on Mr. Naon's expert

testimony that such a remedy is incompatible with the scheme and spirit of Argentine law.

[175] Mr. Naon's evidence will be discussed in more detail below. For the present, it is sufficient to note that neither Mr. Naon nor Mr. Bianchi, the other expert witness for the defence, suggested that a transfer of mineral claims such as that contemplated by the plaintiff would be considered illegal in Argentina. Regardless of the underlying reasons for the transfer, which may or may not be acceptable to the Argentine courts, the transfer itself would be recognized as legitimate as long as the mechanics and form dictated by Argentine law were followed.

[176] In my view, that is all that is required by the fourth condition for the *in personam* exception. As Professor McLeod explained at p. 325:

> In the context of the exception this [fourth] prerequisite may be more illusionary than real. The fact that the *situs* has ultimate control over the immovable really has very little to do with the enforcement of the court order, since the remedies for enforcement operate not against the property but against the person. Some substance may be given to the principle where it would be illegal in the *situs* for the defendant to comply with the rule. Such points, however, are better dealt with in the context of the enforcement of contracts...

[177] The issue of enforcement as it relates to this fourth requirement is very clearly explained in the *obiter* comments of the English court in ***R. Griggs Group Ltd. v. Evans***, [2004] All E.R. 155 (Ch.) at para. 68. The court wrote:

> A court of equity would decline to act if it were proved that the local law forbade the owner to sell his own property. … It would not order the defendant to defy the laws of the foreign state; an exercise not only pointless, but disrespectful to the authority of the sovereign of that state. But usually the local sovereign does permit privately owned land to be alienated.

[178] I am persuaded that an order, the effect of which is to require the defendant to transfer its interest in the mineral claims to the plaintiff, is capable of supervision by this court because such an order operates on the person of the defendants over which legal persons this court has jurisdiction.

[179] I am equally satisfied on the evidence that the law of Argentina does not prohibit the transfer of mineral claims between mining companies. The evidence does not indicate that transfer documents duly executed according to local form by the defendants would be found to be illegal or would be otherwise refused by the registrar of titles in Argentina. Thus, Argentine law will not prevent the defendants from complying with an order requiring them to execute such transfer documents should that order be found by this court to be the appropriate remedy to satisfy the equities between the parties.

[180] Whether or not the Argentine courts would come to the same conclusion on the equities or would agree with this court's reasons for making the order is immaterial to the abilities of this court to effectively supervise and enforce its judgment. As Professor McLeod's fourth criterion specifies, "the mere fact that the *lex situs* would not recognize the personal obligation upon which jurisdiction is based will not be a bar to the granting of the order."

[181] Consequently, the plaintiff's claim meets the prerequisites for the *in personam* exception to the rule prohibiting this court from dealing with claims affecting foreign land. The claim in this case is more appropriately characterized as an equitable

claim for unjust enrichment arising from a breach of confidence. As such, any effect this action may have on the title to land in Argentina is purely incidental.

What choice of law applies to an in personam claim for breach of confidence?

[182] The above analysis does not determine that British Columbia law ought to apply to the issues in this action. It means only that the claim is not primarily a claim over a foreign immovable dictating that the law of Argentina should apply. It remains to properly characterize the claim and apply the appropriate choice of law rule.

[183] The parties agree that a claim for breach of confidence is a restitutionary claim for unjust enrichment resulting from a breach of duty: ***Cadbury Schweppes Inc. v. F.B.I. Foods Ltd.,*** [1999] 1 S.C.R. 142, 59 B.C.L.R. (3d) 1, ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14.

[184] There is also no dispute that the choice of law rule for unjust enrichment claims is the "proper law of the obligation." The parties disagree, however, on how to determine what that proper law is in the circumstances of this case.

[185] Both parties rely on the choice of law rule set out by Dicey and Morris, ***On the Conflict of Laws***. 12th ed. (London: Stephens, 1993) at p. 1471, though they differ on how the rule should be interpreted. Dicey and Morris state that the proper law of the obligation is to be determined according to the following subrules:

> (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;

> (b) If it arises in connection with a transaction concerning an immovable (land) its proper law is the law of the country where the immovable is situated (*lex situs*); and
>
> (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

[186] The plaintiff argues that these subrules were intended to apply in descending order, such that subrule (a) would apply if the case involved a relevant contract irrespective of whether the issue also involved a transaction concerning an immovable.

[187] According to the plaintiff, subrule (a) applies to the present case because the phrase "arising in connection with" ought to be construed broadly to include non-contractual claims that nevertheless relate to a relevant contract or pre-existing contractual relationship: ***Sarabia v. Oceanic Mindoro (The)*** (1996), 26 B.C.L.R. (3d) 143, [1997] 2 W.W.R. 116 (C.A.). They rely in this respect on the broader statement of subrule (a) found in Castel & Walker at §32.1, which mentions an obligation arising in connection with "a pre-existing contractual relationship either actual or intended."

[188] Although the plaintiff accepts, for the purpose of this alternative common law claim only, that the BLEG A data may not have been strictly covered by the Confidentiality Agreement, the plaintiff argues that the obligation of confidence with respect to the data nevertheless arose "in connection with" that agreement or at least in connection with the pre-existing contractual relationship between these parties. Absent that contractual relationship, there would have been no delivery of the BLEG A data to the defendants and no opportunity for the breach of confidence

alleged here. The plaintiff submits that in such circumstances, the court ought to conclude that the parties addressed their minds to the choice of law that would govern their relationship, and subrule (a) must apply.

[189] The parties agree that the law this court should apply to the contract is B.C. law because although the contract was governed by Colorado law, neither party pleaded or proved that law. The court must therefore act as if Colorado law is the same as the law of B.C.: ***"Mercury Bell" (The) v. Amosin***, [1986] 3 F.C. 454, 27 D.L.R. (4th) 641 (Fed. C.A.).

[190] The plaintiff's submission, as I understand it, is based on logical inference and the principle of freedom of contract. In effect, the plaintiff asks the court to infer from the fact that the parties expressly chose the law of Colorado to govern the Confidentiality Agreement that the parties intended Colorado law to govern all aspects of their business relationship or at least all aspects of that relationship relating to the exchange of confidential information. Following that inference, the plaintiff says, the court ought to respect and give priority to the apparent choice of the parties, finding that the law of the Confidentiality Agreement is the proper law of the obligation notwithstanding that the parties did not expressly indicate that choice for the BLEG A data by executing a specific contract with respect to it.

[191] The defendants challenge the plaintiff's hierarchical interpretation of Dicey and Morris's choice of law rules. They interpret the passage as citing independent rules designed to apply in different circumstances. They emphasize that subrule (b) recognizes the longstanding rule of non-interference with foreign immovables, which

is based on the need to ensure that any order affecting foreign land would not be unenforceable because of a conflict with local laws.

[192] Moreover, the defendants dispute that the obligation alleged by the plaintiff in the common law breach of confidence claim can be considered to have arisen "in connection with a contract" because the plaintiff has advanced this claim as an alternative to its claim based on the Confidentiality Agreement. The court is only concerned with a common law claim if the contract between the parties is found to be inapplicable to the issues in this litigation. Thus, according to the defendants, the obligation the plaintiff asserts necessarily and expressly arises outside of contract, making subrule (a) irrelevant to this action.

[193] While I agree with the plaintiff's submission that the phrase "in connection with" ought to be more broadly interpreted than the phrase "arising under" (an alternative phrase that might readily have been used if that was what had been intended), this does not resolve the matter. The same phrase is repeated in the second subrule relied upon by the defendants concerning an obligation that arises "in connection with" a transaction concerning an immovable. The same broad interpretation applied to (a) must surely be applied to (b).

[194] The crux of the issue on the facts of this case is whether the choice of law rules set out by Dicey and Morris were intended to be hierarchical. The plaintiff says this hierarchy accords with common sense, logic, and proper respect for the principle of freedom of contract, but was unable to cite any authority that recognizes such a hierarchy. I take the defendant's position to be that the principles of

sovereignty and territoriality underlying subrule (b) are at least equally if not more deserving of the court's respect as freedom of contract and any inference that may be drawn about the parties' intended choice.

[195] In my view, any difficulty arising from the apparent clash of the first two subrules can be resolved by taking a principled rather than a categorical approach to the choice of law issue. The essential question to be answered in choosing the appropriate law to govern a claim is, "what legal system has the closest and most real connection to the obligation?" This principle is supported by the comments of Castel & Walker at §32.1:

> Since choice of law rules tend to be based on the elements of a cause of action and not on the appropriate consequences of seeking relief, the law governing a claim for unjust enrichment will depend on the nature of the wrong giving rise to the claim. For instance, where the obligation arises in connection with a pre-existing contractual relationship either actual or intended, the obligation is most closely connected with the law applicable to the contractual relationship. Similarly, the obligation to restore the benefit of an unjust enrichment in connection with a person's ownership of an immovable may have its closest and most real connection with the law of the legal unit where the immovable is situated. Thus, it has been proposed that the law governing restitutionary claims in general should be the "law of the unjust factor." Should an analysis based on this approach fail to yield a compelling result, the obligation to restore the unjust enrichment could be regarded as more closely connected with the law of the place where the immediate or ultimate enrichment occurred since the enrichment is at the heart of the action and "the law of the place of the defendant's enrichment is more closely connected with the defendant than the law of the place of the plaintiff's impoverishment."

[196] Thus, the principle underlying the subrules set out by Dicey and Morris appears to be the strength of the connection between the obligation and the competing legal systems. Additional support for this statement of principle can be

found in ***Christopher v. Zimmerman*** (2000), 80 B.C.L.R. (3d) 229, 2000 BCCA 532, where our Court of Appeal found that the appropriate choice of law was the law of the place where the enrichment occurred because that was the law that had "the closest and most real connection" with the obligation in question. Similarly, in ***Unifund Assurance Co. v. Insurance Corp. of British Columbia***, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 58, and ***Castillo v. Castillo***, [2005] 3 S.C.R. 870, 2005 SCC 83, at para. 44, the Supreme Court of Canada emphasized the relative strength of the connection when it held that the connection required for choice of law issues must be more robust and requires a higher threshold than the "real and substantial" connection applied to questions of jurisdiction.

[197] A choice of law rule based on a strong, meaningful connection between the law and the obligation it will govern is consistent with the philosophy underlying private international law. As Hessel E. Yntema expressed in the article, "The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721, at p. 741, cited with approval in ***Morguard Investments Ltd. v. De savoye***, [1990] 3 S.C.R. 1077, 52 B.C.L.R. (2d) 160 at para. 32:

> In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws.

[198] Where claims involve multiple legal systems, the promotion of suitable conditions for pursuing those claims and the principles of order and fairness can

best be achieved by applying the law of the place with the closest and most real connection to the obligation in question.

[199] Castel & Walker in the quotation cited above suggests that Dicey and Morris's third subrule, "the law of the country where the enrichment occurs", can be used essentially as a tie-breaker should the application of the first two rules "fail to yield a compelling result". That interpretation is not wholly consistent with the language in subrule (c), which specifies that the place of enrichment ought to be considered "in any other circumstances"; that is, circumstances *other* than those in which a contractual relationship or an immovable is involved. However, because Dicey and Morris do not propose a choice of law for a situation in which both (a) and (b) apply, it may be possible to stretch the language as far as Castel & Walker suggest.

[200] In my view, a more principled approach to a case such as this one, where the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land, would be to examine all the factors that could be relevant to the strength of the connection between the obligation and the competing legal systems. Such factors should be given weight according to a reasonable view of the evidence and their relative importance to the issues at stake. Thus, each of the factors listed by Dicey and Morris would be considered and weighed along with the following non-exhaustive list of factors to determine which set of laws has the closest and most substantial connection to the obligation.

- Where the transaction underlying the obligation occurred or was intended to occur;

- Where the transaction underlying the obligation was or was intended to be carried out;
- where the parties are resident;
- where the parties carry on business;
- what the expectations of the parties were with respect to governing law at the time the obligation arose; and
- whether the application of a particular law would cause an injustice to either of the parties.

[201] In many cases, perhaps most, it may be that the court will find after examining all the connecting factors that the law of the place where the enrichment occurred is in fact the law with the closest and most real connection to the obligation. However, in my view, that is a conclusion that the court should reach only after full examination and analysis.

[202] The plaintiffs submit that "even if the court were to consider the place of enrichment, IMA certainly treats the enrichment as its own." Because IMA is incorporated in British Columbia, a court applying the law of the place of the enrichment should apply the law of B.C.

[203] The defendants point out that all of the circumstances giving rise to the obligation asserted by the plaintiffs occurred in Argentina. The BLEG A data was created in Argentina, was delivered to the defendants in Argentina, and was used to stake mineral claims in Argentina.

[204] In the circumstances, I find that the enrichment occurred in Argentina. That is also where both parties carried on business at the time the obligation arose, and

where the data was intended to be used, even if the only permitted use or transaction in question was, as I have found, the evaluation and sale of Calcatreu.

[205] One cannot ignore, however, the fact that neither of the parties involved in the exchange of the BLEG A data were Argentine companies, and none of the principals involved in the circumstances leading up to the breach of confidence were Argentinean. The principle actors in this drama were all Canadians or Americans who lacked even a superficial understanding of Argentine law with respect to the control and distribution of confidential information. It is therefore very unlikely that these companies and individuals would have chosen or expected Argentine law to govern their actions and their relationship.

[206] Conversely, each of the principal actors on both sides was aware of the Canadian or Colorado law on this issue. Those were the systems of law under which both parties routinely conducted their affairs. It is particularly significant, in my view, that Mr. Lhotka admitted to being familiar with the ***Lac Minerals*** case and its implications at the time he requested, received, and used the BLEG A data. Thus, the legal system that informed and guided the perceptions and actions of the key players at the time the breach of confidence occurred was Canadian and American law.

[207] In the circumstances, despite the fact that some important choice of law factors point to Argentine law, I find that B.C. law, as it is described in ***Lac Minerals***, has the closest and most real connection to the obligation between these parties, and must apply to determine liability of the common law claim.

Breach of Confidence under Argentine law

[208] If I am wrong in applying B.C. law, I find that liability would nevertheless rest with the defendants were Argentine law to be applied. As has become clear through lengthy expert testimony, Argentine law on a breach of confidence claim is only subtly different from our own law on that issue, and the differences are not substantial enough to relieve the defendants of liability for their misuse of the BLEG A data.

[209] First and foremost, the defining characteristics of confidentiality appear to be the same under both systems of law. At the very least, the criteria required for confidentiality are so similar that there is no question that the BLEG A data would be considered confidential information in Argentina as it is in B.C.

[210] Experts for both parties agreed that confidential information is defined under Argentine law in ***Act 24,766***, Articles 1 and 3, which state in translation:

> **Art. 1** Physical or juridical persons shall be able, in respect of information lawfully under their control, to restrain its disclosure to others, or its acquisition or use by third parties without their consent in a manner contrary to honest commercial practices, provided that such information meets the following conditions:
>
> (a) It is secret in the sense that it is not, as a body or in its configuration, or in the precise assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with such kind of information; and
>
> (b) It has commercial value because it is secret; and
>
> (c) It has been subject to reasonable measures to keep it secret, under the circumstances, taken by the person lawfully in control of it.
>
> It shall be deemed contrary to honest commercial practices: breach of contract; breach of confidence; inducement to infringement; and the

> acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.
>
> **Art. 3** Any person who, because of his work, employment, post, position, exercise of profession, or business relationship, has access to an information complying with the conditions listed in Article 1, and about whose confidentiality the person has been warned, shall refrain from using or disclosing it without good cause, or without the consent of the person controlling such information, or of a user authorized by the latter.

[211] The reference in Article 3 to "information complying with the conditions listed in Article 1" makes it clear that those conditions are the criteria required for information to be found confidential. Although the defendants argued that the reference to a warning in Article 3 creates a fourth criterion, the language of that section is more consistent with only three defining characteristics. The presence of a warning affects whether the use of confidential information is lawful, not whether the information is confidential in the first place. This interpretation is supported by the report of Mr. Bianchi, who referred to "four elements for the prohibition of unauthorized use or disclosure of undisclosed information", not four elements for establishing confidentiality.

[212] The three requirements for confidentiality under Argentine law are therefore that the information is secret, that secrecy affects its value, and that reasonable measures have been taken to keep it secret.

[213] The correspondence with the test for confidentiality under B.C. law is clear: As explained earlier, the Supreme Court of Canada in ***Lac Minerals*** has said that information is confidential if it has "the necessary quality of confidence" about it, and

if it is "communicated in circumstances importing an obligation of confidence". Two of the relevant factors in determining whether information has the "necessary quality of confidence" are the value of the information and the extent of measures taken by its owner to guard its secrecy: ***Ebco Industries Ltd. v. Kaltech Manufacturing Ltd.***, [1999] B.C.J. No. 2350 (QL)(S.C.) at para. 36, citing ***Pharand Ski Corp. v. Alberta*** (1991), 37 C.P.R. (3d) 288 (Alta. Q.B.) and ***Deta Nominees Pty Ltd. v. Viscount Plastics Products Pty Ltd.***, [1979] V.R. 167 at p. 193.

[214] That the value of the information is relevant to the confidentiality enquiry can be seen from the comments cited earlier of Megarry J. in ***Coco v. A.N. Clark (Engineers) Ltd.***, which were also cited with approval by the Supreme Court of Canada in ***Lac Minerals*** and ***Cadbury Schweppes***:

> where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, ... I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

[215] At trial, the parties did not seriously dispute the fact that the BLEG A data meets the requirements of secrecy and value. The defendants focused instead on whether reasonable measures were taken to protect the confidentiality of the information such that the communication to IMA could give rise to an obligation of confidence. The defence submissions on this point are twofold: first, the information pointing to the BLEG A data was posted on the door inside Mr. Cuburu's office for anyone to see; and second, the data was freely given to Mr. Lhotka without any express conditions as to how it ought to be handled by him.

[216] Under both legal systems, what constitutes "reasonable measures" depends on the circumstances surrounding the disclosure of the information and on the common understandings and practices within the particular industry. As Mr. Bianchi noted in his report, under Argentine law, "the adequacy and sufficiency of such measures seems to be dependent on current usages ("*usos y costumbres*") of the corresponding field of business." The law is the same in B.C. As Madam Justice Huddart explained in the original trial judgment in ***Cadbury Schweppes***, again citing ***Coco's case*** and ***Lac Minerals***:

> In Coco's case, Megarry J. said, "it seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information, would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence." This subjective objectivity, approved in *Lac Minerals*, per La Forest and Sopinka, suggests that the standard may vary from case to case. This means that regard must be had to the practice of the particular industry in which the parties are participants and to any agreements between the confider and the confidee.

[217] In the circumstances of this case, I have found that reasonable measures were taken to safeguard the confidentiality of the BLEG A data because only those who had agreed, expressly or implicitly, to maintain confidentiality were given access to the information. Mr. Lhotka requested the data as part of his evaluation of the Calcatreu project. He fully understood that he would be expected to follow the industry practice and keep everything he saw or received during his site visits confidential. He gave that very instruction to his more junior colleagues who accompanied him.

[218] Whether or not Mr. Lhotka had additional reasons, unrelated to Calcatreu, for requesting the data, such reasons were not communicated to Mr. Cuburu or anyone at Minera when the data was requested and delivered. It was not unreasonable for Mr. Cuburu to assume that Mr. Lhotka wished to see the data as part of the due diligence related to the Calcatreu, even though the data related to a geographic area far outside the two-kilometer "stake free" zone specified in the Confidentiality Agreement and was not specifically referenced in that Agreement. Whether opportunities existed to expand Calcatreu was a reasonable consideration in the evaluation of Calcatreu's worth to IMA. Mr. Cuburu testified that the possibility of such an expansion was the reason that the BLEG A data was produced since the express goal of Project Generation was to find new resources that could be added to Calcatreu.

[219] My findings that support both a breach of the Confidentiality Agreement and unlawful use of confidential information at common law underscore that all parties understood the data was confidential. It is therefore clear that the BLEG A data ought to be considered confidential information under both Argentine and B.C. law. Its disclosure to IMA through Mr. Lhotka gave rise to an obligation of confidence. The question remains whether Argentine law would consider that IMA breached that confidence by staking the Navidad Claims.

[220] As set out in para. 152 above, under B.C. law, the receipt of confidential information in circumstances of confidence establishes a duty not to use that

information for any purpose other than a permitted use. Any use other than a permitted use is prohibited and amounts to a breach of the duty of confidence.

[221] Similarly, Articles 1 and 3 of ***Law 24,766*** indicate that prior consent or authorization from the person lawfully in control of the information also dictates what constitutes lawful use of confidential information under Argentine law. The essential question is the same: what is the recipient entitled to do with the information?

[222] Here, the defendants were given the BLEG A data as part of their evaluation of the Calcatreu project. They were entitled to use that information for the purposes of determining whether they wished to bid and at what price. Accordingly, any other use of the data amounts to a breach of confidence under Argentine and B.C. law.

[223] The defendants argue, however, that because they lawfully acquired the BLEG A data through their business relationship with the plaintiffs, Article 3 required the plaintiff to expressly warn them that the information was confidential and subject to restrictions on the use that could be made of it. Without such a warning, the defendants argue, Article 3 imposes no duty to refrain from using the data in any manner the defendants choose. Thus, if there is no other significant difference between the relevant law regarding the use of confidential information in B.C. and Argentina, the necessity that a warning of confidentiality be express is the defining difference.

[224] The plaintiff advances a different interpretation of Article 3. Mr. Lucero explained that Article 3 protects a narrow category of persons who, because of their

close working relationship with the person lawfully in control of the confidential information, are exposed to a great deal of confidential and non-confidential information belonging to the other party. Because it may not always be clear which information is to be treated as confidential, such persons deserve and can expect a warning that particular information falls into the confidential category before they can be held liable for wrongful use. In essence, the warning in Article 3 is meant to protect those who are at greater risk of making an honest mistake about whether certain information is, in fact, confidential.

[225] On this interpretation of Article 3, no warning is required where there is no risk of honest mistake. Another way to look at it is that if there are sufficient signposts of confidentiality in relation to the provision of information, then no "honest" mistake can be made. Therefore, a warning may be implied where the circumstances are such that a reasonable person in the shoes of the recipient would understand from the surrounding context and the practice of the industry that the information they received should be treated as confidential. According to the plaintiff, Argentine law imposes liability where information known to be confidential is wrongfully disclosed or misused, but excuses any misuse or wrongful disclosure that arises from an honest mistake.

[226] The plaintiff argues, moreover, that the issue of warning does not legitimately arise because it is Article 1, not Article 3, that governs the circumstances of this case. According to the plaintiff, Article 1 gives the lawful owner of the information the right to restrain its disclosure, acquisition, or use in a manner contrary to honest

commercial practices. Breach of confidence is specifically listed in that article as being contrary to honest commercial practices. Both Mr. Lucero, for the plaintiff, and Mr. Bianchi, for the defence, agreed that a breach of the principle of good faith also falls into this category. Citing Fernando J. López de Zavalía, ***Teoría de los Contratos*** [Contract Law], Vol. 1, General Part, Editorial Zavalía, Buenos Aires (1991), p. 191, Mr. Lucero explained:

> The most elementary rule of good faith requires that he who knows a secret which has been trusted to him during the course and by virtue of contractual negotiations, shall keep it, and any breach of such duty gives rise to tort liability, which is therefore independent from the fact that the contract may not be eventually executed, and also independent from the fact that negotiations are suddenly or arbitrarily interrupted, since the liability will arise in any case.

[227] According to Mr. Lucero, use of confidential information for purposes other than the negotiations represents a failure to keep it secret and therefore constitutes bad faith or conduct "contrary to honest commercial practices." Both Mr. Lucero and Mr. Bianchi agreed that Article 1 does not require a warning because persons who use information contrary to honest commercial practices do not deserve a warning.

[228] The defendants submit that Article 1 does not apply in this case because Article 1 only grants the right to restrain the use of information that has been acquired through dishonest means. The plaintiff insists that the Article grants the lawful controller of the information the right to restrain dishonest conduct, whether that conduct relates to disclosure, acquisition, or use.

[229] It is well settled that a court faced with conflicting opinions about foreign law is bound to make its own decision about what that law requires: ***Sarabia v. Oceanic***

Mindoro, at para. 11. The general rule with respect to foreign statutes is that the court must consider the evidence of the experts and not the text itself unless the experts cannot agree on the statute's meaning. Faced with contradictory interpretations, the court has no choice but to weigh the expert opinion along with its own examination of the text: ***Rouyer Guillet et cie. v. Rouyer Guillet & Co.***, [1949] All E.R. 244 at 244 (C.A.); ***Allen v. Hay*** (1922), 64 S.C.R. 76.

[230] After careful evaluation and being cognizant of the difficulties inherent in interpreting what is only a translation of ***Law 24,766***, I prefer the plaintiff's interpretation of the text and the interaction between Articles 1 and 3 for the following reasons.

[231] Nothing in the language and structure of Article 1 suggests that the phrase "in a manner contrary to honest commercial practices" relates only to the acquisition of the information and not also to its use. Therefore, Article 1 applies where, as here, the defendants acquired the confidential information legitimately, but then used it in a manner that breaches the duties of confidence and good faith that Argentine law implies in all pre-contractual negotiations.

[232] The defendants clearly understood that the BLEG A data was treated throughout the industry as proprietary, confidential information. There is no doubt that both Mr. Cuburu and Mr. Lhotka knew that all information requested and received in a data room or during a site visit was to be considered confidential information. Under these circumstances, it is unreasonable and unrealistic to expect the plaintiff to expressly say, "this data is confidential." If the parties were in a

business relationship as that term is used in Article 3, the warning that Article requires must be capable of being implied by the circumstances. To say otherwise is to divorce the requirements of law from the reality and practicalities of such business relationships.

[233] However, the key here is that there is no question of honest mistake. The defendants did not receive so much confidential and non-confidential information from the plaintiff that they were unable to determine which was which. The defendants knew that the BLEG A data was inherently confidential and had been received under circumstances that restricted its use. To absolve the defendants from liability for deliberate misuse of confidential data merely because certain words were not spoken would be contrary to justice, whether in Argentina or in B.C.

REMEDIES

Applicable Law

[234] The greatest and most important distinction between the law of Argentina and the law in B.C. as it relates to the facts of this case is the law concerning the remedies available for a breach of confidence.

[235] The parties agree that should damages be awarded, the governing law must be the law of B.C. That is because the defendants did not specifically plead that Argentine law should apply to the issue of damages, and neither party led evidence establishing the circumstances under which damages are assessed in Argentina. Where the relevant foreign law has not been proved, the court must apply its own law.

[236] However, the defendants contend that the law of Argentina ought to govern the availability of a remedial constructive trust or other equitable remedy that the court might impose.

[237] The plaintiff argues that, regardless of which law applies to issues of liability, B.C. law must govern the remedies because it is a general rule of private international law that remedies are procedural in nature, and the law of the forum applies to all matters of procedure. The plaintiff sees no reason to depart from this longstanding principle of law in the circumstances of this case.

[238] Relying on Castel & Walker at §6.2, the defendants argue that Canadian courts should restrict the scope of questions deemed procedural, "so as not to frustrate the fundamental purposes of conflict of laws." The authors propose that a more appropriate test to determine which law should be applied to remedies is whether the foreign law is too inconvenient for the forum court to apply.

[239] The test proposed by Castel & Walker and by the defendants in this case does not appear to have been adopted by Canadian courts. Nevertheless, the defendants say that restitutionary remedies are particularly suited to such a test because they are so closely related to the right claimed in the action. The defendants submit that in claims based on unjust enrichment, the proper law of the obligation governs both the claim and the remedy as an exception to the older principle cited by the plaintiffs.

[240] In that regard, the defendants again rely on the comments of Castel & Walker at §32.1. While acknowledging that the nature of the plaintiff's remedy is generally a question for the *lex fori*, the authors suggest that, "the law of restitution is a remedial form of substantive law which includes whatever remedies are provided by that law to reverse the unjust enrichment." Where the right and remedy claimed are "indissolubly connected" such that granting or denying the particular remedy affects the recognition of the right itself, even questions of remedy must be considered substantive. It is clear from the author's comments at §28.7 that they consider the constructive trust to be such an "indissolubly connected" remedy:

> It is suggested that while claims for unjust enrichment tend to give rise to the remedial device of a constructive trust, they should be treated as matters of substance to which an applicable foreign law should be applied provided it can conveniently be applied. In recent years, Canadian courts have restricted the scope of procedure. The domestic characterization of the issue as remedial should not prevent the application of the applicable law, which is that with which the obligation to restore the benefit unjustly obtained has the closest and most real connection. That law will determine whether the remedy of constructive trust is available.

[241] That opinion may also be found in Dicey and Morris at §29-026, where, although the authors acknowledge that there is no authority on the point, they express the opinion that, "[i]f constructive trusts are regarded, as seems best, within the subject of restitution, Rule 200 will apply to indicate the proper law of the obligation represented by the constructive trust."

[242] The plaintiff urges the court to disregard these text authorities, which they characterize as academic opinion rather than statement of law. This is apparent, the plaintiff says, from Castel & Walker's use of the introductory phrase "it is suggested

that" and Dicey and Morris's conditional construction and use of the phrase "as seems best". Despite giving a contrary opinion, Castel & Walker at §28.7 recognize that at least for domestic law purposes, "the courts have held that the constructive trust is a general equitable restitutionary remedy for unjust enrichment: it is not a substantive right but a remedy that serves as a means of compelling a person to surrender an unjust enrichment."

[243] The plaintiff submits that the court ought not to introduce confusing inconsistency in the law by treating the constructive trust differently in conflict of laws cases. In the plaintiff's submission, it would be a backwards step to deem the constructive trust to be substantive rather than procedural law because the law of constructive trust in Canada has developed beyond the point where it can be said that unjust enrichment claims "tend to give rise to" a constructive trust as Castel & Walker assume. Canadian courts no longer consider the constructive trust to be a substantive claim equivalent to unjust enrichment. It is now viewed primarily, if not solely, as a remedial device, and as such, it is now available not only for claims of unjust enrichment but for other causes of action as well: ***Soulos v. Korkontzilas***, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 at para. 17.

[244] That a constructive trust should be characterized as a remedy and not a substantive claim was recognized by McLachlin J. (as she then was) in ***Peter v. Beblow***, [1993] 1 S.C.R. 980, 77 B.C.L.R. (2d) 1, where she criticized past case law for occasionally conflating "the remedial notion of constructive trust" with unjust enrichment itself, "as though where one is found the other must follow." McLachlin

J. clearly felt that such a fusion of right and remedy was in error, and she wrote that, "'[u]njust enrichment' in equity permitted a number of remedies, depending on the circumstances," and later, "[a] finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust."

[245] La Forest J. expressed a similar opinion that the constructive trust ought to be regarded as a remedy in ***Lac Minerals*** at para. 194:

> It is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. [emphasis added.]

[246] Both La Forest J. and Sopinka J. agreed that a constructive trust could be ordered as a remedy for breach of confidence, but that it was not necessarily, or even very often, the appropriate remedy for that claim. "The court can exercise considerable flexibility in fashioning a remedy for breach of confidence because the action does not rest solely on any one of the traditional jurisdictional bases for action – contract, equity or property – but is *sui generis* and relies on all three."

[247] That opinion was shared by Binnie J. in ***Cadbury Schweppes*** at para. 48, where he stated: "equity, with its emphasis on flexibility, keeps its options open. It would be contrary to the authorities in this Court … to allow the choice of remedy to be driven by a label ("property") rather than a case-by-case balancing of the equities."

[248] In light of the modern view of the constructive trust as expressed in recent Supreme Court of Canada jurisprudence, I am not persuaded that a constructive

trust remedy is "indissolubly connected" to the unjust enrichment arising from the breach of confidence such that both must be seen as two sides of one substantive coin. I find support for this view in the distinction already drawn between the plaintiff's claim for a constructive trust as a remedy for unjust enrichment arising from a breach of confidence and a claim for the declaration of a constructive trust in order to recognize an alleged pre-existing property right. A constructive trust imposed in the latter type of claim may well be so connected to the right at issue that it cannot be treated distinctly as a remedy. In the plaintiff's case, however, the breach of confidence may give rise to a number of remedies, only one of which is a constructive trust.

[249] Moreover, there is no reason in this case to consider the other potential equitable remedies sought by the plaintiff to be substantive in nature. The defendants were not able to cite any authority other than Castel & Walker to support the proposition that the longstanding rule that the *lex fori* applies to remedies has been displaced by a rule based on the convenience or inconvenience of applying foreign law. Absent compelling authority, I am not persuaded to adopt a new test.

[250] Finally, the defendants submit that Argentine law must govern the remedies because it is a principle of law that the court will not award a remedy that is alien to the legal system the laws of which govern liability in the action. In effect, this submission repeats and combines the defendants' arguments that the proper law of the obligation must govern both the claim and the remedy and the argument that the court will not make an order that would be ineffective in the foreign jurisdiction.

[251] ***Vien Estate v. Vien Estate*** (1988), 64 O.R. (2d) 230, 49 D.L.R. (4th) 558 (*sub. nom.* ***Leclerc v. St.-Louis***) (Ont. C.A.), is cited in support; however, that was a case in which the Ontario Court dismissed the claim because it found the proper law of a marriage contract was the law of Quebec, and under that law at the time, there could be no unjust enrichment between spouses. While the court noted that the concept of a constructive trust did not exist in the civil law of Quebec, the decision turned on the absence of liability. Moreover, perhaps because it was released in 1988, this decision appears to fall into the error described by Madam Justice McLachlin in ***Peter v. Beblow***, that is, it conflates the concepts of unjust enrichment and constructive trust. Consequently, the judgment cannot be understood to suggest that the lack of a constructive trust remedy in the law of Quebec would have prevented such a remedy from being awarded had liability been established.

[252] The parties introduced contradictory evidence from the three experts on Argentine law as to whether the courts in Argentina would recognize and enforce an order of this court granting a constructive trust or otherwise requiring the defendants to transfer their interest in the Navidad claims and related assets to the plaintiffs. Not surprisingly, the plaintiff's expert gave his opinion that such orders would be accepted in Argentina, and the defendants' experts testified that the courts would refuse to recognize or enforce such orders because Argentine law does not include a concept similar to the remedial constructive trust or even recognize beneficial ownership of property except with respect to very limited fiduciary duties assigned to a trustee expressly in a will or contract. The defence experts also testified that remedies equivalent to disgorgement of gains without a corresponding loss are

frowned on by the Argentine courts and may be awarded only in rare and strictly defined circumstances such as a case of insider trading.

[253] This case does not require the court to resolve the contradiction in the expert testimony on this issue. Because I have found that the plaintiff advances only an *in personam* claim, any remedies that might be awarded would operate personally against the defendants within this jurisdiction. The parties would have no need to attempt to have the judgment recognized or enforced in Argentina. Any enforcement that might be necessary should the defendants fail to carry out their obligations under an order of this court can be dealt with in this court. Whether or not the Argentine court would enforce remedies determined to be appropriate under Canadian law is not an issue that needs to be determined in this case.

[254] As explained earlier in these reasons with regard to the *in personam* exception to the general rule against interfering with foreign immovables, there is no evidence to suggest that a duly executed transfer of title to the claims in favour of the plaintiffs would be ineffective or illegal in Argentina. Consequently, the defendants' concern that this court ought not to grant an ineffective remedy does not arise.

[255] After considering all of the submissions and evidence, I see no reason to avoid the accepted general rule that determining the nature of the available and appropriate remedies is a matter for the *lex fori*. In any event, even if the defendants are correct in their submission that the proper law of the obligation ought to govern

both the claim and the remedy – of which I remain unconvinced – I have found that the proper law of the obligation in this case is, in fact, B.C. law.

Remedies under Argentine Law

[256] In light of my determination that the law of British Columbia should apply to determine the nature of the appropriate remedy in this case, it is unnecessary to determine what remedies are available for breach of confidence under Argentine law. However, as once again considerable time was spent in evidence and argument on this issue, I provide the following discussion.

[257] The plaintiff admits that the concept of constructive trust is severely limited in Argentina. All three experts agree that a trust can only arise when it is expressly created by a will or a contract. The courts in Argentina cannot order a constructive trust as a remedy for unjust enrichment or breach of confidence as we do here.

[258] However, the plaintiff submits that Argentine law does include a restitutionary remedy that is the "juridical equivalent" of a constructive trust and would permit an Argentine court to order the transfer of title to the mineral claims and associated data. That remedy is *restitutio in natura* or "compensation in kind". It is found in s. 1083 of the Argentine ***Civil Code***, which states in rough translation:

> **1083** The compensation of damages shall consist of returning goods to its previous situation, except where such solution is not feasible, in which case the compensation shall be monetary. The damaged party may also opt to be indemnified by means of monetary compensation.

[259] All of the experts agreed that one of the goals of this section is to fulfill a general principle of Argentine law that a plaintiff must be "made whole" by providing

full compensation for the damage suffered. There is no dispute that the section allows the courts to order defendants to perform some positive act or duty. Mr. Lucero testified for the plaintiff that because of this power, compensation in kind is considered by the Argentine courts to be the best form of compensation available. That statement was not expressly disputed by the defendants.

[260] The experts also agree that compensation in kind under s. 1083 supports an order returning the parties to the situation as it existed before the wrongful conduct occurred. However, Mr. Lucero adds that the section allows the court to make an order returning the plaintiff to the position it *would have been* in prior to the wrongful conduct, citing as authority Fischer, Hans A. ***Los Danos civiles y su reparacion***, trad. De W. Roces, Madrid, 1928, p. 141. He testified that the scope of the section must be interpreted in this way in order to achieve the goal of full compensation.

[261] It was Mr. Lucero's opinion that the power granted under s. 1083 to achieve this goal includes the power to make almost any order that would reverse the wrong in question. He gave the following examples, among others, drawn from Argentine authorities cited in his report:

- If a defendant breaks a pane of glass, he may be ordered to replace it;
- if a defendant illegally printed a book, he may be ordered to destroy all copies;
- If the machinery of a manufacturer makes annoying noises, he should provide for a silencer; and
- If a defendant made libellous or slanderous comments, he may be ordered to publish corrections in the press.

[262] He concluded from these examples that the duty to compensate "in kind" involves more than simply returning a specific good to its previous owner. Thus, in Mr. Lucero's opinion, if the court should find that Aquiline would have staked the Navidad Claims first had the defendants not wrongfully intervened, it would be open to the Argentine court under s. 1083 to order the transfer of the mineral claims to the plaintiff and the disgorgement of any profits earned in the period between the wrongful staking of the claim and its return to the plaintiff.

[263] Mr. Lucero's broad interpretation of s. 1083 was contradicted by the defence experts, Mr. Naon and Mr. Bianchi, whose reports indicate that "compensation in kind" could only be awarded when the plaintiff can establish prior ownership of a specific good.

[264] According Mr. Naon, the section is limited to an order of return to precisely the same situation that existed before the wrong occurred. Therefore, if the plaintiff did not own the asset before the wrong, it could not obtain ownership through an order for "compensation in kind". That section, Mr. Naon says, does not authorize the court to substitute a different kind of asset for the asset that was lost or damaged through the wrongful act. In Mr. Naon's opinion, this narrower interpretation of the compensation available under s. 1083 does not violate the principle of full compensation, because the section specifies that in the event that it is no longer possible to return the asset that was lost through wrongful conduct, monetary compensation will be payable.

[265] Mr. Naon also testified that s. 1083 applies only to tangible assets or "things" capable of orders for specific performance. The section does not provide a remedy for the return of intangible assets such as information. Consequently, it was Mr. Naon's opinion that s. 1083 did not apply in this case because the subject matter of the wrongful conduct was the BLEG A data and, as mere information, that data could not be meaningfully returned to the plaintiff.

[266] In general terms, Mr. Bianchi agreed with Mr. Naon's interpretation of s. 1083. However, Mr. Bianchi admitted under cross-examination that s. 1083 can put the plaintiff in the position it "would have been in" absent wrongful conduct. He was given a hypothetical illustration of the issue, involving a company that could prove that it would have purchased and developed a particular piece of property if an employee had not wrongfully gone out and purchased it first. Mr. Bianchi agreed that an Argentine court might award damages equal to the amount of lost profits to "put the company in the position it would have been in if it had bought the property and earned the profit." He was then asked whether he would agree that if, instead of damages, the court ordered the transfer of the property to the company as compensation in kind, such an order would have the same effect of putting the company in the position it would have been in had the wrongful conduct not occurred. Mr. Bianchi agreed that such an order was possible under s. 1083.

[267] This evidence, obtained under cross-examination, is contrary to Mr. Bianchi's description of the scope of s. 1083 in his written report, where he explains that the courts could not use that section to order the transfer of assets to the plaintiff that it

never owned before. However, I do not believe that Mr. Bianchi was confused by the question or the hypothetical illustration as suggested by the defendants. Immediately following his testimony outlined above, Mr. Bianchi explained that s. 1083 grants the Argentine court extremely broad jurisdiction as to the type of remedy it could order. He said:

> Sir, there is no – if I may add something in this respect. There is no legal limitation, no restriction for a court on the remedy the court may grant, provided that this remedy has been asked for by the plaintiff and provided that the general principles are respected. The public policy in this respect would be that no compensation should be granted above the extent of the damage, otherwise we would have an enrichment without cause for the plaintiff. With this proviso, a court would be free to award any remedy.

[268] Under re-examination, Mr. Bianchi qualified this answer, explaining that the Argentine court would have to be 100 percent certain that the particular remedy was warranted and would not result in overcompensation to the plaintiff. Mr. Bianchi cited no authority in support of his opinion that the standard of proof was 100 percent certainty. His evidence on this point was disputed by Mr. Lucero, who testified that the court would apply the *sana critica* or "reasonable judgment" standard typical of all civil claims, which I understand to be analogous to the Canadian standard of the balance of probabilities.

[269] In my view, the weight of the evidence in this case suggests that compensation in kind would be available to support an order requiring the defendants to transfer the Navidad Claims to the plaintiff.

[270] Just prior to the breach of confidence, the defendant had the BLEG A data, but only the plaintiff had the right to use that data to stake new claims. The evidence of the internal discussions among Aquiline's principals regarding the area covered by the BLEG A data satisfies me that the plaintiff would have staked claims in the Navidad region no later than the end of May 2003 had that been possible. The plaintiff was only prevented from doing so because it discovered that the region was already staked by IMA. It is unlikely, in fact very unlikely, that without the BLEG A data, IMA would have stumbled upon the silver anomalies or the outcroppings observed by Mr. Bussandri. He found them because he was sent specifically to the place where the BLEG A significant anomalies taken from stream sampling points were located.

[271] After rejecting Calcatreu as a possible next area of exploration, IMA intended to look in several other areas in Chubut, but none close enough to Navidad that it is likely it would have found the outcroppings independently. Interestingly, IMA's representatives were quoted in *The Northern Miner*, a widely read mining industry newspaper, as saying the following about their discovery of Navidad:

> Geologically, the Navidad discovery is hosted in an Upper Jurassic series of mixed calcareous sediments and intermediate volcanics mapped by government geologists as the Canadon Asfalto Formation. This formation has never been the focus of metallic mineral exploration. Says Lhotka: "You wouldn't go out looking for a Navidad, because there is nothing like it in the Patagonia".
>
> ...
>
> There was no one hammer mark on anything." says Lhotka. "You could walk past this from 50 metres away, but you could not walk on it and not find it. It's impossible. You can see copper oxide on the top of the hill, and the rocks are so heavy you can't pick them up.

[272] This evidence only emphasizes the significance of the BLEG A data. Without it, one would probably not explore in the area for gold, which was the primary object of IMA. On the other hand, if one did explore in the area without the benefit of the BLEG A data and therefore without a reason to walk up the hill to look for the location of the mineralization strongly indicated by anomalies found in the drainage basin, one could easily miss it. Patterson agreed that the mineralization was hosted by Jurassic rocks described as the "Canadon Asfalto". His evidence was that this was a type of Jurassic rock that had not been the focus of IMA's exploration.

[273] Accordingly, an order requiring the transfer of all of the Navidad Claims; that is, all those claims staked as a result of the use of the BLEG A data, to the plaintiff would return the situation to that which would very likely have existed had the defendants not misused the BLEG A data and would therefore be an order that could be made under s. 1083. Such an order would not violate any principle of Argentine law. It is, in essence, merely an equitable remedy designed to eliminate an unjust enrichment. Both Mr. Lucero and Mr. Bianchi testified that the concept of providing an equitable remedy to remove an *enriquecimiento sin causa*, an "enrichment without cause," is not foreign to Argentine law. While Mr. Bianchi testified that a claim for a remedy of this nature is subsidiary to any remedy available in tort, both he and Mr. Lucero agreed that such a remedy is available if the plaintiff can establish that the defendant was enriched at the expense of the plaintiff's impoverishment and that there is no justification or consideration for the enrichment.

Remedies under B.C. Law

(i) The availability of a constructive trust

[274] The plaintiff seeks foremost the remedy of a constructive trust over the Navidad Claims coupled with a mandatory injunction ordering the defendants to transfer their existing rights to the Navidad Claims to the plaintiff.

[275] The defendants say that a constructive trust is inappropriate in this case for several reasons.

[276] First, the defendants say a constructive trust ought not to be awarded where such a remedy is alien to the jurisdiction where it is sought to be enforced. On the basis of the findings and analysis already set out in these reasons, this submission has no force. I have found that a similar equitable remedy is not unknown to Argentina, and in any event, there is no need for enforcement in Argentina because the remedy sought in this case is enforceable in B.C. This court has *in personam* jurisdiction over all parties to this litigation, as well as subject matter jurisdiction over all causes of action pleaded.

[277] The distinction between *in personam* and *in rem* remedies in the area of conflict of laws is set out in Castel & Walker at §11.2:

> When an action seeks to affect the rights or interests of all persons in the world in a thing, the court exercises its power directly over the thing even though it might not have personal jurisdiction over the interested persons. The court's jurisdiction is said to be *in rem* and it is based on power over the thing....Where a plaintiff seeks a money judgment against a defendant, *or an order directing the defendant to do* or to refrain from doing *something*, the court exercises jurisdiction *in personam* and the action is *in personam*.

[278] A remedial constructive trust is a "proprietary remedy" in that it results in ownership of a thing, but unlike other *in rem* orders, it acts upon a person, rather than on the thing itself. It is not the exercise of *in rem* jurisdiction because the court's jurisdiction is based on its equitable power over the person and not its power "directly over the thing." This distinction is evident in the authorities. The cases cited by the defendants clearly involve the exercise of *in rem* jurisdiction and therefore are not persuasive.

[279] The defendants provide three additional reasons as to why a constructive trust is not appropriate under Canadian law on the facts of this case. None of these reasons are compelling on the facts as I have found them.

[280] The defendants say first that such an equitable remedy is reserved for "vicious and deliberate" conduct. There is no support in the authorities for such a reservation. ***Lac Minerals***, relied upon in part by the defendants, does not stand for such a proposition. The comment in ***Lac Minerals*** concerning the exceptional nature of the remedy was made in the context of La Forest J's view that damages would be adequate redress in most cases.

[281] The plaintiff has urged the court to find that the conduct of the defendants was dishonest. There is no question that senior management of IMA – after Mr. Lhotka made what I find to be essentially an honest mistake in deciding he could open the BLEG A data – was far from honestly mistaken about the use that could be made of the data. Mr. Patterson should have known that Mr. Lhotka's query about the use of confidential information required a response. He made no response.

Once the "discovery" was made using the BLEG A data, I find that IMA's corporate management engaged in providing misinformation regarding how the discovery was made. This misinformation, if not deliberate lies, was at least wilful blindness to the truth. Nevertheless, there is no basis for any finding that the conduct of IMA was vicious and no need to make such a finding before imposing a constructive trust.

[282] Next, the defendants say that before a constructive trust should be employed as a remedy, there must be a link between the wrong, the information, and the acquisition of the property. I agree that such a link must be found. However, given my finding that the use of the BLEG A data led directly to the "discovery" of Navidad and that without its use, it is very unlikely in the circumstances that IMA would have found and staked Navidad within many months if not years, or at all, and that the use of BLEG A was a wrongful use, the link is clear and cogent. In my view, this case has stronger necessary links than either of the classic constructive trust cases, ***Peter v. Beblow*** and ***Lac Minerals***.

[283] Lastly, the defendants say that a constructive trust should only be awarded when damages are inadequate. Again, I agree. In this case, as I set out briefly below, damages are clearly inadequate. In these respects, this case bears a close resemblance to ***Lac Minerals***.

(ii) Lost Opportunity

[284] The defendants suggest that the only real loss the plaintiff suffered was the market value of the BLEG A data. If there is a further loss, the defendants say, it

was the loss of the opportunity to stake the Navidad Claims themselves, and the valuation of that loss must be undertaken by assessing the probability that the plaintiff would have staked the same claims. That probability must be assessed, according to the defendants, from the perspective of what was known at the date the confidence was breached.

[285] This proposition is incorrect. The purpose of compensatory damages, whether assessed in equity or at common law, is to put the plaintiff in the position it would have been in "but for" the defendants' breach. The "but for" test always requires the court to consider, on the balance of probabilities, what would have happened if the defendant had lived up to its legal obligations. The plaintiff's loss flowing from the breach is not determined by reference only to the facts known on the date of the breach; it is determined with the full benefit of hindsight. This very point was made by Binnie J. in ***Cadbury Schweppes***, at para. 64, where he adopted the causation test in ***Canson Enterprises Ltd. v. Boughton & Co.***, [1991] 35 C.R. 534, 85 D.L.R. (4th) 129, for breach of confidence purposes:

> **Measure of the "Lost Opportunity"**
>
> The applicable concept of restoration was set out in the reasons of McLachlin J. in *Canson Enterprises* as follows, at p. 556:
>
> > In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.

[286] By reason of the defendants' breach, the plaintiff lost the opportunity of staking the Navidad Claims. The court, in determining whether, in fact, the plaintiff would have staked Navidad, must consider the evidence of subsequent events. For example, the court cannot treat the purchase of Calcatreu by Aquiline as a contingency, because hindsight demonstrates that it in fact occurred.

[287] A review of the evidence detailing the process IMA went through when staking Navidad and all the related claims is instructive as to what Aquiline would likely have done had they been free, as they ought to have been, to stake the original Navidad Claim as the sole lawful users of the BLEG A data.

[288] The decision to stake was made on November 29, 2002, after Patterson told Grosso about the anomalies. The staking was intended to cover the Jurassic rock areas in which the anomalies were located, and all of the anomalies are found within the area that was staked.

[289] Bussandri went to the location of the anomalies in the BLEG A data and very quickly located the source of the anomalies by walking up the hill from where the anomalies were located. Patterson adopted this evidence from his examination for discovery:

> Q All right. Now, Mr. Bussandri went and did some reconnaissance work in early December, as we know.
>
> ...
>
> Q 2002?
>
> A Correct.
>
> Q All right. And the first place he went was an area he described as El Alamo to find the source of the silver anomalies?

A Correct.

Q And you were advised that he found them very quickly?

A He did.

Q And that was brought to your attention in December 2002?

A It was.

Q By Mr. Lhotka?

A Correct.

Q All right. Were you also advised that he was looking in other areas in the same month in that northwest and southeast corridor from David Jorge's property?

A Correct. During that same visit he visited a number of other areas.

Q Right. Did you ever send him back to those areas after December of 2002?

A No, we didn't.

Q Okay. Did he recommend that you go back to those areas?

A To be honest, I don't recall.

[290] The process of discovering the Navidad project area was referred to in contemporaneous memoranda prepared by Lhotka on December 17, 2002, and December 26, 2002. On December 17, 2002, Lhotka advised Patterson as follows:

> This morning I spoke with Daniel Bussandri about the recce work in the Gastre area he started on December 10th. Obviously, all of this information is very preliminary, but it appears significant and therefore I wanted to bring it to your attention and the Technical Committee.
>
> Daniel first called me on Dec the 11th to report that he had located the source of the strong 8-km long Ag-Pb-Zn anomaly that we discovered in the data supplied by Normandy/Newmont on Calcatreu.

[291] On December 26, 2002, Lhotka advised Patterson as follows:

> Daniel and I exchanged emails about one comment in his report about uncertainty of old BLEG sites. He felt that some were not good sites with very poorly developed drainage and he questioned whether they really sampled there or might there have been a coordinate error. I am

> not concerned for errors as we used the data to make the discovery so why should we doubt it now? Our sampling should shortly at least partly confirm the old data.
>
> ...
>
> The huge strength and size of anomaly gives me a lot of faith. If it was potty and small would we have found it so fast when the exposure is not supposed to be great?

[292] In December 26, 2002, the connection of the Navidad Project mineralization to the Canadon Asfalto Formation was noted by Lhotka. In an email to Patterson of December 26, 2002, he stated in part:

> Checked the continuation of Gan Gan geology to the NW onto the old (1976) Gastre 1:200,000 sheet. The host Canadon Asfalto Fm is not mapped as occurring along strike. There are volcanics of the Lonco Trapial Fm (Jurassic) however they are largely staked by Patagonia Gold.
>
> There is a bit of Asfalto mapped about 20 km both SE and NW of David Jorge's property, but they are small areas 1*2 km and 2*6 km approx and do not look that important.
>
> ...
>
> If that formation is the key the only other obvious direction to go is south as indicated before. Haven't made more extensive searches.

[293] On January 31, 2003, Patterson emailed Berretta concerning additional claims staked in relation to the Navidad project.

> The five new claims in north-central chubut have been selected to cover stratigraphy and documented reports of mineralization (old minas) similar to that which hosts the Navidad discovery. The purpose of this staking is to quickly tie up as much prospective ground as possible as it is likely that news of the Navidad discovery will spark considerable competitor interest in the region, focussed on the same stratigraphy as that which hosts Navidad ...

[294] In connection with the staking of the other Inversiones claims after December 6, 2002, Patterson adopted this evidence from his examination for discovery:

Question 83:

Q I'm showing you a copy of the management proxy circular, dated May 14th, 2004, with respect to the reorganization of IMA. You recall when that took place?

A I do.

...

Q And you understood that as a result of reorganization, the Navidad properties were going to be in the IMA corporate chain and that another company, Golden Arrow, was going to have all of IMA's other properties?

A I understood that, yes.

Q All right. And the sixth page -- numbered page of this document shows the corporate chain after the arrangement, with IMA Exploration Inc. at the top of the chain and the Navidad area properties at the bottom of the chain on the left-hand column.

...

Q Do you see that?

A I see that.

Q All right. And on page 25 there's reference to the Navidad project.

...

A I do.

Q And reference to the title of the Navidad project and the date the first cateo was staked, December 6th, 2002?

A I see that.

Q And we'll come to that sequence -- I'll go over it with you, Mr. Patterson, but you recall it was on December 6th, 2002, that the cateo which has the Navidad project was first staked by IMA?

A I do.

Q And you were directly involved with that circumstance?

A I was.

Q And so the history of the project is then discussed, and then there are some other properties that are 100 percent owned by IMA that are referred to on page 36 and then over to page 38.

A Yeah, I see those.

Q And they are described as Navidad area properties, other than the December 6th, 2002 cateo?

A Yes.

Q And you understood that these other properties were going to be included in the IMA chain along with the Navidad project?

A They would remain in IMA.

Question 104:

Q Right. So by virtue of having found Navidad and a particular set of host rocks, you could then look at other areas which had similar characteristics?

A Sure. We were staking ground looking for that same -- that same rock formation.

Q Right. And then subsequent to that it looks like the plan would be to do preliminary prospecting by way of, for example, stream sediment sampling in those new cateos that were staked following the Navidad project discovery.

A That would be a very normal first phase of exploration, yes.

Q All right. In order to put together properties which -- which together would be of interest to IMA with the Navidad project?

A Yes.

Question 140:

Q All right. And do you know when these properties, the Navidad area properties, were put together with the Navidad project and put in IMA as part of the reorganization?

A They were always in IMA.

Q All right.

A There was no putting them in. They just simply weren't taken out?

Q They weren't taken out and put together with the properties in western Chubut?

A Correct.

Q Because it was natural to keep them together?

A Sure. They're a grouping both geologically and by geological target, and it makes sense that they should go with Navidad.

Q Right. They all relate to one another.

A Correct.

Q And some of them are, I guess, relatively close in kilometres to the Navidad project?

A Some of them are contiguous with the Navidad project; others are outlying. They're all within maybe a hundred kilometres or so.

Question 169:

Q The claims that are referred to as the Navidad project and the Navidad area properties are held in the name of this Argentine subsidiary, Inversiones Mineras Argentinas SA?

A I believe so.

[295] The arrangement was a reorganization of IMA. IMA retained the Navidad Project and the properties related to it, which were registered in the name of Inversiones or its nominee. Golden Arrow was incorporated by IMA to be the owner of all of the other IMA properties, such as the properties in Western Chubut and Peru. This arrangement was approved by Order of this Court in June 2004.

[296] In sum, the Navidad project was staked on December 6, 2002, as a direct result of the use by IMA of the BLEG A data. The other properties, indirectly owned by IMA through the chain of subsidiaries leading to Inversiones, were staked because they had similar characteristics to the Navidad Project and IMA hoped to find a similar style of Navidad mineralization on those properties. There was no evidence from IMA's witnesses, not surprisingly, that any of the Navidad area properties would have been staked had IMA not staked the original Navidad Claim.

[297] In the result, I find that all claims staked in the Navidad area connected to the Navidad Project would have been staked by Aquiline following a similar process had the plaintiff been first to stake the original Navidad Claim. Thus, the true measure of the plaintiff's lost opportunity is the value of all of the Navidad Area Claims.

(iii) Inadequacy of Damages

[298] In ***Lac Minerals***, at para. 197, the Supreme Court of Canada held that a constructive trust remedy should be granted in circumstances where there is "...reason to grant to the plaintiff the additional rights that flow from recognition of a right of property."

[299] The choice of remedy in ***Lac Minerals*** was driven in large measure by difficulties inherent in the valuation of a mineral asset (albeit one in that case which was far more advanced than the Navidad Area Claims). La Forest J. summarized the point at para 192:

> The trial judge assessed damages in this case at $700,000,000 in the event that the order that Lac deliver up the property was not upheld on appeal. In doing so he had to assess the damages in the face of evidence that the Williams property would be valued by the market at up to 1.95 billion dollars. Before us there is a cross-appeal that damages be reassessed at $1.5 billion. The trial judge found that no one could predict future gold prices, exchange rates or inflation with any certainty, or even on the balance of probabilities. Likewise he noted that the property had not been fully explored and that further reserves may be found. The Court of Appeal made the following comment, at p. 59, with which I am in entire agreement:
>
> > ... there is no question but that gold properties of significance are unique and rare. There are almost insurmountable difficulties in assessing the value of such a property in the open market. The actual damage which has been sustained by Corona is virtually impossible to determine with any degree of accuracy. The profitability of the mine, and accordingly its value, will depend on the ore reserves of the mine, the future price of gold from time to time, which in turn depends on the rate of exchange between the U.S. dollar and Canadian dollar, inflationary trends, together with myriad other matters, all of which are virtually impossible to predict.

> To award only a monetary remedy in such circumstances when an alternative remedy is both available and appropriate would in my view be unfair and unjust.

[300] The same difficulty was relied upon in ***Visagie v. TVX Gold Inc.*** (1998), 78 O.T.C. 1, 42 B.L.R. (2d) 53; aff'd 49 O.R. (3d) 198, 187 D.L.R. (4th) 193 (C.A.), a case where Feldman J. awarded a constructive trust over the defendant's joint venture interest in a mine located in Greece obtained through the use of the plaintiff's confidential information. Feldman J. rejected damages as the appropriate remedy stating the following:

> A further issue is whether there is any other reason why it would be more appropriate in this case to make a compensatory award of damages reflecting the full value of the property, rather than a restitutionary award. In my view this is the type of case, like Lac, involving a gold mine where the value is a moving target and therefore the damage is 'virtually impossible to determine with any degree of certainty.'

[301] Those words are equally applicable, if not more so, in this case where the Navidad Claims are only in the very early stages of development. Any amount of damages that this court might award would amount to speculation as to the value of the claims and would quite conceivably cause an injustice to one of the parties through over- or under-compensation.

[302] Moreover, it is particularly important to remember that in this case, the remedy is awarded for a breach of contract. Notwithstanding that I have dealt with all alternative claims in these reasons, I have found that the BLEG A data was in fact covered by the Confidentiality Agreement and IMA's use of it was a breach of that

Agreement. The Confidentiality Agreement contemplates the plaintiff's right to equitable remedies for breach of the agreement. Clause 9 provides:

> **Specific Enforcement Entitlement**. Reviewer acknowledges that Newmont may not have an adequate remedy at law in money damages if any of the covenants in this Agreement are not performed in accordance with their terms and Reviewer therefore agrees that Newmont is entitled to specific enforcement of the terms hereof (whether by injunction or other equitable remedy) in addition to any other remedy to which it may be entitled.

[303] The plaintiff's right to a constructive trust remedy does not require that the parties have specifically contracted for that remedy. The Supreme Court of Canada has recognized the availability of a constructive trust for breach of a contractual term of confidentiality. In ***Pre-Cam Exploration & Development Ltd. v. McTavish***, [1966] S.C.R. 551, 57 D.L.R. (2d) 557, the defendant was held to have breached an implied term of an employment agreement that he would not use confidential information obtained during the course of his employment for his own advantage. Following his resignation, the defendant used data obtained by him during exploration work to stake certain mining claims that the court held would have been staked by his employer in the ordinary course of events. Judsons J. stated:

> Without the information acquired during the course of his employment, McTavish would not have staked the adjoining claim. This was highly confidential information and the purpose for which it was being sought was obvious — the acquisition of other connected claims which would be of advantage to the existing claims. Neither Pre-Cam nor McTavish, its servant, could acquire these connected claims against the interest of Murtack. Contrary to the majority opinion in the Court of Appeal, **I think that it was a term of his employment, which McTavish, on the facts of this case, understood that he could not use this information for his own advantage.** The use of the term "fraud" by the learned Chief Justice at trial was fully warranted. The severance of his employment on December 27 was an empty formality which could not improve his position. I do not mean by this that a

> simple minded person with his own ideas of common honesty could do this sort of thing without having to answer. **The constructive trust is imposed in a case of this kind because of the mere use of confidential information for private advantage against the interest of the person who made the acquisition of the information possible.** [emphasis added]

[304] In ***Lac Minerals***, La Forest J. made clear at para. 193 that it could not be said that the parties in ***Pre-Cam Exploration*** "stood in a 'special relationship' to one another, but a constructive trust was nevertheless awarded."

[305] The plaintiff's loss for breach of contract must be compensated by ensuring it is put in the position it would have been in "but for" the breach. Its loss for breach of confidence may be assessed on a "but for" analysis, or on a restitutionary analysis. However, in circumstances where the plaintiff's loss is equal to the defendant's gain, nothing turns on the distinction. This is the same situation as in ***Lac Minerals*** at para. 188 where La Forest J. stated that "...if [damages] could in fact be adequately assessed, compensation and restitution in this case would be equivalent measures...."

[306] What ultimately underscored the court's analysis of the appropriate remedy in ***Lac Minerals*** was the finding of fact in the court below that, but for Lac Mineral's breach of confidence, Corona would have acquired the mining rights. La Forest J. stated at paras. 183-184:

> The issue then is this. If it is established that one party, (here Lac), has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona), and if the acquisition of that asset amounts to a breach of duty to the plaintiff, here either a breach of fiduciary obligation or a breach of a duty of confidence, what remedy is available

> to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.
>
> In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by Lac, Corona would have acquired the property. In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain [page 670] the [defendant] made at the [plaintiff's] expense." [Emphasis added.] In my view the fact that Corona never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution*, at pp. 133-39. Lac has therefore been enriched at the expense of Corona.

[307] This court has found that IMA's intervention in staking a cateo around the area containing the BLEG anomalies prevented the plaintiff from staking that ground in the spring or summer of 2003 when the plaintiff was likely to have done so, consistent with its staking of ground around lesser anomalies found in the BLEG data. La Forest J.'s conclusion at para. 191 of that decision speaks to the appropriateness of a constructive trust in this case:

> ...The constructive trust does not lie at the heart of the law of restitution. It is but one remedy, and will only be imposed in appropriate circumstances. Where it could be more appropriate than in the present case, however, it is difficult to imagine.

(iv) Mandatory Injunction

[308] Even if I were not satisfied that a constructive trust was the appropriate remedy in this case, I would find that a mandatory injunction requiring the defendants to transfer the Navidad Area Claims to the plaintiff would, standing alone, be appropriate as a remedy for the defendant's breach of confidence and breach of contract.

[309] Although in ***Lac Minerals***, the court appears to equate the transfer of property with the imposition of a constructive trust, the two remedies may not always be mutually interdependent. As cited above, both La Forest J. and Sopinka J. recognized that, "[t]he court can exercise considerable flexibility in fashioning a remedy for breach of confidence."

[310] A constructive trust is necessary where the facts of a case require the court to vest all or a portion of a particular piece of property in the plaintiff in order to recognize the plaintiff's pre-existing proprietary right arising from having significantly contributed to the value of that property. However, where the facts of the case do not require such recognition, a mandatory injunction may stand alone to remedy wrongdoing. As Professor Waters explains in ***The Law of Trusts***. 3rd ed. (Toronto: Thomson Carswell, 2005) pp. 485-486:

> … there has always been a general equitable jurisdiction to grant an injunction whenever it is appropriate. This can arise out of conduct which amounts to legal wrongdoing, but also less serious conduct. … There is no reason to doubt that a court could grant such an injunction to reverse an unjust enrichment.

[311] On the facts of this case, the plaintiff certainly contributed to the acquisition of the Navidad Claims by the defendants. Despite IMA's public announcements about the quality of the rock lying about the area, the BLEG A data was clearly "the springboard which led to the acquisition" because it put IMA "in a preferred position vis-à-vis others with respect to knowledge of the desirability of acquiring the property": ***Lac Minerals***, at paras. 61-62. However, I do not think it necessary for the plaintiffs to establish a pre-existing proprietary right to the Navidad Claims in order to support an order for their transfer. The transfer is not required to recognize the plaintiff's contribution to the asset, but rather because it is the only equitable way to compensate the plaintiff for the legal wrong it suffered; namely, the defendants' breach of confidence.

[312] The defendants argued that because the plaintiff did not previously own the mineral claims, and because it is not absolutely certain that but for the breach of confidence, the plaintiff would have staked the claims, a transfer of title by way of a mandatory injunction would result in overcompensation to the plaintiff.

[313] As Binnie J. pointed out in ***Cadbury Schweppes***, in some cases, such as ***Lac Minerals***, the key to the remedy will be "the course of events that would *likely* have occurred 'but for' the breach" [emphasis added]. In this case, the plaintiff is entitled to the whole of the claims it would have staked had the defendant not wrongfully intervened. Equity does not require that the parties share the Navidad Claims, so a constructive trust is not required to protect the plaintiff's interests while the title remains solely in the defendants' name. Therefore, the court may order a

mandatory injunction, pursuant to the court's equitable jurisdiction, to require the defendants to transfer the claims to the plaintiff forthwith.

[314] The situation is, in essence, very similar to that in ***Lac Minerals***, where the court found that Lac acted to Corona's detriment when it used the confidential information to acquire the Williams property that Corona would have otherwise acquired. Because of the circumstances in which confidential information was exchanged, the court found that Lac became "uniquely disabled" from pursuing property in the area for a period of time. The court determined that precluding Lac from acquiring the property was not an unacceptable result because Lac had had options open to it: it could have negotiated a relationship with Corona based on the disclosure of confidential information, or it could have pursued property in the area for itself on the basis of publicly available information. Lac could not have the best of both worlds.

[315] The same options were available to IMA in the present case. IMA could have negotiated with the plaintiff (or its predecessor) to buy the BLEG A data outright or come to some other arrangement to enable it to use the data for its own purposes. Alternatively, IMA could have pursued property in the area covered by the data through publicly available information. What it could not do—especially after Mr. Lhotka raised the concern in his email of whether use of the data for the acquisition of claims was lawful—was ignore that concern, ignore the circumstances in which it received the data, and plunge ahead, using the data to stake the claims without prior authorization for such use.

[316] IMA was not forced to review the BLEG A data. It was not part of the original disclosure package for the Calcatreu project. Mr. Lhotka was familiar with IMA's exploration plans for the area, and he was familiar with the Supreme Court's decision in ***Lac Minerals***. Had Mr. Lhotka had any concern about disabling IMA from pursuing claims in the region, he could have chosen not to pursue the BLEG A data. Instead, he chose to request it and review it. Under those circumstances, it is not unjust to find that IMA was "uniquely disabled" from staking claims in the area covered by that data.

[317] In such circumstances, "the policy objectives in both equity and tort would support the restoration of the plaintiff to the position it would have occupied 'but for' the breach": see ***Cadbury Schweppes***, at para. 51. That requires an order that IMA execute a transfer of the claims in favour of plaintiff.

[318] However, the plaintiff would be unjustly overcompensated if it was not required to reimburse the defendants for the development that they have funded on the site since the claims were staked. Accordingly, an order is also required that the defendants will submit an accounting of the development expenses for reimbursement by the plaintiff. Any dispute arising from those expenses will be reviewable by this court.

ASSESSING DAMAGES

[319] The parties have asked that this court assess damages. I am reluctant to do so for the reasons explained above relating to the inadequacy of damages in a case

such as this and the extreme difficulty of arriving at an assessment that could be described in any way as fair.

[320] Assessing damages in a case of breach of confidence as in any other tort engages the principle that the object of damages is to compensate for loss or injury.

[321] The damages in this case must be assessed based on my finding that but for IMA having staked the Navidad Project in December and further related staking in the ensuing few months, Aquiline would have likely staked it at the latest in May 2003 and would have followed a similar process to stake the related claims. The actual staking by IMA in December of 2002 was solely because of the use of Newmont's confidential BLEG A data. Almost no other public information was used and certainly none that would have led Daniel Bussandri to "discover" Navidad. Without that initial "discovery," IMA would not likely have staked the related Navidad Claims.

[322] There is no compelling evidence to support a finding that what the plaintiff lost by the misuse of its confidential information was the chance to stake only the first Navidad Claim - that is to make the "discovery" that IMA did.

[323] Thus, the plaintiff's loss is the value all of the related claims less the cost of exploration and development of those claims to date. That cost would have to have been incurred by the plaintiff if it had staked the claims first.

[324] Coming to a reasonable and fair assessment of the value of those claims is difficult indeed. The only evidence of the value of the claims at this point, when they

are still in a relatively early stage of exploration, is that of the plaintiff's expert, Ms. Hodos. Her expertise in providing an opinion of value in such circumstances as these was not contested. In fact, the defence called no evidence to contradict her opinion. Her valuation of the Navidad Project, which she qualified as being nearly an educated crystal ball gaze is, give or take, US$85 million.

[325] Ms. Hodos testified about the challenges presented to an appraiser faced with evaluating Navidad at this stage of its development. She said that there was a fog of data that was difficult to penetrate.

[326] Ms. Hodos stated that the limits of the deposit are not yet defined, thus there is not yet a full understanding of the nature of the deposit, and in her opinion it would take at least a year to resolve this uncertainty.

[327] Although the property will definitely emerge from a category 2 deposit, as she defined it, one does not know in what form. There is no mining plan as yet. What portions of the mine will be lead and what parts will be silver is not yet known. She described the level of metallurgical analysis as primitive. A great deal of work is yet to be done. Although there are some preliminary ideas, the analysis is by no means exhaustive and not terribly reliable. This makes it very uncertain and difficult to settle on a value for the property. Moreover, the political risk of operating in Argentina is a difficult one to evaluate.

[328] Ms. Hodos applied a 24% discount rate to her assessment of the income approach to valuation. She described this rate as high, with rates of 5-15% being

more currently fashionable in the evaluation of mineral properties. Clearly, the use of such a high discount rate, reflecting the uncertainty flowing from metallurgy, resource size, and the underground mining ban, impacts the assessment of value.

[329] The impact of uncertainty about the size of the resource and the impact of the Chubut ban on underground mining is exemplified by the estimate of value prepared for IMA by Mr. Chapman. Mr. Chapman valued the project between US$472 million and US$612 million. He applied a 5% discount rate, and assumed an open-pit mine, allowing a low stripping ratio, a high recovery rate, and a silver price of $6 per ounce. Ms. Hodos said this of his assumptions:

> Q …Can you comment on the likelihood or not that his valuation, that is, the Chapman valuation, would ultimately be accurate or no?
>
> A. I can't predict with any accuracy. My personal opinion is that Chapman, I think, is pretty optimistic. **It's possible his forecasts could be achieved**, but I think he's pretty optimistic. [emphasis added]

[330] The impact of Ms. Hodos' discount rate, reflecting uncertainty with a stage 2 project, is also reflected in her sensitivity analyses. She includes two "cases" where she varies her assumptions, and then applies different discount rates to demonstrate the impact on value. On Case I, she assumes the current resource estimate of Snowden and a $5.50 per ounce silver price. At a 24% rate, the value is US$71,177,703. At 15%, the value is US$124 million. In Case II, she references Pierre Lassonde's theory that 50% of all mines eventually double their reserves, and assumes a 50% chance that Navidad falls into this elite class, thereby increasing Navidad's tonnage by 50%. She applies the 2004 average silver price ($6.67 per

ounce) and arrives at a net present value of US$191 million (at a 24% discount rate). When she lowers the discount rate to 15%, the value increases to US$285 million. On this latter scenario, Ms. Hodos deposed that "buyer resistance" would limit the upper price to US$200 million.

[331] With respect to the comparable approach, Ms. Hodos commented on the importance of San Cristobal as the only project of comparable size to Navidad. For the purposes of comparison, San Cristobal's adjusted value is US$183 million. Ms. Hodos deposed that if it were not for "Navidad's issues"; that is, the challenging metallurgy, the underground mining ban, and the early stage of development, San Cristobal would be a very good comparable.

[332] Ms. Hodos described this project as very large and stated that the market could be "thirsty" for it if it were available. It is potentially "world class," the significance of which has an impact on more than value. She deposed:

> Well, that phrase is commonly applied to very large and spectacular occurrences of metal, of first minerals. "World class" means that no matter where you find it in the world, it's worth developing, and that **there's tremendous amount of prestige, I guess, too, attributable to the company that owns one of these things.** Examples of world-class deposits, Yanacocha in Peru, a gold quarry mine. The Macassa mine in the Abitibi for 50 years I think turned out -- oh, I can't remember the number of million ounces of gold, **but the Northern Miner, interestingly, published this historic newspaper for their 100th anniversary or whatever it was in which they highlighted the news items of the day going back to the beginning of their publication, and they had fabulous deposits that they put in that listing, including the nickel deposits in Sudbury and so forth, and one of the last entries is Navidad**. So the Northern Miner essentially placed it in that elite category. Now, that's not to say -- we don't even know if Navidad is economic at this point in time, but it is big and you can afford to spend a lot of money evaluating it. [emphasis added]

[333] The difficulties that Ms. Hodos had in attempting to evaluate Navidad are underscored by the affidavit of David Terry, a Vice President of Exploration for IMA. In para. 8 of his affidavit, he stated that it is inherent in the nature of a property such as Navidad that significant additional information will become known as work on the project continues. He described significant developments that occurred subsequent to the date of Ms. Hodos' valuation, including a new resource estimate that was published by IMA. Furthermore, he deposed as follows:

> In my professional opinion, publication of the Hodos Report, notwithstanding its very appropriate cautionary language, has a very real risk of being misleading respecting the issues concerning the Navidad resource. I emphasis [*sic*] that this continual inflow of new data and the eventual outcome of a detailed pre-feasibility analysis may substantially enhance or reduce the value of the asset depending on whether the positive or negative contingencies, either identified in the Hodos Report or otherwise, are realized in the subsequent data.

[334] Ms. Hodos' opinion gave the market value of Navidad as conservatively US$85 million. However, in cross-examination, Grosso testified as follows, highlighting the frailty of any such opinion:

> Q Yes, All right. Now, just a question about the value of Navidad. This resource is in the very early stages of being identified, that is, fully identified; is that correct?
>
> A Rephrase that again, sir.
>
> Q I'll try it again. You haven't fully explored by various means the full extent of the resource there, have you?
>
> A No, not by all means.
>
> Q No. But based on the technical work that's been done by the IMA staff, you understand this resource is going to be -- you believe it's going to be significantly increased, do you not?
>
> A We hope so.

Q Yes. And if IMA had received a cash offer of $100 million US for this property, you'd turn it down flat, wouldn't you?

A That decision is not made by me, but I believe that that would be correct.

Q Yes. That is, you would recommend to your board to say forget it; correct?

A Most likely.

[335] Thus, a reasonable inference is that IMA's position is that US$85 million undervalues the asset. However, there is as yet no firm basis to go to the top of the range of values suggested by Ms. Hodos.

[336] For the reasons set out above in the discussion as to why a constructive trust is a more appropriate remedy than damages in this case, the value of US$85 million is the best that can be done. In the circumstances, I would, if awarding damages as the most appropriate remedy in this case, accede to the plaintiff's request that the amount of US$85 million is subject to an update of the valuation of Ms. Hodos.

[337] In this case, clearly, damages are not a reasonable alternative remedy.

CONCLUSION

[338] For the reasons set out above this court makes the following declarations and orders:

1) A declaration that Inversiones holds the Navidad Claims pursuant to a constructive trust in favour of Minera Aquiline.

2) This court grants a mandatory injunction requiring:

   a) that Inversiones transfer the Navidad Claims and any assets related thereto to Minera Aquiline or its nominee within 60 days of this order;

b) that IMA take any and all steps required to cause Inversiones to comply with the terms of this order;

c) that the transfer of the Navidad Claims and any assets related thereto is subject to the payment to Inversiones of all reasonable amounts expended by Inversiones for the acquisition and development of the Navidad Claims to date.

d) Any accounting necessary to determine the reasonableness of the expenditures referred to in (c) above shall be by reference to the Registrar of this court.

3) The parties may speak to an order for costs.

[339] Judgment for the plaintiff.

"M.M. Koenigsberg, J."
The Honourable Madam Justice M.M. Koenigsberg

July 21, 2006 – ***Revised Judgment***

On the front page of the Reasons for Judgment, Brent Meckling also appears as Counsel for the Defendants.

TAB 8B

Johnny Mennillo *Appellant*

v.

Intramodal inc. *Respondent*

INDEXED AS: MENNILLO *v.* INTRAMODAL INC.

2016 SCC 51

File No.: 36124.

2015: December 8; 2016: November 18.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Commercial law — Corporations — Oppression — Reasonable expectations of shareholder — Shareholder resigning as officer and director of corporation — Whether resignation extended to shareholder status and shares transferred accordingly — Whether evidence supported reasonable expectation asserted by shareholder of being treated as such and, if so, whether reasonable expectation was violated — Whether shareholder unlawfully deprived of shareholder status as a result of corporation's conduct — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 241.

In 2004, M and R, two friends, discussed the possibility of creating a road transportation company. M would contribute the money to start up the business while R would bring skills to ensure its success. R had the company incorporated on July 13, 2004, and that same day, the company's board of directors passed a resolution to accept notices of subscription to securities by R and M and to issue 51 shares to R and 49 shares to M. Both the notices of subscription and the resolution were signed by R alone. Thereafter, R and M rarely complied with the requirements of the *Canada Business Corporations Act* ("*CBCA*") and almost never put anything in writing. They had neither a partnership nor a shareholders' agreement, and there was no written contract or any other legal formality relating to M's advances of substantial amounts of money to R.

Johnny Mennillo *Appelant*

c.

Intramodal inc. *Intimée*

RÉPERTORIÉ : MENNILLO *c.* INTRAMODAL INC.

2016 CSC 51

N° du greffe : 36124.

2015 : 8 décembre; 2016 : 18 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit commercial — Sociétés par actions — Abus — Attentes raisonnables de l'actionnaire — Démission d'un actionnaire à titre de dirigeant et d'administrateur d'une société — La démission valait-elle également pour la qualité d'actionnaire et, dans l'affirmative, les actions ont-elles de ce fait été transférées? — La preuve étaye-t-elle l'allégation selon laquelle l'actionnaire s'attendait raisonnablement à être traité comme tel et, dans l'affirmative, cette attente raisonnable a-t-elle été frustrée? — Le comportement de la société a-t-il eu pour effet de dépouiller illégalement l'actionnaire de sa qualité d'actionnaire? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, c. C-44, art. 241.

En 2004, deux amis, M et R, ont envisagé la possibilité de créer une entreprise de transport routier. M devait avancer les fonds de démarrage et R, mettre à contribution ses compétences pour assurer la réussite de l'entreprise. Le 13 juillet 2004, R a constitué la société et, le même jour, le conseil d'administration de cette dernière a adopté une résolution à l'effet d'accepter les avis de souscription de valeurs mobilières de R et de M et d'émettre 51 actions à R et 49 à M. Tant les avis de souscription que la résolution n'ont été signés que par R. Subséquemment, R et M n'ont que rarement observé les exigences de la *Loi canadienne sur les sociétés par actions* (« *LCSA* ») et n'ont presque jamais rien consigné par écrit. Ils n'ont pas non plus conclu de contrat de société ou de convention d'actionnaires, et les avances de fonds substantielles consenties par M à R n'ont pas fait l'objet d'un contrat écrit ou de quelque autre formalité juridique.

On May 25, 2005, M sent a letter to the corporation in which he indicated that he was resigning as an officer and director of the company. M asserts that he never intended to stop being a shareholder, but the corporation contends that M also resigned as a shareholder and accordingly transferred his shares to R. Claiming that the corporation and R unduly and wrongfully stripped him of his status as a shareholder, M applied for an oppression remedy pursuant to s. 241 of the *CBCA*.

The trial judge dismissed M's oppression claim based on the factual finding that M had undertaken to remain a shareholder only so long as he was willing to guarantee the corporation's debts and later was no longer willing to do so. A majority of the Court of Appeal dismissed the appeal.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Abella, Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ.: The trial judge's factual findings are not reviewable on appeal because no palpable and overriding error is present here. M's oppression claim must accordingly be approached on the basis of the trial judge's factual findings to the effect that from May 25, 2005 onwards, M did not want to be a shareholder, did not want to be treated as such and, as a result, transferred his shares to R.

There are two elements of an oppression claim. The claimant must first identify the expectations that he or she claims have been violated and establish that the expectations were reasonably held. Then the claimant must show that those reasonable expectations were violated by conduct falling within the statutory terms, that is, conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder.

In the present case, M's oppression claim is groundless. M could have no reasonable expectation of being treated as a shareholder: he no longer was and expressly demanded not to be so treated. As against the corporation, the most that can be said is that it failed to carry out M's wishes as a result of not observing certain necessary corporate formalities. But in light of these findings, it cannot be said that the corporation acted oppressively or that it illegally stripped him of his status as a shareholder. What happened is that the corporation failed to make sure that all the legal formalities were complied with before registering the transfer of shares to R. The acts of the corporation which M claims to constitute oppression were in fact taken, albeit imperfectly, in accordance with his express wishes.

Le 25 mai 2005, M a fait parvenir à la société une lettre dans laquelle il démissionnait à titre de dirigeant et d'administrateur de l'entreprise. Il affirme n'avoir jamais eu l'intention de cesser d'être actionnaire, mais la société soutient qu'il a également démissionné à titre d'actionnaire et transféré de ce fait ses actions à R. En application de l'art. 241 de la *LCSA*, M a intenté un recours pour abus, alléguant que la société et R l'avaient dépouillé indûment et illégalement de sa qualité d'actionnaire.

Le juge de première instance a rejeté le recours pour abus après avoir conclu des faits que M ne s'était engagé à demeurer actionnaire que tant qu'il serait disposé à garantir le passif de la société et que, à un moment ultérieur, il n'avait plus été disposé à le faire. Les juges majoritaires de la Cour d'appel ont rejeté l'appel.

Arrêt (la juge Côté est dissidente) : Le pourvoi est rejeté.

Les juges Abella, Cromwell, Karakatsanis, Wagner, Gascon et Brown : Les conclusions de fait du juge de première instance ne sont pas susceptibles de révision en appel car elles ne sont entachées d'aucune erreur manifeste et dominante. Il faut donc statuer sur le recours pour abus de M à partir des conclusions de fait du juge de première instance selon lesquelles, à compter du 25 mai 2005, M n'a plus voulu être actionnaire, n'a plus voulu être traité comme tel et a de ce fait transféré ses actions à R.

Deux choses incombent à celui qui allègue l'abus. D'abord, il doit préciser quelles attentes ont censément été frustrées et en établir le caractère raisonnable. Ensuite, il doit démontrer que ces attentes raisonnables ont été frustrées par un comportement que vise le libellé de la loi, à savoir le fait d'abuser des droits d'un détenteur de valeurs mobilières ou de se montrer injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts.

Dans la présente affaire, le recours pour abus est sans fondement. M ne pouvait pas raisonnablement s'attendre à être traité comme un actionnaire : il ne l'était plus et il avait expressément demandé à ne plus être traité comme tel. On peut tout au plus reprocher à la société de ne pas avoir donné suite au vœu de M en omettant d'observer certaines formalités requises de sa part. Cependant, on ne saurait affirmer au vu de ces conclusions qu'elle a agi abusivement à l'égard de M ou qu'elle l'a dépouillé illégalement de sa qualité d'actionnaire. En fait, la société a omis de s'assurer de l'observation de toutes les formalités d'ordre juridique avant d'inscrire le transfert des actions à R. Les mesures de la société que M tient pour abusives ont en fait été prises, bien que de manière imparfaite, selon la volonté qu'il avait exprimée.

The fact that a corporation fails to comply with the requirements of the *CBCA* does not, on its own, constitute oppression. What may trigger the remedy is conduct that frustrates reasonable expectations, not simply conduct that is contrary to the *CBCA*. In the present case, the failure to observe the corporate formalities in removing M as a shareholder in accordance with his express wishes to be so removed cannot be characterized as an act unfairly prejudicial to the extent that this omission deprived him of his status as a shareholder. The corporation failed to observe the formalities of carrying out his wish not to be a shareholder. Nor can the failure to properly remove him as a shareholder in accordance with his express wishes make it just and equitable for him to regain his status as a shareholder.

Regarding the issue of whether the share transfer could have been retroactively cancelled, it is not possible to do so by way of simple oral consent. An issuance of shares can be cancelled only if (a) the corporation's articles are amended or (b) the corporation reaches an agreement to purchase the shares, which requires that the directors pass a resolution, that the shareholder in question gives his or her express consent and that the tests of solvency and liquidity be met. Meeting the requirements with respect to the maintenance of share capital cannot be optional, given that it is the share capital that is the common pledge of the creditors and is the basis for their acceptance of doing business with the corporation.

It is common ground that the shares that were transferred were not endorsed by M. Therefore it is true that the corporation proceeded to register a transfer that did not meet all of the criteria stated in the *CBCA*. Since this was an important formality required by law, it was to be observed on pain of nullity of the transfer. But there is no doubt about the fact that M knew that this formality was not complied with when the company proceeded to register the transfer in the corporate books, and that he was aware that he had not endorsed his share certificate when the shares were transferred to R as the trial judge found. As he was aware of the situation of which he now complains more than three years prior, his claim in that regard was and is still prescribed. Even if the transfer was subject to nullity, it did not mean that it was inexistent.

Finally, regarding the possibility of a conditional issuance of the shares, the condition at issue was a result of an agreement between M and R that the former would be a shareholder only if he guaranteed the corporation's debts. This agreement was reached by M and R; the corporation was not a party to this agreement. Accordingly, it does not attract the corporate formalities applicable to a conditional issuance of shares.

L'inobservation des formalités de la *LCSA* par une société ne constitue pas en soi de l'abus. Peut ouvrir droit au recours pour abus le comportement qui frustre l'attente raisonnable, mais pas celui qui est seulement contraire à la *LCSA*. En l'espèce, l'inobservation des formalités nécessaires au retrait de M à titre d'actionnaire, conformément à la volonté qu'il avait exprimée, ne saurait constituer un acte injustement préjudiciable à son égard en ce qu'elle le prive de sa qualité d'actionnaire. La société a omis d'observer les formalités requises pour donner suite à sa volonté de cesser d'être actionnaire. L'omission d'effectuer régulièrement son retrait à titre d'actionnaire, selon la volonté qu'il avait exprimée, ne saurait non plus rendre juste et équitable la réintégration de M au sein de l'actionnariat.

Quant à savoir si le transfert des actions aurait pu être annulé rétroactivement, une telle mesure n'aurait pu intervenir sur simple consentement verbal. Il ne peut y avoir annulation d'une émission d'actions que a) par modification des statuts de la société ou b) par achat de gré à gré des actions par la société, ce qui requiert une résolution des administrateurs, le consentement exprès de l'actionnaire en cause et le respect des critères de solvabilité et de liquidité. La conformité aux exigences relatives au maintien du capital-actions ne saurait être facultative puisque le capital-actions constitue le gage commun des créanciers en fonction duquel ces derniers acceptent de faire affaire avec la société.

Nul ne conteste que les actions transférées n'ont pas été endossées par M. La société a donc bel et bien inscrit un transfert qui ne respectait pas toutes les conditions prévues par la *LCSA*. S'agissant d'une formalité légale importante, son inobservation exposait l'opération à la nullité. Or, il ne fait aucun doute que M savait que cette formalité n'avait pas été accomplie lorsque la société a inscrit le transfert dans ses registres et que son certificat n'était pas endossé lors du transfert de ses actions à R, comme l'a conclu le juge de première instance. Puisque, plus de trois ans auparavant, il connaissait la situation qu'il déplore aujourd'hui, son recours était et demeure prescrit. Même s'il était susceptible d'annulation, le transfert existait tout de même.

Enfin, en ce qui concerne la possibilité que les actions aient été émises conditionnellement, la condition en cause résultait d'un accord entre M et R selon lequel le premier ne serait actionnaire que s'il se portait garant du passif de la société. L'accord est intervenu entre M et R, et la société n'y est pas partie. Il ne requérait donc pas l'observation des formalités liées à une émission conditionnelle d'actions.

Per McLachlin C.J. and Moldaver J.: It is not necessary to determine whether there was an effective transfer of M's shares to R. This appeal can be disposed of on the basis that M has failed to show a reasonable expectation that he would not be removed as a shareholder from the corporation's books given that he asked to be removed as a shareholder. This is confirmed by the fact that subsequently M ceased to conduct himself as an equity shareholder and advanced money as loans. The trial judge's finding of fact is supported by the evidence. Consequently, the trial judge did not err in denying M's oppression claim.

Per Côté J. (dissenting): Two key principles are deeply rooted in Canadian corporate law and cannot simply be disregarded or ignored: the principle that a corporation's legal personality is distinct from that of its shareholder or shareholders, and the principle or rule of the maintenance of capital. The formalities provided for in corporate legislation are imposed to give effect to these principles, and they are necessary to protect the corporation's patrimony, the common pledge of its creditors.

These principles cannot be variable. The principle that a corporation has a distinct legal personality and the maintenance of capital principle are just as important in the case of a small company as in that of a large one, if not more so. Although expectations may vary from one shareholder to another in the case of a closely held corporation, this does not diminish the importance of these principles. The same is true of the formalities provided for by law to ensure that they are adhered to.

It follows that the conclusion that shares were issued conditionally in this case or that the agreement between the two shareholders regarding M's shares was cancelled retroactively, simply by their consenting to its being cancelled, and that this cancellation had some effect on the corporation even though the necessary formalities were not observed, jeopardizes important pillars of Canadian corporate law.

Along the same lines, the fact that one shareholder claims he and his fellow shareholder entered into an agreement for the transfer of shares does not relieve the corporation of its legal duty to make the necessary inquiries before passing a resolution approving that transfer of shares and registering the transfer in its registers. The *CBCA* imposes some very strict requirements to be met before a transfer of shares is registered, including that the security be endorsed and that the transfer be rightful. The corporation's

La juge en chef McLachlin et le juge Moldaver : Point n'est besoin de décider s'il y a effectivement eu transfert des actions de M à R. On peut statuer sur le pourvoi à partir du fait que M n'a pas démontré qu'il pouvait raisonnablement s'attendre à ce que les registres de la société continuent de faire état de sa qualité d'actionnaire puisqu'il avait demandé à ne plus être actionnaire. Cela est d'ailleurs confirmé par le fait qu'il a cessé par la suite d'agir comme actionnaire participatif et a avancé des fonds sous forme de prêts. La conclusion de fait du juge de première instance trouve appui dans la preuve. Il n'a donc pas eu tort de rejeter le recours pour abus intenté par M.

La juge Côté (dissidente) : Deux grands principes sont profondément enracinés en droit canadien des sociétés par actions et ne peuvent simplement être écartés ou ignorés : il s'agit du principe de la personnalité juridique distincte de la société par rapport à celle de son ou ses actionnaires, et du principe ou de la règle du maintien du capital. Les formalités prévues par les lois relatives aux sociétés par actions sont imposées en raison de ces principes et elles sont nécessaires à la protection du patrimoine de la société, gage commun de ses créanciers.

Ces principes ne peuvent être à géométrie variable. Le principe de la personnalité juridique distincte de la société et celui du maintien du capital sont tout aussi importants — sinon plus — dans le cas d'une petite société que dans celui d'une grande. Bien que les attentes des actionnaires puissent varier de l'un à l'autre dans le cas d'une société par actions à capital fermé, l'importance de ces principes n'est pas pour autant diminuée. Il en va de même des formalités prévues par la loi pour faire respecter ces principes.

Il s'ensuit que la conclusion selon laquelle il y a eu en l'espèce émission conditionnelle d'actions ou encore celle selon laquelle il y a eu en l'espèce annulation rétroactive de l'entente entre les deux actionnaires quant aux actions de M sur simple consentement de ceux-ci et que cette annulation a eu quelque effet que ce soit sur la société, en dépit de l'absence du formalisme requis, mettent en péril des piliers importants du droit canadien des sociétés.

Dans le même sens, la prétention d'un actionnaire suivant laquelle une entente de transfert d'actions est intervenue entre lui et son coactionnaire ne libère pas la société en cause de son devoir légal de faire les vérifications requises avant d'entériner par résolution ce transfert d'actions et de l'inscrire dans ses registres. La *LCSA* soumet l'inscription d'un transfert d'actions à des conditions préalables très strictes, dont l'endossement du titre et le caractère régulier du transfert. L'omission de telles

failure to make such inquiries in this case was in itself a form of oppression.

M did not, by expressing an intention to withdraw from the corporation as a shareholder, extinguish any reasonable expectations he may have had as regards his remaining on the company's books as a shareholder. To conclude the opposite would amount to saying that the mere expression of an intention to withdraw from a corporation as a shareholder would also extinguish the reasonable expectation that the corporation in question will act in accordance with the law and with its articles and by-laws and will make the necessary inquiries before depriving a person of his or her shareholder status, and would thereby defeat the oppression remedy. However, the *CBCA* itself does not limit access to the oppression remedy in such a manner and, what is more, shareholders are entitled to expect a corporation to act in accordance with its articles and by-laws and, more generally, with the law. These are, so to speak, presumed expectations.

The question of reasonable expectations is of greater relevance to the determination of a shareholder's rights that are not specifically provided for in the legislation and in the corporation's articles and by-laws. Where, as in this case, a corporation is alleged to have acted unlawfully, the focus of the analysis is not so much on the question of reasonable expectations as on that of whether the corporation's conduct was in fact unlawful and, therefore, oppressive. Mere irregularities that are not oppressive or unfairly prejudicial will not be sufficient to justify granting the remedy to the complainant. On the other hand, a failure to comply with a mandatory legislative provision or with the requirements set out in the corporation's articles and by-laws that relate to the very recognition of shareholder status may justify granting the oppression remedy.

In this case, several aspects of the corporation's conduct are problematic. The evidence shows that the share certificate in question was not endorsed. It also shows that the corporation made no inquiries before passing the resolution to transfer M's shares, and that the resolution was passed retroactively and was signed by a single shareholder (namely the majority shareholder). The corporation's conduct in this regard, which violated express provisions of the legislation and of its own articles and by-laws, was prejudicial to M: that conduct unlawfully stripped him of his status as a shareholder. It is difficult to imagine how a business corporation could act more oppressively toward a shareholder than by depriving him or her of that status.

vérifications par la société en l'espèce constituait en soi une forme d'abus.

En exprimant l'intention de se retirer de la société à titre d'actionnaire, M ne mettait fin à toutes attentes raisonnables qu'il pouvait avoir de demeurer dans les registres de la société en tant qu'actionnaire. Conclure le contraire revient à dire que la simple expression de l'intention de se retirer d'une société en tant qu'actionnaire mettrait également fin à l'attente raisonnable que la société en question agisse en conformité avec la loi et ses statuts et règlements et qu'elle procède aux vérifications requises avant de priver une personne de son statut d'actionnaire, faisant ainsi échec au recours pour abus. Or, la *LCSA* elle-même ne limite pas ainsi l'accès au recours pour abus et, de plus, les actionnaires sont en droit de s'attendre à ce que la société agisse en conformité avec ses statuts et règlements et, plus généralement, avec la loi. Il s'agit pour ainsi dire d'attentes présumées.

La question des attentes raisonnables a une plus grande pertinence lorsqu'il s'agit de déterminer les droits d'un actionnaire au-delà de ce qui est spécifiquement prévu dans la loi et les statuts et règlements de la société. Lorsque l'illégalité de la conduite de la société est alléguée, comme c'est le cas en l'espèce, l'analyse ne porte pas tant sur la question des attentes raisonnables que sur celle visant à déterminer si la conduite de la société est effectivement illégale et, partant, abusive. De simples irrégularités, qui ne constituent pas pour autant un abus ou un acte injustement préjudiciable, ne seront pas suffisantes pour donner ouverture au recours du plaignant. À l'inverse, l'omission de se conformer à une disposition impérative de la loi ainsi qu'aux exigences prévues par les statuts et règlements de la société en ce qui concerne la reconnaissance même du statut d'actionnaire pourra donner ouverture au recours pour abus.

En l'espèce, plusieurs aspects de la conduite de la société posent problème. La preuve révèle que le certificat d'actions en cause n'a pas été endossé. Elle révèle également que la société n'a fait aucune vérification avant d'adopter la résolution de transfert des actions de M, et que c'est rétroactivement et avec la signature d'un seul actionnaire (c'est-à-dire l'actionnaire majoritaire) que la résolution a été adoptée. Cette conduite de la société, qui contrevient à des dispositions expresses de la loi, de ses statuts et de ses règlements, a été préjudiciable à M : elle l'a dépouillé illégalement de son statut d'actionnaire. Et il est difficile d'imaginer conduite plus abusive d'une société par actions à l'endroit d'un actionnaire que celle de le priver de ce statut.

The conduct of a corporation that approves a transfer of shares without making any inquiries and that confuses its interests with those of its majority shareholder, as if it were a mere puppet, is not less oppressive simply because another shareholder at some point expressed an intention to withdraw from the corporation without there being any agreement on the terms of such a withdrawal.

Furthermore, the trial judge did not find that the corporation's shareholders had agreed on a transfer of shares. The interpretation to the effect that he did so find denotes a fragmented reading of the trial judge's reasons and distorts his conclusions. The trial judge instead concluded that, given that M's shares had been issued on condition that he guarantee the corporation's debts, the intention he expressed of withdrawing from the corporation was sufficient for him to be stripped of his status as a shareholder. It is inaccurate to say that the trial judge's finding that the shares had been transferred was independent of their having been issued conditionally.

The parties characterized the agreement that was alleged to have been entered into by the corporation's shareholders in several different ways, at times as a conditional issuance of shares, at times as a retroactive cancellation and at times as a contract of sale or a contract of gift. This reflects a more fundamental problem, namely that, without some speculation, no intention in this regard can be found in the evidence. Indeed, the difficulty the courts below had in characterizing the alleged agreement resulted from the fact that there was no evidence of the juridical operation contemplated by the corporation's shareholders on May 25, 2005 that allegedly resulted in the transfer of M's shares.

Moreover, it is impossible to find, as a matter of law, that M transferred his shares on May 25, 2005. Whatever conclusion might be reached about the credibility of the witnesses in this regard, the intention expressed by M of withdrawing from the corporation had no effect on his rights as a shareholder. In this case, the intention expressed by M was at most an invitation to contract.

The analysis that is required in the circumstances cannot disregard the interplay between Quebec civil law and the *CBCA*. It is contrary to basic principles of Quebec civil law to argue that the intention expressed by M in this case resulted in an agreement of wills even though there was no agreement on the juridical operation being contemplated. To conclude that the expression of such an intention bars M's claim for oppression — thereby approving after the fact the transfer registered by the corporation in

La conduite d'une société qui avalise un transfert d'actions sans vérification aucune, et qui confond ses intérêts avec ceux de son actionnaire majoritaire comme si elle n'était qu'une simple marionnette, n'est pas moins abusive seulement parce que, à un certain moment donné, un coactionnaire a exprimé son intention de se retirer de la société, sans qu'il y ait eu entente quant aux modalités d'un tel retrait.

Par ailleurs, le premier juge n'a pas conclu que les actionnaires de la société s'étaient entendus afin de procéder à un transfert d'actions. Cette interprétation dénote une lecture parcellaire du jugement de première instance et en dénature les conclusions. Le juge de première instance a plutôt conclu que l'intention exprimée par M de se retirer de la société, dans la mesure où ses actions avaient été émises conditionnellement à ce qu'il garantisse le passif de la société, était suffisante pour le dépouiller de son statut d'actionnaire. Il n'est pas exact en l'espèce d'affirmer que le juge de première instance a conclu à la cession des actions, indépendamment du caractère conditionnel de leur émission.

Les parties ont qualifié l'entente qui serait intervenue entre les actionnaires de la société de maintes façons, y voyant tantôt une émission conditionnelle, tantôt une annulation rétroactive, tantôt un contrat de vente ou de donation. Cela traduit un problème plus fondamental : le fait que, sauf conjecture, aucune intention à cet effet ne ressort de la preuve. En fait, la difficulté éprouvée par les juridictions inférieures à qualifier la prétendue entente résulte du fait que la preuve est muette sur l'opération juridique qui aurait été envisagée par les actionnaires de la société le 25 mai 2005 et qui aurait eu comme résultat le transfert de ses actions.

Il est d'ailleurs impossible de conclure en droit que M a transféré ses actions le 25 mai 2005. En effet, peu importe la conclusion quant à la crédibilité des témoins à cet égard, l'intention manifestée par M de se retirer de la société était sans effet sur ses droits en tant qu'actionnaire. En l'espèce, l'intention exprimée par M constituait tout au plus une invitation à contracter.

L'analyse qui s'impose dans les circonstances ne peut ignorer l'interaction du droit civil québécois avec la *LCSA*. Soutenir que l'intention exprimée par M en l'espèce donnait lieu à un accord de volontés, et ce, malgré l'absence d'entente quant à l'opération juridique projetée, va à l'encontre de principes élémentaires du droit civil québécois. Conclure que l'expression d'une telle intention constitue une fin de non-recevoir au recours pour abus de M — avalisant ainsi a posteriori le transfert

its registers — is contrary to the law, to fairness and to common sense.

In addition to having no basis in law, the finding that M had expressed his intention of withdrawing as a shareholder and had transferred his shares in May 2005 is not supported by the evidence and is thus based on palpable and overriding errors. The trial judge erred in rejecting M's testimony in this regard, since he did so on the basis of an unreasonable interpretation of several pieces of evidence in the record. At most, the evidence shows that M expressed an intention to divest himself of his shares, but no agreement was reached on how he would dispose of them.

Finally, the prescription period applicable to a claim under s. 241 of the *CBCA* will depend on the basis for the claim. Where — as in this case — the complainant has been acknowledged to be a shareholder at some point and is claiming to have been unlawfully stripped of shareholder status by the corporation, the claim is therefore imprescriptible.

Cases Cited

By Cromwell J.

Applied: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; **referred to:** *Premier Tech ltée v. Dollo*, 2015 QCCA 1159, leave to appeal refused, 2016 CanLII 21792; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298; *Martin v. Dupont*, 2016 QCCA 475; *Inspecteur général des institutions financières v. Assurances funéraires Rousseau et frère Ltée*, [1990] R.R.A. 473.

By McLachlin C.J.

Applied: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560.

By Côté J. (dissenting)

Smith v. Gow-Ganda Mines, Ltd. (1911), 44 S.C.R. 621; *Budd v. Gentra Inc.* (1998), 111 O.A.C. 288; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; *Journet v. Superchef Food Industries Ltd.*, [1984] C.S. 916; *Martin v. Dupont*, 2016 QCCA 475; *Paré v. Paré (Succession de)*, 2014 QCCA 1138; *Grusk v. Sparling* (1992), 44 Q.A.C. 219; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Bénard v. Gagnon*,

inscrit par la société dans ses registres — heurte la loi, l'équité et le sens commun.

La conclusion suivant laquelle M aurait exprimé son intention de se retirer en tant qu'actionnaire et aurait transféré ses actions en mai 2005, en plus de n'avoir aucun fondement en droit, ne trouve aucune assise dans la preuve et repose donc sur des erreurs manifestes et dominantes. Lorsque le juge de première instance rejette le témoignage de M à cet égard, il commet une erreur puisqu'il le fait en s'appuyant sur une interprétation déraisonnable de plusieurs pièces versées au dossier. Tout au plus, la preuve démontre qu'une intention de se départir de ses actions a été exprimée par M, sans toutefois qu'il n'y ait eu d'entente quant à la façon dont il disposerait de ses actions.

Enfin, le délai de prescription applicable au recours exercé en application de l'art. 241 de la *LCSA* dépendra du fondement du recours. Lorsque le statut d'actionnaire a été à un moment reconnu au plaignant — comme c'est le cas en l'espèce —, et que celui-ci prétend que la société l'en a illégalement dépouillé, le recours est alors imprescriptible.

Jurisprudence

Citée par le juge Cromwell

Arrêt appliqué : *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560; **arrêts mentionnés :** *Premier Tech ltée c. Dollo*, 2015 QCCA 1159, autorisation d'appel refusée, 2016 CanLII 21792; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Ingles c. Tutkaluk Construction Ltd.*, 2000 CSC 12, [2000] 1 R.C.S. 298; *Martin c. Dupont*, 2016 QCCA 475; *Inspecteur général des institutions financières c. Assurances funéraires Rousseau et frère Ltée*, [1990] R.R.A. 473.

Citée par la juge en chef McLachlin

Arrêt appliqué : *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560.

Citée par la juge Côté (dissidente)

Smith c. Gow-Ganda Mines, Ltd. (1911), 44 R.C.S. 621; *Budd c. Gentra Inc.* (1998), 111 O.A.C. 288; *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560; *Journet c. Superchef Food Industries Ltd.*, [1984] C.S. 916; *Martin c. Dupont*, 2016 QCCA 475; *Paré c. Paré (Succession de)*, 2014 QCCA 1138; *Grusk c. Sparling* (1992), 44 C.A.Q. 219; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Bénard*

2002 CanLII 23768, aff'd 2004 CanLII 73057; *Regroupement des marchands actionnaires inc. v. Métro Inc.*, 2011 QCCS 2389; *Greenberg v. Gruber*, 2004 CanLII 14882.

Statutes and Regulations Cited

Act respecting the legal publicity of enterprises, CQLR, c. P-44.1.

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 24(4), 25(3), 34, 39(6), 49(4)(a), (13), 50(1)(c), 53(d), 60(1), 64, 65(3), 76, 79(1)(a), 115(3), 117(1), 118(7), 119(3), 121(a), 146, 238, 241, 243, 247.

Civil Code of Québec, arts. 1378, 1381, 1414, 1416, 1422, 1824, 1825, 2922, 2925, 2927.

Authors Cited

Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 7e éd., par Pierre-Gabriel Jobin et Nathalie Vézina. Cowansville, Qué.: Yvon Blais, 2013.

Campion, John A., Stephanie A. Brown and Alistair M. Crawley. "The Oppression Remedy: Reasonable Expectations of Shareholders", in *Law of Remedies: Principles and Proofs*, Special Lectures of the Law Society of Upper Canada. Scarborough, Ont.: Carswell, 1995, 229.

Crête, Raymonde, et Stéphane Rousseau. *Droit des sociétés par actions*, 3e éd. Montréal: Thémis, 2011.

Gaudet, Serge. "Inexistence, nullité et annulabilité du contrat: essai de synthèse" (1995), 40 *McGill L.J.* 291.

Hansmann, Henry, Reinier Kraakman and Richard Squire. "The New Business Entities in Evolutionary Perspective", [2005] *U. Ill. L. Rev.* 5.

Karim, Vincent. *Les obligations*, 4e éd. Montréal: Wilson & Lafleur, 2015.

Koehnen, Markus. *Oppression and Related Remedies*. Toronto: Thomson/Carswell, 2004.

Lafond, Pierre-Claude. *Précis de droit des biens*, 2e éd. Montréal: Thémis, 2007.

Lamontagne, Denys-Claude. *Biens et propriété*, 7e éd. Cowansville, Que.: Yvon Blais, 2013.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*, 2e éd. Montréal: Thémis, 2012.

Martel, Paul. *Business Corporations in Canada: Legal and Practical Aspects*. Toronto: Thomson Reuters, 2005 (loose-leaf updated 2016, release 6).

Morritt, David S., Sonia L. Bjorkquist and Allan D. Coleman. *The Oppression Remedy*. Toronto: Canada Law Book, 2004 (loose-leaf updated December 2015, release 17).

c. Gagnon, 2002 CanLII 23768, conf. par 2004 CanLII 73057; *Regroupement des marchands actionnaires inc. c. Métro Inc.*, 2011 QCCS 2389; *Greenberg c. Gruber*, 2004 CanLII 14882.

Lois et règlements cités

Code civil du Québec, art. 1378, 1381, 1414, 1416, 1422, 1824, 1825, 2922, 2925, 2927.

Loi canadienne sur les sociétés par actions, L.R.C. 1985, c. C-44, art. 24(4), 25(3), 34, 39(6), 49(4)a), (13), 50(1)c), 53d), 60(1), 64, 65(3), 76, 79(1)a), 115(3), 117(1), 118(7), 119(3), 121a), 146, 238, 241, 243, 247.

Loi sur la publicité légale des entreprises, RLRQ, c. P-44.1.

Doctrine et autres documents cités

Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 7e éd., par Pierre-Gabriel Jobin et Nathalie Vézina, Cowansville (Qc), Yvon Blais, 2013.

Campion, John A., Stephanie A. Brown and Alistair M. Crawley. « The Oppression Remedy : Reasonable Expectations of Shareholders », in *Law of Remedies : Principles and Proofs*, Special Lectures of the Law Society of Upper Canada, Scarborough (Ont.), Carswell, 1995, 229.

Crête, Raymonde, et Stéphane Rousseau. *Droit des sociétés par actions*, 3e éd., Montréal, Thémis, 2011.

Gaudet, Serge. « Inexistence, nullité et annulabilité du contrat : essai de synthèse » (1995), 40 *R.D. McGill* 291.

Hansmann, Henry, Reinier Kraakman and Richard Squire. « The New Business Entities in Evolutionary Perspective », [2005] *U. Ill. L. Rev.* 5.

Karim, Vincent. *Les obligations*, 4e éd., Montréal, Wilson & Lafleur, 2015.

Koehnen, Markus. *Oppression and Related Remedies*, Toronto, Thomson/Carswell, 2004.

Lafond, Pierre-Claude. *Précis de droit des biens*, 2e éd., Montréal, Thémis, 2007.

Lamontagne, Denys-Claude. *Biens et propriété*, 7e éd., Cowansville (Qc), Yvon Blais, 2013.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*, 2e éd., Montréal, Thémis, 2012.

Martel, Paul. *La société par actions au Québec*, vol. I, *Les aspects juridiques*, Montréal, Wilson & Lafleur, 2011 (feuilles mobiles mises à jour juin 2016, envoi nº 97).

Morritt, David S., Sonia L. Bjorkquist and Allan D. Coleman. *The Oppression Remedy*, Toronto, Canada

Peterson, Dennis H., and Matthew J. Cumming. *Shareholder Remedies in Canada*, 2nd ed. Markham, Ont.: LexisNexis, 2009 (loose-leaf updated August 2016, release 39).

Wegenast, F. W. *The Law of Canadian Companies*. Toronto: Carswell, 1979 (reissue of 1931 ed.).

APPEAL from a judgment of the Quebec Court of Appeal (Vézina, Gagnon and St-Pierre JJ.A.), 2014 QCCA 1515, [2014] AZ-51101093, [2014] J.Q. nº 8429 (QL), 2014 CarswellQue 10625 (WL Can.), affirming a decision of Poirier J., 2012 QCCS 1640, [2012] AZ-50849648, [2012] J.Q. nº 3574 (QL), 2012 CarswellQue 3855 (WL Can.). Appeal dismissed, Côté J. dissenting.

Claude Marseille, *Paul Martel* and *Caroline Dion*, for the appellant.

Hubert Camirand and *Marie-Geneviève Masson*, for the respondent.

The judgment of Abella, Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] In this oppression proceeding under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the underlying question is whether, as the appellant, Johnny Mennillo, alleges, the business or affairs of Intramodal inc. were carried on or conducted in a manner that was oppressive or unfairly prejudicial to or unfairly disregarded Mr. Mennillo's interests: s. 241(2) *CBCA*.

[2] The informal manner in which the parties dealt with each other and their lack of attention to proper documentation gave rise to some technical points of corporate law including how a share transfer can be properly registered and how a share

Law Book, 2004 (loose-leaf updated December 2015, release 17).

Peterson, Dennis H., and Matthew J. Cumming. *Shareholder Remedies in Canada*, 2nd ed., Markham (Ont.), LexisNexis, 2009 (loose-leaf updated August 2016, release 39).

Wegenast, F. W. *The Law of Canadian Companies*, Toronto, Carswell, 1979 (reissue of 1931 ed.).

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Vézina, Gagnon et St-Pierre), 2014 QCCA 1515, [2014] AZ-51101093, [2014] J.Q. nº 8429 (QL), 2014 CarswellQue 10625 (WL Can.), qui a confirmé une décision du juge Poirier, 2012 QCCS 1640, [2012] AZ-50849648, [2012] J.Q. nº 3574 (QL), 2012 CarswellQue 3855 (WL Can.). Pourvoi rejeté, la juge Côté est dissidente.

Claude Marseille, *Paul Martel* et *Caroline Dion*, pour l'appelant.

Hubert Camirand et *Marie-Geneviève Masson*, pour l'intimée.

Version française du jugement des juges Abella, Cromwell, Karakatsanis, Wagner, Gascon et Brown rendu par

LE JUGE CROMWELL —

I. Introduction

[1] La question qui, aux fins du présent pourvoi, sous-tend le recours pour abus intenté sur le fondement de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44 (« *LCSA* »), est celle de savoir si, comme l'allègue l'appelant, Johnny Mennillo, Intramodal inc. a abusé des droits de ce dernier ou s'est montrée injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts, par la façon dont elle a conduit ses activités commerciales ou ses affaires internes (par. 241(2) de la *LCSA*).

[2] Le caractère informel des rapports entre les parties et le peu d'attention que ces dernières ont porté à l'établissement des documents requis soulèvent certains points techniques du droit des sociétés, notamment en ce qui concerne la manière dont

transfer may be cancelled. However, the answer to the fundamental question of whether Mr. Mennillo was oppressed in the corporate law sense turns on which of two sharply different versions of the facts — one supported by Mr. Mennillo and the other by Intramodal's controlling shareholder, Mario Rosati — ought to be accepted.

[3] Mr. Mennillo claims that he was oppressed because he was an investor in Intramodal who was frozen out of equity participation by Mr. Rosati. Intramodal denies this and says that Mr. Mennillo, far from having been frozen out of the corporation, wanted to be removed as a director and shareholder and transferred his shares to Mr. Rosati.

[4] The trial judge completely rejected Mr. Mennillo's version of events and substantially accepted Intramodal's. The judge found that Mr. Mennillo agreed that he would remain a shareholder only so long as he was willing to guarantee the corporation's debts. He ultimately decided that he did not wish to do so and transferred his shares to Mr. Rosati. The failure to observe the formalities necessary to complete the transfer of the shares, the judge found, resulted from an error or oversight on the part of Mr. Rosati's lawyer.

[5] If the trial judge's findings of fact are accepted, as in my view they ought to be, Mr. Mennillo's oppression claim is groundless. The critical finding is that Mr. Mennillo did not wish to remain a shareholder and told Mr. Rosati to have him removed as such. On those findings, all the corporation can be accused of is sloppy paperwork. But sloppy paperwork on its own does not constitute oppression. Neither does the corporation and its controlling shareholder treating Mr. Mennillo exactly as he wanted to be treated. While some errors were made in the courts below on some points of corporate law, Mr. Mennillo's oppression claim was properly dismissed and I would dismiss his appeal.

un transfert d'actions peut être inscrit régulièrement ou annulé. Toutefois, la question fondamentale de savoir si M. Mennillo a fait l'objet d'un abus au sens du droit des sociétés dépend de la version des faits que l'on retient entre les deux, nettement différentes, offertes par M. Mennillo et Mario Rosati, l'actionnaire contrôlant d'Intramodal.

[3] M. Mennillo allègue l'abus de ses droits. Investisseur dans Intramodal, il aurait été exclu de toute participation au capital par M. Rosati. Intramodal nie l'abus et affirme que, loin d'avoir été évincé de la société, M. Mennillo ne voulait plus faire partie de ses administrateurs et de ses actionnaires et a transféré ses actions à M. Rosati.

[4] Le juge de première instance rejette en bloc la version des faits de M. Mennillo et retient essentiellement celle d'Intramodal. À son avis, M. Mennillo a convenu qu'il ne demeurerait actionnaire que tant qu'il serait disposé à garantir le passif de la société. Finalement, M. Mennillo y a renoncé et a transféré ses actions à M. Rosati. De l'avis du juge, ce serait une erreur ou un oubli de la part de l'avocat de M. Rosati qui expliquerait l'inobservation des formalités nécessaires pour mener à bien le transfert des actions.

[5] Si les conclusions de fait du juge de première instance sont justes, comme j'estime qu'elles le sont, le recours pour abus de M. Mennillo est sans fondement. Selon la conclusion cruciale, M. Mennillo n'a pas souhaité demeurer actionnaire et a demandé à M. Rosati de faire en sorte qu'il ne le soit plus. Partant, la seule chose que l'on peut reprocher à la société est de ne pas avoir observé les formalités. Or, cette inobservation ne saurait en soi constituer de l'abus. La façon dont la société et son actionnaire contrôlant ont considéré M. Mennillo, c'est-à-dire exactement comme il le voulait, ne saurait non plus constituer de l'abus. Bien que les juridictions inférieures aient commis des erreurs sur des points touchant au droit des sociétés, j'estime que l'allégation d'abus a été rejetée à raison et je suis d'avis de rejeter le pourvoi.

II. Overview of the Legal Context, Parties' Positions and Issues

A. *Legal Context*

[6] To understand the facts and issues, it is important to understand the legal framework in which they must be considered.

[7] All of the relief requested by Mr. Mennillo is based solely on his claim of oppression under s. 241 of the *CBCA*. Other claims that he might have made, but did not make, are irrelevant to this appeal and cannot be considered. That section provides:

241 (1) A complainant may apply to a court for an order under this section.

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

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

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

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

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

[8] The Court set out the nature and constituent elements of an oppression claim in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at paras. 53-94. The oppression remedy is inspired by the principles of equity: it gives courts a

II. Aperçu du contexte juridique, des thèses des parties et des questions en litige

A. *Contexte juridique*

[6] Pour bien comprendre les faits et les questions en litige, il importe de préciser le contexte juridique dans lequel ils doivent être examinés.

[7] Le redressement demandé par M. Mennillo prend entièrement appui sur son allégation d'abus formulée en application de l'art. 241 de la *LCSA*. Les autres allégations qu'il aurait pu formuler, mais qu'il n'a pas formulées, sont sans pertinence et ne peuvent être prises en compte. Voici le texte de cette disposition :

241 (1) Tout plaignant peut demander au tribunal de rendre les ordonnances visées au présent article.

(2) Le tribunal saisi d'une demande visée au paragraphe (1) peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;

c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[8] Dans l'arrêt *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, par. 53-94, la Cour fait état de la nature de l'allégation d'abus et de ses composantes. Le recours pour abus s'inspire des principes d'equity : le tribunal se

broad jurisdiction to enforce "not just what is legal but what is fair" (para. 58; see also *Premier Tech ltée v. Dollo*, 2015 QCCA 1159, leave to appeal refused, 2016 CanLII 21792 (S.C.C.)). Whether there has been oppression is judged according to "business realities" not "narrow legalities": *BCE*, at para. 58. Furthermore, "[w]hat is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play": para. 59.

[9] There are two elements of an oppression claim. The claimant must first "identify the expectations that he or she claims have been violated . . . and establish that the expectations were reasonably held": *BCE*, at para. 70. Then the claimant must show that those reasonable expectations were violated by conduct falling within the statutory terms, that is, conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder: para. 68; s. 241(2) *CBCA*.

[10] According to the trial judge's findings of fact, Mr. Mennillo agreed that he would remain a shareholder of the corporation on the condition that he guarantee its debts. He decided that he no longer wished to guarantee those debts and transferred his shares to Mr. Rosati. He could, therefore, have no reasonable expectation of being treated as a shareholder thereafter. He also could be thought to reasonably expect the corporation to ensure that the corporate formalities to register this arrangement would be observed. But the failure to do so (i.e. the conduct that "violated" those expectations) cannot be characterized as "oppressive, unfairly prejudicial or unfairly disregarding" of his interests. This was a two-person, private company in which the dealings between the parties were marked by extreme informality. As this Court said in *BCE*, "[c]ourts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company": para. 74. In substance, Mr. Mennillo was not oppressed but treated as he wanted the corporation to treat him. The failure of the company's lawyer to

voit conférer le vaste pouvoir d'imposer « le respect non seulement du droit, mais [aussi] de l'équité » (par. 58; voir aussi *Premier Tech ltée c. Dollo*, 2015 QCCA 1159, autorisation de pourvoi refusée (2016 CanLII 21792 (C.S.C.)). L'existence d'un abus tient à la « réalité commerciale », pas seulement aux « considérations strictement juridiques » (*BCE*, par. 58). En outre, le tribunal détermine ce qui est juste et équitable « selon les attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu » (par. 59).

[9] Deux choses incombent à celui qui allègue l'abus. D'abord, il doit « préciser quelles attentes ont censément été frustrées [. . .] et en établir le caractère raisonnable » (*BCE*, par. 70). Ensuite, il doit démontrer que ces attentes raisonnables ont été frustrées par un comportement visé par le libellé de la loi, à savoir le fait d'abuser des droits d'un détenteur de valeurs mobilières ou de se montrer injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts (par. 68; par. 241(2) de la *LCSA*).

[10] Suivant les conclusions de fait du juge de première instance, M. Mennillo avait convenu qu'il demeurerait actionnaire de la société à la condition d'en garantir le passif. Il avait ensuite fait savoir qu'il ne souhaitait plus être garant de ce passif et il avait cédé ses actions à M. Rosati. Il ne pouvait donc pas raisonnablement s'attendre à être considéré comme un actionnaire par la suite. Il était par contre concevable qu'il s'attende raisonnablement à ce que la société s'assure de l'observation des formalités alors requises pour inscrire l'accord. Mais l'omission de la société de s'en assurer (soit le comportement par lequel elle a « frustré » les attentes de l'intéressé) ne saurait être assimilée au fait d'abuser des droits de M. Mennillo ou de se montrer injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts. La société en cause était une société fermée constituée de deux personnes dont les rapports entre elles se caractérisaient par une absence totale de formalisme. Comme le dit la Cour dans *BCE*, « [i]l est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une

comply with the corporate law requirements to give effect to that intention is not oppression.

[11] Contrary to what my colleague Justice Côté concludes, the fact that a corporation fails to comply with the requirements of the *CBCA* does not, on its own, constitute oppression: paras. 166 and 195. The oppression remedy is a discretionary one that is equitable in nature: D. S. Morritt, S. L. Bjorkquist and A. D. Coleman, *The Oppression Remedy* (loose-leaf), at p. 5-10.4; D. H. Peterson and M. J. Cumming, *Shareholder Remedies in Canada* (2nd ed. (loose-leaf)), at p. 17-14. What may trigger the remedy is conduct that frustrates reasonable expectations, not simply conduct that is contrary to the *CBCA*. As I see it, my colleague's approach not only represents a significant departure from our jurisprudence, but as applied here permits Mr. Mennillo to use oppression proceedings as an instrument of oppression rather than as a remedy for it.

B. *Parties' Positions*

[12] Mr. Mennillo submits that he was unlawfully removed from the list of shareholders of the corporation through an amended declaration filed with the Registraire des entreprises of Quebec ("REQ") on July 18, 2005. He also argues that as a shareholder, he had the right to access the corporate records of the company during the usual business hours, a right which was denied to him until the fourth day of the trial in the Superior Court. Simply put, his oppression claim is that he is a shareholder and investor who was frozen out of the corporation.

[13] For its part, Intramodal says that Mr. Mennillo resigned as a director, asked not to be a shareholder and transferred his shares to Mr. Rosati. His advances of funds were fully repaid with a healthy bonus. Putting the corporation's position in its simplest terms, Mr. Mennillo did not want to be an equity shareholder and, as we shall see, he is no longer one.

petite société fermée qu'à ceux d'une société ouverte de plus grande taille » (par. 74). En somme, M. Mennillo n'a pas été victime d'abus, mais a été traité par la société comme il l'avait souhaité. Le fait que l'avocat de celle-ci n'a pas observé les formalités du droit des sociétés pour donner effet à cette volonté ne constitue pas de l'abus.

[11] Contrairement à ce que conclut ma collègue la juge Côté, l'inobservation des formalités de la *LCSA* par une société ne constitue pas en soi de l'abus (par. 166 et 195). Le recours pour abus est de nature discrétionnaire et a pour assise l'equity (D. S. Morritt, S. L. Bjorkquist et A. D. Coleman, *The Oppression Remedy* (feuilles mobiles), p. 5-10.4; D. H. Peterson et M. J. Cumming, *Shareholder Remedies in Canada* (2e éd. (feuilles mobiles)), p. 17-14). Peut ouvrir droit au recours le comportement qui frustre l'attente raisonnable, mais pas celui qui est seulement contraire à la *LCSA*. J'estime que non seulement l'approche de ma collègue rompt sensiblement avec la jurisprudence de la Cour, mais aussi que, en l'espèce, elle permet à M. Mennillo de faire du recours pour abus un instrument d'abus plutôt que de redressement.

B. *Thèses des parties*

[12] M. Mennillo soutient qu'Intramodal a illégalement rayé son nom de la liste des actionnaires dans une déclaration modificative déposée auprès du Registraire des entreprises du Québec (« REQ ») le 18 juillet 2005. Il prétend par ailleurs que, en tant qu'actionnaire, il avait le droit de consulter les registres de la société pendant les heures normales de bureau, mais qu'on lui a refusé l'exercice de ce droit jusqu'au quatrième jour du procès en Cour supérieure. Autrement dit, il s'agirait d'un actionnaire et investisseur qu'on aurait évincé de la société.

[13] Intramodal rétorque que M. Mennillo a démissionné de son poste d'administrateur, qu'il a demandé à ne plus être actionnaire et qu'il a cédé ses actions à M. Rosati. Il y a eu remboursement intégral des sommes avancées par M. Mennillo et versement d'une prime généreuse à ce dernier. L'entreprise soutient en somme que M. Mennillo ne voulait pas être un actionnaire participatif et, comme nous le verrons, qu'il ne l'est plus.

C. *Issues*

[14] Putting aside questions of prescription and remedy, Mr. Mennillo raises two legal points and one factual point on appeal.

[15] In relation to the law, he maintains:

(a) The trial judge erred in finding that he had transferred his shares to Mr. Rosati when no such transfer was validly effected in law (2012 QCCS 1640); and

(b) The majority of the Court of Appeal erred in concluding that a share subscription could be retroactively cancelled by simple verbal agreement and without complying with the required legal formalities (2014 QCCA 1515).

[16] In relation to the facts, Mr. Mennillo relies on the conclusions of the dissenting judge in the Court of Appeal and says that the trial judge erred in rejecting his claim that he is a shareholder of the corporation.

[17] I agree with Mr. Mennillo in relation to the second legal point relating to corporate law. However, this point has no impact on the result of the oppression proceedings. The trial judge found that in May 2005, Mr. Mennillo did not want to remain a shareholder because he no longer wanted to be guarantor of all Intramodal's debts. Some corporate formalities of the transfer of shares from Mr. Mennillo to Mr. Rosati were not completed as a result of an error or oversight on the part of Mr. Rosati's lawyer. From that date, Mr. Mennillo agreed to be simply a lender to his friend Mr. Rosati. As of May 25, 2005, Mr. Mennillo ceased to be a shareholder in the corporation. That is exactly how the corporation treated him. In my view, the dissenting justice in the Court of Appeal was wrong to overturn these findings of fact. There was, to be sure, some very sloppy paperwork. But in light of the key findings of fact, the corporation in substance simply treated Mr. Mennillo as he wanted to be treated and he was repaid all of the money he had loaned with a substantial bonus.

C. *Questions en litige*

[14] M. Mennillo soulève en appel deux points de droit et un point de fait sur lesquels je me penche sans égard aux questions de prescription et de redressement.

[15] S'agissant du droit, il fait valoir ce qui suit :

a) Le juge de première instance conclut à tort qu'il a cédé ses actions à M. Rosati alors qu'aucun transfert valable en droit n'a été effectué (2012 QCCS 1640);

b) Les juges majoritaires de la Cour d'appel ont tort de conclure qu'il est possible d'annuler rétroactivement une souscription d'actions par simple entente verbale, sans accomplir les formalités juridiques requises (2014 QCCA 1515).

[16] S'agissant des faits, M. Mennillo invoque les conclusions du juge dissident de la Cour d'appel et soutient que le juge de première instance rejette à tort sa prétention selon laquelle il est actionnaire de l'entreprise.

[17] Je donne raison à M. Mennillo quant au deuxième point qui touche au droit des sociétés, mais cela n'a aucune incidence sur l'issue du recours pour abus. Le juge de première instance conclut que, en mai 2005, M. Mennillo ne souhaitait plus être actionnaire, car il ne voulait plus être garant de la totalité du passif d'Intramodal. Certaines des formalités nécessaires au transfert des actions de M. Mennillo à M. Rosati n'ont pas été accomplies à cause d'une erreur ou d'un oubli de la part de l'avocat de M. Rosati. Dès ce moment, M. Mennillo a consenti à n'être qu'un simple prêteur vis-à-vis de son ami, M. Rosati. Le 25 mai 2005, M. Mennillo a cessé d'être actionnaire de la société et c'est exactement ainsi que la société l'a traité. À mon avis, le juge dissident de la Cour d'appel a tort d'infirmer ces conclusions de fait. Il y a certes eu un grand manque de formalisme, mais à la lumière de ces conclusions de fait cruciales, la société a pour l'essentiel simplement traité M. Mennillo comme il avait souhaité l'être et ce dernier a été remboursé de toutes les sommes prêtées en plus de toucher une prime substantielle.

III. Analysis

A. *The Factual Issue*

(1) Preliminary Observations

[18] The main question on which the outcome of the appeal depends is whether the trial judge made a reviewable error in finding that in May 2005, Mr. Mennillo did not wish to remain a shareholder because he no longer wanted to be the guarantor of all of Intramodal's debts and transferred his shares to Mr. Rosati. If these factual findings stand, Mr. Mennillo's oppression action is groundless: it was not oppressive, unfairly prejudicial to, or unfairly disregarding of his interests for the corporation to treat Mr. Mennillo as he himself asked to be treated. I recall that, as the Court said in *BCE*, in considering a claim in oppression, the courts should look at business realities not merely narrow legalities: para. 58.

[19] The appeal also raises some points of corporate law and of the law of prescription. These legal points, however, have no bearing on the ultimate disposition of the appeal. I will briefly address them after I set out my reasons for affirming the trial judge's fundamental conclusions.

(2) Overview of the Basic Facts

[20] In the winter of 2004, Messrs. Johnny Mennillo and Mario Rosati, two friends, discussed the possibility of creating a company. Mr. Mennillo would contribute the money to start up the business while Mr. Rosati would bring skills to ensure the success of a road transportation company. Mr. Rosati reserved the name "Intramodal" in April 2004.

[21] Mr. Rosati had the company incorporated on July 13, 2004. That same day, Intramodal's board of directors passed a resolution to accept notices of subscription to securities by Mr. Rosati and Mr. Mennillo and to issue 51 class "A" shares to Mr. Rosati and 49 shares of the same class to Mr. Mennillo. Both the

III. Analyse

A. *Le litige factuel*

(1) Remarques préliminaires

[18] L'objet principal du pourvoi est de savoir si le juge de première instance commet une erreur susceptible de contrôle lorsqu'il conclut que, en mai 2005, M. Mennillo ne souhaitait plus être actionnaire, car il ne voulait plus être garant de la totalité du passif d'Intramodal, de sorte qu'il a cédé ses actions à M. Rosati. Si ces conclusions de fait demeurent, le recours pour abus exercé par M. Mennillo est sans fondement : la société n'a pas abusé des droits de M. Mennillo et elle ne s'est pas montrée injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts puisqu'elle l'a traité comme il l'avait demandé. Rappelons que, comme le dit la Cour dans *BCE*, le tribunal saisi d'une allégation d'abus doit tenir compte de la réalité commerciale et pas seulement des considérations strictement juridiques (par. 58).

[19] Le pourvoi soulève par ailleurs quelques points en droit des sociétés ainsi qu'en droit de la prescription. Ces points de droit n'ont cependant aucune incidence sur l'issue du pourvoi. Je les examinerai brièvement une fois exposés les motifs pour lesquels je suis d'avis de confirmer les principales conclusions du juge de première instance.

(2) Aperçu des faits essentiels

[20] À l'hiver 2004, deux amis, MM. Mennillo et Rosati, ont envisagé la création d'une entreprise. M. Mennillo devait avancer les fonds de démarrage et M. Rosati, mettre ses compétences à contribution pour assurer la réussite d'une société de transport routier. En avril 2004, M. Rosati a réservé la dénomination « Intramodal ».

[21] Le 13 juillet 2004, M. Rosati constituait Intramodal en personne morale. Le même jour, le conseil d'administration d'Intramodal adoptait une résolution par laquelle les avis de souscription d'actions de MM. Rosati et Mennillo étaient acceptés et 51 actions de catégorie « A » étaient émises à M. Rosati,

notices of subscription and the resolution were signed by Mr. Rosati alone.

[22] It is worth mentioning at this point that many of the legal difficulties in this case have arisen as a result of the virtually complete lack of formality that accompanied the parties' business dealings. They rarely complied with the requirements of the *CBCA* and in fact almost never put anything in writing. They had neither a partnership nor a shareholders' agreement. They rarely or never exchanged emails or letters. Before Intramodal was incorporated, the roles that Messrs. Mennillo and Rosati respectively intended to fulfill in the company were agreed upon by a simple handshake. Once Intramodal was incorporated (on July 13, 2004), they became its directors and shareholders, but neither of them paid for their shares, contrary to the requirements of s. 25(3) *CBCA* and Mr. Mennillo's share certificate was never signed as required by s. 49(4)(a) *CBCA*.

[23] There was no written contract or indeed any other legal formality relating to Mr. Mennillo's advances of substantial amounts of money to Mr. Rosati. As evidence of the money provided for Intramodal by Mr. Mennillo, there are only two sheets of a Rolodex, marked up by Mr. Mennillo and initialed by Mr. Rosati.

[24] On May 25, 2005, Mr. Mennillo sent a letter to Intramodal in which he indicated that he was resigning as an officer and director of the company. He and Mr. Rosati give different accounts as to the reasons for and extent of his resignation. Whereas Intramodal argues that Mr. Mennillo transferred his shares to Mr. Rosati, Mr. Mennillo asserts that he never intended to stop being a shareholder of the company. On July 18, 2005, Daniel Ovadia, Intramodal's lawyer, filed an amending declaration with the REQ to indicate that Mr. Mennillo had been removed as a director and shareholder of the company.

[25] Between September 2005 and December 5, 2005, Mr. Mennillo advanced $145,000 to

49 à M. Mennillo. Tant les avis de souscription que la résolution n'ont été signés que par M. Rosati.

[22] Il convient de mentionner que, dans la présente affaire, bon nombre des problèmes d'ordre juridique tiennent à l'absence quasi totale de formalisme dans les relations d'affaires. Les parties n'ont que rarement observé les exigences de la *LCSA* et n'ont en fait presque jamais rien consigné par écrit. Elles n'ont pas non plus conclu de contrat de société ou de convention d'actionnaires. Elles ont rarement échangé des courriels ou des lettres, ou ne l'ont jamais fait. Avant la constitution d'Intramodal, MM. Mennillo et Rosati convenaient par une simple poignée de main des fonctions de l'un et de l'autre dans l'entreprise. Une fois Intramodal constituée en société (le 13 juillet 2004), ils en sont devenus les administrateurs et les actionnaires, mais aucun n'a versé la somme nécessaire pour libérer ses actions, contrairement aux exigences du par. 25(3) de la *LCSA*. En outre, le certificat d'actions de M. Mennillo n'a jamais été signé comme l'exige l'al. 49(4)a) de la *LCSA*.

[23] Les avances de fonds substantielles de M. Mennillo à M. Rosati n'ont été constatées par aucun contrat écrit et n'ont d'ailleurs fait l'objet d'aucune autre formalité juridique. La preuve des sommes ainsi versées à Intramodal se résume à deux fiches de *Rolodex* annotées par M. Mennillo et paraphées par M. Rosati.

[24] Le 25 mai 2005, M. Mennillo a fait parvenir à Intramodal sa lettre de démission à titre d'administrateur et de dirigeant de la société. Les versions de MM. Mennillo et Rosati diffèrent tant sur les motifs de ce geste que sur sa portée. Intramodal soutient que M. Mennillo a transféré ses actions à M. Rosati, tandis que M. Mennillo affirme qu'il n'a jamais eu l'intention de cesser d'être actionnaire de la société. Le 18 juillet 2005, l'avocat d'Intramodal, M^e^ Daniel Ovadia, a déposé auprès du REQ une déclaration modificative faisant état du retrait de M. Mennillo à titre d'administrateur et d'actionnaire de la société.

[25] Du mois de septembre 2005 au 5 décembre de la même année, M. Mennillo a avancé 145 000 $

Mr. Rosati. Intramodal began operating in December 2005, and Mr. Mennillo continued to advance money to Mr. Rosati. The amounts he advanced totalled $440,000, which included the $145,000 that had been paid in 2005. The two men met on two occasions in July 2007, and they do not agree about what took place at those meetings.

[26] According to Mr. Mennillo, he was with Mr. Rosati and another friend at the Rib'N Reef restaurant on July 14, 2007 when he noted that Intramodal was thriving and Mr. Rosati was now living very well. Upset about this, Mr. Mennillo complained that he was not sharing in the company's success. At a second meeting, on July 21, 2007, Mr. Mennillo asked that the amounts of his loans be repaid and that he receive his share of the profits generated by Intramodal. He rejected at that time an offer to transfer his shares to Mr. Rosati.

[27] According to Mr. Rosati, following the July 14 meeting, Mr. Mennillo was quite unhappy about having received no return on his $440,000 investment that had resulted in the start-up of a lucrative business. Mr. Rosati suggested that they meet a week later to resolve their differences. At that meeting, Mr. Rosati asked Mr. Mennillo what amount might satisfy him in order to put an end to their dispute. Mr. Mennillo fixed the amount at $150,000, which meant that the total debt amounted to $690,000, including interest at the annual rate of 10 percent and a bonus of $100,000.

[28] In October 2007, Mr. Rosati and Mr. Mennillo met several times together with Antoine Papadimitriou, Mr. Mennillo's accountant. According to Mr. Mennillo, the purpose of these meetings was to fix a price for the redemption of his shares. He claimed that it was at these meetings that his advisers had suggested that his advances ($440,000) be repaid using false invoices. Mr. Papadimitriou had also suggested that the $440,000 principal amount be increased by approximately 35 percent because the tax owing on it would be paid by Mr. Mennillo's management company, 147488 Canada Inc. This would raise the amount of the repayment to $690,000.

à M. Rosati. Les activités d'Intramodal ont débuté en décembre 2005, et M. Mennillo a continué de verser des sommes à M. Rosati. Au total, il aura avancé 440 000 $, ce qui comprend les 145 000 $ déjà versés en 2005. En juillet 2007, les deux hommes se sont rencontrés deux fois, mais conservent chacun un souvenir différent de ces rencontres.

[26] Selon la version de M. Mennillo, c'est lors d'un repas avec M. Rosati et un autre ami, le 14 juillet 2007, au restaurant Rib'N Reef, qu'il aurait constaté qu'Intramodal était devenue prospère et que M. Rosati menait un grand train de vie. Contrarié par la situation, il se serait plaint de ne bénéficier aucunement de la réussite de l'entreprise. Lors de la seconde rencontre, le 21 juillet 2007, il aurait demandé le remboursement des sommes prêtées et le versement de sa part des profits d'Intramodal. Il aurait alors rejeté l'offre de transférer ses actions à M. Rosati.

[27] Selon la version de M. Rosati, après la rencontre du 14 juillet, M. Mennillo se serait montré assez mécontent de l'absence de rendement de son investissement de 440 000 $, qui avait permis le démarrage d'une entreprise lucrative. M. Rosati aurait proposé une rencontre une semaine plus tard pour régler le différend puis, lors de cette rencontre, il aurait demandé à M. Mennillo de lui indiquer quel montant pourrait le satisfaire et mettre fin à la mésentente. M. Mennillo aurait alors fixé ce montant à 150 000 $ de sorte que la créance totale s'élève à 690 000 $, y compris l'intérêt au taux annuel de 10 p. 100 et une prime de 100 000 $.

[28] En octobre 2007, de nombreuses rencontres ont eu lieu entre MM. Rosati et Mennillo et le comptable de ce dernier, Antoine Papadimitriou. Selon M. Mennillo, ces rencontres avaient pour but de fixer le prix de rachat de ses actions. Il prétend que c'est à l'occasion de ces rencontres que ses conseillers lui ont proposé d'obtenir le remboursement de ses avances (440 000 $) au moyen de fausses factures. M. Papadimitriou aurait en outre proposé de majorer d'environ 35 p. 100 le capital de 440 000 $ puisque cette somme serait imposée entre les mains de la société de gestion de M. Mennillo, 147488 Canada inc. Suivant ce scénario, le montant du remboursement se serait élevé à 690 000 $.

[29] As for Mr. Rosati, he claims to have attended these meetings alone. He also claims that the purpose of the negotiations was instead to increase the amount of the repayment that had previously been agreed upon in July 2007. He maintains that Paolo Carzoli, a tax specialist, suggested that, to enable Mr. Mennillo to claim the capital gains exemption, the company's books be corrected such that Mr. Mennillo would receive 49 common shares, which he would then sell to Mr. Rosati. Mr. Rosati rejected this.

[30] The money Mr. Mennillo had advanced to Mr. Rosati was repaid in its entirety between July 2006 and December 7, 2009. This was done by means of cheques issued by Intramodal for the payment of false invoices issued by 147488 Canada Inc. for "consultation fees" or "management fees". The total amount paid by Intramodal to Mr. Mennillo's management company was $690,000.

[31] On December 7, 2009, at a meeting in a restaurant, Mr. Rosati gave Mr. Mennillo a cheque for $40,000 marked "Full and Final Payment". A few days later, Mr. Mennillo consulted his lawyer, Israel Kaufman, about this note. According to Mr. Mennillo, that was when he first understood that he was no longer a shareholder of Intramodal.

[32] On February 25, 2010, Mr. Kaufman sent Intramodal a demand letter. Claiming that Intramodal and Mr. Rosati had unduly and wrongfully stripped him of his status as a shareholder, Mr. Mennillo applied for an oppression remedy against Intramodal on September 7, 2010.

(3) Findings of Fact at First Instance

[33] Poirier J. began by stating that the case before him essentially turned on the credibility of the witnesses. He then rejected Mr. Mennillo's version of the facts in its entirety. He concluded that as of May 25, 2005, Mr. Mennillo

[29] M. Rosati dit pour sa part s'être présenté seul à ces rencontres et que les négociations visaient plutôt à augmenter le montant du remboursement déjà convenu en juillet 2007. Afin que M. Mennillo puisse profiter de la déduction pour gains en capital, un avocat fiscaliste, M^e^ Paolo Carzoli, lui aurait conseillé de rectifier les registres de la société de façon qu'il reçoive 49 actions ordinaires et les vende à M. Rosati, ce que ce dernier aurait refusé.

[30] Les avances de fonds de M. Mennillo à M. Rosati ont été entièrement remboursées entre le mois de juillet 2006 et le 7 décembre 2009. Le remboursement s'est fait par chèques d'Intramodal sur présentation de fausses factures établies par 147488 Canada inc. pour des « consultations » (« *consultations fees* ») ou de la « gestion » (« *management fees* »). La somme totale versée par Intramodal à la société de gestion de M. Mennillo se monte à 690 000 $.

[31] Le 7 décembre 2009, lors d'une rencontre dans un restaurant, M. Rosati a remis à M. Mennillo un chèque de 40 000 $ portant la mention « *Full and Final Payment* » (règlement total et définitif). Quelques jours plus tard, M. Mennillo a consulté son avocat, M^e^ Israel Kaufman, au sujet de cette mention. C'est alors qu'il aurait compris qu'il n'était plus actionnaire d'Intramodal.

[32] Le 25 février 2010, M^e^ Kaufman a fait parvenir une mise en demeure à Intramodal. Le 7 septembre 2010, M. Mennillo a intenté contre Intramodal un recours pour abus dans le cadre duquel il alléguait qu'Intramodal et M. Rosati l'avaient dépouillé indûment et illégalement de sa qualité d'actionnaire.

(3) Conclusions de fait tirées en première instance

[33] Le juge Poirier affirme d'abord que l'issue de l'affaire dont il est saisi repose essentiellement sur la crédibilité des témoins, puis il rejette en bloc la version de M. Mennillo. Il conclut que, à compter du 25 mai 2005, M. Mennillo

[TRANSLATION] refused to participate in this venture [that is, to be an equity shareholder in Intramodal] and asked to be removed from the company as a shareholder and a director effective May 25, 2005. As of that date, Mennillo agreed only to be a lender of $440,000 to his friend Rosati. The failure to complete the transfer of Mennillo's shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer.

Since May 25, 2005, Mennillo has no longer been a shareholder or director of Intramodal. [paras. 74-75 (CanLII)]

[34] It is clear from a careful reading of the trial judge's reasons that he understood that Mr. Mennillo would cease to be a shareholder as a result of transferring his shares to Mr. Rosati. In the judge's view, Mr. Mennillo had more than a mere intention of being removed from the company; he found that Mr. Mennillo transferred his shares to Mr. Rosati and ceased to hold any shares in Intramodal. There was a basis for this conclusion in the evidence notwithstanding that the evidence was admittedly confused and confusing. However, the critical finding for the purposes of the substance of the oppression claim was that as of May 25, 2005, Mr. Mennillo did not wish to be a shareholder and asked to be removed. On that point, Mr. Rosati's evidence was unshaken and accepted by the trial judge.

[35] The judge's conclusions and his rejection of Mr. Menillo's version of events were based on the following findings of fact:

(i) The reason given by Mr. Mennillo for his resignation as a director of Intramodal (i.e. that Mr. Rosati didn't want a potential client, namely Labatt Breweries ("Labatt"), to know that Mr. Mennillo was involved in the corporation) was false.

(ii) The funds advanced by Mr. Mennillo, starting before Intramodal had been incorporated, were loans and were not advanced as investments in the corporation.

(iii) The figure 250,000 appearing on the "Rolodex record", which also showed all the amounts

a refusé cette aventure [soit le fait d'être actionnaire participatif d'Intramodal] et a demandé son retrait de la compagnie à titre d'actionnaire et d'administrateur à compter du 25 mai 2005. À compter de cette date, [M.] Mennillo a accepté de n'être que le prêteur d'une somme de 440 000 $ à son ami [M.] Rosati. Le fait que la cession des actions de [M.] Mennillo à [M.] Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de l'avocat de [M.] Rosati.

Depuis le 25 mai 2005, [M.] Mennillo n'est plus détenteur d'aucune action ni administrateur de Intramodal. [par. 74-75 (CanLII)]

[34] Il ressort de la lecture attentive de ses motifs que, pour le juge, M. Mennillo cessait d'être actionnaire dès le transfert de ses actions à M. Rosati. À son avis, M. Mennillo n'a pas seulement eu l'intention de se retirer de la société, mais a cédé ses actions à M. Rosati et cessé d'être actionnaire d'Intramodal. Cette conclusion a une assise dans la preuve même si, de l'avis de tous, cette dernière est confuse et source de confusion. Toutefois, selon la conclusion cruciale sur le bien-fondé de l'allégation d'abus, en date du 25 mai 2005, M. Mennillo ne souhaitait plus être actionnaire et a demandé son retrait. Sur ce point, le témoignage de M. Rosati demeure constant, et le juge y ajoute foi.

[35] Les conclusions du juge et le rejet par ce dernier de la version de M. Mennillo reposent sur le constat des faits suivants :

(i) Le motif invoqué par M. Mennillo pour démissionner à titre d'administrateur d'Intramodal (à savoir que M. Rosati ne voulait pas que La Brasserie Labatt (« Labatt »), un client éventuel, sache que M. Mennillo avait des intérêts dans la société) était faux.

(ii) Les sommes avancées par M. Mennillo avant la constitution en société d'Intramodal étaient des prêts, non des investissements dans la société.

(iii) Le montant de 250 000 $ qui figure sur le *Rolodex*, lequel fait état de toutes les sommes

advanced by Mr. Mennillo, corresponded to the amount that Mr. Mennillo and Mr. Rosati had agreed on in July 2007 and that had served to establish the amount of the final payment ($440,000 + $250,000 = $690,000).

(iv) Two documents relating to an insurance policy taken out on the lives of Mr. Mennillo and Mr. Rosati, the beneficiary of which was Intramodal, proved, first, that Mr. Rosati believed as of August 15, 2006 that he was the sole shareholder and director of Intramodal and, second, that Mr. Mennillo was only a creditor of the company.

(v) In a letter from Mr. Kaufman, Mr. Mennillo's lawyer, dated October 31, 2007, no mention was made of financing for the purchase of shares, as what was referred to was instead the acknowledgment of a debt.

(vi) In a memorandum dated November 26, 2007, Mr. Carzoli, a tax adviser retained by Mr. Papadimitriou (Mr. Mennillo's accountant), described the ownership of shares in Intramodal as of the fall of 2007 and concluded from it that Mr. Mennillo was no longer a shareholder of the company at that time.

(vii) The demand letter sent to Intramodal by Mr. Kaufman on February 25, 2010 showed that Mr. Mennillo knew he was no longer a shareholder and that this had been the case since May 2005, when he had resigned as a director and transferred his shares.

(viii) As could be seen in Intramodal's books, there was a common shares certificate in Mr. Mennillo's name. However, it was not signed, and the same was true on the share transfer form on the back, which contained only the nominative information. These books also contained a resolution dated May 25, 2005 concerning the transfer of the shares from Mr. Mennillo to Mr. Rosati. If the transfer was not completed, this was the result of an error or oversight on the part of Mr. Rosati's lawyer.

avancées par M. Mennillo, correspond à la somme dont ont convenu MM. Mennillo et Rosati en juillet 2007 et qui a servi à établir le montant du remboursement total (440 000 $ + 250 000 $ = 690 000 $).

(iv) Les deux documents relatifs à l'assurance contractée sur la vie de M. Mennillo et celle de M. Rosati et dont le bénéficiaire était Intramodal établissent, d'une part, que M. Rosati se croyait, depuis le 15 août 2006, seul actionnaire et administrateur d'Intramodal et, d'autre part, que M. Mennillo n'était que créancier de la société.

(v) Dans une lettre de l'avocat de M. Mennillo, M[e] Kaufman, datée du 31 octobre 2007, il n'est nullement fait mention du financement d'un éventuel achat d'actions, mais plutôt d'une reconnaissance de dette.

(vi) Dans un mémorandum en date du 26 novembre 2007, M[e] Carzoli, un avocat fiscaliste dont M. Papadimitriou (le comptable de M. Mennillo) retenait les services, décrit l'actionnariat d'Intramodal à l'automne 2007 et conclut que M. Mennillo n'est plus, à ce moment, actionnaire de la société.

(vii) La mise en demeure transmise par M[e] Kaufman à Intramodal le 25 février 2010 montre que M. Mennillo savait qu'il n'était plus actionnaire, et ce, depuis mai 2005, lorsqu'il avait démissionné à titre d'administrateur et transféré ses actions.

(viii) Les registres d'Intramodal révèlent l'existence d'un certificat d'actions ordinaires au nom de M. Mennillo. Or, celui-ci n'est pas signé, non plus que le formulaire de transfert d'actions figurant à l'endos, qui ne contient que des renseignements nominatifs. Par ailleurs, ces registres contiennent une résolution datée du 25 mai 2005 portant sur le transfert des actions de M. Mennillo à M. Rosati. Si le transfert des actions de M. Mennillo à M. Rosati n'a pas été effectué, c'est à cause d'une erreur ou d'un oubli de la part de l'avocat de M. Rosati.

(ix) An out-of-court examination of Mr. Mennillo on October 28, 2010 supported the view that he had acknowledged that he no longer wanted to be a shareholder of Intramodal as of May 2005. He mentioned several times in the course of that examination that he had removed himself as a shareholder of Intramodal, but then corrected himself to say that he had only resigned as a director. Moreover, the date he gave as the one at which he had learned he was no longer a shareholder was not the one specified in his motion to institute proceedings and also differed from the one specified in his affidavit of July 29, 2010. The trial judge found that a revelation as important as that should have made an impression on Mr. Mennillo.

(4) Mr. Mennillo's Position With Respect to These Findings

[36] Mr. Mennillo relies on the conclusions of the dissenting judge who found a number of errors in the reasoning of the trial judge which justified setting aside his findings of fact. I will consider each in turn.

(a) *The Reason Mr. Mennillo Gave for Resigning as a Director*

[37] The trial judge found that Mr. Mennillo's explanation of why he had resigned as a director in May 2005 was false.

[38] Mr. Mennillo's version was that Labatt wished to review Intramodal's books and to visit its premises. He said that his involvement with the company would not be favourable in Labatt's eyes because of his activities in hydroponic greenhouses and the sale of tobacco products. Mr. Mennillo placed this visit by Labatt at a time when Intramodal was acquiring important transportation equipment and he referred repeatedly in his testimony to the fact that Labatt would come to visit the premises.

[39] The trial judge found, however, that Mr. Mennillo's resignation could not have been linked to

(ix) L'interrogatoire préalable de M. Mennillo le 28 octobre 2010 confirme l'opinion selon laquelle ce dernier a reconnu avoir souhaité ne plus être actionnaire d'Intramodal à partir du mois de mai 2005. Lors de cet interrogatoire, il a mentionné à quelques reprises qu'il avait démissionné comme actionnaire d'Intramodal, pour se reprendre ensuite et affirmer que cette démission n'était qu'à titre d'administrateur. De plus, la date à laquelle il dit avoir appris qu'il n'était plus actionnaire ne correspond pas à celle indiquée dans sa requête introductive d'instance et diffère également de celle qui figure dans son affidavit du 29 juillet 2010. Selon le juge de première instance, le moment de cette révélation si importante aurait dû imprégner la mémoire de M. Mennillo.

(4) Thèse de M. Mennillo sur ces conclusions

[36] M. Mennillo invoque les conclusions du juge dissident de la Cour d'appel, à savoir que, dans ses motifs, le juge de première instance commet un certain nombre d'erreurs qui justifient l'infirmation de ses conclusions de fait. Je les examine tour à tour.

a) *Le motif invoqué par M. Mennillo pour démissionner à titre d'administrateur*

[37] Le juge de première instance conclut que le motif invoqué par M. Mennillo pour démissionner à titre d'administrateur en mai 2005 était faux.

[38] Selon M. Mennillo, Labatt voulait examiner les registres d'Intramodal et visiter ses locaux. Il dit que Labatt aurait vu d'un mauvais œil sa participation dans l'entreprise à cause de ses activités dans le domaine des serres hydroponiques et celui de la vente de produits du tabac. Il fait coïncider la visite des représentants de Labatt avec l'acquisition d'équipements de transport importants par Intramodal et il mentionne plusieurs fois dans son témoignage la visite des locaux d'Intramodal par Labatt.

[39] Le juge de première instance conclut cependant que la démission de M. Mennillo ne peut avoir

the examination of Intramodal's books by representatives of Labatt because at the time, Intramodal had no equipment or premises. In any case, Mr. Mennillo's explanation made no sense because his resignation as a director would not make him disappear from the corporation's books if, as he claimed, he was a shareholder. The judge also referred to the inconsistencies in Mr. Mennillo's evidence in relation to this resignation.

[40] The dissenting judge in the Court of Appeal found that the trial judge had erred by setting aside Mr. Mennillo's version of events. He reasoned that although Intramodal did not have any equipment, it was engaging in some public relations activities at the time of the proposed visit. He also thought that Mr. Mennillo's explanation made sense in light of the fact that Labatt would not likely be concerned if Mr. Mennillo's involvement was only as a minority shareholder and, in any event, the problem could have been resolved by Mr. Mennillo transferring his shares to his management company.

[41] Respectfully, there was no basis for the dissenting judge to set aside the trial judge's rejection of Mr. Mennillo's explanation of why he had resigned as a director. As the majority of the Court of Appeal pointed out, Mr. Mennillo linked Labatt's visit to a time when Intramodal was acquiring transportation equipment. But it was clear that Intramodal was not doing so in the time leading up to Mr. Mennillo's resignation in May 2005. I would add that Mr. Mennillo also linked the visit to a time when Labatt could visit the premises. But this made no sense because Intramodal had no premises as of the date of Mr. Mennillo's resignation as a director. Moreover, the trial judge made no error in concluding that if Mr. Mennillo stayed on as a shareholder, his involvement would be obvious not only from the books of the corporation but also from the public register.

[42] There was no clear and determinative error on the part of the trial judge with respect to this point.

été liée à l'examen des registres d'Intramodal par les représentants de Labatt, car Intramodal ne possédait alors ni équipements ni locaux. Quoi qu'il en soit, l'explication de M. Mennillo ne se tient pas, car sa démission à titre d'administrateur n'aurait pas fait disparaître son nom des registres de la société si, comme il le prétend, il était demeuré actionnaire. Le juge invoque également les incohérences de son témoignage sur sa démission.

[40] Le juge dissident de la Cour d'appel conclut que le juge de première instance écarte à tort la version des faits de M. Mennillo. Il explique que même si Intramodal n'avait pas d'équipement, elle se livrait à certaines activités de relations publiques au moment où devait avoir lieu la visite. De plus, l'explication de M. Mennillo se tient puisque Labatt ne se serait pas vraisemblablement inquiétée de la participation de M. Mennillo au seul titre d'actionnaire minoritaire et que, de toute façon, le problème aurait pu être résolu par le simple transfert de ses actions à sa société de gestion.

[41] En tout respect, aucun fondement ne permettait au juge dissident d'écarter la décision du juge de première instance de ne pas ajouter foi à l'explication de sa démission à titre d'administrateur offerte par M. Mennillo. Comme le soulignent les juges majoritaires de la Cour d'appel, M. Mennillo fait coïncider la visite des représentants de Labatt avec l'acquisition d'équipements de transport par Intramodal. Or, il appert clairement que ce n'est pas ce que faisait Intramodal au cours de la période qui a précédé la démission de M. Mennillo en mai 2005. J'ajoute que M. Mennillo fait également coïncider la visite avec une période où Labatt aurait pu visiter les locaux, ce qui était invraisemblable, car Intramodal n'en disposait pas le jour de la démission de M. Mennillo à titre d'administrateur. Qui plus est, le juge de première instance n'a pas tort de conclure que si M. Mennillo était demeuré actionnaire, sa participation dans la société aurait été évidente à la lecture non seulement des registres de l'entreprise, mais aussi du registre public.

[42] Le juge de première instance ne commet aucune erreur manifeste et déterminante sur ce point.

(b) *The Life Insurance Documents*

[43] The dissenting judge took issue with the trial judge's reliance on documents relating to a life insurance in which Mr. Rosati indicated that he was the sole shareholder of the corporation. The dissenting judge thought that these statements needed to be treated with caution as they originated with Mr. Rosati and, in addition, it was hard to understand why, if Mr. Mennillo was simply a creditor, Intramodal would insure his life. However, as the majority of the Court of Appeal pointed out, Mr. Rosati was dealing with a broker who had done business with Mr. Mennillo for more than 20 years. The trial judge was entitled to take into account that in September 2006, Mr. Rosati was openly claiming, in dealings with Mr. Mennillo's insurance broker, that Mr. Mennillo was not a shareholder in the corporation. The trial judge could well conclude that such behaviour on Mr. Rosati's part enhanced the credibility of his theory. There was certainly no basis to interfere with the trial judge's findings in this regard.

(c) *The Carzoli Memorandum*

[44] The dissenting judge was also of the view that the trial judge had misinterpreted a memo prepared by Mr. Carzoli, a tax specialist retained by Mr. Mennillo's accountant, Mr. Papadimitriou.

[45] The trial judge noted that, in a memo prepared after a meeting with Mr. Mennillo's accountant, Mr. Carzoli wrote that "[t]he minute book of the company indicates that the shares are owned by only one shareholder . . . . The other shareholder . . . was only an investor in the company": para. 50. The judge took this as some evidence that Mr. Mennillo did not believe himself to be a shareholder as of the date of the memorandum (i.e. November 26, 2007).

[46] The dissenting judge thought that this was an erroneous inference because Mr. Carzoli explained in the rest of the memorandum that the register needed correction in order to reflect the reality that Mr. Mennillo was in fact a shareholder.

b) *Les documents relatifs à l'assurance-vie*

[43] Le juge dissident reproche au juge de première instance de se fonder sur des documents d'assurance-vie dans lesquels M. Rosati dit être l'unique actionnaire de la société. Il estime que cette affirmation doit être considérée avec circonspection dans la mesure où M. Rosati en est l'auteur. De plus, on comprend mal pourquoi Intramodal aurait assuré la vie de M. Mennillo s'il n'avait été qu'un simple créancier. Toutefois, comme le font observer les juges majoritaires de la Cour d'appel, M. Rosati retenait les services d'un courtier qui faisait affaire avec M. Mennillo depuis plus de 20 ans. Le juge de première instance pouvait donc tenir compte du fait que, en septembre 2006, M. Rosati affirmait ouvertement, lorsqu'il avait affaire au courtier d'assurance de M. Mennillo, que ce dernier n'était pas actionnaire de la société. Il pouvait très bien conclure que le comportement de M. Rosati ajoutait à la véracité de sa thèse. Il n'y avait assurément aucune raison valable d'intervenir à l'égard des conclusions du juge sur ce point.

c) *Le mémorandum de M^e^ Carzoli*

[44] Le juge dissident est également d'avis que le juge de première instance interprète mal le mémorandum de M^e^ Carzoli, un avocat fiscaliste dont le comptable de M. Mennillo, M. Papadimitriou, retenait les services.

[45] Le juge de première instance indique que, dans un mémorandum rédigé après sa rencontre avec le comptable de M. Mennillo, M^e^ Carzoli écrit : [TRADUCTION] « [l]e registre des procès-verbaux de la société indique que les actions n'appartiennent qu'à un seul actionnaire [. . .] L'autre actionnaire [. . .] n'est qu'un investisseur de l'entreprise » (par. 50). Cet élément prouve selon lui que M. Mennillo ne se croyait pas actionnaire à la date du mémorandum (soit le 26 novembre 2007).

[46] Le juge dissident estime qu'il s'agit d'une inférence erronée, car dans le reste de son mémo, M^e^ Carzoli explique que le registre doit être rectifié afin de constater que M. Mennillo est en fait actionnaire. Il conclut également du mémorandum que

The dissenting judge was also of the view that the memorandum showed that Mr. Carzoli's strategy was based on the premise that Mr. Mennillo was a shareholder.

[47] However, as the majority in the Court of Appeal pointed out, the statement that there was only one shareholder was made to Mr. Mennillo's accountant and yet passed in silence. Moreover, as the trial judge and the majority further noted, the memorandum was inconsistent with Mr. Mennillo's testimony that he had only learned that he was not a shareholder in winter of 2009 given that the memorandum was dated roughly two years before.

[48] Once again, the trial judge's reliance on the Carzoli memorandum did not provide an appropriate basis for appellate intervention in relation to the trial judge's rejection of Mr. Mennillo's evidence.

(d) *The October 31, 2007 Letter*

[49] The dissenting judge also took issue with the trial judge's reliance on an October 31, 2007 letter from Mr. Mennillo's lawyer, Mr. Kaufman. In the dissenting judge's view, a careful reading of that letter showed that it was not contrary to Mr. Mennillo's position.

[50] The trial judge noted that while Messrs. Kaufman and Mennillo took the position that this letter was directed at putting in place financing to permit Mr. Rosati to buy Mr. Mennillo's shares, the letter itself said nothing about a share purchase but rather was drafted in terms of an acknowledgment of debt. The majority of the Court of Appeal saw nothing wrong with the trial judge's treatment of this letter and nor do I. It was open to the judge to infer from the letter, and particularly the absence of any mention of share purchase in it, that it would be unlikely to omit mention of that element in light of Mr. Mennillo's contention that he had never withdrawn as a shareholder.

la stratégie proposée par M[e] Carzoli supposait que M. Mennillo soit actionnaire.

[47] Toutefois, comme le signalent les juges majoritaires de la Cour d'appel, la déclaration selon laquelle il n'y a qu'un seul actionnaire a été faite au comptable de M. Mennillo, mais elle a pourtant été passée sous silence. Qui plus est, comme le font observer le juge de première instance et les juges majoritaires de la Cour d'appel, le témoignage de M. Mennillo selon lequel il n'aurait appris qu'à l'hiver 2009 qu'il n'était pas actionnaire ne concorde pas avec le fait que le mémorandum a été rédigé environ deux ans auparavant.

[48] Encore une fois, ce n'est pas parce que le juge de première instance s'appuie sur le mémorandum de M[e] Carzoli que la Cour d'appel est admise à intervenir quant à sa décision d'écarter le témoignage de M. Mennillo.

d) *La lettre du 31 octobre 2007*

[49] Le juge dissident déplore aussi le fait que le juge de première instance se fonde sur une lettre de l'avocat de M. Mennillo, M[e] Kaufman, datée du 31 octobre 2007. Selon lui, une lecture attentive révèle que cette lettre ne va pas à l'encontre de la thèse de M. Mennillo.

[50] Le juge de première instance fait remarquer que même si M[e] Kaufman et M. Mennillo ont fait valoir que cette lettre visait un montage financier qui aurait permis à M. Rosati d'acheter les actions de M. Mennillo, la lettre comme telle ne fait pas mention d'un achat d'actions et revêt plutôt la forme d'une reconnaissance de dette. Les juges majoritaires de la Cour d'appel n'ont rien à redire, et moi non plus, sur ce que le juge de première instance conclut de la lettre. Il lui était loisible d'en inférer, surtout en l'absence de toute mention d'un achat d'actions, que l'omission d'une telle mention était invraisemblable au vu de la prétention de M. Mennillo selon laquelle il n'avait jamais renoncé à sa qualité d'actionnaire.

(e) *The February 25, 2010 Letter*

[51] Finally, the dissenting judge was of the view that the trial judge had drawn erroneous inferences from the demand letter dated February 25, 2010 sent to Intramodal by Mr. Mennillo's lawyer, Mr. Kaufman. This letter referred to the alleged request that Mr. Mennillo "resign from the company" because of the interest on the part of Labatt and alleged that his share of the company had not been remitted to him following his resignation as promised.

[52] The trial judge used this letter to support the inference that, as of May 2005 when he submitted his resignation as a director, Mr. Mennillo knew that he was no longer a shareholder and, as well, to infer the date at which Mr. Mennillo stopped being a shareholder.

[53] The dissenting judge in the Court of Appeal was of the view that this letter did not support these inferences. In his opinion, the use by a lawyer (Mr. Kaufman) of the phrase "resign from the company" could not refer to anything but Mr. Mennillo's resignation as a director; it could not be understood to encompass Mr. Mennillo's shareholder status. Moreover, the letter insisted that Mr. Mennillo was a 50 percent partner in the corporation. The dissenting judge saw in this letter a clear expression that [TRANSLATION] "Mennillo still considered himself a shareholder of (partner in) Intramodal, holding almost 50% of the shares, and as such he was entitled to a share of the profits in the same proportion": para. 110 (CanLII).

[54] Once again, however, there was no basis for appellate intervention with respect to the trial judge's reliance on this letter. I agree with the reasons of the majority of the Court of Appeal for rejecting the dissenting judge's contention:

[TRANSLATION] It may be possible to disagree about how to interpret this letter, but the Judge's interpretation does not seem to me to be "clearly wrong"; indeed, it is easy to defend. Mennillo is claiming $1M, *inter alia*,

e) *La mise en demeure du 25 février 2010*

[51] Enfin, le juge dissident estime que le juge de première instance tire des conclusions erronées de la mise en demeure du 25 février 2010 que l'avocat de M. Mennillo, M[e] Kaufman, a fait parvenir à Intramodal. Le document fait mention de la demande qui aurait été faite à M. Mennillo de [TRADUCTION] « démissionner de la société » à cause de l'intérêt manifesté par Labatt et ajoute que la participation de M. Mennillo dans l'entreprise ne lui a pas été rendue après sa démission comme on le lui avait promis.

[52] Le juge de première instance s'appuie sur ce document non seulement pour conclure qu'en mai 2005, lorsqu'il a présenté sa démission à titre d'administrateur, M. Mennillo savait qu'il n'était plus actionnaire, mais aussi pour inférer la date à laquelle M. Mennillo a cessé de l'être.

[53] Le juge dissident de la Cour d'appel estime que la mise en demeure n'étaye pas ces conclusions. À son avis, employée par un avocat (M[e] Kaufman), la formule [TRADUCTION] « démissionner de la société » ne pouvait viser que la qualité d'administrateur de M. Mennillo, à l'exclusion de sa qualité d'actionnaire. De surcroît, la mise en demeure souligne que M. Mennillo est associé à raison de 50 p. 100 dans l'entreprise. Le juge dissident y voit la manifestation claire du fait que « [M.] Mennillo se considérait toujours actionnaire (*partner*) d'Intramodal à près de 50 % et, à ce titre, [qu']il avait le droit au partage des profits (*share of the profits*) dans la même proportion » (par. 110 (CanLII)).

[54] Mais, encore une fois, le fait que le juge de première instance s'appuie sur cette mise en demeure ne justifie pas une intervention en appel. Je souscris aux motifs pour lesquels les juges majoritaires de la Cour d'appel rejettent l'affirmation de leur collègue dissident :

On peut différer d'opinion sur l'interprétation à donner au texte de cette [mise en demeure], mais celle du Juge ne me paraît pas « manifestement erronée », elle se défend même aisément. [M.] Mennillo réclame 1 M$,

"for failing to remit to him his share of the company". One cannot claim something one already owns. His claim implies that he is not a shareholder of Intramodal, given that he wants to become one. [para. 184]

(f) *Conclusion Concerning the Trial Judge's Findings of Fact*

[55] The trial judge's factual findings are only reviewable on appeal if they constitute an error that is both palpable and overriding: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 42. I agree with the majority of the Court of Appeal that no such error is present here. While the dissenting judge preferred a different interpretation of some of the evidence than that adopted by the trial judge, he was not entitled to substitute his view absent a palpable and overriding error. When we examine the trial judge's conclusions in light of the record, we find that there was no such error.

[56] We must, therefore, approach the case on the basis that, from May 25, 2005 onwards, Mr. Menillo did not want to be a shareholder, did not want to be treated as such and, as a result, transferred his shares to Mr. Rosati.

[57] On these findings of fact, Mr. Mennillo's oppression claim is groundless. He could have no reasonable expectation of being treated as a shareholder: he no longer was and expressly demanded not to be so treated. As against Intramodal, the most that can be said is that the corporation failed to carry out his wishes as a result of not observing certain necessary corporate formalities. But in light of these findings, it cannot be said that the corporation acted oppressively or that it illegally stripped him of his status as a shareholder as Justice Côté concludes: para. 198. What happened is that the corporation failed to make sure that all the legal formalities were complied with before registering the transfer. The acts of the corporation which Mr. Mennillo claims to constitute oppression were in fact taken, albeit imperfectly,

entre autres, « *for failing to remit to him his share of the company* » [[TRADUCTION] « pour omission de lui rendre sa participation dans l'entreprise »]. On ne saurait réclamer quelque chose que l'on détient déjà. Sa réclamation implique qu'il n'est pas actionnaire d'Intramodal puisqu'il veut le devenir. [par. 184]

f) *Conclusion sur les conclusions de fait du juge de première instance*

[55] Les conclusions de fait du juge de première instance ne sont susceptibles de révision en appel que si elles sont entachées d'une erreur manifeste et dominante (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 10; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Ingles c. Tutkaluk Construction Ltd.*, 2000 CSC 12, [2000] 1 R.C.S. 298, par. 42). Je conviens avec les juges majoritaires de la Cour d'appel qu'il n'y a aucune erreur de la sorte en l'espèce. Le juge dissident voit certes dans certains éléments de preuve autre chose que le juge de première instance, mais il ne peut pour autant faire primer son opinion, sauf erreur manifeste et dominante. Au vu du dossier, nous estimons que les conclusions du juge ne sont pas entachées d'une telle erreur.

[56] Nous devons donc considérer que, dès le 25 mai 2005, M. Mennillo ne voulait plus être actionnaire et qu'il ne souhaitait pas être tenu pour tel, d'où le transfert de ses actions à M. Rosati.

[57] Eu égard à ces conclusions de fait, le recours pour abus est sans fondement. M. Mennillo ne pouvait pas raisonnablement s'attendre à être traité comme un actionnaire : il ne l'était plus et avait expressément demandé à ne plus être considéré comme un actionnaire. Tout au plus peut-on dire d'Intramodal qu'elle n'a pas donné suite à son vœu du fait qu'elle a omis d'observer certaines formalités requises de sa part. Cependant, on ne saurait affirmer au vu de ces conclusions que la société a agi abusivement à l'égard de M. Mennillo ou qu'elle l'a dépouillé illégalement de son statut d'actionnaire, comme le conclut la juge Côté (par. 198). En fait, la société a omis de s'assurer de l'observation de toutes les formalités d'ordre juridique avant d'inscrire le transfert. Les mesures de la société que M. Mennillo

in accordance with his express wishes. But it cannot be unfairly prejudicial to Mr. Mennillo for the corporation to register a transfer of shares that he wished to happen, and that, as I will discuss later, he can no longer attack. As a consequence, all of Mr. Mennillo's claims must fail.

[58] The failure to observe the corporate formalities in removing Mr. Mennillo as a shareholder in accordance with his express wishes to be so removed cannot, in my respectful view, be characterized as an act unfairly prejudicial to the extent that this omission deprived him of his status as a shareholder: Côté J., at para. 207. The corporation failed to observe the formalities of carrying out his wish *not* to be a shareholder. Nor can the failure to properly remove him as a shareholder in accordance with his express wishes make it just and equitable for him to regain his status as a shareholder: para. 204.

B. *Corporate Law Points*

[59] Although it is not strictly speaking necessary to do so, I will address three points of corporate law because some clarification of them will be useful: whether the share transfer could have been retroactively cancelled as the majority of the Court of Appeal thought; the consequence of the failure to observe the formalities prescribed by the *CBCA*; and whether the shares could have been issued conditionally.

(1) The Possible Retroactive Cancellation of the Share Transfer

[60] Before the trial judge and the Court of Appeal, Mr. Mennillo argued that he has been a shareholder of Intramodal from its incorporation and remained as such. Before the trial judge, Intramodal presented two different theories in response to Mr. Mennillo's argument. The first one is that Mr. Mennillo would have become a shareholder had he accepted to financially support the corporation and to be the guarantor of the entirety of its debts, but he declined or neglected to do so and

tient pour abusives ont en fait été prises, bien que de manière imparfaite, selon la volonté qu'il avait exprimée. La société ne peut donc pas s'être montrée injuste à son égard en lui portant préjudice du fait qu'elle a inscrit le transfert d'actions qu'il avait lui-même voulu et, comme je l'explique plus loin, qu'il ne peut plus contester. En conséquence, les allégations de M. Mennillo doivent toutes être rejetées.

[58] Soit dit en tout respect, l'inobservation des formalités nécessaires au retrait de M. Mennillo à titre d'actionnaire, conformément à la volonté qu'il avait exprimée, ne saurait constituer un acte injustement préjudiciable [à son égard] dans la mesure où elle le prive de son statut d'actionnaire (la juge Côté, par. 207). La société a omis d'observer les formalités requises pour donner suite à sa volonté de *cesser* d'être actionnaire. L'omission d'effectuer régulièrement le retrait à titre d'actionnaire, selon la volonté exprimée par M. Mennillo, ne saurait non plus rendre juste et équitable sa réintégration en qualité d'actionnaire (par. 204).

B. *Points relevant du droit des sociétés*

[59] Même si, à strictement parler, ce n'est pas nécessaire, je me penche sur trois points du droit des sociétés, car certains éclaircissements à leur sujet seront utiles : le transfert d'actions aurait-il pu être annulé rétroactivement comme le prétendent les juges majoritaires de la Cour d'appel, quelles sont les conséquences de l'omission d'observer les formalités prescrites par la *LCSA* et les actions auraient-elles pu être émises conditionnellement?

(1) La possibilité d'annuler rétroactivement le transfert d'actions

[60] En première instance et en Cour d'appel, M. Mennillo a soutenu qu'il était devenu actionnaire d'Intramodal dès sa constitution en société et qu'il l'était toujours. En première instance, Intramodal a fait valoir deux théories différentes pour réfuter la thèse de M. Mennillo. Elle a d'abord prétendu que M. Mennillo serait devenu actionnaire s'il avait accepté d'appuyer financièrement l'entreprise et de se porter garant de la totalité de son passif, mais qu'il avait refusé ou négligé de le faire, de sorte qu'il

consequently never became a shareholder. The second one is that Mr. Mennillo resigned as a director of Intramodal and transferred his shares to Mr. Rosati. Intramodal focused on its second theory before the Court of Appeal and argued that the shares were transferred from Mr. Mennillo to Mr. Rosati on May 25, 2005.

[61] The trial judge concluded that Mr. Mennillo agreed that he would remain a shareholder only so long as he was willing to guarantee the corporation's debts and that Mr. Mennillo ultimately decided that he did not wish to do so and transferred his shares to Mr. Rosati. In the Court of Appeal, the majority concluded as follows on this issue:

> [TRANSLATION] . . . Can it be concluded that there was a genuine transfer of the shares from Mennillo to Rosati? It seems to me, rather, that they quite simply agreed on May 25, 2005 to retroactively cancel their agreement to associate with one another that they had originally entered into in 2004. The agreement had been reached informally, as was the cancellation thereof. [para. 225]

[62] It is worth highlighting that this theory of the retroactive cancellation of the agreement was neither adopted by the trial judge nor pleaded by the parties.

[63] Contrary to what the majority of the Court of Appeal suggested, I am of the opinion that it is not possible to retroactively cancel an issuance of shares by way of simple oral consent. As Mr. Mennillo points out, an issuance of shares can be cancelled only if (a) the corporation's articles are amended or (b) the corporation reaches an agreement to purchase the shares, which requires that the directors pass a resolution, that the shareholder in question gives his or her express consent and that the tests of solvency and liquidity be met. Can such an act by the corporation be valid even though these requirements of the *CBCA* have not been met? I do not think so.

[64] The commentators agree that meeting the requirements with respect to the maintenance of share capital cannot be optional, given that it is the share capital that is the common pledge of the creditors and is the basis for their acceptance of doing

n'était jamais devenu actionnaire. Elle a ensuite soutenu que M. Mennillo avait démissionné de son poste d'administrateur et qu'il avait transféré ses actions à M. Rosati. En Cour d'appel, Intramodal a mis l'accent sur sa deuxième théorie et soutenu que M. Mennillo avait cédé ses actions à M. Rosati le 25 mai 2005.

[61] Selon le juge de première instance, M. Mennillo a convenu qu'il ne demeurerait actionnaire que tant qu'il serait disposé à garantir le passif de la société. M. Mennillo a finalement décidé de ne pas se porter ainsi garant et a transféré ses actions à M. Rosati. Voici ce qu'opinent les juges majoritaires de la Cour d'appel sur ce point :

> . . . peut-on conclure qu'il y a eu véritablement cession des actions de [M.] Mennillo à [M.] Rosati? Il me semble plutôt que, tout simplement, ils conviennent le 25 mai 2005 d'annuler rétroactivement leur entente d'association convenue au départ en 2004. L'entente avait été conclue sans aucun formalisme, de même son annulation. [par. 225]

[62] Il convient de souligner que cette thèse de l'annulation rétroactive de l'entente n'est pas retenue par le juge de première instance, ni défendue par l'une ou l'autre des parties.

[63] Contrairement à ce que laissent entendre les juges majoritaires de la Cour d'appel, on ne peut selon moi annuler rétroactivement une émission d'actions sur simple consentement verbal. Comme le souligne M. Mennillo, il ne peut y avoir annulation d'une émission d'actions que a) par modification des statuts de la société ou b) par achat de gré à gré des actions par la société, ce qui requiert une résolution des administrateurs, le consentement exprès de l'actionnaire en cause et le respect des critères de solvabilité et de liquidité. Un tel acte de la société peut-il être valide malgré le non-respect de ces conditions de la *LCSA*? J'estime que non.

[64] Les auteurs reconnaissent que le respect des exigences relatives au maintien du capital-actions ne saurait être facultatif puisque le capital-actions constitue le gage commun des créanciers en fonction duquel ces derniers acceptent de faire affaire

business with the corporation: P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at pp. 12-17, 12-18 and 14-31; R. Crête and S. Rousseau, *Droit des sociétés par actions* (3rd ed. 2011), at pp. 550-52; F. W. Wegenast, *The Law of Canadian Companies* (1979 (reissue of 1931 ed.)), at p. 313.

[65] Furthermore, certain American commentators point out that strict protection of a corporation's capital stock is necessary in a context in which the liability of shareholders is, for its part, limited:

> Strong entity shielding and limited liability are highly complementary; the presence of one generally calls for the other. . . .
>
> . . . limited liability generally requires strong entity shielding, largely because limited liability increases the incentive for owners to withdraw from the firm when its prospects are doubtful. That incentive, in turn, creates the threat of a run on the firm's assets, which would destroy going-concern value to the detriment of both the firm's creditors and its owners. By denying owners the power to withdraw unilaterally, strong entity shielding prevents such runs. [Footnote omitted.]

(H. Hansmann, R. Kraakman and R. Squire, "The New Business Entities in Evolutionary Perspective", [2005] *U. Ill. L. Rev.* 5, at pp. 11-12)

[66] More concretely, why would the law establish strict requirements primarily to protect creditors' interests if such requirements could validly be ignored? I am unable to find a satisfactory answer to this question, and it is my opinion that the respondent has also failed to provide one.

(2) The Consequence of Non-Compliance With the Formalities of the *CBCA*

[67] The trial judge held that Mr. Mennillo was no longer a shareholder of Intramodal as of May 25, 2005 and that [TRANSLATION] "[t]he failure to complete the transfer of Mennillo's shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer": para. 74.

avec la société (P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (feuilles mobiles), par. 12-79 à 12-82, 14-107 et 14-108; R. Crête et S. Rousseau, *Droit des sociétés par actions* (3e éd. 2011), p. 550-552; F. W. Wegenast, *The Law of Canadian Companies* (1979 (réédition de l'éd. de 1931)), p. 313).

[65] Qui plus est, certains auteurs américains relèvent que la protection stricte du capital-actions d'une société est nécessaire dans la mesure où la responsabilité de l'actionnaire est pour sa part limitée :

> [TRADUCTION] La protection stricte de l'entité et la responsabilité limitée sont très complémentaires; l'une appelle généralement l'autre . . .
>
> . . . la responsabilité limitée exige généralement la protection stricte de l'entité, surtout parce qu'elle est de nature à inciter des propriétaires à quitter l'entreprise lorsque son avenir est incertain. À son tour, cette incitation expose le capital-actions à des retraits massifs, lesquels sont susceptibles de réduire à néant la valeur de l'entreprise au détriment de ses créanciers et de ses propriétaires. En refusant aux propriétaires le droit de se retirer unilatéralement, la protection stricte de l'entité empêche de tels retraits. [Note en bas de page omise.]

(H. Hansmann, R. Kraakman et R. Squire, « The New Business Entities in Evolutionary Perspective », [2005] *U. Ill. L. Rev.* 5, p. 11-12)

[66] De manière plus concrète, pourquoi la loi établirait-elle des exigences strictes visant principalement la protection des intérêts des créanciers si de telles exigences pouvaient être ignorées en toute impunité? Je ne puis trouver de réponse satisfaisante à cette question et, à mon avis, l'intimée n'est pas non plus en mesure d'en avancer une.

(2) Les conséquences de l'inobservation des formalités prescrites par la *LCSA*

[67] Le juge de première instance conclut que M. Mennillo a cessé d'être actionnaire d'Intramodal le 25 mai 2005 et que « [l]e fait que la cession des actions de [M.] Mennillo à [M.] Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de l'avocat de [M.] Rosati » (par. 74).

[68] Needless to say, there is no evidence in writing of such transfer between Mr. Mennillo and Mr. Rosati. But for the reasons I set out at length above, the trial judge made no palpable and overriding error when he rejected Mr. Mennillo's version of events and substantially accepted Intramodal's. For this reason, I accept his finding that Mr. Mennillo refused to take on the role of Intramodal's guarantor and transferred his shares to Mr. Rosati. The evidence on the transfer point is conflicting and inconsistent. The judge adopted a view of the evidence that was open to him given the extreme informality of the parties' dealings and their virtually complete inattention to corporate formalities. As I read his reasons, there was an onerous contract between Mr. Mennillo and Mr. Rosati for the transfer of the shares, a view supported by the evidence: *Martin v. Dupont*, 2016 QCCA 475; art. 1381 *Civil Code of Québec* ("*C.C.Q*").

[68] Il va sans dire qu'aucun écrit n'atteste cette cession. Mais pour les motifs détaillés qui précèdent, le juge de première instance ne commet aucune erreur manifeste et dominante lorsqu'il rejette la version des faits de M. Mennillo et qu'il retient essentiellement celle d'Intramodal. C'est pourquoi je fais mienne sa conclusion voulant que M. Mennillo ait refusé de se porter garant du passif d'Intramodal et transféré ses actions à M. Rosati. La preuve relative au transfert des actions est contradictoire et incohérente. Son interprétation par le juge Poirier est légitime compte tenu du caractère extrêmement informel des rapports entre les parties et de l'inobservation par ces dernières de la quasi-totalité des formalités requises d'une société. Suivant mon interprétation de ses motifs, un contrat à titre onéreux liait MM. Mennillo et Rosati concernant le transfert des actions, ce qui est étayé par la preuve (*Martin c. Dupont*, 2016 QCCA 475; art. 1381 du *Code civil du Québec* (« *C.c.Q.* »)).

[69] It is uncontested that Intramodal did not ascertain whether some of the corporate formalities of the *CBCA* were complied with by Mr. Mennillo and Mr. Rosati when it registered the transfer of shares, but that cannot in and of itself invalidate any transfer between them: *Inspecteur général des institutions financières v. Assurances funéraires Rousseau et frère Ltée*, [1990] R.R.A. 473 (C.A.); Martel, at pp. 16-28 to 16-30.

[69] Nul ne conteste qu'Intramodal a omis de s'assurer que MM. Mennillo et Rosati s'étaient acquittés de certaines de leurs obligations suivant la *LCSA* lorsqu'elle a inscrit le transfert d'actions. Or, pareille omission ne peut en soi invalider un transfert intervenu entre les deux hommes (*Inspecteur général des institutions financières c. Assurances funéraires Rousseau et frère Ltée*, [1990] R.R.A. 473 (C.A.); Martel, par. 16-103 à 16-108).

[70] On this point, s. 76 *CBCA* states:

[70] À cet égard, l'art. 76 de la *LCSA* dispose ce qui suit :

76 (1) Where a security in registered form is presented for transfer, the issuer shall register the transfer if

(a) the security is endorsed by an appropriate person as defined in section 65;

(b) reasonable assurance is given that that endorsement is genuine and effective;

(c) the issuer has no duty to inquire into adverse claims or has discharged any such duty;

(d) any applicable law relating to the collection of taxes has been complied with;

76 (1) L'émetteur doit procéder à l'inscription du transfert d'une valeur mobilière nominative lorsque les conditions suivantes sont réunies :

a) la valeur mobilière est endossée par une personne compétente au sens de l'article 65;

b) des assurances suffisantes sur l'authenticité et la validité de cet endossement sont données;

c) il n'est pas tenu de s'enquérir de l'existence d'oppositions ou il s'est acquitté de cette obligation;

d) les lois relatives à la perception de droits ont été respectées;

(e) the transfer is rightful or is to a *bona fide* purchaser; and

(f) any fee referred to in subsection 49(2) has been paid.

(2) Where an issuer has a duty to register a transfer of a security, the issuer is liable to the person presenting it for registration for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer.

e) le transfert est régulier ou est effectué au profit d'un acheteur de bonne foi;

f) les droits prévus au paragraphe 49(2) ont été acquittés.

(2) L'émetteur tenu de procéder à l'inscription du transfert d'une valeur mobilière est responsable, envers la personne qui la présente à cet effet, du préjudice causé par tout retard indu ou par tout défaut ou refus.

[71] In this case, the requirements of s. 76(1)(a) *CBCA* are not fulfilled. It is common ground that the shares that were transferred were not endorsed by Mr. Mennillo. Therefore it is true that Intramodal proceeded to register a transfer that did not meet all of the criteria stated in the *CBCA*. But this is of no assistance to Mr. Mennillo under the circumstances. It is not as a result of an improper registration of this share transfer that Mr. Mennillo is no longer the holder of any shares in Intramodal. It is rather as a result of his transfer of these shares to Mr. Rosati, as found by the trial judge.

[71] En l'espèce, la condition prévue à l'al. 76(1)a) de la *LCSA* n'est pas remplie. Nul ne conteste que les actions transférées n'ont pas été endossées par M. Mennillo. Il est donc exact de prétendre qu'Intramodal a inscrit un transfert qui ne respectait pas toutes les conditions prévues par la *LCSA*. Or, cette irrégularité n'appuie pas la thèse de M. Mennillo. Ce n'est pas à cause d'une inscription irrégulière du transfert d'actions qu'il n'est plus actionnaire d'Intramodal, mais parce qu'il a transféré ses actions à M. Rosati, comme le conclut le juge de première instance.

[72] In that regard, the endorsement of the shares was required to complete the transfer itself between Mr. Mennillo and Mr. Rosati. It was required for the shares to be delivered, which, in turn, was necessary to complete the share transfer: ss. 60(1) and 65(3) *CBCA*. Since this was an important formality required by law, it was to be observed on pain of nullity of the transfer: arts. 1414 and 1416 *C.C.Q.*; Martel, at pp. 16-26 et seq.

[72] L'endossement des actions était nécessaire pour mener à bien le transfert de M. Mennillo à M. Rosati. Il était requis pour la livraison des actions, laquelle s'imposait à son tour pour qu'il y ait transfert (par. 60(1) et 65(3) de la *LCSA*). S'agissant d'une formalité légale importante, son inobservation exposait l'opération à la nullité (art. 1414 et 1416 *C.c.Q.*; Martel, par. 16-91 et suiv.).

[73] With that being said, there is no doubt about the fact that Mr. Mennillo knew that this formality was not complied with when the company proceeded to register the transfer in the corporate books, some time in 2007. There is also no doubt that he was aware that he had not endorsed his share certificate when the shares were transferred to Mr. Rosati as the trial judge found.

[73] Cela dit, il ne fait aucun doute que M. Mennillo savait que cette formalité n'avait pas été accomplie lorsque, en 2007, la société a inscrit le transfert dans ses registres. Nul ne peut non plus douter qu'il savait que son certificat n'était pas endossé lors du transfert des actions à M. Rosati, comme le conclut le juge de première instance.

[74] While it might have been possible for Mr. Mennillo to attack the transfer on the basis of the non-compliance with this required formality of the *CBCA*, no such claim was or could have been advanced when he instituted his proceedings in

[74] M. Mennillo aurait pu contester le transfert en invoquant l'inobservation de cette formalité exigée par la *LCSA*, mais il ne l'a pas fait et n'aurait pas pu le faire au moment d'intenter son recours en septembre 2010. Puisque, plus de trois ans auparavant,

September 2010. As he was aware of the situation of which he now complains more than three years prior, his claim in that regard was and is still prescribed: art. 2925 *C.C.Q.* Even if the transfer was subject to nullity, it did not mean that it was inexistent. In Quebec civil law, the sanction of nullity needs to be pronounced by a tribunal: S. Gaudet, "Inexistence, nullité et annulabilité du contrat: essai de synthèse" (1995), 40 *McGill L.J.* 291, at pp. 331-35; J.-L. Baudoin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 386; D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 1101. Only once nullity is judicially pronounced is a purported contract "deemed never to have existed": art. 1422 *C.C.Q.* Indeed, a "contract which does not meet the necessary conditions of its formation may be [as opposed to is] annulled": art. 1416 *C.C.Q.* This judicial intervention must be sought within three years of becoming aware of the cause of nullity: arts. 2925 and 2927 *C.C.Q.*

il connaissait la situation qu'il déplore aujourd'hui, son recours était et demeure prescrit (art. 2925 *C.c.Q.*). Même s'il était susceptible d'annulation, le transfert existait tout de même. En droit civil québécois, la sanction qu'est la nullité doit être prononcée par le tribunal (S. Gaudet, « Inexistence, nullité et annulabilité du contrat : essai de synthèse » (1995), 40 *R.D. McGill* 291, p. 331-335; J.-L. Baudoin et P.-G. Jobin, *Les obligations* (7e éd. 2013), par P.-G. Jobin et N. Vézina, par. 386; D. Lluelles et B. Moore, *Droit des obligations* (2e éd. 2012), par. 1101). Ce n'est qu'une fois la nullité prononcée par une cour de justice que le contrat « est réputé n'avoir jamais existé » (art. 1422 *C.c.Q.*). En effet, le « contrat qui n'est pas conforme aux conditions nécessaires à sa formation peut [et non pas doit] être frappé de nullité » (art. 1416 *C.c.Q.*). La mesure judiciaire doit être demandée au plus tard trois ans après que l'intéressé a eu connaissance de la cause de nullité (art. 2925 et 2927 *C.c.Q.*).

(3) The Conditional Issuance of the Shares

[75] In the Court of Appeal, the dissenting judge read the trial judge's reasons as holding that the issuance of the shares to Mr. Mennillo had been conditional on his remaining a guarantor. The dissenting judge went on to say that this conditional status is not set out in the *CBCA* and in any event, even if it were, such status would also have needed to be specified in the books of the company. The dissenting judge also expressed the view that this sort of conditional shareholder status could not depend on an informal agreement between two individuals.

(3) L'émission conditionnelle des actions

[75] Le juge dissident de la Cour d'appel conclut des motifs du juge de première instance que les actions ont été émises à M. Mennillo à la condition qu'il demeure garant du passif. Il ajoute que la *LCSA* ne prévoit pas un tel actionnariat conditionnel et que, de toute manière, s'il avait été possible, il aurait fallu qu'il soit indiqué dans les registres de la société. Toujours selon lui, un tel actionnariat conditionnel ne saurait tenir à un accord informel entre deux personnes.

[76] I am in substantial agreement with the dissenting judge about the law on this point. Conditions attaching to the shares need to be specified in the articles of the corporation and in the securities register. Also, the resolution authorizing the issuance of the shares to Mr. Mennillo would have needed to specify their conditional status: ss. 24(4), 49(13) and 50(1)(c) *CBCA*. These formalities were not fulfilled.

[76] Je suis d'accord pour l'essentiel avec le juge dissident quant au droit applicable sur ce point. La condition dont une action est assortie doit être précisée dans les statuts de la société et dans son registre des valeurs mobilières. De même, la résolution autorisant l'émission des actions à M. Mennillo aurait dû préciser qu'elles étaient assorties d'une condition (par. 24(4) et 49(13) et al. 50(1)c) de la *LCSA*). Ces formalités n'ont pas été accomplies.

[77] But in my respectful view, the dissenting judge misread the trial judge's reasons. None of the parties argued that they intended the shares to be issued conditionally and in my view the trial judge did not intend to and did not say that any condition was attached to the shares themselves. Rather, when we read his reasons in light of the evidence, we see that he was of the view that the condition to which the trial judge referred was a result of an agreement between Messrs. Mennillo and Rosati that the former would be a shareholder only if he guaranteed Intramodal's debts. This agreement was reached by Messrs. Mennillo and Rosati; Intramodal was not a party to this agreement. Accordingly, it does not attract the corporate formalities applicable to a conditional issuance of shares. Understood in this way, there is no legal error in the trial judge's approach to this issue.

C. *Prescription and Remedy*

[78] The trial judge found that Mr. Mennillo's oppression claim was prescribed. He reasoned that the three-year period in art. 2925 *C.C.Q.* applied and that time began to run in May 2005 when, in his view, Mr. Mennillo knew that he would not be treated as a shareholder. The majority of the Court of Appeal did not deal with this issue. But the dissenting judge found that time had not started to run until December 2009 and in any event that the acts of oppression were continuing. Before this Court, Mr. Mennillo adopts, in a single paragraph of his factum, the reasoning of the dissenting judge on this point. Intramodal adopts the position of the trial judge.

[79] Given the limited judicial consideration of these points in the reasons of the Superior Court and the Court of Appeal, and the conclusion that Mr. Mennillo's oppression claim is groundless on its merits, I prefer not to venture a final opinion on this precise point in the context of this appeal.

[80] As a result of my proposed disposition of the appeal in relation to the dismissal of the oppression claim, it is not necessary for me to address what

[77] Toutefois, à mon humble avis, le juge dissident interprète erronément les motifs du juge de première instance. Aucune des parties ne prétend avoir voulu que les actions soient émises à quelque condition et, à mon sens, le juge de première instance n'entend pas dire et ne dit pas que les actions sont assorties comme telles d'une condition. Au vu de la preuve, il appert plutôt de ses motifs que la condition dont il fait mention résulte d'un accord entre MM. Mennillo et Rosati selon lequel le premier ne serait actionnaire que s'il se portait garant du passif d'Intramodal. L'accord en question est intervenu entre MM. Mennillo et Rosati, et Intramodal n'y est pas partie. Il ne requérait donc pas l'observation des formalités applicables à une émission conditionnelle d'actions. Dans cette optique, la démarche du juge de première instance n'est entachée d'aucune erreur de droit.

C. *Prescription et mesure de redressement*

[78] Le juge de première instance arrive à la conclusion que le recours pour abus de M. Mennillo est prescrit. Il explique que le délai de trois ans imparti à l'art. 2925 du *C.c.Q.* s'applique et qu'il a commencé à courir en mai 2005, soit au moment où, selon lui, M. Mennillo a appris qu'il ne serait plus traité comme un actionnaire. Les juges majoritaires de la Cour d'appel ne se prononcent pas sur la question. Le juge dissident estime cependant que le délai n'a commencé à courir qu'en décembre 2009 et que, de toute façon, l'abus s'était poursuivi. Devant notre Cour, M. Mennillo reprend à son compte, dans un même paragraphe de son mémoire, le raisonnement du juge dissident sur ce point. Quant à Intramodal, elle se range à l'avis du juge de première instance.

[79] Étant donné le peu d'attention que la Cour supérieure et la Cour d'appel accordent à ces questions, et la conclusion selon laquelle le recours pour abus intenté par M. Mennillo doit être rejeté sur le fond, je préfère ne pas me prononcer sur ce point précis de manière définitive dans le cadre du pourvoi.

[80] Vu la manière dont je propose de statuer en l'espèce sur le rejet du recours pour abus, point n'est besoin de me prononcer sur les mesures de

remedies would be appropriate in the event oppression had been established.

IV. Disposition

[81] I would dismiss the appeal with costs and affirm the costs orders made by the Superior Court and the Court of Appeal.

The reasons of McLachlin C.J. and Moldaver J. were delivered by

[82] THE CHIEF JUSTICE — I would dismiss the appeal for the following reasons.

[83] This is an action for oppression. Mr. Mennillo complains that Intramodal inc. acted oppressively in removing him as shareholder from the books of the company.

[84] To establish oppression, the shareholder must show: (1) a reasonable expectation that the corporation would treat him in a certain way; and (2) that the corporation breached that reasonable expectation (*BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 68). The action is an equitable action to protect reasonable and legitimate shareholder expectations — the "cornerstone of the oppression remedy" (*BCE*, at para. 61). Evidence of shareholder expectations is essential to whether conduct has been oppressive in a particular case (*BCE*, at para. 59; P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at p. 31-67; D. H. Peterson and M. J. Cumming, *Shareholder Remedies in Canada* (2nd ed. (loose-leaf)), at §§ 17.41 to 17.43; D. S. Morritt, S. L. Bjorkquist and A. D. Coleman, *The Oppression Remedy* (loose-leaf), at p. 3-2).

[85] I do not find it necessary to determine whether there was an effective transfer of Mr. Mennillo's shares in Intramodal inc. to Mr. Rosati. Suffice it to say that among other things, assessing the nature of the prestations that the parties decided to provide each other under an "onerous contract" — Mr. Rosati gets Mr. Mennillo's shares in exchange

redressement qui auraient été indiquées si l'abus avait été établi.

IV. Dispositif

[81] Je suis d'avis de rejeter le pourvoi avec dépens et de confirmer les ordonnances de la Cour supérieure et de la Cour d'appel sur les dépens.

Version française des motifs de la juge en chef McLachlin et du juge Moldaver rendus par

[82] LA JUGE EN CHEF — Je suis d'avis de rejeter le pourvoi pour les motifs suivants.

[83] M. Mennillo a intenté un recours pour abus. Il reproche à Intramodal inc. d'avoir agi de façon abusive en le dépouillant de sa qualité d'actionnaire dans les registres de la société.

[84] Pour établir l'abus, l'actionnaire doit prouver (1) qu'il s'attendait raisonnablement à ce que la société le traite d'une certaine manière et (2) que la société a frustré cette attente raisonnable (*BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, par. 68). Issu de l'equity, le recours vise à protéger les attentes raisonnables et légitimes de l'actionnaire, lesquelles constituent la « pierre angulaire [du recours] pour abus » (*BCE*, par. 61). La preuve des attentes de l'actionnaire est essentielle pour qualifier un comportement d'abusif dans une situation donnée (*BCE*, par. 59; P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (feuilles mobiles), par. 31-197 et 31-198; D. H. Peterson et M. J. Cumming, *Shareholder Remedies in Canada* (2e éd. (feuilles mobiles)), § 17.41 à 17.43; D. S. Morritt, S. L. Bjorkquist et A. D. Coleman, *The Oppression Remedy* (feuilles mobiles), p. 3-2).

[85] Je n'estime pas nécessaire de décider s'il y a effectivement eu transfert à M. Rosati des actions de M. Mennillo dans Intramodal inc. Je me contente de dire que, entre autres choses, la question de la nature des prestations que les parties se sont consenties l'une à l'autre par voie de « contrat à titre onéreux » — M. Rosati obtenant les actions de M. Mennillo

of Intramodal inc. relieving Mr. Mennillo of his obligation to guarantee Intramodal inc.'s debts — is an issue that leaves me somewhat perplexed (a point made by Côté J. at para. 229 of her dissenting reasons).

[86] Be that as it may, in my view, this appeal can be disposed of on the basis that Mr. Mennillo has failed to show a reasonable expectation that he would not be removed as a shareholder from Intramodal inc.'s books. The trial judge found that Mr. Mennillo agreed that his shares should be transferred to Mr. Rosati: [TRANSLATION] "Mennillo refused to participate in this venture [that is, to be an equity shareholder in Intramodal] and asked to be removed from the company as a shareholder and director as of May 25, 2005" (2012 QCCS 1640, at para. 74 (CanLII)).

[87] Having asked to be removed as a shareholder, Mr. Mennillo had no reasonable expectation that he would remain on the books as a shareholder. This is confirmed by the fact that subsequently Mr. Mennillo ceased to conduct himself as an equity shareholder and advanced money as loans. The trial judge's finding of fact is supported by the evidence.

[88] Mr. Mennillo has failed to establish a reasonable expectation that he would remain a shareholder in Intramodal inc. It follows that his action for oppression must fail. Consequently, the trial judge did not err in denying Mr. Mennillo's claim.

[89] I would dismiss the appeal.

English version of the reasons delivered by

CÔTÉ J. (dissenting) —

I. Introduction

[90] It is sometimes essential to go back to the basics of the law to render the decision that is appropriate in the circumstances. It is just as essential to recall some of those basics.

en contrepartie de la libération de ce dernier par Intramodal inc. de son obligation de garantir le passif de la société — me laisse quelque peu perplexe (le point est soulevé par la juge Côté au par. 229 de ses motifs dissidents).

[86] Quoi qu'il en soit, le fait que M. Mennillo n'a pas démontré qu'il pouvait raisonnablement s'attendre à continuer de figurer à titre d'actionnaire dans les registres d'Intramodal inc. permet de statuer sur le pourvoi. Le juge de première instance conclut que M. Mennillo a accepté que ses actions devaient être cédées à M. Rosati : « [M.] Mennillo a refusé cette aventure [c'est-à-dire être actionnaire participatif d'Intramodal] et a demandé son retrait de la compagnie à titre d'actionnaire et d'administrateur à compter du 25 mai 2005 » (2012 QCCS 1640, par. 74 (CanLII)).

[87] Ayant demandé à ne plus être actionnaire, M. Mennillo ne pouvait pas raisonnablement s'attendre à ce que les registres de la société continuent de faire état de sa qualité d'actionnaire. Cela est d'ailleurs confirmé par le fait qu'il a cessé par la suite d'agir comme actionnaire participatif et a avancé des fonds sous forme de prêts. Cette conclusion de fait du juge de première instance trouve appui dans la preuve.

[88] M. Mennillo n'a pas prouvé qu'il pouvait raisonnablement s'attendre à demeurer actionnaire d'Intramodal inc. Son recours pour abus doit donc échouer. Par conséquent, le juge de première instance n'a pas eu tort de le débouter.

[89] Je suis d'avis de rejeter le pourvoi.

Les motifs suivants ont été rendus par

LA JUGE CÔTÉ (dissidente) —

I. Introduction

[90] Il est parfois essentiel de revenir aux fondements du droit afin de rendre la décision qui s'impose dans certaines circonstances. Il est tout aussi essentiel de rappeler certains de ces fondements.

[91] Two key principles are deeply rooted in Canadian corporate law and cannot simply be disregarded or ignored: the principle that a corporation's legal personality is distinct from that of its shareholder or shareholders, and the principle or rule of the maintenance of capital.

[92] In my view, both the trial judge and the majority of the Court of Appeal completely disregarded these two principles in their analysis.

[93] With respect, the analysis that is required in the circumstances cannot disregard the interplay between Quebec civil law and the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), and must neither weaken the strict formal requirements of corporate law — in this area, *forma dat esse rei* — nor confuse the business corporation with the partnership. Care must be taken not to assume that the registration of a transfer of shares means that there was a contract for the transfer of shares. Like the trial judge's assertion that shares can be issued conditionally without the corporation approving the issuance and that of the majority of the Court of Appeal that a share issuance may be cancelled retroactively without any formalities, the solution proposed by the majority cannot, in my view, be reconciled with the basic principles of corporate law and the civil law.

[94] I therefore cannot agree with the majority's opinion.

[95] The appellant, Johnny Mennillo, objects to a resolution passed by the respondent corporation, Intramodal Inc., and to its registration in its registers of a transfer of his shares to its majority shareholder, Mario Rosati. Although Intramodal initially argued, with a supporting affidavit, that the appellant had never been one of its shareholders, it now acknowledges that he was indeed a shareholder, but it refuses, contrary to the law and to its own articles and by-laws, to recognize that he now has that

[91] Deux grands principes sont profondément enracinés en droit canadien des sociétés par actions et ne peuvent simplement être écartés ou ignorés : il s'agit du principe de la personnalité juridique distincte de la société par rapport à celle de son ou ses actionnaires, et du principe ou de la règle du maintien du capital.

[92] À mon avis, tant le juge de première instance que les juges majoritaires de la Cour d'appel ont totalement fait abstraction de ces deux principes dans leurs analyses respectives.

[93] Avec égards, l'analyse qui s'impose dans les circonstances ne peut ignorer l'interaction du droit civil québécois avec la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44 (« *LCSA* »), et ne doit pas fragiliser les exigences strictes du droit des sociétés sur le plan du formalisme — en ce domaine « *forma dat esse rei* » — et ne doit pas non plus confondre la société par actions avec la société de personnes. Il faut se garder de tenir pour acquis que l'inscription d'un transfert d'actions signifie qu'il y a eu contrat de transfert d'actions. Au même titre que l'affirmation du juge de première instance selon laquelle il peut y avoir émission conditionnelle d'actions sans que celle-ci ne soit entérinée par la société, et celle des juges majoritaires de la Cour d'appel selon laquelle une émission d'actions peut être annulée rétroactivement sans aucune formalité, la solution préconisée par la majorité est, à mon avis, irréconciliable avec les principes élémentaires du droit des sociétés et du droit civil.

[94] Je ne puis donc me résoudre à souscrire à l'opinion de la majorité.

[95] L'appelant, Johnny Mennillo, reproche à la société intimée, Intramodal inc., l'adoption d'une résolution et l'inscription dans ses registres d'un transfert de ses actions au bénéfice de son actionnaire majoritaire, Mario Rosati. Bien qu'Intramodal ait d'abord prétendu, déclaration sous serment à l'appui, que l'appelant n'avait jamais été actionnaire d'Intramodal, elle reconnaît aujourd'hui qu'il a effectivement été actionnaire, mais refuse de lui reconnaître ce statut et les avantages qui s'y rattachent, et

status and is entitled to the advantages associated therewith.

[96] It is also important to be clear that this is a proceeding brought by the appellant against Intramodal under s. 241 *CBCA*. Contrary to what my colleague seems to be suggesting, this is not a case in which one shareholder sues another over the ownership of his or her shares in a company. Mr. Rosati is not a party to this litigation.

[97] In his claim, the appellant asked that the resolution passed by the respondent company be revoked and that its registers be rectified. This means that, although he brought this claim under s. 241 *CBCA*, he could also have done so under s. 243 *CBCA* (rectification of registers) or s. 247 *CBCA* (failure by a corporation to comply with the legislation or with its articles or by-laws). The appellant submitted that Intramodal had breached its legal duties by passing the resolution in question and registering the transfer of his shares although none of the formalities required by law had been observed. He argued that the respondent company's conduct in refusing to recognize his status as a shareholder was oppressive and that a remedy was appropriate under s. 241 *CBCA*. In addition to a declaration that he had always remained a shareholder of the company, the appellant asked, as a consequence, that the resolution approving the transfer of his shares be revoked and that the company's registers be rectified accordingly.

[98] The trial judge and the majority of the Court of Appeal found that the appellant's claim was without merit on the ground that he had, in their view, expressed an intention in May 2005 to withdraw from the respondent company both as a director and officer and as a shareholder. It was therefore open to Intramodal to register the transfer of the appellant's shares to Mr. Rosati despite the fact that there had been no exchange of wills with regard to the terms of the appellant's withdrawal and even though the principal formalities required by law for the transfer of shares had not been observed. The dissenting judge found that his colleagues were disregarding the formal requirements of corporate law.

ce, en contravention à la loi et à ses propres statuts et règlements.

[96] Il importe de plus de préciser qu'il s'agit d'un recours entrepris par l'appelant à l'encontre d'Intramodal en vertu de l'art. 241 *LCSA*. Contrairement à ce que semble laisser entendre mon collègue, il ne s'agit pas d'un litige où un coactionnaire en poursuit un autre relativement à la propriété de ses actions dans la société. M. Rosati n'est pas partie au présent litige.

[97] Dans le cadre de son recours, l'appelant demande l'annulation de la résolution adoptée par la société intimée et la rectification de ses registres. En ce sens, son recours, bien que tombant sous le coup de l'art. 241 *LCSA*, aurait également pu être entrepris en vertu des art. 243 *LCSA* (rectification des registres) ou 247 *LCSA* (inobservation par la société de la loi ou de ses statuts ou règlements). L'appelant soutient qu'Intramodal a manqué à ses obligations légales en adoptant ladite résolution et en procédant à l'inscription du transfert de ses actions, alors qu'aucune des formalités requises par la loi n'avait été accomplie. La conduite de la société intimée, par son refus de reconnaître son statut d'actionnaire, est selon lui abusive et un redressement s'impose en vertu de l'art. 241 *LCSA*. En sus d'une déclaration selon laquelle il est toujours demeuré actionnaire de la société, l'appelant demande donc l'annulation de la résolution avalisant le transfert de ses actions de même que la rectification des registres de la société en conséquence.

[98] Le juge de première instance et les juges majoritaires de la Cour d'appel ont estimé que le recours de l'appelant n'était pas fondé au motif qu'il avait, selon eux, en mai 2005, exprimé son intention de se retirer de la société intimée, tant à titre d'administrateur et de dirigeant que d'actionnaire. Intramodal pouvait donc procéder à l'inscription du transfert des actions de l'appelant à M. Rosati, et ce, malgré l'absence d'échange de volontés quant aux modalités du retrait de l'appelant et même si les principales formalités prescrites par la loi en matière de transfert d'actions n'avaient pas été respectées. Le juge dissident a pour sa part conclu que l'opinion de ses collègues faisait fi du formalisme requis en droit des sociétés.

[99] According to the trial judge, the majority of the Court of Appeal and my colleagues, the fact that a shareholder expresses an intention to withdraw from a business corporation bars the shareholder from bringing any oppression proceeding for the express purpose of seeking recognition of his or her status as a shareholder. My colleague Cromwell J. finds that, in the civil law of Quebec, the expression of such an intention is equivalent to a transfer of shares. In other words, it is sufficient to cause a person to lose his or her status as a shareholder.

[100] With respect, I am of the view that the fact that one shareholder claims he and his fellow shareholder entered into an agreement for the transfer of shares does not relieve the corporation of its legal duty to make the necessary inquiries before passing a resolution approving that transfer of shares and registering the transfer in its registers. It is clear from the evidence that Intramodal did not discharge any of its legal duties in this regard. If the respondent company had made the proper inquiries, it would have discovered that the appellant's share certificate (Intramodal share certificate No. 2) had not been endorsed, contrary to the requirements of the *CBCA* and to the transfer restrictions set out on the share certificate itself and in the company's articles. It should then have refrained from registering the transfer in its registers. As well, the impugned resolution should not have been passed.

[101] In my opinion, Intramodal instead confused its interests with those of its majority shareholder, took a disturbingly lax approach in preparing its corporate documents and displayed wilful blindness as regards its legal duties. That confusion was particularly obvious — to say the least — in each of the courts below, and in this Court, where Intramodal vigorously defended the interests of its majority shareholder, who did not even see fit to intervene in the case but instead used Intramodal as his puppet. Intramodal could of course have defended itself on the allegations made against it, but it chose instead to expend its energy on defending an alleged agreement to which it was not even a party without even

[99] Suivant le raisonnement du juge de première instance, de la majorité de la Cour d'appel et de mes collègues, l'intention manifestée par un actionnaire de se retirer d'une société par actions constitue une fin de non-recevoir à tout recours pour abus visant précisément à faire reconnaître ce statut d'actionnaire. Selon mon collègue le juge Cromwell, l'expression d'une telle volonté équivaut en droit civil québécois à un transfert d'actions. En d'autres mots, elle suffit pour faire perdre à une personne son statut d'actionnaire.

[100] Avec égards, je suis d'avis que la prétention d'un actionnaire suivant laquelle une entente de transfert d'actions est intervenue entre lui et son coactionnaire ne libère pas la société en cause de son devoir légal de faire les vérifications requises avant d'entériner par résolution ce transfert d'actions et de l'inscrire dans ses registres. Or, il est manifeste, à la lumière de la preuve, qu'Intramodal n'a respecté aucune de ses obligations légales à cet égard. Si la société intimée avait procédé aux vérifications qui s'imposaient, elle aurait alors constaté que le certificat d'actions de l'appelant (certificat d'actions n° 2 d'Intramodal) n'avait pas été endossé, contrairement aux exigences de la *LCSA* et aux restrictions de transfert figurant sur le certificat d'actions lui-même ainsi que dans les statuts d'Intramodal. Cette dernière aurait dès lors dû s'abstenir d'inscrire le transfert dans ses registres. Également, la résolution contestée n'aurait pas dû être adoptée.

[101] À mon avis, Intramodal a plutôt confondu ses intérêts avec ceux de son actionnaire majoritaire et fait preuve d'un laxisme troublant dans la préparation de sa documentation corporative, ainsi que d'aveuglement volontaire quant au respect de ses obligations légales. Cette confusion a été plus qu'apparente — pour dire le moins — devant chacune des juridictions inférieures, et devant notre Cour, où Intramodal s'est employée à défendre vigoureusement les intérêts de son actionnaire majoritaire, lequel n'a même pas jugé bon d'intervenir au litige, utilisant plutôt Intramodal comme sa marionnette. Intramodal pouvait certainement se défendre des reproches formulés à son endroit,

bothering to determine its scope or verify that it was genuine.

[102] By focusing solely on the scope of the alleged agreement between the appellant and Mr. Rosati without considering the respondent company's conduct, its failure to discharge its legal duties and the consequences of that failure, the trial judge and the majority of the Court of Appeal disregarded the company's distinct legal personality as well as the basic requirements of corporate law. Rather than punishing the respondent company's unlawful conduct, they chose to endorse its actions.

[103] In addition, the trial judge made palpable and overriding errors and disregarded key evidence in arriving at the conclusion that Mr. Mennillo had transferred his shares to Mr. Rosati in May 2005.

[104] Finally, I find that the trial judge and the majority of the Court of Appeal also erred in concluding that the appellant's claim was prescribed. In this Court, the parties agreed that the appellant was, at least at some point, a shareholder of Intramodal. By challenging the respondent company's decision for unlawfully depriving him of his status, the appellant is exercising a remedy that, by its very nature, relates to his right of ownership in his shares. Neither the *CBCA* nor the *Civil Code of Québec* ("*C.C.Q.*") provides that extinctive prescription applies in such a case. As I will explain below, the ownership of shares, as opposed to the rights conferred by them, is not subject to extinctive prescription in Quebec. As a result, the three-year prescription period provided for in art. 2925 *C.C.Q.* cannot be set up against the appellant's claim for oppression.

[105] For these reasons, I am of the opinion that the appeal should be allowed.

mais elle a plutôt choisi de consacrer ses énergies à la défense d'une prétendue entente à laquelle elle n'était même pas partie et dont elle ne s'était même pas donné la peine de déterminer l'étendue et de vérifier l'authenticité.

[102] Le juge de première instance et les juges majoritaires de la Cour d'appel, en s'attachant uniquement à la portée de la prétendue entente conclue entre l'appelant et M. Rosati, sans égard à la conduite de la société intimée, au non-respect de ses obligations légales et aux conséquences de ce non-respect, ont fait fi de la personnalité juridique distincte de celle-ci ainsi que des prescriptions élémentaires du droit des sociétés. Plutôt que de sanctionner la conduite illégale de la société intimée, ils ont choisi de cautionner ses agissements.

[103] De plus, le juge de première instance a commis des erreurs manifestes et dominantes et a fait abstraction d'éléments clés de la preuve en arrivant à la conclusion que M. Mennillo aurait transféré ses actions à M. Rosati en mai 2005.

[104] Enfin, le juge de première instance et les juges majoritaires de la Cour d'appel ont également, à mon avis, eu tort de conclure que le recours de l'appelant était prescrit. Les parties s'entendent devant notre Cour pour dire que l'appelant était, à un certain moment du moins, actionnaire d'Intramodal. L'appelant, en attaquant la décision de la société intimée de le priver illégalement de son statut, exerce un recours qui, de par sa nature, se rattache à son droit de propriété sur ses actions. Ni la *LCSA* ni le *Code civil du Québec* (« *C.c.Q.* ») ne prévoient de prescription extinctive dans un tel cas. Tel que nous le verrons, la propriété des actions, par opposition aux droits qu'elles confèrent, ne fait pas l'objet d'une prescription extinctive au Québec. Partant, l'appelant ne peut se voir opposer, à l'encontre de son recours pour abus, le délai de prescription de trois ans de l'art. 2925 *C.c.Q.*

[105] Pour ces motifs, je suis d'avis qu'il y a lieu d'accueillir le pourvoi.

II. Facts

[106] In 2004, the appellant and his long-time friend, Mr. Rosati — who worked for Canvec Logistics at the time — discussed the possibility of forming a road transportation company. They agreed that the appellant would provide the start-up financing and that Mr. Rosati would contribute his skills and contacts.

[107] In April 2004, the name "Intramodal" was reserved with Quebec's Enterprise Registrar ("REQ"). The respondent company was incorporated on July 13, 2004. Its certificate of incorporation and its registers confirm that Mr. Rosati and Mr. Mennillo were appointed directors and officers and that Mr. Rosati held 51 and Mr. Mennillo 49 (share certificates No. 1 and No. 2) of the 100 Class "A" common shares that were issued for $1 each.

[108] On May 25, 2005, Mr. Mennillo resigned as a director and officer of Intramodal. A notice of resignation prepared by Daniel Ovadia, acting as Intramodal's lawyer, was sent to Mr. Mennillo, who signed it and faxed it back to Mr. Ovadia. The notice in question did not mention Mr. Mennillo's status as a shareholder but referred only to his removal as a director and officer. The reasons for the resignation were in dispute at trial, as Mr. Mennillo and Mr. Rosati offered conflicting interpretations of the events.

[109] Intramodal remained inactive for several months. The evidence shows that on July 18, 2005, Mr. Ovadia filed an amending declaration with the REQ that specified that the appellant had been removed as a director and officer, and as a shareholder. The declaration in question was signed by Mr. Ovadia, but not by the appellant.

[110] On August 5, 2005, Mr. Rosati ceased working for Canvec Logistics. He then dedicated himself full time to getting Intramodal off the ground. In the

II. Les faits

[106] Au cours de l'année 2004, l'appelant et son ami de longue date, M. Rosati — qui travaille alors chez Canvec Logistique —, discutent de la possibilité de créer une société œuvrant dans le domaine du transport routier. Ils conviennent que l'appelant en financera le démarrage et que M. Rosati y contribuera par le biais de ses compétences et de ses contacts.

[107] En avril 2004, le nom d'Intramodal est réservé auprès du Registraire des entreprises du Québec (« REQ »). La société intimée est constituée le 13 juillet 2004. Le certificat de constitution et les registres de la société confirment que MM. Rosati et Mennillo en sont nommés administrateurs et dirigeants et qu'ils détiennent respectivement 51 pour M. Rosati et 49 pour M. Mennillo (certificats d'actions nº 1 et nº 2) des 100 actions ordinaires de catégorie « A » émises au prix d'un dollar chacune.

[108] Le 25 mai 2005, M. Mennillo démissionne à titre d'administrateur et de dirigeant d'Intramodal. Un avis de démission, rédigé par Mᵉ Daniel Ovadia, agissant comme avocat d'Intramodal, lui est transmis, avis que M. Mennillo signe avant de le retourner à Mᵉ Ovadia par télécopieur. L'avis en question ne fait aucunement mention du statut d'actionnaire de M. Mennillo, mais seulement de son retrait à titre d'administrateur et de dirigeant. Les raisons expliquant cette démission ont fait l'objet d'un débat en première instance, MM. Mennillo et Rosati proposant des interprétations divergentes des événements.

[109] Intramodal demeurera inactive pendant plusieurs mois. La preuve révèle que le 18 juillet 2005, Mᵉ Ovadia a déposé auprès du REQ une déclaration modificative prévoyant le retrait de l'appelant à titre d'administrateur et de dirigeant, ainsi que d'actionnaire. La déclaration en question porte la signature de Mᵉ Ovadia. Nulle part toutefois n'y apparaît celle de l'appelant.

[110] Le 5 août 2005, M. Rosati cesse de travailler pour Canvec Logistique. Il s'investit alors à temps plein dans le démarrage d'Intramodal. À

fall of 2005, money was advanced by Mr. Mennillo. Intramodal officially began operating in December. Mr. Mennillo continued advancing money, which was used to finance the company's operations. As advances were made by Mr. Mennillo, the loaned amounts were recorded on cards of a Rolodex initialled by Mr. Rosati. A total of $440,000 was advanced in that way between June 2004 and October 2006.

[111] That amount was repaid in full by Intramodal between July 3, 2006 and December 7, 2009 by means of cheques marked "consultation fees" or "management fees". During that period, Mr. Mennillo was thus paid $690,000, which included interest and a premium, plus the applicable taxes.

[112] By 2006, the company founded by Mr. Mennillo and Mr. Rosati had become very successful.

[113] On March 24, 2006, Mr. Rosati filed with the REQ an annual declaration dated February 8, 2006 in which Mr. Mennillo was still listed as a shareholder of the company.

[114] In July 2007, at a dinner among friends, an argument broke out when Mr. Mennillo learned of the company's success. That same year (the exact date is not in evidence), Intramodal passed a retroactive resolution acknowledging Mr. Mennillo's resignation as a director and officer and approving the transfer of his shares to Mr. Rosati. That resolution, which is at the heart of this litigation and which shows that Mr. Mennillo was a shareholder of the company, at least before the transfer, was not signed by Mr. Mennillo. Nor did he ever endorse his share certificate, which remained in Intramodal's possession at all times and was never delivered to the purported transferee.

[115] In the fall of 2007, there were discussions involving the following persons: Antoine

l'automne 2005, des sommes d'argent sont avancées par M. Mennillo. En décembre, les activités d'Intramodal débutent officiellement. M. Mennillo continue d'avancer des sommes d'argent qui sont utilisées pour financer les activités de la société. Au fur et à mesure que M. Mennillo fait ces avances, les sommes prêtées sont consignées sur les fiches d'un *Rolodex* avec les initiales de M. Rosati. Au total, 440 000 $ seront ainsi avancés entre juin 2004 et octobre 2006.

[111] Ce montant sera remboursé en totalité par Intramodal au cours de la période du 3 juillet 2006 au 7 décembre 2009, et ce, au moyen de chèques portant la mention [TRADUCTION] « frais de consultation » ou « frais de gestion » (« *consultation fees* » ou « *management fees* »). Une somme de 690 000 $, incluant les intérêts et une prime à laquelle s'ajoutent les taxes applicables, est donc versée à M. Mennillo durant cette période.

[112] Dès 2006, l'entreprise fondée par MM. Mennillo et Rosati connaît un vif succès.

[113] Le 24 mars 2006, M. Rosati dépose au REQ une déclaration annuelle portant la date du 8 février 2006 dans laquelle M. Mennillo apparaît toujours comme actionnaire de la société.

[114] En juillet 2007, lors d'un souper entre amis, la discorde éclate alors que M. Mennillo prend conscience du succès de l'entreprise. En 2007 (la date exacte n'est pas établie par la preuve), Intramodal adopte une résolution avec effet rétroactif qui reconnaît la démission de M. Mennillo à titre d'administrateur et de dirigeant et qui entérine le transfert de ses actions à M. Rosati. Cette résolution, qui est au cœur du présent litige et qui atteste que, à tout le moins avant le transfert, M. Mennillo était actionnaire de la société, n'est pas signée par lui. Par ailleurs, le certificat d'actions de M. Mennillo ne sera jamais endossé par lui non plus. Il demeurera en tout temps entre les mains d'Intramodal et ne sera jamais délivré à son prétendu cessionnaire.

[115] Dès l'automne 2007, sont entreprises des discussions auxquelles prennent part les personnes

Papadimitriou, an accountant who was retained by several of the appellant's businesses, Paolo Carzoli, a tax lawyer who had been consulted by Mr. Papadimitriou for the occasion, and Israel Kaufman, a commercial lawyer consulted by the appellant to structure the proposed transaction. The appellant and Mr. Rosati also gave different accounts of the purpose of those discussions: according to the appellant, the purpose of the discussions was to determine a price for the redemption of his shares, while Mr. Rosati claimed that their purpose was to increase the amount of the repayment to be made to the appellant. The appellant's version was corroborated in this regard by Mr. Papadimitriou, Mr. Carzoli and Mr. Kaufman.

[116] On December 22, 2008, Intramodal amended its articles by removing any rights and privileges associated with the Class "A" to "G" shares of its capital stock and replacing them with new rights and privileges associated with Class "A" to "I" shares. New shares were issued to Fiducie Intra 4 (a trust created by Mr. Rosati) and to Mr. Rosati himself.

[117] On December 7, 2009, the appellant met Mr. Rosati at a restaurant and Mr. Rosati gave him a $40,000 cheque from Intramodal marked "Full and Final Payment". A few days after that payment, the appellant consulted his lawyer, who then checked the "CIDREQ" reports available online and obtained copies of the declarations filed with the REQ by Intramodal. Noting that the appellant was no longer listed as a shareholder, the lawyer told him about this discovery.

[118] On February 25, 2010, Mr. Kaufman sent Intramodal a formal notice. The appellant filed a claim for oppression against the respondent company on September 7, 2010.

[119] The appellant's version of the events that led to the dispute differs from Mr. Rosati's.

[120] Mr. Rosati maintains that in the initial agreement, the appellant undertook to finance the

suivantes : Antoine Papadimitriou, comptable dont les services sont retenus par plusieurs entreprises de l'appelant, M^e^ Paolo Carzoli, avocat fiscaliste consulté par M. Papadimitriou pour l'occasion et M^e^ Israel Kaufman, avocat commercialiste consulté par l'appelant pour le montage de l'opération projetée. L'appelant et M. Rosati offrent également des versions différentes quant à l'objet de ces discussions : selon l'appelant, ces discussions ont pour but de fixer le prix pour le rachat de ses actions, alors que selon M. Rosati, elles visent à augmenter le montant du remboursement à verser à l'appelant. La version de l'appelant est toutefois corroborée sous ce rapport par M. Papadimitriou, M^e^ Carzoli et M^e^ Kaufman.

[116] Le 22 décembre 2008, Intramodal modifie ses statuts en supprimant tous les droits et privilèges afférents aux actions de catégories « A » à « G » de son capital pour les remplacer par de nouveaux droits et privilèges afférents aux actions de catégories « A » à « I ». De nouvelles actions sont émises à Fiducie Intra 4 (une fiducie créée par M. Rosati) et à M. Rosati lui-même.

[117] Le 7 décembre 2009, l'appelant rencontre M. Rosati dans un restaurant et ce dernier lui remet un chèque de 40 000 $ tiré par Intramodal, sur lequel apparaît la mention [TRADUCTION] « règlement total et définitif » (« *Full and Final Payment* »). Quelques jours après ce paiement, l'appelant consulte son avocat, qui examine alors les rapports « CIDREQ » disponibles en ligne et obtient copie des déclarations déposées par Intramodal auprès du REQ. Il constate que l'appelant n'apparaît plus comme actionnaire et l'informe de sa découverte.

[118] Le 25 février 2010, M^e^ Kaufman envoie une mise en demeure à Intramodal. L'appelant intente un recours pour abus contre la société intimée le 7 septembre 2010.

[119] La version de l'appelant et celle de M. Rosati diffèrent quant aux événements ayant mené au différend en cause.

[120] M. Rosati soutient que dans le cadre de l'entente initiale, l'appelant s'est engagé à assumer

respondent company and guarantee its debts. At trial, he testified that his relationship with the appellant had begun to deteriorate in July 2004. According to Mr. Rosati, the appellant expressed serious doubts at that time about his ability to successfully implement their plan. Mr. Mennillo discussed this with Mr. Rosati and told him that he intended to withdraw from the company. Mr. Rosati acknowledges that he and Mr. Mennillo at no time formally established the terms of such a withdrawal. According to Mr. Rosati, the company had not yet started operating at the time of their discussion on this subject. Mr. Rosati insisted that the appellant continue financing him, and the appellant agreed to provide him with $300,000.

[121] The appellant categorically denies that he ever expressed an intention to withdraw from the company as a shareholder. He also denies that there was an agreement on his withdrawal as a shareholder. He admits withdrawing solely as a director and an officer, as is confirmed by his notice of resignation, and says that he did so at his friend's request. According to the appellant, a few weeks before May 25, 2005, Mr. Rosati told him that people from the Labatt Brewing Company Ltd. — a potential client — wanted to look at Intramodal's registers. Mr. Mennillo testified that Mr. Rosati told him at that time that it would be better that he withdraw while the necessary verifications were being carried out. According to Mr. Mennillo's own testimony, he resigned as a director and officer only after being promised that he would be reinstated. It was Mr. Rosati, through his lawyer, who sent the appellant a letter of resignation, which the appellant signed immediately.

[122] More specifically, the appellant's and Mr. Rosati's versions of the following events are diametrically opposed:

- With regard to a meeting at a restaurant on July 14, 2007, Mr. Rosati maintains that the appellant told him he was dissatisfied with the return on his loan. The two of them then decided to schedule a meeting to determine the amount to which the appellant was entitled in order to settle their dispute. According to Mr. Rosati,

le financement de la société intimée et à garantir son passif. Au procès, il a témoigné que sa relation avec l'appelant avait commencé à se détériorer à partir de juillet 2004. Toujours selon M. Rosati, l'appelant aurait alors exprimé de sérieux doutes quant à sa capacité à mener à bien leur projet. M. Mennillo en a discuté avec M. Rosati et lui a fait part de son intention de se retirer de la société. M. Rosati reconnaît que lui et M. Mennillo n'ont jamais formellement établi les modalités d'un tel retrait. Leur discussion à cet égard survient, toujours selon M. Rosati, alors que les activités de la société n'ont pas encore débuté. M. Rosati insiste pour que l'appelant continue de le financer, ce qu'il convient de faire à hauteur de 300 000 $.

[121] L'appelant, pour sa part, nie catégoriquement avoir manifesté, à quelque moment que ce soit, son intention de se retirer de la société comme actionnaire. Il nie de plus qu'il y ait eu entente visant son retrait comme actionnaire. Il admet s'être retiré uniquement à titre d'administrateur et de dirigeant, comme le confirme son avis de démission, et ce, à la demande de son ami. L'appelant affirme que quelques semaines avant le 25 mai 2005, ce dernier lui aurait indiqué que des gens de La Brasserie Labatt Ltée — un client potentiel — souhaitaient consulter les registres d'Intramodal. M. Mennillo témoigne que M. Rosati lui a alors indiqué qu'il valait mieux qu'il se retire le temps que les vérifications nécessaires soient faites. Selon son propre témoignage, M. Mennillo n'aurait démissionné comme administrateur et dirigeant que sous promesse d'être rétabli dans ses fonctions. C'est M. Rosati qui, par l'entremise de son avocat, lui fait parvenir une lettre de démission que l'appelant signe immédiatement.

[122] Plus particulièrement, l'appelant et M. Rosati offrent des versions diamétralement opposées des événements suivants :

- Concernant une rencontre au restaurant le 14 juillet 2007, M. Rosati soutient que l'appelant lui a indiqué qu'il était insatisfait du rendement de son prêt. Tous les deux ont alors décidé de fixer une rencontre afin de déterminer le montant auquel l'appelant a droit et mettre fin à leur différend. Les rencontres subséquentes

the purpose of the subsequent meetings in 2007 was to increase the amount on which they had already agreed.

- The appellant maintains that it was on July 14, 2007 that he realized Intramodal was doing very well. A meeting was scheduled not only to agree on the repayment of the loans, but also to determine a price for the redemption of his shares. Discussions on this subject took place on several occasions in 2007, but they were unsuccessful. It was not until December 2009, as a result of Mr. Kaufman's inquiries, that the appellant learned he was no longer a shareholder of Intramodal.

[123] However, Mr. Rosati and Mr. Mennillo agree on one point. There was no mention whatsoever on May 25, 2005 of the sale, exchange or gift of shares. At most, according to Mr. Rosati, because the appellant expressed an intention to withdraw from Intramodal whereas his shares had been issued to him on condition that he finance the company and guarantee its debts, he lost his status as a shareholder at that time. This is the version of the facts that was accepted by the trial judge.

III. Decisions of the Courts Below

A. *Quebec Superior Court, 2012 QCCS 1640 (Poirier J.)*

[124] The trial judge was of the view that the outcome of this case depended entirely on the credibility of the witnesses. He stated that the appellant's testimony and that of Mr. Rosati were contradictory with respect to three events in particular, namely:

- the appellant's resignation as a director and an officer of Intramodal on May 25, 2005;

- the meeting of July 14, 2007 at the restaurant and the meeting between the appellant and Mr. Rosati on July 21, 2007; and

ayant eu lieu en 2007 visaient, toujours selon M. Rosati, à augmenter le montant déjà convenu.

- L'appelant soutient que c'est le 14 juillet 2007 qu'il a réalisé qu'Intramodal avait le vent dans les voiles. Une rencontre est fixée, non seulement pour convenir du remboursement des prêts, mais également pour déterminer le prix de rachat de ses actions. Des discussions à ce sujet auront lieu à plusieurs reprises en 2007, mais avorteront. Ce n'est qu'en décembre 2009, suite aux vérifications de M^e^ Kaufman, qu'il apprendra qu'il n'est plus actionnaire d'Intramodal.

[123] MM. Rosati et Mennillo s'entendent toutefois sur un point. Le 25 mai 2005, il n'a jamais été question de vente, d'échange ou de donation d'actions. Tout au plus, selon M. Rosati, l'appelant ayant manifesté son intention de se retirer d'Intramodal alors que ses actions lui avaient été émises conditionnellement à ce qu'il finance la société et en garantisse le passif, il a alors perdu son statut d'actionnaire. C'est cette version des faits qui a été retenue par le juge de première instance.

III. Décisions antérieures

A. *Cour supérieure du Québec, 2012 QCCS 1640 (le juge Poirier)*

[124] Le juge de première instance estime que l'issue de la présente affaire repose entièrement sur la crédibilité des témoins. Il indique que le témoignage de l'appelant et celui de M. Rosati sont contradictoires quant à trois événements en particulier, à savoir :

- la démission de l'appelant à titre d'administrateur et de dirigeant d'Intramodal en date du 25 mai 2005;

- la rencontre du 14 juillet 2007 au restaurant ainsi que celle entre l'appelant et M. Rosati le 21 juillet 2007;

– the series of meetings with the appellant's accountant between October and December 2007.

[125] On the first of those events, the trial judge found that the reason for the appellant's withdrawal as a director and an officer [TRANSLATION] "cannot be linked to the visit to Intramodal's premises and the examination of the company's books by representatives of Labatt", thus rejecting the appellant's claim that Mr. Rosati had asked him to resign to reassure that potential client (para. 29 (CanLII)). The trial judge rejected the appellant's version with respect to the other events as well.

[126] The trial judge also analyzed the exhibits filed by the parties in detail. In his opinion, several of them directly contradicted the appellant's version.

[127] He concluded from the evidence as a whole that the appellant had held 49 common shares *on condition that he finance Intramodal's operations and guarantee all of its debts once it began operating as a business*. He also found that the shares had been distributed as follows when the respondent company was incorporated: 51 percent to Mr. Rosati and 49 percent to the appellant.

[128] More importantly, the trial judge found that it was the appellant who had asked to be removed from the company (both as a director and officer and as a shareholder) effective May 25, 2005. As of that date, in the trial judge's view, the appellant became merely a lender of $440,000 to Intramodal's sole shareholder, namely Mr. Rosati. In other words, because the appellant's shares had been issued on condition that he finance Intramodal's operations and guarantee its debts, those shares were transferred to Mr. Rosati when the appellant expressed a wish to be relieved of his obligations to Intramodal. The appellant nevertheless continued financing Intramodal's operations after May 25, 2005. The trial judge added that [TRANSLATION] "[t]he failure to complete the transfer of [the appellant's] shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer" (para. 74).

– la série de rencontres avec le comptable de l'appelant, d'octobre à décembre 2007.

[125] En ce qui concerne le premier de ces événements, le juge de première instance estime que le motif du retrait de l'appelant à titre d'administrateur et de dirigeant « ne peut être lié à la visite du local de Intramodal et l'examen des livres de la compagnie par les représentants de Labatt », rejetant ainsi la prétention de l'appelant suivant laquelle M. Rosati lui aurait demandé de démissionner afin de rassurer ce client potentiel (par. 29 (CanLII)). Quant aux autres événements, il rejette également la version de l'appelant.

[126] Le juge de première instance procède en outre à une analyse détaillée des pièces produites par les parties. Il est d'avis que plusieurs d'entre elles contredisent directement la version de l'appelant.

[127] Il retient de l'ensemble de la preuve que l'appelant a détenu 49 actions ordinaires *conditionnellement à ce qu'il finance les activités d'Intramodal et garantisse l'ensemble de son passif dès que débuteraient les activités de l'entreprise*. Il retient également que, lors de la constitution de la société intimée, les actions ont été réparties de la façon suivante : 51 p. 100 pour M. Rosati et 49 p. 100 pour l'appelant.

[128] Plus important encore, le juge de première instance retient que c'est l'appelant qui a demandé son retrait de la société (tant à titre d'administrateur et de dirigeant que d'actionnaire) à compter du 25 mai 2005. Selon lui, à partir de ce jour, l'appelant devenait simple prêteur d'une somme de 440 000 $ au seul actionnaire d'Intramodal, à savoir M. Rosati. En d'autres termes, dans la mesure où l'émission des actions de l'appelant était conditionnelle à ce que celui-ci finance les activités d'Intramodal et garantisse son passif, les actions ont été cédées à M. Rosati lorsque l'appelant a exprimé le souhait d'être libéré de ses obligations à l'égard d'Intramodal. L'appelant a pourtant continué à financer les activités d'Intramodal après le 25 mai 2005. Le juge de première instance ajoute que « [l]e fait que la cession des actions de [l'appelant] à Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de

In short, in his opinion, the appellant was no longer a shareholder, director or officer of Intramodal, which meant that his claim had to be dismissed.

B. *Quebec Court of Appeal, 2014 QCCA 1515*

(1) Reasons of the Majority (Vézina and St-Pierre JJ.A.)

[129] The majority of the Court of Appeal, per Vézina J.A., agreed with the trial judge that the outcome of this case depended on the credibility of the witnesses. In the majority's view, the trial judge had not made any palpable and overriding error that warranted the intervention of the Court of Appeal. Moreover, his assessment of the facts, including the finding that the appellant had been excluded from Intramodal as a shareholder at his own request, necessarily led to the conclusion that the claim had to be dismissed.

[130] Furthermore, the majority found that little weight should be given to the business records in this case, because the relevant documents had been prepared in a sloppy manner. They gave some examples of this, noting that, [TRANSLATION] "[c]learly, neither the parties nor their professional advisers were concerned about paperwork and formalities" and that it was therefore not surprising that the appellant's removal as a shareholder had not been properly registered (para. 216 (CanLII)). The majority added that [TRANSLATION] "[t]his lack of duly completed and reliable documents means that it will be necessary to look to the evidence as a whole, including the depositions, in order to determine what really happened in this case and what the parties actually agreed to" (para. 219).

[131] After considering the evidence relating to the three events analyzed by the trial judge, the majority of the Court of Appeal concluded as follows:

[TRANSLATION] Counsel for Mennillo argues that Mennillo cannot have both been a shareholder and not been a shareholder. Rosati admits that he was one, so it is up to him to prove that he ceased to be one. Hence the issue of the $49 discussed above.

l'avocat de Rosati » (par. 74). Bref, selon lui, l'appelant n'est plus détenteur d'aucune action ni administrateur ou dirigeant d'Intramodal. Son recours doit par conséquent être rejeté.

B. *Cour d'appel du Québec, 2014 QCCA 1515*

(1) Motifs des juges majoritaires (les juges Vézina et St-Pierre)

[129] La majorité de la Cour d'appel, sous la plume du juge Vézina, partage l'avis du juge de première instance selon lequel l'issue de la présente affaire repose sur la crédibilité des témoins. Selon elle, le juge de première instance n'a commis aucune erreur manifeste et dominante justifiant l'intervention de la Cour d'appel. Qui plus est, son appréciation des faits, notamment la conclusion selon laquelle c'est à sa propre demande que l'appelant a été exclu d'Intramodal comme actionnaire, menait nécessairement à la conclusion que le recours devait être rejeté.

[130] Par ailleurs, les juges majoritaires estiment que peu de poids doit être accordé aux documents de l'entreprise dans la présente affaire dans la mesure où les documents pertinents ont été rédigés sans aucune rigueur. Ils donnent quelques exemples qui les amènent à affirmer que, « [m]anifestement, ni les parties ni leurs professionnels ne se souciaient des papiers et des formalités », et qu'il n'est alors pas surprenant que le retrait de l'appelant comme actionnaire n'ait pas été dûment inscrit (par. 216 (CanLII)). Ils ajoutent que « [c]ette absence de documents dûment complétés et fiables oblige à chercher dans l'ensemble de la preuve, dont les dépositions, ce qui s'est réellement passé dans cette affaire, ce dont les parties ont vraiment convenu » (par. 219).

[131] Après avoir examiné la preuve relative aux trois événements analysés par le juge de première instance, les juges majoritaires de la Cour d'appel concluent ce qui suit :

Selon son avocat, Mennillo ne peut avoir été actionnaire et ne pas l'avoir été. Or, Rosati admet qu'il l'a été, donc c'est à lui de prouver qu'il a cessé de l'être. D'où la question des 49 $, ci-dessus traitée.

In my opinion, and this is the only point on which I have any doubt with respect to the judgment: Can it be concluded that there was a genuine transfer of the shares from Mennillo to Rosati? It seems to me, rather, that they quite simply agreed on May 25, 2005 to retroactively cancel their agreement to associate with one another that they had originally entered into in 2004. The agreement had been reached informally, as was the cancellation thereof.

In this sense, it can be said that Mennillo was a shareholder of Intramodal and that he never was one. This is the case for any contract that is annulled *ab initio* (from the start). The owner of an immovable who applies for annulment remains the owner until the judgment, but the next day is deemed never to have been the owner. If a marriage contract is annulled, the marriage is nonetheless a putative marriage. The spouse in good faith was never married, but it is as if he or she were, as that spouse benefits from the effects of marriage.

Ultimately, it does not matter how Mennillo's removal from the company on May 25, 2005 occurred, since the parties themselves did not see fit to clarify this and observe the formalities. Whether their initial agreement was cancelled or the shares were redeemed, the fact is that only Rosati remained in the company, and he subsequently developed his business for himself and his family. [Emphasis added; paras. 224-27.]

[132] In short, although the majority did not intervene with respect to the trial judge's findings of fact, they did express doubts about his conclusion that the appellant's shares had been transferred to Mr. Rosati. There was no evidence that the terms of the appellant's removal as a shareholder had been discussed. In the majority's view, even though the two men had in fact agreed on the appellant's removal, they had not seen fit to specify how this was to occur. Vézina and St-Pierre JJ.A. held that insofar as the initial agreement had been entered into without any formalities, it could be cancelled in the same way.

(2) Reasons of the Dissenting Judge (Gagnon J.A.)

[133] Gagnon J.A. would have allowed the appeal on the basis that the trial judge's reasons contained

À mon avis, et c'est le seul point où j'ai un doute par rapport au jugement : peut-on conclure qu'il y a eu véritablement cession des actions de Mennillo à Rosati? Il me semble plutôt que, tout simplement, ils conviennent le 25 mai 2005 d'annuler rétroactivement leur entente d'association convenue au départ en 2004. L'entente avait été conclue sans aucun formalisme, de même son annulation.

Et en ce sens, on peut affirmer que Mennillo a été actionnaire d'Intramodal et qu'il ne l'a jamais été. C'est le cas dans tout contrat annulé *ab initio* (depuis le début). Le propriétaire d'un immeuble qui en demande l'annulation demeure propriétaire jusqu'au jugement, le lendemain il est réputé ne jamais l'avoir été. Si un contrat de mariage est annulé, ce n'en est pas moins un mariage putatif, et l'époux de bonne foi n'a jamais été marié, mais c'est tout comme, il (ou elle) bénéficie des effets du mariage.

Enfin, peu importe comment s'est effectué le retrait de Mennillo de l'entreprise le 25 mai 2005 puisque les intéressés n'ont pas jugé bon eux-mêmes de le préciser et d'y mettre les formes. Que ce soit par annulation de leur entente initiale ou par rachat d'actions, le fait est que seul Rosati est demeuré dans la société et, par la suite, il a développé son entreprise pour lui et les siens. [Je souligne; par. 224-227.]

[132] Bref, bien qu'ils n'interviennent pas quant aux conclusions factuelles du juge de première instance, les juges majoritaires expriment des doutes quant à sa conclusion selon laquelle il y a eu cession d'actions de l'appelant à M. Rosati. En effet, la preuve est muette sur l'existence de quelque discussion concernant les modalités du retrait de l'appelant à titre d'actionnaire. Selon les juges majoritaires, même si tous deux se sont effectivement entendus sur le retrait de l'appelant, ils n'ont toutefois pas cru bon de prévoir comment ce retrait s'effectuerait. De l'avis des juges Vézina et St-Pierre, dans la mesure où l'entente initiale avait été conclue sans aucun formalisme, elle pouvait être annulée de la même façon.

(2) Motifs du juge dissident (le juge Gagnon)

[133] Le juge Gagnon aurait pour sa part accueilli l'appel au motif que le jugement de première

errors of law and palpable and overriding errors of fact. Among other things, he faulted the trial judge, and the majority, for disregarding the law and the respondent company's articles and by-laws by reducing the case to no more than one of credibility.

[134] In Gagnon J.A.'s view, the trial judge was wrong to find that the appellant's ownership of 49 common shares of Intramodal was [TRANSLATION] "conditional" (para. 32). The legislation does not provide for conditional shareholder status, he said. Moreover, there was nothing in the respondent company's registers to support such a position.

[135] Gagnon J.A. added that [TRANSLATION] "status as a shareholder cannot depend on an informal agreement between individuals and on whether one of them chooses to resiliate it or not to resiliate it" (para. 32). He expressed the opinion that the evidence adduced at trial concerning the appellant's status as a shareholder for the period from July 13, 2004 to May 25, 2005 was indisputable. In his view, there was no doubt that the appellant was one of Intramodal's two founding shareholders. The only issue was therefore whether he ceased to be a shareholder at some point and, if so, how.

[136] On the question of a possible transfer of the appellant's shares to Mr. Rosati, Gagnon J.A. found that the onus was on Mr. Rosati to show that he was the duly registered transferee of the appellant's shares pursuant to s. 53(d) *CBCA*.

[137] In response to the respondent company's argument that the appellant's failure to make good on his undertaking to guarantee the company's debts amounted to the price paid by Mr. Rosati to acquire his shares, Gagnon J.A. observed that this confused the company's interests with those of its majority shareholder and also disregarded their distinct legal personalities.

[138] Gagnon J.A. also rejected the respondent company's alternative theory that the appellant had "given" his shares to Mr. Rosati. He relied on art. 1824 *C.C.Q.*, which provides that a gift of

instance est entaché d'erreurs de droit ainsi que d'erreurs de fait manifestes et dominantes. Il reproche entre autres au juge de première instance et aux juges majoritaires de faire abstraction de la loi ainsi que des statuts et des règlements de la société intimée lorsqu'ils réduisent le litige à une simple affaire de crédibilité.

[134] Selon le juge Gagnon, le juge de première instance ne pouvait conclure que la détention par l'appelant de 49 actions ordinaires d'Intramodal était « conditionnelle » (par. 32). Le caractère conditionnel du statut d'actionnaire, dit-il, n'est pas prévu par la loi. D'ailleurs, rien dans les registres de la société intimée n'appuie cette thèse.

[135] Le juge Gagnon ajoute que « la qualité d'actionnaire ne peut dépendre d'une entente informelle intervenue entre des individus, selon que l'un d'eux choisit ou pas de la résilier » (par. 32). Il estime que la preuve présentée en première instance relativement à la qualité d'actionnaire de l'appelant pour la période du 13 juillet 2004 au 25 mai 2005 est incontestable. Il ne fait selon lui aucun doute que l'appelant était l'un des deux actionnaires fondateurs d'Intramodal. La seule question qui se pose est donc de savoir si, à un moment ou à un autre, il a cessé de l'être et, si oui, comment.

[136] Sur la question d'un possible transfert des actions de l'appelant à M. Rosati, le juge Gagnon considère qu'il appartenait à M. Rosati de démontrer qu'il était le cessionnaire dûment inscrit des actions de l'appelant en vertu de l'al. 53d) *LCSA*.

[137] À l'argument de la société intimée selon lequel le défaut de l'appelant de respecter son engagement de garantir le passif de la société équivaudrait au prix payé par M. Rosati pour l'acquisition de ses actions, le juge Gagnon rétorque que c'est confondre l'intérêt de la société avec celui de son actionnaire majoritaire, en plus de ne pas tenir compte de leurs personnalités juridiques distinctes.

[138] Le juge Gagnon rejette également l'hypothèse avancée subsidiairement par la société intimée et selon laquelle l'appelant aurait « donné » ses actions à M. Rosati. Il s'appuie sur l'art. 1824 *C.c.Q.*,

movable property must be made by notarial act *en minute*, with one exception: where consent to a gift of such property is accompanied by delivery and immediate possession of the property. Gagnon J.A. noted that, in the instant case, Intramodal had not received any notarial contract in which Mr. Mennillo transferred his shares to Mr. Rosati. He added that the evidence did not show a manual gift from the appellant to Mr. Rosati accompanied by delivery of the instrument.

[139] Gagnon J.A. ended his reasons on this point by noting that, to have the claim dismissed, the respondent company had to show that Mr. Rosati was the actual transferee of the shares in question, which required that his share certificate be endorsed in accordance with s. 64 *CBCA*. Moreover, Intramodal's articles provided that no share could be transferred unless the board of directors passed a resolution consenting to the transfer. In the circumstances, it was quite simply not open to Intramodal to disregard these requirements and approve a transfer of shares to Mr. Rosati.

[140] Gagnon J.A. was also of the view that the trial judge should not have rejected the appellant's version of the facts and that there were palpable and overriding errors in his analysis in this regard.

[141] Finally, Gagnon J.A. also rejected the argument that the claim was prescribed.

IV. Issues

[142] The main issues are as follows:

- Did the respondent company, by passing the resolution approving the transfer of the appellant's shares to its majority shareholder and registering that transfer in its registers, contrary to the applicable legislation and to its own articles and by-laws, create an oppressive situation that satisfies the conditions for making a claim for oppression under s. 241 *CBCA*?

qui prévoit que la donation d'un bien meuble s'effectue par acte notarié en minute, sauf dans le seul cas où le consentement à la donation d'un tel bien s'accompagne de la délivrance et de la possession immédiate du bien. Le juge Gagnon souligne que, en l'espèce, Intramodal ne s'est vu remettre aucun contrat notarié dans lequel M. Mennillo transférait ses actions à M. Rosati. Il ajoute que la preuve ne révèle pas un don manuel de l'appelant à M. Rosati accompagné de la délivrance du titre.

[139] Le juge Gagnon termine ses motifs sur ce point en soulignant que, pour obtenir le rejet du recours, la société intimée devait démontrer que M. Rosati était le véritable cessionnaire des actions en cause, ce qui nécessitait l'endossement de son certificat d'actions, le tout conformément à l'art. 64 *LCSA*. De plus, les statuts d'Intramodal prévoient qu'aucune action ne peut être transférée sans le consentement du conseil d'administration exprimé par voie de résolution. Dans ces circonstances, Intramodal ne pouvait tout simplement pas faire fi de ces exigences et ratifier un transfert d'actions à M. Rosati.

[140] Le juge Gagnon est par ailleurs d'avis que le juge de première instance n'aurait pas dû écarter la version des faits de l'appelant et que son analyse, sur ce point, est entachée d'erreurs manifestes et dominantes.

[141] Enfin, le juge Gagnon rejette également l'argument selon lequel le recours est prescrit.

IV. Questions en litige

[142] Les principales questions en litige sont les suivantes :

- La société intimée, en adoptant la résolution entérinant le transfert des actions de l'appelant au bénéfice de son actionnaire majoritaire et en inscrivant ce transfert dans ses registres, en contravention de la législation applicable et de ses propres statuts et règlements, a-t-elle provoqué une situation d'abus qui satisfait aux conditions d'ouverture du recours pour abus prévu à l'art. 241 *LCSA*?

- Can the fact that the appellant expressed an intention to withdraw from the respondent company be raised against him as a bar to such a claim?

- Did the trial judge make palpable and overriding errors in assessing the evidence?

- Is the appellant's claim prescribed?

V. Analysis

A. *Importance of Formalism in Corporate Law*

[143] As I mentioned above, the analysis of the issues requires a review of some basic principles. While it is true that the appellant and Mr. Rosati did not make the effort to prepare complete documents setting out the exact terms of their business relationship and that they took a rather lax approach in preparing their corporate documents, there is no question that a corporation was indeed formed under the *CBCA* on July 13, 2004 and that the appellant was a shareholder from that date until at least May 25, 2005.

[144] A number of arguments have been advanced in this case with respect to the appellant's shares and, more specifically, to his status as a shareholder, including that the appellant was never a shareholder of the respondent company, that he agreed to transfer the shares to Mr. Rosati, that his ownership of the shares was conditional, and that the shares in question were cancelled retroactively.

[145] With regard to the cancellation of the shares, counsel for the appellant correctly noted at the hearing, in response to the reasons of the majority of the Court of Appeal, that such a cancellation can be effected only in accordance with the law, that is, by amending the corporation's articles or, if the shares have already been paid for, by redeeming them.

[146] The *CBCA* regulates the cancellation of a corporation's shares in order to ensure the integrity of the corporation's share capital and to preserve the common pledge of its creditors. It does so in

- L'appelant peut-il se voir opposer l'expression de son intention de se retirer de la société intimée comme fin de non-recevoir à un tel recours?

- Le juge de première instance a-t-il commis des erreurs manifestes et dominantes dans son appréciation de la preuve?

- Le recours de l'appelant est-il prescrit?

V. Analyse

A. *Importance du formalisme en droit des sociétés*

[143] Tel que mentionné plus avant, l'analyse des questions en litige exige un rappel de certains principes de base. S'il est vrai que l'appelant et M. Rosati se sont peu souciés de transposer dans des écrits complets les modalités exactes de leurs relations d'affaires et qu'ils ont fait preuve d'un certain laxisme dans la préparation des documents relatifs à la société, il est incontestable qu'une société a bel et bien été formée en vertu de la *LCSA* le 13 juillet 2004 et que l'appelant a été actionnaire du 13 juillet 2004 jusqu'au moins le 25 mai 2005.

[144] Le sort réservé aux actions de l'appelant en l'espèce et, en l'occurrence, à sa qualité d'actionnaire, a donné lieu à plusieurs thèses, entre autres celles suivant lesquelles l'appelant n'aurait jamais été actionnaire de la société intimée, il aurait convenu de les transférer à M. Rosati, il aurait été un actionnaire conditionnel, ou encore les actions en cause auraient été annulées rétroactivement.

[145] En ce qui concerne l'annulation des actions, l'avocat de l'appelant, à l'audience, et en réponse au jugement majoritaire de la Cour d'appel, a souligné à juste titre qu'une telle annulation ne pouvait se faire que conformément à la loi, soit par voie de modification des statuts, soit, si les actions ont déjà été payées, par voie d'achat ou de rachat.

[146] La *LCSA* encadre l'annulation des actions de la société dans le but de garantir l'intégrité du capital-actions et de préserver le gage commun des créanciers, le tout conformément à la règle du

accordance with the maintenance of capital rule, which is of particular importance in corporate law:

> Although the trust fund doctrine does not completely apply to our corporate law, it nonetheless constitutes the basis of a rule which appears in the law today: the maintenance of capital rule.
>
> This rule is inferred from statutory provisions prohibiting or submitting to solvency (federally) or accounting tests various transactions directly or indirectly having an effect on the paid-up capital of a corporation, such as the reduction of issued capital, declaration of dividends, acquisition by a corporation of its shares, issue of shares at a discount, transfer of shares not fully paid, etc. In the Quebec *Business Corporations Act*, it is telling that most of these provisions are found in a section entitled "Maintenance of share capital".
>
> The paid-up capital of a corporation must be maintained and safeguarded in the interest of the creditors: to this extent we can say that the trust fund doctrine is present, especially when we consider that all the above-mentioned transactions can lead to the personal liability of the directors.
>
> The principle, which essentially comes from doctrine and case law respecting paid-up capital, is the following: a corporation is not allowed to "traffic in" its capital. The statutory provisions we have referred to merely define the limits of this principle by creating certain exceptions to the prohibition against a corporation drawing on its paid-up capital. Any action which does not fall within the scope of these exceptions infringes the maintenance of capital rule and is therefore unlawful. [Emphasis added; footnotes omitted.]

(P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at pp. 12-17 and 12-18)

[147] It should be borne in mind that, although a business corporation is similar to a partnership in some respects, as is true, for example, of relationships between the shareholders of a closely held corporation, it differs from a partnership in several ways, including the fact that it requires a stricter adherence to formalities to ensure its independent existence.

maintien du capital, laquelle est au cœur du droit des sociétés :

> Même si la doctrine du *Trust fund* ne s'applique pas intégralement dans notre droit des sociétés, elle n'en constitue pas moins un fondement d'une règle qui, elle, se manifeste dans les lois actuelles : la règle du maintien du capital.
>
> Cette règle se déduit des dispositions statutaires interdisant ou soumettant à des tests de solvabilité, au fédéral, ou comptables, diverses opérations ayant pour conséquence directe ou indirecte d'affecter le capital souscrit de la société, comme par exemple la réduction du capital émis, la déclaration de dividendes, l'acquisition de ses propres actions par la société, l'émission d'actions à escompte, le transfert d'actions impayées, etc. Dans la *Loi sur les sociétés par actions*, il est significatif que la plupart de ces dispositions soient regroupées dans une section, intitulée « Maintien du capital ».
>
> Le capital souscrit de la société doit être maintenu, sauvegardé, et ce dans l'intérêt des créanciers : dans cette mesure, on peut parler d'une manifestation de la doctrine du *Trust fund*, surtout quand on constate que toutes les opérations mentionnées plus haut engagent la responsabilité personnelle des administrateurs.
>
> À la base, le principe dégagé par la doctrine et la jurisprudence en matière de capital souscrit est le suivant : la société n'a pas le droit de « trafiquer » dans son capital. Les dispositions statutaires auxquelles nous avons fait allusion ne viennent que préciser les limites de ce principe, en créant certaines exceptions à cette défense pour la société de toucher à son capital souscrit. Tout geste qui n'entre pas dans le cadre de ces exceptions contrevient à la règle du maintien du capital et est de ce fait illégal. [Je souligne; notes en bas de page omises.]

(P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (feuilles mobiles), par. 12-79 à 12-82)

[147] Rappelons que la société par actions, malgré qu'elle comporte certaines similitudes avec la société de personnes, notamment en ce qui concerne les rapports entre les actionnaires dans le cas d'une société par actions à capital fermé, s'en distingue à plusieurs égards, notamment par le fait qu'elle requiert un formalisme plus grand visant à assurer son existence autonome.

[148] A business corporation is not merely the product of an agreement between associates. As Martel notes, "[a] corporation is a 'joint stock corporation' incorporated through the intervention of the State, not by contract, and as such it is not subject to the partnership rules in the *Civil Code*" (p. 27-32 (footnote omitted)).

[149] By choosing a business corporation as their legal vehicle for carrying on business, a company's founders and shareholders voluntarily decide to be subject to a scheme that, although it does involve numerous formalities, also has a number of advantages, including the limited liability of directors for the corporation's debts, which is an advantage that flows directly from the corporation's distinct legal personality.

[150] In the case at bar, if Mr. Mennillo and Mr. Rosati had wanted consensualism to take precedence over formalism in the conduct of their affairs, they could easily have opted for a partnership, but they did not do so. Since they instead chose to create a business corporation, they cannot enjoy the advantages of such a corporation without complying with the stricter rules that apply to it.

[151] A business corporation is a legal person established for a private interest that has a distinct legal personality and patrimony: R. Crête and S. Rousseau, *Droit des sociétés par actions* (3rd ed. 2011), at para. 51. In principle, it expresses itself through the resolutions of its board of directors. Decisions of the board of directors must be made at meetings that are lawfully called, although it is also possible for all the directors to sign a given resolution in writing, in which case the resolution is as valid as if it had been passed at a meeting: s. 117(1) *CBCA*.

[152] The shareholders may exercise the management powers of the board of directors only if they enter into a unanimous shareholder agreement pursuant to s. 146 *CBCA*. Moreover, several of the many powers conferred on the board of directors may not be delegated and require authorization from the board itself: ss. 121(a) and 115(3) *CBCA*. In the

[148] Une société par actions n'est pas que le produit d'une entente entre les associés. Comme le souligne Martel : « La société est une "société par actions", constituée par l'intervention de l'État et non pas par contrat et comme telle elle n'est pas assujettie au régime général des sociétés du Code civil » (par. 27-122 (note en bas de page omise)).

[149] En choisissant le véhicule juridique qu'est la société par actions pour exercer leurs activités, les fondateurs et actionnaires d'une telle société décident volontairement de s'assujettir à un régime qui est certes soumis à de nombreuses formalités, mais qui comporte aussi plusieurs avantages, notamment la responsabilité limitée des administrateurs quant au passif de la société, soit un avantage qui découle directement de sa personnalité juridique distincte.

[150] Dans le cas qui nous occupe, si MM. Mennillo et Rosati avaient voulu que le consensualisme prime le formalisme dans la conduite de leurs affaires, ils auraient facilement pu opter pour une société de personnes, mais ils ne l'ont pas fait. Dans la mesure où ils ont plutôt choisi de créer une société par actions, ils ne peuvent bénéficier des avantages de ce type de société sans se soumettre aux règles plus strictes qui s'y rattachent.

[151] La société par actions est une personne morale de droit privé dotée d'une personnalité juridique et d'un patrimoine distincts : R. Crête et S. Rousseau, *Droit des sociétés par actions* (3e éd. 2011), par. 51. Elle s'exprime en principe au moyen des résolutions adoptées par son conseil d'administration. Les décisions du conseil d'administration doivent se prendre lors de réunions régulièrement convoquées, à moins que tous les administrateurs ne signent une résolution écrite, auquel cas cette dernière a la même valeur qui si elle avait été adoptée au cours d'une réunion : par. 117(1) *LCSA*.

[152] Les pouvoirs de gestion du conseil d'administration ne peuvent être exercés par les actionnaires que lorsque ceux-ci adoptent une convention unanime des actionnaires en vertu de l'art. 146 *LCSA*. De plus, parmi les nombreux pouvoirs conférés au conseil d'administration, plusieurs ne peuvent être délégués et doivent faire l'objet d'une

in registering a transfer of shares and the oppression that resulted from its failure to discharge them, (3) the alleged agreement between the appellant and Mr. Rosati regarding the shares in question and, finally, (4) the question whether the claim is prescribed.

(1) Conditions for Making a Claim for Oppression

[169] Section 241(2) *CBCA* provides that a complainant may apply to a court to rectify matters resulting from a corporation's conduct where

> **(a)** any act or omission of the corporation . . . effects a result,
>
> **(b)** the business or affairs of the corporation . . . are or have been carried on or conducted in a manner, or
>
> **(c)** the powers of the directors of the corporation . . . 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 . . . .

[170] In *Budd v. Gentra Inc.* (1998), 111 O.A.C. 288, the Ontario Court of Appeal described the purpose of the oppression remedy and the nature of the relevant conduct as follows:

> Section 241 provides a statutory means whereby corporate stakeholders may gain redress for corporate conduct which has one of the effects described in s. 241(2). The section serves as a judicial brake against abuse of corporate powers, particularly, but not exclusively, by those in control of a corporation and in a position to force the will of the majority on the minority. Section 241 enables the court to intercede in the affairs and operation of a corporation and to effectively override the decisions of those charged with the responsibility of corporate governance. [para. 32]

[171] The oppression remedy introduced by the reform of corporate law that began in the 1970s

transfert d'actions et la situation d'abus provoquée par son omission de s'en acquitter, (3) la prétendue entente entre l'appelant et M. Rosati quant aux actions en cause et, enfin, (4) la question de la prescription du recours.

(1) Les conditions d'ouverture du recours pour abus

[169] Le paragraphe 241(2) *LCSA* prévoit qu'un plaignant peut demander au tribunal de redresser toute situation provoquée par la société lorsqu'elle

> abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :
>
> **a)** soit en raison de son comportement;
>
> **b)** soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;
>
> **c)** soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[170] La Cour d'appel de l'Ontario, dans l'affaire *Budd c. Gentra Inc.* (1998), 111 O.A.C. 288, décrit ainsi l'objet du recours pour abus et la nature de la conduite visée :

> [TRADUCTION] L'article 241 [de la *LCSA*] permet à un intéressé dans la société d'obtenir une ordonnance pour remédier au comportement de la société qui a l'un des effets mentionnés au par. 241(2). Il constitue un frein judiciaire à l'abus des pouvoirs de la société, en particulier, mais pas seulement, par les actionnaires majoritaires susceptibles d'infléchir la volonté des actionnaires minoritaires. L'article 241 permet au tribunal de s'immiscer dans les affaires et dans l'exploitation d'une société et d'annuler les décisions des personnes auxquelles incombe la régie de l'entreprise. [par. 32]

[171] Le recours pour abus introduit par la réforme du droit des sociétés amorcée dans les années

gives the courts significant powers in respect of the internal affairs of the corporation in question. It is an equitable remedy that, *inter alia*, allows a corporation's directors, officers and shareholders to resolve their disputes in a case involving oppression.

[172] Shareholders of a closely held corporation sometimes find it unnecessary to enter into a detailed agreement to govern their internal relationships. However, a shareholder may have legitimate expectations that go beyond what is specifically provided for in the corporation's articles and by-laws; an oppression remedy such as the one provided for in s. 241 *CBCA* is therefore all the more justified.

[173] As this Court noted in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, s. 241 *CBCA* is extremely broad in scope. The broad powers this section confers on a court enable the court, *inter alia*, to prevent a corporation from arguing that, because its actions were lawful, the oppression remedy is not available to a complainant: Crête and Rousseau, at paras. 1576-77.

[174] In some circumstances, where an alleged illegality is also oppressive or unfairly prejudicial, the oppression remedy will also make it possible to sanction a corporation for failure to discharge its legal duties, although proof of such a failure is not a prerequisite under s. 241 *CBCA*:

> . . . the oppression remedy does not turn on legal rights as much as on concepts of fairness and equity. Conduct may be oppressive even if it is "legal" in the sense that it is based on the exercise of a legal right. The remedy gives the court broad, equitable jurisdiction to enforce not just what is legal but what is fair. Although some courts have tied oppression relief to the establishment of some type of common legal claim, the oppression remedy is not simply a codification of the common law. The weight of jurisprudence holds that, although a breach of a legal duty will constitute oppression, it is not a prerequisite to a finding of oppression. As a result, a finding of oppression does not require the applicant to

70 confère aux tribunaux d'importants pouvoirs à l'égard des affaires internes de la société visée. Il s'agit d'un recours en equity qui permet notamment aux administrateurs, aux dirigeants et aux actionnaires d'une société de résoudre leurs conflits en cas d'abus.

[172] Dans une société par actions à capital fermé, les actionnaires jugent parfois inutile de conclure une entente détaillée pour régir leurs rapports internes. Or, un actionnaire peut avoir des attentes légitimes qui dépassent le cadre de ce qui est spécifiquement prévu dans les statuts et règlements de la société; un recours pour abus comme celui que prévoit l'art. 241 *LCSA* est donc d'autant plus justifié.

[173] Comme le rappelle notre Cour dans l'arrêt *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, la portée de l'art. 241 *LCSA* est extrêmement large. Les vastes pouvoirs conférés au tribunal par cette disposition lui permettent notamment d'empêcher la société d'opposer la légalité de ses actes comme fin de non-recevoir au recours pour abus d'un plaignant : Crête et Rousseau, par. 1576-1577.

[174] Le recours pour abus permettra également, dans certaines circonstances, lorsque l'illégalité alléguée constitue par ailleurs un abus ou un acte injustement préjudiciable, de sanctionner la société qui omet de se conformer à ses obligations légales, même si la démonstration d'une telle omission ne constitue pas une condition préalable aux fins de l'art. 241 *LCSA* :

> [TRADUCTION] . . . le recours pour abus repose moins sur des droits reconnus par la loi que sur des notions d'équité et de justice. Une conduite peut être abusive même si elle est "légale" au sens où elle résulte de l'exercice d'un droit reconnu par la loi. L'exercice du recours confère au tribunal le pouvoir général, fondé sur l'equity, de faire respecter non seulement ce qui est légal, mais aussi ce qui est juste. Certains tribunaux ont subordonné leur intervention à l'établissement d'une quelconque réclamation en common law, mais le recours pour abus n'est pas seulement le résultat de la codification de la common law. Il appert de la jurisprudence que même si le manquement à une obligation légale constitue un abus,

establish conduct that is subject to redress at law. When determining whether conduct is oppressive, courts have been admonished to look at business realities and not narrow legalities. [Emphasis added; footnotes omitted.]

(M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 78-79)

[175] According to the analytical approach set out in *BCE*, a court must proceed in two stages in considering a claim under s. 241 *CBCA*. First, the court must determine whether the evidence shows that the complainant had a reasonable expectation having regard to the facts of the case before it. Then, it must determine whether the conduct contrary to that expectation was oppressive or unfairly prejudicial within the meaning of s. 241 *CBCA*: *BCE*, at para. 68.

[176] If the court concludes that there was oppressive conduct on the corporation's part, it then has a broad discretion to decide what remedial order to make. Section 241 *CBCA* contains a non-exhaustive list of orders that can be made; the contemplated order must take the parties' mutual interests into account.

[177] At the first stage, that of the reasonable expectation, the court can consider various factors, as this Court noted in *BCE* (at para. 72):

Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[178] I cannot subscribe to the view that, by expressing an intention to withdraw from the respondent company as a shareholder, Mr. Mennillo extinguished any reasonable expectations he may

il n'est pas requis pour que l'on puisse conclure à l'abus. Partant, pour prouver l'abus, le demandeur n'a pas à établir l'existence d'une conduite qui justifie un redressement en droit. On a exhorté les tribunaux appelés à se prononcer sur le caractère abusif d'une conduite à tenir compte de la réalité commerciale et non des considérations strictement juridiques. [Je souligne; notes en bas de page omises.]

(M. Koehnen, *Oppression and Related Remedies* (2004), p. 78-79)

[175] Dans le cadre d'un recours fondé sur l'art. 241 *LCSA*, le tribunal doit, suivant la méthode d'analyse mise de l'avant dans l'arrêt *BCE*, procéder en deux étapes. Il doit d'abord déterminer si la preuve démontre une attente raisonnable du plaignant compte tenu des faits propres à l'espèce. Il doit ensuite déterminer si la violation de cette attente constitue un abus ou un acte injustement préjudiciable au sens de l'art. 241 *LCSA* : *BCE*, par. 68.

[176] Lorsque le tribunal conclut qu'il y a eu conduite abusive de la part de la société, il dispose alors d'un large pouvoir discrétionnaire pour choisir l'ordonnance réparatrice à rendre. L'article 241 *LCSA* prévoit une liste non exhaustive d'ordonnances qu'il peut imposer, l'ordonnance envisagée devant prendre en compte les intérêts mutuels des parties.

[177] À la première étape axée sur l'attente raisonnable, le tribunal peut prendre en compte différents facteurs, comme l'a rappelé notre Cour dans *BCE* (par. 72) :

Des facteurs utiles pour l'appréciation d'une attente raisonnable ressortent de la jurisprudence. Ce sont notamment les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées.

[178] Je ne puis souscrire à l'opinion selon laquelle en exprimant l'intention de se retirer de la société intimée à titre d'actionnaire, M. Mennillo mettait fin à toutes attentes raisonnables qu'il pouvait

have had as regards his remaining on the company's books as a shareholder, or that the expression of that intention barred his claim for oppression. By that logic, the mere expression of an intention to withdraw from a corporation as a shareholder would also extinguish the reasonable expectation that the corporation in question will act in accordance with the law and with its articles and by-laws and will make the necessary inquiries before depriving a person of his or her shareholder status, thereby defeating the oppression remedy. I cannot accept this reasoning for the reasons that follow.

[179] First, the *CBCA* itself does not limit access to the oppression remedy in such a manner. Section 238 provides that a complainant (including one who makes a claim for oppression) may be a registered holder of a security but may also be a former registered holder of a security of a corporation. The s. 241 remedy is therefore available to a former shareholder, not only one who has allegedly expressed an intention to cease to be a shareholder, but also one who has allegedly completed a specific juridical operation by which he or she effectively transferred his or her shares.

[180] Next, where the complainant's expectations are based on strict legal rules and the corporation's impugned conduct is alleged to have been unlawful, it is my view that the question of reasonable expectations plays an extremely limited role, or even no role at all. This is readily understandable, since shareholders are entitled to expect a corporation to act in accordance with its articles and by-laws and, more generally, with the law. These are, so to speak, presumed expectations:

> It is submitted that the shareholders' reasonable expectations analysis is the most appropriate theory to determine whether the interests of a shareholder have been unfairly prejudiced or unfairly disregarded in the context of a closely-held corporation. The analysis goes to the heart of the unfairness on an intuitive level. It also defines the standard of unfairness in a manner that is conducive to a principled application at law.
>
> Of course other circumstances can attract the remedial scope of the oppression remedy. Corporate action which

avoir de demeurer dans les registres de la société en tant qu'actionnaire, ni que l'expression de cette intention constituait une fin de non-recevoir à son recours pour abus. Selon cette logique, la simple expression de l'intention de se retirer d'une société en tant qu'actionnaire mettrait également fin à l'attente raisonnable que la société en question agisse en conformité avec la loi et ses statuts et règlements et qu'elle procède aux vérifications requises avant de priver une personne de son statut d'actionnaire, faisant ainsi échec au recours pour abus. Je ne peux souscrire à ce raisonnement pour les raisons qui suivent.

[179] Tout d'abord, la *LCSA* elle-même ne limite pas ainsi l'accès au recours pour abus. En effet, l'art. 238 prévoit qu'un plaignant (notamment en cas de recours pour abus) peut être le détenteur inscrit de valeurs mobilières, mais également un ancien détenteur de valeurs mobilières d'une société. Donc, le recours prévu à l'art. 241 est ouvert à un ancien actionnaire, non seulement celui qui aurait exprimé une intention de ne plus l'être, mais aussi celui qui aurait conclu une opération juridique précise en vertu de laquelle il a effectivement cédé ses actions.

[180] Ensuite, lorsque les attentes du plaignant se fondent sur le droit strict, et qu'il allègue l'illégalité de la conduite reprochée à la société, je suis d'avis que la question des attentes raisonnables joue un rôle extrêmement limité et n'en joue peut-être même aucun. Cela se comprend aisément puisque les actionnaires sont en droit de s'attendre à ce que la société agisse en conformité avec ses statuts et règlements et, plus généralement, avec la loi. Il s'agit pour ainsi dire d'attentes présumées :

> [TRADUCTION] Les attentes raisonnables de l'actionnaire constitueraient le meilleur cadre d'analyse pour décider si une société fermée s'est montrée injuste à l'égard d'un actionnaire en lui portant préjudice ou en ne tenant pas compte de ses intérêts. L'analyse s'attache alors intrinsèquement à la notion d'injustice et se veut intuitive. Elle définit aussi l'injustice d'une manière propice à l'application d'un principe de droit.
>
> D'autres situations peuvent évidemment justifier le prononcé d'une ordonnance pour remédier à un abus.

is contrary to the constitution of the corporation, or which constitutes a breach by the directors of their duties to the corporation, may be considered to be oppressive, or to unfairly prejudice or unfairly disregard the interests of the shareholders. In these situations, an analysis of shareholders' reasonable expectations is arguably of little substantive importance. To say that shareholders have a reasonable expectation that corporate action will be taken lawfully, or that directors will act in accordance with their duties, is a rather banal statement. The conclusion that unlawful conduct should give rise to relief under the oppression remedy could be reached on the basis of an alternative theory. [Emphasis added.]

(J. A. Campion, S. A. Brown and A. M. Crawley, "The Oppression Remedy: Reasonable Expectations of Shareholders", in *Law of Remedies: Principles and Proofs* (1995), 229, at p. 249)

[181] In my view, the question of reasonable expectations is of greater relevance to the determination of a shareholder's rights that are not specifically provided for in the legislation and in the corporation's articles and by-laws. Indeed, this Court observed in *BCE* that "[the] oppression [remedy] gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (para. 58).

[182] As a result, where, as in the instant case, a corporation is alleged to have acted unlawfully, the focus of the analysis is not so much on the question of reasonable expectations as on that of whether the corporation's conduct was in fact unlawful and, therefore, oppressive: Martel, at p. 31-80.

[183] While it is true, as the Court noted in *BCE*, that "[t]he size, nature and structure of the corporation are relevant factors in assessing reasonable expectations" and that "[c]ourts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company" (para. 74), that latitude depends, of course, on the nature of the alleged violation.

L'acte de la société qui va à l'encontre de ses statuts constitutifs ou qui constitue un défaut, par les administrateurs, de respecter leurs obligations envers la société peut être considéré comme un abus des droits de l'actionnaire ou comme une mesure injuste lui causant préjudice ou ne tenant pas compte de ses intérêts. Dans de telles situations, on pourrait soutenir que l'analyse fondée sur les attentes raisonnables de l'actionnaire a peu de pertinence. Que l'actionnaire s'attende raisonnablement à ce que la société agisse en toute légalité ou à ce que les administrateurs agissent conformément à leurs obligations est plutôt évident. La conclusion selon laquelle une conduite illégale devrait permettre un redressement dans le cadre d'un recours pour abus pourrait être tirée par application d'une autre théorie. [Je souligne.]

(J. A. Campion, S. A. Brown et A. M. Crawley, « The Oppression Remedy : Reasonable Expectations of Shareholders », dans *Law of Remedies : Principles and Proofs* (1995), 229, p. 249)

[181] À mon avis, la question des attentes raisonnables a une plus grande pertinence lorsqu'il s'agit de déterminer les droits d'un actionnaire au-delà de ce qui est spécifiquement prévu dans la loi et les statuts et règlements de la société. D'ailleurs, notre Cour, dans *BCE*, rappelait que « la demande de redressement pour abus [. . .] confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité » (par. 58).

[182] En conséquence, lorsque l'illégalité de la conduite de la société est alléguée, comme c'est le cas en l'espèce, l'analyse ne porte pas tant sur la question des attentes raisonnables que sur celle visant à déterminer si la conduite de la société est effectivement illégale et, partant, abusive : Martel, par. 31-213.

[183] S'il est vrai, comme le souligne notre Cour dans *BCE*, que « [l]a taille, la nature et la structure de la société constituent [. . .] des facteurs pertinents dans l'appréciation d'une attente raisonnable » et qu'« [i]l est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une petite société fermée qu'à ceux d'une société ouverte de plus grande taille » (par. 74), cette latitude dépend bien sûr de la nature de la violation alléguée.

[184] In sum, mere irregularities that are not oppressive or unfairly prejudicial will not be sufficient to justify granting the remedy to the complainant. On the other hand, a failure to comply with a mandatory legislative provision or with the requirements set out in the corporation's articles and by-laws that relate to the very recognition of shareholder status may justify granting the oppression remedy. In my view, this is particularly important for the protection of a minority shareholder in a closely held corporation like Intramodal. Otherwise, what remedy would be available to a shareholder who claims to have been unlawfully dispossessed?

(2) Oppressive Conduct on the Respondent Company's Part

[185] In this case, several aspects of the respondent company's conduct are problematic.

[186] First of all, there is the impugned resolution, which was passed in 2007, retroactive to 2005. There is nothing more specific in the evidence as regards the date it was passed. The resolution, of which the appellant learned only after he had brought his claim, reads as follows:

IT WAS RESOLVED THAT:

. . .

5. The Corporation also hereby approves and accepts the transfer by **Johnny MENNILLO** of the Forty-Nine (49) Class "A" Shares registered in his name, represented by Certificate number 2 unto **Mario ROSATI**.

6. In view of said transfer of Shares, it is hereby confirmed that effective this day **Mario ROSATI** is the Sole Shareholder of the Corporation, having One Hundred (100) Class "A" Shares registered in his name.

Each and every of the foregoing six (6) Resolutions is hereby consented to by the Sole Director and Sole Shareholder of the Corporation entitled to vote on such Resolutions pursuant to the Canada Business Corporations

[184] En somme, de simples irrégularités, qui ne constituent pas pour autant un abus ou un acte injustement préjudiciable, ne seront pas suffisantes pour donner ouverture au recours du plaignant. À l'inverse, l'omission de se conformer à une disposition impérative de la loi ainsi qu'aux exigences prévues par les statuts et règlements de la société en ce qui concerne la reconnaissance même du statut d'actionnaire pourra donner ouverture au recours pour abus. Je suis d'avis que cela est particulièrement important pour la protection de l'actionnaire minoritaire dans une société fermée telle qu'Intramodal. Sinon, quel recours serait à la disposition de l'actionnaire qui se prétend illégalement évincé?

(2) La situation d'abus provoquée par la société intimée

[185] En l'espèce, plusieurs aspects de la conduite de la société intimée posent problème.

[186] Il y a d'abord la résolution attaquée, qui a été adoptée en 2007, avec effet rétroactif en 2005. La preuve n'est pas plus précise quant à la date de son adoption. Cette résolution, dont l'appelant n'a eu connaissance qu'une fois son recours entrepris, est libellée comme suit :

[TRADUCTION]

IL A ÉTÉ RÉSOLU QUE :

. . .

5. Par la présente, la Société approuve et accepte la cession par **Johnny MENNILLO** à **Mario ROSATI** de quarante-neuf (49) actions de catégorie « A » immatriculées à son nom, tel qu'attesté par le certificat numéro 2.

6. En raison de cession d'actions, il est confirmé par la présente, avec effet immédiatement, que **Mario ROSATI** est l'unique actionnaire de la Société, cent (100) actions de catégorie « A » étant immatriculées à son nom.

Chacune des six (6) résolutions qui précèdent est par la présente approuvée par l'unique administrateur et actionnaire de la Société ayant droit de vote à l'égard de telles résolutions suivant la Loi canadienne sur les sociétés

Act as evidenced by his signature hereto this 25th day of May, 2005 10.00 a.m. [Underlining added; bold in original.]

(A.R., vol. VIII ("Minutes Book of Intramodal"), at p. 118)

[187] Next, the evidence shows that the respondent company registered the transfer referred to in the resolution in its registers. Under the *CBCA*, the company could not register such a transfer unless the security was endorsed, which was not the case here.

[188] Section 60(1) *CBCA* provides that it is only on "delivery" of a security, that is, at the time of the voluntary transfer of possession, that the purchaser acquires the rights in the security that the transferor had or had authority to convey:

(1) On delivery of a security the purchaser acquires the rights in the security that the transferor had or had authority to convey, except that a purchaser who has been a party to any fraud or illegality affecting the security or who as a prior holder had notice of an adverse claim does not improve their position by taking from a later *bona fide* purchaser.

[189] Furthermore, the purchaser of a security may become a *bona fide* purchaser only as of the time of its endorsement: s. 64 *CBCA*. It is worth nothing that s. 65(3) *CBCA* says the following about an endorsement for the purposes of the assignment or transfer of a security:

(3) An endorsement of a security in registered form is made when an appropriate person signs, either on the security or on a separate document, an assignment or transfer of the security or a power to assign or transfer it, or when the signature of an appropriate person is written without more on the back of the security.

[190] Endorsement is a condition that must be met for a contract entered into by two shareholders with respect to the purchase of a security to have any legal effect on the corporation. Moreover, if the necessary endorsements are not on or with the security and the corporation registers the transfer of the security anyway, it is liable for any loss incurred as a result of the registration: s. 79(1)(a) *CBCA*. And as

par actions, ce qui est attesté par sa signature apposée en ce 25e jour de mai 2005, à 10 heures. [Je souligne; en caractères gras dans l'original.]

(d.a., vol. VIII (les « registres d'Intramodal »), p. 118)

[187] Ensuite, la preuve révèle que la société intimée a inscrit dans ses registres le transfert auquel la résolution réfère. Or, en vertu de la *LCSA*, la société ne pouvait procéder à l'inscription d'un tel transfert que si la valeur mobilière était endossée, ce qui n'est pas le cas en l'espèce.

[188] En effet, le par. 60(1) *LCSA* prévoit que les droits transmissibles de celui qui cède la valeur mobilière ne passent à l'acquéreur qu'à la « livraison » de la valeur mobilière, c'est-à-dire au moment du transfert volontaire de possession :

(1) Dès livraison de la valeur mobilière, les droits transmissibles du cédant passent à l'acquéreur, mais le fait de détenir une valeur d'un acheteur de bonne foi ne saurait modifier la situation du cessionnaire qui a participé à une fraude ou à un acte illégal mettant en cause la validité de cette valeur ou qui, en tant qu'ancien détenteur, connaissait l'existence d'une opposition.

[189] Qui plus est, l'acquéreur d'une valeur mobilière ne devient acquéreur de bonne foi qu'après son endossement : art. 64 *LCSA*. Il est à noter que le par. 65(3) *LCSA* précise ce qui suit au sujet de l'endossement aux fins de cession ou de transfert d'une valeur mobilière :

(3) L'endossement d'une valeur mobilière nominative aux fins de cession ou de transfert se fait par l'apposition, soit à l'endos de cette valeur sans autre formalité, soit sur un document distinct ou sur une procuration à cet effet, de la signature d'une personne compétente.

[190] L'endossement constitue une condition *sine qua non* pour qu'un contrat intervenu entre deux coactionnaires quant à l'acquisition d'une valeur mobilière puisse avoir quelque effet juridique sur la société. D'ailleurs, si la valeur mobilière n'est pas assortie des endossements requis, et que la société procède tout de même à l'inscription de son transfert, elle est responsable du préjudice causé par une

I mentioned above, s. 76 *CBCA* expressly provides that a corporation may not register a transfer in its records and registers without first making certain inquiries, one of which relates to the required endorsements.

[191] In the instant case, the company's articles expressly imposed other restrictions, including that the company *could not* register a transfer of shares in its registers unless the share certificate had been duly endorsed and all requirements with respect to transfers had been met:

C. TRANSFER OF SECURITIES

. . .

133. Registration of transfers. Subject to the Act and to the provisions of paragraph 135 below, no transfer of securities or of warrants shall be registered in the securities' register of the Corporation unless:

(a) the security certificate has been duly endorsed by the proper person;

(b) a reasonable assurance has been given to the effect that the endorsement is genuine;

(c) every act or statute in Canada or in a province or territory of Canada with respect to the collection of income tax, sales taxes or charges, duties or fees has been complied with;

(d) any restriction on its issue, on its transfer or on the holding thereof as authorized by the articles has been complied with; and

(e) any lien on the securities as provided for in paragraph 131 above has been reimbursed. [Bold in original.]

(Minutes Book of Intramodal, at pp. 94-95)

[192] Clearly, endorsement of the share certificate, as a precondition to the registration of a transfer

telle inscription : al. 79(1)a) *LCSA*. De plus, tel que mentionné précédemment, l'art. 76 *LCSA* prévoit expressément qu'une société ne peut inscrire un transfert d'actions dans ses livres et registres sans d'abord procéder à certaines vérifications, y compris quant aux endossements requis.

[191] En l'espèce, d'autres restrictions s'appliquaient expressément en vertu des statuts de la société, notamment celle voulant que cette dernière *ne puisse* inscrire un transfert d'actions dans ses registres que si le certificat d'actions a été régulièrement endossé et que toutes les exigences relatives au transfert ont été respectées :

[TRADUCTION]

C. CESSION DE VALEURS MOBILIÈRES

. . .

133. Inscription d'une cession. Sous réserve de la Loi et du paragraphe 135, la cession d'une valeur mobilière ou d'un bon de souscription ne peut être inscrite au registre des valeurs mobilières de la Société que si :

(a) le certificat d'action est dûment endossé par la personne habilitée à le faire;

(b) des assurances raisonnables sont données que la signature ainsi apposée est authentique;

(c) les exigences de toute loi canadienne, y compris d'une province ou d'un territoire du Canada, relative à la perception de l'impôt sur le revenu, de la taxe de vente ou de frais ou de droits ont été respectées;

(d) toute restriction applicable à son émission, à sa cession ou à sa détention autorisées par les statuts a été respectée;

(e) toute sûreté réelle grevant la valeur mobilière comme le prévoit le paragraphe 131 a été levée. [En caractères gras dans l'original.]

(registres d'Intramodal, p. 94-95)

[192] De toute évidence, l'endossement du certificat d'actions, à titre de condition préalable à

of shares, was important enough for the respondent company's founders to consider it appropriate to include an express provision to this effect in their articles, in addition to mentioning it on the share certificates.

[193] The following note appears on the appellant's certificate: "Only the person whose name appears on the front of this certificate or his duly authorized agent or representative may validly transfer the shares represented by this certificate" (Minutes Book of Intramodal, at p. 170).

[194] The very existence of a legal duty that the respondent company make the necessary inquiries before registering a transfer of shares created a reasonable expectation for the company's shareholders. It is clear that the respondent company failed to discharge this duty and that its failure to do so was more than a mere irregularity.

[195] The appellant had a reasonable expectation that the respondent company would act in accordance with the law and with its articles and by-laws. He had a reasonable expectation that the respondent company would make the necessary inquiries before depriving him of his status as a shareholder. The failure to do so was unfairly prejudicial to the appellant insofar as it deprived him of that status.

[196] The evidence shows that the share certificate in question was not endorsed. It also shows that the respondent company made no inquiries before passing the resolution to transfer the appellant's shares, and that the resolution was passed retroactively and was signed by a single shareholder (namely Mr. Rosati). The respondent company's lawyer admitted on cross-examination that his job was to do what Intramodal's majority shareholder, Mr. Rosati, asked and nothing more:

Q. So, if you're told by a client to remove a shareholder without a signed document, will you do it?

l'inscription d'un transfert d'actions, était suffisamment important pour que les fondateurs de la société intimée jugent pertinent d'inclure une disposition expresse à cet effet dans leurs statuts, en plus d'en faire mention sur les certificats d'actions.

[193] Sur le certificat de l'appelant, on peut en effet lire la mention suivante : [TRADUCTION] « Seule la personne dont le nom figure au recto du présent certificat ou son mandataire ou son représentant dûment autorisé peut valablement céder les actions dont la détention est attestée par le présent certificat » (registres d'Intramodal, p. 170).

[194] L'obligation légale de la société intimée de procéder aux vérifications requises avant d'inscrire le transfert d'actions créait *ipso facto* une attente raisonnable chez ses actionnaires. Il est manifeste que la société intimée n'a pas respecté cette obligation et que son défaut dépasse le cadre d'une simple irrégularité.

[195] L'appelant avait l'attente raisonnable que la société intimée agisse en conformité avec la loi et ses statuts et règlements. Il avait l'attente raisonnable que la société intimée, avant de le priver de son statut d'actionnaire, procède aux vérifications requises. L'omission de ce faire constitue un acte injustement préjudiciable à l'appelant dans la mesure où elle le prive de son statut d'actionnaire.

[196] La preuve révèle que le certificat d'actions en cause n'a pas été endossé. Elle révèle également que la société intimée n'a fait aucune vérification avant d'adopter la résolution de transfert des actions de l'appelant, et que c'est rétroactivement et avec la signature d'un seul actionnaire (c'est-à-dire M. Rosati) que la résolution a été adoptée. L'avocat de la société intimée a reconnu en contre-interrogatoire que sa tâche consistait à obtempérer aux demandes de l'actionnaire majoritaire d'Intramodal, M. Rosati, sans plus :

[TRADUCTION]

Q. Donc, si un client vous dit de supprimer le nom d'un actionnaire sans vous remettre un document signé à l'appui, le faites-vous?

A. If I have instructions, I will do what the instructions are.

[197] Despite all the emphasis placed on the appellant's expressed intention to withdraw from Intramodal, the fact is that Intramodal had no way of knowing that such an intention had actually been expressed, since, by its own admission, it did not make the required inquiries in this regard, which it considered unnecessary.

[198] To conclude that there was oppression in the circumstances is not to allow Mr. Mennillo to use the oppression remedy provided for in s. 241 *CBCA* as an instrument of oppression, but simply to recognize the obvious: Mr. Rosati used his position as majority shareholder to strip Mr. Mennillo of his status as a shareholder. To paraphrase the Ontario Court of Appeal in *Budd*, it was to put a brake on this very type of conduct that Parliament thought it necessary to introduce the oppression remedy provided for in s. 241 *CBCA*.

[199] If the respondent company had made the necessary inquiries, it would not have registered the transfer of shares. Assuming that there was in fact an agreement between the appellant and Mr. Rosati in this regard, the parties to the agreement would therefore have had to meet again to take the necessary steps to record the agreement and ensure that the legislated conditions were met. If Mr. Mennillo had in fact agreed to transfer his shares, it would have been a simple matter to ask him to sign Intramodal's resolution in 2007. In the event of a disagreement, Intramodal's majority shareholder could then have taken the necessary action to require the appellant to endorse his share certificate and sign the relevant corporate documents:

> The law requires that the transferor provide the purchaser with any "requisite necessary to obtain registration" of the transfer, and states that if he does not comply with the demand within a reasonable time, the purchaser may reject the transfer or consider the transfer contract to be rescinded. [Footnote omitted.]

(Martel, at p. 16-30)

R. Si on me donne des instructions, j'agis conformément à ces instructions.

[197] Malgré toute l'insistance mise sur l'intention manifestée par l'appelant de se retirer d'Intramodal, le fait est qu'Intramodal n'avait aucun moyen de savoir qu'une telle intention avait effectivement été exprimée car, de son propre aveu, elle n'a pas fait les vérifications requises à cet égard, estimant que de telles vérifications n'étaient pas nécessaires.

[198] Conclure à l'abus dans les circonstances ne revient pas à permettre à M. Mennillo d'instrumentaliser le recours pour abus prévu par l'art. 241 *LCSA*, mais tout simplement à reconnaître l'évidence : M. Rosati a utilisé sa position d'actionnaire majoritaire pour dépouiller M. Mennillo de son statut d'actionnaire. Pour paraphraser la Cour d'appel de l'Ontario dans l'affaire *Budd*, c'est précisément afin de mettre un frein à ce genre de conduite que le législateur a cru nécessaire d'introduire le recours pour abus prévu à l'art. 241 *LCSA*.

[199] Si la société intimée avait fait les vérifications requises, elle n'aurait pas inscrit le transfert d'actions. À supposer qu'il y ait effectivement eu entente entre l'appelant et M. Rosati à cet égard, les parties à l'entente auraient alors dû se rencontrer à nouveau afin de prendre les moyens nécessaires pour consigner cette entente et s'assurer que les conditions établies par la loi étaient satisfaites. Si M. Mennillo avait effectivement consenti au transfert de ses actions, il aurait été très simple de lui demander de signer la résolution d'Intramodal en 2007. En cas de mésentente, l'actionnaire majoritaire d'Intramodal aurait alors pu intenter les recours nécessaires afin de forcer l'appelant à endosser son certificat d'actions et à signer les documents corporatifs pertinents :

> La loi impose au cédant l'obligation de fournir à l'acquéreur les pièces nécessaires à l'inscription du transfert, et précise que s'il ne se conforme pas à toute demande à cet effet dans un délai raisonnable, l'acquéreur peut refuser le transfert ou en demander la rescision. [Note en bas de page omise.]

(Martel, par. 16-106)

[200] A conclusion that Intramodal's conduct in this regard was prejudicial to the appellant does not require a lengthy explanation: that conduct unlawfully stripped him of his status as a shareholder. It is difficult to imagine how a business corporation could act more oppressively toward a shareholder than by depriving him or her of that status.

[201] The conduct of a corporation that approves a transfer of shares without making any inquiries and that confuses its interests with those of its majority shareholder, as if it were a mere puppet, is not less oppressive simply because another shareholder at some point expressed an intention to withdraw from the corporation without there being any agreement on the terms of such a withdrawal. To suggest otherwise would amount to encouraging a corporation's shareholders to refrain from participating in any kind of discussions or negotiations about a possible transfer of shares.

[202] The instant case concerns a complainant who was originally recognized as a shareholder, who alleges that the corporation has committed clear violations of the law and of its articles and by-laws, and who has applied for an oppression remedy under s. 241 *CBCA*. The oppressive situation created by the corporation can indeed be remedied by means of a claim for oppression, or of an application to rectify registers under s. 243 *CBCA* or an application under s. 247 *CBCA* to compel the corporation to discharge its duties, provided that the conditions for the chosen remedy are met, which is the case here. It should be noted that, independently of ss. 243 and 247 *CBCA*, s. 241(3)(k) gives the courts the power to order the rectification of registers and to sanction unlawful conduct on the corporation's part.

[203] The classic example of this situation can be found in *Journet v. Superchef Food Industries Ltd.*, [1984] C.S. 916, at p. 925, in which the Superior Court found the conduct of the corporation in question to be oppressive on the basis of several unlawful and fraudulent acts it had committed. The evidence that the acts were unlawful was considered sufficient

[200] Nul besoin d'une grande démonstration pour conclure que cette conduite d'Intramodal a été préjudiciable à l'appelant : elle l'a dépouillé illégalement de son statut d'actionnaire. Et il est difficile d'imaginer conduite plus abusive d'une société par actions à l'endroit d'un actionnaire que celle de le priver de ce statut.

[201] La conduite d'une société qui avalise un transfert d'actions sans vérification aucune, et qui confond ses intérêts avec ceux de son actionnaire majoritaire comme si elle n'était qu'une simple marionnette, n'est pas moins abusive seulement parce que, à un certain moment donné, un coactionnaire a exprimé son intention de se retirer de la société, sans qu'il y ait eu entente quant aux modalités d'un tel retrait. Soutenir le contraire revient à inciter les actionnaires d'une société à s'abstenir de toute forme de discussions ou de pourparlers relativement à un possible transfert d'actions.

[202] En l'espèce, il est question d'un plaignant dont le statut d'actionnaire a été initialement reconnu, qui reproche à la société des violations claires de la loi et de ses statuts et règlements, et qui intente un recours pour abus en vertu de l'art. 241 *LSCA*. La situation abusive provoquée par la société peut effectivement être corrigée par le truchement d'un tel recours, ou d'un recours en rectification des registres fondé sur l'art. 243 *LCSA*, ou encore d'un recours fondé sur l'art. 247 *LCSA* visant à contraindre la société à se conformer à ses obligations, pour autant que les conditions du recours choisi soient satisfaites, ce qui est le cas en l'espèce. Rappelons que l'al. 241(3)k), indépendamment des art. 243 et 247 *LCSA*, octroie au tribunal le pouvoir d'ordonner la rectification des registres et permet de sanctionner la société pour l'illégalité de sa conduite.

[203] L'exemple classique en la matière correspond à l'affaire *Journet c. Superchef Food Industries Ltd.*, [1984] C.S. 916, p. 925, où la Cour supérieure a conclu à une conduite abusive sur la base de plusieurs actes illégaux et frauduleux commis par la société en cause. La preuve de l'illégalité des actes a été jugée suffisante pour satisfaire les conditions

to meet the conditions for the oppression remedy, and no additional evidence was required.

[204] In my view, the same reasoning applies in the case at bar. With respect for those who disagree, I find that the appellant has discharged his burden of proving the validity of his claim for oppression. The evidence shows that the company's actions, namely passing the resolution to transfer the appellant's shares, registering that transfer in its registers and subsequently filing declarations to the same effect, constituted violations of express provisions of the legislation and the company's articles and by-laws. This evidence was sufficient to justify a finding that the company's conduct was oppressive and prejudicial and that it warranted revocation of the company's resolution and the rectification of its registers.

[205] The purpose of the appellant's application is to obtain a conclusion that the company failed to discharge its legal duties and an order that its registers be rectified accordingly. As I mentioned above, the appellant could very well have brought an application under s. 243 or 247 *CBCA*. Had he done so, he would have been successful. In view of the liberal interpretation that has been given to s. 241 *CBCA* and the nature of the remedy being sought, it would not be very pragmatic to dismiss his claim simply because it was made under s. 241 rather than s. 243 or 247 *CBCA*. Raymonde Crête and Stéphane Rousseau comment as follows in this regard:

[TRANSLATION] A review of the case law shows that, in some cases, claimants apply for the oppression remedy even where the alleged acts are in fact clear violations of the rules that could easily give rise to alternative recourses under the legislation. Despite those alternatives, judges take a pragmatic approach in this regard and agree to intervene on the basis of the oppression remedy even though, in this context, proof of the unlawful acts limits the usefulness of interventions based on fairness involving the oppression remedy. We note, however, that there is nothing to prevent a claimant from joining to his or her claim other recourses provided for in the legislation with respect to business corporations or flowing from general law principles, such as a derivative action or an application for an investigation, a mandatory or

d'ouverture du recours pour abus et aucune preuve additionnelle n'a été exigée.

[204] À mon avis, le même raisonnement s'applique en l'espèce. J'estime, avec égards pour l'opinion contraire, que l'appelant s'est déchargé de son fardeau de preuve quant au bien-fondé de son recours pour abus. La preuve démontre que les actes commis par la société, soit l'adoption de la résolution de transfert des actions de l'appelant, l'inscription de ce transfert dans les registres et les déclarations subséquentes au même effet, constituent des violations des dispositions expresses de la loi, de ses statuts et de ses règlements. Il s'agit d'une preuve suffisante pour conclure à une conduite abusive et préjudiciable justifiant l'annulation de la résolution adoptée par la société et la rectification de ses registres.

[205] Le redressement demandé vise à faire reconnaître l'inobservation par la société de ses obligations légales et à faire rectifier ses registres en conséquence. Tel que mentionné ci-dessus, l'appelant aurait certes pu entreprendre un recours sur le fondement des art. 243 ou 247 *LCSA*. Il aurait alors eu gain de cause. Vu l'interprétation libérale de l'art. 241 *LCSA* et la nature du redressement demandé, ce serait faire preuve de bien peu de pragmatisme que de rejeter son recours pour le seul motif qu'il a été entrepris en vertu de l'art. 241 plutôt que des art. 243 ou 247 *LCSA*. À cet égard, les auteurs Raymonde Crête et Stéphane Rousseau écrivent ce qui suit :

L'examen de la jurisprudence montre que, dans certains cas, les demandeurs font appel au recours en cas d'abus même si les actes reprochés constituent en fait des violations claires de la réglementation qui peuvent aisément donner lieu à des recours alternatifs conformément à la loi. Malgré la présence de ces mesures alternatives, les juges adoptent en cette matière une approche pragmatique et acceptent d'intervenir sur la base du recours pour abus bien que, dans ce contexte, la preuve des actes illégaux réduise l'utilité des interventions fondées sur l'équité en vertu du recours en cas d'abus. Notons, par ailleurs, que rien n'empêche un demandeur de joindre à sa demande d'autres recours prévus dans la loi sur les sociétés par actions ou dans les principes de droit commun, notamment en y joignant un recours de nature oblique

negatory order, the rectification of registers or even liquidation of the corporation. [Emphasis added; footnote omitted; para. 1629.]

[206] Section 241 *CBCA* is extremely broad in scope and gives a court broad powers: *BCE*, at para. 58. This extremely broad scope of the oppression remedy means that it is appropriate in the instant case to consider the recourse relating to rectification of registers (s. 243 *CBCA*) or the one relating to failure by the corporation to comply with the legislation or with its articles or by-laws (s. 247 *CBCA*).

[207] In any event, the conclusion that the respondent company unlawfully deprived the appellant of his status as a shareholder leads inescapably to the conclusion that its conduct in this case was oppressive. Indeed, what could be more oppressive than being unlawfully stripped of one's status as a shareholder?

[208] In my view, this conclusion is sufficient to dispose of the merits of the case. Nonetheless, in light of the importance attached by the parties to the agreement that is alleged to have been entered into by Mr. Mennillo and Mr. Rosati on May 25, 2005, and of my colleague's remarks in this regard, which could have serious consequences going beyond the scope of this case, I think it is important to discuss that issue.

(3) Alleged Agreement Between the Appellant and Mr. Rosati

(a) *Nature of the Alleged Agreement*

[209] My reading of the trial judge's reasons differs from that of the majority. In my view, the trial judge did not find that the appellant and Mr. Rosati had agreed on a transfer of shares. That interpretation, advanced by the respondent company, denotes a fragmented reading of the trial judge's reasons and distorts his conclusions. The trial judge instead concluded that, *given that the appellant's shares had been issued on condition that he guarantee the respondent company's debts*, the intention he

ou une demande en vue d'obtenir une enquête, une ordonnance mandatoire ou négatoire, la rectification des registres ou même la liquidation de la société. [Je souligne; note en bas de page omise; par. 1629.]

[206] La portée de l'art. 241 *LCSA* est extrêmement large et confère de vastes pouvoirs au tribunal : *BCE*, par. 58. Cette portée extrêmement large du recours pour abus permet de considérer dans la présente instance le recours en rectification des registres (art. 243 *LCSA*) ou celui pour inobservation par la société de la loi ou de ses statuts ou règlements (art. 247 *LCSA*).

[207] À tout événement, la conclusion selon laquelle la société intimée a illégalement privé l'appelant de son statut d'actionnaire mène irrémédiablement à la conclusion qu'il y a eu abus en l'espèce. En effet, quelle forme plus grave d'abus y a-t-il que celle de se faire dépouiller illégalement de son statut d'actionnaire?

[208] Cette conclusion suffit à mon avis pour statuer sur le fond de l'affaire. Néanmoins, vu l'importance accordée par les parties à la question et vu les propos de mon collègue sur celle-ci, lesquels pourraient avoir de lourdes conséquences dépassant le cadre du présent litige, j'estime important d'aborder la prétendue entente qui serait intervenue entre MM. Mennillo et Rosati le 25 mai 2005.

(3) La prétendue entente entre l'appelant et M. Rosati

a) *Nature de la prétendue entente*

[209] Ma lecture du jugement de première instance diffère de celle de la majorité. Je suis d'avis que le premier juge n'a pas conclu que l'appelant et M. Rosati s'étaient entendus afin de procéder à un transfert d'actions. Cette interprétation, mise de l'avant par la société intimée, dénote une lecture parcellaire du jugement de première instance et en dénature les conclusions. Le juge de première instance a plutôt conclu que l'intention exprimée par l'appelant de se retirer de la société, *dans la mesure*

expressed of withdrawing from the company was sufficient for him to be stripped of his status as a shareholder:

[TRANSLATION] The Court concludes that Mennillo held 49 common shares issued by Intramodal on condition that he guarantee all of Intramodal's debts once it began operating. Mennillo refused to participate in this venture and asked to be removed from the company as a shareholder and a director effective May 25, 2005. As of that date, Mennillo agreed only to be a lender of $440,000 to his friend Rosati. The failure to complete the transfer of Mennillo's shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer.

Since May 25, 2005, Mennillo has no longer been a shareholder or director of Intramodal. [Emphasis added; paras. 74-75.]

[210] These remarks are not open to differing interpretations. There is no doubt that deference is owed to the trial judge's findings of fact in the absence of a palpable and overriding error, and an appellate court does not have *carte blanche* to take isolated passages from the trial judge's reasons and give them a meaning they do not have. The trial judge's findings of fact must be considered as they are, and as a whole. In short, it is, in my respectful opinion, inaccurate to say that the trial judge's finding that the shares had been transferred was independent of their having been issued conditionally.

[211] My colleague's reasoning strikes me as contradictory. He is of the view that the trial judge accepted as a finding of fact that "Mr. Mennillo agreed that he would remain a shareholder only so long as he was willing to guarantee the corporation's debts" (reasons of Cromwell J., at paras. 4 and 61 (emphasis added)) and that "Mr. Mennillo agreed that he would remain a shareholder of the corporation on the condition that he guarantee its debts" (para. 10 (emphasis added)). Yet the rest of the trial judge's statement to the effect that the occurrence of the suspensive condition *resulted in a transfer of*

où ses actions avaient été émises conditionnellement à ce qu'il garantisse le passif de la société intimée, était suffisante pour le dépouiller de son statut d'actionnaire :

Le Tribunal arrive à la conclusion que Mennillo a détenu 49 actions ordinaires émises par Intramodal, le tout conditionnellement à ce que ce dernier garantisse l'ensemble des créances de Intramodal dès que cette dernière débute ses activités. Mennillo a refusé cette aventure et a demandé son retrait de la compagnie à titre d'actionnaire et d'administrateur à compter du 25 mai 2005. À compter de cette date, Mennillo a accepté de n'être que le prêteur d'une somme de 440 000 $ à son ami Rosati. Le fait que la cession des actions de Mennillo à Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de l'avocat de Rosati.

Depuis le 25 mai 2005, Mennillo n'est plus détenteur d'aucune action ni administrateur de Intramodal. [Je souligne; par. 74-75.]

[210] Ces propos ne peuvent donner lieu à des interprétations divergentes. Certes, les conclusions factuelles du juge de première instance doivent être traitées avec déférence, sauf erreur manifeste et dominante, mais les tribunaux d'appel n'ont pas carte blanche pour retenir isolément certains passages du jugement de première instance et leur donner un sens qu'ils n'ont pas. Les conclusions factuelles du juge de première instance doivent être considérées telles quelles, dans leur ensemble. Bref, avec égards, je suis d'avis qu'il n'est pas exact en l'espèce d'affirmer que le juge de première instance a conclu à la cession des actions, indépendamment du caractère conditionnel de leur émission.

[211] Le raisonnement de mon collègue me paraît contradictoire. Il est d'avis que le juge de première instance a accepté comme conclusion de fait que « M. Mennillo a convenu qu'il ne demeurait actionnaire que tant qu'il serait disposé à garantir le passif de la société » (motifs du juge Cromwell, par. 4 et 61 (je souligne)) et que « M. Mennillo [a] convenu qu'il demeurerait actionnaire de la société à condition d'en garantir le passif » (par. 10 (je souligne)). Or, le reste de l'affirmation du juge de première instance selon laquelle la réalisation de la condition suspensive *aurait donné lieu à une cession*

shares cannot be considered in isolation. Moreover, my colleague Cromwell J. finds that the evidence supports the trial judge's conclusion even though, in his view, that evidence is "confused and confusing" (para. 34), and "conflicting and inconsistent" (para. 68). I will return to the trial judge's assessment of the evidence below. For now, I note that my colleague acknowledges that there was no condition attached to the issuance of the shares in the case at bar and that it is wrong in law to say the opposite (para. 76), but he nevertheless finds that "the condition to which the trial judge referred was a result of an agreement between Messrs. Mennillo and Rosati that the former would be a shareholder only if he guaranteed Intramodal's debts" (para. 77). With respect, I do not see how it is possible both to accept the trial judge's conclusion that Mr. Mennillo held 49 common shares issued by Intramodal on condition that he guarantee all of its debts and to postulate that, in law, Mr. Mennillo could not be a conditional shareholder in this case.

d'actions ne peut être considéré en vase clos. De plus, mon collègue le juge Cromwell est d'avis que la preuve appuie la conclusion du juge de première instance, malgré que cette preuve soit, selon lui, « confuse et source de confusion » (par. 34) et « contradictoire et incohérente » (par. 68). Je reviendrai plus loin sur la question de l'appréciation de la preuve par le juge de première instance. Je note pour l'instant que mon collègue reconnaît qu'aucune condition n'était rattachée à l'émission des actions en l'espèce et qu'il est erroné en droit de prétendre le contraire (par. 76), mais qu'il conclut néanmoins que « la condition dont [le juge de première instance] fait mention résulte d'un accord entre MM. Mennillo et Rosati selon lequel le premier ne serait actionnaire que s'il se portait garant du passif d'Intramodal » (par. 77). Avec égards, je vois mal comment on peut à la fois accepter la conclusion du juge de première instance voulant que M. Mennillo ait détenu 49 actions ordinaires émises par Intramodal conditionnellement à ce qu'il garantisse l'ensemble des créances de celle-ci et postuler que M. Mennillo ne pouvait pas, en droit, être actionnaire conditionnel en l'espèce.

[212] The majority of the Court of Appeal also concluded that the appellant no longer had the status of a shareholder, but for another reason, namely that the intention he had expressed of withdrawing from the respondent company had resulted in the retroactive cancellation of his shares.

[212] Pour leur part, les juges majoritaires de la Cour d'appel ont également conclu que l'appelant n'avait plus le statut d'actionnaire, mais pour une autre raison, à savoir que l'intention manifestée de se retirer de la société intimée avait entraîné l'annulation rétroactive de ses actions.

[213] The parties characterized the agreement that was alleged to have been entered into by Mr. Mennillo and Mr. Rosati in several different ways, at times as a conditional issuance of shares, at times as a retroactive cancellation and at times as a contract of sale or a contract of gift. This reflects a more fundamental problem, namely that, without some speculation, no intention in this regard can be found in the evidence. Indeed, the difficulty the courts below had in characterizing the alleged agreement resulted from the fact that there was no evidence of the juridical operation contemplated by Mr. Rosati and Mr. Mennillo on May 25, 2005 that allegedly resulted in the transfer of Mr. Mennillo's shares. The same is true in this Court.

[213] Les parties ont qualifié l'entente qui serait intervenue entre MM. Mennillo et Rosati de maintes façons, y voyant tantôt une émission conditionnelle, tantôt une annulation rétroactive, tantôt un contrat de vente ou de donation. Cela traduit un problème plus fondamental : le fait que, sauf conjecture, aucune intention à cet effet ne ressort de la preuve. En fait, la difficulté éprouvée par les juridictions inférieures à qualifier la prétendue entente résulte du fait que la preuve est muette sur l'opération juridique qui aurait été envisagée par MM. Rosati et Mennillo le 25 mai 2005 et qui aurait eu comme résultat le transfert de ses actions. Il en est de même pour notre Cour.

[214] The *CBCA* provides, as a general rule, that the cancellation of shares held by a shareholder can happen in only two ways: by an amendment to the corporation's articles or by redemption of the shares by the corporation. In the case of redemption, two types are possible: unilateral redemption by the corporation and redemption by mutual agreement.

[215] In the instant case, the respondent company did not amend its articles at any time before May 25, 2005. Regarding the possibility that it redeemed the appellant's shares unilaterally, such a redemption would have had to be provided for in the company's articles, which was not the case for the Class "A" shares held by the appellant. The company's articles did give it a right of unilateral redemption, but only for Class "G" shares.

[216] As for a redemption by mutual agreement, it is subject to a number of formalities, including the passage of a directors' resolution to that effect and, under s. 34 *CBCA*, tests of solvency and liquidity.

[217] Even more importantly, the *CBCA* provides that such a redemption, whether unilateral or by mutual agreement, results in cancellation of the acquired shares:

39 ...

. . .

(6) Shares or fractions thereof of any class or series of shares issued by a corporation and purchased, redeemed or otherwise acquired by it shall be cancelled or, if the articles limit the number of authorized shares, may be restored to the status of authorized but unissued shares of the class.

[218] In the case at bar, even assuming that the appellant did in fact consent to the redemption of his shares — which he disputes — it must be acknowledged that none of the formalities applicable to such a redemption were performed, which means that it cannot be said that the appellant's shares were cancelled by way of redemption.

[214] La *LCSA* prévoit, en règle générale, que l'annulation des actions d'un actionnaire n'est possible que selon deux modalités, soit la modification des statuts de la société, soit le rachat des actions par la société. En cas de rachat, deux formes peuvent être envisagées : le rachat unilatéral par la société ou le rachat de gré à gré.

[215] En l'espèce, à aucun moment avant le 25 mai 2005, la société intimée n'a procédé à une modification de ses statuts. Quant à la possibilité qu'elle ait procédé unilatéralement au rachat des actions de l'appelant, un tel rachat devait être prévu par les statuts de la société, ce qui n'est pas le cas des actions de catégorie « A » détenues par l'appelant. Les statuts de la société prévoient certes un droit de rachat unilatéral par la société, mais pour les actions de catégorie « G » seulement.

[216] Le rachat de gré à gré est pour sa part soumis à plusieurs formalités, y compris l'adoption d'une résolution des administrateurs à cet effet et, en vertu de l'art. 34 *LCSA*, des tests de solvabilité et de liquidité.

[217] Plus important encore, la *LCSA* prévoit qu'un tel rachat, unilatéral ou de gré à gré, entraîne l'annulation des actions acquises :

39 ...

. . .

(6) Les actions ou fractions d'actions de toute catégorie ou série de la société émettrice acquises par elle, notamment par achat ou rachat, sont annulées; elles peuvent reprendre le statut d'actions autorisées non émises de la catégorie dont elles relèvent, au cas où les statuts limitent le nombre d'actions autorisées.

[218] Or, en l'espèce, même en tenant pour acquis qu'il y a effectivement eu consentement du principal intéressé du rachat de ses actions — ce que ce dernier conteste —, force est d'admettre qu'aucune des formalités applicables à un tel rachat n'a été accomplie, si bien que l'on ne peut prétendre que les actions de l'appelant ont été annulées par rachat.

[219] Indeed, the respondent company indicates in its factum that the stated capital was never reduced. Nor was any resolution passed to approve the company's redemption of the shares. As I will explain below, the only resolution at issue apparently concerned a transfer of shares between the appellant and Intramodal's majority shareholder, Mr. Rosati.

[220] What is more, it is difficult to see how the tests of liquidity and solvency could have been met given that, by the respondent company's own admission, it had no assets at the time.

[221] In short, the argument that the appellant's shares were cancelled retroactively by way of redemption fails not because of mere technical irregularities in the corporate documents, but on the basis of the legal requirements applicable to the redemption of shares and, hence, to their cancellation.

[222] The trial judge's conclusion — which the majority of the Court of Appeal rejected — that the appellant's shares were issued on condition that he would guarantee the respondent company's debts, and that the desire he expressed to cease guaranteeing those debts had the effect of depriving him of his status as a shareholder, is also contrary to the provisions of the *CBCA*.

[223] As I mentioned above, the trial judge referred to this possibility at para. 74 in writing that [TRANSLATION] "Mennillo held 49 common shares issued by Intramodal on condition that he guarantee all of Intramodal's debts once it began operating" (emphasis added).

[224] Finally, it can be seen from the respondent company's registers that no suspensive condition related to the issuance of the appellant's shares was set out in the resolution of the board of directors that authorized their issuance. For such a suspensive condition to have any effect, it would also have had to appear in the respondent company's registers. Otherwise, there would be no way for creditors to

[219] La société intimée, dans son mémoire, affirme d'ailleurs que le capital déclaré n'a en aucun temps été réduit. De plus, aucune résolution n'a été adoptée pour approuver le rachat de ses actions par la société. En fait, la seule résolution en cause vise, comme nous le verrons plus loin, un transfert d'actions qui serait intervenu entre l'appelant et l'actionnaire majoritaire d'Intramodal, M. Rosati.

[220] Qui plus est, on voit mal comment les critères de liquidité et de solvabilité auraient pu être satisfaits étant donné que la société intimée ne comptait alors, de son propre aveu, aucun actif.

[221] Bref, la thèse selon laquelle les actions de l'appelant auraient été annulées rétroactivement par voie de rachat se bute non pas à de simples irrégularités techniques dans la documentation corporative, mais bien aux exigences légales applicables à un rachat d'actions et, partant, à leur annulation.

[222] La conclusion du juge de première instance — écartée par les juges majoritaires de la Cour d'appel — selon laquelle les actions de l'appelant auraient été émises conditionnellement à ce qu'il garantisse le passif de la société intimée, le souhait exprimé par l'appelant de ne plus garantir celui-ci ayant eu pour effet de le priver du statut d'actionnaire, va également à l'encontre des dispositions de la *LCSA*.

[223] Comme mentionné précédemment, le juge de première instance réfère à cette possibilité au par. 74 lorsqu'il écrit que « Mennillo a détenu 49 actions ordinaires émises par Intramodal, le tout conditionnellement à ce que ce dernier garantisse l'ensemble des créances de Intramodal dès que cette dernière débute ses activités » (je souligne).

[224] Enfin, à la lecture des registres de la société intimée, on constate qu'aucune condition suspensive liée à l'émission des actions de l'appelant n'est prévue dans la résolution du conseil d'administration autorisant l'émission de celles-ci. Pour qu'une telle condition suspensive puisse produire quelque effet, encore aurait-il fallu qu'elle apparaisse dans les registres de la société intimée, sans quoi il n'y

know that the company's share capital could be affected at any time.

(b) *Effect of the Alleged Agreement*

[225] I also agree with the appellant and the dissenting judge of the Court of Appeal that it is impossible to find, as a matter of law, that the appellant transferred his shares to Mr. Rosati on May 25, 2005. Whatever conclusion might be reached about the credibility of the witnesses in this regard, the intention expressed by the appellant of withdrawing from the respondent company had no effect on his rights as a shareholder.

[226] Though governed by the *CBCA*, a transfer of shares remains subject to the conditions of formation of a contract.

[227] My colleague Cromwell J. states that the appellant transferred his shares to Mr. Rosati by means of an onerous contract, but he does not specify the nature of that contract, its essential elements and what prestation Mr. Mennillo received in return from Mr. Rosati. However, [TRANSLATION] "[t]he fact that a contract is innominate does not mean that it is subject to no legislative scheme": D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 136.

[228] The *Civil Code of Québec* defines a contract as "an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation" (art. 1378). Where there is no meeting of the minds between the parties — unlike where the conditions of formation of a contract are not met, which results in the nullity of the contract — it cannot be found that a contract even exists: V. Karim, *Les obligations* (4th ed. 2015), at para. 507; see also para. 642. The proposal must be firmly directed toward the completion of a specific juridical operation: Lluelles and Moore, at para. 275.

[229] The respondent company submits that the appellant transferred his shares to Mr. Rosati and that, in return, he was relieved of his obligation to

avait aucun moyen pour les créanciers de savoir que son capital-actions pouvait à tout moment être affecté.

b) *Effet de la prétendue entente*

[225] Je partage par ailleurs l'avis de l'appelant et du juge dissident en Cour d'appel qu'il est impossible de conclure en droit que l'appelant a transféré ses actions à M. Rosati le 25 mai 2005. En effet, peu importe la conclusion à laquelle nous pouvons arriver sur la crédibilité des témoins à cet égard, l'intention manifestée par l'appelant de se retirer de la société intimée était sans effet sur ses droits en tant qu'actionnaire.

[226] Bien qu'il soit régi par la *LCSA*, le transfert d'actions demeure assujetti aux conditions de formation d'un contrat.

[227] Mon collègue le juge Cromwell dit que l'appelant a transféré ses actions à M. Rosati par le biais d'un contrat à titre onéreux, mais il omet de préciser quelle serait la nature du contrat, quels sont ses éléments essentiels et quelle prestation M. Mennillo aurait reçue en retour de la part de M. Rosati. Or, « [l]e caractère innommé d'un contrat ne signifie pas pour autant qu'il échappe à tout régime législatif » : D. Lluelles et B. Moore, *Droit des obligations* (2e éd. 2012), par. 136.

[228] Le *Code civil du Québec* définit le contrat comme « un accord de volonté, par lequel une ou plusieurs personnes s'obligent envers une ou plusieurs autres à exécuter une prestation » (art. 1378). L'absence de rencontre des volontés des parties, contrairement au non-respect des conditions de formation du contrat qui, lui, entraîne la nullité, empêche de conclure à l'existence même du contrat : V. Karim, *Les obligations* (4e éd. 2015), par. 507; voir aussi par. 642. La proposition doit tendre de manière ferme à la conclusion d'une opération juridique précise : Lluelles et Moore, par. 275.

[229] La société intimée soutient que l'appelant a transféré ses actions à M. Rosati et qu'il était libéré, en contrepartie, de son obligation de financer

finance Intramodal's operations and guarantee its debts. In my view, this is not a valid prestation. This submission by the respondent company, once again, confuses the company's distinct legal personality with that of its shareholder or shareholders.

[230] The intention expressed by the appellant in this case was at most an invitation to contract. The fact that a transfer of shares was registered by the respondent company where Mr. Rosati had spent no money to acquire the appellant's shares certainly does not prove that the appellant transferred his shares. To conclude from the respondent company's registration of a transfer of shares that a contract was formed is to engage in circular reasoning: because a transfer was registered, a contract was formed, and because the contract was formed, the transfer is necessarily valid.

[231] The parties also referred to the possibility that the alleged agreement of May 2005 was a contract of gift, but it is clear that there was no gift in the case at bar. There is a presumption in the civil law that acts are normally by onerous title. Two things must thus be proved before a gift can be found to exist: an absence of consideration and [TRANSLATION] "a deliberate intent to impoverish oneself" (*Martin v. Dupont*, 2016 QCCA 475, at paras. 26-31 (CanLII)). In its factum, the respondent company states that [TRANSLATION] "[the appellant] wants just one thing: to receive '. . . *money for the rest of [his] life, till [he dies]*'" (para. 30). On the face of it, this seems to me to be the exact opposite of an intent to impoverish oneself. Moreover, and this is not insignificant, neither the respondent company nor the appellant is arguing that the shares were given to Mr. Rosati on May 25, 2005. The former states in its factum that the alleged contract between the parties was [TRANSLATION] "anything but a gratuitous contract" (para. 77), while the latter denies the very existence of an exchange of wills but, in an alternative argument, responds to the fact that no valid consideration was received by reiterating the requirements for a gift under the *Civil Code of Québec* and the legal consequences of a failure to satisfy those requirements.

les opérations d'Intramodal et de garantir le passif de la société. À mon avis, cela ne constitue pas une prestation valide. Cette prétention de la société intimée confond, encore une fois, la personnalité juridique distincte de la société avec celle de son ou ses actionnaires.

[230] Tout au plus, l'intention exprimée par l'appelant en l'espèce constituait une invitation à contracter. Le fait qu'un transfert d'actions a été inscrit par la société intimée alors que M. Rosati n'a déboursé aucune somme pour acquérir les actions de l'appelant ne prouve certainement pas que l'appelant a cédé ses actions. Conclure de l'inscription d'un transfert d'actions par la société intimée qu'un contrat a été formé relève du raisonnement circulaire : parce qu'un transfert a été inscrit, un contrat a été formé et parce que le contrat a été formé, le transfert est nécessairement valide.

[231] Les parties ont également évoqué la possibilité que la prétendue entente du mois de mai 2005 constitue un contrat de donation. Or, il est clair qu'il n'y a pas eu de donation en l'espèce. En effet, il existe en droit civil une présomption selon laquelle un acte est normalement à titre onéreux. Deux éléments doivent alors être établis pour conclure à la donation : l'absence de contrepartie et « la volonté réfléchie de s'appauvrir » (*Martin c. Dupont*, 2016 QCCA 475, par. 26-31 (CanLII)). Dans son mémoire, la société intimée écrit qu'« [u]ne seule volonté [. . .] anime [l'appelant] : de recevoir [TRADUCTION] "(...) *de l'argent [s]a vie durant, jusqu'à [s]on décès*" » (par. 30). Cela me semble, a priori, l'antithèse d'une volonté de s'appauvrir. Par ailleurs, et ce n'est pas anodin, ni la société intimée ni l'appelant ne prétendent que les actions ont été données à M. Rosati le 25 mai 2005. La première indique dans son mémoire que le prétendu contrat intervenu entre les parties est « tout sauf un contrat à titre gratuit » (par. 77). Le second nie l'existence même d'un échange de volontés, mais répond subsidiairement à l'absence de contrepartie valide en rappelant les exigences du *Code civil du Québec* en matière de donation et les conséquences du non-respect de telles exigences en droit.

[232] Article 1824 *C.C.Q.* reads as follows:

1824. The gift of movable or immovable property is made, on pain of absolute nullity, by notarial act *en minute*, and shall be published.

These rules do not apply where, in the case of the gift of movable property, the consent of the parties is accompanied by delivery and immediate possession of the property.

[233] In the absence of a published notarial act *en minute*, a gratuitous contract must be consistent with the definition of a manual gift, according to which either the donee must be put in immediate possession of the property or all hindrances must be removed so that the donee can take possession of the property (art. 1825 *C.C.Q.*). If the contract does not meet the conditions for a manual gift, it is absolutely null: *Paré v. Paré (Succession de)*, 2014 QCCA 1138.

[234] Furthermore, s. 65(3) of the *CBCA* imposes a second requirement for possession in the case of a manual gift: the share certificate for the transferred shares must, at a minimum, be endorsed by the transferor (*Grusk v. Sparling* (1992), 44 C.A.Q. 219).

[235] In the instant case, not only did the appellant never express an intention to make a gift of his shares, but it is clear that these conditions were not met.

[236] In short, I cannot accept the proposition that the onus was on the appellant to seek a conclusion that the alleged agreement of May 25, 2005 was null after inferring that a contract existed from the fact that a transfer had been registered even though there had been no exchange of wills on that date concerning a specific juridical operation and even though the appellant did not know that the transfer had been registered in the respondent company's registers until he had instituted this proceeding.

(4) Trial Judge's Assessment of the Evidence

[237] In his claim, the appellant alleges wrongful conduct on the respondent company's part, that is,

[232] L'article 1824 *C.c.Q.* se lit ainsi :

1824. La donation d'un bien meuble ou immeuble s'effectue, à peine de nullité absolue, par acte notarié en minute; elle doit être publiée.

Il est fait exception à ces règles lorsque, s'agissant de la donation d'un bien meuble, le consentement des parties s'accompagne de la délivrance et de la possession immédiate du bien.

[233] En l'absence d'un acte notarié en minute et publié, le contrat à titre gratuit doit correspondre à la définition d'un don manuel, ce qui implique que le donataire soit mis en possession immédiate du bien ou, sinon, que tous les obstacles soient écartés afin qu'il puisse en prendre possession (art. 1825 *C.c.Q.*). S'il ne respecte pas les conditions du don manuel, le contrat est nul de nullité absolue : *Paré c. Paré (Succession de)*, 2014 QCCA 1138.

[234] Dans la même veine, pour qu'il y ait possession aux fins d'un don manuel, la *LCSA*, à son par. 65(3), prévoit une seconde exigence : le certificat d'actions constatant les actions cédées doit au minimum être endossé par le cédant (*Grusk c. Sparling* (1992), 44 C.A.Q. 219).

[235] En l'espèce, non seulement l'appelant n'a jamais exprimé l'intention de donner ses actions, mais il est évident que ces conditions n'ont pas été satisfaites.

[236] En somme, je ne puis souscrire à la thèse qu'il appartenait à l'appelant de soulever la nullité de la prétendue entente du 25 mai 2005, après avoir inféré qu'il y avait eu contrat parce qu'un transfert avait été inscrit, alors qu'il n'y avait pas eu, à ce jour-là, d'échange de volontés sur une opération juridique précise et que l'appelant n'a eu connaissance de l'inscription du transfert dans les registres de la société intimée qu'à une fois le présent recours intenté.

(4) Appréciation de la preuve par le juge de première instance

[237] Dans le cadre de son recours, l'appelant reproche à la société intimée sa conduite fautive, à

that it failed to discharge its legal duties and that it registered a transfer of shares without having observed the necessary formalities.

[238] However, insofar as my colleague Cromwell J. accepts the trial judge's finding of fact that the appellant had expressed his intention of withdrawing from Intramodal as a shareholder and had transferred his shares to Mr. Rosati in May 2005, and given that my colleague bases his analysis on that finding, I believe it is important to point out the errors the trial judge made in assessing the evidence. In addition to having no basis in law, that finding by the trial judge is not supported by the evidence and is thus based on palpable and overriding errors. I therefore agree with the dissenting judge of the Court of Appeal that the trial judge's analysis on this point contained errors warranting appellate intervention: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[239] The finding that the appellant told Mr. Rosati he wanted to withdraw from Intramodal as a shareholder on May 25, 2005 is based solely on Mr. Rosati's testimony. The trial judge erred in rejecting the appellant's testimony, since, as the dissenting judge of the Court of Appeal rightly noted, he did so on the basis of an unreasonable interpretation of several pieces of evidence in the record.

[240] First, there is the letter of resignation signed by the appellant on May 25, 2005, which speaks for itself. The appellant withdrew from the company as a director and officer at that time. That letter prepared by the respondent company's lawyer — who, according to the evidence, was following the majority shareholder's instructions — could easily have provided for more if that had been the parties' intention. But it did not.

[241] Next, there are various documents relating to life insurance taken out on the appellant and Mr. Rosati, of which the respondent was the beneficiary. One of those documents stated that

savoir l'omission de se conformer à ses obligations légales et l'inscription d'un transfert d'actions sans le respect des formalités requises.

[238] Toutefois, dans la mesure où mon collègue le juge Cromwell accepte la conclusion de fait du juge de première instance selon laquelle l'appelant aurait exprimé son intention de se retirer d'Intramodal en tant qu'actionnaire et aurait transféré ses actions à M. Rosati en mai 2005, et puisqu'il en fait le fondement de son analyse, j'estime qu'il est important de souligner les erreurs commises par le juge de première instance dans son appréciation de la preuve. En effet, en plus de n'avoir aucun fondement en droit, cette conclusion du juge de première instance ne trouve aucune assise dans la preuve et repose donc sur des erreurs manifestes et dominantes. Je partage ainsi l'avis du juge dissident de la Cour d'appel selon lequel l'analyse du juge de première instance sur ce point comporte des erreurs justifiant l'intervention en appel : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

[239] La conclusion selon laquelle l'appelant aurait indiqué à M. Rosati qu'il voulait se retirer en tant qu'actionnaire d'Intramodal le 25 mai 2005 s'appuie exclusivement sur le témoignage de ce dernier. Lorsque le juge de première instance rejette le témoignage de l'appelant, il commet une erreur puisque, comme le souligne à juste titre le juge dissident de la Cour d'appel, il le fait en s'appuyant sur une interprétation déraisonnable de plusieurs pièces versées au dossier.

[240] Il y a d'abord la lettre de démission signée par l'appelant le 25 mai 2005, laquelle lettre parle d'elle-même. L'appelant se retirait alors de la société comme administrateur et dirigeant. Cette lettre, préparée par l'avocat de la société intimée, lequel suivait, selon la preuve, les instructions de l'actionnaire majoritaire, aurait facilement pu prévoir davantage si telle avait été l'intention des parties. Or, ce n'est pas le cas.

[241] Il y a aussi les divers documents relatifs à la souscription d'une assurance-vie sur les personnes de l'appelant et de M. Rosati et dont l'intimée était la bénéficiaire. L'un de ces documents indique que

Mr. Rosati was the respondent company's sole shareholder. Yet the policy in question was on the lives of both the appellant and Mr. Rosati. What insurable interest did Intramodal have in the appellant's life if he was no longer a shareholder? To ask the question is to answer it.

[242] As for the letter written by Mr. Kaufman on October 31, 2007 that was sent to the appellant, I also agree with the dissenting judge of the Court of Appeal that it could not reasonably lead to an inference that the appellant was, by insisting on being repaid his investment, relinquishing his shares.

[243] Nor could the formal notice of February 25, 2010 prepared by Mr. Kaufman lead to any negative inference. In it, the appellant claimed to be entitled to receive 50 percent of the respondent company's profits and to continue his partnership with Rosati. But by February 25, 2010, it had become clear that the appellant was no longer a shareholder *in the respondent company's registers*. According to his testimony and that of his professional advisers, the purpose of the letter was to have the situation remedied, failing which $1,000,000 would be claimed from Mr. Rosati.

[244] Finally, another ground advanced by the trial judge for rejecting the appellant's version was that, in his opinion, the reason the appellant gave for his withdrawal as a director and officer, namely the visit to Intramodal's premises and the examination of the company's books by representatives of Labatt, was false. Yet the dissenting judge of the Court of Appeal noted that, even though the company had not been active at the time, the appellant's assertion that meetings had taken place with representatives of Labatt had not been contradicted. Moreover, amounts were advanced before December 2005 and continued to be advanced until October 2006.

[245] In short, in my view, the evidence does not support the conclusion that the two shareholders entered into an agreement under which the appellant withdrew from the company as a shareholder. In arriving at that conclusion, the trial judge made

M. Rosati est le seul actionnaire de la société intimée. Pourtant, ladite police couvre tant la vie de l'appelant que celle de M. Rosati. Quel intérêt assurable Intramodal détenait-elle sur la vie de l'appelant si celui-ci n'était plus un actionnaire? Poser la question, c'est y répondre.

[242] Quant à la lettre rédigée par M^e^ Kaufman le 31 octobre 2007 et transmise à l'appelant, je suis également d'accord avec le juge dissident en Cour d'appel pour dire qu'on ne pouvait raisonnablement en inférer que l'appelant, en insistant pour se faire rembourser son investissement, renonçait par le fait même à ses actions.

[243] La mise en demeure du 25 février 2010 rédigée par M^e^ Kaufman ne permettait pas non plus de tirer d'inférence négative. L'appelant y revendique son droit à 50 p. 100 des profits de la société intimée et son partenariat avec M. Rosati. Or, en date du 25 février 2010, il était devenu clair que l'appelant n'était plus actionnaire *dans les registres de la société intimée*. Selon son témoignage et celui de ses représentants professionnels, la lettre visait à faire corriger la situation à défaut de quoi une somme de 1 000 000 $ serait réclamée à M. Rosati.

[244] Enfin, le juge de première instance a également rejeté la version de l'appelant parce que, selon lui, le motif avancé du retrait à titre d'administrateur et de dirigeant, soit la visite du local d'Intramodal et l'examen des livres de la société par les représentants de Labatt, était faux. Le juge dissident en Cour d'appel souligne que même si la société intimée n'était pas alors active, l'affirmation de l'appelant selon laquelle des rencontres avaient eu lieu avec des représentants de Labatt n'a pas été contredite. Des sommes ont d'ailleurs été avancées avant décembre 2005 et ont continué de l'être jusqu'en octobre 2006.

[245] Bref, à mon avis, la conclusion selon laquelle une entente est intervenue entre les deux actionnaires en vertu de laquelle l'appelant s'est retiré de la société intimée en tant qu'actionnaire n'est pas étayée par la preuve. Pour arriver à cette

palpable and overriding errors and disregarded key aspects of the evidence. At most, the evidence shows that the appellant expressed an intention to divest himself of his shares, but no agreement was reached on how he would dispose of them.

(5) Prescription of the Claim

[246] In the alternative, the respondent company argues that the appellant's claim must be dismissed on the ground that it is prescribed. The trial judge and the majority of the Court of Appeal agreed with that argument.

[247] The *CBCA* does not specify the prescription period that applies to the oppression remedy, although it does provide for a two-year prescription period for other remedies, two examples of which can be found in ss. 118(7) and 119(3) *CBCA*. It can therefore be assumed, at least where this remedy is concerned, that Parliament intended to defer to general civil law principles where a claim for oppression is made in Quebec: Martel, at pp. 31-191 to 31-192.

[248] In this regard, art. 2925 *C.C.Q.* provides as follows:

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise determined.

[249] A claim under s. 241 *CBCA* is normally brought to enforce a personal right. This is the case, for example, where the complainant alleges that a corporation's majority shareholder has acted in disregard of minority shareholders' interests (*Bénard v. Gagnon*, 2002 CanLII 23768 (Que. Sup. Ct.), aff'd by 2004 CanLII 73057 (Que. C.A.)) or where what is described as oppression consists of acts committed by the directors, who are alleged to have misled and unfairly treated certain shareholders in the same class (*Regroupement des marchands actionnaires inc. v. Métro Inc.*, 2011 QCCS 2389). An oppression claim can also be made to enforce a real right where, for example, the corporation in question refuses to pay

conclusion, le juge a commis des erreurs manifestes et dominantes et a fait abstraction d'éléments clés de la preuve. Tout au plus, la preuve démontre qu'une intention de se départir de ses actions a été exprimée par l'appelant, sans toutefois qu'il n'y ait eu d'entente quant à la façon dont il disposerait de ses actions.

(5) Prescription du recours

[246] Subsidiairement, la société intimée fait valoir que le recours de l'appelant doit être rejeté au motif qu'il est prescrit. Le juge de première instance et les juges majoritaires de la Cour d'appel ont également conclu en ce sens.

[247] Le délai de prescription applicable au recours pour abus n'est prévu nulle part dans la *LCSA*. Celle-ci prévoit pourtant, pour d'autres recours, un délai de prescription de deux ans. C'est le cas des par. 118(7) et 119(3) *LCSA*. On peut donc supposer, dans le cas de ce recours du moins, que le législateur fédéral entendait s'en remettre aux principes généraux du droit civil lorsqu'un tel recours est intenté au Québec : Martel, par. 31-482.

[248] À cet égard, l'art. 2925 *C.c.Q.* prévoit ce qui suit :

2925. L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.

[249] Le recours fondé sur l'art. 241 *LCSA* tend normalement à faire valoir un droit personnel. C'est le cas notamment lorsque le plaignant allègue que l'actionnaire majoritaire d'une société agit sans tenir compte des intérêts des actionnaires minoritaires (*Bénard c. Gagnon*, 2002 CanLII 23768 (C.S. Qc), conf. par 2004 CanLII 73057 (C.A. Qc)), ou lorsque l'abus s'entend d'actes des administrateurs qui auraient induit en erreur et traité inéquitablement certains actionnaires d'une même catégorie (*Regroupement des marchands actionnaires inc. c. Métro Inc.*, 2011 QCCS 2389). Le recours pour abus peut également tendre à faire valoir un droit réel lorsque, par exemple, la société en cause refuse

dividends owed to the complainant despite acknowledging the complainant's status as a shareholder.

[250] Sometimes, as in the case at bar, the claim is instead premised on the complainant's ownership of shares and on the corporation's refusal to acknowledge the complainant's status as a shareholder. In such cases, a claim under s. 241 *CBCA* is brought not to *enforce* a real right but to have it *acknowledged*.

[251] In the civil law, the right of ownership (in this case the right of ownership of a security) is perpetual, which means that it is not lost either by non-use or by the mere passage of time:

[TRANSLATION] The right of ownership is *perpetual*. This does not mean that the right remains forever attached to the same patrimony or that it can be transmitted perpetually; it means that it is not lost through non-use (*supra*, at No. 18). However, an owner can destroy (corporeal) property, in which case the right will disappear with the property, which explains why the right is identified with the property. The owner can also renounce the right (the abandoned property then becomes a thing without an owner — arts. 934 et seq. C.C.Q.) or transfer the property to a trust patrimony without an owner (art. 1261 C.C.Q.), or the right may be acquired by a third party possessor through acquisitive prescription . . . . [Emphasis in original; footnote omitted.]

(D.-C. Lamontagne, *Biens et propriété* (7th ed. 2013), at para. 207)

[252] Professor Pierre-Claude Lafond states the following on this same subject:

[TRANSLATION] One characteristic of the right of ownership is that it is not lost by way of extinctive prescription (see *supra*, at 3.1.2.4). Since an action in revendication sanctions the right of ownership, it too is therefore *imprescriptible*, unlike other types of actions to enforce a real right, which are prescribed by ten years (art. 2923 C.C.Q.) or by three years (art. 2925 C.C.Q.), depending on whether the right is immovable or movable. In our view, those two provisions cannot apply, given that the purpose of a petitory action is not to *enforce* a right but to *have it acknowledged* (art. 912 C.C.Q.).

de verser au plaignant, à qui elle reconnaît pourtant le statut d'actionnaire, les dividendes qui lui sont dus.

[250] Il arrive, comme c'est le cas en l'espèce, que le recours se fonde plutôt sur la prémisse que le plaignant est propriétaire d'actions et qu'on reproche à la société de refuser de lui reconnaître le statut d'actionnaire. Le recours fondé sur l'art. 241 *LCSA* vise alors non pas à *faire valoir* un droit réel, mais à le faire *reconnaître*.

[251] Or, le droit civil reconnaît le caractère perpétuel du droit de propriété (en l'occurrence un droit de propriété portant sur une valeur mobilière), ce qui signifie que celui-ci ne se perd ni par le non-usage ni par le simple écoulement du temps :

Le droit de propriété est *perpétuel*. Cela signifie non pas que le droit demeure attaché à perpette au même patrimoine ou qu'il est transmissible perpétuellement, mais qu'il ne se perd pas par le non-usage (*supra*, n° 18). Cependant, le propriétaire peut détruire son bien (corporel), le droit disparaissant avec celui-ci, ce qui permet de comprendre l'identification du droit au bien. Il peut encore renoncer à son droit (le bien abandonné devenant un bien sans maître — 934 et s. C.c.Q.), transférer son bien à un patrimoine fiduciaire dépourvu de propriétaire (1261 C.c.Q.), ou le droit peut se prescrire acquisitivement au bénéfice d'un tiers possesseur . . . [En italique dans l'original; note en bas de page omise.]

(D.-C. Lamontagne, *Biens et propriété* (7e éd. 2013), par. 207)

[252] Sur ce même point, le Professeur Pierre-Claude Lafond s'exprime ainsi :

Une des caractéristiques du droit de propriété est qu'il ne se perd pas par l'effet de la prescription extinctive (voir *supra*, 3.1.2.4). Puisque l'action en revendication sanctionne le droit de propriété, elle est donc aussi *imprescriptible*, et ce contrairement aux autres espèces d'actions qui visent à faire valoir un droit réel, lesquelles se prescrivent par dix ans (art. 2923 C.c.Q.) ou trois ans (art. 2925 C.c.Q.), selon qu'il s'agit d'un droit immobilier ou mobilier. À notre avis, ces deux dispositions ne peuvent s'appliquer, car l'action pétitoire ne vise nullement à *faire valoir* un droit, mais plutôt à le *faire reconnaître* (art. 912 C.c.Q.).

In practice, this imprescriptibility may be defeated where acquisitive prescription is claimed by a possessor (arts. 2917 to 2919 C.C.Q.) (see *infra*, at 6.3.3.3.2), although this does not change the principle that the right of ownership cannot be lost by reason of the passage of time. [Emphasis added; citations omitted.]

(*Précis de droit des biens* (2nd ed. 2007), at para. 1205)

[253] Thus, extinctive prescription cannot be set up against a person seeking to have his or her ownership of property *acknowledged*.

[254] A share of a company is a real right in respect of which a shareholder can seek recognition of a right of ownership: "For a shareholder, ownership of shares is a real right, not a personal right, which can render inadmissible in Quebec an action taken to be declared owner of shares of which the *situs* is outside Quebec" (Martel, at p. 12-11 (emphasis added; footnotes omitted)).

[255] As a result, the prescription period applicable to a claim under s. 241 *CBCA* will depend on the basis for the claim. Where — as in this case — the complainant has been acknowledged to be a shareholder at some point and is claiming to have been unlawfully stripped of shareholder status by the corporation, the claim is therefore imprescriptible.

[256] This was the conclusion reached by the Quebec Court of Appeal in *Greenberg v. Gruber*, 2004 CanLII 14882 (Que. C.A.).

[257] In that case, the complainant submitted that shares in several corporations were being held for him by the respondents as *prête-noms* (nominees). He argued that he actually owned a third of the shares of those corporations, and he requested, *inter alia*, that the registers be rectified and that a share certificate be delivered to him.

[258] The respondents sought to set up extinctive prescription against the claim. The trial judge held that prescription was applicable but that the claim

En pratique, cette imprescriptibilité peut cependant être mise en échec par l'effet d'une prescription acquisitive réclamée d'un possesseur (art. 2917 à 2919 C.c.Q.) (voir *infra*, 6.3.3.3.2), ce qui ne change rien au principe que le droit de propriété ne saurait se perdre par l'écoulement du temps. [Je souligne; références omises.]

(*Précis de droit des biens* (2e éd. 2007), par. 1205)

[253] Ainsi, la personne qui cherche à se voir *reconnaître* la propriété d'un bien ne peut se faire opposer la prescription extinctive.

[254] L'action d'une société constitue un droit réel sur lequel l'actionnaire peut demander que son droit de propriété soit reconnu : « Pour l'actionnaire, la propriété des actions est un droit réel, et non un droit personnel, ce qui peut rendre irrecevable au Québec un recours intenté pour se faire déclarer propriétaire d'actions dont le *situs* est hors du Québec » (Martel, par. 12-42 (je souligne; notes en bas de page omises)).

[255] Suivant ce raisonnement, le délai de prescription applicable au recours exercé en application de l'art. 241 *LCSA* dépendra du fondement du recours. Lorsque le statut d'actionnaire a été à un moment reconnu au plaignant — comme c'est le cas en l'espèce — et que celui-ci prétend que la société l'en a illégalement dépouillé, le recours est alors imprescriptible.

[256] C'est la conclusion à laquelle est arrivée la Cour d'appel du Québec dans *Greenberg c. Gruber*, 2004 CanLII 14882 (C.A. Qc).

[257] Dans cette affaire, le plaignant soutenait que les intimés détenaient pour lui, à titre de prête-noms, des actions dans plusieurs sociétés. Il faisait valoir qu'il était dans les faits propriétaire du tiers des actions de ces sociétés et demandait notamment que les registres soient rectifiés et qu'un certificat d'actions lui soit remis.

[258] En réponse à ce recours, les intimés ont tenté d'opposer la prescription extinctive. Le juge de première instance ayant conclu que la prescription

was not prescribed, and the respondents appealed that decision. The issue before the Quebec Court of Appeal was whether, in such a case, extinctive prescription can be relied on [TRANSLATION] "in order to argue that a shareholder has lost the right of ownership in his shares because of his failure to act in a timely manner" (*Greenberg*, at para. 6). If the answer was yes, the Court of Appeal also had to determine which prescription period was applicable, that of 10 years under art. 2922 *C.C.Q.* or that of three years under art. 2925 *C.C.Q.*

[259] The Court of Appeal accepted the complainant's argument that extinctive prescription cannot be raised where, in the case of a claim under s. 241 *CBCA*, the complainant seeks to assert a right of ownership or seeks acknowledgment of his or her status as a shareholder in connection with that right.

[260] More specifically, the Court of Appeal reached the conclusion that [TRANSLATION] "the fact that [the complainant] failed to contest the 'denial' of his status as a shareholder within three years (or any other period) does not mean that he can no longer assert his right of ownership in the shares" (*Greenberg*, at para. 43). To terminate the complainant's right of ownership, the respondents would have had to show that they had acquired the shares by way of acquisitive prescription, but they were not making that argument. The Court of Appeal added that, "[a]s an owner, the [complainant] certainly cannot be prevented from asserting his right of ownership by someone who simply refuses to acknowledge that right" (*Greenberg*, at para. 44).

[261] I am in complete agreement with that reasoning.

[262] Like the respondents in *Greenberg*, the respondent company in the case at bar is not arguing that it became the owner of the appellant's shares by way of acquisitive prescription. It is simply refusing to acknowledge the appellant's status as a shareholder, and its argument is that its majority shareholder, Mr. Rosati, now owns his shares as a result of an alleged informal verbal agreement between the appellant and Mr. Rosati. However, I

était applicable mais que le recours n'était pas prescrit, les intimés ont fait appel de la décision. La question dont la Cour d'appel du Québec était saisie était de savoir si, dans un tel cas, la prescription extinctive pouvait être invoquée « pour prétendre qu'un actionnaire a perdu le droit de propriété de ses actions vu son défaut d'agir en temps utile » (*Greenberg*, par. 6). Dans l'affirmative, la Cour d'appel devait également déterminer quel délai de prescription était applicable, celui de 10 ans prévu à l'art. 2922 *C.c.Q.* ou celui de trois ans prévu à l'art. 2925 *C.c.Q.*

[259] La Cour d'appel a fait droit à la prétention du plaignant selon laquelle la prescription extinctive ne pouvait être invoquée lorsque, dans le cadre d'un recours fondé sur l'art. 241 *LCSA*, un plaignant cherche à faire valoir son droit de propriété ou demande que, en lien avec ce droit, le statut d'actionnaire lui soit reconnu.

[260] Plus particulièrement, la Cour d'appel est arrivée à la conclusion que « ce n'est pas parce que [le plaignant] a omis de contester la "négation" de son statut d'actionnaire à l'intérieur d'un délai de trois ans (ou de tout autre délai) qu'il ne peut plus faire valoir son droit de propriété sur les actions » (*Greenberg*, par. 43). Pour mettre fin au droit de propriété du plaignant, les intimés devaient démontrer qu'ils avaient acquis les actions par voie de prescription acquisitive, ce qu'ils ne soutenaient pas. Toujours selon la Cour d'appel, « [e]n tant que propriétaire, [le plaignant] ne peut certainement pas être empêché de faire valoir son droit de propriété par quelqu'un qui refuse simplement de reconnaître ce droit » (*Greenberg*, par. 44).

[261] Je souscris entièrement à ce raisonnement.

[262] En l'espèce, tout comme dans affaire *Greenberg*, la société intimée ne prétend pas être devenue propriétaire des actions de l'appelant par application de la prescription acquisitive. Elle refuse tout simplement de reconnaître à l'appelant son statut d'actionnaire et soutient que c'est son actionnaire majoritaire, M. Rosati, qui est dorénavant propriétaire de ses actions en raison d'une prétendue entente verbale et intervenue informellement entre

would stress once again that the situation in this case differs from the one in *Greenberg*, as Mr. Rosati is not a party to the litigation and therefore cannot claim acquisitive prescription in relation to the shares. Nor can the respondent company do so on his behalf.

VI. Conclusion

[263] For all these reasons, I would allow the appeal, revoke the resolution to transfer the appellant's shares and order that the respondent company's registers be rectified to reflect the appellant's status as a shareholder, with costs throughout.

Appeal dismissed with costs, CÔTÉ J. *dissenting.*

Solicitors for the appellant: Blake, Cassels & Graydon, Montréal.

Solicitors for the respondent: Langlois lawyers, Montréal.

l'appelant et M. Rosati. Or, contrairement à la situation dans l'affaire *Greenberg*, et j'insiste une fois de plus sur ce point, M. Rosati n'est pas partie au litige et ne peut par conséquent revendiquer la prescription acquisitive des actions. La société intimée ne peut non plus le faire pour lui.

VI. Conclusion

[263] Pour tous ces motifs, je suis d'avis d'accueillir le pourvoi, d'annuler la résolution de transfert des actions de l'appelant et d'ordonner la rectification des registres de la société intimée afin de refléter le statut d'actionnaire de l'appelant, le tout avec dépens devant toutes les cours.

Pourvoi rejeté avec dépens, la juge CÔTÉ *est dissidente.*

Procureurs de l'appelant : Blake, Cassels & Graydon, Montréal.

Procureurs de l'intimée : Langlois avocats, Montréal.

TAB 9

NATIONAL BANK OF GREECE AND ATHENS, S.A. *v.* METLISS.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow), October 10, 14, 16, 17, 21, 22, November 25, 1957.]

Conflict of Laws—Succession—Universal succession by foreign law of one foreign company to another—Whether recognised by English courts—Creditor's action against successor company protected by moratorium imposed by foreign law.

Company—Foreign company—Amalgamation—Universal succession of new amalgamated company by law of domicil—Whether recognised by English courts—Creditor's action against successor to foreign guarantor company.

In 1927 the M. Bank, a Greek bank, issued sterling mortgage bonds, payment of interest and principal being guaranteed by the N. Bank, another Greek bank incorporated under Greek law. The proper law of these contracts was English. No interest had been paid on the bonds since 1941, when the Germans and Italians occupied Greece. In 1949 a Greek law suspended all obligations on the bonds and imposed a moratorium thereon. The suspension and moratorium were still in force. In 1953, by a Greek law, the N. Bank was amalgamated with another Greek bank, the A. Bank, to form a new amalgamated company, the G. Bank, the appellants. The Greek Act governing the amalgamation of banking companies provided that a new company absorbing another company by amalgamation should become the "universal successor" to the rights and liabilities in general of the amalgamated companies, without any other formality or act. In an action by a bondholder, the respondent, against the G. Bank for arrears of interest,

Held: the respondent was entitled to recover six years' arrears of interest against the G. Bank since—

(i) the court recognised not only the fact that the G. Bank was created by and existed under Greek law but also that it had been invested with the liabilities as well as the assets of the N. Bank and the A. Bank to which banks it was the universal successor, and

(ii) the proper law of the contracts being English, the N. Bank, if sued in the English courts, could not have relied on the moratorium imposed by Greek law and, therefore, neither could the G. Bank.

Decision of the COURT OF APPEAL (sub nom. *Metliss* v. *National Bank of Greece and Athens, S.A.*, [1957] 2 All E.R. 1) affirmed.

[As to the recognition of the dissolution of foreign corporations, see 7 HALSBURY'S LAWS (3rd Edn.) 13, para. 22; and as to the withholding of recognition because of the nature of a foreign law, see ibid., 8, para. 10.]

Cases referred to:

(1) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*, (1890), 25 Q.B.D. 399; 59 L.J.Q.B. 510; 63 L.T. 503; 11 Digest (Repl.) 423, *723*.

(2) *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank*, [1939] 3 All E.R. 38; [1939] 2 K.B. 678; 160 L.T. 615; Digest Supp.

(3) *Lazard Bros. & Co.* v. *Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 10 Digest (Repl.) 1299, *9161*.

(4) *Beavan* v. *Hastings (Lord)*, (1856), 2 K. & J. 724; 27 L.T.O.S. 282; 69 E.R. 973; 11 Digest (Repl.) 398, *550*.

Appeal.

Appeal by the National Bank of Greece and Athens, S.A., from an order of the Court of Appeal (DENNING, ROMER and PARKER, L.JJ.), dated Mar. 18, 1957, and reported sub nom. *Metliss* v. *National Bank of Greece and Athens, S.A.*, [1957] 2 All E.R. 1, affirming an order of SELLERS, J., dated July 12, 1956. The appellants were a new amalgamated Greek company which, by Greek law, was the universal successor both to a Greek company which had no English assets but which had guaranteed the interest (which was in arrear) on Greek bonds payable in England and subjected by Greek law to a moratorium, and to another Greek company which had English assets. SELLERS, J., held the appellants liable to pay six years' arrears of interest on the bonds to the respondent, Cyril Metliss, a bondholder. The facts appear in the opinion of VISCOUNT SIMONDS.

T. G. Roche, Q.C., and *N. H. Lever* for the appellants.

J. G. Foster, Q.C., and *M. Littman* for the respondent.

The House took time for consideration.

Nov. 25. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the respondent is the holder of bonds of the total amount of £21,900, part of an issue of £2,000,000 seven per cent. sterling mortgage bonds issued by the National Mortgage Bank of Greece in the year 1927 and guaranteed by the National Bank of Greece. Both these companies were incorporated under Greek law. In the year 1935 the provisions of the bonds were modified so as to reduce the rate of interest from seven per cent. to four and three quarters per cent. and to provide that bondholders resident in Greece should be paid only in drachmae. These modifications, the latter of which did not affect the respondent, were agreed to by the guarantor, the National Bank of Greece. On Dec. 6, 1955, the respondent, having in vain presented for payment coupons for interest which had accrued since June 1, 1941, brought an action in the Queen's Bench Division, not against the original debtor nor against the guarantor, but against the appellants, the National Bank of Greece and Athens, S.A., claiming unpaid arrears of interest for fourteen and a half years to June 1, 1955, amounting to £15,083 12s. 6d. He recovered judgment for £6,241 5s. 1d., being the interest due for the six years preceding the presentations of coupons. An appeal by the appellants was dismissed by the Court of Appeal.

Your Lordships will see at once how important and novel a question is raised in this appeal. For I am not aware of any case, nor has the industry of learned counsel discovered one, in which, in the courts of this country, a plaintiff has, without a plea of novation or statutory assignment, recovered a sum due under a contract from one who was not a party to that contract. It will be necessary to examine closely the circumstances which, in the opinion of SELLERS, J., and the Court of Appeal, support the claim. A further question, not of general importance, is also raised whether, if the appellants are suable in this action, they can claim the benefit of a moratorium decreed by Greek law which would undoubtedly avail them if they were sued in Greece.

The appellants, a company incorporated under Greek law, owe their existence to an Act of the Greek Parliament and a Decree made under it, to which I must briefly refer. By the Act, which was enacted on Feb. 18, 1953, and was numbered Act No. 2292, it was provided (I take the so-called official translation) that

> "When the amalgamation of limited liability banking companies is concerned, the legal provisions in force are amended as follows."

Then follow provisions relating to amalgamation consequent on shareholders' meetings to which I need not refer. Then comes s. 4:

> "No description of the items contributed is required in the relative contract of amalgamation nor in the statutes, in the case of amalgamation

by formation of a new company, provided that all the assets and liabilities of the banking companies amalgamating are contributed as a whole.

"The company which absorbs another company by merger, or the new company formed by the amalgamation, becomes the universal successor to the rights and liabilities in general of the amalgamated companies, without any other formality or act whatsoever."

Section 8 provides that:

"Wherever in a Law, Decree or Ministerial Decision reference is made to one of the above-mentioned amalgamated limited liability banking companies by shares, it is understood that reference is made to the new limited liability banking company formed pursuant of the amalgamation, and generally all provisions in force of Laws, Decrees or Ministerial Decisions in favour of one of the amalgamated companies are considered as being in favour of the new company as from the formation of the latter."

Section 10 provides that

"The amalgamation of limited liability banking companies by shares, by formation of a new limited liability banking company by shares, may also be effected without a resolution of the general meeting of the shareholders, by Decree promulgated on the proposal of the Council of Ministers."

It was under the authority of this last section that, on Feb. 27, 1953, a decree was promulgated under which the Greek company that I have mentioned, the National Bank of Greece, and another Greek company, the Bank of Athens, were amalgamated and a new limited liability company by shares formed under the style "National Bank of Greece and Athens, Ltd. Co." having its seat in Athens and as objects the carrying on of the business of the amalgamated banks for a period of fifty years. The decree prescribed the terms of amalgamation in respect of shareholders and other matters, and then, by cl. 5, provided that as from the publication of the decree the two companies, the National Bank of Greece and the Bank of Athens, should cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication should be considered as being automatically contributed to the new company constituted by those presents, which was substituted, ipso jure and without any other formality, in all rights and obligations of the amalgamated banks, as their universal successor. (I again use the language of the official translation.) Thus the guarantor bank, which owed its existence to the law of Greece, was by the same law extinguished. On the other hand, the original debtor bank was left untouched by that or, so far as I am aware, any other decree and, on Oct. 27, 1955, asserted its continued existence by making an offer to the holders of its sterling bonds about which it is necessary to say no more than that it was rejected by the respondent. On the contrary, within a few days he presented his interest coupons to Hambros Bank, Ltd. (one of the paying agents named in the bonds) for payment, and, payment being refused, brought this action not against the debtor bank but against the new company created by the Greek decree of Feb. 27, 1953.

It may be mentioned here that the new company, that is the appellants, duly registered with the Registrar of Companies the prescribed particulars under s. 410 of the Companies Act, 1948, and are now carrying on business in this country. It must also be added that it has not been, and could not be, alleged that there has been a novation of the original contract between the respondent and the appellants. The respondent rests his claim against the appellants on Greek law and specifically on the decree of Feb. 27, 1953, and on nothing else.

I have so far said nothing about the second point that arises in this case, viz.: how far the appellants can avail themselves of the Greek moratorium laws to which I will refer later, even if they are otherwise liable on the bonds. I propose to defer any discussion of this point until I have dealt with the main question.

To the respondent's claim, the appellants object in brief that they were not parties to the original bonds and, therefore, are not liable in respect of them, that the proper law of the bonds was English law and no foreign decree can operate to modify the terms thereof or to substitute one company for another as a party thereto and (stating the same proposition in other words) that English law does not recognise a succession imposed by a foreign law to an obligation arising under a contract governed by English law. Each one of these propositions is challenged by the respondent so far as it relates to the present claim, except that it is now conceded, as was held by the learned trial judge, that the proper law of the contract is English.

My Lords, it must be apparent that, if the appellants are right, a strange situation is revealed. Here is a company whose status is recognised by the courts of this country because it is incorporated by the law of its domicil. By that law it is invested with duties, powers, assets, liabilities. It admits that, if sued in Greece, it would be liable on the bonds here in question, subject always to the benefit of any moratorium. It comes to this country, carries on its business, and assumes unchallenged possession of the assets of the dissolved company. It is the strange climax of this narrative that it then disclaims a liability to which that dissolved company was undoubtedly subject. I do not think that an English court of justice should readily give effect to such a pretension, and I will in the first place examine such authority as was cited by learned counsel for the appellants in support of his propositions.

In the forefront was put *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1) ((1890), 25 Q.B.D. 399), a case which will be found to illustrate well the fallacy of the appellants' contention. In that case, according to the headnote, a party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled. The parties having entered into a contract of which the law was indisputably English law, the defendants made default and, in defence of a claim made against them in an English court, pleaded that they had been placed in judicial liquidation by the Tribunal of Commerce of the Seine, France being the country of their domicil. This plea was vigorously rejected by the court, LORD ESHER, M.R., saying (ibid., at p. 407):

> "I wish to base my judgment, however, on the assumption that they were so discharged [i.e., by the order of the French court]. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicil is altogether outside the general principle that governs such matters, and cannot be supported."

This statement of the law is repeated as r. 102 in DICEY'S CONFLICT OF LAWS (6th Edn.) at p. 447, and, subject to certain immaterial qualifications, can be accepted by this House. But what bearing has it on the present case? It would, no doubt, be relevant if the original guarantor company were being sued and pleaded that they had been dissolved by the law of their domicil and their liability ended. But that is not what has happened. It is not an issue in this case whether the original guarantor company could still be sued notwithstanding that it has been wound-up and its liabilities transferred to the new company under Greek law, and it is the fundamental fallacy of the appellants' argument that the two propositions are treated as complementary, that is to say that, if our law would regard the original company as still liable, the new company can disclaim the liability which is imposed on it by Greek law—and, I would say, imposed on it as a condition of its existence, but that is to anticipate what I shall say on another aspect of the case.

Reliance was next placed on some observations of the Court of Appeal in *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank* (2) ([1939] 3 All E.R. 38). They have so little relevance to the

present case that I hesitate to occupy time by referring to them. The question there was whether a contract, of which the proper law was English and which was to be performed in England, was enforceable in the English courts although its performance might involve a breach by the defendants of the law of Hungary. The court did not challenge the principle* that

> " a contract (whether lawful by its proper law or not) is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed . . .",

but rejected with lively references to the possible laws of Ruritania the suggested extension of this principle to a case where the contract is lawful in the country where it is to be performed. Your Lordships have recently had occasion to examine this question at some length. I can only say that it appears to me to be irrelevant to the question whether our courts will recognise the liability of the appellants to an obligation imposed on them by their own law.

No other authority, I think, was cited in support of the appellants' contention. The question is rather one of principle and analogy, though analogies are dangerous and principles difficult to state with precision. The analogy, which has found some favour with the courts below and is not without its use, is in the conception of universal succession. That is a conception of the Roman law which found its way into many systems of law including, as my noble and learned friend, LORD KEITH OF AVONHOLM, has pointed out, the law of Scotland. It may be assumed that the Greek legislature, using the words " Universal successor " in the relevant Act, was looking to the familiar principle under which the heir was the universal successor of his testator and regarded as eadem persona cum defuncto, and was asserting the identity of the new company with the old. But I do not care to rest my opinion on a conception which is, at the least, artificial. The fact is that the new company is a new juristic entity which was not a party to any contract with the respondent, and I do not think that, when a competent legislature has created a corporation and vested in it all the powers, assets and liabilities of an old corporation, which is then dissolved, anything is added by a further reference to universal succession, unless, indeed, it can be said that such a reference makes the path seem more familiar and, therefore, easier. In the same way it is easier to recognise the validity and efficacy of such a transfer if one recalls the many examples of statutory amalgamation of undertakings in this country and, no doubt, in other countries. It might be said that it has become a commonplace feature of commerce and industry in the modern state that such amalgamations should take place, and that it has become a matter of comity to recognise them except in so far as they are in conflict with the positive law of the country where it is sought to give effect to them.

But, my Lords, in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this? I believe that justice will be done if your Lordships think it right not only to recognise the fact that the new company exists by the law of its being but to recognise also what it is by the same law. It is conceded that its status must be recognised. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognising its existence, if we do not also recognise the purposes of its existence and give effect to them accordingly? If, for reasons of comity, we recognise the new company as a juristic entity, neither the Greek government, the creator, nor the new company, its creature, can complain that we, too, clothe it with all the attributes with which it has been invested. Thus and thus alone, as it appears, justice will be done. It may not be inappropriate that, in dealing with this Greek company,

* DICEY'S CONFLICT OF LAWS (6th Edn.), p. 637, r. 141, Exception.

A I have used language which may to some of your Lordships be reminiscent of the words of a Greek philosopher of more than two thousand years ago.

I conclude, therefore, that the appellants fail in their first contention that they are not liable on the bonds which were guaranteed by the old company. If I have to base my opinion on any principle, I would venture to say it was the principle of rational justice. I turn now to the second question, whether, being B sued in this country, the appellants can claim the benefit of the moratorium imposed by successive Greek laws.

The effect of these laws is, I think, correctly stated in the appellants' formal Case and I quote from it. In the month of April, 1941, the Germans and Italians occupied Greece and payment of the sums falling due under the bonds ceased and (so far as the bonds in question in this case are concerned) was never resumed. C In November, 1949, the suspension of payments was regularised by the Greek Emergency Law 1318 of November, 1949, which suspended the service on Greek bonds payable in foreign currency (including these bonds) until June 30, 1952. The Emergency Law was ratified by the Greek Law 1586. The moratorium was continued by Greek Law 2204 of 1952 until June 30, 1954, then by Greek Law 2948 of 1954 until Dec. 31, 1954, then by Greek Law 3162 of 1955 until June 30, 1955, D and by Greek Law 3274 of 1955 until Dec. 31, 1955. Thus the moratorium was still in force at the date of the issue of the writ in this action on Dec. 6, 1955. The only other thing that need be said about these laws is that they expressly operated to suspend not merely all remedies for enforcement of the bonds in question but also the obligation to make payments, and it is conceded by the respondent that, if he sued in Greece, the moratorium would be an effective E defence to his action.

My Lords, I think that in the consideration of this question some confusion has arisen out of the evidence of the experts on Greek law who were called on either side. They could, of course, give evidence as to the meaning and effect in Greek law of the statutes to which I have referred and say what, in their opinion, the result would be if the appellants were sued on the bonds in a Greek F court. But they could not give evidence on the question which our courts and ultimately your Lordships have to decide: whether, and to what extent, in an action here the moratorium laws will be regarded as capable of affecting the obligations under the bonds which are admittedly governed by English law. I have read and re-read the evidence and the statutes to which they relate and am unable to extract anything from them except what may be said to be obvious, G that the new company succeeded to (inter alia) the liabilities of the old company, including the liability on these bonds, but that, if the bondholder sued in a Greek court, he would be met by the moratorium and his action would fail. I can find no firm evidence that, on a true construction of the amalgamation decree, the new company was to be in a better position than the old in regard to foreign contracts. On the contrary, there was repeated affirmation of the pro- H position that the new company was to be in just the same position as the old, having truly the advantage of any law of which the old company had the benefit but having nothing more. I ask then what would have been the position of the old company if sued here on these bonds and am absolved from any further examination of the question by the concession freely and, I think, rightly made by the appellants that the old company could not have relied on the moratorium. I Clearly the obligations in English law (the proper law of the contract) could not be affected by a Greek law which purported to vary its terms. I would for this purpose regard a law imposing a moratorium as in the same category as a law creating a new period of limitation. In this respect it is interesting to note that the appellants, though it did not become necessary for them to rely on it, in fact pleaded the English Statute of Limitations as a partial answer to the claim. But whether the law of the foreign country imposes a moratorium or a period of limitation, it cannot avail a defendant sued in the courts of this country. For

these reasons, I think that the contentions of the appellants on the second point also fail. A

I ought not to conclude without referring to an argument powerfully presented by junior counsel for the appellants, which made some appeal to me. It was to the effect that it was to the last degree improbable that the Greek government, having as a matter of public policy imposed a moratorium on the payment of these amongst other bonds, should then create a new corporation which, in this country at least, would not be able to take advantage of it. This may be so, though, where questions of policy are concerned, it would be unwise to come to any conclusion without a full knowledge of all the facts. But I have borne this aspect of the case carefully in mind in coming to the conclusion which I have stated. I cannot be satisfied by any extraneous consideration that the obligations of the new company in an English court are in any way different from those of the company of which it is the " universal successor ". B C

The appeal should, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, two questions arise for decision on this appeal. I would state them as follows:—(i) Apart from the effect (if any) of the Greek statutes imposing a moratorium, does the Greek Statute No. 2292 of Feb. 18, 1953, coupled with the decree of Feb. 27, 1953, make the appellants liable in an English court on the guarantee given by the National Bank of Greece in 1927? (ii) If the answer to the first question is " Yes ", does the existence of the moratorium under Greek law preclude the respondent from recovering the sum awarded to him by SELLERS, J.? D

My Lords, I would answer " Yes " to the first question. On this point I am content to say that I agree with the Court of Appeal. E

On the second question, counsel for the appellants puts his argument somewhat as follows. The rights of the respondent against the appellants arise only by reason of the Greek statute and decree, since the appellants were not a party to the contract of guarantee. It is, therefore, necessary to see exactly what obligation was imposed on the appellants by the Greek legislation. That is a question of Greek law and is, therefore, a question of fact to be proved by the evidence of experts on the law of Greece. If the respondent goes to Greek law to establish his right, he must accept the whole of the relevant Greek law, and not only the part of it which suits him best. F

So far, my Lords, I think that the argument has considerable force, and I shall assume, without so deciding, that it is right, and pass on to the next stage of the argument. Counsel next points out that the moratorium was in force when the amalgamation took place, since it had been extended till June 30, 1954, by a law of Aug. 15, 1952, and, as a result of subsequent extension, it was in force when the writ was issued, and it is still in force. Counsel then submits that, according to the evidence of the experts on Greek law, the obligation which passed to the appellants was a suspended obligation and it is still a suspended obligation. I agree that this is the effect of the evidence, if one is considering only what would happen if this action were brought in a Greek court, but I do not think this helps the appellants. The evidence of the experts was that the amalgamation had the effect of putting the appellants in exactly the same position in all respects, as regards this obligation, as the old bank was in immediately before the amalgamation. Now the position of the old bank immediately before the amalgamation was as follows. An action against it on the guarantee would have succeeded in an English court, but would have failed in a Greek court, because of the moratorium. As I understand the evidence, and, in particular, the evidence of Mr. Seferiades at p. 294 to p. 296 of Appendix II [to the Printed Record] immediately after the amalgamation the new bank was in exactly that position and is in that position today. If this is so, the respondent was entitled to bring the present action in England and to succeed in it. G H I

A For these reasons, my Lords, I would answer the second question in the negative and dismiss this appeal.

LORD TUCKER: My Lords, the National Bank of Greece, the original guarantors of the bonds issued by the National Mortgage Bank of Greece in December, 1927, was a corporate entity created by Greek law. Its existence as a
B legal entity has been destroyed by the Greek decree of Feb. 27, 1953, promulgated under powers conferred by an Act of the Greek Parliament (No. 2292) passed on Feb. 18, 1953. English law will recognise both the creation and destruction of this foreign corporation by the law of the country of its domicil (cf. *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (3), [1933] A.C. 289). One of the consequences of the dissolution of this entity is that it is no longer possible to sue
C it and obtain judgment against it in an English court for a debt payable in this country. Statutory remedies to mitigate to some extent these consequences have been created by the provisions of the Companies Acts for winding-up non-existent foreign companies with assets here. These statutory remedies, in my view, are not really relevant to the questions which your Lordships are called on to decide in the present appeal.

D The same decree which destroyed the National Bank of Greece created a new legal entity, namely, the present appellants, the National Bank of Greece and Athens, S.A., which was "substituted ipso jure and without any other formality, in all rights and obligations of the said amalgamated banks" for the National Bank of Greece and the National Bank of Athens, which latter corporation had also been extinguished by this same decree. The decree provided that the two
E former banks should

> "cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication is considered as being automatically contributed to the new limited liability banking company [the National Bank of Greece and Athens Company] by shares, constituted by virtue of these presents . . ."

F English law will look at the Greek decree to determine the status of this new entity. It is contended, however, that the transfer of liabilities from the old bank to the new is no part of its status. It is said that "status" is confined to the existence, powers and dissolution of the new corporation.

My Lords, I think the result of this appeal really turns on this short point. It is devoid of authority. I do not regard *Beavan* v. *Lord Hastings* (4) ((1856), G 2 K. & J. 724) as really affording any guidance. The identity of the old bank has become merged in the amalgam by a process which is by no means alien to English legal conceptions. It is of the very essence of the transaction that the liabilities and assets of the former should attach to the latter, and to recognise the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical. Why an English court should be compelled to
H recognise that part of the decree which has extinguished the old bank but to refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand. In my view, the fact that this liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellants and, accordingly, governed by the law of its domicil.

I On the second point, namely, the effect of the Greek moratorium, I am of opinion that Greek law is irrelevant. This was an English debt and the obligation to pay it, its quantum and the date of payment are all governed by English law which will not give effect to the Greek moratorium. DENNING, L.J., said in the Court of Appeal ([1957] 2 All E.R. at p. 8):

> "We recognise that Greek law has power of life and death over the company which it created, and we must accept the substitute whom it has provided; but when the substitute stands in our courts to answer for an

English debt, it must answer according to English law, which says that the debt must be paid according to its terms." A

It is argued that the liability which attached to the new bank at birth was only a suspended obligation, but the nature of the obligation under an English contract must be determined by English law and the Greek moratorium would not have availed the original guarantor in an English court. It follows, in my opinion, that it cannot avail the appellants, and I would respectfully accept the language quoted above as a concise statement of the grounds on which this appeal should be dismissed. B

LORD KEITH OF AVONHOLM: My Lords, I agree with the line of reasoning by which your Lordships have arrived at the conclusion that the liability of the appellants to the respondent involves a question of status. I find it easier, however, to approach the matter from the point of view of succession. The appellants were expressly declared by the relevant Greek statute and subsequent royal decree to be the "universal successor" of the banks which were absorbed and extinguished by the amalgamation decree. This conception, as expounded in the evidence in this case, is common to other legal systems which have borrowed from the Roman law. Used generally with reference to an heir who takes up a succession on death, it carries with it a liability on the heir to the deceased's creditors for the deceased's debts. From this aspect he represents the deceased. The persona of the deceased is regarded as continued in the heir, or, as it is otherwise expressed, he is eadem persona cum defuncto. He is no more to be regarded as a new party introduced into a contract than is an executor or administrator of a dead man's estate in English law. The term "universal successor" may be foreign to English law but it cannot be regarded as strange in this House for the doctrine is part of the common law of Scotland, though now affected by statute, and, till within the last hundred years, had important consequences to the heir in a succession. As such the doctrine would not appear to have differed in its fundamental principles from the common law of Greece. I would quote only one short passage from STAIR'S INSTITUTES OF THE LAWS OF SCOTLAND, Vol. I, Book III, Title IV, p. 505, s. XXIII: C D E F

> "Heirs in law are called universal successors, quia succedunt in universum jus quod defunctus habuit, they do wholly represent the defunct, and are as one person with him, and so they do both succeed to him active, in all the rights belonging to him, and passive, in all the obligations and debts due by him . . ." G

There are material differences between a succession and a novation. In succession no question of contract arises. In both cases, it is true, the creditor will have lost the personal credit of the debtor on which he may be assumed to have relied. On the other hand he will not have lost, in a universal succession, the security of the debtor's assets which will have passed to the successor and be available for the creditor, whereas in a novation no transfer of assets need take place at all. The extinction of a corporation under statute or decree and the passing of all its rights and liabilities to a successor exhibits, in my view, all the features of a universal succession. It may not generally be so regarded, but the consequences appear to me to be in many respects indistinguishable. But be that as it may, in the present case the new bank has been declared the universal successor of the old banks. The result is to fix on it the status and the liabilities of a universal successor. That, in short, is the effect of the evidence given of the Greek law, and in this matter, which is essentially a question of status, it is to Greek law that recourse must be had. I accordingly reject the contention that the appellants are not liable to be sued on the contract of guarantee, as not being party to the contract. They are just as liable as would be the executor in England of a deceased debtor. H I

A The answer to the first point in the case really determines the second point taken for the appellants. If the appellants represent the old debtor they must be subject to all the pleas that affected that debtor. They stand in his shoes. The proper law of the contract is English law and it is conceded that, if the original guarantor had been sued here, the Greek moratoria could not be pleaded in defence. The same must apply, in my opinion, to the new bank which has
B succeeded to the liabilities of the old.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion that has been delivered by my noble and learned friend on the Woolsack.

Appeal dismissed.

C Solicitors: *Stibbard, Gibson & Co.* (for the appellants); *Hardman, Phillips & Mann* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

D

Re A SOLICITOR'S CLERK.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Barry and Havers, JJ.), November 8, 22, 1957.]

E *Solicitor's Clerk—Disciplinary jurisdiction over unadmitted clerk—Exclusion from employment without consent—Order made after extension of jurisdiction in respect of conduct before it—Whether disciplinary committee had jurisdiction to make order—Solicitors Act, 1941 (4 & 5 Geo. 6 c. 46), s. 16 (1), as substituted by Solicitors (Amendment) Act, 1956 (4 & 5 Eliz. 2 c. 41), s. 11.*

F *Statute—Retrospective operation—Amendment extending disciplinary jurisdiction—Amendment not expressly stated to be retroactive—Whether jurisdiction conferred in relation to conduct before date of amendment.*

In 1953 the appellant, an unadmitted solicitor's clerk, was convicted of larceny. The property stolen was not property of the solicitor by whom the appellant was employed or of any client of the solicitor. On Apr. 23, 1957, application was made, under s. 16* of the Solicitors Act, 1941, by virtue
G of an amendment thereto effected by s. 11† of the Solicitors (Amendment) Act, 1956, to the disciplinary committee appointed from the members of the Council of the Law Society for an order directing that no solicitor should employ the appellant without the written permission of the Law Society. By order dated Sept. 20, 1957, the disciplinary committee made such a direc-
H tion as from that date. Before the amendment made by the Act of 1956,

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* Section 16 (1) of the Solicitors Act, 1941 read as follows:

" (a) Where a person who is or was a clerk to a solicitor but is not himself a solicitor has been convicted of larceny, embezzlement, fraudulent conversion or any other criminal offence in respect of any money or property belonging to or held or controlled by the solicitor by whom he is or was employed or any client of such solicitor . . . an application may be made by or on behalf of the society to the disciplinary committee
I that an order be made directing that as from a date to be specified in such order, no solicitor shall in connexion with his practice as a solicitor take or retain the said person into or in his employment or remunerate the said person without the written permission of the society."

† Section 11 (1) of the Solicitors (Amendment) Act, 1956, substituted as from Nov. 1, 1956, the following words for those of s. 16 (1) (a) above:

" (a) Where a person who is or was a clerk to a solicitor but is not himself a solicitor has been convicted—(i) of larceny, embezzlement or fraudulent conversion; or (ii) of any other criminal offence in respect of any money or property belonging to or held or controlled by the solicitor by whom he is or was employed or any client of that solicitor . . . "

TAB 10

1954 CarswellOnt 61
Ontario Supreme Court [High Court of Justice]

National Trust Co. v. Ebro Irrigation & Power Co.

1954 CarswellOnt 61, [1954] 3 D.L.R. 326, [1954] O.R. 463, [1954] O.W.N. 516, [1954] O.J. No. 545

National Trust Company Limited v. Ebro Irrigation and Power Company Limited et al.

National Trust Company Limited v. Catalonian Land Company Limited et al.

Schroeder J.

Heard: April 20-27, 1954
Judgment: May 12, 1954

Counsel: *C. F. H. Carson, Q.C. J. L. Stewart, Q.C., J. G. Middleton, Q.C.*, and *J. W. de C. O'Grady*, for the plaintiff in each action.
A. S. Pattillo, Q.C., and *B. R. McDade*, for the Canadian defendant companies.

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

Two actions for declaratory judgments.

The actions were tried together by Schroeder J. without a jury at Toronto.

Schroeder J.:

1 The plaintiff in its capacity as trustee under the terms and provisions of certain trust deeds which are hereinafter mentioned, became the owner of shares of the capital stock and of bonds of the defendant companies Ebro Irrigation and Power Company Limited and Catalonian Land Company Limited (which will be hereinafter referred to as "Ebro" and "Catalonian Land" respectively), these bonds and shares having been the property of Barcelona Traction, Light and Power Company Limited, (which will be hereinafter referred to as "Barcelona"). On 12th February 1948 a judgment or order of a Spanish Court declared Barcelona (the holding company) to be bankrupt and certain persons, purporting to act under the authority of that judgment or order, seized and brought under their control the physical assets of the defendants Ebro and Catalonian Land and, although neither of these companies had been adjudged bankrupt, they purported to issue new share capital and new bonds of both companies which they eventually sold to the defendant Fuerzas Electricas de Cataluna, S.A., which will be hereinafter referred to as "F.E.C.", a company which had obviously been organized for the purpose of acquiring such assets and operating the businesses formerly operated by Ebro and Catalonian Land. The procedure under which these functionaries, who were appointed in accordance with the terms of the bankruptcy judgment, undertook to sell to F.E.C. the alleged bonds and shares of Ebro and Catalonian Land, certificates of title to which were all situated in the Province of Ontario, was a process theretofore unknown to Spanish law. F.E.C. now claims to be the sole owner of such bonds and shares and of all the fixed assets of both Ebro and Catalonian Land, and purports to exercise all rights of ownership over the same, alleging that it has taken all proper and necessary steps to wind up and dissolve both of these corporations.

2 Following the bankruptcy judgment, and in an endeavour to protect its rights and interests and the rights and interests of the bondholders, whom, as trustees, it represented, the plaintiff brought an enforcement action in this Court, in the course of which a receiver and manager was duly appointed by judgment of the Court dated 15th July 1948. While the validity of the Spanish bankruptcy decree was at once contested by Barcelona, the merits of its opposition have not

been considered by the Spanish Courts because of the effect of proceedings described as "*declinatario*" taken by some of the Spanish creditors of Barcelona, which operated to suspend the proceedings instituted by Barcelona challenging the bankruptcy order made against it. Notwithstanding this, the bankruptcy proceedings have been permitted to be carried out to the point where all the fixed assets of Ebro and Catalonian Land in Spain are now in the actual control and possession of F.E.C. An action by the plaintiff National Trust Company in Spain was "not admitted", that is to say, it was declared that the action could not proceed and the merits of the claim were never considered or dealt with.

3 Considering that it is under a duty to protect its portfolio in the interests of the bondholders and others who lent money to Barcelona on the security thereof, the plaintiff asks for a judgment of this Court declaring: (1) that both Ebro and Catalonian Land are Canadian companies, incorporated and still subsisting under the laws of Canada, having their head offices in the city of Toronto and having outstanding the shares and bonds which will be more particularly referred to; (2) that the properly authorized and constituted share-register and register of transfers of the defendants are those maintained in the city of Toronto and that the share-register and register of transfer of shares of the defendants purportedly authorized in Spain in or about the year 1949 were not properly authorized and that such authorization was invalid and that the outstanding shares and bonds of the defendants Ebro and Catalonian Land are validly represented by, and only by, certain certificates for shares and certain bonds of the said defendants which are held by the plaintiff in the city of Toronto or have been deposited by it with the accountant of the Supreme Court of Ontario.

4 It is contended by the plaintiff that its right to the relief it claims is governed by the law of Ontario, which is the domicile of both Ebro and Catalonian Land. It is therefore desirable to consider the facts relating to the incorporation of these companies, their financial structure, their by-laws controlling all matters of internal management, and their bonded indebtedness. It is also necessary for a better appreciation of the problem involved in the case at bar to consider to some extent the various steps that were taken in Spain and culminated in the catastrophe that has engulfed both Ebro and Catalonian land and has jeopardized the securities held by the plaintiff to such an extent that it feels constrained to take the proceedings now under consideration.

5 National Trust Company Limited (which will be hereinafter referred to as "National Trust") was incorporated under the laws of the Province of Ontario by letters patent dated the 12th August 1898. The defendant Ebro was incorporated under the laws of Canada by letters patent dated 12th September 1911, and it established and still maintains its head office in the city of Toronto, in the Province of Ontario. The defendant Catalonian Land was also incorporated under the laws of Canada by letters patent dated the 7th April 1912, and it established and still maintains its head office in the city of Toronto. The defendant F.E.C. is a company incorporated in Spain pursuant to Spanish law in or about the year 1951, with head office in the city of Barcelona. In the year of its incorporation Ebro, which acquired in Spain extensive hydro-electric undertakings, complied with the commercial laws of that country and was permitted to carry on its operations, which it continued until prevented from doing so by reason of what took place in 1948 and subsequent years. The assets of Catalonian Land consisted to a large extent of land and buildings in Spain, where in the year 1912 it qualified itself under the local law to carry on business which it continued to carry on until 1948 and for a short time subsequently, when its operations were interrupted as hereinafter stated.

6 The authorized and issued share-capital of Ebro was originally 25,000 shares of $100 each but by virtue of a by-law of the company passed on 28th October 1926 and confirmed by supplementary letters patent dated 11th November 1926, the company's capital stock was increased to 150,000 ordinary shares of the par value of $100 each and 150,000 deferred shares without nominal or par value. All of the aforesaid shares were duly issued and none of them has been retired and the directors of Ebro recognize the same as being outstanding, fully-paid, and non-assessable. Ebro also created and issued £9,500,000 principal amount of 6 $^{1}/_{2}$% general mortgage bonds and £1,500,000 principal amount of 6 $^{1}/_{2}$% cumulative income bonds, none of which has been retired and all of which are still outstanding.

7 All the ordinary and deferred shares and all the aforementioned bonds of the defendant Ebro were acquired by Barcelona, a company incorporated under the laws of Canada by letters patent dated 12th November 1911, and prior to the institution of the bankruptcy proceedings in Spain the same were mortgaged and charged by Barcelona to the plaintiff

as trustee under a trust deed dated 10th July 1915, and indentures supplemental thereto under which consolidated 6 $^{1}/_{2}$% prior lien bonds of Barcelona were issued and are outstanding, and a trust deed dated 1st December 1911 and indentures supplemental thereto under which 5 $^{1}/_{2}$% mortgage bonds of Barcelona were issued and are outstanding, to secure the bonds issued under such trust deeds and the interest and premiums thereon and all other moneys expressed to be secured thereby. Pursuant to the provisions of the trust deeds and supplemental indentures certificates representing all of the said ordinary shares and deferred shares and all of the said bonds of the defendant Ebro were deposited with the plaintiff. With the exception of 24,840 ordinary shares, which are registered in the name of the plaintiff, all of the shares of the defendant Ebro are registered either in the name of Barcelona or in the names of directors of the defendant Ebro or in the names of nominees, the certificates representing the shares registered in the names of Barcelona or of such directors or nominees being endorsed in blank for transfer or having attached stock-transfer powers executed in blank. All of the said bonds issued by the defendant Ebro are in bearer form. Some of the certificates for shares of the defendant Ebro held by the plaintiff were deposited by it in the year 1950 and all of the bonds of the defendant Ebro held by the plaintiff were deposited by it in the year 1951 with the Supreme Court of Ontario, pursuant to orders made in the receivership action.

8 The authorized and issued share-capital of the defendant Catalonian Land consists of 1,000 shares of $100 each and this company also has outstanding $100,000 principal amount of 6% gold bonds. 990 of the said shares are registered in the name of the plaintiff and all of the bonds are in bearer form.

9 The shares and bonds of Catalonian Land which are still recognized as being outstanding, fully-paid and non-assessable, and all the bonds, which are also recognized by Catalonian Land as outstanding, were acquired by Barcelona, which mortgaged and charged the same to the plaintiff as trustee under the trust deeds hereinbefore mentioned, under the terms of which certificates representing all of the said shares and bonds were deposited with the plaintiff. All such share-certificates and bonds are and have at all material times been held by the plaintiff in the city of Toronto, with the exception of 990 of the shares which stand in the name of the plaintiff and which were deposited by it in the year 1950 with the Supreme Court of Ontario pursuant to an order made in the receivership action. With the exception of 10 shares registered in the names of directors of the defendant Catalonian Land, all such shares are registered in the name of the plaintiff and the certificates representing the shares standing in the names of such directors are endorsed in blank for transfer.

10 By an order of a Spanish Court dated 12th February 1948 and made in bankruptcy proceedings instituted against Barcelona in Spain, Barcelona was declared to be bankrupt. In order to explain the various actions and proceedings which followed in the Courts of Spain, the plaintiff and the defendant Ebro called two outstanding members of the legal profession in Spain to testify as to the law of that country.

11 I have had the advantage of hearing the evidence of Señor Roberto Sanchez Jiminez, a highly qualified lawyer practising his profession in Spain, who represents large British, American and other foreign corporations and interests, as well as the evidence of Dr. José Maria Giralt y Segura, also a very competent and highly qualified member of the legal profession in that country. Dr. Giralt was eminent in the academic field, and while he now actively engages in the practice of law in Barcelona, he is Professor Emeritus of Law at Barcelona University. Numerous documents consisting of applications to the Spanish Courts, judgments or orders of the Courts, and recorded acts of the "*judge comisario*" and "*depositario*" and other persons engaged in carrying out the bankruptcy judgment, and extracts from documents registered in the mercantile registers in Barcelona, including minutes of alleged shareholders' and directors' meetings (the shareholders and directors being all Spanish nationals who assumed the right to act as shareholders and directors of Ebro and Catalonian Land), and other papers were filed in this case as exhibits, translations of which are set forth in exs. 32 and 68.

12 The actions taken in the Spanish Courts by Ebro, Catalonian Land, Barcelona and National Trust, as well as actions taken by certain Spanish nationals by way of intervention, will not be set out in any complete sense, and indeed it is not necessary for the purposes of this judgment that this should be done. It is sufficient to mention the more important proceedings so as to indicate broadly what efforts were made in Spain to attack the bankruptcy proceedings against

Barcelona, which were extended to affect the assets of both Ebro and Catalonian Land, both of which were separate and distinct entities, and the result of such proceedings, or, to express it more accurately, the failure to secure any result and in many instances the failure to secure even an opportunity to present a case or a defence and answer on the merits.

13 In the course of their evidence Señor Sanchez and Dr. Giralt explained the functions of certain officials or persons who act in bankruptcy matters in their country and a brief reference to their evidence on that point will be conducive to a better understanding of what follows.

14 When the Court declares a person or corporation to be bankrupt, a "*comisario*" is appointed to exercise certain powers of a judicial or quasi-judicial nature. He must be a merchant who carries on business within the jurisdiction in which the bankruptcy decree is made. Señor Sanchez referred to him more than once as a "*judge-comisario*", but he is not required to be, and as a general rule is not, a lawyer or a person who has received legal training; he must be a merchant. The *comisario* exercises control over the actions of the *depositario*, an official appointed by the Court at the same time as the *comisario* is appointed. The *depositario* corresponds to some extent to a receiver and manager as known under our system. The *comisario* possesses power to affirm or disaffirm the actions of the *depositario* and his judgments or orders are effective as orders of the Court and remain in effect unless modified or reversed on appeal. "*Sindicos*" are officials who discharge functions not dissimilar to those carried out by the *depositario*, but they are clothed with somewhat broader powers over the administration of the assets of the bankrupt's estate and are appointed when the bankrupt estate has been brought to that stage of administration where it becomes necessary to dispose of the assets and make distribution of the proceeds of the disposition among the creditors.

15 In authorizing seizure of the bankrupt's assets, the order of the Court permitted the seizure of shares of Ebro and Catalonian Land held by Barcelona, declaring "it being understood that the occupation implies the '*mediata y civilisima*' possession with regard to its shares which may be in the hands of Barcelona Traction, Light and Power Company Limited". One can only speculate as to the meaning of that phrase, since both Señor Sanchez and Dr. Giralt agree that it is a term which is unknown in Spanish law, but apparently the words were intended to have the magical effect of enabling the officials to whom these extraordinary powers were committed to reach across the seas and reduce into their possession and bring under their control share-certificates and documents of title to bonds which were physically reposing in a vault somewhere in the city of Toronto. The inference is clear, however, that it is a new form of procedure which was without foundation under the laws of Spain as they existed at the time that this new theory was introduced for the first time in the Barcelona case.

16 The said order of 12th February 1948, which will be hereinafter referred to as "the bankruptcy decree", was made *ex parte* by the Court of Reus, a town in the Province of Tarragona, Spain, upon the application of three Spanish nationals who will be referred to as "the petitioners". These persons purported to be the holders of 5 $^{1}/_{2}$% first mortgage bonds of Barcelona. Two Spanish nationals were appointed as *depositario* and *comisario* respectively in the bankruptcy proceedings. Although the bankruptcy decree declared only Barcelona to be bankrupt, the judgment authorized the *depositario* and *comisario* to seize or cause to be seized and brought into their possession and control the assets of the defendant Ebro in Spain, upon the theory that the share-capital of Ebro was owned by Barcelona. Failing to recognize these two companies as separate and distinct legal entities, the order provided what was called ancillary relief so far as the defendant Ebro was concerned, and the *comisario* was authorized to dismiss the officers and servants of Ebro, to effect a seizure, in the bankruptcy of Barcelona, of all Ebro's property and under the theory of possession "*mediata y civilisima*" of the shares of the defendant Ebro. By a further order of the Reus Court made on the 27th March 1948 this possession was declared to extend also to all secured and unsecured bonds issued by Ebro, and to extend thereto notwithstanding that the documents of title were in the actual possession of the plaintiff. By the said supplementary decree of 27th March 1948 the same relief was granted so far as the physical assets of Catalonian Land and the shares and bonds, secured and unsecured, issued by it were concerned.

17 Although Barcelona entered an appearance in the bankruptcy proceedings and applied to have the bankruptcy decree set aside on the grounds, *inter alia*, that it was made without jurisdiction and was contrary to the law of Spain,

the hearing of such application has been and still is delayed by procedural steps taken in the bankruptcy proceedings by other parties intervening and acting in concert with the petitioners, and the bankruptcy decree is still in force and effect in Spain notwithstanding the fact that it was made *ex parte* and that Barcelona has not yet had an opportunity of presenting its defence thereto on the merits.

18 By order made in the bankruptcy proceedings by the *comisario* on the 20th February 1948 the *comisario* purported to dismiss all the members of the board of directors of Ebro and Catalonian Land who had been appointed in accordance with the provisions of The Companies Act of Canada, and this order was confirmed by orders of the Reus Court made between the 17th and the 27th March 1948. Later, on 16th March 1948, the *depositario* constituted himself a meeting of the shareholders of these companies in Spain and elected new directors. He claimed to exercise the powers of sole shareholder of the defendants Ebro and Catalonian Land by virtue of the doctrine of "*mediata y civilisima* possession" of the share-capital of both defendant companies which was declared to have been granted to him by the bankruptcy decree, and exercising such powers he proceeded to appoint as directors of the defendant Ebro, as from the 20th February 1948, certain Spanish nationals who will be hereinafter referred to as "the Spanish board". He also conferred upon any two members of the Spanish board the right to execute documents on behalf of Ebro and to revoke the authority of the Spanish solicitors who had been duly authorized to act on behalf of the company in the Court of Reus and in the other Courts in Spain.

19 On the 9th April 1948 the *depositario*, claiming the right to exercise the powers of a general meeting of the defendant Catalonian Land by virtue of the said "possession *mediata y civilisima*" of its share-capital, alleged to have been granted to him by the bankruptcy decree and the ancillary relief awarded in the supplementary judgment, undertook (1) to dismiss all the members of the board of directors of Catalonian Land who had been appointed in accordance with the provisions of The Companies Act of Canada, and (2) to appoint certain Spanish nationals, who will be hereinafter referred to as "the Spanish board" of Catalonian Land. The aforesaid actions of the *depositario* with respect to both Ebro and Catalonian Land were approved by an order of the *comisario* and his order was confirmed by an order of the Court of Reus made between the 17th and the 27th March 1948.

20 Pursuant to an order of the Spanish Court made in the bankruptcy proceedings involving Barcelona, what purported to be a meeting of the creditors of Barcelona was held in Spain on the 19th September 1949, at which meeting three Spanish nationals were elected as *sindicos*, and they thereupon purported to assume control over the shares of the defendants Ebro and Catalonian Land which had been theretofore exercised by the *depositario* and the *comisario*, the latter having been ordered by the Court of Reus, on or about the 20th September 1949, to hand over to the *sindicos* all the assets seized in the bankruptcy of Barcelona.

21 On or about 1st December 1949 the Spanish board, as it was then constituted, passed a resolution providing as follows:

22 (1) that the register of shares of the defendants Ebro and Catalonian Land should be kept at the offices of the said defendants in the city of Barcelona;

23 (2) that the persons registered in such registers as holders of shares should alone be recognized as shareholders and only persons whose names were entered in such registers as entitled to charges upon such shares should be recognized as entitled thereto;

24 (3) that new ordinary and deferred shares should be issued representing the whole of the share-capital of the defendant Ebro and that new shares should be issued representing the whole of the share-capital of the defendant Catalonian Land;

25 (4) that the names of the persons to whom shares were so issued should be entered in such register and new share-certificates should be delivered in respect thereof.

26 On or about the 14th December 1949 the *sindicos*, claiming to exercise the powers of a general meeting of the defendants Ebro and Catalonian Land respectively, by virtue of the "possession *mediata y civilisima*" of the share-capital of these two defendants which was declared to be vested in them by the bankruptcy decree and the order of 20th September 1949, previously mentioned, purported to pass resolutions:

27 (1) ratifying all actions taken by the Spanish board since its appointment by the *depositario* on 16th March 1948;

28 (2) ratifying the resolutions of the Spanish board relating to the issue of new shares in the capital of the defendants Ebro and Catalonian Land referred to above;

29 (3) declaring that the defendants Ebro and Catalonian Land were incorporated under and governed under Spanish law;

30 (4) ratifying and declaring that the head office of both of these defendants was situate in the city of Barcelona;

31 (5) providing that all general meetings of the said defendants should be held at their head offices in the city of Barcelona and that the shareholders attending such meetings must deposit their shares in Spain and that the only persons entitled to exercise the rights of shareholders should be those whose names were entered in the register of shares hereinbefore mentioned;

32 (6) declaring that the pledgor or mortgagor of shares the subject of any pledge or mortgage should be entitled to exercise voting rights in respect of such shares to the exclusion of the pledgee or mortgagee;

33 (7) authorizing the Spanish board to issue the said shares, to enter in the register the names of persons to whom the said shares were issued and to issue share certificates in respect thereof; and

34 (8) declaring that the defendants Ebro and Catalonian Land were regulated by their statutes registered in the commercial register of the Province of Barcelona and that the above-mentioned resolutions should be registered in such commercial register as constituting part of the statutes of these two defendants.

35 The said resolutions were entered in the commercial register of the Province of Barcelona on or about the 22nd February 1950.

36 On or about 30th May 1950 a further entry was made in the commercial register of the Province of Barcelona whereby the Spanish board of Ebro purported to acknowledge on behalf of Ebro that the *sindicos*, by virtue of their office, were entitled to all property and rights in all the bonds issued by the said defendant.

37 In accordance with orders made by the Spanish Court in the bankruptcy proceedings, a sale by auction of the assets of Barcelona was purported to be held in Spain on the 4th January 1952, at which sale the said *sindicos* purported to sell to the defendant F.E.C., among other things, all the ordinary and deferred shares and all the bonds of the defendant Ebro as well as all the shares and bonds of the defendant Catalonian Land, such shares and bonds being supposedly represented by the new share-certificates and the new bonds issued in Spain. Following this sale the defendant F.E.C. purported to act as a shareholder of the defendants Ebro and Catalonian Land and to constitute its nominees directors of the said companies. On 21st August 1952 the defendant F.E.C. caused to be held in Spain what purported to be a meeting of the shareholders of the defendant Ebro at which the shareholders professed, among other things, to ratify the resolutions and actions hereinbefore mentioned, to adapt the by-laws of the defendant Ebro to accord with Spanish law as it existed on 17th July 1951, to convert the capital stock of Ebro into Spanish currency and to provide that 75 per cent. of its ordinary shares might not be transferred to persons who were not Spanish nationals, to amend the charter of the defendant Ebro by altering its name to Riegos y Fuerzas del Ebro, S.A., to move its head office to the city of Barcelona and to subject the defendant Ebro for all purposes to the Spanish law of 17th July 1951. On 13th October 1952 the defendant F.E.C. caused a similar meeting of the shareholders of the defendant Catalonian Land to be held, at which similar resolutions were passed as affecting that company and changing its name to Terrenos de Cataluna, S.A.

38 The defendant F.E.C. has taken *de facto* possession of the assets of Ebro and Catalonian Land in Spain and has also, through its nominees, taken steps in Spain for the winding-up or dissolution of the defendant Ebro and has taken further steps to amalgamate Catalonian Land with Immuebles y Terrenos de Cataluna, S.A., the latter corporation to absorb the former.

39 The defendants Ebro and Catalonian Land have at all times maintained their status as companies incorporated under the laws of Canada and have maintained their head offices in the city of Toronto. The plaintiff was appointed transfer-agent and registrar of the ordinary and deferred shares of the defendant Ebro and since that time has acted as such transfer-agent and registrar and maintained in the city of Toronto a share-register and a register of transfers for ordinary and deferred shares. The defendant Catalonian Land has at all times kept a share-register and register of transfers for the shares of that company at its head office. Each company has at all relevant periods of time had in office a board of directors consisting of qualified shareholders who had been properly elected as directors at shareholders' meetings which were duly held in Canada.

40 No notice was given to the plaintiff of any meetings of the shareholders of the defendants Ebro and Catalonian Land professed to be held in Spain and it was not represented at any such meetings. Neither the *depositario*, the *comisario* nor the *sindicos* previously mentioned nor the defendant F.E.C. nor any of their respective nominees who assumed the right to act as shareholders or directors of the defendants Ebro and Catalonian Land in Spain was ever registered as a shareholder of the defendants Ebro or Catalonian Land on any register kept by or on behalf of these defendants pursuant to the provisions of The Companies Act of Canada.

41 After the seizure by the *comisario* and *depositario* of the property of the defendant Ebro the latter company, through its Spanish solicitors who were given instructions for that purpose, made applications to the Spanish Court in Reus to set aside the bankruptcy decree in so far as it professed to direct the seizure of that defendant's property. These applications, however, were dismissed by the Court on the following grounds: (1) that Ebro was not a party to the bankruptcy proceedings and therefore was not entitled to object to the same; (2) that since its shares were owned by Barcelona it had no legal personality distinct from Barcelona.

42 On the 16th March 1948 the *depositario* revoked the authority of the Spanish solicitors who had been instructed to act on behalf of this defendant not only in the Court of Reus but in other Courts in Spain and his action was approved by an order of the *comisario* on the same date and was later affirmed by an order of the Court of Reus between 17th and 27th March 1948. Between 17th and 20th March 1948 the Spanish board purported to ratify the said revocation of the authority of the Spanish solicitors hereinbefore referred to and to appoint other Spanish solicitors to act on behalf of and in the name of Ebro in the Court of Reus and other Courts in Spain. The Spanish solicitors who were thus substituted for the solicitors appointed by the lawful directors of the company then applied to the Court for the purpose of withdrawing the appeals made by Ebro's properly-instructed solicitors, as mentioned earlier. Such withdrawals and the authority of the substituted Spanish solicitors to act for the defendant Ebro, to the exclusion of the solicitors previously appointed, were accepted and upheld by the Courts before which these applications and appeals were pending.

43 Some time in the year 1952, and after the sale of the assets of Ebro and Catalonian Land was authorized, an action was taken in the Spanish Courts by the plaintiff in the present action for a declaration that the shares and bonds of both Ebro and Catalonian Land were situated in the city of Toronto. The Court of first instance rejected the action on the ground that there was no proof of the fact that some of the purported assets of Ebro and Catalonian Land were in Canada, notwithstanding the fact that a certificate of the Supreme Court of Ontario to that effect had been filed with the pleadings, or, to express it in another way, the action was "not admitted". The result is that there has never been any hearing of this action. National Trust then appealed to the Court of Appeal in Barcelona, which confirmed the judgment of the judge of first instance. The matter is now before the Supreme Court of Spain and the decision of that Court has not yet been pronounced. In any event, the only issue before that Court is a procedural question as to whether or not the Court has jurisdiction to entertain an appeal on this point. It should also be mentioned that the Court was being asked in this latter action to declare the rights of the plaintiff under Spanish law.

44 The evidence of Professor Giralt makes it plain that what happened in the Courts of Spain was contrary to Spanish law, but this Court is not asked to say that the law of Spain was infringed, or to express any opinion upon the judgments or orders made in the Spanish Courts, nor is it necessary for the purposes of the present action that this should be done. We are concerned in this case with the status and the regulation of the affairs of two Canadian companies, and it is contended that the rights of National Trust in relation to the share-capital of both Ebro and Catalonian Land, and the bonds which have been pledged to it under the trust deeds in question herein, are to be governed by the law of the domicile of these two companies.

45 It is well established that the domicile of a corporation is in the country in which it was incorporated. In Cheshire on Private International Law, 4th ed. 1952, at pp. 193-4, it is stated that: "Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, i.e. by the law of the domicil. What this law is admits of no doubt if we reason upon the analogy of the individual. Every person, natural and artificial, acquires at birth a domicil of origin by operation of law. In the case of the natural person it is the domicil of his father, in the case of the juristic person it is the country in which it is born, i.e. in which it is incorporated." In support of this proposition the author cites *Gasque v. Commissioners of Inland Revenue*, [1940] 2 K.B. 80.

46 The text proceeds: "If it is a corporation, it can be so only by virtue of the law by which it was incorporated. It is to this law alone that all questions concerning the creation and dissolution of the corporate status are referred. In the words of Lord Wright: 'English courts have long since recognized as juristic persons, corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law .... But if the creation depends on the act of the foreign State which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eye of English law. The will of the sovereign power which created it can also destroy it.' *Lazard Bros. v. Midland Bank, Ltd.*, [1933] A.C. at p. 297."

47 In *Gasque v. Commissioners of Inland Revenue, supra*, Macnaghten J. quotes from a judgment of Holmes J. in *Bergner & Engel Brewing Company v. Dreyfus* (1898), 70 Am. St. Rep. 251, as follows: "A corporation has its domicil in the jurisdiction of the state which created it, and, as a consequence, has no domicil anywhere else."

48 In *Baroness Wenlock v. River Dee Company* (1887), 36 Ch.D. 674 at 685, Bowen L.J. stated: "What you have to do is find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature."

49 In *Gasque v. Commissioners of Inland Revenue, supra*, Macnaghten J. quoted with approval what was said by Sargant L.J. in *Todd v. Egyptian Delta Land and Investment Company, Limited*, [1928] 1 K.B. 152 at 173, reversed [1929] A.C. 1, where he expressed the following opinion: "In my judgment the provisions of the [Companies (Consolidation)] Act of 1908, not only enable a company to be born here, but necessarily keep the company domiciled here throughout its existence. And, though residence is less than domicil, and may often occur without domicil, yet I doubt whether an obligatory and continuous domicil in England such as seems to me to result from the provisions of the Act of 1908 in the case of such companies as this, does not necessarily involve residence at the place of domicil."

50 And as was stated by Macnaghten J. in the *Gasque* case at p. 84: "The domicil of origin, or the domicil of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence."

51 It follows that the instrument of incorporation and the laws of a corporation's domicile govern not only its creation and continuing existence, but also all matters of internal management, the creation of share capital, and related matters, so that to determine questions affecting the status of a Canadian company and matters relating to its internal management reference must be had not only to the letters patent creating it and any supplementary letters patent and its by-laws but also to the powers and duties of the directors as set forth in ss. 92 of The Companies Act, R.S.C. 1952, c. 53.

52 The principle enunciated above is very clearly stated in 20 Corpus Juris Secundum, 1940, s. 1802, pp. 21-3:

> Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. Whatever disabilities are thereby placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere with knowledge of such limitations. Hence, a corporation can exercise no powers in a state other than that of its creation except such as are conferred upon it by its charter and the laws creating and governing it; and this principle applies even as to the mode in which, or the officers or agents by whom, a corporation is required by its charter provisions or by the law of its corporate domicile to contract or act. Furthermore, subject to certain well-established exceptions, considered infra . . ., the rule is fairly general that a corporation is subject in other jurisdictions even to the general laws of the state of its creation, where such laws are intended as restrictions upon the powers of the corporation.
>
> In accordance with the foregoing rules, it is held that a corporation's charter and the laws of its domicile govern with respect to the fact and duration of the existence of the corporation, its internal affairs and management, its capacity to sue, the authority of its directors to represent it or to bring an action, its power to make particular contracts, the validity of conveyances of corporate property, the corporation's right to issue stock, its right to guarantee dividends upon stock, the validity of transfers of its stock, and the validity of bonus stock issued to directors.
>
> Apart from burdens which may be imposed upon them by the laws of a state which a foreign corporation enters and in which it undertakes to do business, considered infra .... the rights and liabilities of stockholders and directors are determined by the charter and governing laws of the state in which the corporation is created.

53 According to the evidence of both Señor Sanchez and Professor Giralt companies which are qualified to do business by registering their charters in the mercantile registers of Spain are subject to the laws of Spain so far as any business transacted by them in Spain is concerned, but all questions affecting the status of the company, its internal affairs and management, the authority of its directors and related questions, are determined according to the domestic law or the law of the corporation's domicile.

54 The law of a company's domicile also governs as to the persons who are entitled to act as directors of that corporation and the manner of their selection. On this point reference may be made to *Banco De Bilbao v. Sancha; Same v. Rey*, [1938] 2 K.B. 176, [1938] 2 All E.R. 253, where it was stated by Clauson L.J. at pp. 194-5: "The question what body of directors have the legal right of representing the Banco de Bilbao, a commercial entity organized under the laws prevailing in Bilbao and having its corporate home in Bilbao, must depend in the first place on the articles under which it is constituted. The interpretation of those articles and the operation of them, having regard to the general law, must be governed by the lex loci contractus (see per Lord Wrenbury in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112, 149), i.e., by the law from time to time prevailing at the place where the corporate home (domicilio social) was set up. It seems clear that (for example) a law of the French legislature cannot have (at all events outside France) any operation in regard to the relations between an English company established in England under English law, and its shareholders on the one hand, and persons claiming as a board of directors to have control over the affairs of that company on the other. The question accordingly resolves itself into this: What is the Government whose laws govern in such a matter the Banco de Bilbao? The answer would seem necessarily to be: the laws of the government of the territory in which Bilbao is situate."

55 It has been held that the property represented by shares of a Canadian company is subject to Canadian law, which can effectively prevent a transferee from acquiring legal or equitable title to such shares: *Spitz v. The Secretary of State of Canada*, [1939] Ex. C.R. 162 at 172, [1939] 2 D.L.R. 546, or can effectively divest a registered shareholder of his title to the share: *Lovibond v. Grand Trunk Railway Company of Canada et al.*, [1939] O.R. 305, [1939] 2 D.L.R. 562, 50 C.R.T.C. 124.

56 It has been established in the evidence that neither Ebro nor Catalonian Land established branch registers in accordance with s. 108 of The Companies Act, nor were the shares of these companies listed on any stock-exchange. The right to transfer shares in a Canadian company is not restricted except as provided by s. 38 of The Companies Act, so

that it was not open to the Spanish board to restrict the ownership of shares to Spanish nationals to the extent of 75 per cent. as that board attempted to do. Section 36 of The Companies Act also makes invalid a transfer of shares without entry in the appropriate register and none of the shares which the Spanish board purported to create has been registered on the registers of these two companies kept in the city of Toronto.

57 Section 88 of The Companies Act also provides that the directors of a company are to be elected by shareholders in a general meeting of the company assembled at some place within Canada. Under s. 107 of the Act share-registers of a company must be kept in Canada and under s. 108 provision is made for the keeping of branch registers of transfers in other places either within or outside of Canada. It is to be noted, however, that the registers which were authorized by the Spanish board to be opened in Spain were, to all intents and purposes, to be regarded as the main registers.

58 It should also be observed that under s. 48 of The Companies Act share-capital can be altered only by a by-law which is confirmed by supplementary letters patent and by s. 26 the name of a company may be changed by by-law which is also subject to confirmation by supplementary letters patent. On the subject of the location of the head office, s. 21 of the Act provides that a company incorporated under the Act shall at all times have a head office in the place within Canada where the head office is to be situate in accordance with the letters patent or the provisions of Part I of the Act, "which head office shall be the domicile of the company in Canada". By the same section, the company is permitted to establish other offices and agencies elsewhere within or without Canada as it deems expedient.

59 While the head office must be kept in Canada, its place can be changed, but only if the change is sanctioned by at least two-thirds of the votes cast at a general meeting of the shareholders called for considering the by-law, followed by publication of a certified copy thereof in the Canada Gazette after the same has been filed with the Secretary of State.

60 In *Re Canadian Cereal and Flour Mills Co. Limited* (1921), 51 O.L.R. 316, 67 D.L.R. 234, 2 C.B.R. 158, Orde J. considered whether or not a judgment declaring a company bankrupt destroyed the company's corporate entity or interfered with its power to function as a corporation. This question is discussed at p. 318 as follows:

> Apart from these grounds for believing that an assignment cannot affect the company's status or the powers of the directors and shareholders, there is the fact that under sec. 13 of the Act the insolvent, whether under an assignment or under a receiving order, may always submit to the creditors, through the trustee, a proposal for a composition, or for an extension, or for a scheme of arrangement. And this right is as clearly open to a corporation as to an individual. If so, how can the company authoritatively decide upon or present such a proposal unless its directors and shareholders can meet for the purpose of deliberation? Limited though the scope of the company's activity must necessarily be because of its inability to carry on its business, yet, within the circumscribed ambit of its curtailed powers, it has clearly, in my judgment, still power to continue its corporate existence, and this, not as in a merely dormant or moribund state, but so as to express its corporate decisions for all such purposes as may be expedient or necessary.

61 Dr. Giralt testified that the law of Spain was similar to the Canadian law in this respect, and stated that under Spanish law if a foreign company doing business in Spain has been declared to be bankrupt in Spain, such a decree does not preclude the directors of the company, who may be out of Spain, from continuing to have further directors' meetings or from carrying on the affairs of the company.

62 It would seem to follow that all the acts proved to have been done in Spain in relation to Ebro and Catalonian Land and the shares of their capital and the bonds issued by them have been done by persons who were not properly authorized, and those persons who purported to act as shareholders or directors were proved never to have been registered at any time as shareholders of either of these defendants on any register kept by them or on their behalf in accordance with the provisions of The Companies Act of Canada. Furthermore, the shareholders' meetings and directors' meetings of both Ebro and Catalonian Land which purported to have been held in Spain, and by the *depositario* and *comisario* and the *sindicos* or the defendant F.E.C. or their nominees as shareholders and directors of the defendants Ebro and Catalonian Land, were not properly constituted and were completely invalid and ineffective. No action which these persons claim

to have taken on behalf of either of the defendants Ebro or Catalonian Land pursuant to resolutions passed at any such meeting has been properly authorized nor is the same binding on these defendants in any way.

63 The only question remaining to be considered is whether or not the Court ought to exercise its discretion in favour of the plaintiff by granting a declaratory judgment in accordance with its prayer in this action.

64 Section 15(*b*) of The Judicature Act, R.S.O. 1950, c. 190, reads: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether any consequential relief is or could be claimed or not."

65 In 19 Halsbury, 2nd ed. 1935, s. 511, at p. 212, it is stated: "Judgments and orders are usually determinations of rights in the actual circumstances of which the Court has cognisance, and give some particular relief capable of being enforced. It is, however, sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any reference to their enforcement. Such merely declaratory judgments may now be given, and the Court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not."

66 The declaratory judgment for which the plaintiff asks under the provisions of s. 15(*b*) of The Judicature Act is, of course, a discretionary remedy and the manner in which the Court's discretion ought to be exercised must depend on the circumstances of each individual case.

67 From all that has been stated, it is obvious that the plaintiff as well as Barcelona, Ebro and Catalonian Land, have made strenuous efforts to have their rights adjudicated upon in the Courts of Spain from the year 1948 down to the present time, but all their endeavours have been fruitless. The attempts made by Barcelona to protect its rights and interests have been frustrated by the taking of proceedings known under Spanish law as a "*declinatario*", which was defined earlier. It is rather astonishing that Barcelona, which has never sought the right to do business in Spain, has never carried on business there, and has no assets in that country, could be declared bankrupt in that jurisdiction, its domicile and all its assets being in Canada. Equally startling is the fact that the assets of Ebro and Catalonian Land were made subject to seizure in consequence of the decree of bankruptcy against Barcelona on the theory that Barcelona and these companies were not separate entities. The law of Spain, according to the evidence of Dr. Giralt, recognizes corporations as juristic persons to the same extent as does the law of this country, and a corporation is regarded as something different from the aggregate of its members or shareholders as determined in *Salamon v. A. Salamon and Company, Limited*, [1897] A.C. 22. It would appear that no decree of bankruptcy has been rendered involving either Ebro or Catalonian Land, nor is there evidence that any judgment has been rendered directly against these corporations or either of them. Notwithstanding all this, all their assets have come into the possession and under the control of the defendant F.E.C., which company, although duly served with the process of this Court in both actions, did not see fit to appear therein or to participate in the trial.

68 Another factor to be taken into consideration is that Dr. Giralt in his evidence states that the Spanish Commercial Code of 1929 provides that the Court decreeing bankruptcy shall provide for "the judicial occupation of all the properties of the bankrupt and the books and records and documents relating to its business and that 'judicial occupation' means physical apprehension and nothing less". He further pointed out that in Spanish law the assets of Barcelona could have been reached in Canada pursuant to art. 300 of the Law of Civil Procedure in Spain which provides that "where a summons or other judicial proceedings have to be carried out in a foreign country, letters rogatory will have to be sent through diplomatic channels or in the manner and form provided for in the treaties and failing such treaties in the manner and form determined by the general rules issued by the Government of Spain, and that in all cases the principle of reciprocity should be observed". He added that so far as Canada was concerned the treaty of 27th June 1929, to which Canada adhered in 1935, provided means by which action could have been taken to reach the assets of Barcelona situated in Canada as this treaty contained reciprocal provisions relating to the carrying out of such judicial proceedings in both Spain and Canada. He further stated that under Spanish bankruptcy law "a pledgee of assets is not obliged to deliver up assets pledged as security for a debt without first receiving payment of the debt". Dr. Giralt also commented that when

a "*declinatario*" is in existence it is absolute under Spanish law that a final decision be made in such proceedings before *sindicos* will be appointed in bankruptcy proceedings, and that the Barcelona case is unique in the history of Spanish law inasmuch as *sindicos* were appointed while the "*declinatario*" was still pending. This action, according to this witness, is prohibited by art. 114 of the Law of Civil Procedure because there was no urgency involved and there existed no danger of irreparable damage being done, as in any event all the assets were in the hands of the *depositario* who had seized them.

69 The plaintiff contends, with substantial justification, that it is unable at this time to obtain a legal determination of the matters in issue between it and the defendants Ebro and Catalonian Land unless it obtains a judgment of this Court granting the declaratory relief for which it asks. The defendants Ebro and Catalonian Land set up that F.E.C. claims to be entitled to the shares and bonds, ownership of which is claimed by the plaintiff in this action, and that in view of the conflicting claims of the plaintiff and the defendant F.E.C. they are entitled to the protection of a judgment of a Court of competent jurisdiction upon such claims, and they submit their rights to the Court in the circumstances.

70 What has occurred in Spain with respect to the properties of Ebro and Catalonian Land strikes at the fundamental rights of all companies in this country which have made heavy capital investments in foreign countries, and is a course of conduct which can have far-reaching and disastrous consequences to Canadian investors. The course of events outlined has had the result of vitiating these particular securities in the hands of the plaintiff and if it should be directed to realize upon the same in the enforcement action, conceivably the value of its portfolio will be found to have been greatly diminished. For this reason alone the plaintiff is entitled to have its rights declared and the situation clarified. Under all the circumstances disclosed in the evidence, I have reached the conclusion that this Court ought not to withhold from the plaintiff the declaratory relief which it seeks, notwithstanding the fact that no consequential relief is or could be claimed. There will, therefore, be judgment in the action in which Ebro is a defendant declaring:

71 (1) that the defendant Ebro is a Canadian company duly incorporated and continuing and subsisting under the laws of Canada, that its head office is at the city of Toronto, and that it has outstanding the shares and bonds referred to in para. 5 of the statement of claim;

72 (2) that the properly authorized and constituted share-register and register of transfers of shares of the defendant Ebro are those maintained in the city of Toronto by the plaintiff and that the share-register and register of transfers of shares of the defendant Ebro purported to have been authorized in Spain in or about the year 1949 were not properly authorized;

73 (3) that the outstanding shares and the outstanding bonds of the defendant Ebro are validly represented by and only by certain certificates for shares and certain bonds of the defendant Ebro which are held by the plaintiff in the city of Toronto or have been deposited by the plaintiff with the Accountant of the Supreme Court of Ontario and are held by him or on his behalf in the said city of Toronto.

74 In the action in which Catalonian Land is a defendant there will be judgment declaring:

75 (1) that the defendant Catalonian Land is a Canadian company duly incorporated and continuing and subsisting under the laws of Canada, that its head office is at the city of Toronto and that it has outstanding the shares and bonds referred to in para. 5 of the statement of claim;

76 (2) that the properly authorized and constituted share-register and register of transfers of shares of the defendant Catalonian Land are those maintained at the head office of the defendant Catalonian Land in the city of Toronto; and that the share-register and register of transfer of shares of the defendant Catalonian Land purported to have been authorized in Spain in or about the year 1949 were not properly authorized;

77 (3) that the outstanding shares and the outstanding bonds of the defendant Catalonian Land are validly represented by and only by certain certificates for shares and certain bonds of the defendant Catalonian Land which are held by the plaintiff in the city of Toronto or have been deposited by the plaintiff with the Accountant of the Supreme Court of Ontario and are held by him or on his behalf in the said city of Toronto.

78 The plaintiff is also entitled to its costs of each action as against all the defendants, but it shall be restricted to one counsel fee.

Judgment for plaintiff.

Solicitors of record:
Solicitors for the plaintiff in both actions: *Tilley, Carson, Morlock & McCrimmon*, Toronto, *and Fraser, Beatty, Tucker, McIntosh & Stewart*, Toronto.
Solicitors for the defendants Ebro and Catalonian Land: *Blake, Anglin, Osler & Cassels*, Toronto.

TAB 11

RE MAPLE LEAF MILLS LTD.

British Columbia Supreme Court, Verchere, J. September 12, 1962.

W. R. D. Underhill, for petitioner.
A. Smith, for Attorney-General, *contra.*

VERCHERE, J.:—The petitioner Maple Leaf Mills Limited is an Ontario corporation duly registered in British Columbia

as an extra-provincial company. It was formed by letters patent of amalgamation issued April 1, 1961, under the seal of the Secretary of the Province of Ontario, upon the amalgamation by agreement under that name of three then-existing Ontario companies, namely Purity Flour Mills Limited, Toronto Elevators Limited and Maple Leaf Milling Company Limited. The last-named company, which had previously also been registered in British Columbia, is registered in the Vancouver Land Registry Office as the owner of a charge by way of right to purchase certain lands in North Vancouver, subject to a sub-right to purchase in favour of Mr. and Mrs. Sayle. The fee-simple to the lands is registered in the indefeasible fees register. Claiming by reason of the amalgamation to be the successor to Maple Leaf Milling Co. and the owner of all its property, the petitioner now invokes the *Quieting Titles Act,* R.S.B.C. 1960, c. 327, to have its title to the right to purchase investigated and the validity thereof ascertained and asks for a declaration that the amalgamation has vested in it the interest of Maple Leaf Milling Co. in the right to purchase and that such vesting constitutes a transmission within the meaning of the *Land Registry Act,* R.S.B.C. 1960, c. 208, so that it has a good title thereto. It also asks for a direction to the Registrar of Titles requiring him to enter the petitioner on the register and on the duplicate certificate of title.

The *Corporations Act,* R.S.O. 1960, c. 71, pursuant to which the amalgamation agreement was approved and the letters patent issued, provides, and the letters patent recite, that on and from the date of the letters patent the amalgamating companies are amalgamated and continued as one company by the name in the letters patent provided and that the amalgamated company possesses all the property, rights, privileges and franchises and is subject to all the liabilities, contracts, disabilities and debts of each of the amalgamating companies. Counsel agree, however, that some aid is necessary to perfect the petitioner's title to the right to purchase in question here. They disagree only as to the method and have been good enough to file supplementary submissions in writing which have been most helpful.

Counsel for the petitioner asserts that the petitioner clearly qualifies as "a person . . . who has an estate . . . in land" applying for "investigation of his title" within the meaning of s. 3 of the *Quieting Titles Act,* because of the effect of the amalgamation in Ontario of each of the amalgamating company's rights and the subsequent registration of the amalgamated company in British Columbia. Counsel for the

Attorney-General contends on the other hand that there is no jurisdiction here under the *Quieting Titles Act* and the application should be for a vesting order under the *Trustee Act*, R.S.B.C. 1960, c. 390, because, in short, the effect of the amalgamation agreement and the confirming letters patent was not to alter the legal title but only to confer on the amalgamated company a beneficial interest which can and should be recognized by a vesting order, which "will constitute an instrument as defined by S. 2, *Land Registry Act*, through which a 'transmission', S. 2, will be discernible", thus laying a foundation for a transmission application under the *Land Registry Act*. Jurisdiction under the *Quieting Titles Act* is lacking, he says, because the land admittedly is held under a certificate of indefeasible title which is conclusive as to title and the interest in question here is an outstanding interest, *i.e.* one that has not vested in the petitioner, which it is now sought to get in.

Clearly the *Quieting Titles Act* gives no power to vest an outstanding interest in an applicant. See *Re Risk*, [1925] 1 D.L.R. 537 (1924), 56 O.L.R. 134; *Re Quieting Titles Act, Re Waters, Re Sherman* (1957), 22 W.W.R. 698, and *Re Quieting Titles Act & Jean & Jean* (unreported—Vancouver Registry, X311/58). The purpose of the Act is to enable titles presently existing to be investigated and a declaration of the validity of such titles obtained.

But the situation here, if the letters patent of amalgamation can be given effect according to their tenor, is very different from those in the cases above cited. By the letters patent three existing undertakings were blended into one and each amalgamating company lost its previous separate identity and existence, while all its property became possessed by the amalgamated company. Although, as Mr. Smith contends, the amalgamation agreement may have been "a formal covenant to convey" and not a conveyance it seems to me that upon the issue of the letters patent the essential step was taken to vest in the petitioner the title to the right to purchase and, if those letters patent can be recognized, to give to it also the right to apply for registration of its interest. Further, the letters patent constitute a "document in writing relating to the transfer of land or otherwise dealing with or affecting land or any interest or estate in land, or evidencing title thereto", and therefore an instrument: see *Land Registry Act*, s. 2. The decisions in *Re Cuming* (1869), L.R. 5 Ch. 72; *Re Girard (sub nom. Re Trustee Act, Sec. 43)* (1952), 5 W.W.R. (N.S.) 336, and *Re Tyerman* (unreported—Vancouver Registry, X692/60), to which I was referred, are

therefore distinguishable, as in those cases an instrument which could be acted upon was lacking. It was conceded that the letters patent undoubtedly would transfer land in Ontario. The question then is whether they can operate similarly in British Columbia, where registration of the amalgamated company as an extra-provincial company has already been granted to it pursuant to Part VII of the *Companies Act*, R.S.B.C. 1960, c. 67.

It is not to be doubted that for reasons of comity we should recognize the amalgamated company created by the Province of Ontario as a juristic entity and that it was recognized as such when it was permitted to register in British Columbia, failing which, unless it were a Dominion company it could not acquire or hold land in the Province or register any title thereto under the *Land Registry Act* nor maintain certain actions in the Courts of this Province. See *Companies Act*, s. 203. Apart from these restrictions however, its status and its duties, powers and liabilities are conferred on it by the law of its domicile, *i.e.* the country of its incorporation: see 7 Hals., 3rd ed., pp. 12 and 13. The *Corporations Act* and the letters patent purport to vest in the amalgamated company title to the interest in question. Therefore, not to recognize that vesting in British Columbia would be, I think, to refuse to recognize the status of the amalgamated company. In *Nat'l Bank of Greece v. Metliss*, [1957] 3 All E.R. 608 at p. 612, Viscount Simonds said:

> I believe that justice will be done if your Lordships think it right not only to recognise the fact that the new company exists by the law of its being but to recognise also what it is by the same law. It is conceded that its status must be recognised. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognising its existence, if we do not also recognise the purposes of its existence and give effect to them accordingly? If, for reasons for comity, we recognise the new company as a juristic entity, neither the Greek government, the creator, nor the new company, its creature, can complain that we, too, clothe it with all the attributes with which it has been invested. Thus and thus alone, as it appears, justice will be done.

Applying the effect of these words, as I understand them, to the situation here is to make it apparent that the letters patent can and should be recognized as vesting in the amalgamated company the interest in land previously belonging to one of the amalgamating companies, and to recognize, too, that the amalgamating company has now ceased to exist. Having recognized this situation, it seems to me to be proper to declare the result by the declaration I am asked to make.

In my opinion to do this is not, as counsel for the Attorney-General submitted, to recognize any control over lands in this Province by a "foreign" Legislature. It is only to recognize and declare rights vested in an extra-provincial company by the Legislature of its domicile and thus enable the Registrar of Titles, upon proof of the registration of the amalgamated company in British Columbia, to enter it upon the register and upon the duplicate certificate of title as the owner of the interest in land in question.

There will accordingly be a declaration as prayed that the amalgamation has vested in the petitioner the interest of Maple Leaf Milling Co. in the right to purchase so that the petitioner has good title thereto subject to the sub-right to purchase in favour of Mr. and Mrs. Sayle. The requested direction to the Registrar of Titles seems unnecessary however and, in any event, the Registrar is not a party.

Order accordingly.

TAB 12A

Supreme Court of British Columbia
Northland Properties Ltd., Re
Date: 1988-07-05

S. Strukoff, for Metropolitan Trust.

A. Edson, for Touche Ross Limited.

A.C. Zepil, for Guardian Trust.

(Vancouver No. A880966)

[1] July 5, 1988. TRAINOR J.:- There are several motions before me in which both the petitioner companies and the Bank of Montreal ask for orders and directions pursuant to the provisions of the Companies' Creditors Arrangement Act. Not only the rights of the companies and the bank, but those of all creditors, will be affected by my rulings and I have also heard submissions of counsel and representatives of other creditors. The submissions of counsel have been lengthy and supported by their review of affidavits and exhibits thereto. The motions, of course, must be considered in the light of that evidence. It is therefore appropriate to set out something of the background or history of the relationship of the parties involved in these proceedings.

[2] The companies are engaged in the business of real estate investment and development in western Canada and in the western United States. They collectively own and operate:

(a) A chain of 20 hotels and motels in western Canada known as the "Sandman Inns";

(b) Five office buildings in Calgary and Vancouver;

(c) An office building in Portland, Oregon;

(d) Development land in California;

(e) A number of other smaller office buildings and parcels of land.

[3] The Sandman Inns chain of hotels was founded in 1967. All hotels, inns and office buildings, with a couple of exceptions, were constructed by the companies as new facilities. Until 1977, separate companies were incorporated to acquire property in selected communities for the purpose of establishing a hotel, the purpose of separate

corporate ownership being to permit the management of each hotel to participate. This policy was changed at that time and the interest of each participating owner was bought out. In his affidavit sworn 27th May 1988 Robert John Gaglardi, who is the president and a director of each of the companies, avers:

> 24. In summary, although legal title to the companies' real estate and other assets is disbursed among the companies, beneficial ownership ultimately resides for the most part in myself and Ralph Beck [the father-in-law of Robert John Gaglardi], albeit in differing proportions. The companies' separate legal existence has been maintained only for the purpose of reflecting the different degrees of beneficial ownership of the companies' assets and as required to satisfy certain lenders including Bank of Montreal (the "bank"). Otherwise, and for all other intents and purposes, and in particular for the purpose of day-to-day management and operations, the companies are treated internally and by others as a single business entity.

[4] Mr. Gaglardi further says that the companies' business operations are divided into the hotel division and the office division with no distinction being made on the basis of legal ownership of the property and assets comprising each division. He states:

> 26. By virtue of operating as two divisions without regard to corporate niceties and actual legal ownership, the finances of the companies are inextricably intertwined. As a rule, trade creditors of the hotel division bill their accounts to "Sandman Inns", notwithstanding that a particular hotel may be owned by any one of Sandman Inns, Northland or Sandman Four.
>
> 28.Cheques and other instruments generated from hotel operations are also made payable to Sandman Inns without regard to the corporate entity actually owning the particular hotel to which the income is attributable.
>
> 29. Similarly, the office division operates generally under the name of "Northland Properties" notwithstanding actual legal ownership of each office building. Cheques received from tenants of office properties are as a rule all made out in favour of Northland.
>
> 30. Until recently, the companies collectively maintained a single operating account with the bank in Vancouver, British Columbia. Into this account were deposited all cheques and cash from the hotel and office divisions regardless of their source and without heed to the company which owned the property respect of which the income was generated. This account was maintained in the name of "Sandman Inns" and no attempt was ever made by the bunk or by the companies to allocate revenues, deposits or withdrawals to each company. As to payroll, all cheques are issued by Sandman Inns in relation to both hotel division and the office division.

[5] He further says that the audited financial statements of the companies, with the exception of Northland, are prepared on a consolidated basis only, although he does

acknowledge that separate tax returns have been filed each year and that it has been necessary to allocate expenses and revenues for that purpose.

[6] On the other hand, I have an affidavit of Mr. Bygott, a manager with the special accounts management unit of the Bank of Montreal, sworn 23rd June 1988 in which he challenges a further statement by Mr. Gaglardi that "the system is incapable of producing separate financial summaries for each company". Mr. Bygott exhibits to his affidavit materials produced on behalf of the companies from which he concludes that it is "quite possible and relatively simple for the companies to determine and set out comprehensive particulars of the debts owed by each of them and the security therefor on an unconsolidated basis".

[7] The companies began to experience financial problems starting in 1981 and 1982, when their revenues declined and interest rates rose sharply. The suspension of payment of interest to the bank led to a number of attempts to restructure the companies' indebtedness. The bank worked closely with the companies in those processes. One of the issues to be resolved between the companies and the bank is the claim by the companies that the bank is liable to them for damages for what has been described in argument as "lender liability". This claim is based on dealings between the companies and the bank and allegations of damage arising from the exercise of control by the bank over the business operations of the companies. That issue may be relevant to a determination of the voting rights of the bank with respect to the plan proposed by the companies under the Companies' Creditors Arrangement Act. Otherwise that issue is not before me at this time.

[8] By the spring of 1988 the financial status of the companies, in general terms, was that they owed slightly less than $200 million and had assets valued at approximately $100 million. The amount owing to the bank, which was included in that general indebtedness, was in the sum of approximately $117 million.

[9] Other indebtedness of the companies was roughly as follows:

1. Priority mortgagees	$77,000,000

2. General unsecured creditors	2,000,000
3. Property and business taxes	3,700,000
4. Corporation capital tax	300,000

[10] The indebtedness to the bank, in its submission, is made up as follows:

1. Series A bonds	$45,000,000
2. Series C bonds	2,000,000
3. The put debt secured by the A bonds, the U.S. trust deeds and the other security	70,000,000

[11] In December 1987 the bank authorized the commencement of a receivership action against the companies. Royal Trust Corporation of Canada, acting on behalf of the bank under a trust deed to which the companies were parties, moved in the receivership action for summary judgment against the companies under the trust deed and the appointment of a receiver-manager of the companies. The motions for summary judgment and the requests for the appointment of a receiver-manager of the companies were heard by Boyle L.J.S.C. on 1st and 2nd February 1988. The companies sought and obtained an adjournment of the applications until 8th April 1988 to allow them time of obtain evidence confirming the availability of alternate financing. At the time of granting those adjournments, Boyle L.J.S.C. said:

> Although the long history of negotiations and agreements are relevant here, there is no need to detail them. There is some bitterness on the companies' part as a result of what they see as interference by the bank in their operations at consequent cost to the companies but, even if their operation had been ideal day-to-day, their financial distress now would remain acute.
>
> It is enough to say that the bank gave the companies many opportunities to refinance and in no sense sandbagged them unexpectedly with the present proceedings,

[12] The hoped-for alternate financing did not materialize. Consequently, on 6th April 1988 the companies filed petitions in the bankruptcy court for the district of Oregon pursuant to c. 11 of the United States Bankruptcy Code acknowledging indebtedness in

the amount of almost $200 million with assets having a value of approximately half that amount.

[13] On 7th April 1988 the companies petitioned this court under the Companies' Creditors Arrangement Act. That Act provides:

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds, debentures, debenture stock or other evidences of indebtedness of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee, and
>
> (b) the compromise or arrangement that is proposed under section 4 or section 5 in respect of the debtor company includes a compromise or arrangement between the debtor company and the holders of an issue referred to in paragraph *(a)*.

[14] I found that the companies in these proceedings were debtor companies, which, on the material filed in support of the petition, qualified them to invoke the Companies' Creditors Arrangement Act.

[15] The Companies' Creditors Arrangement Act further provides:

> 4. Where a compromise or arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of such creditors or class of creditors, and, if the court so determines, of the shareholders of such company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of such creditors or class of creditors, and, if the court so determines, of the shareholders of such company, to be summoned in such manner as the court directs.
>
> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of such sections, agree to any compromise or arrangement either as proposed or as altered or modified at such meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding on all the creditors, or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and is also binding on the company, and in the case of a company that has made an authorized assignment or against which a receiving order has been made under the

Bankruptcy Act or is in course of being wound up under the *Winding-up Act,* is also binding on the trustee in bankruptcy or liquidator and contributories of the company.

7. Where an alteration or modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, such meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and such directions may be given as well after as before adjournment of any meeting or meetings, and the court may in its discretion direct that it shall not be necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and a compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

[16] As the initial step with respect to the compromise or arrangement to which reference is made in those sections, I ordered as follows:

AND THIS COURT FURTHER ORDERS that the Petitioners be and are hereby authorized and permitted to file with this Honourable Court, on or before August 25, 1988. or such other date as may be ordered by this Court, a formal plan of compromise or arrangement (the "Reorganization Plan") between the Petitioners and its secured and unsecured creditors ...

AND THIS COURT FURTHER ORDERS that the Petitioners shall remain in possession of their undertaking, property and assets and shall continue to carry on their business and upon approval of the Reorganization Plan as provided for in the Petition, to implement same according to its terms ...

[17] The Companies' Creditors Arrangement Act also provides:

11. Notwithstanding anything in the *Bankruptcy Act* or in the *Winding-up Act,* whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on such notice to any other person, or without notice as it may see fit, make an order staying until such time as the court may prescribe or until further order all proceedings taken or that might be taken in respect of such company under the *Bankruptcy Act* and the *Winding-up Act* or either of them, and the court may restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit, and the court may also make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

[18] Pursuant to the authority of that section, I ordered as follows:

AND THIS COURT FURTHER ORDERS that all proceedings taken or that might be taken by any of the Petitioners' creditors under the Bankruptcy Act, R.S.C. 1970, c. B-3 and the Winding-up Act, R.S.C., 1970, c. W-10, or either of them, shall be stayed until further order of this Court upon notice to the Petitioners and that further

> proceedings in any action, suit or proceeding commenced by any person against any of the Petitioners be stayed until further order of this Court upon notice to the Petitioner that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person except with leave of this Court, upon notice to the Petitioners, and subject to such terms as this Court may impose, and that the right of any person to realize upon or otherwise deal with any security held by that person on the undertaking, property and assets of any of the Petitioners be and the same is postponed on such terms and conditions as this Court may deem proper.

[19] On 20th June 1988 I heard a motion by counsel on behalf of Guardian Trust Company, one of the priority mortgagees in these proceedings. Because it is fundamental to the motions before me now, I want to repeat a portion of what I said in dealing with the Guardian Trust motion:

> With respect to this particular legislation, I would like to refer to what is said by the Court in *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.,* [1984] 5 W.W.R. 215,32 Alta. L.R. (2d) 150, 52 C.B.R. (N.S.) 109,53 A.R. 39 (Q.B.). At p. 113, Mr. Justice Wachowich said:
>
> "This Act, though little used, is one of a number of federal statutes dealing with insolvency. In common with the various other statutes, it envisages the protection of creditors and the orderly administration of the debtor's affairs or assets ..."
>
> Then he cites authority for that proposition and continues:
>
> "In the words of Duff C.J.C., who spoke for the Court in *A.G. Can. v. A.G. Que.,* [1934] S.C.R. 659 [at 661] ...
>
> " '... the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.' "
>
> "The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors."
>
> I adopt that as a statement of the purpose of this legislation and the underlying purpose behind the order which was made on the 7th of April last.

[20] At the time I made that order I was satisfied on the basis of the material filed in support of the petition that the companies should have an opportunity to lay before its creditors a proposal as to how its liabilities could be met and the companies continue in operation. The purpose of this legislation is to keep companies in business if possible.

That is the sense in which this legislation is to be distinguished from winding-up or bankruptcy proceedings: *Re Avery Const. Co., 24* C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.).

[21] There are separate motions before me for consideration and decision at this time. I will consider each in detail but, in summary, they are as follows:

1.Motion by the companies for an order that:

(a) their reorganizations be merged and consolidated for all purposes;

(b) the form of proof of claim and its instructions annexed to the motion be approved;

(c) they be granted liberty to file a single consolidated reorganization plan;

(d) the process for accepting and determining the claims of creditors be as set forth in the instructions to proof of claim;

(e) they be granted liberty to constitute preliminary classes of creditors.

2. Motion by the bank:

(a) for a "stand still" order;

(b) for the appointment of Touche Ross Limited as interim receiver of the companies.

3. Motion by the bank for an order: for directions with respect to the bank's entitlement to vote at any meeting of creditors called in these proceedings.

[22] At the time of drafting these reasons for judgment, counsel have not completed their submissions with respect to all of the issues raised in the notices of motion. However, I propose to deal with those matters in respect of which they have confirmed to me that their submissions have been completed.

[23] MOTION NO. 2 - For a "stand still" order and the appointment of an interim receiver

[24] I will not set out all of the detail with respect to the powers and duties sought for Touche Ross Limited as interim receiver of the companies authorizing it to monitor the

operations and affairs of the companies. Suffice to say that nothing turns at this time, and in the particular circumstances of this case, on the extent and nature of those powers and duties.

[25] The stand still order sought is as follows:

> THIS COURT ORDERS THAT, until further Order of this Honourable Court, the Petitioners, and each of them, be and are hereby enjoined and restrained from:
>
> (a) issuing any further shares, bonds, debentures or other securities, or permitting the transfer of any such instruments or otherwise changing in any way their corporate or share structure;
>
> (b) selling, transferring, or otherwise disposing of or charging, encumbering or otherwise mortgaging any of their assets, save and except leases of office space entered into in the ordinary and usual course of management of office properties;
>
> (c) incurring any debts or obligations whatsoever, except in the ordinary and usual course of business and as necessary to continue business operations in the manner conducted prior to April 7,1988;
>
> (d) applying any of their cash flow in any manner or for any purpose other than in the ordinary and usual course of business and for the purpose of continuing present business operations; and
>
> (e) entering into or effecting any arrangements or compromises with, or making any payments other than in the ordinary and usual course of business and for the purpose of continuing present business operations to, any creditors, including secured creditors, without obtaining an Order of this Honourable Court following proper notice to the parties of record.

[26] Consideration of the matters raised in this motion involves a recognition of the fact that there has been in place an order staying any and all proceedings which might be taken by any creditor of the companies since 7th April 1988. Reorganization plans need not be filed until 25th August 1988 and the meetings of creditors are scheduled for 16th September 1988. During the whole of that period there is no order directing the companies to report to their creditors. The operations of the companies continue to be controlled and directed by their boards of directors and there is no mechanism in place to ensure that the rights of the creditors are being properly protected.

[27] In the course of submissions counsel for the companies informed me that he would consent to the stand still order as set out above subject only to some possible minor adjustment of the wording thereof. On that basis, that order will be made. If counsel have a problem with the wording, they may arrange to speak to me.

[28] I also understood in the course of submissions that counsel for the companies consented to an order being made obliging the companies to report to the creditors and the court as follows:

Reporting Requirements

Section in: Credit Agreement	Trust Deed	Item
7.2	6.4	Evidence of maintenance of corporate existence.
7.3	-	Evidence of maintenance of federal, provincial and municipal licenses, consents and permits.
7.4	6.9	Evidence of payment of taxes when due (including 1988 tax rolls).
7.5	6.7	Access to all properties and right to physically inspect.
7.8-7.11	6.18	Evidence of maintenance of adequate insurance coverage, payment of premiums when due and renewal when due (August 1, 1988).
9.1	-	1987 annual audited financial statements (draft, if necessary).
9.2	-	Quarterly (within 30 days) unaudited financial statements (commencing quarter ended March 31, 1988).
9.3	-	Monthly (within 30 days) unaudited profit/loss, cash flow and variance reports (in the form as traditionally provided, by individual property and combined on a divisional basis).
9.4	-	Bi-weekly (within 5 days) daily revenue summaries for all hotels (in the form of the "Flash Reports" as traditionally provided).
9.5	-	Annual budgets and business plans (combined, divisional and by corporate entity).
8.12	6.6	Evidence of capital expenditures since August 1987 (actual vs. plan vs. budget).
8.12	-	Details of major individual expenditures, greater than $20,000 per corporate entity or $200,000 for all entities combined in the fiscal year.
7.5	6.5	Monthly detailed listing of:

		- aged payables -aged receivables -reconciliations of bank accounts (including outstanding cheques).
7.16 and 7.13	6.6 and 6.14	Details of any municipal health, fire or work orders over any of the properties, and evidence of compliance.
8.3 and 8.4	6.13	Details of prior mortgages: - current balance outstanding - current status (arrears, if any) - status of renewals as they occur including details of terms.
7.5	6.5	Detailed occupancy/tenancy information for properties: (a)Hotels - occupancy levels by property - room rates by property - commencing March 1988 (b)Commercial - current rent rolls - tenant inducements (cash/free rent/lease takeovers/others - commitments for tenant improvements - leases under negotiations

[29] A further significant fact to be considered on this motion is that the companies have engaged a firm of chartered accountants to prepare material for the creditors' meetings. In his affidavit sworn 27th June 1988, John Bowles, a partner of Coopers & Lybrand, chartered accountants, avers that they:

> ... are currently in the process of preparing for the audit of the 1987 financial statements of the Northland/Sandman Group, which, together with the stub period financial statements for the period January 1, 1988 to July 31, 1988 with a review engagement report will be included with the Petitioners' information circular to be delivered to their creditors in conjunction with their final proposed plan.

[30] He further avers that the books and records of the companies have been reviewed for the period 7th April to 31st May 1988 and that Coopers & Lybrand:

> ... have not become aware of anything that would lead us to believe that the Petitioners have not continued to conduct themselves in the normal course of their business and in furtherance of the finalization of their reorganization plan.

[31] On the basis of all of that material, it appears that the companies will be reporting and that a firm of chartered accountants are in the process of doing an audit and preparing a full financial statement for the purposes of full consideration of the plan proposed at the creditors, meeting.

[32] I am satisfied that I have jurisdiction to appoint an interim receiver and spell out the responsibilities of that office such that his true role would be that of a monitor or watchdog during this interim period. The cost would be significant but is not a factor of great weight considering the total indebtedness of the companies. The most significant factor militating against the appointment of a monitor at this time is the evidence that it probably would require at least one month for him to familiarize himself with the corporate structures and finances before he could even begin to assess the financial activities of the companies and report on them. When the material is provided in response to the reporting requirements and the reports from Coopers & Lybrand, the creditors may wish to apply for an order for further or other directions to the companies. In the meantime, however, the motion for the appointment of an interim receiver is refused.

MOTION NO. 1(A) AND (C)

[33] The order sought under this motion is under the general heading of consolidation. The particular request is for an order that:

> a) The within reorganizations with respect to Northland Properties Limited, Sandman Inns Ltd., Sandman Four Ltd., Unity Investment Company, Limited, B & W Development Co. (1986) Ltd., and T N Developments Ltd. under the Company Act and the Companies' Creditors Arrangements Act be merged and consolidated for all purposes ...

[34] In putting forward this motion, the companies assert that they are not seeking to vary their obligations to the creditors at this time. However, the proposal is that the court approve the preparation of a single reorganization plan for presentation to the creditors of all of the companies. The companies say this is realistic and practical because all of the businesses of the companies were carried on as a single entity, which resulted in the

financial affairs of the companies being so interwoven that they have become inseparable. They point, as well, to the common ownership and management of the companies and to the greater cost involved in the preparation of a separate reorganization plan for each corporation.

[35] Counsel for the bank, in opposing this motion, questions the jurisdiction of the court to make such an order. Consolidation is not specifically authorized under the Companies' Creditors Arrangement Act. The end result of the process which the companies ask that they be given leave to set in motion at this time would be amalgamation of the companies. The companies would appear to be insolvent and that fact is a bar to amalgamation in many jurisdictions in Canada. A company seeking amalgamation as a general rule is required to satisfy the court that its creditors approve of the amalgamation. Of course that request can be made by the companies. However, I do not think that it would be appropriate for the companies to obtain from the court what might appear to be approval of amalgamation without any reference to the creditors.

[36] I appreciate that there is evidence that the companies have, in large part, been run as a single entity. However, as I have pointed out, their assets, income and liabilities have been segregated for the purposes of income tax returns and there is some evidence that separate schedules of assets and liabilities have been filed in the United States bankruptcy proceedings.

[37] There is a scarcity of Canadian cases dealing with this subject and none of the ones referred to me have been of assistance. Both counsel have referred to American cases dealing with the somewhat analogous c. 11 bankruptcy proceedings. In *Re Baker & Getty Fin. Services Inc.,* 78 B.R. 139 (U.S. Bankruptcy Ct., N.D. Ohio, 1987), the court said:

> The propriety of ordering substantive consolidation is determined by a balancing of interests. The relevant enquiry asks whether "the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition".

The court then went on to list seven factors which had been developed to assist in the balancing of interests. Those factors are:

1. difficulty in segregating assets;

2. presence of consolidated financial statements;

3. profitability of consolidation at a single location;

4. commingling of assets and business functions;

5. unity of interests in ownership;

6. existence of intercorporate loan guarantees; and

7. transfer of assets without observance of corporate formalities.

Re Vecco Const. Indust. Inc., 4 B.R. 407 at 410 (U.S. Bankruptcy Ct., E.D. Va., 1980).

[38] I have considered the submissions of counsel with respect to each of those factors. I also refer to in *Re Snider Bros.,* 18 B.R. 230 (U.S. Bankruptcy Ct., D. Mass., 1982), where the court said at p. 234:

> It must be recognized and affirmatively stated that substantive consolidation, in almost all instances, threatens to prejudice the rights of creditors ... This is so because separate debtors will almost always have different ratios of assets to liabilities. Thus, the creditors of a debtor whose asset-to-liability ratio is higher than that of its affiliated debtor must lose to the extent that the asset-to-liability ratio of the merged estates will be lower. Why then would substantive consolidation ever be permitted?
>
> A review of the case law reveals that equity has provided the remedy of consolidation in those instances where it has been shown that the possibility of economic prejudice which would result from continued corporate separateness outweighed the minimal prejudice that consolidation would cause. While several courts have recently attempted to delineate what might be called "the elements of consolidation". *In re Food Fair, Inc.,* 10 B.R. 13, 124 (Bkrtcy. S.D.N.Y. 1981); *In re Vecco Construction Industries, Inc.,* 4 B.R. 407, 6 B.C.D. 461,1 C.B.C. 2d 216 (Bkrtcy. E.D. Va. 1980), I find that the only real criterion is that which I have referred to, namely the economic prejudice of continued debtor separateness versus the economic prejudice of consolidation.

And at p. 238:

> Moreover, the evidence in support of an application to consolidate must do more than show a unity of interest or an intermingling of funds. It must show a harm which

> has resulted therefrom, *Soviero v. Franklin National Bank of Long Island,* supra, or that prejudice will result from a lack of consolidation. *Chemical Bank New York Trust Co. v. Kheel,* supra. Indeed, consolidation has been denied even though the debtors had always conducted their business on a consolidated basis, with a joint bank account, inter-corporate loans, and joint payroll, because the court was not satisfied that the prior practice of operating as a single unit was necessary or desirable. *In re Coventry Energy Corporation, 5* B.C.D. 98 (S.D. Ohio 1979). In addition, consolidation was denied in that case despite the absence of objections by any party. Hence, it must be clearly shown that not only are the "elements of consolidation" present in a given bankruptcy setting, but that the court's action is necessary to prevent harm or prejudice, or to effect a benefit generally.

[39] I accept the analysis contained in the *Snider* case. It would be improper for the court to interfere with or appear to interfere with the rights of the creditors. In my view, that appearance would be created by making an order that the reorganizations be merged and consolidated for all purposes. The order sought in this part of the motion is refused. Of course that does not mean that the companies are barred from seeking from the creditors their approval of a consolidated plan. I say that consolidation is not appropriate at this time. The creditors may decide to accept a consolidated plan when they have had a full opportunity to consider the reorganization plans submitted to them.

MOTION NO. 1(B) AND (D)

[40] The companies move for an order that:

> b) The form of Proof of Claim and its instructions attached hereto as Schedule "A" be approved by this Honourable Court for mailing by the Petitioners to their creditors...
>
> d) The process for accepting and determming the claines of creditors of the Petitioners be as set forth in the Instructions to the Proof of Claim attached hereto.

[41] I have reviewed the proof of claim form and the instructions accompanying it. As well, I have considered the submissions of counsel for the companies and the bank. I confirm the ruling which I made on 29th June 1988 that because of the unusual financial arrangements between the companies and the bank, it would be inappropriate to require the bank to attempt to set out its claims on that form. I ruled that the bank should have leave to file a separate individual statement of its claims. That statement must be filed by 6th July 1988. If the companies take objection to the statement, they are entitled to reply by 13th July 1988, following which a date may be obtained from the registrar to appear before me in respect of those differences.

[42] I confirm that there are two matters contained in the motions still to be resolved. Counsel have agreed to exchange written submissions, following which a date for a further hearing will be arranged if necessary. Those two matters are the companies' motion that they be granted liberty to constitute preliminary classes of creditors and a motion by the bank for an order for directions with respect to the bank's entitlement to vote at any meeting of creditors called in these proceedings.

Order accordingly.

TAB 12B

Supreme Court of British Columbia
Northland Properties Ltd., Re
Date: 1988-12-12

H.C. Clark, R.D. McRae and R. Ellis, for petitioners.

G.W. Ghikas and C.S. Bird, for Bank of Montreal.

F.H. Herbert, Q.C., and N. Kambas, for Excelsior Life Insurance.

Company of Canada and National Life Assurance Company of Canada.

S. Strukoff and R. Argue, for Metropolitan Trust Company.

A. Czepil, for Guardian Trust Company.

L.A. Jensen, for Royal Trust Corporation of Canada.

A. Bensler, for Canada Trustco Mortgage Company and Guaranty Trust.

D.W. Donohoe, for Thorne Riddell.

(Vancouver A880966)

[1] December 12, 1988. TRAINOR J. (orally):– This is an application for an order under the Companies' Creditors Arrangement Act, approving and sanctioning a reorganization plan submitted to the petitioners' creditors. It was unanimously approved by all classes of creditors except the priority mortgagees. That class, however, did approve the plan by the majority provided in the Act. The particular order sought is lengthy and is set out in the minutes attached to the motion by which this application is brought.

[2] In the course of considering the plan, the various steps taken to obtain creditors' approval, all of the evidence and the submissions on behalf of the minority of the priority mortgagees who voted against approval of the plan, I will deal with the elements of the order sought.

[3] The petitioners are a number of companies engaged in the business of real estate investment and development in western Canada and the western United States. They collectively own and operate a number of office buildings and a chain of 20 hotels and motels in western Canada known as the Sandman Inns. The hotels, inns and office buildings, with a couple of exceptions, were constructed by the companies as new facilities.

[4] Financial problems started in 1981, with declining revenues and rising interest rates. By the spring of 1988 the companies owed about $200,000,000 and had assets of

about $100,000,000. The Bank of Montreal was owed about $117,000,000 by the companies, and it authorized the commencement of a receivership action.

[5] Before a decision was given in those proceedings, the companies petitioned under the Companies' Creditors Arrangement Act for an order directing meetings of the secured and unsecured creditors of the companies to consider a proposed compromise or arrangement between the creditors and the companies.

[6] I heard that petition on 7th April 1988 and ordered, as an initial step, that the companies were authorized to file a reorganization plan with the court, and that in the meantime the companies would remain in possession of their undertaking, property and assets, and could continue to carry on their businesses. I further ordered, pursuant to s. 11 of the Act, that all proceedings against the companies be stayed until further order of this court.

[7] The thrust of this legislation is the protection of creditors and the orderly administration of the assets and affairs of debtors.

[8] Duff C.J.C., who gave the judgment of the court in *Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que.,* [1934] S.C.R. 659 at 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75, said:

> ... the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.

[9] Mr. Justice Wachowich, in *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.,* 52 C.B.R. (N.S.) 109 at 114 [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.), said:

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[10] Earlier, I indicated, and I now reassert, my adoption of those judicial statements indicating the purpose of this legislation and the underlying purpose behind the order which I made on 7th April last.

[11] In reasons which I gave in this matter on 5th July 1988 [reported 69 C.B.R. (N.S.) 266 at 273, 29 B.C.L.R. (2d) 257 (S.C.)], I said:

> At the time I made that order I was satisfied on the basis of the material filed in support of the petition that the companies should have an opportunity to lay before their creditors a proposal as to how their liabilities could be met and the companies continue in operation. The purpose of this legislation is to keep companies in business if possible. That is the sense in which this legislation is to be distinguished from winding-up or bankruptcy proceedings: *Re Avery Const. Co.,* 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C).

[12] A number of motions to this court sought changes or definition of rights and procedures. The companies filed a plan in August, but that was amended, particularly with respect to classification of creditors. I will deal later with the question of classes of creditors, but for now I merely wish to say that, in the first instance, it is the responsibility of the debtor companies to define the classes and make the proposal to them.

[13] One of the interim applications which I heard in this matter on the motions of the companies and the bank dealt with the composition of classes. My ruling that two classes of bondholders should be recognized, namely, the "A bondholders" and the "put debt claimants and C bondholders" was upheld by the Court of Appeal. Throughout that application and decisions it was of paramount importance that it only related to the question of the classes into which the securities held by the bank should be divided.

[14] I did, however, rule that in addition to the individual meetings of classes of creditors and at the conclusion of those meetings a general meeting of all creditors should be convened to consider the plan. That in fact was done.

[15] The plan proposed by the companies was based on the following classes of creditors:

Class Name	*Definition*
shareholder creditors	a creditor who is a shareholder (except the bank)
A bondholders	the holder of a series A bond issued by the petitioners, except B & W, under the trust deed
put debt claimants and C bondholders	the bank in respect of the put debt and as holder of a series C bond

	issued by Northland pursuant to the trust deed
priority mortgagees	a creditor other than the bank, a bondholder or the trustee having a mortgage against a property
government creditors	a creditor with a claim that arises pursuant to a municipal by-law or a provincial, state or federal taxing statute, who is not a property tax creditor
property tax creditors	a creditor having a claim for unpaid municipal property taxes
general creditors	a creditor not falling within any other class, but does not include a contingency claimant

[16] Other applications were brought which dealt with notices, proxies, proof of claim forms, exchange rate and directions for the calling of meetings.

[17] The companies and the Bank of Montreal reached an agreement on 20th October 1988 by which they settled all outstanding claims against each other. It deals with the amounts owing to the bank by the companies, claims by the companies and others against the bank in relation to a lender liability lawsuit and the terms of a compromise between the bank and the companies. This agreement is referred to in the material as the "settlement agreement". It recites that it is the entire agreement between the parties, and a copy of it was provided to creditors, along with such other documents as notice of the meetings, the reorganization plan and an information circular.

[18] The class meetings and the general meeting of creditors were held in Vancouver on 31st October and 1st November 1988. W.J. Little, a vice-president of Dunwoody Limited, acted as chairman of all meetings. He supervised the conduct of scrutineers who recorded the votes cast for and against the plan at each of the meetings. At each of the meetings additional information which had arisen between the time the plan was mailed to the creditors and the date of the meeting was disclosed to the creditors.

[19] Particulars of the disclosures are set out in the affidavit of Terrence King, sworn 14th November 1988 and filed herein. Most deal with variations to the plan with respect to priority mortgagees.

[20] The report of Mr. Little, as chairman of the meetings, is contained in his affidavit sworn 9th November 1988. All classes of creditors voted unanimously in favour of the plan, except the class of priority mortgagees. The result of the vote in that class is:

- Priority mortgagees meeting of petitioners held on 31st October 1988. The priority mortgagees present in person or by proxy, to the value of $77,087,531.69. The number of mortgagees total 15.

- Voting for in person or by proxy, $60,397,607.50. The percentage of value is 78.35 per cent. The number of mortgagees voting for is 11, which amounts to a percentage of 73.33 per cent.

- Voting against in person or by proxy, $16,689,924.19, which is a percentage of 21.65 per cent. Four mortgagees voted against, and that percentage is 26.67 per cent.

[21] The two main opponents of the plan were Guardian Trust Company and the holders of a joint mortgage, Excelsior Life Assurance and National Life Assurance. Guardian and Excelsior have participated in this application and I have received and considered their submissions.

[22] It will be seen that 11 of 15, that is, 73.33 per cent of the priority mortgagees voted in favour of the plan, and that those who favoured the plan represented 78.35 per cent of the value of the mortgages in this class. Based on that result, the companies now apply for an order approving and sanctioning the reorganization plan. The Companies' Creditors Arrangement Act provides (and I want to set out both ss. 6 and 7):

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of such sections, agree to any compromise or arrangement either as proposed or as altered or modified at such meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding on all the creditors, or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and is also binding on the company, and in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* or is in course of being wound up under the *Winding-up Act,* is also binding on the trustee in bankruptcy or liquidator and contributories of the company.

> 7. Where an alteration or modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, such meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and such directions may be given as well after as before adjournment of any meeting or meetings, and the court may in its discretion direct that it shall not be necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and a compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

[23] In summary, the two conditions which must be met are approval of the plan by the creditors, and approval and sanction by the court. Here each class of creditor voted in favour of the plan by a majority in number who represented at least 75 per cent of the value of the creditors in that class. Consequently, the sole issue is whether the court should approve and sanction the plan.

[24] In the exercise of its discretion, the court should consider three criteria, which are:

1. There must be strict compliance with all statutory requirements.

2. All material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the Companies' Creditors Arrangement Act.

3. The plan must be fair and reasonable.

[25] As I indicated, I have had the benefit of full submissions by counsel. I will refer to a number of the cases cited by them.

[26] I refer to a decision of the Alberta Court of Queen's Bench, Berger J., in *Re Associated Investors of Can. Ltd.*, 67 C.B.R. (N.S.) 237, [1988] 2 W.W.R. 211 at 218, 56 Alta. L.R. (2d) 259, 38 B.L.R. 148, 46 D.L.R. (4th) 669 (sub nom. *Re First Investors Corp. Ltd.)*, where he said:

> Assistance in interpreting s. 6 may thus be obtained from other company and corporation Acts which have their genesis in the British statute and are akin in wording to the Companies' Creditors Arrangement Act.

And then he went on to set out elements which are similar to the ones to which I have referred.

[27] In *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.*, [1891] 1 Ch. 213 at 238-39, a decision of the English Court of Appeal, Lindley L.J. said:

> ... what the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting *bona fide*. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bona fide,* and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.

[28] In the Ontario Court of Appeal in *Re Dairy Corp. of Can. Ltd.,* [1934] O.R. 436 at 439, [1934] 3 D.L.R. 347, Middleton J.A. said:

> Upon this motion I think it is incumbent upon the Judge to ascertain if all statutory requirements which are in the nature of conditions precedent have been strictly complied with and I think the Judge also is called upon to determine whether anything has been done or purported to have been done which is not authorized by this Statute. Beyond this there is, I think, the duty imposed upon the Court to criticize the scheme and ascertain whether it is in truth fair and reasonable.

[29] And the English Court of Appeal again, in *Re English, Scottish & Australian Chartered Bank,* [1893] 3 Ch. 385, [1891-94] All E.R. Rep. 775, referred to in the judgment, again by Lindley L.J., to what he had said in the decision to which I have referred earlier, *Re Alabama.* He confirmed that, and he also quoted what Fry L.J. said in that earlier decision [pp. 778-79]:

> It is quite obvious from the language of the Act and from the mode in which it has been interpreted that the court does not simply register the resolution come to by the creditors, or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed unobserved and which might be pointed out later. But giving them the opportunity of observation, I repeat that I think they are much better judges of a commercial matter than any court, however constituted, can be. While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view – that is, with a view to the interests of the class to which they belong, and that which they are empowered to bind – the court ought to be slow to differ from them. It should do so unhesitatingly if there is anything wrong about it. But it ought not to do so, in my judgment, unless something is brought to the attention of the court to show that there has been some great oversight or miscarriage.

[30] And again, in the Ontario Court of Appeal in *Re Langley's Ltd.,* [1938] O.R. 123 at 141-42, [1938] 3 D.L.R. 230, Masten J.A. said:

> I desire to make my view clear with regard to the function of the Court upon an application of tins kind, so far as it relates to the fairness and reasonableness of the compromise or arrangement itself. It is in the nature of such a proceeding that it will alter and affect the respective rights of shareholders and different classes of shareholders, and it appears to me that, granted the compromise or arrangement proposed is placed fairly and squarely before the shareholders, the meeting or meetings is or are called and conducted in accordance with the provisions of the statute, and that 75 per cent of the shares of each class represented agree to the compromise or arrangement, the Court is entitled to sanction it. In such a case the Court is not, in my opinion, to substitute its view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the shareholders themselves.

[31] And in *Re Wellington Bldg. Corp. Ltd.,* [1934] O.R. 653, 16 C.B.R. 48 at 53, [1934] 4 D.L.R. 626 (S.C.), Kingstone J. [quoting Bowen L.J.] said:

> "The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such."

[32] I want to refer as well to an article by Stanley Edwards ["Reorganizations Under the Companies' Creditors Arrangement Act"] which appears in vol. 25 of the Canadian Bar Review. I refer specifically to p. 595, where he said:

> In addition to being feasible, a reorganization plan should be fair and equitable as between the parties. In order to make the Act workable it has been necessary to permit a majority of each class, with court approval, to bind the minority to the terms of an arrangement. This provision is justified as a precaution that minorities should not be permitted to block or unduly delay the reorganization for reasons that are not common to other members of the same class of creditors or shareholders, or are contrary to the public interest.

[33] And on p. 602 he spoke of the classification of creditors, and said:

> Classification of the creditors is the next problem which the court will face. Creditors should be classified according to their contract rights, – that is according to their respective interests in the company.

[34] He said at p. 612 that votes must be made in good faith and referred to a decision of the judicial counsel in *Br. Amer. Nickel Corp. Ltd. v. O'Brien,* [1927] A.C. 369 at 373-74 (P.C.), where Viscount Haldane, in giving the opinion, said:

> ... their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

[35] The reorganization plan, as I indicated, was distributed and considered. In putting forward the plan, there are a number of recitals which indicate the hope of the companies for their future. For example, recital "H" is:

> Management is of the opinion that the Companies can return substantially more to their Creditors from the continued operation of the Properties than could reasonably be expected to be realized from their sale on a liquidation.

And recital "I":

> Management is also of the opinion that the Companies will be able to return more to the Creditors following the anticipated refinancing, since the Companies' debt structure will have been significantly improved and management's time and efforts will once again be concentrated on the business and operations of the Companies.

[36] The reorganization plan contains as art. 1.01:

> Purpose of Plan
>
> The purpose of this Plan is to permit the Companies to remain in possession of their undertaking, property and assets, and to continue to carry on their businesses, as reorganized, with the intent that the Companies will be able to pay each Creditor as much or more on account of its Claim, calculated on a Net Present Value basis, than it would on a liquidation of the Companies' assets via alternate proceedings available to wind up the affairs or liquidate the assets of insolvent debtors or other proceedings which might be initiated by Creditors to recover their Claims or enforce security granted to them by the Companies.
>
> 1.02 Effect of Plan
>
> This Plan involves the amalgamation and refinancing of the Companies and, generally, the amendment of certain terms of and the extension of time for satisfaction of debts of the Companies. Management believes that this Plan will allow the Companies to fulfill their obligations hereunder from the Trustco financing and income from their operations.
>
> 1.03 Principles of Plan
>
> This plan has been formulated on the basis of the following principles:
>
> (a) The acceptance of this Plan will allow the Companies to utilize their large tax loss position to assist in raising capital to repay the Creditors on the basis of their Claims, as restructured. Those tax losses are not available to the Companies or the Creditors in a bankruptcy of the Companies.
>
> (b) The Companies' financial position permits them to take advantage of tax-assisted methods of financing under the Tax Act which will effectively reduce the cost of refinancing below the cost of any conventional method of refinancing. The First Distress Preferred Share issue will result in Net Proceeds sufficient to satisfy all cash payment obligations of the Companies to the Bank pursuant to the Settlement Agreement.

[37] The plan goes on in a number of other paragraphs under the topic of Principles of Plan" to discuss the details of that.

[38] One of the relevant definitions is that of "Agreed Price", which is defined to mean:

... the amount agreed to among the Companies and a Creditor as the value of a Property for the purposes of a Sale of that Property under this Plan or, in the absence of agreement within the time limited for such agreement by this Plan [the amount determined as a result of a specific system of appraisals or by arbitration].

[39] Article III deals with the plan summary:

3.01 Amalgamation

The Companies will amalgamate to form the Amalgamated Company. The Amalgamated Company may, for tax purposes, incorporate a whollyowned subsidiary to issue Distress Preferred Shares and loan the Net Proceeds to the Amalgamated Company. The Net Proceeds will be used by the Amalgamated Company to fulfill its obligations to Creditors in accordance with this Plan.

3.02 Financing of Debt Restructuring

The Companies have entered into the Settlement Agreement for the purpose of resolving all matters among the Companies, the Principals and the Bank. The Companies have received a firm commitment from Trustco to provide them with sufficient financing to permit $33,550,000 to be paid to the Bank under the Settlement Agreement. In addition, the Companies are currently negotiating with a bank to act as Guarantor to assist the Companies in raising sufficient funds to satisfy all their indebtedness to Priority Mortgagees and Property Tax Creditors. As a result, the Companies are now in a position to propose to their Creditors the following arrangements:

(a) The Bank

By the Settlement Agreement the Companies have agreed, inter alia, that on or before January 17, 1989 or such later date, not later than February 6, 1989, as may be agreed by the Bank, the Companies will, at their option, either pay the Bank the sum of $41,650,000 or pay the Bank the sum of $33,550,000 and deliver to the Bank title to all Non-Core Properties and the Mortgage Receivables, in consideration of which the Bank will acknowledge reduction of the Bank Debt by the sum of $41,650,000 and transfer and assign to Holdco or its nominee the remaining Bank Debt and the security therefor.

All actions commenced by the Companies against the Bank have been or have been agreed to be discontinued or dismissed by consent at the earliest practicable time after the execution of the Settlement Agreement. All actions commenced by the Bank in respect of past dealings between them have been or are to be discontinued or dismissed by consent and the relationship between the Companies and the Bank will, upon performance of all conditions and obligations to be performed by the parties to the Settlement Agreement, be at an end. In the event of a default on the part of the Companies, including non-approval of this Plan by the requisite majority of Creditors of each Class or the Court within the time limits prescribed in the Settlement Agreement, the Bank may immediately become or cause its nominee to become the sole owner of all outstanding shares in the Companies and/or take title to such of the assets of the Companies, as the Bank shall require in its discretion.

(b) First Distress Preferred Share Issue

It is the intention of the Companies to cause Finco [a wholly-owned subsidiary of the Amalgamated Company] to issue sufficient Distress Preferred Shares to Trustco to realize Net Proceeds therefrom sufficient to pay $33,550,000 to the Bank. It is the intention of the Companies to satisfy their remaining obligations to the Bank under the Settlement Agreement either by raising monies on the Non-Core Properties and

Mortgage Receivables as may be necessary to pay an additional $8,100,000 to the Bank or by transferring the Non-Core Properties and Mortgage Receivables to the Bank. The Companies have applied to Revenue Canada, Taxation for an advance tax ruling to authorize the issuance by a subsidiary of the Amalgamated Company of

Distress Preferred Shares. The Companies have been advised by their tax advisors that such a ruling should be available to them in their current situation.

(c) Priority Mortgagees

After the Effective Date [i.e. the date upon which a final order is accepted for filing by the Registrar of Companies], a mortgage held by a Priority Mortgagee against a Property:

(i) will remain in full force and effect on its Existing Terms except as modified hereby;

(ii) will have its term extended to the earlier of the fifth anniversary of the Effective Date and March 31, 1994;

(iii) will have the interest payable thereunder adjusted to the applicable Five Year Rate or such lower rate as may be agreed between the Priority Mortgagee and the Companies.

This Plan contains provisions that govern the amount to be received by a Priority Mortgagee on the Sale of a Property and special provisions relating to interest rates and early redemption during the first six months of the extended term.

[40] Article IX deals with priority mortgagees. Two particularly relevant sections are:

9.02 (d)

If a Property has been determined by the Companies, or is determined by the Companies as at the Effective Date, to be worth less than the amount due to all Priority Mortgagees holding mortgages against the Property and the Companies then determine and notify the appropriate Priority Mortgagee in writing not later than March 31, 1989:

(i) that the Property is integral to this Plan, then the Priority Mortgagee that would not receive the full amount of its Claim from the Sale Proceeds of the Property will reduce the amount of its mortgage to the Agreed Price and will sell and assign the balance of its Claim to Holdco or its nominee for $1.00; or

(ii) that it is in the best interests of the Companies, necessary under this Plan or required by the provisions of this plan to dispose of that Property, then the Priority Mortgagee that would not receive the full amount of its Claim from the Sale Proceeds of that Property will:

(A) cause a nominee of the Priority Mortgagee to purchase that Property at the Agreed Price by assumption of that portion of that Priority Mortgagee's Claim which is equal to the Agreed Price for that Property, and

(B) sell and assign the balance of its Claim to Holdco or its nominee for $1.00.9.04 Agreement with Companies

Notwithstanding anything contained in this Article IX, if the Companies, before the Meetings:

(a) agree with any Priority Mortgagee as to specific provisions of its mortgage which may differ materially from those set out in this Plan; and

(b) those provisions are fully disclosed to the Creditors and the Bank before or at the Meetings;

the terms of that agreement will override the specific provisions of this Plan as they relate to that Priority Mortgagee and its mortgage.

[41] The information circular which was distributed to creditors contains a complete list of the priority mortgagees. It deals with the subject of classes of creditors and talks about community of interest. Recited at p. 45 of the information circular is what the companies say happened with respect to changes in class designations.

> The five Classes of Priority Mortgagees originally contemplated by the Proof of claim have been consolidated, following the Order of The Honourable Mr. Justice Trainor of July 5, 1988 permitting the Companies to file a consolidated Plan and the Companies' considerations in the development of the Plan, into one Class, Priority Mortgagees. Insofar as the treatment of Priority Mortgagees under the Plan is not dependent on or related to ownership of the various Properties and the mortgages will be serviced out of the continued Revenue generated by the Amalgamated Company, it was determined that Classes should not be constituted on the basis of the Company owning the Property. Instead, Priority Mortgagees are classified on the basis of the treatment of their Claims envisaged by the Plan and on the further premise that their Claims and priorities are not so dissimilar so as to make it impossible for them to consult together with a view to their common interest. Although the Priority Mortgagees are for the most part secured by charges against different Properties, their relative security positions are essentially the same. It is the Companies' position that differing terms of payment (i.e. maturity date and rate of interest) and differing security (i.e. Properties) do not sufficiently differentiate the Priority Mortgagees so as to require separate Classes. The Amended Petition filed with the Court by the Companies on August 25, 1988 contemplated two distinct classes of Priority Mortgagees, however, that distinction was made solely on the basis of how the Plan, at that time, affected the rights of various Priority Mortgagees. As a result of the Settlement Agreement and the consequent amendments to the Plan, that distinction is no longer relevant.

[42] As I indicated earlier, the settlement agreement with the bank was distributed and there was disclosure of all the negotiations which occurred after documents were sent to the creditors.

[43] Referring back to the three criteria which I mentioned and with respect to the first, which is strict compliance with all statutory requiremerits, I am satisfied that the companies have complied. There has been disclosure and full and adequate explanation of the proposal and how, in the opinion of the companies, it will function. The meetings were properly conducted in circumstances of disclosure and open response.

[44] The second criteria is that all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the Act. With respect to this criteria I have read and considered all of the material which has been filed throughout the course of many proceedings and applications

which I have heard in this matter, and I have, of course, considered the submissions which have been made to me by counsel.

[45] The principal concern under this criteria is whether the classes of creditors were properly established. The only class to which objection has been taken is the priority mortgagee class. There was a dispute earlier about the bondholder classes, but as I indicated earlier in these reasons, that was resolved by an application to the court.

[46] I want to refer again to the decision of Mr. Justice Kingstone in *Re Wellington,* supra, where [at p. 53] he refers with approval to the *Re Alabama* case, and then he refers to the case of *Sovereign Life Assur. Co. v. Dodd,* [1892] 2 Q.B. 573 (C.A.), and the judgment of Lord Esher M.R. who said:

> "The Act says that the persons to be summoned to the meeting ... are persons who can be divided into different classes – classes which the Act of Parliament recognizes, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes ...
>
> "It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

[47] Classes of creditors should be established, having in mind the principles found in the cases to which I have referred. Generally, one should consider, first, whether the debt is secured or not. That distinction is recognized in the Act. If there is security, what is the nature of it, what is the nature of the claim and what contractual rights exist? In these proceedings the companies first proposed to establish separate classes based on the fact that each mortgage was on a separate property.

[48] If the companies' proposal for a consolidated approach to the plan is accepted, then, in my view, there can be no basis for separate classes on the ground that each mortgage is on a separate piece of property.

[49] In the reasons for judgment which I gave in this matter on 5th July last, at p. 21 [C.B.R., p. 280] I referred to a decision of the United States Bankruptcy Court in *Re Snider Bros.,* 18 B.R. 230 (Mass. Bankruptcy Court, 1987), and I said:

> I accept the analysis contained in the *Snider* case. It would be improper for the court to interfere with or appear to interfere with the rights of the creditors. In my view, that

> appearance would be created by making an order that the reorganizations be merged and consolidated for all purposes. The order sought in this part of the motion is refused. Of course that does not mean that the companies are barred from seeking from the creditors their approval of a consolidated plan. I say that consolidation is not appropriate at this time. The creditors may decide to accept a consolidated plan when they have had a full opportunity to consider the reorganization plans submitted to them.

[50] That consolidated plan was put to the creditors, and it would seem that the vast majority of the creditors have accepted that concept.

[51] An examination of the relationship between the companies and the priority mortgagees satisfies me that they are properly in the same class. The points of similarity are:

1. The nature of the debt is the same, that is, money advanced as a loan.

2. It is a corporate loan by a sophisticated lender who is in the business and aware of the gains and risks possible.

3. The nature of the security is that it is a first mortgage.

4. The remedies are the same – foreclosure proceedings, receivership.

5. The result of no reorganization plan would be that the lender would achieve no more than the value of the property, less the costs of carrying until disposal, plus the legal costs as well would come out of that. A possible exception would be if an order absolute left the creditor in the position of holding property for a hoped for appreciation in value.

6. Treatment of creditors is the same. The term varied to five years, the interest rates 12 per cent or less, and the amount varied to what they would get on a receivership with no loss for costs; that is, it would be somewhat equivalent to the same treatment afforded to the Bank of Montreal under the settlement agreement.

[52] The points of dissimilarity are that they are separate properties and that there are deficiencies in value of security for the loan, which vary accordingly for particular priority mortgagees. Specifically with respect to Guardian and Excelsior, they are both in a deficiency position.

[53] Now, either of the reasons for points of dissimilarity, if effect was given to them, could result in fragmentation to the extent that a plan would be a realistic impossibility. The distinction which is sought is based on property values, not on contractual rights or legal interests.

[54] I turn then to the last of the criteria, that is, that the plan must be fair and reasonable. There can be no doubt that a secret, clandestine agreement giving an advantage as the price for voting support would defeat the proceedings.

[55] The Supreme Court of Canada in *Hochberger v. Rittenberg* (1916), 54 S.C.R. 480, 36 D.L.R. 450 at 452 [Que.], dealt with this question. Fitzpatrick C.J.C. said:

> Here there was a previous secret understanding that the appellants should receive security for their debt and a direct advantage over all the others who were contracting on the assumption that all were being treated alike. The notes sued on were given in pursuance of an agreement, which was void, as made in fraud of the other creditors ...

[56] At p. 455 Duff J. said:

> Any advantage, therefore, obtained by them as the price of their participation, which was not made known to the other parties, must be an advantage which they could not retain without departing from the line of conduct marked out in such circumstances by the dictates of good faith.

[57] The material before me does not indicate any agreement of that kind. The plan permitted negotiation, and in fact there was negotiation with both Guardian and Excelsior before the meetings. All the results from negotiations which took place with other priority mortgagees were reported to both the class and the general meetings.

[58] Guardian and Excelsior submit that by the special agreement reached with Relax its vote was bought in order to ensure the necessary majority in the class. They say it violates the principle of equality and that the vote cannot be considered bona fide for the purpose of benefitting the class as a whole.

[59] The particulars with respect to the Relax mortgage and the negotiations which took place are set out in the material which has been filed. The basic and fundamental difference between the facts as presented by the companies on the one hand and Guardian and Excelsior on the other relates to the value of the property. There is an appraisal which indicates value in the amount of $3,700,000 and there is other material before me which indicates a value of something between $4,500,000 and $4,600,000.

[60] The negotiations which took place and the arrangement which was made and which was presented to the meeting of the priority mortgagees involved a payment of a cash sum to Relax at some future date, not later than 18 months from the effective date, in return for a reduction of the Relax mortgage from something over $6,000,000 down to about $4,000,000.

[61] The negotiations might, on the surface, appear to have been in the nature of an excessive payment to Relax for the consideration in their agreement, which agreement, incidentally, included an undertaking to vote in favour of the plan. But the answer given by the companies is that what in effect was happening at that meeting was a negotiation as to the agreed price and that this negotiation took place earlier rather than later and that the parties in fact came to an accord with respect to the agreed price and that the settlement between them was on that basis.

[62] If that is so, it is something which took place in accordance with what is proposed by the reorganization plan. I have reviewed and re-read a number of times the submissions by the companies and particularly by counsel on behalf of Guardian and Excelsior. I am satisfied that I should accept the explanation as to what took place, which has been advanced on behalf of the companies.

[63] The question, of course, is whether or not there is some preference which is given to one mortgagee over the other mortgagees, or the other creditors. This has been canvassed thoroughly in the submissions under the headings of interclass preferences and intraclass preferences.

[64] I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities. Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

[65] There is in the submissions considerable discussion of the personal guarantee given by Robert Gaglardi of the amount owing under the mortgages to the priority mortgagees who complain of the plan. That guarantee is there. The guarantee does not form part of the reorganization plan, in my view. It is not mentioned in the plan, that I remember, insofar as a negotiating factor is concerned, in any event, and it is something which should not form part of the negotiations.

[66] The fact of the matter is that if the reorganization plan is not approved, then, no doubt, the bankruptcy proceedings would go ahead, and under those proceedings the second position with respect to real property interests would go to the Bank of Montreal

who are in a position of having something like $120,000,000 owing to them at this time, so any claim for a shortfall by a first mortgagee, having in mind the possibility of collecting on a guarantee of Mr. Gaglardi's, would rank second to the Bank of Montreal's claim of $121,000,000. In those circumstances I just do not think it has any value.

[67] What is the effect of the plan and those two priority mortgagees? In my view, neither is worse off than the "no plan condition", and they could stand to gain the amount otherwise thrown away in carrying costs and in legal costs.

[68] In the circumstances and on the basis of the material before me, I would not think giving them the option of holding the properties after order absolute would be a viable choice weighty enough to find the companies' course to be unfair and unreasonable.

[69] In conclusion, I am satisfied that the companies have complied with all statutory requirements regarding service, notice, convening and conduct of meetings and so on, and other matters of that kind. The plan which has been prepared is in conformity with the object of the Act and, in particular, the companies have properly classified the creditors of the companies.

[70] The plan was approved by each class of creditors under the plan. The approval was unanimous in all cases except the priority mortgagees, and in that instance the required statutory majority in number and three-quarters in value of the creditors voted in favour of it.

[71] I do not find that the plan is unjust, unfair or is in the nature of a confiscation of the rights of creditors. So I am satisfied that the order should go in the form in which it is set out in the minutes attached to the motion.

[72] I specifically would like to confirm that I would ask that the order contain a request to the United States Bankruptcy Court which had earlier indicated that it would await the outcome of these proceedings before taking any further steps in matters pending before it, and that request would be that they would consider the plan and approve and sanction it as they see fit, having in mind the proceedings which have taken place here and the reasons which I have given for my approval and sanction of the plan.

Application granted.

TAB 12C

Court of Appeal
Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.
Date: 1989-01-05

F.H. Herbert and N. Kambas, for appellant Excelsior Life Insurance Company of Canada and appellant National Life Assurance Company of Canada.

A.P. Czepil, for appellant Guardian.

H.C.R. Clark and R.D. Ellis, for respondent companies.

G.W. Ghikas and C.S. Bird, for respondent Bank of Montreal.

(Vancouver Nos. CA010238; CA010198; CA010271)

January 5, 1989. Excerpt from the transcript.

[1] MCEACHERN C.J.B.C.: We are giving an oral judgment this morning because of the commercial urgency of these appeals and because counsel's helpful arguments have narrowed the issues substantially. We are indebted to counsel for their useful submissions.

[2] The petitioners (respondents on these appeals) are a number of companies (which I shall call "the companies") who have outstanding issues of secured bonds and are all engaged in real estate investment and development in Western North America and who collectively own and operate a number of office buildings and the Sandman Inn chain of hotels and motels. The appellants, Excelsior Life and National Life and Guardian Trust, are creditors of the petitioners who hold mortgages over specific properties owned by certain of the companies. They, along with eleven other lenders, are called "priority mortgagees".

[3] The companies ran into financial problems starting in 1981 and by spring of 1988, the companies owed approximately $200 million against assets of $100 million. The major creditor, the Bank of Montreal (which I shall sometimes call "the bank"), was owed approximately $117 million by the companies and the bank authorized the commencement of a receivership action. The bank holds security in all of the assets of the companies by way of trust deeds and bonds ranking second in priority to the security held by the priority mortgagees. Before decision in the receivership proceedings, the companies petitioned under the Companies' Creditors Arrangement Act, R.S.C. 1970, c.

C-25 [now R.S.C. 1985, c. C-36] (which I shall sometimes refer to as "C.C.A.A.") for an order directing meetings of the secured and unsecured creditors to consider a proposed compromise or arrangement plan.

[4] Mr. Justice Trainor, on 7th April 1988, granted the petition authorizing the companies to file a reorganization plan with the court, and that in the meantime, the companies would continue to carry on business and remain in possession of their undertaking, property and assets. Further, all proceedings against the companies were stayed. The original reorganization plan was filed on 25th August 1988. It provided that each priority mortgagee holding security over the property of the individual petitioners would constitute a separate class.

[5] The petitioners obtained an order to hold a creditors' meeting on 31st October 1988 and 1st November 1988. The order provided that in addition to meetings of individual classes of creditors, there should be a later general meeting of all creditors to consider the plan. In addition, the petitioners obtained an order to file and serve the amended plan seven days before the creditors' meeting along with their information circular. Other applications were brought which dealt with notices, proxies, proof of claim forms, exchange rates and directions for the calling of meetings.

[6] The amended plan was based on the following classes of creditors (descriptions of which are contained in the reasons for judgment of Trainor J. at pp. 6-7) namely:

- shareholder creditors

- A bondholders

- PUT debt claimants and C bondholders

- priority mortgagees

- government creditors

- property tax creditors

- general creditors

[7] The amended plan also proposed consolidation of all the petitioner companies. The amended plan provided that all priority mortgagees would be grouped into one class for voting purposes. There were fifteen priority mortgagees in total, eleven of which were fully secured while the remaining four (including the appellants) faced deficiencies. The amended plan also authorized the companies to negotiate with creditors in order, if possible, to reach as much agreement as possible so that the plan would have a better chance of gaining the requisite majorities.

[8] The companies and the Bank of Montreal reached a settlement agreement on 20th October 1988, dealing with (a) the amounts owing to the bank by the companies; (b) claims by the companies and others against the bank in relation to a lender liability lawsuit; and (c) the terms of a compromise between the bank and the companies. The Bank of Montreal, according to the information circular, would only realize $32,859,005 upon liquidation. The settlement agreement between the Bank of Montreal and the companies, which is incorporated as part of the plan, provides that as of 17th January 1989, the bank is to receive the sum of $41,650,000 in either cash or in cash plus properties. A copy of this agreement was provided to creditors, along with such other documents including a notice of the meetings, the reorganization plan, and an extensive information circular.

[9] The class meetings and the general meetings of creditors were held in Vancouver on 31st October and 1st November 1988. All classes of creditors voted unanimously in favour of the plan except the priority mortgagee class. This class approved the plan by the requisite majority pursuant to the provisions of the C.C.A.A., that is, a simple majority of creditors in the class holding at least 75 per cent of the debt voting in favour of the plan. 73.3 per cent of the priority mortgagees holding 78.35 per cent of the debt voted in favour of the plan.

[10] Relax Development Corporation Ltd., a priority mortgagee facing a deficiency, voted in favour of the plan. If Relax had not voted in favour of the plan, the companies would not have obtained the requisite majority from the priority mortgagee class. Prior to the settlement with the bank, Relax struck an agreement with the companies on the value

of its security amounting to about $900,000 over an appraisal value which was in dispute. Relax agreed in the settlement to vote in favour of the plan. More about that later.

[11] The appellants on these appeals voted against the plan, and raised objections that the plan improperly put all priority mortgagees into one class, and also that the plan preferred some creditors over others. They allege that the net effect of the plan on the fully secured priority mortgagees is different than that on the mortgagees facing deficiencies, in that the plan reduces the amount of debt owed to the mortgagees facing deficiencies to the market value of the subject property of their respective security, and required assignment of the deficiency for $1. They lose the right to obtain an order absolute of foreclosure pursuant to their security. On the other hand, the fully secured priority mortgagees recover the entire amount of their indebtedness.

[12] The appellants Excelsior and National are secured creditors of the petitioner, Northland Properties Ltd., one of the companies. They hold a first mortgage jointly over an office tower in Calgary adjacent to the Calgary Sandman Inn. Both buildings share common facilities. The principle amount of the debt owing to Excelsior and National as of 26th October 1988, is $15,874,533 plus interest of $311,901. The market value of the office tower as of 13th May 1988 was stated to be $11,675,000. They, therefore, face a potential deficiency of $4,512,434.

[13] Guardian Trust is a secured creditor of the petitioner, Unity Investment Company Limited, and holds a first mortgage over a small office building in Nelson, British Columbia. The amount owing to Guardian is $409,198.46 and the estimated deficiency is approximately $150,000 exclusive of transaction costs.

[14] Mr. Justice Trainor, on 12th December 1988, found that the companies had complied with the provisions of the C.C.A.A., and, therefore, the court could exercise its discretion and sanction the reorganization plan. Excelsior and National and Guardian appeal against that decision.

[15] Mr. Justice Trainor had the carriage of this matter almost from the beginning and he heard several preliminary applications. In a careful and thorough judgment, he set out the facts distinctly, reviewed the authorities and approved the plan. I do not propose to review

the authorities again because they are extensively quoted in nearly every judgment on this subject. It will be sufficient to say that they include *Re Companies' Creditors Arrangement Act; A.G. of Can. v. A.G. Que.,* [1934] S.C.R. 659, [1934] 4 D.L.R. 75; *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.,* [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 52 C.B.R. (N.S.) 109, 53 A.R. 39 (Q.B.); *Re Associated Investors of Can. Ltd.,* [1988] 2 W.W.R. 211, 56 Alta. L.R. (2d) 259, 67 C.B.R. (N.S.) 237, 38 B.L.R. 148, 46 D.L.R. (4th) 669 (sub nom. *Re First Investors Corp. Ltd.)* (Q.B.); *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.,* [1891] 1 Ch. 231 (C.A.); *Re Dairy Corp. of Can. Ltd.,* [1934] O.R. 436, [1934] 3 D.L.R. 347; *Re Wellington Bldg. Corp.,* [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626; *Br. Amer. Nickel Corp. v. O'Brien Ltd.,* [1927] A.C. 369 (P.C.); *Sovereign Life Assur. Co. v. Dodd,* [1892] 2 Q.B.D. 573 (C.A.), and others.

[16] The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:

(1) There must be strict compliance with all statutory requirements (it was not suggested in this case that the statutory requirements had not been satisfied);

(2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;

(3) The plan must be fair and reasonable.

[17] Similarly, there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

[18] There were really four issues argued on this appeal but, as is so often the case, there is some overlapping. I shall attempt to deal with them individually.

[19] First it was alleged, principally by Mr. Czepil, that the Act does not authorize a plan whereby the creditors of other companies can vote on the question of whether the creditors of another company may compromise his claim. He called this the cross-company issue.

[20] This argument arises out of the particular facts that Mr. Czepil's client found itself in where it had a first mortgage, that is, Guardian had a first mortgage on a building owned by Unity which was the only asset of Unity, and he says the C.C.A.A. does not permit creditors of other companies to vote on the disposition of Guardian's security. I think there would be considerable merit in this submission except for the fact that the plan contemplates the consolidation of all the petitioner companies and the applications are made in this case not just under the C.C.A.A., but also under ss. 276-78 of the British Columbia Company Act, R.S.B.C. 1979, c. 59. In this respect, it is necessary to mention s. 20 of the C.C.A.A. which provides:

> 20. The provisions of this Act may be applied conjointly with the provisions of any Act of Canada or of any province, authorizing or making provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[21] During the argument of these appeals, we were treated to a review of the history of this matter in the court below. In reasons for judgment dated 5th July 1988 [now reported *Re Northland Properties Ltd.* (1988), 29 B.C.L.R. (2d) 257, 69 C.B.R. (N.S.) 266], Mr. Justice Trainor recited that he had been asked by some of the parties to approve a consolidation plan, but he declined to do so as the plan was not then before him in final form. It is implicit that Trainor J. thought he had authority to approve a consolidation plan and he referred to American authorities particularly, *Re Baker & Getty Fin. Services Inc.,* 78 B.R. 139 (U.S. Bankruptcy Ct., N.D. Ohio, 1987), and in *Re Snider Bros.,* 18 B.R. 320 (U.S. Bankruptcy Ct., D. Mass., 1982), and he said that he accepted the analysis of *Snider,* which proposes the test between economic prejudice of continued debtor separateness versus the economic prejudice of consolidation, and holds that consolidation is preferable if its economic prejudice is less than separateness prejudice.

[22] I think Mr. Justice Trainor was right for the reasons described in the American authorities and because to hold otherwise would be to deny much meaning to s. 20 of the

C.C.A.A. and would mean that when a group of companies operated conjointly, as these companies did (all were liable on the Bank of Montreal bonds), it would be necessary to propose separate plans for each company and those plans might become fragmented seriously.

[23] I am satisfied there is jurisdiction to entertain a consolidation proposal.

[24] Secondly, it was agreed that the composition of the class of priority creditors was unfair by reason of including all priority mortgagees without regard to the fact that some of them faced a deficiency and some did not. The appellants were each in the latter difficulty and they argue that they should have been placed in a different class because the other 11 priority mortgagees were going to get paid in full whether the plan was approved or not. This argument would have more merit if the plan were only for the benefit of the undersecured priority mortgagee. But the plan was also for the benefit of the company and the other creditors who, by their votes, indicted that they thought the plan was in their best interest. The learned chambers judge considered this question carefully. At p. 25 of his reasons he said this:

> An examination of the relationship between the companies and the priority mortgagees satisfies me that they are properly in the same class. The points of similarity are:
>
> 1. The nature of the debt is the same, that is, money advanced as a loan.
>
> 2. It is a corporate loan by a sophisticated lender who is in the business and aware of the gains and risks possible.
>
> 3. The nature of the security is that it is a first mortgage.
>
> 4. The remedies are the same - foreclosure proceedings, receivership.
>
> 5. The result of no reorganization plan would be that the lender would achieve no more than the value of the property, less the costs of carrying until disposal, plus the legal costs as well would come out of that. A possible exception would be if an order absolute left the creditor in the position of holding property for a hoped-for appreciation in value.
>
> 6. Treatment of creditors is the same. The term varied to five years, the interest rates 12 per cent or less, and the amount varied to what they would get on a receivership with no loss for costs; that is, it would be somewhat equivalent to the same treatment afforded to the Bank of Montreal under the settlement agreement.
>
> The points of dissimilarity are that they are separate priorities and that there are deficiencies in value of security for the loan, which vary accordingly for particular

> priority mortgagees. Specifically with respect to Guardian and Excelsior, they are both in a deficiency position.
>
> Now, either of the reasons for points of dissimilarity, if effect was given to them, could result in fragmentation to the extent that a plan would be a realistic impossibility. The distinction which is sought is based on property values, not on contractual rights or legal interests.

[25] I agree with that, but I wish to add that in any complicated plan under this Act, there will often be some secured creditors who appear to be oversecured, some who do not know if they are fully secured or not, and some who appear not to be fully secured. This is a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both.

[26] I adopt, with respect, the reasoning of Forsyth J. of the Court of Queen's Bench of Alberta, in a recent unreported decision in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.,* No. 8801-14453, 17th November 1988 [now reported 63 Alta. L.R. (2d) 361, 92 A.R. 81], particularly at pp. 13 and 14 [pp. 369-70]. I am unable to accede to this ground of appeal.

[27] Thirdly, I pause to mention that it was not suggested that the arrangement with the Bank of Montreal constituted a preference. It was argued, however, that the entire plan was tainted by the agreement made by the companies with Relax. Apparently, there was an appraisal showing a value of its security at $3.7 million while other evidence suggests a value of between $4.5 million to $4.6 million. The amount owing to Relax on its mortgage was $6 million.

[28] Early in the history of this matter before the plan was finalized, and before the companies struck their crucial arrangement with the Bank of Montreal, the companies and Relax agreed to a future cash payment of $500,000 and a valuation of $4 million for the Relax property which could, in total, amount to a preference of up to $900,000 to Relax and that company, in consideration of that compromise, agreed to vote for the plan.

[29] It should be mentioned that the plan, from its inception, ensured to the priority mortgagees the full market value of their security to be determined either by agreement, appraisal, or, if necessary, arbitration. Thus, the appellants do not stand to lose anything

by the agreement made with Relax. It is the bank which carried the burden of that expense.

[30] There is no doubt that side deals are a dangerous game and any arrangement made with just one creditor endangers the appearance of the bona fides of a plan of this kind and any debtor who undertakes such a burden does so at considerable risk. In this case, however, it is apparent that this agreement was not made for the purpose of ensuring a favourable vote because at the time the deal was struck the companies had not reached an accommodation arrangement with the bank. I think the companies were negotiating, as businessmen do, on values for the purpose of putting a plan together.

[31] Further the arrangement with Relax was fully disclosed in the plan. This does not ensure its full absolution if it was improper, but at least it removes any coloration of an underhanded or secret deal. In fact, there were also negotiations between the companies and the appellants but nothing came of those discussions.

[32] After referring to the fact that the plan anticipated and permitted negotiations about values and other matters, the learned chambers judge said this at pp. 28 and 29 of his reasons:

> The negotiations might, on the surface, appear to have been in the nature of an excessive payment to Relax for the consideration in their agreement, which agreement, incidentally, included an undertaking to vote in favour of the plan. But the answer given by the companies is that what in effect was happening at that meeting was a negotiation as to the agreed price and that this negotiation took place earlier rather than later and that the parties in fact came to an accord with respect to the agreed price and that the settlement between them was on that basis.
>
> If that is so, it is something which took place in accordance with what is proposed by the reorganization plan. I have reviewed and reread a number of times the submissions by the companies and particularly by counsel on behalf of Guardian and Excelsior. I am satisfied that I should accept the explanation as to what took place, which has been advanced on behalf of the companies.

[33] In the circumstances of this case, I would not disagree with the learned chambers judge in that connection.

[34] Lastly, it remains to be considered whether the plan is fair and reasonable. I wish to refer to three matters.

[35] First, the authorities warn us against second-guessing businessmen (see *Re Alabama,* supra, at p. 244). In this case, the companies and their advisors, the bank and its advisors, and all the creditors except the two appellants, voted for the plan. As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

[36] Secondly, I wish to mention Mr. Czepil's argument that the plan was unfair, perhaps not conceptually. but operationally by authorizing negotiations. He says this put the parties in a difficult position when it came to vote because they risked retribution if they failed to reach agreement and then voted against the plan. He complains that some benefits offered in negotiations are no longer available to his clients.

[37] With respect, negotiations between businessmen are much to be desired and I would not wish to say anything that would impede that salutory process. If negotiations lead to unfairness, then other considerations, of course, arise. But that, in my view, is not this case.

[38] Thirdly, the plan assures all the priority mortgagees the full market value of their security without liquidation expenses. That is more than they could expect to receive if there had been no plan.

[39] What they gave up is the right to take the property by order absolute or to seek a judicial sale and pursue the borrower for the deficiency. Guardian was actually offered its security but declined to accept it. The difficulty about this whole matter is the uncollectability of the deficiency having regard to the overwhelming debt owed to the bank which would practically eliminate any real chance of recovery of the deficiency.

[40] In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p. 29:

> I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.

> Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

[41] I agree with that.

[42] I also agree with the learned chambers judge that the plan should have been approved and I would dismiss these appeals accordingly.

[43] ESSON J.A.: I agree.

[44] WALLACE J.A.: I agree.

[45] MCEACHERN J.A.: The appeals are dismissed with costs.

Appeal dismissed.

TAB 13

CITATION: Redstone Investment Corporation (Re), 2016 ONSC 4453
COURT FILE NO.: CV-14-10495-00CL
DATE: 2016-10-05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE RECEIVER OF REDSTONE INVESTMENT CORPORATION AND REDSTONE CAPITAL COROPRATION

AND IN THE MATTER OF A MOTION PURSUANT TO SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Ian Aversa* and *Jeremy Nemers*, for Grant Thornton Limited., in its capacity as Receiver and Manager of Redstone Investment Corporation, Redstone Capital Corporation and 1710814 Ontario Inc. o/a Redstone Management Services

Justin Fogarty and *Pavle Masic*, for RIC Investors

Grant Moffat and *Kyla Mahar*, for RCC Investors

Harvey Chaiton and *Doug Bourassa*, for RMS Investors

ENDORSEMENT

Introduction

[1] This motion seeks a determination of whether the estates of three corporate entities – Redstone Investment Corporation ("RIC"), Redstone Capital Corporation ("RCC"), and 1710814 Ontario Inc. o/a Redstone Management Services ("RMS") – should be substantively consolidated.

[2] The motion was brought by Grant Thornton Limited in its capacity as court-appointed receiver ("GTL" or the "Receiver") of the property, assets and undertakings of RIC, RCC, and RMS (collectively "Redstone").

[3] To facilitate the determination of this issue, Newbould J. granted an order, which, among other things, appointed representative counsel ("RIC Representative Counsel") to represent the interests of parties who hold promissory notes issued by RIC (the "RIC Investors"), representative counsel ("RCC Representative Counsel") to represent the interests of all parties who hold bonds issued by RCC (the "RCC Investors"), and representative counsel ("RMS Representative Counsel") to represent the interests of all parties who invested money with RMS ("RMS Investors").

[4] The order of Newbould J. provides that any RIC Investor, RCC Investor, and RMS Investor who is not represented by their respective Representative Counsel will nonetheless be bound by the decision made in respect of this motion.

[5] In the absence of substantive consolidation of RIC, RCC, and RMS, the RCC Investors have priority for any receivership funds over the RIC Investors by virtue of an inter-corporate agreement under which RCC is a secured creditor of RIC.

[6] The RIC and RMS Investors argue in favour of substantive consolidation; the RCC Investors oppose substantive consolidation; the Receiver put forward an independent legal opinion that it is unlikely substantive consolidation would be ordered in this case.

What is Substantive Consolidation?

[7] Under a substantive consolidation, a number of affiliated legal entities, typically corporations, are treated as if they were one entity, resulting in the assets of the various debtors being pooled to create a common fund out of which claims of creditors of all the debtors are jointly satisfied. See: Janis Sarra, *"Corporate Group Insolvencies: Seeing the Forest and the Trees"* (2008) 24 B.F.L.R. 63, at. p. 8.

[8] The authority for substantive consolidation of bankrupt estates in Canada lies under the equitable jurisdiction of the Superior Court of Justice granted by s. 183(1) of the *Bankruptcy and Insolvency Act* ("BIA"). See: *A. & F. Baillargeon Express Inc. (Trustee of) (Re)*, [1993] Q.J. No. 884 ("Baillargeon"), at para. 23); *Nortel Networks Corporation (Re)*, 2015 ONSC 2987, at para. 216 and *Bacic v. Millennium Education & Research Charitable Foundation,* 2014 ONSC 5875.

Background

Procedural History

[9] On March 24, 2014, RIC and RCC commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), with GTL appointed as Monitor.

[10] On August 8, 2014, the CCAA proceedings were converted to receivership proceedings and GTL was appointed as Receiver of the property, assets and undertakings of RIC and RCC.

[11] On August 12, 2014, the Receiver assigned RIC and RCC into bankruptcy. GTL was appointed trustee in bankruptcy of each estate.

[12] On September 17, 2014, the receivership proceedings were expanded, on motion by the Receiver, to include RMS.

[13] A *Mareva* injunction has been in place since April 4, 2014, restraining RMS and Mr. Edmond Chin-Ho So, the founder of the Redstone group of companies, from encumbering the assets of RMS (the "Mareva Order").

Redstone Incorporation and Ownership Structure

[14] RMS was incorporated on September 19, 2006, and it is wholly-owned by Mr. So. RMS was used to process loans until the establishment of RIC. Starting March 14, 2012, RMS provided administrative services to RIC and RCC through a Management Services Agreement (the "MSA"). The services provided to RIC included seeking out borrowers, reviewing suitability for investment, carrying out due diligence, and maintaining a register of outstanding RIC Notes.

[15] RIC was incorporated in Ontario on September 25, 2009, and is also extra-provincially registered in Alberta. RIC was wholly-owned by Mr. So until January 28, 2014, when he transferred 60% of the shares to Mr. Eric Hansen. RIC carried on business as a commercial lender to Canadian small to medium-sized businesses and entrepreneurs seeking capital on a short-term basis. Loans ranged from $250,000 to $2,000,000 and were payable within 30 days to one year. RIC financed its lending activities by way of a continuous offering of unsecured promissory notes ("RIC Notes") distributed under exemptions from the prospectus requirement.

[16] RCC was incorporated on December 15, 2011, for the purpose of raising registered funds that would be transferred to RIC. RCC is owned 40% by Mr. So and 60% by Target Capital Inc. ("TCI"). RCC ownership was set up with TCI in voting control so that investments in RCC would qualify as a "deferred plan investment" under Canadian income tax legislation, making it eligible for registered savings plans.

[17] RCC raised capital through a continuous offering of unsecured fixed rate bonds ("RCC Bonds") under the same exemptions from the prospectus requirement as the RIC Notes. RCC would then transfer the capital it obtained from investors to RIC so that RIC could use the amounts to fund new loans to third parties.

Leadership and Business Operations of Redstone

[18] Mr. So created the Redstone group of companies with the aim of providing short-term high-interest loans to small and medium-sized Canadian companies. Borrowing clients came to RIC directly, through a referral, or from a bank or accounting firm. After conducting due diligence consisting of an assessment of their financial position and financing needs, loans would be arranged.

[19] Mr. So is an experienced and educated participant in securities' markets. His formal education includes completion of three and a half years of a Bachelor of Commerce program at the King's University in Alberta. Upon leaving university, he joined a boutique corporate finance firm, Harris Brown, where he started as a research analyst and ultimately moved into the role of Manager of Finance and Administration. Throughout his employment, he researched target companies, worked in debt lending, and liaised with clients looking for debt or equity financing.

[20] Mr. So was the president and chief executive officer ("CEO") of RIC and RCC until January 28, 2014, when he resigned from these roles following his incarceration for unrelated criminal charges. At that time, Mr. Hansen – who had been a consultant providing marketing

and investor relations to the Redstone companies since the summer of 2011 – became the sole director and officer of RIC and RCC, until his own resignation on August 8, 2014, when Redstone entered receivership.

[21] RIC and RCC shared the same registered office, located at 101 Duncan Mill Road, Suite 400, Toronto, Ontario. Though it had another registered office, RMS used Duncan Mill Road as its principal address.

[22] Mr. So had sole signing authority for transfers between the three Redstone entities, though he contends that Mr. Chris Shaule and Mr. Karim Habib, both of whom had acted under him as portfolio analysts for the Redstone companies under contract, did as well. Mr. Shaule was responsible for maintaining the books and records of RIC and RCC. Mr. So himself maintained the books and records of RMS.

[23] Mr. Hansen, together with Mr. Shaule and Mr. Habib, engaged in a review of the Redstone companies' financial position starting January 2014. Various financial irregularities came to light, so the Redstone companies and GTL on March 17, 2014, with a view to potentially acting as a court-appointed monitor in a CCAA filing.

The RCC – RIC Loan Agreement and General Security Agreement

[24] To facilitate the transfer of funds, RCC and RIC entered into a loan agreement dated January 23, 2012 (the "Loan Agreement"), which provided for a loan between $250,000 and $25,000,000 that would be drawn upon with RCC's pre-approval. The agreement was signed by Mr. So on behalf of both companies. RCC lent RIC approximately $14.5 million under the agreement.

[25] As part of this lending arrangement, RIC granted RCC a security interest over all of its property via a General Security Agreement (the "GSA").

[26] Mr. So explained on cross-examination that, though he now understands that RCC is the first-ranking secured creditor of RIC due to the GSA, he did not appreciate that the GSA would have this effect until Redstone commenced proceedings under the CCAA in March 2014. This is a point to which I will return later in these reasons.

[27] On March 14, 2014, in anticipation of the CCAA proceedings, Mr. Hansen performed a search under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "PPSA") over each of RIC and RCC. The RIC search revealed that RIC had no secured creditors other than TD Bank. The RCC search showed a registration in favour of RIC. Mr. Hansen caused the discharge of the RIC entry against RCC and filed a registration against RIC in RCC's favour. This registration was made prior to the CCAA proceedings.

Redstone Offerings

The Subscription Process

[28] RIC Notes and RCC Bonds were issued under a continuous offering made pursuant to exemptions from the prospectus requirement of securities legislation in British Columbia, Alberta, and Ontario. Both RIC and RCC obtained investors under Offering Memoranda ("OM") – documents provided to investors in exempt distributions that set out the business of the company, including liabilities and risk factors. Neither RIC nor RCC are registered in any capacity with securities regulatory authorities.

[29] As part of the subscription process, investors acknowledged receipt of the OM and were advised of the risky nature of the investment in the form of a Subscription Agreement delivered to RIC[1] or RCC,[2] depending on the product to which the investors subscribed (i.e., RIC Notes or RCC Bonds). The investors also provided a Representation Letter, in which the investor set out how they qualified for the exemption used to make the purchase. In addition, RCC Investors provided a specific release for TCI. The Subscription Agreement provides, among other information, that "the Subscriber has received and reviewed the Offering Memorandum" in connection with the purchase of the notes.

[30] Each one of the RIC and RCC OM contain a section describing risk factors – "ITEM 8 – RISK FACTORS" – that includes the following statements, respectively:

> The purchase of the [RIC Notes] offered hereby is suitable only for sophisticated investors of adequate financial means who can bear the risk of loss associated with an investment in the Company and who have no need for liquidity in this investment. Prospective investors should give careful consideration to the following risk factors in evaluating the merits and suitability of an investment in the Company. The following does not purport to be a comprehensive summary of all the risks associated with an investment in the Company. Rather, the following are only certain particular risks to which the Company is subject. Management urges prospective investors to

> The purchase of [RCC Bonds] pursuant to this Offering should only be made after consulting with independent and qualified sources of investment and tax advice. Investment in the Bonds at this time is highly speculative. The Corporation's business involves a high degree of risk, which even a combination of experience, knowledge and careful evaluation may not be able to overcome. Purchasers of Bonds must rely on the ability, expertise, judgement [*sic*], discretion, integrity and good faith of the management of the Corporation. This Offering is suitable for investors who are willing to rely solely upon the management of the Corporation and who could afford a total

[1] The RIC OMs state that the subscription documents have to be delivered to RIC at its Duncan Mill Road address for all except subscriptions under RIC's first two OMs: the July 8, 2010 OM directs that forms be sent to Harris Brown & Partners Ltd. as RIC's agent, and the January 20, 2011 OM directs that forms be sent to Sterling Grace as RIC's agent. On February 20, 2014, the registration of Sterling Grace was suspended by the Ontario Securities Commission for several failures, including with respect to acting as an exempt market dealer facilitating subscriptions to Redstone Investment Corporation.

[2] The RCC OMs state that the subscription documents be sent to RCC at its Duncan Mill Road address.

discuss such risks and other potential risks in detail with their professional advisors prior to making an investment decision.

loss of their investment.

The RIC Offerings

[31] RIC issued seven OMs between 2010 and 2013 for the purpose of obtaining investments and one non-offering OM to amend a prior memorandum for deficient disclosure of the Loan Agreement.

[32] The four OMs issued prior to the Loan Agreement advised that RIC may subsequently enter loans that could supersede the RIC Notes. These OMs state, "The [Notes] are unsecured, and as a result (i) are subordinate to any secured debt which the Company now has or may hereafter incur, and (ii) purchasers will have no direct recourse to the assets of the Company or any other collateral."

[33] However, the April 2012 OM failed to disclose the Loan Agreement entered earlier that year as a material contract. The non-disclosure contravened the requirements for a distribution under the s. 2.9 OM exemption that had been used to make distributions in Alberta and British Columbia. This led the securities regulators of those two provinces to issue deficiency letters to RIC with respect to the April 2012 OM, as well as make cease trade orders.

[34] RIC settled with the securities regulators by issuing a non-offering OM on August 30, 2012 (the "Rescission OM"), which included and disclosed the RCC Loan and gave RIC Investors who subscribed under distributions based on the April 2012 OM the opportunity to rescind their investments. One investor accepted the rescission offer and the investment was repaid. The correction brought RIC in compliance with the s. 2.9 requirements. The cease trade orders were revoked by both the Alberta and British Columbia securities commissions in October 2012.[3]

[35] The amended April 2012 OM and the two subsequent OMs disclose the Loan Agreement and the GSA under material contracts. They also outlined risks related to the notes, including that "[t]he present and after acquired personal property of the Company is secured in favour of RCC pursuant to the terms of the RCC Loan Agreement."

[36] Since its inception, RIC has issued 925 notes raising $65,474,000. As of February 28, 2014, approximately $23,340,145 of this is outstanding to RIC Investors.

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[3] The cease trade orders were issued on June 7, 2012 in BC and June 15, 2012 in Alberta. The orders were fully revoked on October 4, 2012 in BC and October 10, 2012 in Alberta.

The RCC Offerings

[37] RCC issued two OMs, one in 2012 and the other in 2013.[4] The Loan Agreement is discussed in both OMs: the 2012 OM indicates that RCC intends to enter a loan agreement with RIC and the 2013 OM indicates the agreement has been executed.

[38] Both OMs include a summary of loan terms and advise of the risks pertaining to the loan. They indicate that the loan would "be secured by way of a General Security Agreement securing all present and after acquired personal property of RIC in favour of [RCC]." In terms of investment risk with respect to RIC, the OMs indicate that "[a] return on investment for a Subscriber under this Offering is dependent upon RIC's ability to meet its obligations of principal and interest pursuant to the RIC Loan." Further, the risks section explains that "[t]here is no assurance or guarantee that [RCC] will be repaid the RIC Loan in accordance with its terms, if at all, and any failure of RIC pursuant to its payment obligations will directly affect the ability of [RCC] to pay interest and redeem the Bonds."

[39] The 2013 RCC OM appends the RIC OM issued March 1, 2013, and advises RCC Investors to review it as it details the risk factors that pertain to RIC's business.

[40] Since its inception, RCC has issued 710 bonds raising $16,486,000. All of the bonds were issued after the Loan Agreement was executed. As of February 28, 2014, approximately $16,317,602 of this is outstanding to RCC Investors.

[41] It is of note, though perhaps not of consequence, that the RIC and RCC OMs which reference the Loan Agreement misstate the minimum loan amount as $150,000, when the agreement actually provides that the minimum loan amount is $250,000.

Receivership: Redstone Assets and Claims

[42] Each of RIC, RCC, and RMS maintained separate financial records and bank accounts. Transfers between the companies have been consistently recorded in their respective books. The Receiver undertook an examination of each company's assets.

[43] The assets of RIC as of February 28, 2014, consist of its lending portfolio, which includes 35 accounts with loans totaling approximately $24,648,000. The loans are generally secured against the assets of the borrowers and personal guarantees from their respective shareholders. The sole material asset of RCC is its loan to RIC, which totals $14,260,116. According to the Receiver's investigation, RIC and RCC are owed $8,344,714 by RMS.[5]

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[4] The RCC OMs are dated April 3, 2012 and March 1, 2013.

[5] As a result of the *Mareva* order, the Monitor undertook a forensic review of two of RMS's bank accounts at the TD Bank. RMS also maintains an account with National Bank. The Receiver also completed an investigation and

[44] The claims against each corporation and the Receiver's realizations for each estate as of June 2015 are as follows:

Entity	*Claims accepted*	*Total claim amount*	*Estate amount*
RIC	501	$23,434,146	$16,886,899
RCC	683	$15,849,360	$273,129
RMS	9	$9,854,219	$169,279

[45] After disbursements, the Receiver holds $13,776,924. If the priority of RCC Investors is recognized, they would recover approximately 86% of their claims, and the other investors would obtain minimal, if any, recovery. If the Redstone estates are consolidated and the funds divided equally, each investor would recover approximately 28% of their claim.

Law and Argument

[46] The RIC and RMS Investors ask me to exercise my equitable discretion and substantively consolidate the estates. The RCC Investors oppose consolidation. Before turning to the parties' interpretation of the facts and their respective arguments, I provide a brief overview of the law surrounding substantive consolidation in Canada and the United States, followed by a description of each party's characterization of the key facts.

[47] In determining the appropriateness of substantive consolidation, all counsel referenced *Northland Properties Ltd. (Re)* [1988] B.C.J. No. 1210, affir'd *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* [1989] B.C.J. No. 63 (C.A.), where the court stated that in determining whether to impose substantive consolidation, the court must balance the economic prejudice to the creditors resulting from continuing corporate separateness against the economic prejudice caused by consolidation. To establish that substantive consolidation is warranted, it must be shown that the "elements of consolidation" are present, and that the consolidation would prevent a harm or prejudice or would effect a benefit generally. The "elements of consolidation" adopted in *Northland* from United States case law were as follows:

(i) difficulty in segregating assets;
(ii) presence of consolidated financial statements;
(iii) profitability of consolidation at a single location;
(iv) co-mingling of assets and business functions;
(v) unity of interests in ownership;
(vi) existence of inter-corporate loan guarantees; and

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prepared completed an analysis relating to the sources and use of funds relating to RMS. As a result of this analysis, the Receiver determined that there was a total of $8,344,714 due from RMS to RIC and RCC.

(vii) transfer of assets without observing corporate formalities.

Substantive Consolidation in the United States: Three Approaches to Assessing What is Just and Equitable in the Circumstances

[48] A brief overview is included to contextualize the approach Canadian courts have adopted thus far, given the relatively limited treatment of this concept in Canada, before addressing the parties' arguments on the application of substantive consolidation to their dispute.

[49] In the United States, the determination is made under the courts' equitable jurisdiction, similar to Canada. American courts have taken divergent approaches that has led to the articulation of several tests, the first regarding retaining flexibility but recently indicating that orders should be limited to very specific circumstances.

[50] The power of U.S. courts to order substantive consolidation is derived not from explicit statutory provisions but rather from the Bankruptcy Court's general powers in s. 105(a) of the *Bankruptcy Code* "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the *Bankruptcy Code*]". Substantive consolidation has been recognized by the Supreme Court as a power under this section in *Sampsell v. Imperial Paper and Color Corp.*[6] Given its foundation upon an equitable basis, in determining whether to order substantive consolidation courts are guided by what is just and equitable in the circumstances. Three leading approaches led to the evolution of this determination.

First Approach: Three-Part Test

[51] In *In re Auto-Train Corp., Inc.*,[7] the Court of Appeals for the District of Columbia Circuit moved away from relying on a list of factors to ascertain whether there has been an abuse of the corporate form and instead adopted a three-part test for determining whether or not to grant a substantive consolidation request:

1. Is there a substantial identity between the entities to be consolidated?[8]
2. Is consolidation necessary to avoid some harm or to realize some benefit?

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[6] 313 U.S. 215 (1941).

[7] 810 F.2d 270, Bankr. L. Rep (CCH) P 71618 (D.C. Cir. 1987). This test has been adopted by the D.C. Circuit and the Eleventh Circuit: see Eastgroup Properties v. Southern Motel Assn'n, Ltd., 935 F.2d 245, 249, Bankr. L. Rep (CCH) P 74055 (11th Cir. 1991). The necessity of consolidation requirement follows from Snider Brothers Inc., Re, 18 B.R. 230 (U.S. Mass., 1982) and the balancing of interests element flows from Baker & Getty Financial Services Inc., Re, 78 B.R. 139 (U.S. Bankr. N.D. Ohio, 1987).

[8] This is a typical *alter ego* inquiry made in corporate veil cases and generally involves consideration of the seven factors set out in In re Vecco Construction Industries, Inc., 4 B.R. 407 (Bankr. E.D. Va. 1980): 1. Difficulty in segregating assets; 2. Presence of consolidated financial statements; 3. Profitability of consolidation of a single location; 4. Comingling of assets and business functions; 5. Unity of interests in ownership; 6. Existence of inter-corporate loan guarantees; and 7. Transfers of assets without observance of corporate formalities.

3. If a creditor objects and demonstrates that it relied on the separate credit of one of the entities and that it will be prejudiced by the consolidation, will the demonstrated benefits of consolidation heavily outweigh the harm to the objecting creditor?

Second Approach: Two-Part Test with a Focus on Reliance

[52] In *In re Augie/Restivo Baking Co., Ltd.*,[9] the Court of Appeals for the Second Circuit departed from previous cases where determinations were made without regard for creditor reliance and were only based on corporate veil principles pertaining to respecting corporate separateness,[10] and instead set a two-part approach with a focus on reliance:

1. Have creditors dealt with the entities as a single economic unit rather than relying on their separate identities in extending credit?
2. Are the affairs of the debtors so entangled that consolidation will benefit all creditors?

Third Approach: Stricter Focus on Prepetition and Postpetition Consequences of Consolidation

[53] In *In re Owens Corning*,[11] the Third Circuit elected to set out a stricter approach, rejecting *Auto-Train* as creating "a threshold not sufficiently egregious and too imprecise for easy measure" and disapproving of the checklist approach used in assessing corporate separateness, holding instead that substantive consolidation is appropriate only when an applicant proves either that:

1. Prepetition, the entities for whom consolidation is sought disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity, or

2. Postpetition, their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

[54] Interestingly, all three approaches referenced above focus on the administrative costs of separating the entities with consequent detrimental effect on all creditors. In the case at bar, this is not a factor as the assets are held separately and the books and records, although they may not be pristine, are such that the Receiver can identify the creditors of each entity.

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[9] 860 F.2d 515, Bankr. L. Rep. (CCH) P 72482 (2d Cir. 1988). This test has been adopted by the Second and Ninth Circuits and followed by the Fourth Circuit.

[10] For example, in Soviero v. Franklin National Bank of Long Island, 328 F. 2d 446 (2d Cir. 1964), the Second Circuit Court of Appeals focused the inquiry on corporate veil-based principles and specifically looked to whether there was an abuse of the corporate form or structure, including whether the companies at issue operated a single business, had the same directors, shareholders, and staff, or shared accounting records. In Chemical Bank New York Trust Co. v. Kheel, 369 F. 2d 845 (2nd Cir. 1966), the court found that substantive consolidation can be authorized where the finances of the entities are hopelessly entangled despite a creditor's reliance on the separate credit of the debtor companies.

[11] 419 F.3d 195, Bankr. L. Rep. (CCH) P 80343 (3d Cir. 2005).

[55] I now return to the investors' key positions on this issue in the context of Redstone's receivership.

Credibility, Relevance and Findings of Facts

RIC Investors

[56] In support of their submission that consolidation is appropriate, counsel for the RIC Investors contends that the Redstone companies operated as a single entity that shared business functions, resources, personnel, and cash flow, and whose assets are intermingled due to inaccurate recordkeeping. RIC Representative Counsel further highlights the following facts:

- Redstone operates a centralized cash management system, with no protocol of any kind regarding the movement of monies between RCC, RIC or RMS – even though the companies have separate bank accounts, the funds flowed between entities to serve operational needs without having any rules, policies or regulations in place in respect of recording inter-company transfers;
- Evidence by Redstone staff that they saw no distinction between how funds were advanced between RCC and RIC or RMS and RIC, and that they treated the companies interchangeably;
- Redstone personnel discovered millions of dollars of unexplained transactions, bearing the hallmark of fraudulent activity;
- The Receiver discovered an error in the RCC accounting ledger – namely, RCC bond purchases between June and September 2012 totalling $713,722 that were not recorded in the RCC accounting ledger, but the funds from which were paid to RCC and then transferred to RIC – that renders unreliable the Receiver's assertion in its Fourth Report that "transfers between bank accounts were recorded in great detail in the books of records of each of RIC and RCC";
- According to the terms of the MSA, all expenses were to be borne by RMS, but in practice RIC generally held the bulk of cash and covered expenses incurred for the benefit of all three companies, such as fees for any market dealers involved in facilitating the sale of RIC Notes or RCC Bonds, accounting and legal fees or salaries for staff;
- Mr. So's evidence that only in 2013 were attempts made to improve recordkeeping within Redstone. Further, the records before late 2013 are not accurate and make it impossible to know the true inter-company balances;
- The RMS books were never subject to an audit, and though Mr. So employed "auditors" in respect of RIC and RCC, no evidence has been produced as to the quality or assurance level of the audits, nor are any reports or working notes included in the record;
- Mr. So's evidence that he viewed the companies as a single entity, which is how he represented them to investors, and he in fact intended, in late 2013, to amalgamate RIC and RCC and wind down RMS, as a part of which the RIC Notes and RCC Bonds would be exchanged for a new and identical security;

- The representations by Mr. So and Redstone personnel to the Exempt Market Dealers (EMD) who promoted Redstone products were that investments in each company would be treated equally. The marketing materials for RIC and RCC distributed to investors were virtually identical, both describing the same investment terms, interest rates, and risks, and both failing to reference any priority for RCC Investors;
- Evidence of investors that they were led to believe RIC, RCC and RMS were interchangeable, and most investors were never informed of the Loan Agreement and GSA.

RMS Investors

[57] Counsel to RMS Investors supports the position of the RIC Investors. In particular, RMS points to evidence by RMS and RIC Investors that they were led to believe there was no distinction between RIC and RMS or RIC and RCC. Further, RMS notes that there is no evidence that the RCC Investors relied on their priority position in making their purchases. Counsel also points to the evidence of various Redstone investors and others, who swore they made investments in Redstone and were led to believe that there was no distinction between RIC and RMS. Additionally, some of these investors swore that they were not told that RCC had a priority position and that they either did not receive an OM or only received one after the investments were made. Further, RMS Representative Counsel highlights the following evidence:

- Mr. Farouk Haji, whose affidavit detailed the process an Exempt Market Dealing Representative is required to follow prior to a client undertaking a new trade in an exempt market product, did not discuss whether he advised any clients of the priority position of RCC over RIC;
- There is no evidence from any RCC Investor that they relied on the priority position in making their investments;
- Ms. Cynthia Lewis' second investment in RIC, made in February 2011 in the amount of $540,000, was not treated in accordance with the OM in place at the time: she was first assigned RIC security against the ultimate borrower that was discharged in 2011 without her knowledge, and when her promissory note from RIC matured and rolled over in the February 16, 2012, after having already rolled over a number of times, the replacement note was issued by RMS rather than RIC but the language of the note nonetheless required interest payments from RIC. Ms. Lewis advises that Mr. So explained the rollover to RMS as due to RMS being for "friends and family";
- Mr. Chad MacDonald received a promissory note from RMS and RMS agreed to assign him a portion of the security it obtained from the ultimate borrower, Green Dot Finance Inc. However, the Green Dot loan, which formed the security for the investment and which appeared to be an asset of RIC, was sold for full face value to Maple Brook.

RCC Investors

[58] RCC Representative Counsel contends that consolidation would unduly prejudice the RCC Investors' interests as this is not a case where corporate formalities were not maintained or the liabilities were not readily identifiable. They point to the following in support of this position:

- The creditor pools of RIC and RCC are different, the creditors invested in each entity based on distinct OMs prepared on a single-entity basis, and the creditors of each entity are identifiable;

- RIC, RCC and RMS each maintained separate bank accounts. The evidence available to the Receiver and its consultants indicated that Mr. So did not treat each of these as one bank account. Transfers between bank accounts were recorded with great detail in the books and records of RIC and RCC;

- On cross-examination, Mr. So's evidence was that he assumed inter-company transfers were recorded in the books of the respective corporations as either receivables or payables. In addition, he advised staff to make best efforts to ensure the transactions pertaining to an entity stay within that entity and be processed through the correct account. He also advised them to record inter-company transfers where necessary. It was his belief and/or hope that this was undertaken properly;

- The assets of each Redstone corporation are different and identifiable. RIC's assets as of February 28, 2014, consisted of its lending portfolio which included 35 accounts with loans totaling approximately $24.648 million. The loans were all secured against the assets of the underlying borrower, and typically were supported by personal guarantees from shareholders where the borrower was a corporation. RCC's sole material asset is the loan receivable from RIC, on a secured basis in the amount of $14,260,116. The assets of RMS are identified by Mr. So in his sworn affidavit as several loan receivables, office furniture and the like, which he valued at $4,706,510. The assets and liabilities of RMS have been the subject of a forensic review undertaken by GTL in its capacity as Monitor and Receiver;

- RIC and RCC had separate audited and unaudited financial statements and did not prepare consolidated financial statements. The most recent audited financial statements for RIC and RCC were dated August 31, 2012. RMS also maintained separate financial records;

- Note 6 of the audited and unaudited financial statements of RCC attached to the RCC 2013 OM states that the loan from RCC to RIC is secured by way of a GSA on all present and after-acquired property of RIC.

Mr. So's Evidence on Cross-Examination

[59] As articulated above, counsel to RCC relies on the evidence of Mr. So to support its position. I have reviewed the affidavits and the transcript of Mr. So's cross-examination and have come to the conclusion that his evidence is unreliable and should be disregarded.

[60] In many cases, the answers provided by Mr. So on cross-examination belie the fact that he is highly educated and very experienced in the financial field. Mr. So was asked about the inter-company transfers between each of RMS, RIC and RCC. Mr. So answered that when such inter-corporate transfers occur, there would be an appropriate entry, whether a receivable or payable, in the relevant books and records of those companies.

[61] Mr. So was also asked about the Cease Trade Order that related to RCC and RIC. He was asked how the issue was resolved. Mr. So answered as follows:

> While Craig Betham took … you know, reformatted both OMs for us. And one of the things at that time was that … the original RCC OM was a separate OM that was created. Then, what the regulators wanted us to do, because these two companies are basically the same company, or related companies, they wanted us to do a wrapper, a wrap-around OM, so that the RIC OM had to be included in the RCC OM. That was done. Then, the second thing was we had to offer rights of rescission to all investors that invested in the previous OM, so that they had the proper information to decide if they were going to rescind or remain in the company. And then once those two things were done, we were restored back into good standing with the regulators.

[62] In addition, Mr. So was asked whether he had certain friends and family who are RIC Investors. He answered in the affirmative. He also understood that if the RIC Investors were successful on this substantive consolidation initiative, it would be reflected in the ultimate distribution to the investors.

[63] Mr. So was asked questions with respect to the GSA provided by RIC to RCC, executed January 23, 2012.

Question 518:	Can you tell me, in your own words, what you think this document purports to do?
Answer:	I remember that this was when we created Redstone Capital. It was what … I believe the lawyers, for Craig Skauge … I can't remember who at that time had told us that it was to be put in place in order to make RCC RSP eligible or something of that sort, that there had to be a securities agreement in place into RIC. But one of the things that I wanted to add, was that I had always spoken to him about, that this was, is in *pari passu* with all RIC Investors…
Question 528:	So it's your evidence today that starting from your years at Harris Brown and subsequently your years at Redstone, where your primary function was to lend money to entities to take security for those loans, that you did not understand what this general security agreement did?

Answer: I understood that RCC was taking a GSA at RIC. Yes, I understood that.

Question 529: So we'll start again. When you executed this document in January 2012.

Answer: Yes.

Question 530: [D]id you understand that the effect of this document would be to grant a security interest in and to RCC, with respect to RIC's assets?

Answer: I understood that it would be granting a security interest. Yes I did…

Question 531: Okay.

Answer: My understanding … and which is why all marketing material, and the way that Redstone has always been presented to all investors and EMDss, was that everything was *pari passu*. The only difference between RCC and RIC was RCC was registered funds and RIC were non-registered.

Question 532: I understand that, but I guess. I just want to make sure I understood what you're saying to me. We have established that you understand what a general security agreement is.

Answer: Yes.

Question 533: And what a general security agreement does? And the effect of a general security agreement.

Answer: Yes.

Question 534: And you agree that this document has the effect of a typical general security agreement?

Answer: Yes.

Question 535: And you agree that you have executed this document.

Answer: Yes.

Question 536: But you're telling me that you always had the impression that RIC and RCC would be treated on a *pari passu* basis. I have a hard time how that holds together.

> Answer: Well because that's what I had spoken to the lawyers about when we were creating the RCC OM and everything. That it was … everyone was always to be *pari passu*. And we were never told differently and that is. Mr. Hansen was even involved in that, when we were creating RCC. I never once told that RCC has a priority over RIC. …

[64] The foregoing interchange establishes, in my view, that Mr. So's evidence is completely unreliable. It is inconceivable that an individual with a background education in commerce and finance, followed by a lengthy career in the financial industry, could make the statements that Mr. So did. He understands the effect of a GSA, which is that one party is granted security over its assets in favour of another party (the secured party). This is a fundamental and elementary financing concept. I fail to understand how Mr. So can appreciate the effect of a GSA in situations where a Redstone entity is lending money to a borrower, yet fail to understand the effects of the same type of agreement when granted by RIC in favour of RCC. It is impossible to reconcile these positions.

[65] I find that Mr. So's attempt to explain this anomaly arose *ex post facto*. Mr. So arrived at his *pari passu* understanding not at the time of granting the security, but subsequent to the collapse of Redstone and the initiation of these proceedings in an attempt to justify that the three entities in question should be consolidated for distribution purposes. The fact that substantive consolidation, if granted, favours his family and friends, cannot be overlooked.

[66] I am satisfied that Mr. So knew that RCC was created in order that it could attract eligible funds for registered investors; that RIC was a separate entity from RCC; that RIC granted a security agreement in favour of RCC; and that the effect of granting such a security agreement resulted in RCC being a secured party holding a security interest in the assets of RIC and, therefore, having priority over RCC.

[67] The evidence of Mr. So is replete with contradictions. I find his evidence to be unreliable in all respects, such that I have disregarded it in its entirety. Obviously, this finding is extremely detrimental to the position put forth by counsel on behalf of both RIC Investors and RMS Investors, to the extent they rely on the evidence of Mr. So.

Investor State of Mind

[68] Counsel for the RMS Investors also pointed to evidence of a number of RMS and RIC Investors who claimed they were led to believe that there was no distinction between RIC and RMS or RIC and RCC, and further that there was no evidence that RCC Investors relied on their priority position in making their purchases. In support of this argument, the RMS Investors highlighted the evidence of Cynthia Lewis, Chad MacDonald, Nick DeCesare, Robert Dodd, Dario Mirabella and Ronald Smithers. In my view, the evidence of these individuals carries little weight.

[69] Their evidence has to be discounted because it is subjective evidence provided today about their state of mind and knowledge at the time they made the investment a number of years

ago. Their evidence is also at odds with the language contained in the loan agreement and OMs. The evidence is suspect as these parties are aware that it is in their best financial interest to take the position that they were led to believe there was no distinction between RIC, RMS and RCC. Indeed, it would be surprising if they did not take such a position. Investors in RIC and RMS stand to receive nominal distribution unless there is substantive consolidation. This is in contrast to a projected distribution of 28% if there is substantive consolidation.

[70] A review of the authorities also convinces me that their evidence is of very limited utility and is largely irrelevant. The "elements of consolidation" adopted from U.S. case law were referenced in *Northland, supra*. Absent from this list, and for good reason, is the knowledge or state of mind of the investor or creditor at the time that investments were made or credit was advanced.

[71] In my view, a creditor's motivation for investing is not relevant to any of the considerations set out in the test for substantial consolidation. I considered this issue in a preliminary motion, indexed as *Redstone Investment Corporation*, 2016 ONSC 513, at paras. 11 – 15:

> [11] RCC Representative Counsel submits that the evidence in the Bach Affidavit is relevant as it shows Mr. Bach's motivation for investing in RCC and the actual prejudice he will suffer in the event of substantive consolidation.
>
> [12] The test for substantive consolidation was recently summarized in *Bacic v. Millennium Educational and Research Charitable Foundation*, 2014 ONSC 5875, 19 C.B.R. (6th) 286 at para 113.
>
> > It requires the balancing of interest of the affected parties and an assessment whether creditors will suffer greater prejudice in the absence of consolidation and the debtors or any objecting creditors will suffer from its imposition. Regard must be had to the:
> >
> > a) Difficulty in segregating assets;
> >
> > b) Presence of consolidated Financial Statements;
> >
> > c) Profitability of consolidation at a single location;
> >
> > d) Commingling of assets and business functions;
> >
> > e) Unity of interests in ownerships;
> >
> > f) Existence of intercorporate loan guarantees; and,
> >
> > g) Transfer of assets without observance of corporate formalities.

> in order to assess the overall effect of the consolidation. (*Atlantic Yarns Inc., Re*, 2008 NBQB 144; *Northland Properties Ltd., Re*, (1988) B.C.J 1210 (B.C.S.C.), affirmed in *Northland Properties Ltd., Re*, (1989) B.C.J. No. 63 (B.C.C.A.) and *PSINET Ltd, Re* (2002), 33 CBR (4) 284 (Ont. S.C. [Commercial List]).

[13] In *PSINET*, supra, Farley J. held, at para. 11 that consolidation by its very nature will benefit some creditors and prejudice others and, as a result, it is appropriate to look at the overall general effect. This approach was affirmed in *Atlantic Yarns*, supra. In *J.P. Capital Corp.*, Re (1995), 31 CBR (3d) 102 (Ont. S.C.) Chadwick J. expressed concern about the consolidation of actions without knowing the effect it will have on all creditors. Chadwick J. wrote, "Although expediency is an appropriate consideration, it should not be done at the possible prejudice or at the expense of any particular creditor." In considering the relevance of *JP Capital* to this matter, I note that the *J.P. Capital* involved an "extremely complex bankruptcy" touching on a number of companies and assets, the parties were in the midst of cross-examination, and there were issues raised with respect to the actual corporate structure of the various companies and the tracing of the assets in relationship to the parties (para.17)."

[14] In my view, Mr. Bach's motivation for investing in RCC is not relevant to any of the considerations set out in the test for substantive consolidation. As a result, in determining the overall general prejudice to both sets of creditors, it seems to me that if the evidence is not relevant, refusing leave cannot be prejudicial to Mr. Bach, as an individual creditor. The second part of the Rule 39.02(2) is not applicable as no cross-examination took place and since I have determined that the content of the affidavit is not relevant to the determination of the Substantive Consolidation Hearing, the fourth part of the test need not be considered.

[15] Accordingly, since I have concluded that the Bach Affidavit does not meet the relevance criteria of the Rule 39.02(2) test, the motion seeking leave to deliver the Bach Affidavit as evidence in the Substantive Consolidation Hearing is dismissed.

[72] There is a great danger to placing any weight on the state of mind of the investor or creditor in the substantive consolidation analysis. Human nature is such that individuals would be far more likely to recite or recall a fact situation, which, if acceptable, puts them in a better financial position. All that is required would be for the individual to take the position that a number of the RIC Investors and RMS Investors are taking in these proceedings, namely, that they did not know that RCC had priority. This presupposes that the investors did not read the governing documents. It presupposes that the EMDs either did not read the governing documents or did not advise the Investors of the contents of the governing documents.

[73] To recognize state of mind would result in an unacceptable level of commercial uncertainty where written contracts could be overridden by parties who voluntarily choose not to read the governing documents.

[74] Counsel acknowledges that the consolidation of bankrupt estates was recently authorized in *Bacic, supra* and *D'Addario v. Ernst & Young Inc.*, 2014 ABQB 474. In both cases, the assets of the corporations, business functions and financial statements were all co-mingled. However, in deciding to consolidate the estates, the court in each decision explicitly noted that consolidation would not be to the prejudice or expense of a particular creditor. In particular, the court in *D'Addario* found that "no creditor would benefit from consolidation at the expense of any other". That is clearly not so in this case. The projected distribution for RCC Investors would be reduced from 86% to 28%.

Legal Argument

[75] Counsel to RMS Investors referenced the text of Dr. Janis Sarra, *Rescue: The Companies' Creditors Arrangement Act*, 2d ed (Toronto: Carswell, 2013), where the author explains the process to be followed in assessing whether to consolidate estates:

> Generally, the courts will determine whether to consolidate proceedings by assessing whether the benefits will outweigh the prejudice to particular creditors if the proceedings are to be consolidated. In particular, the court will examine whether the assets and liabilities are so intertwined that it is difficult to separate them for purposes of dealing with different entities. The court will also consider whether consolidation is fair and reasonable in the circumstances of the case.

[76] Based on the jurisprudence canvassed above, there are two related streams of case law in Canada on the issue of substantive consolidation in either a restructuring or a bankruptcy situation: First, the *Northland* line of cases involving analysis of: (i) the elements of consolidation; and (ii) whether consolidation would prevent a harm or prejudice or would effect a benefit generally. Second, there is a more ad hoc approach involving fact-based analysis guided by the equities.

[77] In this case, the essential effect of consolidation would be to avoid the priority arrangement purportedly created by the loan documents, resulting in moderate recoveries to the investors in each of the Redstone entities. Absent consolidation, RCC Investors will receive a projected 86% recovery. RCC Investors and RMS Investors would receive a nominal recovery at best.

[78] The following general principles respecting the doctrine of substantive consolidation represent a summary of Canadian case law:

(i) Are the elements of consolidation present, such as the intertwining of corporate functions and other commonalities across the group?

(ii) Do the benefits of consolidation outweigh the prejudice to particular creditors?

(iii) Is consolidation fair and reasonable in the circumstances?

[79] Based on the foregoing – and knowing that the evidence of Mr. So carries no weight and that the evidence of the investors is of very limited import – the analysis of the *Northland* factors supports maintaining the status quo.

(i) Difficulty in Segregating Assets

[80] The assets of each of RIC, RCC and RMS are easily identifiable, are not difficult to segregate, and have been segregated as is demonstrated by the Receiver's Statement of Receipts and Disbursements.

(ii) Presence of Consolidated Financial Statements

[81] RIC, RCC and RMS did not prepare consolidated financial statements. All financial statements, audited and unaudited, were prepared on an entity-by-entity basis. The financial statements of RIC and RCC were audited. This factor supports maintaining the status quo.

(iii) Co-mingling of Assets and Business Functions

[82] The only material asset of RCC is the secured inter-company receivable from RIC, which is not co-mingled with any assets of RIC or RMS. To the extent that any business functions were co-mingled, this can be explained by the MSA between RMS and RIC and the terms of the OMs that confirm that RIC was liable for all costs incurred by RCC relating to RCC's Offering. As such, this factor supports maintaining the status quo.

(iv) Unity of Interests in Ownership

[83] There is no unity of interest in ownership. RIC, RCC and RMS have different ownership structures. RIC is owned 60% by Mr. So and 40% by Mr. Hansen. RCC is owned 60% by TCI and 40% by Mr. So. RMS is wholly-owned by Mr. So.

(v) Existence of Inter-Corporate Loan Guarantees

[84] There are no inter-corporate loan guarantees of any third party financing. This factor supports maintaining the status quo.

(vi) Transfer of Assets Without Observance of Corporate Formalities

[85] While there is evidence of transfers of assets without observance of corporate formalities, the preponderance of evidence relates to transfers from RIC/RCC to RMS. Prior to the CCAA filing, it was determined that RMS received significant unauthorized cash transfers from RIC estimated to be approximately $8.5 million. The Receiver completed an investigation and

prepared an analysis relating to the source and uses of funds relating to RMS. As a result of the analysis, the Receiver determined that there is a total of approximately $8.3 million due from RMS to RIC and RCC. As such, in my view, this factor supports maintaining the status quo.

Prejudice to Creditors

[86] In addition to a review of the factors set out above, the court will consider the relative prejudice to creditors that will result from substantive consolidation. In this case, substantive consolidation eliminates the secured inter-company receivable, while it is the only material asset of RCC. The result is, therefore, from an objective standpoint, extremely prejudicial to the RCC Investors as their recoveries (based on available information in the Receiver's Fourth Report) would go from 86% in a status quo scenario to 28% in a substantively consolidated estates scenario. Conversely, the RIC Investors and RMS Investors benefit from the consolidation from effectively no recovery in a status quo scenario to a 28% recovery in a substantively consolidated scenario.

[87] Investors in RCC and RIC took calculated risks based upon OMs that disclosed the RCC GSA and RIC loan. The RIC Investors acknowledge that these were risky investments and that they may not recover their investments. Now, facing the very risk they previously acknowledged, the RIC Investors seek to ameliorate the prospect of a negligible recovery against RIC to the prejudice of RCC Investors.

[88] As Trainer J. explained in *Northland*, "it would be improper for the court to interfere with or appear to interfere with the rights of the creditors," and that such an appearance would be created if the estates are ordered merged for all purposes. This caution rings true in this case. To order substantive consolidation would require me to ignore written contracts and rely on subjective *ex post facto* evidence.

Conclusion

[89] Substantive consolidation is an equitable remedy. The primary aim of this extraordinary remedy is to ensure the equitable treatment of all creditors. It is recognized that as consolidation effectively redistributes wealth among creditors of the related entities, individuals will invariably realize asymmetric losses or gains (see: M. MacNaughton and M. Arzoumanidis, *"Substantive Consolidation in the Insolvency of Corporate Groups: A Comparative Analysis*" (2007), ANNREVINSOLV 16, at p. 3).

[90] In this case, I have concluded that it is not appropriate to invoke this extraordinary remedy. The assets are held separately and audited financial statements exist for RIC and RCC. The governing loan documents clearly set out that the corporations are separate and that the obligations of RIC to RCC are subject to a GSA. Referencing *Northland,* the "elements of consolidation" are not present. Furthermore, there would also be significant financial prejudice to creditors of RCC if substantive consolidation were ordered.

[91] In the result, an order shall issue that the three corporate entities are not be to substantially consolidated.

Costs

[92] The parties have previously provided costs outlines to the court, which should be incorporated into a draft order for my review.

Regional Senior Justice G.B. Morawetz

Date: October 5, 2016

TAB 14

[IN THE COURT OF APPEAL.]

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RISDON IRON AND LOCOMOTIVE WORKS *v.* FURNESS.

Company—Limited Liability—Company formed for purpose of Trading in Foreign Country—Personal Liability of Shareholders under the Foreign Law—Conflict of Laws.

An English company, incorporated under the Joint Stock Companies Acts as a limited company, was formed for the purpose of acquiring and working mines in (amongst other countries) the United States of America, and by the articles of association the directors were empowered to do all things necessary to comply with the requirements of the law of any country where the company might carry on business. The company acquired and worked mines in the State of California, and for the purposes of those mines purchased from the plaintiffs, manufacturers in California, certain machinery. By the law of California every shareholder of a company, whether incorporated in California or elsewhere trading within that State is personally liable for such proportion of the company's debts as the amount of his shares bears to the whole of the subscribed capital of the company. The company having become insolvent, the plaintiffs sued the defendant, a shareholder of the company, in this country for his proportion of the price of the machinery:—

Held, that the defendant did not by becoming a member of the company upon the terms of the memorandum and articles of association authorize the directors to pledge his personal credit for the price of the goods supplied, and that, in the absence of express authority on his part, the action could not be maintained against him.

Judgment of Kennedy J., [1905] 1 K. B. 304, affirmed.

APPEAL from a judgment of Kennedy J. on the argument of a point of law raised on pleadings, reported [1905] 1 K. B. 304.

The allegations of the statement of claim were to the following effect:—

The plaintiffs are a corporation incorporated under the laws of the State of California, in the United States of America, and carry on the business of general machinery manufacturers in that State.

The defendant is a shareholder in a company called the "Copper King, Limited," whose registered offices are in the city of London, and was at all material times the holder of shares in the company.

The Copper King, Limited, was registered as a joint stock

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company under the Companies Acts, 1862—1898, with a capital divided into shares of 1*l.* each, all of which was fully subscribed, and by its memorandum of association the objects for which the company was incorporated were (inter alia) :—

To acquire any copper or other mines in the United States of America, Australia, and elsewhere;

To search for, crush, win, get, and prepare for market ore and mineral substances of all kinds;

To purchase machinery and materials of every kind requisite for the purposes of the company;

To carry out all or any of the foregoing objects in any parts of the world either as principals or agents;

To do all other things incidental or conducive to the attainment of the above objects.

Under the articles of association the directors were empowered by art. 87 (L) to "do all such other things and take such steps as may be now or at any time become necessary so as to comply with any statutory enactment, rule, or regulation in any country, colony, or place where the company may carry on business, or where all or any part of the property and undertaking of the company may be situate."

Pursuant to the terms of the memorandum and articles of association, and until its bankruptcy and winding-up hereinafter specified, the Copper King, Limited, carried on business in the State of California.

Between September 30 and December 15, 1902, the plaintiffs, in accordance with contracts made by and between themselves and the Copper King, Limited, supplied and delivered machinery and goods to and did certain work and labour for the Copper King, Limited, at the price of $10,404·96. The Copper King, Limited, failed to pay the plaintiffs the said sum or any part thereof, and on February 4, 1903, the plaintiffs commenced an action against the Copper King, Limited, in the Superior Court of the city and county of San Francisco, in the United States of America, for the said sum.

In or about the month of June, 1903, and before the action had been tried, certain creditors of the Copper King, Limited, filed a petition in bankruptcy against the company, and subsequently

the company was adjudicated bankrupt according to the laws of the United States.

In consequence of the adjudication of bankruptcy the action and all further proceedings therein were stayed, and the costs and expenses which the plaintiffs had incurred were lost.

At an extraordinary general meeting held at the registered offices of the company the shareholders of the Copper King, Limited, passed a resolution that the company should be voluntarily wound up, and that resolution was duly confirmed.

By art. 12 of the Constitution of the State of California it is provided as follows:—

By s. 3 (so far as is material to this action), "Each stockholder of a corporation or joint stock association shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation."

By s. 15, "No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favourable terms than are prescribed by law to similar corporations organized under the laws of this State."

By s. 322 of the Civil Code of the State of California it is provided as follows:—

"Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each and in such action the Court must ascertain the proportion of the claim or debt for which each defendant is liable and a several judgment must be rendered against each in conformity therewith. If any stockholder pay his proportion of any debt due from the corporation incurred while he was such stockholder he is relieved from any further personal liability for such debt and if an action has

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been brought against him upon such debt it shall be dismissed as to him upon his paying the costs or such proportion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred, and such liability is not released by any subsequent transfer of stock. . . . . In corporations having no capital stock each member is individually and personally liable for his proportion of its debts and liabilities and similar actions may be brought against him either alone or jointly with other members to enforce such liability as by this section may be brought against one or more stockholders and similar judgments may be rendered. The liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within this State shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this State."

The Copper King, Limited, so carrying on business as aforesaid in the State of California, and the defendant as a member and shareholder, became and were subject to the laws of the State. The defendant as a shareholder is personally liable for the sum of 405*l.* 15*s.*, being the proportion of the debts of the Copper King, Limited, that the amount of his shares therein bears to the total subscribed capital of the company.

The defendant pleaded (inter alia) that the statement of claim disclosed no cause of action.

At the hearing judgment was given for the defendant. (1

The plaintiffs appealed.

M. Lush, K.C., and *Ernest Pollock, K.C.*, for the plaintiffs. The defendant was a shareholder in a company registered in California, and subject to the law of that State, which creates a personal liability on the part of individual members of the company for its debts. There was therefore created a transitory cause of action, and the defendant can be sued in England. If he had been sued in California, and judgment obtained against

(1) [1905] 1 K. B. 304.

him, he would have been liable in an action in these Courts on that judgment, and the same result should follow if he is sued in these Courts in the first instance. The defendant cannot be called upon to contribute to the company of which he is a member beyond the agreed limit, but he authorized the company to act as his agent to bind his credit. This is the necessary consequence of the liberty given to the company to trade in California. A person dealing with the company in California would act with knowledge that the law of that State created a personal liability on the shareholders of the company, and in these circumstances privity of contract existed between the plaintiffs and the defendant. In *Bank of Australasia* v. *Harding* (1) the liability arose because the company was carrying on business under the protection of the colonial laws. It did not matter whether the shareholder had notice as to what those laws were; his liability was enforceable because the colonial law constituted the chairman, when being sued, an agent for the members of the company, and when his liability was established, by judgment recovered against him, the liability of the shareholders to contribute followed and was enforceable in this country. The cases of *Bank of Australasia* v. *Nias* (2) and *Copin* v. *Adamson* (3) also shew liability on the part of a shareholder without its being necessary to prove notice to him of the laws of the foreign State in which the company is carrying on business. It is sufficient to shew that by the memorandum and articles it was contemplated that the company should carry on business in California, and that fact gave authority to register the company there so as to create liability to the laws of that State. The defendant, in fact, made the company his agent to incur legal liabilities on his behalf. The memorandum of association is certainly wide enough to support this argument, for it includes power to do "all other things incidental or conducive to the attainment of the above objects," that is, the carrying on of the business of the company in, among other parts of the world, the State of California. In Lindley on Companies, 6th ed., vol. ii., p. 1222, it is said, "The

(1) (1850) 9 C. B. 661. (2) (1851) 16 Q. B. 717.
(3) (1874) L. R. 9 Ex. 345.

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right of a corporation to sue in a foreign country, as well as its right to contract in a foreign country, are both based, not on the law of the State creating the body corporate, but on the extent to which the foreign State chooses to recognize that law"; but the author adds, "It is curious, however, that this point should never have been discussed or formally decided in this country." Therefore the company when trading in California should be treated as reincorporated there and subject to Californian law, and not as a company subject to limitations imposed by English law. A reference to this matter is also to be found in Story on Conflict of Laws, 8th ed., s. 106, note, where the restrictions are given which are imposed by various countries as a condition of the ability of a corporation to trade within the limits of those countries. In view of the fact that the defendant has authorized the directors of the company to take such steps as may be necessary to comply with the law of any country in which the company carries on business there is no inconsistency between the limited liability in this country, as between the company and its shareholders, and the statutory liability imposed by the law of California on the shareholders in respect of debts of the company. The case of *Pinney* v. *Nelson* (1) is in point. The learned judge in the Court below overlooked a passage at p. 146 of the report, which shews that under the laws of the State of Colorado there was a limitation of the liability of the shareholders of the company. The company was incorporated in that State, and one of its purposes was expressed to be to carry on business in the State of California. It did so and incurred liabilities, and it was held that the contract of the shareholders inter se must be assumed to have been made with reference to the laws of California, which make a shareholder liable for his proportion of the debts of his company. It can make no difference, considering the wide terms of the liberty to trade in foreign countries in the present case, that the State of California is not specifically mentioned. There was a sufficiently definite submission to the law of California, and under that law the defendant incurred the liability on which he is sued in this action.

(1) (1901) 183 U. S. 144.

[They cited also *Lloyd* v. *Guibert* (1) and *Mostyn* v. *Fabrigas*. (2)]

J. A. Hamilton, K.C., and *Leck*, for the defendant, were not called on to argue.

COLLINS M.R. This is an appeal from a judgment of Kennedy J. upon what is the modern substitute for a demurrer, and a question of law has to be decided before the facts of the case are definitely ascertained. We have, therefore, to decide the point upon the facts as they are stated in the pleadings. It appears that the defendant was a member of a limited company registered under the Companies Acts, 1862—1898, and among other objects for which the company was incorporated were—to acquire copper mines in any part of the world, including the United States of America, to search for the mineral, and to purchase machinery and materials of every kind requisite for the purposes of the company. In carrying out these objects the directors were empowered to take such steps as might be necessary to comply with any statutory enactment, rule, or regulation in any place where the company might carry on business. The company, with a view to carrying on business in California, caused itself to be registered there, and the law of that State imposes on companies trading there certain conditions. One of those conditions is that each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of the claim payable by each. There is, further, a provision to this effect: "The liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within this State, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this State."

(1) (1865) L. R. 1 Q. B. 115.

(2) (1774) 1 Smith's Leading Cases, 11th ed. at p. 627; 1 Cowp. 161.

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It appears, therefore, that by the law of the State of California a remedy is given to a creditor of a company, not merely against the company with which the contract was made, but against the individual shareholders in proportion to their holdings in the company. That individual liability could not and does not arise by reason merely that the person is a shareholder of the company, and if it is to be held that, by reason of the company of which he is a member entering into contracts and carrying on business in California, his liability as a member of that company is altered, it must be on the ground that he had authorized the company to carry on business there on the terms that he should become liable according to the law of California, and not according to the constitution of the company of which he was a member. I do not express an opinion as to how the case would stand if the defendant were shewn to have in fact assented to the company carrying on business in California on the terms that he should incur personal liability in accordance with the law of that State. If this were shewn, or if facts were proved from which it could be inferred that he had authorized the mode of trading under the particular conditions which imposed a liability on him, the case might be different. It is not necessary to decide that point, because in this case it is sought to infer liability merely from the provisions in the memorandum of association under which the company caused itself to be registered in California and carried on business there. On the facts of this case it cannot be and ought not to be inferred that the defendant authorized the company to pledge his credit in the manner suggested, and unless such an authority is found as a fact or can be properly inferred from the agreed facts no liability can arise. I agree with Kennedy J., who has pointed out in his judgment that, though there are general provisions as to the company carrying on business in foreign countries, there is always the underlying and essential fact of its incorporation as an English company and the fundamental fact that it is a limited company. Primâ facie the provisions of the memorandum of association must be taken to give power to do things not inconsistent with the constitution of the company under the memorandum and articles of association, but it cannot be assumed that because there is liberty

to trade in a foreign country, the company is released from the fundamental condition which limits the liability of its members. To arrive at any other conclusion there must be something more than the fact that the company, which is a limited company, is authorized by its memorandum of association to do certain things. The authority to do these things is given to a limited company, and it can only do them subject to the limited liability of its shareholders, which is a fundamental condition of its existence. Certain authorities have been cited to us, of which certainly the English authorities appear to be entirely consistent with the view that I have expressed. In each of the two cases *Bank of Australasia* v. *Harding* (1) and *Bank of Australasia* v. *Nias* (2) the defendant, who was held liable by foreign law, he himself not being resident on the spot, and not being served with process according to English law, was a member of a company whose constitution provided for the very thing that was done. Being a member of a company so constituted, of course he could not avoid being responsible, and he was held to be made liable in terms to which he had expressly consented. In *Copin* v. *Adamson* (3) an effort was made in the second replication in an action on a foreign judgment to fix the shareholder in a French (4) company with liability, under the law of France, the country where the work of the company had been carried on, without reference to the statutes and articles of association of the company, and this attempt failed, for the Court held that his rights must be ascertained with reference to the contract to which he himself was a party. It was also said that there were decisions in the Courts of the United States which supported the arguments put forward on behalf of the plaintiffs, and the case relied on was *Pinney* v. *Nelson*. (5) When that case is examined it appears to be distinguishable from the present one upon the grounds stated by Kennedy J. in his judgment. By the

(1) 9 C. B. 661.
(2) 16 Q. B. 717.
(3) L. R. 9 Ex. 345.
(4) The name of the company is given in the report as "Société de Commerce de France, Limited," but see Lord Cairns's judgment in C.A., 1 Ex. D. at p. 18; the appeal was on the first replication alone, which did rely on the statutes of the company. —F.P.
(5) 183 U. S. 144.

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constitution of the company in that case there were provisions out of which the Court inferred that there was an express agreement, to which all the shareholders must be taken to be parties, that the business of the company should be conducted in a named and foreign State. The inference of fact was that every person who could be said to be a party to the initiation and incorporation of that company must be taken to have authorized the company to trade in California, that being the special object with which the company was incorporated. That was the inference of fact that was drawn. It is not for us to canvass whether it was rightly drawn or not in that case. In the case before us there is a complete absence of the materials on which the inference was drawn in that case. It seems to me that the case is distinguishable from the present, and in my opinion the decision of the learned judge was right and the appeal must be dismissed.

ROMER L.J. I agree with the judgments of my brother Kennedy and my Lord. The sole question is whether under the circumstances stated in the pleadings the defendant must be taken by implied authority to have contracted with the plaintiffs to be liable individually for a portion of the debt due to them from the Copper King Company, of which he was a shareholder. I need only say that the facts fail to establish any such authority or contract. There are admittedly no facts that could establish such a contract or liability except the fact that the defendant became a shareholder in the limited company that had an intention to trade in foreign parts, and obtained authority to do so under the memorandum of association and traded in California. In my view the memorandum and articles of association, rightly construed, cannot be treated as an authority, by every shareholder of the company, to the company, or its directors or agents, to carry on business in a foreign country so as to make the shareholder liable beyond the limited liability under which he came as a member of the company by virtue of the English law.

If this is the correct view—and it appears to me to be clear that it is—this appeal fails. If there was no authority there

was clearly no contract, and if there is no contract there is no way by virtue of which the defendant could be made liable in this country to the plaintiffs. I need hardly point out that the shareholder and the company are different entities, and that the judgment obtained abroad is a judgment against the company, which prima facie does not affect the shareholder. If the shareholder and the company are treated as different entities the plaintiffs cannot by law enforceable in this country say that the company, trading in California, must, though without authority from the shareholder, nevertheless be held to have contracted so as to make him liable. There is no ground on which liability on the part of the defendant to the plaintiff can be legally based. The decision of the learned judge was right, and the appeal, consequently, fails.

MATHEW L.J. I am of the same opinion. The fundamental rule under which the company, of which the defendant is a member, is carried on in England, is that the personal credit of a shareholder cannot be pledged. It is said that the memorandum of association rescinds that fundamental principle and enables the company to carry on its business abroad, on the terms that the individual shareholder is to be liable as if it were an unlimited company. In order to establish that proposition, it is necessary to shew a contract on the part of the shareholder to make himself liable to that extent. The plaintiffs in this case fail to shew even knowledge on the part of the defendant of the existence in California, where the work of the company was being carried on, of a law having that effect, and they are unable to shew any request or assent by the defendant. That being so, it seems to be clear that the appeal fails.

Appeal dismissed.

Solicitors for plaintiffs: *Balfour, Allan & North.*
Solicitors for defendant: *W. A. Crump & Son.*

A. M.

TAB 15

[HOUSE OF LORDS.]

H. L. (E.) 1896 Nov. 16.

ARON SALOMON (PAUPER) . . . . . APPELLANT;

AND

A. SALOMON AND COMPANY, LIMITED RESPONDENTS.

BY ORIGINAL APPEAL.

AND

A. SALOMON AND COMPANY, LIMITED APPELLANTS;

AND

ARON SALOMON . . . . . RESPONDENT.

BY CROSS APPEAL.

Company—Private Company—One Man Company—Limited Liability—Winding-up—Fraud upon Creditors—Liability to indemnify Company in respect of Debts—Rescission—Companies Act 1862 (25 & 26 *Vict. c.* 89) *ss.* 6, 8, 30, 43.

It is not contrary to the true intent and meaning of the Companies Act 1862 for a trader, in order to limit his liability and obtain the preference of a debenture-holder over other creditors, to sell his business to a limited company consisting only of himself and six members of his own family, the business being then solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the Act being complied with.

A trader sold a solvent business to a limited company with a nomina capital of 40,000 shares of 1*l.* each, the company consisting only of the vendor, his wife, a daughter and four sons, who subscribed for one share each, all the terms of sale being known to and approved by the shareholders.

In part payment of the purchase-money debentures forming a floating security were issued to the vendor. Twenty thousand shares were also issued to him and were paid for out of the purchase-money. These shares gave the vendor the power of outvoting the six other shareholders. No shares other than these 20,007 were ever issued. All the requirements of the Companies Act 1862 were complied with. The vendor was appointed managing director, bad times came, the company was wound up, and after satisfying the debentures there was not enough to pay the ordinary creditors:—

Held, that the proceedings were not contrary to the true intent and meaning of the Companies Act 1862; that the company was duly formed and registered and was not the mere "alias" or agent of or trustee for the vendor; that he was not liable to indemnify the company against the creditors' claims; that there was no fraud upon creditors or shareholders; and that the company (or the liquidator suing in the name of the company) was not entitled to rescission of the contract for purchase.

The decisions of Vaughan Williams J. and the Court of Appeal ([1895] 2 Ch. 323) reversed.

THE following statement of the facts material to this report is taken from the judgment of Lord Watson:—

The appellant, Aron Salomon, for many years carried on business, on his own account, as a leather merchant and wholesale boot manufacturer. With the design of transferring his business to a joint stock company, which was to consist exclusively of himself and members of his own family, he, on July 20, 1892, entered into a preliminary agreement with one Adolph Anholt, as trustee for the future company, settling the terms upon which the transfer was to be made by him, one of its conditions being that part payment might be made to him in debentures of the company. A memorandum of association was then executed by the appellant, his wife, a daughter, and four sons, each of them subscribing for one share, in which the leading object for which the company was formed was stated to be the adoption and carrying into effect, with such modifications (if any) as might be agreed on, of the provisional agreement of July 20. The memorandum was registered on July 28, 1892; and the effect of registration, if otherwise valid, was to incorporate the company, under the name of "Aron Salomon and Company, Limited," with liability limited by shares, and having a nominal capital of 40,000*l.*, divided into 40,000 shares of 1*l.* each. The company adopted

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the agreement of July 20, subject to certain modifications which are not material; and an agreement to that effect was executed between them and the appellant on August 2, 1892. Within a month or two after that date the whole stipulations of the agreement were fulfilled by both parties. In terms thereof, 100 debentures, for 100*l.* each, were issued to the appellant, who, upon the security of these documents, obtained an advance of 5000*l.* from Edmund Broderip. In February 1893 the original debentures were returned to the company and cancelled; and in lieu thereof, with the consent of the appellant as beneficial owner, fresh debentures to the same amount were issued to Mr. Broderip, in order to secure the repayment of his loan, with interest at 8 per cent.

In September 1892 the appellant applied for and obtained an allotment of 20,000 shares; and from that date until an order was made for its compulsory liquidation, the share register of the company remained unaltered, 20,001 shares being held by the appellant, and six shares by his wife and family. It was all along the intention of these persons to retain the business in their own hands, and not to permit any outsider to acquire an interest in it.

Default having been made in the payment of interest upon his debentures, Mr. Broderip, in September 1893, instituted an action in order to enforce his security against the assets of the company. Thereafter a liquidation order was made, and a liquidator appointed, at the instance of unsecured creditors of the company. It has now been ascertained that, if the amount realised from the assets of the company were, in the first place, applied in extinction of Mr. Broderip's debt and interest, there would remain a balance of about 1055*l.*, which is claimed by the appellant as beneficial owner of the debentures. In the event of his claim being sustained there will be no funds left for payment of the unsecured creditors, whose debts amount to 7733*l.* 8*s.* 3*d.*

The liquidator lodged a defence, in name of the company, to the debenture suit, in which he counter-claimed against the appellant (who was made a party to the counter-claim), (1.) to have the agreements of July 20 and August 2, 1892 rescinded,

(2.) to have the debentures already mentioned delivered up and cancelled, (3.) judgment against the appellant for all sums paid by the company to the appellant under these agreements, and (4.) a lien for these sums upon the business and assets. The averments made in support of these claims were to the effect that the price paid by the company exceeded the real value of the business and assets by upwards of 8200*l.*; that the arrangements made by the appellant for the formation of the company were a fraud upon the creditors of the company; that no board of directors of the company was ever appointed, and that in any case such board consisted entirely of the appellant, and there never was an independent board. The action came on for trial on the counter-claim before Vaughan Williams J., when the liquidator was examined as a witness on behalf of the company, whilst evidence was given for the appellant by himself, and by his son, Emanuel Salomon, one of the members of the company, who had been employed in the business for nearly twenty years.

The evidence shews that, before its transfer to the new company, the business had been prosperous, and had yielded to the appellant annual profits sufficient to maintain himself and his family, and to add to his capital. It also shews that at the date of transfer the business was perfectly solvent. The liquidator, whose testimony was chiefly directed toward proving that the price paid by the company was excessive, admitted on cross-examination that the business, when transferred to the company, was in a sound condition, and that there was a substantial surplus. No evidence was led tending to support the allegation that no board of directors was ever appointed, or that the board consisted entirely of the appellant. The non-success and ultimate insolvency of the business, after it came into the hands of the company, was attributed by the witness Emanuel Salomon to a succession of strikes in the boot trade, and there is not a tittle of evidence tending to modify or contradict his statement. It also appears from the evidence that all the members of the company were fully cognisant of the terms of the agreements of July 20 and August 2, 1892, and that they were willing to accept and did accept these terms.

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At the close of the argument Vaughan Williams J. announced that he was not prepared to grant the relief craved by the company. He at the same time suggested that a different remedy might be open to the company; and, on the motion of their counsel, he allowed the counter-claim to be amended. In conformity with the suggestion thus made by the Bench, a new and alternative claim was added for a declaration that the company or the liquidator was entitled (1.) to be indemnified by the appellant against the whole of the company's unsecured debts, namely, 7733*l.* 8*s.* 3*d.*; (2.) to judgment against the appellant for that sum; and (3.) to a lien for that amount upon all sums which might be payable to the appellant by the company in respect of his debentures or otherwise until the judgment was satisfied. There were also added averments to the effect that the company was formed by the appellant, and that the debentures for 10,000*l.* were issued in order that he might carry on the business, and take all the profits without risk to himself; and also that the company was the "mere nominee and agent" of the appellant.

Vaughan Williams J. made an order for a declaration in the terms of the new and alternative counter-claim above stated, without making any order on the original counter-claim.

Both parties having appealed, the Court of Appeal (Lindley, Lopes and Kay L.JJ.) being of opinion that the formation of the company, the agreement of August 1892, and the issue of debentures to the appellant pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismissed the appeal with costs, and declined to make any order on the original counter-claim. (1)

Against this order the appellant appealed, and the company brought a cross-appeal against so much of it as declined to make any order upon the original counter-claim. Broderip having been paid off was no party to this appeal or cross-appeal.

(1) Reported as *Broderip* v. *Salomon*, [1895] 2 Ch. 323.

June 15, 22, 29. *Cohen Q.C.* and *Buckley Q.C.* (*McCall Q.C.* and *Muir Mackenzie* with them), for the appellant in the original appeal. The view of Vaughan Williams J. that the company was the mere alias or agent of the appellant so as to make him liable to indemnify the company against creditors, was not adopted by the Court of Appeal, who seem to have considered the company as the appellant's trustee. There is no evidence in favour of either view. The sale of the business was bonâ fide: the business was genuine and solvent, with a substantial surplus. All the circumstances were known to and approved by the shareholders. All the requirements of the Companies Act, 1862, were strictly complied with: the purpose was lawful, the proceedings were regular. How could the registrar refuse to register such a company? What objection is it that the vendor desires to convert his unlimited into a limited liability? That is the prime object of turning a private business into a limited company, practised every day by banks and other great firms. And what difference to creditors could it make whether the debentures were held by the vendor or by strangers? Whoever held them had the preference over creditors—that is the future creditors—all the old creditors having been paid off by the vendor. There was no misrepresentation of fact, and no one was misled: where is "the fraud upon creditors" spoken of in the Court of Appeal? The creditors were under no obligation to trust the company; they might, if they had desired, have found out who held the shares, and in what proportion, and who held the debentures. There is not a word in ss. 6, 8, 30, 43, or any other section of the Companies Act, 1862, forbidding or even pointing against such a company so formed and for such objects. Then, if the company was a real company, fulfilling all the requirements of the Legislature, it must be treated as a company, as an entity, consisting indeed of certain corporators, but a distinct and independent corporation. The Court of Appeal seem to treat the company sometimes as substantial and sometimes as shadowy and unreal: it must be one or the other, it cannot be both. A Court cannot impose conditions not imposed by the Legislature, and say that the shareholders must not be related

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to each other, or that they must hold more than one share each. There is nothing to prevent one shareholder or all the shareholders holding the shares in trust for some one person. What is prohibited is the entry of a trust on the register: s. 30. If all the shares were held in trust that would not make the company a trustee. The authorities relied upon below (which all turn upon some one being deceived or defrauded) do not touch the present case and do not support the judgment below.

[They referred to *Reg.* v. *Arnaud* (1); *In re Ambrose Lake Tin and Copper Mining Co.* (2); *In re British Seamless Paper Box Co.* (3); *Farrar* v. *Farrars, Limited* (4); *North-West Transportation Co.* v. *Beatty* (5); *In re National Debenture and Assets Corporation* (6); *In re George Newman & Co.* (7)]

As to the cross-appeal, there being no fraud, misrepresentation or deceit, not even any failure of consideration, there is no ground for rescission. Moreover, the company's assets having been sold the company is not in a position to ask for it.

Farwell Q.C. and *H. S. Theobald*, for the respondents. The question is one of fact rather than law, and the true inferences from the facts are these: The appellant incorporated the company to carry on his business without risk to himself and at his creditors' expense. The business was decaying when the company was formed, and though carried on as before, nay with more (borrowed) money, it failed very soon after the sale. To get an advantage over creditors the vendor took debentures and concealed the fact from them. The purchase-money was exorbitant, the price dictated solely by the vendor, and there was no independent person acting for the company. Though incorporated under the Acts the company never had an independent existence: it was in fact the appellant under another name; he was the managing director, the other directors being his sons and under his control. The shareholders other than himself were his own family, and his vast preponderance of shares made him absolute master.

(1) (1846) 9 Q. B. 806.
(2) (1880) 14 Ch. D. 390, 394, 398.
(3) (1881) 17 Ch. D. 467, 476, 479.
(4) (1888) 40 Ch. D. 395.
(5) (1887) 12 App. Cas. 589.
(6) [1891] 2 Ch. 505.
(7) [1895] 1 Ch. 674, 685.

He could pass any resolution, and he would receive all the profits—if any. Whether therefore the company is considered as his agent, or his nominee or his trustee, matters little. The business was solely his, conducted solely for him and by him, and the company was a mere sham and fraud, in effect entirely contrary to the intent and meaning of the Companies Act. The liquidator is therefore entitled to counter-claim against him for an indemnity. As to the cross-appeal and the claim for rescission the decision in *Erlanger* v. *New Sombrero Phosphate Co.* (1) and the observations of Lord Cairns are precisely applicable and conclusive in favour of rescission. See also *Adam* v. *Newbigging*. (2)

[LORD WATSON referred to *Western Bank of Scotland* v. *Addie* (3), following *Clarke* v. *Dickson*. (4)]

[They also referred to *Ex parte Cowen* (5) ; *In re Smith*. (6)]

The House took time for consideration.

Nov. 16. LORD HALSBURY L.C. My Lords, the important question in this case, I am not certain it is not the only question, is whether the respondent company was a company at all—whether in truth that artificial creation of the Legislature had been validly constituted in this instance; and in order to determine that question it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.

Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not

(1) (1878) 3 App. Cas. 1218, 1236, 1238.
(2) (1888) 13 App. Cas. 308.
(3) (1867) L. R. 1 H. L., Sc. 145.
(4) (1858) E. B. & E. 148.
(5) (1867) L. R. 2 Ch. 563.
(6) (1890) 25 Q. B. D. 536, 541.

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be competent to any one—and certainly not to these persons themselves—to deny that they were shareholders.

I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of inquiry which the statute itself recognises as legitimate. If they are shareholders, they are shareholders for all purposes; and even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the cestuis que trust of the seventh, whatever might be their rights inter se, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities, and, dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body.

I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence—quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of scire facias you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

I will for the sake of argument assume the proposition that

the Court of Appeal lays down—that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

I observe that the learned judge (Vaughan Williams J.) held that the business was Mr. Salomon's business, and no one else's, and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent (the company). I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

Lindley L.J., on the other hand, affirms that there were seven members of the company; but he says it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the Legislature intended not to be done.

It is obvious to inquire where is that intention of the Legislature manifested in the statute. Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the Legislature is, or was. In this particular case it is the members of one family that represent all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven shareholders must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as

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to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the Legislature—a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the Legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute.

As one mode of testing the proposition, it would be pertinent to ask whether two or three, or indeed all seven, may constitute the whole of the shareholders? Whether they must be all independent of each other in the sense of each having an independent beneficial interest? And this is a question that cannot be answered by the reply that it is a matter of degree. If the Legislature intended to prohibit something, you ought to know what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. Where am I to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person?

My Lords, I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted—that the business was the business of Aron Salomon, and that the company is variously described as a myth and a fiction. Lopes L.J. says: "The Act contemplated the incorporation of seven independent bonâ fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader." The words "seven independent bonâ fide members with a mind and will of their own, and not the puppets of an individual," are by construction to be read into the Act. Lopes L.J. also said that the company was a mere nominis umbra. Kay L.J. says: "The statutes were intended to allow seven or more persons, bonâ fide associated for the purpose of trade, to limit their liability under certain conditions and to become a corporation. But they were not intended to legalise a pretended association for the purpose of

enabling an individual to carry on his own business with limited liability in the name of a joint stock company."

My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.

Vaughan Williams J. appears to me to have disposed of the argument that the company (which for this purpose he assumed to be a legal entity) was defrauded into the purchase of Aron Salomon's business because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognisant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded.

The proposition laid down in *Erlanger* v. *New Sombrero Phosphate Co.* (1), (I quote the head-note), is that "Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it." But if every member of the company—every shareholder—knows exactly what is the true state of the facts (which for this purpose must be assumed to be the case here), Vaughan Williams J.'s conclusion seems to me to be inevitable that no case of fraud upon the company could here be established. If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.

My Lords, the truth is that the learned judges have never allowed in their own minds the proposition that the company

(1) 3 App. Cas. 1218.

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has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be in influence and authority the whole company; and, assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law; and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned judges below; but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which are implied in some of the observations made by more than one of the learned judges. The appellant, in my opinion, is not shewn to have done or to have intended to do anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own.

The result is that I move your Lordships that the judgment appealed from be reversed, but as this is a pauper case, I regret to say it can only be with such costs in this House as are appropriate to that condition of things, and that the cross-appeal be dismissed with costs to the same extent.

LORD WATSON. My Lords, this appeal raises some questions of practical importance, depending upon the construction of the Companies Acts, which do not appear to have been settled by previous decisions. As I am not prepared to accept without reservation all the conclusions of fact which found favour with the Courts below, I shall, before adverting to the law, state what I conceive to be the material facts established by the evidence before us. [His Lordship stated the facts above set out.]

The allegations of the company, in so far as they have any relation to the amended claim, their pith consisting in the aver-

ments made on amendment, were meant to convey a charge of fraud; and it is unfortunate that they are framed in such loose and general terms. A relevant charge of fraud ought to disclose facts necessitating the inference that a fraud was perpetrated upon some person specified. Whether it was a fraud upon the company and its members, or upon persons who had dealings with the company, is not indicated, although there may be very different considerations applicable to those two cases. The res gestæ which might imply that it was the appellant, and not the company, who actually carried on its business, are not set forth. Any person who holds a preponderating share in the stock of a limited company has necessarily the intention of taking the lion's share of its profits without any risk beyond loss of the money which he has paid for, or is liable to pay upon his shares; and the fact of his acquiring and holding debentures secured upon the assets of the company does not diminish the risk of that loss. What is meant by the assertion that the company "was the mere nominee or agent" of the appellant I cannot gather from the record; and I am not sure that I understand precisely in what sense it was interpreted by the learned judges whose decisions we have to consider.

No additional proof was led after the amendment of the counter-claim. The oral testimony has very little, if any, bearing upon the second claim; and any material facts relating to the fraudulent objects which the appellant is said to have had in view, and the alleged position of the company as his nominee or agent, must be mere matter of inference derived from the agreements of July 20 and August 2, 1892, the memorandum and articles of association, and the minute-book of the company.

On rehearing the case Vaughan Williams J., without disposing of the original claim, gave the company decree of indemnity in terms of their amended claim. I do not profess my ability to follow accurately the whole chain of reasoning by which the learned judge arrived at that conclusion; but he appears to have proceeded mainly upon the ground that the appellant was in truth the company, the other members being either his trustees or mere "dummies," and consequently that

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the appellant carried on what was truly his own business under cover of the name of the company, which was nothing more than an alias for Aron Salomon. On appeal from his decision, the Court of Appeal, consisting of Lindley, Lopes, and Kay L.JJ., made an order finding it unnecessary to deal with the original claim, and dismissing the appeal in so far as it related to the amended claim. The ratio upon which that affirmance proceeded, as embodied in the order, was: "This Court being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures." The opinions delivered by the Lords Justices are strictly in keeping with the reasons assigned in their order. Lindley L.J., observing "that the incorporation of the company cannot be disputed," refers to the scheme for the formation of the company, and says (1): "the object of the whole arrangement is to do the very thing which the Legislature intended not to be done"; and he adds that "Mr. Salomon's scheme is a device to defraud creditors."

Assuming that the company was well incorporated in terms of the Act of 1862, an assumption upon which the decisions appealed from appear to me to throw considerable doubt, I think it expedient, before considering the amended claim, to deal with the original claim for rescission, which was strongly pressed upon us by counsel for the company, under their cross-appeal. Upon that branch of the case there does not appear to me to be much room for doubt. With this exception, that the word "exorbitant" appears to me to be too strong an epithet, I entirely agree with Vaughan Williams J. when he says: "I do not think that where you have a private company, and all the shareholders in the company are perfectly cognisant of the conditions under which the company is formed, and the conditions

(1) [1895] 2 Ch. 337, 339.

of the purchase by the company, you can possibly say that purchasing at an exorbitant price (and I have no doubt whatever that the purchase here was at an exorbitant price) is a fraud upon those shareholders or upon the company." The learned judge goes on to say that the circumstances might have amounted to fraud if there had been an intention on the part of the original shareholders "to allot further shares at a later period to future allottees." Upon that point I do not find it necessary to express any opinion, because it is not raised by the facts of the case, and, in any view, these considerations are of no relevancy in a question as to rescission between the company and the appellant.

Mr. Farwell argued that the agreement of August 2 ought to be set aside upon the principle followed by this House in *Erlanger* v. *New Sombrero Phosphate Co.* (1) In that case the vendor, who got up the company, with the view of selling his adventure to it, attracted shareholders by a prospectus which was essentially false. The directors, who were virtually his nominees, purchased from him without being aware of the real facts; and on their assurance that, in so far as they knew, all was right, the shareholders sanctioned the transaction. The fraud by which the company and its shareholders had been misled was directly traceable to the vendor; and it was set aside at the instance of the liquidator, the Lord Chancellor (Earl Cairns) expressing a doubt whether, even in those circumstances, the remedy was not too late after a liquidation order. But in this case the agreement of July 20 was, in the full knowledge of the facts, approved and adopted by the company itself, if there was a company, and by all the shareholders who ever were, or were likely to be, members of the company. In my opinion, therefore, *Erlanger* v. *New Sombrero Phosphate Co.* (1) has no application, and the original claim of the liquidator is not maintainable.

The Lords Justices of Appeal, in disposing of the amended claim, have expressly found that the formation of the company, with limited liability, and the issue of 10,000*l.* worth of its debentures to the appellant, were "contrary to the true intent

(1) 3 App. Cas. 1218.

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and meaning of the Companies Act, 1862." I have had great difficulty in endeavouring to interpret that finding. I am unable to comprehend how a company, which has been formed contrary to the true intent and meaning of a statute, and (in the language of Lindley L.J.) does the very thing which the Legislature intended not to be done, can yet be held to have been legally incorporated in terms of the statute. "Intention of the Legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. Accordingly, if the words "intent and meaning," as they occur in the finding of the Appeal Court, are used in their proper legal sense, it follows, in my opinion, that the company has not been well incorporated; that, there being no legal corporation, there can be no liquidation under the Companies Acts, and that the counter-claim preferred by its liquidator must fail. In that case its creditors would not be left without a remedy, because its members, as joint traders without limitation of their liability, would be jointly and severally responsible for the debts incurred by them in the name of the company.

The provisions of the Act of 1862 which seem to me to have any bearing upon this point lie within a very narrow compass. Sect. 6 provides that any seven or more persons, associated for a lawful purpose, such as the manufacture and sale of boots, may, by subscribing their names to a memorandum of association and otherwise complying with the provisions of the Act in respect of registration, form a company with or without limited liability; and s. 8, which prescribes the essentials of the memorandum in the case of a company limited by shares, inter alia, enacts that "no subscriber shall take less than one share." The first of these enactments does not require that the persons subscribing shall not be related to each other; and the second

plainly imports that the holding of a single share affords a sufficient qualification for membership; and I can find no other rule laid down or even suggested in the Act. Nor does the statute, either expressly or by implication, impose any limit upon the number of shares which a single member may subscribe for or take by allotment. At the date of registration all the requirements of the Act had been complied with; and, as matters then stood, there does not appear to have been any room for the pleas now advanced by the liquidator. The company was still free to modify or reject the agreement of July 20; and the fraud of which the appellant has been held guilty by the Court of Appeal, though it may have existed in animo, had not been carried into execution by the acceptance of the agreement, the issue of debentures to the appellant in terms of it, and by his receiving an allotment of shares which increased his interest in the company to $\frac{20001}{20007}$ of its actual capital. I have already intimated my opinion that the acceptance of the agreement is binding on the company; and neither that acceptance, nor the preponderating share of the appellant, nor his payment in debentures, being forbidden by the Act, I do not think that any one of these things could subsequently render the registration of the company invalid. But I am willing to assume that proceedings which are permitted by the Act may be so used by the members of a limited company as to constitute a fraud upon others, to whom they in consequence incur personal liability. In this case the fraud is found to have been committed by the appellant against the creditors of the company; but it is clear that if so, though he may have been its originator and the only person who took benefit from it, he could not have done any one of those things, which taken together are said to constitute his fraud, without the consent and privity of the other shareholders. It seems doubtful whether a liquidator as representing and in the name of the company can sue its members for redress against a fraud which was committed by the company itself and by all its shareholders. However, I do not think it necessary to dwell upon that point, because I am not satisfied that the charge of fraud against creditors has any foundation in fact.

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The memorandum of association gave notice that the main object for which the company was formed was to adopt and carry into effect, with or without modifications, the agreement of July, 1892, in terms of which the debentures for 10,000*l.* were subsequently given to the appellant in part payment of the price. By the articles of association (art. 62 (*e*)) the directors were empowered to issue mortgage or other debentures or bonds for any debts due, or to become due, from the company; and it is not alleged or proved that there was any failure to comply with s. 43 or the other clauses (Part III. of the Act) which relate to the protection of creditors. The unpaid creditors of the company, whose unfortunate position has been attributed to the fraud of the appellant, if they had thought fit to avail themselves of the means of protecting their interests which the Act provides, could have informed themselves of the terms of purchase by the company, of the issue of debentures to the appellant, and of the amount of shares held by each member. In my opinion, the statute casts upon them the duty of making inquiry in regard to these matters. Whatever may be the moral duty of a limited company and its shareholders, when the trade of the company is not thriving, the law does not lay any obligation upon them to warn those members of the public who deal with them on credit that they run the risk of not being paid. One of the learned judges asserts, and I see no reason to question the accuracy of his statement, that creditors never think of examining the register of debentures. But the apathy of a creditor cannot justify an imputation of fraud against a limited company or its members, who have provided all the means of information which the Act of 1862 requires; and, in my opinion, a creditor who will not take the trouble to use the means which the statute provides for enabling him to protect himself must bear the consequences of his own negligence.

For these reasons I have come to the conclusion that the orders appealed from ought to be reversed, with costs to the appellant here and in both Courts below. His costs in this House must, of course, be taxed in accordance with the rule applicable to pauper litigants.

LORD HERSCHELL. My Lords, by an order of the High Court, which was affirmed by the Court of Appeal, it was declared that the respondent company, or the liquidator of that company was entitled to be indemnified by the appellant against the sum of 7733*l.* 8*s.* 3*d.*, and it was ordered that the respondent company should recover that sum against the appellant.

On July 28, 1892, the respondent company was incorporated with a capital of 40,000*l.* divided into 40,000 shares of 1*l.* each. One of the objects for which the company was incorporated was to carry out an agreement, with such modifications therein as might be agreed to, of July 20, 1892, which had been entered into between the appellant and a trustee for a company intended to be formed, for the acquisition by the company of the business then carried on by the appellant. The company was, in fact, formed for the purpose of taking over the appellant's business of leather merchant and boot manufacturer, which he had carried on for many years. The business had been a prosperous one, and, as the learned judge who tried the action found, was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant, his wife and daughter, and his four sons, each subscribing for one share. The appellant afterwards had 20,000 shares allotted to him. For these he paid 1*l.* per share out of the purchase-money which by agreement he was to receive for the transfer of his business to the company. The company afterwards became insolvent and went into liquidation.

In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counter-claim that the company was formed by Aron Salomon, and the debentures were issued in order that he might carry on the said business, and take all the profits without risk to himself; that the company was the mere nominee and agent of Aron Salomon; and that the company or the liquidator thereof was entitled to be indemnified by Aron Salomon against all the debts owing by the company to creditors other than Aron Salomon. This counter-claim was not in the pleading as

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originally delivered; it was inserted by way of amendment at the suggestion of Vaughan Williams J., before whom the action came on for trial. The learned judge thought the liquidator entitled to the relief asked for, and made the order complained of. He was of opinion that the company was only an "alias" for Salomon; that, the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him, and, having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them. On appeal the judgment of Vaughan Williams J. was affirmed by the Court of Appeal, that Court "being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement were a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures."

The learned judges in the Court of Appeal dissented from the view taken by Vaughan Williams J., that the company was to be regarded as the agent of the appellant. They considered the relation between them to be that of trustee and cestui que trust; but this difference of view, of course, did not affect the conclusion that the right to the indemnity claimed had been established.

It is to be observed that both Courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances, I am at a loss to understand what is meant by saying that A. Salomon & Co., Limited, is but an "alias" for A. Salomon. It is not another name for the same person; the company is ex hypothesi a distinct legal persona. As little am I able to adopt the view

that the company was the agent of Salomon to carry on his business for him. In a popular sense, a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled, substantially, to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess.

The Court of Appeal based their judgment on the proposition that the formation of the company and all that followed on it were a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862. The conclusion which they drew from this premiss was, that the company was a trustee and Salomon their cestui que trust. I cannot think that the conclusion follows even if the premiss be sound. It seems to me that the logical result would be that the company had not been validly constituted, and therefore had no legal existence. But, apart from this, it is necessary to examine the proposition on which the Court have rested their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years, been, to use a common expression, converted into joint stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in

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the judgment of the Court of Appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company and the transfer to it of the business is, that whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other respect is it intended that there shall be any difference: the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the Court of Appeal be pushed to its logical conclusion, all these companies must, I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable without limit to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think the learned judges in the Court below have contemplated the application of their judgment to such cases as I have been considering; but I can see no solid distinction between those cases and the present one.

It is said that the respondent company is a "one man" company, and that in this respect it differs from such companies as those to which I have alluded. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided, in each case, the requirements of the statute have been complied with and the company has been validly constituted. How does it concern the creditor

whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person, who practically takes the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. The creditors in the present case gave credit to and contracted with a limited company; the effect of the decision is to give them the benefit, as regards one of the shareholders, of unlimited liability. I have said that the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with; and this leads naturally to the inquiry, What are those requirements?

The Court of Appeal has declared that the formation of the respondent company and the agreement to take over the business of the appellant were a scheme "contrary to the true intent and meaning of the Companies Act." I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares may, however, be of as small a nominal value as those who form the company please: the statute prescribes no minimum; and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The Legislature, therefore, clearly sanctions a scheme by which all the shares except six are owned by a single individual, and these six are of a value little more than nominal.

It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion, it makes no difference. The statute forbids the entry in the register of any trust; and it certainly

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contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum, or who have agreed to become members of the company and whose names are on the register, are alone regarded as, and in fact are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do: it concerns only them and their cestuis que trust if they have any. If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act?

It may be that a company constituted like that under consideration was not in the contemplation of the Legislature at the time when the Act authorizing limited liability was passed; that if what is possible under the enactments as they stand had been foreseen a minimum sum would have been fixed as the least denomination of share permissible; and that it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company and how it is held.

I have hitherto made no reference to the debentures which the appellant received in part-payment of the purchase-money of the business which he transferred to the company. These are referred to in the judgment as part of the scheme which is pronounced contrary to the true intent and meaning of the Companies Act. But if apart from this the conclusion that the appellant is bound to indemnify the company against its debts cannot be sustained, I do not see how the circumstance

that he received these debentures can avail the respondent company. The issue of debentures to the vendor of a business as part of the price is certainly open to great abuse, and has often worked grave mischief. It may well be that some check should be placed upon the practice, and that, at all events, ample notice to all who may have dealings with the company should be secured. But as the law at present stands, there is certainly nothing unlawful in the creation of such debentures. For these reasons I have come to the conclusion that the appeal should be allowed.

It was contended on behalf of the company that the agreement between them and the appellant ought, at all events, to be set aside on the ground of fraud. In my opinion, no such case has been made out, and I do not think the respondent company are entitled to any such relief.

LORD MACNAGHTEN. My Lords, I cannot help thinking that the appellant, Aron Salomon, has been dealt with somewhat hardly in this case.

Mr. Salomon, who is now suing as a pauper, was a wealthy man in July, 1892. He was a boot and shoe manufacturer trading on his own sole account under the firm of "A. Salomon & Co.," in High Street, Whitechapel, where he had extensive warehouses and a large establishment. He had been in the trade over thirty years. He had lived in the same neighbourhood all along, and for many years past he had occupied the same premises. So far things had gone very well with him. Beginning with little or no capital, he had gradually built up a thriving business, and he was undoubtedly in good credit and repute.

It is impossible to say exactly what the value of the business was. But there was a substantial surplus of assets over liabilities. And it seems to me to be pretty clear that if Mr. Salomon had been minded to dispose of his business in the market as a going concern he might fairly have counted upon retiring with at least 10,000*l.* in his pocket.

Mr. Salomon, however, did not want to part with the business. He had a wife and a family consisting of five sons and a

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daughter. Four of the sons were working with their father. The eldest, who was about thirty years of age, was practically the manager. But the sons were not partners: they were only servants. Not unnaturally, perhaps, they were dissatisfied with their position. They kept pressing their father to give them a share in the concern. "They troubled me," says Mr. Salomon, "all the while." So at length Mr. Salomon did what hundreds of others have done under similar circumstances. He turned his business into a limited company. He wanted, he says, to extend the business and make provision for his family. In those words, I think, he fairly describes the principal motives which influenced his action.

All the usual formalities were gone through; all the requirements of the Companies Act, 1862, were duly observed. There was a contract with a trustee in the usual form for the sale of the business to a company about to be formed. There was a memorandum of association duly signed and registered, stating that the company was formed to carry that contract into effect, and fixing the capital at 40,000*l.* in 40,000 shares of 1*l.* each. There were articles of association providing the usual machinery for conducting the business. The first directors were to be nominated by the majority of the subscribers to the memorandum of association. The directors, when appointed, were authorized to exercise all such powers of the company as were not by statute or by the articles required to be exercised in general meeting; and there was express power to borrow on debentures, with the limitation that the borrowing was not to exceed 10,000*l.* without the sanction of a general meeting.

The company was intended from the first to be a private company; it remained a private company to the end. No prospectus was issued; no invitation to take shares was ever addressed to the public.

The subscribers to the memorandum were Mr. Salomon, his wife, and five of his children who were grown up. The subscribers met and appointed Mr. Salomon and his two elder sons directors. The directors then proceeded to carry out the proposed transfer. By an agreement dated August 2, 1892, the company adopted the preliminary contract, and in accord-

ance with it the business was taken over by the company as from June 1, 1892. The price fixed by the contract was duly paid. The price on paper was extravagant. It amounted to over 39,000*l.*—a sum which represented the sanguine expectations of a fond owner rather than anything that can be called a businesslike or reasonable estimate of value. That, no doubt, is a circumstance which at first sight calls for observation; but when the facts of the case and the position of the parties are considered, it is difficult to see what bearing it has on the question before your Lordships. The purchase-money was paid in this way: as money came in, sums amounting in all to 30,000*l.* were paid to Mr. Salomon, and then immediately returned to the company in exchange for fully-paid shares. The sum of 10,000*l.* was paid in debentures for the like amount. The balance, with the exception of about 1000*l.* which Mr. Salomon seems to have received and retained, went in discharge of the debts and liabilities of the business at the time of the transfer, which were thus entirely wiped off. In the result, therefore, Mr. Salomon received for his business about 1000*l.* in cash, 10,000*l.* in debentures, and half the nominal capital of the company in fully paid shares for what they were worth. No other shares were issued except the seven shares taken by the subscribers to the memorandum, who, of course, knew all the circumstances, and had therefore no ground for complaint on the score of overvaluation.

The company had a brief career: it fell upon evil days. Shortly after it was started there seems to have come a period of great depression in the boot and shoe trade. There were strikes of workmen too; and in view of that danger contracts with public bodies, which were the principal source of Mr. Salomon's profit, were split up and divided between different firms. The attempts made to push the business on behalf of the new company crammed its warehouses with unsaleable stock. Mr. Salomon seems to have done what he could: both he and his wife lent the company money; and then he got his debentures cancelled and reissued to a Mr. Broderip, who advanced him 5000*l.*, which he immediately handed over to the company on loan. The temporary relief only hastened

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ruin. Mr. Broderip's interest was not paid when it became due. He took proceedings at once and got a receiver appointed. Then, of course, came liquidation and a forced sale of the company's assets. They realized enough to pay Mr. Broderip, but not enough to pay the debentures in full; and the unsecured creditors were consequently left out in the cold.

In this state of things the liquidator met Mr. Broderip's claim by a counter-claim, to which he made Mr. Salomon a defendant. He disputed the validity of the debentures on the ground of fraud. On the same ground he claimed rescission of the agreement for the transfer of the business, cancellation of the debentures, and repayment by Mr. Salomon of the balance of the purchase-money. In the alternative, he claimed payment of 20,000*l.* on Mr. Salomon's shares, alleging that nothing had been paid on them.

When the trial came on before Vaughan Williams J., the validity of Mr. Broderip's claim was admitted, and it was not disputed that the 20,000 shares were fully paid up. The case presented by the liquidator broke down completely; but the learned judge suggested that the company had a right of indemnity against Mr. Salomon. The signatories of the memorandum of association were, he said, mere nominees of Mr. Salomon—mere dummies. The company was Mr. Salomon in another form. He used the name of the company as an alias. He employed the company as his agent; so the company, he thought, was entitled to indemnity against its principal. The counter-claim was accordingly amended to raise this point; and on the amendment being made the learned judge pronounced an order in accordance with the view he had expressed.

The order of the learned judge appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the Act requires that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or

that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned Lords Justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.

When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the words of the enactment, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority—no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability.

Mr. Salomon appealed; but his appeal was dismissed with costs, though the Appellate Court did not entirely accept the view of the Court below. The decision of the Court of Appeal proceeds on a declaration of opinion embodied in the order which has been already read.

I must say that I, too, have great difficulty in understanding this declaration. If it only means that Mr. Salomon availed

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himself to the full of the advantages offered by the Act of 1862, what is there wrong in that? Leave out the words "contrary to the true intent and meaning of the Companies Act, 1862," and bear in mind that "the creditors of the company" are not the creditors of Mr. Salomon, and the declaration is perfectly innocent: it has no sting in it.

In an early case, which in some of its aspects is not unlike the present, the owners of a colliery (to quote the language of Giffard L.J. in the Court of Appeal) "went on working the colliery not very successfully, and then determined to form a limited company in order to avoid incurring further personal liability." "It was," adds the Lord Justice, "the policy of the Companies Act to enable this to be done." And so he reversed the decision of Malins V.-C., who had expressed an opinion that if the laws of the country sanctioned such a proceeding they were "in a most lamentable state," and had fixed the former owners with liability for the amount of the shares they took in exchange for their property: *In re Baglan Hall Colliery Co.* (1)

Among the principal reasons which induce persons to form private companies, as is stated very clearly by Mr. Palmer in his treatise on the subject, are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company, as Mr. Palmer observes, a trade can be carried on with limited liability, and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law. A company, too, can raise money on debentures, which an ordinary trader cannot do. Any member of a company, acting in good faith, is as much entitled to take and hold the company's debentures as any outside creditor. Every creditor is entitled to get and to hold the best security the law allows him to take.

If, however, the declaration of the Court of Appeal means that Mr. Salomon acted fraudulently or dishonestly, I must say I can find nothing in the evidence to support such an imputation. The purpose for which Mr. Salomon and the other

(1) L. R. 5 Ch. 346.

subscribers to the memorandum were associated was "lawful." The fact that Mr. Salomon raised 5000*l.* for the company on debentures that belonged to him seems to me strong evidence of his good faith and of his confidence in the company. The unsecured creditors of A. Salomon and Company, Limited, may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company, I suppose, because they had long dealt with Mr. Salomon, and he had always paid his way; but they had full notice that they were no longer dealing with an individual, and they must be taken to have been cognisant of the memorandum and of the articles of association. For such a catastrophe as has occurred in this case some would blame the law that allows the creation of a floating charge. But a floating charge is too convenient a form of security to be lightly abolished. I have long thought, and I believe some of your Lordships also think, that the ordinary trade creditors of a trading company ought to have a preferential claim on the assets in liquidation in respect of debts incurred within a certain limited time before the winding-up. But that is not the law at present. Everybody knows that when there is a winding-up debenture-holders generally step in and sweep off everything; and a great scandal it is.

It has become the fashion to call companies of this class "one man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid, it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.

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One argument was addressed to your Lordships which ought perhaps to be noticed, although it was not the ground of decision in either of the Courts below. It was argued that the agreement for the transfer of the business to the company ought to be set aside, because there was no independent board of directors, and the property was transferred at an overvalue. There are, it seems to me, two answers to that argument. In the first place, the directors did just what they were authorized to do by the memorandum of association. There was no fraud or misrepresentation, and there was nobody deceived. In the second place, the company have put it out of their power to restore the property which was transferred to them. It was said that the assets were sold by an order made in the presence of Mr. Salomon, though not with his consent, which declared that the sale was to be without prejudice to the rights claimed by the company by their counter-claim. I cannot see what difference that makes. The reservation in the order seems to me to be simply nugatory.

I am of opinion that the appeal ought to be allowed, and the counter-claim of the company dismissed with costs, both here and below.

LORD MORRIS. My Lords, I quite concur in the judgment which has been announced, and in the reasons which have been so fully given for it.

LORD DAVEY. My Lords, it is possible, and (I think) probable, that the conclusion to which I feel constrained to come in this case may not have been contemplated by the Legislature, and may be due to some defect in the machinery of the Act. But, after all, the intention of the Legislature must be collected from the language of its enactments; and I do not see my way to holding that if there are seven registered members the association is not a company formed in compliance with the provisions of the Act and capable of carrying on business with limited liability, either because the bulk of the shares are held by some only, or even one of the members, and the others are what is called "dummies," holding, it may be, only one share

of 1*l.* each, or because there are less than seven persons who are beneficially entitled to the shares.

I think that this result follows from the absence of any provision fixing a minimum nominal amount of a share—the provision in s. 8 that no subscriber shall take less than one share, and the provision in s. 30 that no notice of any trust shall be entered on the register. With regard to the latter provision, it would, in my opinion, be impossible to work the machinery of the Act on any other principle, and to attempt to do so would lead only to confusion and uncertainty. The learned counsel for the respondents (wisely, as I think) did not lay any stress on the members, other than the appellant, being trustees for him of their shares. Their argument was that they were "dummies," and did not hold a substantial interest in the company, i.e., what a jury would say is a substantial interest. In the language of some of the judges in the Court below, any jury, if asked the question, would say the business was Aron Salomon's and no one else's.

It was not argued in this case that there was no association of seven persons to be registered, and the registration therefore operated nothing, or that the so-called company was a sham and might be disregarded; and, indeed, it would have been difficult for the learned counsel for the respondents, appearing, as they did, at your Lordships' Bar for the company, who had been permitted to litigate in the Courts below as actors (on their counter-claim), to contend that their clients were non-existent. I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that s. 18, making the certificate of the registrar conclusive evidence that all the requisitions of the Act in respect of registration had been complied with, would be an answer to it.

We start, then, with the assumption that the respondents have a corporate existence with power to sue and be sued, to incur debts and be wound up, and to act as agents or as trustees, and I suppose, therefore, to hold property. Both the Courts below have, however, held that the appellant is liable to indemnify the company against all its debts and liabilities.

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Vaughan Williams J. held that the company was an "alias" for the appellant, who carried on his business through the company as his agent, and that he was bound to indemnify his own agent; and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to cestui que trust.

The ground on which the learned judges seem to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the Act and unlawful. I observe, in passing, that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say, one share. I am at a loss to see how in either view taken in the Courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant; and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking the learned counsel what the equity was, but got no answer. By an "alias" is usually understood a second name for one individual; but here, as one of your Lordships has already observed, we have, ex hypothesi, a duly formed legal persona, with corporate attributes and capable of incurring legal liabilities. Nor do I think it legitimate to inquire whether the interest of any member is substantial when the Act has declared that no member need hold more than one share, and has not prescribed any minimum amount of a share. If, as was said in the Court of Appeal, the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a

nullity, or, if the appellant has committed a fraud or misdemeanour (which I do not think he has), he may be proceeded against civilly or criminally; but how either of those states of circumstances creates the relation of cestui que trust and trustee, or principal and agent, between the appellant and respondents, is not apparent to my understanding.

I am, therefore, of opinion that the order appealed from cannot be supported on the grounds stated by the learned judges.

But Mr. Farwell also relied on the alternative relief claimed by his pleadings, which was quite open to him here, namely, that the contract for purchase of the appellant's business ought to be set aside for fraud. The fraud seems to consist in the alleged exorbitance of the price and the fact that there was no independent board of directors with whom the appellant could contract. I am of opinion that the fraud was not made out. I do not think the price of the appellant's business (which seems to have been a genuine one, and for some time a prosperous business) was so excessive as to afford grounds for rescission; and as regards the cash portion of the price, it must be observed that, as the appellant held the bulk of the shares, or (the respondents say) was the only shareholder, the money required for the payment of it came from himself in the form either of calls on his shares or profits which would otherwise be divisible. Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members. In fact, it is impossible to say who was defrauded.

Mr. Farwell relied on some dicta in *Erlanger* v. *New Sombrero Phosphate Co.* (1), a case which is often quoted and not infrequently misunderstood. Of course, Lord Cairns' observations were directed only to a case such as he had before him, where it was attempted to bind a large body of shareholders by a contract which purported to have been made between the vendor and

(1) 3 App. Cas. 1218, 1236.

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directors before the shares were offered for subscription; whereas it appeared that the directors were only the nominees of the vendor, who had accepted his bidding and exercised no judgment of their own. It has nothing to do with the present case. That a company may contract with the holder of the bulk of its shares, and such contract will be binding though carried by the votes of that shareholder, was decided in *North-West Transportation Co.* v. *Beatty*. (1)

For these reasons, I am of opinion that the appellant's appeal should be allowed and the cross-appeal should be dismissed. I agree to the proposed order as to costs.

Order of the Court of Appeal reversed and cross-appeal dismissed with costs here and below; the costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis; cause remitted to the Chancery Division.

Lords' Journals, November 16, 1896.

Solicitors for appellant: *Ralph Raphael & Co.*
Solicitors for respondents: *S. M. & J. B. Benson.*

(1) 12 App. Cas. 589.