TAB 18

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

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Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

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APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the

Excise Tax Act, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status*

quo while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural

or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and

that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities

(S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to

the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income

tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty,

> property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.*

had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease*

Holding Corp., Re (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing

or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he

two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters,

M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> **67** (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I

have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> **(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11 [1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency*

Act and the Companies' Creditors Arrangement Act; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) Burden of proof on application — The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's

premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed

trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

TAB 19

1990 CarswellBC 70
British Columbia Supreme Court

Tezcan v. Tezcan

1990 CarswellBC 70, [1990] B.C.J. No. 30, 19 A.C.W.S. (3d) 1309, 44 B.C.L.R. (2d) 343, 68 D.L.R. (4th) 277

TEZCAN v. TEZCAN

Harvey J.

Heard: November 20-24, 28-30; December 1, 4-8, 11, 12, 1989
Judgment: March 6, 1990
Docket: Vancouver No. A832138

Counsel: *R. Liu Basham* and *V.M. Bjorndahl*, for plaintiff.
F.E. Maxwell, for defendant.

Subject: International; Family; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Conflict of laws

III Family law
III.1 Marriage
III.1.c Property rights within marriage
III.1.c.i On separation of spouses
III.1.c.i.A Immovables

Family law

III Division of family property
III.5 Assets which may be excluded from property to be divided
III.5.a General principles
III.5.a.i Family and non-family assets

Family law

III Division of family property
III.8 Factors affecting equal or unequal division
III.8.b Spouse's extra-provincial property

Family law

III Division of family property
III.9 Order for division of property
III.9.b Factors to be considered in determining nature of order
III.9.b.iii Miscellaneous

Headnote

Conflict of Laws --- Family law — Marriage — Property rights within marriage — On separation of spouses — Immovables

Family Law --- Family property on marriage breakdown — Assets which may be excluded from property to be divided — Family and non-family assets

Family Law --- Family property on marriage breakdown — Factors affecting equal or unequal division — Spouse's extra-provincial property

Family Law --- Family property on marriage breakdown — Factors affecting equal or unequal division — Tax consequences of division

Family law — Matrimonial property — Conflict of laws — Parties married in Turkey moving to British Columbia and acquiring property here, then returning to Turkey — Wife bringing Family Relations Act action for property division after divorce in Turkey — General rule of lex rei sitae applying to immovable property — No contract governing property division — Separation of property regime imposed by Turkish law in absence of contract not operating to displace general rule — Husband's Turkish properties beyond court's jurisdiction but taken into consideration in reapportioning British Columbia properties.

Conflict of laws — Property — Immovable property — Parties married in Turkey moving to British Columbia and acquiring property here, then returning to Turkey — Wife bringing Family Relations Act action for property division after divorce in Turkey — General rule of lex rei sitae applying to immovable property — No contract governing property division — Separation of property régime imposed by Turkish law in absence of contract not operating to displace general rule — Husband's Turkish properties beyond court's jurisdiction but taken into consideration in reapportioning British Columbia properties.

Family law — Matrimonial property — Characterization of assets — Business assets — Husband acquiring interest in apartment building during marriage — Husband's interest acquired with view to securing financial future of family and income used for family purposes — Husband's interest a family asset, and, alternatively, a business asset to which wife made indirect contribution during marriage.

Family law — Matrimonial property — Characterization of assets — Family assets — Husband acquiring interest in apartment building during marriage — Husband's interest acquired with view to securing financial future of family and income used for family purposes — Husband's interest a family asset, and, alternatively, a business asset to which wife made indirect contribution during marriage.

Family law — Matrimonial property — Factors governing division — Earnings and earning capacity — Parties divorced in Turkey after 22-year marriage seeking division of real property in British Columbia — Equal division unfair considering need for economic self-sufficiency and other factors affecting capacity of spouses — Court considering value of husband's property in Turkey, and fact that wife, now Canadian immigrant, remained at home while husband enhanced his career and earning capacity.

Family law — Matrimonial property — Factors governing division — Means and needs of parties — Parties divorced in Turkey after 22-year marriage seeking division of real property in British Columbia — Equal division unfair considering need for economic self-sufficiency and other factors affecting capacity of spouses — Court

considering value of husband's property in Turkey, and fact that wife, now Canadian immigrant, remained at home while husband enhanced his career and earning capacity.

Family law — Matrimonial property — Factors governing division — Length of marriage and separation — Parties divorced in Turkey after 22-year marriage seeking division of real property in British Columbia — Equal division unfair considering need for economic self-sufficiency and other factors affecting capacity of spouses — Court considering value of husband's property in Turkey, and fact that wife, now Canadian immigrant, remained at home while husband enhanced his career and earning capacity.

The parties were Turkish citizens who married in Turkey in 1961. While living in Vancouver from 1961 to 1966, they acquired several properties. At the time of trial they owned a condominium in which their equity was valued at $130,000, and the defendant owned a 13/20 interest in an apartment building in which the total ownership equity amounted to $1.56 million. He also owned property in Turkey having a value in excess of $1 million. The parties separated in 1983 and were divorced that same year. The divorce decree did not deal with property issues. The plaintiff brought an action for an interest in the British Columbia properties, claiming in trust, contract and under the Family Relations Act.

Held:

Judgment for plaintiff.

The existence of an express or implied contract relating to the property was not established, and therefore the general rule of lex rei sitae as to immovable property applied. That rule was not displaced by the separation of property regime which Turkish law imposes in the absence of an express contract. The existence of that regime does not create an implied contract. As for the claim in trust, the parties discussed the disposition of their British Columbia assets at the time of separation, but there was no common intention to create a trust in favour of the plaintiff. Accordingly, the claim in trust was not made out.

The action was essentially a property action and, given that the "essence" of Pt. 3 of the Family Relations Act is property, the Act applied. The condominium was purchased during the marriage and was jointly held. There was no question that it was a family asset. The interest in the apartment building was also a family asset, since it was purchased for the purpose of securing the financial future of the family and the income it produced was frequently used for family purposes. Even if it was not a family asset, it was a business asset to which the plaintiff had made an indirect contribution by her able performance as a wife and mother. The properties in Turkey were beyond the court's jurisdiction, but they could nevertheless be taken into consideration in reapportioning the British Columbia properties. Equal division was unfair considering the need of each spouse to be economically self-sufficient and other circumstances relating to the capacity of the spouses. It was appropriate to take into account the $1,000,000 value of the defendant's assets in Turkey and the fact that during the 22-year marriage the defendant was able to build his earning capacity to the high level he now enjoyed. In contrast, the plaintiff, now an immigrant to Canada, had remained at home and acquired no job skills. Fairness dictated that she receive 100 per cent of the condominium and 70 per cent of the defendant's interest in the apartment building.

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Cases considered:

Babowech v. Von Como (1989), 35 B.C.L.R. (2d) 246, 18 R.F.L. (3d) 365 (C.A.) — *applied*

Baird v. Baird, 33 B.C.L.R. 77, [1982] 2 W.W.R. 8, 25 R.F.L. (2d) 17, 130 D.L.R. (3d) 128 (C.A.) — *referred to*

Baker v. Baker, [1988] B.C.D. Civ. 1650-03 (S.C.) — *referred to*

Beaudoin v. Trudel, [1937] O.R. 1, [1937] 1 D.L.R. 216 (C.A.) — *distinguished*

Blackett v. Blackett (1989), 40 B.C.L.R. (2d) 99, 22 R.F.L. (3d) 337, 63 D.L.R. (4th) 18 (C.A.) — *considered*

Blockberger v. Blockberger (1983), 48 B.C.L.R. 235, 36 R.F.L. (2d) 241 (C.A.) — *referred to*

Buck v. Buck (1987), 16 B.C.L.R. (2d) 71 (S.C.) — *referred to*

Callwood v. Callwood, [1960] A.C. 659, [1960] 2 W.L.R. 705, [1960] 2 All E.R. 1 (P.C.) — *referred to*

DeNichols v. Curlier, [1900] A.C. 21 (H.L.) — *distinguished*

Derrickson v. Derrickson, [1986] 1 S.C.R. 285, 1 B.C.L.R. (2d) 273, [1986] 3 W.W.R. 193, 50 R.F.L. (2d) 337, [1986] 2 C.N.L.R. 45, 26 D.L.R. (4th) 175, 65 N.R. 278 — *followed*

Drinovz v. Drinovz, [1988] B.C.W.L.D. 1819, [1988] W.D.F.L. 1188 (S.C.) — *considered*

Duke v. Andler, [1932] S.C.R. 734, [1932] 4 D.L.R. 529 [B.C.] — *considered*

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Elsom v. Elsom, [1985] B.C.W.L.D. 2710, [1985] W.D.F.L. 1578, varied 13 R.F.L. (3d) 231, reversed [1989] 1 S.C.R. 1367, 37 B.C.L.R. (2d) 145, [1989] 5 W.W.R. 193, 20 R.F.L. (3d) 225, 59 D.L.R. (4th) 591, 96 N.R. 165 — *applied*

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Farwell v. Farwell, 17 B.C.L.R. 97, [1980] 2 W.W.R. 518, 15 R.F.L. (2d) 49, 105 D.L.R. (3d) 364 (S.C.) — *followed*

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Hackett v. Hackett (1984), 43 R.F.L. (2d) 5 (B.C.S.C.) — *referred to*

Hanuse v. Hanuse (1984), 40 R.F.L. (2d) 250 (B.C.S.C.) — *referred to*

Jeske v. Jeske, [1984] 1 W.W.R. 61, 28 Alta. L.R. (2d) 172, 36 R.F.L. (2d) 376, 50 A.R. 216 (Q.B.) — *considered*

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Liebert v. Liebert, [1990] B.C.W.L.D. 143, [1990] W.D.F.L. 139 (S.C.) — *considered*

Locke v. Locke (1983), 36 R.F.L. (2d) 216 (B.C.S.C.) — *referred to*

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Starko v. Starko, [1986] B.C.W.L.D. 1540, [1986] W.D.F.L. 818 (S.C.) — *applied*

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Vladi v. Vladi (1987), 7 R.F.L. (3d) 337, 39 D.L.R. (4th) 563, 79 N.S.R. (2d) 356, 196 A.P.R. 356 (T.D.) — *referred to*

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Wong v. Wong (1985), 60 B.C.L.R. 135, 44 R.F.L. (2d) 82 (S.C.) — *considered*

Statutes considered:

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Pt. 3

s. 43

s. 45(1), (2), (3)(e)

s. 46(1), (2)

s. 51(f)

s. 52

Matrimonial Property Act, S.N.S. 1980, c. 9

s. 22

Turkish Civil Code of Procedure

Art. 13

Art. 170

Art. 186

Authorities considered:

Castel, Canadian Conflicts of Laws, 2nd ed. (1986), paras. 313, 316, 324.

Law Reform Commission of British Columbia, "Property Rights on Marriage Breakdown", Working Paper 63 (1989).

Action for determination of title to lands acquired during parties' marriage.

Harvey J.:

1 This action follows upon the judgment of the Court of Appeal of this province in *Tezcan v. Tezcan*, 20 B.C.L.R. (2d) 253, [1988] 2 W.W.R. 264, 11 R.F.L. (3d) 113, 24 C.P.C. (2d) 13, 46 D.L.R. (4th) 176. The Court of Appeal held that this court and only this court has jurisdiction to entertain the claims of the plaintiff to title to certain lands acquired in Vancouver, British Columbia, during the course of marriage to the defendant. However, the Court of Appeal did not determine which law should be applied in this proceeding — the British Columbia law of contract, trust and distribution of family assets, or the Turkish marital regime.

2 The plaintiff and defendant were born, married, and divorced in Turkey. They are Turkish citizens. They were married in Turkey on 2nd June 1961. Shortly thereafter, they left Turkey for Vancouver, British Columbia, where the defendant, a professional engineer, took up a teaching position as lecturer in the Faculty of Engineering at the University of British Columbia. They lived in Vancouver from August 1961 to June 1966, when they returned to Turkey with their children. They returned to Vancouver with their children for approximately one year from 1967 to 1968. On their return to Turkey in 1968, they lived there for the remainder of the duration of the marriage.

3 The plaintiff and the defendant separated in June 1983, and were divorced in Turkey on 28th September 1983. The divorce decree does not deal with the property of the parties. Since the divorce, there has not been any proceeding taken by either party in a Turkish court related to property acquired during the marriage.

4 During the course of the marriage, in addition to real properties purchased in Turkey, three properties were purchased in British Columbia, being the Blythwood Apartments, the Cornwall condominium, and the West 13th property. The Blythwood Apartments are held in the name of the defendant as to a 13/20 undivided interest, and unrelated third parties as to a 7/20 undivided interest. The Cornwall condominium is held in the joint names of the plaintiff and the defendant. The West 13th property was held in the joint names of the plaintiff and the defendant until it was sold in April 1983.

5 The plaintiff obtained valuations of the Cornwall and Blythwood properties and the amounts of the mortgages outstanding on both as of the date of trial. The valuations and amounts are:

Cornwall	Valuation	$163,000
	Mortgage	$31,340.60
Blythwood	Valuation	$1,600,000
	Mortgage	$40,000

6 In this action, the plaintiff claims title, rights and interests in and to the British Columbia properties, to the extent of the defendant's interest in such properties. The plaintiff makes no claim in relation to the Turkish properties, except that she submits that their present value should be taken into consideration for the purpose of the division of the British Columbia properties should they or any of them be held to be family assets. It is submitted on behalf of the plaintiff that the questions left for determination by this court are:

7 (a) The proper law to be applied in determining title, rights and interest to and division of the lands in British Columbia.

8 (b) If an oral agreement was made between the parties in the summer of 1983, what is the legal relevance of such agreement and how does it affect the interests of the parties in the real properties held in Turkey and British Columbia.

9 (c) The appropriate division of the lands in British Columbia if the British Columbia Family Relations Act and/or trust principles may be applied.

10 I propose to consider the questions of law left for determination to be essentially as submitted by counsel for the plaintiff.

The proper law

11 Preliminary to the choice of law and its application is the question of how the claim is properly characterized.

12 It is submitted on behalf of the plaintiff that this action is properly characterized as a claim relating to property rights, and that since the claim is one relating to immovable property, the lex rei sitae rule applies, being the law of where the property is situated, which in this case is British Columbia. It is submitted on behalf of the defendant that the claim is properly characterized as a matrimonial claim, and therefore the lex domicilii rule applies, which would mean the appropriate law is the law of the husband's domicile, Turkey.

13 It is submitted on behalf of the defendant that in every respect this is a matrimonial case, and that at common law the application of the substantive law is governed by the domicile of the husband, which in this case is Turkey. The defendant further maintains that common sense dictates that this action be characterized as a matrimonial action; after all, it arose out of marriage and "but for" the union and marriage of these two persons, this action would not even exist.

14 In support of this matrimonial characterization, counsel for the defendant offers two cases which, he submits, are examples of similar situations being characterized as matrimonial: *DeNichols v. Curlier*, [1900] A.C. 21 (H.L.); and *Beaudoin v. Trudel*, [1937] O.R. 1, [1937] 1 D.L.R. 216 (C.A.). These cases are not applicable, because in both cases there existed either an implied or express contract between the parties which was held to determine the proper law to be applied.

15 Although irrelevant to the determination by this court as to whether this action, in this jurisdiction, can be characterized as a property or matrimonial claim, both counsel for the plaintiff and the defendant spent considerable time eliciting evidence from their respective experts regarding how a Turkish court, in accordance with Turkish law, would characterize this claim.

16 Both experts called by the plaintiff, Dr. Davran and Professor Uluocak, testified that a Turkish court would characterize this claim as one related to property and, in accordance with the lex rei sitae rule, refer it to British Columbia courts. They referred to two provisions of Turkish law: firstly, art. 13 of the Turkish Civil Code of Procedure, which reads as follows:

> **Article 13**
>
> A case concerning real property shall be filed in the Court of the place where the property is located. A real property case is an action which has for its object real property or right therein, or right to the detention or possession — even temporary — of that property, whatever the cause may be. A case involving an easement shall be handled by the Court of the place where the property upon which the easement is claimed is located. If a case concerns more than one parcel of real property, the action may be brought in any place where any of the properties is located.

17 Dr. Davran and Professor Uluocak then made reference to art. 23, para. 1, of the Turkish Code, No. 2675, on international private and procedural law, stating that it had application to the circumstances of this matter. Article 23 reads as follows:

> The right of ownership and other rights *in rem* in movable and immovable property are governed by the laws of the place where the property is located.

18 Professor Uluocak stated further, referring to art. 23, "This article is competent to deal with the matters in issue in this case."

19 In contrast, Dr. Nomer, in his affidavit sworn before trial, is of the opinion that art. 23 of Code 2675 is applicable only to commercial disputes over movable or immovable assets which are not associated with family matters. However, Dr. Nomer's viva voce testimony did not confirm his earlier opinion sworn in his affidavit, regarding the applicability of art. 23 only to commercial disputes. I refer to the cross-examination of Dr. Nomer on this point:

> Q. Professor, Article 23 on its face does not distinguish between commercial versus other types of movable or immovable property. Do you agree with me? The Interpreter: Article — Question 23 of No. 2675.
>
> A. The word "commercial" doesn't exist in Article 23 but real estate or movable or non-movable assets do exist.
>
> Q. I am sorry. The Interpreter: did you say "commercial"?
>
> Q. Yes, my question was whether Article 23 specifically distinguishes between commercial property as opposed to some other kind of property, real estate.
>
> A. It covers — in general it covers all movable or non-movable items.

20 Both Dr. Davran and Professor Uluocak stated that in their opinion, art. 23 of Code No. 2675 does not distinguish between commercial versus family property. Professor Uluocak, when cross-examined with regard to the affidavit of Dr.

Nomer, and his "commercial" characterization of art. 23, stated that the opinion of Dr. Nomer outlined in a general way the status of the Turkish law, but that the opinion itself did not deal with the particular issues before this court.

21 In any event, I am unable to conclude that a Turkish court would characterize this claim as one *not* relating to property. In my view, the weight of the evidence favours the opposite conclusion.

22 The plaintiff maintains that this action is, in essence, a property action and should be characterized as such. The plaintiff's pleadings, and the course of the trial revealed that the plaintiff's claim is one based primarily on division of property pursuant to the British Columbia Family Relations Act. While it may be problematic to characterize the nature of a claim by reference to the instrument through which a remedy is sought, nevertheless I am influenced by two decisions which have clearly held that the Family Relations Act is, in essence, legislation which regulates who may own or possess land or other property: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, 1 B.C.L.R. (2d) 273, [1986] 3 W.W.R. 193, 50 R.F.L. (2d) 337, [1986] 2 C.N.L.R. 45, 26 D.L.R. (4th) 175, 65 N.R. 278; and *Farwell v. Farwell*, 17 B.C.L.R. 97, [1980] 2 W.W.R. 518, 15 R.F.L. (2d) 49, 105 D.L.R. (3d) 364 (S.C.).

23 Moreover, the judgment of the Court of Appeal in *Tezcan*, supra, leads me to the conclusion that the nature of this claim has been characterized as one relating to land, and that even if the plaintiff's claims can be said to arise out of the marriage, the claim remains properly characterized as such.

24 At first impression, this action seems to be matrimonial in nature, since it involves two former spouses seeking property division as a result of the dissolution of their marriage. Such a characterization, however, is imprecise and misleading; are all matters which occur in the context of a marriage relationship (for example, domestic assault) to be viewed as primarily matrimonial? The tendency, at least with respect to spousal assaults, is to recognize and treat the assaults for what they are — primarily assaults which happen to occur in a particular context. Similarly, this claim is primarily a property claim which happens to arise within a marital context. The context of the claim should not be confused with the essence of the claim. The essence of this claim is property.

25 Having characterized this claim as one related to property, it is clear from the authorities that the rule lex rei sitae applies to immovable property. In *Duke v. Andler*, [1932] S.C.R. 734, [1932] 4 D.L.R. 529 [B.C.], the Supreme Court of Canada quoted from Story's Conflict of Laws, 8th ed., at p. 738 of its judgment as follows:

> And here the general principle of the common law is, that the laws of the place where such property is situate, exclusively govern, in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title therefore to real property can be acquired, passed and lost only according to the *lex rei sitae*.

26 The defendant submits that, in the matrimonial context, immovables are not governed by lex rei sitae. However, all of the authorities referred to by Mr. Maxwell, except for *DeNichols* and *Beaudoin*, supra, are based on a finding of the existence of a contract between the spouses with respect to their property. The existence of a contract, as will be seen, prevents the application of the lex rei sitae rule, even in the case of immovables. In *DeNichols* and *Beaudoin*, the courts held that the applicable law had the effect of implying a contract between the parties that governed the disposition of property acquired during marriage. These two cases are distinguishable because they involved only movables. In summary, none of the authorities relied on by the defendant persuade me that the lex rei sitae rule does not apply to immovables even in a matrimonial context.

27 There is an exception to this general rule, and that is where the parties have entered into an express or implied contract regarding the properties in dispute. In the current edition of his work, Canadian Conflicts of Laws, 2nd ed. (1986), Professor Castel states at para. 316:

> *In the absence of any marriage contract or settlement*, the rights of the husband and wife to each other's immovables are governed by the *lex situs*, that is, the law of the legal unit where the immovables are situated. [emphasis added]

28 As authority for the proposition, Professor Castel relies on *Welch v. Tennent*, [1891] A.C. 639 (H.L.); *Callwood v. Callwood*, [1960] A.C. 659 at 683, [1960] 2 W.L.R. 705, [1960] 2 All E.R. 1 at 10 (P.C.); and *Rail v. Rail* (1979), 12 R.F.L. (2d) 265 (Ont. H.C.).

29 This exception to the lex rei sitae rule regarding immovable property was also commented upon in *Tezcan*, supra, at p. 258:

> First, as discussed above, it may be that the law applied is not British Columbia law, but the law of another jurisdiction, *where that is shown to be the proper law of an express or implied marriage contract*. [emphasis added]

30 In my view, therefore, the critical question for determination of the application of the proper law is whether there is an express or implied marriage contract, the effect of which governs the rights of the parties to the land in British Columbia. If there is, then the lex rei sitae rule may not apply, and the law of the husband's domicile, Turkey, prevails. Having considered the expert evidence and the relevant provisions of Turkish law referred to by the experts, I find that the existence of an express or implied contract is not proven and therefore the general rule of lex rei sitae as to immovable property must be applied.

31 It is common ground that there was no express contract in this case. More problematic is the defendant's argument that the nature of the Turkish marital regime, which the Tezcans married under, in itself, creates an implied marriage contract. Under Turkish law, there are only three possible matrimonial regimes:

32 (a) community of property;

33 (b) unity of property; and

34 (c) separation of assets.

35 In the absence of an express contract, art. 170 of the Turkish Civil Code presumes that the parties fall under the regime of separation of assets. Article 186 of the Turkish Civil Code defines the separation of assets as follows:

> The system under which the husband and wife each retain the ownership, administration and usufruct of his or her own assets is called separation of assets.

36 It is clear from the evidence that unless the parties specifically contract out of the regime by contracting for unity or community of assets, then the separation of assets regime will be imposed upon them. The defendant submits that since the parties were aware of this at the time of their marriage, by not contracting for unity or community of assets, they made an implied contract to be subject to the separation of assets regime.

37 While not relied upon in argument, legal commentators recognize that implied contracts can be created by operation of law. Castel states at para. 313:

> If the law expressly selected or most substantially connected is that of a jurisdiction by the law of which, upon marriage, the spouses remain separate as to property in the absence of an express marriage contract, the absence of choice of a particular regime is an implied choice of the *status quo ante*.

38 The question in this case, however, is not whether implied contracts *can* be created by operation of law, but whether the Turkish marital regime, *in fact*, does give rise to an implied contract.

39 Dr. Davran and Professor Uluocak directly addressed this question and stated affirmatively that the separation of assets regime does not have the effect of creating or implying a contract between the parties. Dr. Davran, in response to the question, "Does it (the regime) create a contract between the parties?", replied, "Oh, not at all. There is either a

contract then the parties may opt for one of the regimes contained in the Turkish Civil Courts. If there is no contract, no contract is implied, the law becomes operational. Separation of assets prevails."

40 Professor Uluocak states:

> Q. Does the legal regime of Separation of Assets create a contract between the parties for the division of their property?
>
> A. Of course not. By definition there is no contract.

41 Dr. Nomer, the expert called on behalf of the defendant, addressed this question, and while in general agreement with the opinions of Dr. Davran and Professor Uluocak, he hinted at the possibility that an implied contract can be created by operation of Turkish law. Dr. Nomer stated, "Without any doubt, yes, they can choose separation of assets as they can choose unity of assets or community of assets", and "According to the law the parties from the time of their wedding or marriage they have to choose one of these three possibilities."

42 While Dr. Nomer's evidence regarding choosing the regime hints of an implied contract, I do not find that his evidence with regard to this question can be taken to in any way establish that the marriage of the parties, in the context of the Turkish marital regime, had the effect of implying a contract of separation of assets. The weight of the expert evidence in this case establishes that there is no implied contract in the absence of an express contract.

43 In summary, with regard to the question of proper law, I conclude:

44 (a) The claim of the plaintiff is in rem related to real property in British Columbia. The proper law for determining title, right and interest to such property is the law of the place where such property is situate, the lex rei sitae, which is the law of the province of British Columbia.

45 (b) The Turkish separation of assets matrimonial regime does not create an implied marriage contract, which would prevent the application of the lex rei sitae rule and require the application of Turkish law in relation to determining title, right and interest to real property in British Columbia.

46 I have not included in the questions of law left for determination the question of public policy raised by Ms. Basham in her submissions. Ms. Basham submits that even if I was to hold that Turkish matrimonial law applied to deny the plaintiff any significant rights to the British Columbia properties, such a result would offend against substantial justice as known in British Columbia, and that such law should be rejected on the basis of public policy.

47 Because I do not accept Mr. Maxwell's submission that Turkish matrimonial law does apply in this case, it is not necessary to review and consider the submissions made related to public policy, including the reliance of the plaintiff upon the judgment of the Nova Scotia Supreme Court in *Vladi v. Vladi* (1987), 7 R.F.L. (3d) 337, 39 D.L.R. (4th) 563, 79 N.S.R. (2d) 356, 196 A.P.R. 356.

The oral argument — trust principles

48 The plaintiff says that following the separation of the parties in early June 1983, and before they were divorced on 28th September 1983, they agreed orally that with regard to real property acquired during the marriage, the defendant would retain his interest in the Turkish properties in exchange for which the plaintiff would receive his interest in the British Columbia properties. She says discussions related to this question with her husband commenced within a few days after the separation and were subsequently confirmed at a meeting which took place at the end of September at Ulus, Istanbul, attended by the parties and their children, Haluk and Kamer, who were then 21 and 20 years of age respectively.

49 It is conceded if such an agreement was made it is not enforceable, but it is submitted on behalf of the plaintiff such an agreement is relevant in determining the intent of the parties in disposing of the British Columbia properties, and in

that respect may be sufficient to found a trust over the property in the plaintiff's favour, or be relevant in determining what would be a fair division under the Family Relations Act of British Columbia.

50 The defendant denies any such agreement was made.

51 In a general sense, the evidence of Haluk supports the position of the plaintiff. The evidence of Kamer, in part, supports the position of the defendant.

52 Upon consideration of the evidence related to this question and the authorities to which I was referred, I find that the evidence falls short of establishing the oral agreement alleged, or any agreement between the parties.

53 A substantial amount of the time required to try this action was taken with the evidence and submissions related to this question. For this reason, and because certain of the evidence may be relevant to other questions, I consider it appropriate to review the evidence and to provide reasons for my findings.

54 The parties separated at the end of June 1983 following an assault on the plaintiff by the defendant. The plaintiff left the family home, and moved in with her parents who lived a short distance away in Istanbul. The plaintiff's father took the plaintiff to a local hospital for treatment. The plaintiff says her father wanted to press charges against the defendant.

55 As I understand the plaintiff, what followed thereafter was a family conference at her parents' home. The defendant expressed remorse, as he did at trial, for the assault. It is common ground that the plaintiff and the defendant privately then discussed the advisability of obtaining a quick and quiet divorce. It is also common ground that they discussed the plaintiff getting her "hak", which is a Turkish word which translates as "right" or "share". The plaintiff understood this to be a share of the family assets referred to above. The defendant, while agreeing that he used the word "hak", denies that he agreed to give the plaintiff a share of the family assets as is claimed in this action.

56 The plaintiff agreed to the obtaining of a quick and quiet divorce, which was effected according to Turkish law. The plaintiff then awaited a call from the defendant to complete arrangements related to support for the children, and the property settlement agreement.

57 The plaintiff says she called the defendant several times, and after some difficulty in communicating with him, requested they get together to confirm the property settlement agreement — to get what he promised her. This conversation led to the meeting at Ulus at the end of September 1983.

58 Before describing what occurred at Ulus, I consider it useful to review certain factors why the defendant wanted a quick and quiet divorce, which factors the plaintiff submits support her position, and, furthermore, afford reasons why the defendant was prepared to agree to give her his interest in the British Columbia properties.

59 The evidence adduced regarding these factors is lengthy and at times difficult to comprehend fully. The most important factors, not necessarily in the order of importance, are as follows:

60 (a) He did not want to be charged with the assault of his wife because of the damage this would do to him in the business and social community.

61 (b) He wanted to keep the fact of their divorce quiet to avoid personal embarrassment to him in the business and social community.

62 (c) He did not wish the Turkish military government of the day, which had been in power since 1982, to be aware of the extent of his property holdings in Turkey and Canada, and, collaterally, the source of funds with which the Turkish properties were purchased.

63 (d) He did not want the plaintiff to make any claims in a Turkish court regarding the properties acquired during the marriage.

64 (e) He, as the immediate past president of Bosporus University, and president of the equivalent of an alumni association of that university, had concern with regard to an inquiry underway into the solicitation of funds by students and former students with regard to the publishing of a year book. In this regard, the state prosecutor had ordered an inquiry into the solicitation of such funds, including the questioning of a signature of the plaintiff's mother — a nominee executive of a corporate vehicle which the defendant and others had set up to handle the solicitation of funds and publication of the year book.

65 By the time of the Ulus meeting, most of these matters were no longer of concern to the defendant. The state prosecutor was apparently satisfied that the solicitation of funds was for a genuine purpose, as opposed to direction of such funds to subversive elements. The plaintiff's mother was not required to give evidence at the inquiry or at all with regard to her questioned signature.

66 The meeting took place in an office. They sat at a table — Kamer to one end, the others opposite each other. The meeting lasted about 30-35 minutes. Notes were not taken during or made by anyone after the meeting. No person at the meeting can recall exactly what was said. In keeping with the nature of the meeting, the atmosphere was tense. The meeting came to an end when the defendant struck Haluk, following which they were separated by the plaintiff and Kamer. At that point, the plaintiff and Kamer were in tears.

67 The meeting opened with inquiries of a general nature being made with regard to the family members. The defendant particularly inquired of Haluk and Kamer how they were progressing at school. I mention in passing that approximately two weeks after the plaintiff and defendant separated, Haluk and Kamer left the family home to live with the plaintiff at her parents' home. The plaintiff says she opened the material discussion by inquiring of the defendant "how are we going to share the family assets", to which she says he replied, "anything I own — one-half is yours — you get the Canadian properties, I will keep the Turkish properties." The plaintiff says she agreed to this proposal.

68 Haluk supports the plaintiff as to what the defendant said. He says that he then said to the defendant, "Father, how do we know you will keep your word?" He says the defendant then jumped to his feet exclaiming, "Do you say I am lying?", following which the defendant struck him. He says the plaintiff pulled him back, and at this point in time the meeting ended with the plaintiff and Kamer in tears.

69 Kamer says she understood the family was getting together at Ulus because the plaintiff wanted to come to agreement with the defendant with regard to property. She recalls discussion taking place with regard to how much (property) the plaintiff should get. She says the defendant offered something to which the plaintiff responded, "That is not enough." She recalls Haluk questioning the word of the defendant, and the defendant jumping to his feet with a reference to whether he was being accused of lying. She says she does not recall the defendant at any time during the course of the meeting ever saying to the plaintiff "you can have the British Columbia property".

70 The defendant categorically denies having made an offer to give the plaintiff his interest in the British Columbia properties. At one point in the discussion, he says he offered to give her his interest in the Cornwall property, which the plaintiff rejected as being not enough.

71 There was extensive cross-examination with regard to this evidence. With regard to Haluk, it was put to him that he was an advocate for the plaintiff at all times, and, furthermore, that he had an interest — "an eye" — on the defendant's properties for himself. It was also put to him that the altercation which occurred between him and his father arose following him saying to his father, "Come on father you have many properties, give her Blythwood."

72 Haluk firmly denied such suggestions, maintaining that at all times his interest was to see his mother get her fair share of the family assets. He agreed that he had decided not to stay mute and allow the discussion to be entirely between the parties. In this regard, Turkish culture, as I understand it, does not allow a son to question the word of his father, and to intervene in such affairs between his father and mother. He agreed the defendant became angry at his role. When pressed with regard to why his father would have offered to give his interest in Blythwood to the plaintiff,

he referred to an earlier conversation he and Kamer had had with the defendant shortly after the separation, when he says the defendant said to them words to the effect that the plaintiff would have a secure future — she would get her "hak" — a fair share of the family assets.

73 The thrust of the cross-examination of the plaintiff was that she misinterpreted what the defendant meant in their continuing discussions following separation when he told her she would get her "hak". In the end result, the plaintiff agreed that she and the defendant may have been thinking of different things before they came to the meeting at Ulus.

74 Kamer was vigorously cross-examined, properly so in my view, with regard to her evidence at the meeting and an affidavit she swore on 16th August 1988 at the request of the defendant. It was put to her that in the giving of her evidence, including the swearing of the affidavit, she was unduly influenced by the defendant to favour his position as to what happened at the Ulus meeting.

75 She agreed that before August 1988 the defendant had assisted her financially in numerous ways. She agreed that in August 1988 the defendant requested that she swear an affidavit (which was filed in this proceeding) prepared by him or on his behalf in which she denied wit nessing the oral agreement alleged in the statement of claim, and attributing the alleged agreement story to the plaintiff's solicitor. She stated she did not like the sentence in the affidavit attributing the agreement story to the plaintiff's solicitor, that it should not have been there, and that she informed the defendant of her position. The defendant, however, prevailed, making it clear to Kamer that if she did not support him by swearing the affidavit, she would have nothing more to do with him — she would be erased from his life.

76 Kamer says she did not want to lose her father. She felt that if she swore the affidavit she would not lose her brother and mother because they are not persons like her father, which I understood to mean that in some way they would understand her position and forgive her.

77 It does no credit to the defendant that, in my view, he induced, if not compelled, by force of his personality, his 20-year-old daughter to swear an affidavit, one part of which he knew she believed to be untrue.

78 Kamer's concern with what she had done was such that after she swore the affidavit she wrote her mother, enclosing a copy of the affidavit, and tried to explain her motivation in swearing it. I understood her to say in the letter, as she did at trial, that a factor influencing her decision was that she was led to believe by her husband and his father that her mother would obtain 50 per cent of the British Columbia properties because "Canadian law protected women and she would be protected in that way." The plaintiff and Haluk apparently accepted her explanation because at trial Kamer referred to the continuing loving relationship she had with her mother, and referred to her brother as her best friend.

79 Apart from the sentence of the affidavit which I find Kamer knew was untrue, she maintained, throughout a difficult and disturbing cross-examination in a courtroom where both parties were present, that there was no agreement reached as claimed between the parties. In one sense, she was probably in the best position to observe what occurred at the meeting. She took no part in the discussion which took place when the discussion turned to property of the marriage. I do not find she was unduly influenced by the defendant in the giving of her evidence as to what occurred at the Ulus meeting. I am troubled by the fact that a young woman of her obvious intelligence and awareness of the requirement to tell the truth in a document such as an affidavit would allow her own sense of personal conviction to be swayed by the influence of the defendant as she was to swear the affidavit. In the particular circumstances of this case, however, and having regard to the dominant role of the father in Turkish culture as described to me throughout the trial, and with regard to the particular dominance of the defendant, I do not reject her evidence because of the swearing of the affidavit.

80 Consideration of the evidence as a whole leads me to the following conclusions:

81 (a) There was no agreement or consensus on the part of the plaintiff and defendant with regard to the disposition of property acquired during the marriage before the Ulus meeting. At best, the plaintiff was informed she was to get her "hak".

82 (b) The plaintiff agrees that in her discussions with the defendant related to her hak they may have been thinking of different things.

83 (c) The meeting at Ulus did not commence with the parties ad idem with regard what was to be discussed and confirmed.

84 (d) The evidence of the persons in attendance at the Ulus meeting is not sufficiently precise, and, furthermore, is in serious conflict as to what was discussed.

85 (e) The meeting ended not in agreement but in a fight, however one-sided it may have been.

86 In keeping with these conclusions and findings, I do not find that the oral agreement alleged, nor any agreement, has been proved.

87 Ms. Basham submits that a trust can arise by common intention, and that in certain circumstances common intention will suffice to found a trust. She submits further that intention is not restricted to what was said at the Ulus meeting. In this regard, the plaintiff relies as well on her evidence and that of Haluk, that throughout the marriage and consistent with the defendant's view of his role in the family, the properties were purchased for the family.

88 Upon consideration of such evidence and the authorities relied upon, I do not find that such evidence, even if accepted in its entirety, is sufficient to found a trust over the property in British Columbia.

89 The evidence of the parties, as well as that of Haluk, to the effect that properties acquired during the marriage were purchased for the family, may be relevant with regard to the application of the provisions of the Family Relations Act, which will be considered next in these reasons.

The Family Relations Act

90 In my view, potentially four questions arise for determination:

91 (a) Is the Family Relations Act applicable?

92 (b) If the answer to (a) is yes, are the British Columbia properties, or any of them, family assets?

93 (c) If the answer to (b) is yes, when considering the division of such assets in British Columbia, am I entitled to take into account the existence and value of the Turkish properties if reapportionment is necessary?

94 (d) If the answer to (c) is yes, what division of the British Columbia properties should be made?

(a) Is the Family Relations Act applicable?

95 The plaintiff seeks relief pursuant to the Family Relations Act. Having found that this action is, in essence, a property action, the question is whether the Family Relations Act applies. Ms. Basham submits that the Family Relations Act is property rights legislation creating property rights, not matrimonial rights. In support of this submission, she relies upon *Derrickson*, supra, and *Farwell*, supra.

96 In *Derrickson*, the Supreme Court of Canada had to determine whether Pt. 3 of the Family Relations Act applied to lands situate on an Indian reserve. In the course of his judgment for the unanimous court, Chouinard J. quoted ss. 43, 51, and 52 of the Act. He went on to hold at pp. 281-82 as follows:

> The appellant argues that the pith and substance of the Family Relations Act is the division of matrimonial property, not the use of Indian lands. She further argues that it in no way encroaches on the exclusive federal jurisdiction as to the use of Indian lands ...

With respect I do not accept the latter proposition where Indian lands are involved.

The various orders that can be made under s. 52(2) deal inter alia with ownership, right of possession, transfer of title, partition or sale of property, and severance of joint tenancy ...

I cannot but agree with the Attorney-General of Canada who writes in his factum:

> In essence, Part 3 of the *Family Relations Act* is legislation which regulates who may own or possess land or other property. Its true nature and character is to regulate the right to the beneficial use of property and its revenues and the disposition thereof.

It follows that the provisions of the Family Relations Act dealing with the right of ownership and possession of immovable property, while valid in respect of other immovable property, cannot apply to lands on an Indian reserve.

97 Ms. Basham's reliance upon *Derrickson* as support for her argument that the Family Relations Act is property rights legislation may be questioned because the court stated only that Pt. 3 of the Act, is, in essence, "... legislation which regulates who may own or possess land or other property." The Family Relations Act is also substantially concerned with child custody/access/guardianship and child and spousal maintenance. For this reason, it may be an overstatement to state that the Family Relations Act, as a whole, is property rights legislation.

98 However, given the approach of the Supreme Court of Canada in *Derrickson*, which was to determine the true nature and character of only that part of the Family Relations Act being relied upon by one of the parties (the "property" part), I am not required to determine what is the essence of the Family Relations Act as a whole. I need only examine that part of the Act relied upon in this case to determine whether the Family Relations Act should be applied. Since the part relied upon in this case is the same as in *Derrickson*, in my view, the "essence" of Pt. 3 of the Family Relations Act is "property".

99 In *Farwell*, supra, Taylor J. (as he then was) was confronted with the constitutional issue of whether the Family Relations Act infringed upon the federal jurisdiction over marriage and divorce. At p. 102 of his judgment he held as follows:

> This legislation is not legislation in relation to the institution of marriage or the status of spouses as married persons; it relates only to the property and civil rights of such persons ...
>
> While the state, or condition, of the marriage brings the sections into play, the relief to be granted as a consequence is not in any way in relation to the *marriage* itself.

100 Counsel for the defendant submits that *Derrickson* and *Farwell* have no application in this case, as they are confined to the determination of constitutional issues and do not directly address the nature of the Family Relations Act. In support, Mr. Maxwell referred me to *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99, 22 R.F.L. (3d) 337, 63 D.L.R. (4th) 18, wherein Madam Justice Southin of the British Columbia Court of Appeal stated, at pp. 104-105, what she took to be the ratio decidendi of *Derrickson*:

> It is open to the court where, for legal reasons or perhaps even for physical reasons, an asset cannot be divided to make a compensation order under s. 52(2)(*c*) and in doing so leave ownership and possession of the asset in question in the hands of one party or the other. That I take to be the ratio decidendi of *Derrickson* ...

101 The mere fact that the ratio of *Derrickson* may be as stated above, does not make irrelevant the clear comments of the Supreme Court of Canada regarding the nature of Pt. 3 of the Family Relations Act. Moreover, the British Columbia Court of Appeal, in *Blackett*, did not in any way limit or disagree with that part of the judgment in *Derrickson*.

102 I consider *Derrickson* and *Farwell* both relevant and binding on the question as to the nature of Pt. 3 of the Family Relations Act. I find that Pt. 3 of the Family Relations Act, being property legislation, is applicable to the property dispute in this case.

(b) Are the British Columbia properties, or any of them, family assets?

103 The West 13th property was sold in April 1983, following which the proceeds of sale were used in substantial part to purchase property — a lot — in Turkey, and thereafter to construct an apartment thereon which was given by agreement of the parties to Haluk to hold for his benefit and that of Kamer. I do not consider it necessary at this stage of the matter to characterize this property because the proceeds of the sale have substantially been used for family purposes.

104 The Cornwall property was purchased during the course of the marriage, and is held in the joint names of the parties. I do not understand the defendant to question seriously its characterization as a family asset. I find the Cornwall property is a family asset.

105 Ms. Basham submits that the British Columbia properties should be characterized as family assets because they were "ordinarily used for family purposes" relying upon s. 45(2) of the Act. Alternatively, she submits if Blythwood was not so used, it should be characterized as a family asset because it is a venture or business to which the plaintiff made an indirect contribution through effective management of her household and her child-rearing responsibilities, relying upon ss. 45(3)(*e*) and 46(2) of the Act. Mr. Maxwell, both in his memorandum of argument and in his oral submissions, restricted his position to Blythwood. He submits that if the Family Relations Act is applicable, pursuant to the provisions of the Act, and particularly s. 46(1) thereof, Blythwood should be characterized as a business asset and furthermore as a unique asset case. He submits upon the evidence that the plaintiff has not made a contribution directly or indirectly to the acquisition of Blythwood or to its operation.

106 In this regard, the question for determination is how Blythwood should be characterized under the Act. In my view, if I find Blythwood to be a business asset in relation to which the plaintiff has made an indirect contribution as defined in the Act, the Act requires me to treat Blythwood as a family asset. I leave for comment later the principles which appear to govern the division of family assets characterized by ordinary use, and of business assets that qualify as family assets.

Is Blythwood a family asset pursuant to s. 45(2)?

107 Section 45(2) of the Family Relations Act reads as follows:

> 45(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

108 Was Blythwood ordinarily used for a family purpose? The test, as stated in *Elsom v. Elsom* (1983), 49 B.C.L.R. 297, 37 R.F.L. (2d) 150, 3 D.L.R. (4th) 500 (C.A.), apportionment varied 13 R.F.L. (3d) 231, reversed [1989] 1 S.C.R. 1367, 37 B.C.L.R. (2d) 145, [1989] 5 W.W.R. 193, 20 R.F.L. (3d) 225, 59 D.L.R. (4th) 591, 96 N.R. 165 (on reapportionment issue only), is "customary" as opposed to "casual or occasional use." (p. 301)

109 It is clear that the Blythwood apartment was never actually physically used by the Tezcan family. The plaintiff submits that family use of the income Blythwood produced means that Blythwood itself was ordinarily used for a family purpose, and therefore is a family asset. The defendant denies that family use of income "converts" a capital asset into a family asset and relies principally on *Samuels v. Samuels* (1981), 30 B.C.L.R. 186, 22 R.F.L. (2d) 402 (S.C.), and *Liebert v. Liebert*, [1990] B.C.W.L.D. 143, [1990] W.D.F.L. 139, B.C.S.C., Vancouver No. A870431 (not yet reported).

110 In *Samuels*, Catliff L.J.S.C. considered the status of two commercial properties that the husband had inherited 15 years into a 22-year marriage. Both properties paid rental income and that income was used for family purposes. At p. 187 Judge Catliff held:

> I do not construe "property" in s. 45(2) to include the income from such property. A house may be a family asset by reason of its family purpose use, but a house owned by one or both spouses and rented out is not, in my view, a family asset merely because the rent is used for family purposes. Section 45(2) is concerned with how property is ordinarily used, not with how income derived from it is ordinarily spent.

111 In *Liebert*, Scarth L.J.S.C. considered the status of an inter vivos settlement by the husband's father in favour of the husband. Despite the fact that income from the settlement was used for family purposes over the years, Scarth L.J.S.C. held that the settlement itself was not a family asset.

112 I find more persuasive, however, a number of cases in which it is held that family use of the income does convert a capital asset to a family asset. These cases can be divided into two groups: "direct" and "indirect" family use of income from capital assets.

113 In *Sinclair v. Sinclair* (1979), 13 R.F.L. (2d) 352 at 357 (B.C.), Provenzano L.J.S.C. stated the following:

> The evidence supports the conclusion that the Edmonton condominium was purchased as an investment and as a tax shelter. The tax shelter feature would reduce the respondent's current income tax liability by permitting certain deductions related to the condominium from his income. I would see this as a benefit to his family, as making more disposable income available to them for living purposes. The investment aspect, I surmise, would be the hope that the return on the money put into the condominium by the respondent would be greatly enhanced on resale. In this way, I assume, the respondent sought to increase his estate, for the security of himself and his family in future years.

114 The creation of more available income for the family, and securing the financial future of the family are two very "indirect" uses of capital assets. Nevertheless, Provenzano L.J.S.C. held that such uses make the asset itself a family asset. See also *Hackett v. Hackett* (1984), 43 R.F.L. (2d) 5 (B.C.S.C.); and *Buck v. Buck* (1987), 16 B.C.L.R. (2d) 71 (S.C.).

115 Two cases have discussed the more "direct" use of income from a capital asset, and whether that makes the capital asset itself a family asset.

116 In *Drinovz v. Drinovz*, [1988] B.C.W.L.D. 1819, [1988] W.D.F.L. 1188, B.C.S.C., Vancouver No. A870810, 1988 (not yet reported), Mr. Justice Gow referred to the decision in *Samuels*, supra, and stated (p. 12):

> Upon reflection my opinion is that the proposition laid down by Catliff L.J.S.C. that a house owned by one or both spouses and rented out is not a family asset merely because the rent is used for family purposes is not of universal application and was not intended by him to be so.

117 Mr. Justice Gow then posed a hypothetical situation which involved a revenue property, purchased for investment purposes with the understanding that each partner would use half the income for his and her own purposes. Use of income in these circumstances, he submitted, *would* make the revenue property a family asset.

118 Finally, I am influenced by the judgment of McEachern C.J.S.C. (as he then was) in *Starko v. Starko*, [1986] B.C.W.L.D. 1540, [1986] W.D.F.L. 818, B.C.S.C., Vancouver No. D51502, 1986 (not yet reported), regarding the usefulness of maintaining a distinction between the capital asset itself and the income it produces. He states at p. 7:

> And it is not realistic, in my view, to draw any distinction between capital and income ... These shares in my view are entirely comparable with a liquid portfolio which produces income. The husband used it as required to support his family, and it would be sophistry to distinguish between capital and income in the particular facts of this case.

And, at p. 8, he states:

> ... in my view the shares are a cow to be milked rather than a heifer to be bred.

119 See *Wallace v. Wallace*, [1985] B.C.W.L.D. 2165, [1985] W.D.F.L. 1297, B.C.S.C., Vancouver No. D51159, 1985 (unreported), for similar reasoning with respect to shares.

120 In this case, the income Blythwood produced clearly was used, in part, for a family purpose; charge card expenses incurred for family travelling and dining were paid through the Blythwood account, household furnishings were purchased, transfers were made to the parties' joint account — their family account.

121 There is also ample evidence that the properties (including Blythwood) were purchased for the purpose of securing the family's financial future: see *Sinclair*, supra.

122 Both the plaintiff and Haluk testified that the defendant told them on many occasions that the property investments were for family purposes. Moreover, the very structure of the Tezcan's traditional marriage implies that when the defendant from time to time invested in real property, he did so for the purpose of securing his family's future. He was the sole provider and that was his responsibility.

123 There is abundant authority for considering the intention of the parties when determining whether something is a family asset. See *McLennan v. McLennan* (1980), 20 B.C.L.R. 193, 17 R.F.L. (2d) 44 (S.C.); *Lapan v. Lapan* (1982), 18 A.C.W.S. (2d) 442-43 (Ont. Co. Ct.); *Hanuse v. Hanuse* (1984), 40 R.F.L. (2d) 250 (B.C.S.C.); *Schoenfeld v. Schoenfeld*, [1984] B.C.D. Civ. 1650-01 (S.C.); *Baker v. Baker*, [1988] B.C.D. Civ. 1650-03 (S.C.); and *Friend v. Friend*, [1989] B.C.W.L.D. 603, 1329, [1989] W.D.F.L. 457, 804, 13 A.C.W.S. (3d) 264 (S.C.).

124 In conclusion, I find that the Blythwood property is a family asset pursuant to s. 45(2). It was purchased for the purpose of securing the financial future of the family as a unit, and the income it produced was frequently used for family purposes.

125 In the event that my interpretation of the law is not correct, I now will consider whether Blythwood is a business or venture asset to which the plaintiff made a direct or indirect contribution.

Is Blythwood a business asset or venture to which the plaintiff made a contribution?

126 Pursuant to the Family Relations Act, business assets and ventures remain separate property, unless the spouse who does not own the property contributed directly or indirectly to them. The relevant sections read as follows:

> 45. (1) Subject to section 46, this section defines family assets for the purpose of this Act.
>
> (3) ... the definition of family asset includes
>
> (*e*) a right, share or interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed to by or on behalf of the other spouse.
>
> 46. (1) Where property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and where the spouse who does not own a property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.
>
> (2) ... an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

127 Two main issues arise out of these sections, firstly, is Blythwood a venture or business asset, and secondly, did the plaintiff make an indirect contribution and, if so, does there have to be a "nexus" between that contribution and the asset?

128 In my view, Blythwood, as a rental property, is a venture: *Eng v. Eng*, [1984] B.C.W.L.D. 1978, [1984] W.D.F.L. 988, [1984] B.C.D. Civ. 1645-18 (S.C.); *Paulovich v. Paulovich*, [1984] B.C.D. Civ. 1676-05 (S.C.). After reviewing the law, I agree with the statement made in the Law Reform Commission of British Columbia's working paper that in practice,

no distinction appears to have been drawn between business assets and ventures: Working Paper No. 63; Property Rights on Marriage Breakdown, 1989. As a result, I find that Blythwood, as well as being a family asset pursuant to s. 45(2), is also a business asset or venture pursuant to ss. 46(1) and 45(3)(*e*).

129 Did the plaintiff make a direct or indirect contribution to the business asset or venture?

130 The general circumstances of the parties and the acquisition of the properties in dispute have been set out earlier in these reasons. I will now review the evidence related to the role of the plaintiff as a wife and mother.

131 The plaintiff was 20 years of age at the date of marriage. She had not completed her high school education. Throughout the duration of their 22-year marriage, the plaintiff fulfilled the role of a devoted wife and mother. In keeping with their respective roles, the plaintiff looked after and maintained the household, and cared for the two children of the marriage. She was not expected to and did not work at employment outside the matrimonial home during the course of the marriage. The defendant worked and provided the means by which the family maintained its lifestyle both in British Columbia and Turkey.

132 When the family lived in British Columbia, the plaintiff prepared all meals and cared for the children and maintained the family home. When the family resided in Turkey, the plaintiff had the additional responsibility of caring for the defendant's mother who lived with them. The defendant's mother required a special diet and some care which was provided by the plaintiff as part of her responsibilities. When the family resided in Turkey, they had part-time help, but it was the plaintiff who prepared most of the meals and managed the household.

133 During the time the family lived in Vancouver, the defendant founded and became the first president of the Turkish Canadian Cultural Society. In this regard, on social occasions and religious holidays, their home, although modest, was the centre of the Turkish Canadian com munity. The plaintiff was expected to and did perform satisfactorily the role of wife, mother, and supporter of her husband, both in his role as an educator and as a leader in the Turkish Canadian community. In a similar vein, when the defendant was elected president of Bosporus University in Istanbul, for a three-year period, she fulfilled the role of the wife of a university president. She arranged and organized the numerous social and official functions expected of a wife of a university president.

134 In Vancouver and Turkey, the defendant often entertained academic and business colleagues. A good deal of this entertaining was done in the family home. The plaintiff attended to most of the arrangements for these functions. While the defendant had a substantial interest in seeing that such functions and entertainments went well, it was left to the plaintiff to assume most of the responsibility, and in this regard she was a most successful hostess.

135 During the course of the marriage, the defendant travelled extensively in relation to his work. On a number of occasions, at his request, the plaintiff accompanied the defendant to meetings and conferences.

136 It is apparent from the evidence of the children of the marriage that the plaintiff was a loving and caring mother. As Haluk put it in his evidence, the children were encouraged to achieve and they did achieve. While in no way minimizing the encouragement and support the defendant provided, because of his extensive absences from the family home and the necessity to earn the income to provide the family lifestyle, it was the plaintiff who attended to the daily needs of the children, seeing to their personal needs, and assisting them with their school work where possible, and providing emotional support and encouragement. The plaintiff's efforts in this regard are reflected in what the children achieved. They are both medical doctors. They are presently engaged in qualification for their respective medical specialties. In spite of what has happened between the parents, they appear to be responsible, loving children.

137 During the course of the marriage, the plaintiff made other contributions. In the course of his consulting work, the defendant developed computer programs which he sold to clients. The plaintiff did some key-punching in relation to the programs over a period of several years. Of more importance is the plaintiff's contribution to the defendant taking time to study and understand the operation of the real estate markets in the United States and Canada, and particularly in British Columbia. During the time the family lived in Vancouver, the defendant spent approximately six months over

that period of time studying the British Columbia market. At times he would bring persons involved in the real estate business to the family home for the purpose of discussion and study.

138 The plaintiff's efforts in and about the homes in Vancouver and Istanbul, and her willingness to take the major responsibility for the upbringing of the children, made it possible for the defendant to devote his energies to the practice of civil engineering, to succeed as a high-level educator and university president, and to devote time to the study of and participation in the real estate markets in both countries.

139 The defendant submits that the plaintiff made no direct or indirect contribution to what he characterizes as his separate business assets. In addition, he maintains that his interest in Blythwood was acquired by using some part of moneys saved by, and owed to him prior to the marriage. He submits further that the substantial down payment required could not have come from savings from income earned as a lecturer and then as an associate professor during the marriage up to the point in time in 1968 when Blythwood was purchased. He equates the moneys saved and moneys owed as being analogous to an inheritance isolated from communal coffers.

140 The evidence of the defendant is confusing with regard to how much he had saved, and what was owed to him from earnings and investments prior to marriage. At one point during the discovery process, the defendant stated his savings and moneys owed to him from business interests totalled approximately $20,000 Canadian. At trial, supported by evidence of transfer of payments of money between banks and affidavits of business associates, he stated he had saved and had interests in businesses in Turkey and Germany, having a total value of approximately $185,000 Canadian. It seems clear that the defendant was in error when he estimated his savings and other interests totalled $20,000 Canadian. I do not consider it necessary to make an accurate determination of what the defendant brought to the marriage by way of assets. Some of the assets in Turkey were in the form of his interest in mining companies, and accounts receivable in relation to a consulting practice. The defendant was not able to recover the entirety of his interest in the mining companies. I consider it sufficient to find that at the time of marriage his assets, including those capable of liquidation in Turkey, probably had a value of approximately $100,000 Canadian.

141 In his submissions, Mr. Maxwell placed considerable emphasis upon the fact that following the acquisition of Blythwood, the defendant arranged to have it managed by others, retaining only the authority related to major decisions for expenditures. In this regard Mr. Maxwell emphasized that the defendant had no involvement with the management of Blythwood at any time following its acquisition.

142 I find difficulty in accepting the submission that the source of moneys to acquire assets purchased during a long marriage should be determinative when characterizing such assets under the Act. Even if it is true that the purchase money for Blythwood was brought by the defendant into the marriage, I am not convinced that it would be unfair to divide the property equally. I prefer the view expressed by Mr. Justice Lambert, in *Murchie v. Murchie* (1984), 53 B.C.L.R. 157 at 164, 39 R.F.L. (2d) 385 (C.A.), which reads as follows:

> The husband had significant assets at the start of this marriage, including most particularly his dental practice and the associated management of that practice. As the trial judge said, he was at that time a person of means. In a comparatively short marriage of one or two years the fact that the asset was brought into the marriage by one of the spouses and not created by the joint efforts of the spouses would be a reason why equality of distribution of that asset in that marriage would be unfair. But parties marry in contemplation of each other's assets and by entering marriage they give up other opportunities of doing other things. In my opinion, when two people in their forties marry and stay married for the length of time which the parties have stayed married in this case, it is not unfair that both spouses should share equally in the assets brought into the marriage by each of them.

143 Furthermore, in my view, the defendant's submission in this perspective would have been more appropriate in the context of reapportionment under s. 51 and particularly s. 51(*f*) which reads "circumstances of ... acquisition of property ..."

144 I find from the evidence that the plaintiff made a substantial indirect contribution by performing wholly adequately as a wife and mother during a marriage of so many years duration. However, as the Law Reform Commission of British Columbia points out, the case law is not in agreement regarding whether there needs to be a connection or "nexus" between that contribution and the asset itself.

145 The defendant asserts that the nexus is critical. He cites *Samuels*, supra; *Simpkins v. Simpkins*, 41 B.C.L.R. 75, [1983] 2 W.W.R. 361, 32 R.F.L. (2d) 1 at 9, 10 (C.A.); *Underhill v. Underhill*, 45 B.C.L.R. 244, [1983] 5 W.W.R. 481, 34 R.F.L. (2d) 418 at 428 (C.A.); and *Tholl v. Tholl* (1985), 44 R.F.L. (2d) 337 at 349 (B.C.S.C.).

146 In *Samuels*, Catliff L.J.S.C. finds that a nexus is required, largely by reference to the wording of ss. 46(1) and 45(3)(*e*) [at p. 188]:

> But what I think the wife must prove is that her contribution had some connection, albeit in only a general way, with the property in which she seeks an interest. That some connection is required seems clear from s. 46(1) which excludes business assets where the non-owning spouse makes no contribution to "the acquisition of *the* property" or "operation of *the* business". (The italics are mine.) This seems also the sense of s. 45(3)(*e*) which constitutes as a family asset a spouse's interest in a venture "*to which* money or moneys worth" was contributed by the other spouse. (The italics are mine.)

147 Other cases which require a "nexus" include: *Shu-Jung (Quan) v. Dick (Quan)* (1981), 38 B.C.L.R. 68 (S.C.); *Gwynn v. Forsythe* (1985), 45 R.F.L. (2d) 86 (B.C.C.A.); and *Johnson v. Johnson*, 30 B.C.L.R. 115, [1981] 6 W.W.R. 316, 23 R.F.L. (2d) 70 (S.C.).

148 There is equally persuasive authority for the proposition that savings will be made, and contribution to the business asset or venture will be presumed merely upon the petitioner establishing that she or he was an effective spouse, parent and manager of the household: *Locke v. Locke* (1983), 36 R.F.L. (2d) 216 (B.C.S.C.); *Kozak v. Kozak*, [1987] B.C.W.L.D. 2646, [1987] W.D.F.L. 1488, [1987] B.C.D. Civ. 1640-02 (S.C.); *Stewart v. Stewart* (1984), 56 B.C.L.R. 375, 40 R.F.L. (2d) 396 (C.A.); and *Blockberger v. Blockberger* (1983), 48 B.C.L.R. 235, 36 R.F.L. (2d) 241 (C.A.).

149 Most often quoted is *Elsom*, supra, at p. 299. The following passage is relevant here:

> The meaning of s. 46 may, in my opinion, be summarized in this way. A business asset in the name of one spouse is not a family asset unless the other spouse makes a direct or indirect contribution to it. If the spouse has been effective as a wife and mother it is to be inferred that savings have accrued to the benefit of her husband because he has not had to arrange for and pay someone else to provide those services. Those savings are assumed to have advanced the business interests of the husband because more time and money may be devoted to the business. In that sense, there is a nexus between the role of an effective wife and mother and the acquisition or operation of the husband's business.

150 I prefer the approach in *Elsom* for two reasons: first, it allows the court to recognize, in a meaningful way, the importance and value of persons who make our homes and rear our children. Secondly, it recognizes the practical reality that two partners' financial affairs are rarely distinct from, and independent of, all other aspects of their relationship.

151 I find the plaintiff's very able performance of her duties as wife and mother indirectly contributed to the acquisition and/or operation of Blythwood. Overall her assumption of complete responsibility for the "internal" aspects of the marriage, including entertaining and the care of the defendant's mother, enabled the defendant to devote his time to rising through professional and academic ranks and developing an investment portfolio which included Blythwood. More specifically, her efforts allowed him both the time to "learn the market" before buying Blythwood and the money to hire property managers to deal with the daily business of Blythwood. Blythwood, therefore, is a business asset or venture to which the plaintiff made an indirect contribution. It is, therefore, to be treated as a family asset.

(c) Am I entitled to take into account the existence and value of the Turkish properties?

152 Having found that the Cornwall and Blythwood properties are family assets for the reasons stated in (b), before considering what division of the properties should be made, I will address the submission of the plaintiff that I should, if reapportionment is appropriate pursuant to s. 51, take into consideration the existence and value of the Turkish properties, thereby considering the value of the "whole pot".

153 Professor Castel, in Canadian Conflict of Laws, in para. 324, specifically endorses this approach. He states:

> Furthermore, the *ownership* of immovable property as between spouses is governed by the internal law of the place where the land is situated, but where the law of the province where the action is brought is applicable respecting division of family assets, the value of the foreign immovable property may be taken into consideration for the purpose of the division of the family assets.

154 The authorities referred to by Professor Castel in support of this statement arose in jurisdictions that have, within their family property legislation, specific sections that deal with the question. For example, s. 22 of the Nova Scotia Matrimonial Property Act, 1980, c. 9, reads:

> **Conflict of Laws**
>
> 22 (1) The division of matrimonial assets and the ownership of moveable property as between spouses, wherever situated, are governed by the law of the place where both spouses had their last common habitual residence or, where there is no such residence, by the law of the Province.
>
> **Law Governing Immoveable Property**
>
> (2) The ownership of immoveable property as between spouses is governed by the law of the place where that property is situated.
>
> **Other Property Considered**
>
> (3) Notwithstanding subsection (2), where the law of the Province governs the division of assets, the value of the immoveable property wherever situated may be taken into consideration for the purposes of a division of assets.

155 I understand Prince Edward Island, Manitoba, and Saskatchewan to have comparable provisions in their statutes. I have considered a number of decisions which have dealt with ex juris property in accordance with such statutory provisions, including *Nuss v. Nuss* (1983), 37 R.F.L. (2d) 7 (Ont. Co. Ct.), wherein the court stated that only property that can be classified as family asset property may properly be considered.

156 British Columbia has no comparable conflict of laws provisions in the Family Relations Act. The clearest statement of a British Columbia judge regarding the question, is found in the case relied upon by the plaintiff, *Wong v. Wong* (1985), 60 B.C.L.R. 135 at 143, 44 R.F.L. (2d) 82 (S.C.), where Cowan L.J.S.C. stated:

> Assuming the court made a determination that all or part of the British Columbia assets were family assets for the purposes of the Act, it would then have to go on and consider under s. 51 whether the equal division which would follow from such determination would be unfair. To do this effectively, as well as deal with the plaintiff's claim to the Hong Kong assets, it would have to hear expert evidence as to the law of Hong Kong in order to determine what rights under Hong Kong law the plaintiff might have to those assets. This determination would have to be made to decide the issue of fairness even though this court could not make any order specifically affecting the Hong Kong assets since those assets are outside of its jurisdiction. Even so, in my view, evidence would have to be called in this regard from Hong Kong witnesses pertaining to the value of the Hong Kong assets before the court could

> reasonably decide if an equal division of the British Columbia assets (assuming they were found to be family assets) would be unfair.

157 In *Jeske v. Jeske*, [1984] 1 W.W.R. 61, 28 Alta. L.R. (2d) 172, 36 R.F.L. (2d) 376, 50 A.R. 216, Cawsey J. of the Alberta Queen's Bench was confronted with a question as to enforcement of a division of matrimonial property order made by a British Columbia court. Spencer J., for the Supreme Court of British Columbia, had, in an unreported decision, specifically held that he had no jurisdiction to deal with lands situated in the province of Alberta, but held that the lump sum award he made was based on a consideration of the value of immovable property situated in Alberta. Cawsey J. made the order, enforcing Spencer J.'s judgment.

158 In *Babowech v. Von Como* (1989), 35 B.C.L.R. (2d) 246, 18 R.F.L. (3d) 365, the British Columbia Court of Appeal held, in part, that a division of property made below was unfair, pursuant to s. 51 of the Family Relations Act, and took into consideration when making its division, properties situated in Washington and Florida. The "whole pot" of the parties, including foreign properties, was considered in this matter when it came to reapportionment under s. 51.

159 In *Wallace*, supra, Finch J., when dealing with the disposition of some of the parties' assets, held that the petitioner wife's inheritance was not "property" which he could take into account under s. 51 of the Act. While Finch J.'s judgment was relied upon by Mr. Maxwell in another respect, having considered the judgment, I do not feel that his exclusion of the petitioner wife's inheritance derogates from the approach taken by other courts to this question.

160 The judgment of the Court of Appeal in *Tezcan*, supra, appears to support the whole pot approach. I refer to the final paragraph of the court's judgment, at p. 258, which reads as follows:

> Second, assuming that a British Columbia court in such an action were to hold that the Family Relations Act was applicable or that the equitable doctrine of constructive trust applied, it would be open to the British Columbia court to take into account a division of property made in another jurisdiction in determining what order, if any, should be made in relation to the British Columbia land.

161 In my view, Madam Justice McLachlin's words, "a division of property made in another jurisdiction" should not be limited to a court-ordered division of property, but should also include a regime-imposed division of property. On this assumption, the fact that the defendant has exclusive title and right to the properties in Turkey can be considered in deciding what portion of Blythwood should be awarded to the plaintiff.

162 In conclusion, I find that I am entitled to take into account the existence and value of the Turkish properties when reapportioning the properties pursuant to s. 51 of the Act. In a number of Canadian jurisdictions such an approach is mandated by statute. In my view, considering such properties appears to make sense in terms of doing justice to the parties.

(d) What division of the British Columbia properties should be made?

163 Having found that both the Cornwall property and the Blythwood apartment are family assets, s. 43 of the Family Relations Act requires that they be divided equally between the plaintiff and the defendant. That division, however, is subject to reapportionment pursuant to s. 51 which reads as follows:

> 51. Where the provisions for division for property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (*a*) the duration of the marriage;
>
> (*b*) the duration of the period during which the spouses have lived separate and apart;
>
> (*c*) the date when property was acquired or disposed of;

> (*d*) the extent to which property was acquired by one spouse through inheritance or gift;
>
> (*e*) the needs of each spouse to become or remain economically independent and self sufficient; or
>
> (*f*) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property ... be divided into shares fixed by the court ...

164 The word "unfair" is not defined. There is no criteria regarding the fixing of appropriate shares when the decision has been made to redistribute. What is unfair appears to be dependent upon the circumstances in a given case with the assistance of the factors set out in s. 51.

165 The focus then, is on whether an equal division of family assets would be unfair having regard to the factors enumerated in s. 51: *Baird v. Baird*, 33 B.C.L.R. 77, [1982] 2 W.W.R. 8, 25 R.F.L. (2d) 17, 130 D.L.R. (3d) 128 (C.A.). It is important to note also that all of the factors listed in s. 51 interact and overlap to some degree and that the weight given to each factor and the division that is made in the end, ultimately depends primarily upon the individual judge's determination of what is fair: note *Gywnn v. Forsythe* (1982), 40 B.C.L.R. 358 at 372-73, 31 R.F.L. (2d) 188, varied on other grounds 45 R.F.L. (2d) 86 (C.A.).

166 The factors that have guided my determination of what is fair in this case include s. 51(*a*), (*e*) and (*f*), and I will now consider each of them.

(a) Duration of marriage

167 Since they were married for over 22 years, it is fair to characterize the Tezcan's marriage as a "long marriage". Although the case law does not provide precise guidance with respect to what effect this should have on reapportionment, it seems that duration of marriage is a "negative" factor. This means that it is most often used in cases of short marriages to reduce the claimant's percentage, rather than as a reason to increase the claimant's percentage when the marriage is long. The following passage from Mr. Justice Locke's 2nd July 1985 decision in *Elsom v. Elsom*, [1985] B.C.W.L.D. 2710, [1985] W.D.F.L. 1578 (S.C.), reflects this view of the "duration of marriage" factor:

> These parties lived together for nine years before separation and neither of them were youngsters. It is not obvious that the marriage is so short that one must immediately come to the conclusion that a 50 per cent division is unfair. But as I follow the train of thought in the authorities, in the case of a long marriage with a continuing contribution by the wife, even if only indirect, it becomes more difficult to displace the 50 per cent rule, without something more.

168 There is certainly nothing with respect to the length of this marriage that would warrant reducing the plaintiff's share. Neither do I find that the duration of the marriage, in itself, is sufficient to warrant increasing the plaintiff's share of Cornwall and Blythwood. I do find, however, that the length of the marriage, with the respective roles of the spouses as referred to earlier in these reasons, taken together with the needs of a plaintiff to become economically independent and self-sufficient, form a proper basis upon which to find that equal division of the properties would be unfair to the plaintiff. In this regard, I consider subss. (*a*) and (*e*) of s. 51 to interact to allow a proper determination of what is fair.

(e) Need of each spouse to become or remain economically self-sufficient ... and

169

(f) Any other circumstances ... relating to ... the capacity ... of a spouse:

170 The disparate financial positions of the Tezcans and their differing abilities to become or remain economically self-sufficient compel a finding that an equal division would be unfair in the circumstances.

171 I have held that I am entitled to take into account the existence and value of the property owned by the defendant in Turkey.

172 The plaintiff obtained valuations of four of the Turkish properties. The valuations of these properties totalled approximately $1,500,000 Canadian. The remaining property, a condominium at Erenko, is not valued. This is the property which was given to Haluk for his benefit and that of Kamer. The defendant held this property in his name until Haluk obtained his majority, at which time the property was put in his name in accordance with Turkish law.

173 The defendant questioned the valuations, maintaining that they did not accurately reflect the values indicated. He gave detailed evidence in relation to the values of the properties.

174 I have difficulty in accepting the plaintiff's valuations of the four properties in Turkey, having regard to certain of the evidence of the defendant. In this regard, the defendant referred to certain restrictions imposed by the appropriate local government related to development of properties which were acquired by him with the prospect in mind of development and subsequent sale. I am satisfied, however, that what was the parties' matrimonial home in Istanbul, a substantial condominium, has a value in excess of $500,000 Canadian. I consider the evidence to support the conclusion that the value of the defendant's properties in Turkey is probably worth an amount substantially in excess of $1,000,000 Canadian. The defendant has exclusive title to these properties.

175 In addition, the plaintiff is a Turkish woman, now an immigrant to Canada, with minimal education, who stayed at home and raised the children for some 22 years. She says she has no particular skills and that, as a result, she is virtually unemployable except as a shop clerk — a position that she is currently attempting to obtain.

176 At no time since the divorce has the plaintiff received support in the form of maintenance from the defendant. Furthermore, following the divorce, she was required to sell her jewellery to obtain funds to allow Haluk to complete his studies to obtain a medical degree in Turkey.

177 In contrast, while the plaintiff fulfilled her role in the marriage, the defendant has had 22 years to rise through academic and professional ranks, nationally and internationally, to the point that he now commands an excellent income, and need not worry about his financial future.

178 In summary, the defendant has in excess of $1,000,000 Canadian worth of property in Turkey and the prospect of continued high earnings. The plaintiff has received no support from the defendant, has at best a very limited earning potential, has only an interest in the Cornwall property, and no financial security. She is presently dependent upon members of her family for support.

179 In the particular circumstances of this case, and having regard to the factors referred to in s. 51 which I consider to be appropriate, and what I consider represents fairness, I allocate the properties in the following manner:

(1) Cornwall	100 per cent to the plaintiff.
(2) Blythwood	70 per cent to the plaintiff.
	30 per cent to the defendant.

180 The plaintiff is entitled to costs.

Judgment for plaintiff.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Corlett v. Hoelker | 2012 BCSC 25, 2012 CarswellBC 69, [2012] W.D.F.L. 1879, [2012] W.D.F.L. 1927, [2012] B.C.W.L.D. 2332, [2012] B.C.W.L.D. 2370, 13 R.F.L. (7th) 400, 210 A.C.W.S. (3d) 718 | (B.C. S.C., Jan 11, 2012)

1992 CarswellBC 1
British Columbia Court of Appeal

Tezcan v. Tezcan

1992 CarswellBC 1, [1992] B.C.J. No. 30, 17 W.A.C. 276, 31 A.C.W.S. (3d) 66, 38 R.F.L. (3d) 142, 62 B.C.L.R. (2d) 344, 87 D.L.R. (4th) 503, 8 B.C.A.C. 276

TOMRIS TEZCAN v. SEMIH S. TEZCAN

Cumming, Gibbs and Hinds JJ.A.

Heard: December 9 and 10, 1991
Judgment: January 14, 1992
Docket: Vancouver Doc. CA012233

Counsel: *Thomas R. Berger* and *Barbara E. Bulmer*, for appellant.
Rose-Mary Liu Basham, Q.C., and *Richard J. Berrow*, for respondent.

Subject: Family; International; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Conflict of laws

III Family law
III.1 Marriage
III.1.c Property rights within marriage
III.1.c.i On separation of spouses
III.1.c.i.A Immovables

Family law

III Division of family property
III.5 Assets which may be excluded from property to be divided
III.5.a General principles
III.5.a.i Family and non-family assets

Family law

III Division of family property
III.8 Factors affecting equal or unequal division
III.8.b Spouse's extra-provincial property

Family law

III Division of family property
III.9 Order for division of property

III.9.b Factors to be considered in determining nature of order
III.9.b.iii Miscellaneous

Headnote

Conflict of Laws --- Family law — Marriage — Property rights within marriage — On separation of spouses — Immovables

Family Law --- Family property on marriage breakdown — Factors affecting equal or unequal division — Tax consequences of division

Family law — Matrimonial property — Conflict of laws — Parties married in Turkey moving to British Columbia and acquiring property here, then returning to Turkey — Wife bringing Family Relations Act action for property division after divorce in Turkey — General rule of lex rei sitae applying to immovable property — No contract governing property division — Separation of property regime imposed by Turkish law in absence of contract not operating to displace general rule — Husband's Turkish properties beyond court's jurisdiction properly taken into consideration by trial judge in reapportioning British Columbia properties.

Family law — Matrimonial property — Orders for division — Means of effecting division — Trial judge awarding wife percentage interests in two of husband's properties — Transfer of interest to wife contemplated by order of trial judge having adverse tax consequences for husband — Appeal court substituting money judgment.

Family law — Matrimonial property — Scope and operation of matrimonial property legislation — Nature of rights — Family Relations Act, Pt. 3, creating interest in land in non-titled spouse affecting title.

Conflict of laws — Property — Immovable property — Parties married in Turkey moving to British Columbia and acquiring property here, then returning to Turkey — Wife bringing Family Relations Act action for property division after divorce in Turkey — General rule of lex rei sitae applying to immovable property — No contract governing property division — Separation of property regime imposed by Turkish law in absence of contract not operating to displace general rule — Husband's Turkish properties beyond court's jurisdiction properly taken into consideration by trial judge in reapportioning British Columbia properties.

The parties were Turkish citizens who married in Turkey in 1961, when the husband was aged 28 and the wife 20. They moved to British Columbia later that year. In 1968 they returned to live in Turkey, where they separated in 1983 and divorced in 1984. The divorce decree did not deal with the substantial real estate and other assets accumulated both in Turkey and in British Columbia during the marriage. The wife brought an action under the *Family Relations Act*. The trial judge awarded the wife a 100 per cent interest in one of two British Columbia properties and a 65 per cent share of her husband's 70 per cent share in the other British Columbia property. In doing so, the judge found that the proper law to be applied was that of British Columbia and he took into account the value of the properties in Turkey. The husband appealed.

Held:

Appeal dismissed; order varied so as to substitute a money award for a transfer of property.

Part 3 of the *Family Relations Act* differs from other similar Canadian enactments which create only a payment obligation between spouses and do not, as does the British Columbia statute, create interests in real property. Upon dissolution of the marriage the Act operates to vest a proprietary interest in land in the non-titled spouse which would be recognized in the land titles system and affect title in respect of all persons. Accordingly, claims made

under Pt. 3 have to be considered as property claims for the purposes of the choice of law rules. There being no marriage contract to the contrary, and because the wife's claims were to immovable property, the lex situs applied. The trial judge did not err in finding no "reason to the contrary" to displace the law of the matrimonial domicile as the proper law of the contract, nor did he err in accepting expert evidence as to that law and in finding as a fact that there was no implied contract under which the parties agreed to a regime of separation of assets according to Turkish law. As well, the expert evidence at trial showed that even if an implied contract existed under Turkish law, it would not govern immovables in British Columbia.

The trial judge did not err in considering the value of the Turkish properties for the purposes of distributing the matrimonial properties in British Columbia, and he made no reversible error in determining the value of the Turkish properties. The formal order required the husband to transfer his interest in the properties to the wife and gave liberty to apply in respect of tax consequences. It was clear that a transfer would have negative tax consequences for the husband and that a monetary award would have been more suitable. That was an order that could be made under s. 9(1)(*a*) of the *Court of Appeal Act*, thereby avoiding the expense of further delays in returning to the trial court.

Table of Authorities

Cases considered:

Battye v. Battye (1989), 22 R.F.L. (3d) 427 (Ont. H.C.) — *referred to*

Beaudoin v. Trudel, [1937] O.R. 1, [1937] 1 D.L.R. 216 (C.A.) — *referred to*

Biedler v. Biedler, [1983] 5 W.W.R. 129, 33 R.F.L. (2d) 366 (B.C.S.C.) — *referred to*

Blackett v. Blackett (1989), 40 B.C.L.R. (2d) 99, 22 R.F.L. (3d) 337, 63 D.L.R. (4th) 18 (C.A.) — *referred to*

Danish v. Danish (1981), 33 B.C.L.R. 176 (C.A.) — *referred to*

De Nicols v. Curlier, [1900] A.C. 21 (H.L.) — *considered*

Derrickson v. Derrickson, [1986] 1 S.C.R. 285, 1 B.C.L.R. (2d) 273, [1986] 3 W.W.R. 193, 50 R.F.L. (2d) 337, 65 N.R. 278, [1986] 2 C.N.L.R. 45, 26 D.L.R. (4th) 175 — *referred to*

Devos v. Devos, [1970] 2 O.R. 323, 10 D.L.R. (3d) 603 (C.A.) — *considered*

Duke v. Andler, [1932] S.C.R. 734, [1932] 4 D.L.R. 529 [B.C.] — *referred to*

Farwell v. Farwell (1979), 17 B.C.L.R. 97, [1980] 2 W.W.R. 518, 15 R.F.L. (2d) 49, 105 D.L.R. (3d) 364 (S.C.) — *referred to*

Heon v. Heon (1989), 69 O.R. (2d) 758, 22 R.F.L. (3d) 273, 34 E.T.R. 252 (H.C.) [additional reasons (1989), 70 O.R. (2d) 781, 23 R.F.L. (3d) 408 (H.C.)] — *referred to*

Laurence v. Laurence (1991), 56 B.C.L.R. (2d) 254, 33 R.F.L. (3d) 27 (C.A.) — *applied*

McEvoy v. Ford Motor Co. (1991), 62 B.C.L.R. (2d) 161 (C.A.) — *referred to*

Mills v. Mills (1980), 20 R.F.L. (2d) 197 (B.C.S.C.) — *referred to*

Parsons, Re, 29 O.W.N. 430, [1926] 1 D.L.R. 1160 (H.C.) — *referred to*

Porter v. Armstrong, [1926] S.C.R. 328, [1926] 2 D.L.R. 340 [B.C.] — *referred to*

R. v. Ericson (December 9, 1991), Vancouver Doc. CA013312 (C.A.), [1992] B.C.W.L.D. 167 — *referred to*

Rosencrantz v. Union Contractors Ltd. (1960), 31 W.W.R. 597, 23 D.L.R. (2d) 473 (B.C.S.C.) — *referred to*

Ross v. Ross (1894), 25 S.C.R. 307 [Que.] — *referred to*

Stark v. Stark (1990), 47 B.C.L.R. (2d) 99, 26 R.F.L. (3d) 425, 71 D.L.R. (4th) 466 (C.A.) [leave to appeal to S.C.C. refused (1991), 53 B.C.L.R. (2d) xxxi, 31 R.F.L. (3d) 466n, 77 D.L.R. (4th) vii] — *referred to*

Tezcan v. Tezcan (No. 1) (1986), 6 B.C.L.R. (2d) 209, 31 D.L.R. (4th) 71, reversed (1987), 20 B.C.L.R. (2d) 253, [1988] 2 W.W.R. 264, 11 R.F.L. (3d) 113, 24 C.P.C. (2d) 13, 46 D.L.R. (4th) 176 (C.A.) — *applied*

Wong v. Wong (1985), 60 B.C.L.R. 135, 44 R.F.L. (2d) 82 (S.C.) — *referred to*

Statutes considered:

Court of Appeal Act, S.B.C. 1982, c. 7

s. 9(1)(a)*considered*

Family Relations Act, R.S.B.C. 1979, c. 121

Part 3 (ss. 43-55)*considered*

s. 43(2)*referred to*

s. 51*referred to*

s. 52*referred to*

s. 53(2)*referred to*

Income Tax Act, S.C. 1970-71-72, c. 63 — *referred to*

Partnership Act, R.S.B.C. 1979, c. 312

s. 3(a)*referred to*

Turkish Civil Code — *considered*

Rules considered:

British Columbia Supreme Court Rules, 1990

R. 18A

Appeal from judgment of Harvey J., (1990), 44 B.C.L.R. (2d) 343, 68 D.L.R. (4th) 277, in action for determination of title to lands acquired during parties' marriage.

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

Judgment appealed from

1 This is an appeal from the judgment of Mr. Justice Harvey pronounced March 6, 1990 finding that the proper law to be applied is that of British Columbia and reallocating family property in British Columbia pursuant to s. 51 of the *Family Relations Act*, R.S.B.C. 1979, c. 121. This decision is reported at (1990), 44 B.C.L.R. (2d) 343, 68 D.L.R. (4th) 277.

Facts

2 The parties were born in Turkey.

3 The appellant (the husband) obtained a Ph.D. degree in engineering. By 1961 he had accumulated some $100,000 in savings as a result of income earned.

4 The parties were married in Turkey on June 2, 1961. The husband was then 28 and the respondent (the wife) was 20. She had not then completed her high school education.

5 There were two children of the marriage: a son, Haluk, and a daughter, Kamer. Throughout the marriage, the wife looked after and maintained the household and cared for the children. She also made arrangements for numerous social functions related to the advancement of the husband's career.

6 In August 1961 the parties moved to Vancouver where the husband took a position as a lecturer in the Faculty of Engineering at the University of British Columbia.

7 The husband also studied and participated in the real estate market. Three British Columbia properties were purchased during the course of the marriage:

8 (a) The "West 13th property," which was held in the joint names of the parties until it was sold in April 1983. The proceeds were used to purchase property in Turkey which was eventually given to Haluk;

9 (b) The "Cornwall Condominium," which was held in the joint names of the parties. At the time of trial it was valued at $163,000, subject to a $31,340.60 mortgage;

10 (c) The "Blythwood Apartments," which was purchased in 1967 and held in the name of the husband as to a 13/20 undivided interest. The remaining interest was held by unrelated third parties, the Drs. Soykan. This property was valued at trial at $1.6 million but was subject to a $40,000 mortgage. It was never actually physically used by the Tezcan family, although the income it produced was clearly used for a family purpose and it was intended to secure the family's financial future. The property was managed by others hired for the purpose.

11 In June 1966 the Tezcan family returned to Turkey and in 1967 came again to Vancouver. Both of the parties obtained Canadian citizenship.

12 In 1968 the Tezcan family returned to Turkey, where they lived for the remainder of their marriage. While the family lived in Turkey, the wife also cared for the husband's mother who lived with them.

13 The husband purchased properties in Turkey which, at the time of trial, were valued at over $1 million.

14 The parties separated in June 1983. In early September 1983 the parties and their two children met at Ulus, near Istanbul, to discuss the disposition of property acquired during the marriage. No final agreement, however, was reached.

15 On September 18, 1983 the parties were divorced in Turkey. The Turkish divorce decree did not deal with the property of the parties and no other proceedings have been taken with respect to the property. The husband has exclusive title and right to the properties in Turkey.

16 On August 10, 1984 the husband remarried in Turkey. He has two children by his second wife.

17 The wife also remarried but she divorced her second husband one month before the trial of this action. The wife has minimal education and is now virtually unemployable except in low-paying jobs. She has received no maintenance from her first husband.

18 This action was commenced by the wife in January 1984.

19 On September 15, 1986 Proudfoot J. (as she then was) dismissed the action pursuant to R. 18A on the ground that it would be inappropriate for the courts of British Columbia to assume jurisdiction. This decision is reported at (1986), 6 B.C.L.R. (2d) 209, 31 D.L.R. (4th) 71.

20 On December 9, 1987 the wife's appeal from the order of Proudfoot J. was allowed. McLachlin J.A. (as she then was), for the court, found that as the claim related to lands within the province, the courts of British Columbia had jurisdiction, and to decline jurisdiction would be to deprive the wife of her claim to the properties. This decision is reported at (1987), 20 B.C.L.R. (2d) 253, [1988] 2 W.W.R. 264, 46 D.L.R. (4th) 176, 11 R.F.L. (3d) 113, 24 C.P.C. (2d) 13.

21 On March 6, 1990, after a 16-day trial, Harvey J. awarded the wife a 100 per cent interest in the Cornwall property and a 70 per cent interest in her husband's 65 per cent share of the Blythwood property pursuant to the matrimonial property provisions of the *Family Relations Act*.

Issues

22 The appellant seeks to persuade this court that the law of Turkey should be the law applicable for determining the disposition of the matrimonial assets of the Tezcan marriage. According to the Turkish regime, married persons would be deemed to hold separate assets and therefore the respondent would not be entitled to any portion of the husband's property. The respondent submits that the law of British Columbia is the law applicable for determination of division of matrimonial assets (in particular the Cornwall and Blythwood properties). The trial judge agreed with the respondent and held that the law of British Columbia (specifically the *Family Relations Act*) was the proper law to apply.

23 Specifically in his factum the appellant alleges the following errors in the judgment under appeal:

I. As to choice of law the trial judge erred

24 (a) He should have held that rights to Blythwood, being a movable, were to be adjudicated under the Turkish regime.

25 (b) He should have found an implied contract between the parties that they should be governed by the Turkish regime.

26 (c) Choice of law for purposes of the *Family Relations Act* should be determined by choosing the law of the jurisdiction with which the spouses have the most real and substantial connection, in this case Turkey.

II. The trial judge erred in the 70/30 division he made of family assets

27 (a) He should not have taken the appellant's Turkish properties into account.

28 (b) He gave undue weight to the evidence of the respondent's valuator.

29 (c) He did not reach a correct figure even on the evidence he did consider.

III. The trial judge erred in making an order for the transfer of the appellant's interest in Blythwood to the respondent without regard to the tax consequences.

30 Counsel for the respondent, in her factum, states the issues thus:

Choice of law

31 (a) What is the character of the respondent's claim to an interest in the Blythwood and Cornwall properties?

32 (b) Is Blythwood a movable?

33 (c) If the respondent's claim is characterized as a claim to an interest in immovable property, does the law of British Columbia govern the claim, or the law of Turkey?

34 (d) If Turkish law governs the respondent's claim, does Turkish law remit the dispute to British Columbia law by renvoi?

35 (e) If Turkish law governs the respondent's claim and would reject it on the basis of a separation of spousal assets, is that conclusion offensive to the public policy of British Columbia and unforceable?

36 (f) Should the established lex situs rule be abandoned in favour of a "substantial connection" test for choice of law?

Apportionment

37 (g) Should the value of Turkish properties owned by the appellant be taken into account in apportioning the Blythwood and Cornwall properties?

38 (h) Did the learned trial judge miscalculate the value of the Turkish properties?

Discussion

39 To assess these contentions it is necessary to consider the matter in several discrete steps.

I. Characterization — Is this a property or matrimonial claim?

40 (i) In order properly to determine which substantive law this court should resort to for the resolution of this matter, it is first necessary to determine which choice of law rule to apply in accordance with the conflicts rules of this province. The choice of law rule instructs the court as to which substantive system of law it should apply to resolve the issue in dispute. Obviously, the determination of the choice of law rule may affect the ultimate outcome of the case. For example, one choice of law rule may point to the lex domicilii (which might favour the appellant) and another may point to the lex situs (which might favour the respondent).

41 (ii) In order to make the determination regarding the choice of law rule, this court must first determine under which juridical category the matter is deemed to fall, i.e., how is the claim properly characterized. A different choice of law rule (and thus perhaps a different substantive law) may apply depending on whether the present claim is characterized as a property matter or as a matrimonial matter.

42 (iii) Characterization of the claim to fit within a juridical category may itself present difficulties. As Dicey and Morris, *The Conflict of Laws*, 9th ed. (London: Stevens & Sons Ltd., 1973), at p. 20 note:

... the forum may regard the question as one of succession, while the foreign law may regard the same question as one of matrimonial property. This is the problem of characterisation.

43 In the present case it is not necessary to establish a rigid rule regarding characterization of claims into juridical categories for conflict of law cases. I reach this conclusion because, according to either the Turkish law (as proven on the evidence) or the law of British Columbia, the claim of the respondent in this case would properly be characterized as one relating to property.

(a) Turkish Characterization

44 The learned trial judge found as a matter of fact that a Turkish court would characterize this claim as one related to property. He said (pp. 282-83 D.L.R.):

Both experts called by the plaintiff, Dr. Davran and Professor Uluocak, testified that a Turkish court would characterize this claim as one related to property and, in accordance with the *lex rei sitae* rule, refer it to British Columbia courts. They referred to two provisions of Turkish law; firstly, art. 13 of the Turkish *Civil Code of Procedure*, which reads as follows:

> Article 13
>
> A case concerning real property shall be filed in the Court of the place where the property is located. A real property case is an action which has for its object real property or right therein, or right to the detention or possession — even temporary — of that property, whatever the cause may be. A case involving an easement be handled by the Court of the place where the property upon which the easement is claimed is located. If a case concerns more than one parcel of real property, the action may be brought in any place where any of the properties is located.

Dr. Davran and Professor Uluocak then made reference to art. 23, para. 1, of the Turkish Code, No. 2675, "International Private and Procedural Law", stating that it had application to the circumstances of this matter. Article 23 reads as follows:

> The right of ownership and other rights *in rem* in movable and immovable property are governed by the laws of the place where the property is located.

Professor Uluocak stated further, referring to art. 23, "This article is competent to deal with the matters in issue in this case." ...

In any event, I am unable to conclude that a Turkish court would characterize this claim as one *not* relating to property. In my view, the weight of the evidence favours the opposite conclusion.

(b) British Columbia Characterization

45 Section 43(2) of the *Family Relations Act* provides:

(2) The interest under subsection (1) [entitlement to assets on marriage breakup] is an undivided half interest in the family asset as a tenant in common.

46 In the court below Harvey J. stated (p. 284):

... this claim is primarily a property claim which happens to arise within a marital context. The context of the claim should not be confused with the essence of the claim. The essence of this claim is property.

47 There does not appear to be any error in this conclusion. The learned trial judge relied upon the judgment of Taylor J. (as he then was) in *Farwell v. Farwell* (1979), 17 B.C.L.R. 97, [1980] 2 W.W.R. 518, 15 R.F.L. (2d) 49, 105 D.L.R. (3d) 364 (S.C.) where he wrote, at p. 102 [B.C.L.R.]:

> This legislation is not legislation in relation to the institution of marriage or the status of spouses as married persons; it relates only to the property and civil rights of such persons.

And on *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at 295, 1 B.C.L.R. (2d) 273, [1986] 3 W.W.R. 193, 50 R.F.L. (2d) 337, 65 N.R. 278, [1986] 2 C.N.L.R. 45, 26 D.L.R. (4th) 175, where Chouinard J., for the court, expressly adopted the submission of the Attorney General of Canada:

> In essence, Part 3 of the *Family Relations Act* is legislation which regulates who may own or possess land or other property. Its true nature and character is to regulate the right to the beneficial use of property and its revenues and the disposition thereof.

48 The fact that *Farwell* and *Derrickson* were constitutional cases does not render them inapplicable to the characterization of the claims determined by the court.

49 I agree with the learned trial judge that the claims of the respondent to the assets in the present case pursuant to Pt. 3 of the *Family Relations Act* are to be considered property claims for the purposes of the choice of law rules.

50 It is, therefore, next necessary to determine which choice of law rule applies to property matters according to the conflicts rules of this province.

II. Choice of law rule for property

51 It is common ground that the choice of law rules applicable to proprietary claims arising from marriage are as follows:

52 (1) Claims to movable property are governed by the lex domicilii (i.e., the law of the matrimonial domicile); and

53 (2) Claims to immovable property are governed by the lex situs unless;

54 (3) Any marriage contract (express or implied) provides otherwise (see 8 Hals. (4th) 370, paras. 513 and 515).

III. Are all Family Relations Act claims to be considered claims to movables?

55 The appellant contends that all *Family Relations Act* claims should be considered as claims to movables and thus governed by the lex domicilii (which in the present case would be that of Turkey). In his factum he states:

> A claim under the *Family Relations Act* is a claim based on the equities between the spouses, a claim *in personam*, and it should not be categorized as a claim for title to real property.

56 I am unable to accept this submission.

57 The Act itself is clearly intended to confer proprietary rights to interests in land, which are immovables. Section 53(2) specifically empowers the court to, inter alia:

58 (a) declare ownership of or right of possession to property;

59 (b) order that, on a division of property, title to a specific property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;

60 (d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;

61 (g) where property is owned by spouses as joint tenants, sever the joint tenancy.

62 Professor McLeod, in an annotation to *Battye v. Battye* (1989), 22 R.F.L. (3d) 427 at 428 (Ont. H.C.), states:

> ... the [Ontario] Family Law Act is not a "property" statute. It is a debtor-creditor statute that divides value and creates an in personam equalization entitlement: *contrast Family Relations Act, R.S.B.C. 1979, c. 121, which creates property rights.* (emphasis added)

63 Similarly, Professor Nicholas Rafferty in "Matrimonial Property and the Conflict of Laws" (1982), 20 U.W.O. L. Rev. 177 at p. 197, writes:

> Only the British Columbia legislation purports to create actual property rights.

64 The rights which arise by operation of the *Family Relations Act* are not simply matrimonial rights between the parties inter se. Part 3 of the Act differs from other similar Canadian enactments which create only a payment obligation between spouses and do not, as does the British Columbia statute, create interests in real property. Upon dissolution of the marriage the Act operates to vest a proprietary interest in land in the non-titled spouse which would be recognized in the land titles system and affect title in respect of all persons: see *Biedler v. Biedler*, [1983] 5 W.W.R. 129, 33 R.F.L. (2d) 366 at 374 (B.C.S.C.); *Heon v. Heon* (1989), 69 O.R. (2d) 758, 22 R.F.L. (2d) 273 at 293, 34 E.T.R. 252 (H.C.); *Mills v. Mills* (1980), 20 R.F.L. (2d) 197 at 203-204 (B.C.S.C.), approved in *Stark v. Stark* (1990), 47 B.C.L.R. (2d) 99, 26 R.F.L. (3d) 425 at 436, 71 D.L.R. (4th) 466 (C.A.).

65 I must therefore reject the appellant's argument that all claims arising under the *Family Relations Act* are to be characterized as claims to movables.

IV. Should the appellant's interest in the Blythwood property be considered a partnership asset and therefore a movable?

66 The appellant argues that the Blythwood property was an asset of a partnership (in the legal sense of the word) between himself and the Drs. Soykan and therefore a movable for the purposes of the choice of law rules discussed above.

67 No argument was advanced in the court below regarding this issue of an alleged "partnership" relationship. It was not pleaded and was raised for the first time in the appellant's revised factum filed October 8, 1991. The recent decision of this court in *McEvoy v. Ford Motor Co.* (November 26, 1991), Vancouver Docs. CA011437, CA09901 [now reported 62 B.C.L.R. (2d) 161], precludes argument being made on this point. Mr. Justice Legg said, at pp. 7-8 [pp. 165-66]:

> The leading authorities make clear that a Court of Appeal should not give effect to a point taken for the first time in appeal unless it be clear that had the question been raised at the proper time, no further light could have been thrown upon it. I refer to *Lamb v. Kincaid* (1907), 38 S.C.R. 516 at 519, 27 C.L.T. 489, per Duff J. (as he then was); and *Thomson v. Lambert*, [1938] S.C.R. 253 at 269, 70 C.C.C. 78, [1938] 2 D.L.R. 545 [Ont.]. I also refer to *Re Cowburn; Ex parte Firth* (1882), 19 Ch. Div. 419 at 429 (C.A.); and *Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A.C. 473 at 480 (P.C.).
>
> This court in *Block Brothers Realty Ltd. v. Boese* (1988), 24 B.C.L.R. (2d) 178 at 179, said that the court ought only to decide in favour of the appellant on a ground put forward for the first time if it is *satisfied beyond doubt*, first that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at trial.

68 See also *R. v. Ericson* (December 9, 1991), Vancouver Doc. CA013312 (C.A.), [1992] B.C.W.L.D. 167.

69 It is far from clear that had the partnership issue been raised below, no further light could have been thrown upon it. In fact, it would seem that significantly more evidence would have been required had this argument been brought up at trial.

70 Moreover, even if the appellant were permitted to pursue the partnership issue in this court, I am not persuaded that he could succeed on the merits.

71 The appellant contends that the factual basis for finding a partnership was before the trial judge. The record does not evidence any consideration of the issue of a partnership in the legal sense in the court below, nor does it provide the basis from which such a relationship could be found by this court. The only references to a "partnership" the appellant could provide to us were with respect to some very general comments of certain witnesses. For example, Ms. Tezcan stated:

> [Dr. Tezcan] was looking for an investment, you know, for the future of the family, but his money wasn't enough. He decided that he should find a partner, he wanted to buy a large property ... [Tr. vol. 3, p. 418, l. 3-6]

And:

> Q. This was his business partner from Blythwood?
>
> A. Yes. [Tr. vol. 3, p. 437, l. 23-24]

72 The appellant notes that an accountant, D.R. Parker, testified as to a partnership relationship. He discussed sending financial information to the parties and stated:

> My responsibility is to the partnership, not to the individuals. [Tr. vol. 4, p. 585, l. 37-38]

73 This evidence does not, in my view, prove that Dr. Tezcan and the Drs. Soykan were anything more than co-investors or joint venturers in the Blythwood property.

74 The *Partnership Act*, R.S.B.C. 1979, c. 312, provides, as one of the rules for determining partnership:

> 3 ...
>
> (*a*) joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

75 In *Porter v. Armstrong*, [1926] S.C.R. 328 at 329, [1926] 2 D.L.R. 340 [B.C.], Duff J. (as he then was) said:

> Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing.

And, at p. 330:

> The real question is whether, from the evidence before us, one ought to infer an agreement in the juridical sense that the property these two persons intended dealing with was to be held jointly as partnership property, and sold as such. Is this what they contemplated? Had they in their minds a binding agreement which would disable either of them from dealing with his share — that is to say, with his share in the land itself — as his own separate property? A common intention that each should be at liberty to deal with his undivided interest in the land as his own would obviously be incompatible with an intention that both should be bound to treat the corpus as the joint property, the property of a partnership.

76 There was insufficient evidence before the trial judge to support a finding of partnership in the legal sense of the term. In my view, the appellant has not discharged the burden of proving a partnership.

77 Having rejected the appellant's argument that Blythwood was a partnership asset, it is not necessary to deal with the argument that partnership property is personalty and therefore a movable for the purposes of choice of law rules.

78 Both the Blythwood and Cornwall properties are to be considered immovables for the purpose of the choice of law rules. Thus, the governing law will be the lex situs (the law of British Columbia) unless an implied contract providing otherwise is found to exist between the parties.

V. Is there an implied contract between the parties?

79 The learned trial judge stated, at p. 285:

> ... the critical question ... is whether there is an express or implied marriage contract, the effect of which governs the rights of the parties to the land in British Columbia. If there is, then the *lex rei sitae* rule may not apply ...

80 It is conceded by the appellant that there was no express contract made between the parties in the present case. However, the appellant contends that there was an implied contract which was created by operation of the *Turkish Civil Code* (the law according to which the parties were married).

81 In the court below, Harvey J. heard evidence of experts relating to Turkish law. He concluded, as a matter of fact (p. 286):

> In the absence of an express contract, art. 170 of the Turkish *Civil Code* presumes that the parties fall under the regime of separation of assets. Article 186 of the Turkish *Civil Code* defines the separation of assets as follows:
>
> > 186. The system under which the husband and wife each retain the ownership, administration and usufruct of his or her own assets is called separation of assets.

82 The appellant argues that by not expressly contracting *out* of this separation of assets regime, the parties are to be taken as having impliedly contracted *into* this relationship as a result of the Turkish Code. There is no question that in general, an implied contract *can* arise as a result of the law under which parties have been married (*De Nicols v. Curlier*, [1900] A.C. 21 (H.L.)). It is therefore necessary to determine whether such an implied contract is to be found to exist in the present case.

83 The learned trial judge considered the evidence of the Turkish experts to determine whether the operation of the *Turkish Civil Code* was such as to create an implied contract. He examined the issue from the perspective of Turkish law and concluded (p. 287):

> The weight of the expert evidence in this case establishes that there is no implied contract in the absence of an express contract.

84 This determination was a finding of fact. The appellant does not challenge the evidence of the Turkish experts, but rather submits:

> ... it is for the court of the forum to decide whether the law of the jurisdiction where the parties were married will imply a contract; this is not to be left to the experts. *The question of the existence of a contract for the purposes of the British Columbia conflicts rules is a question of British Columbia law.*

85 He argues, therefore, that *this* court should decide whether there was an implied contract as a result of operation of the *Turkish Civil Code*. The appellant suggests that if the matter is left to British Columbia courts, there is authority

for such a finding of implied contract: *De Nicols v. Curlier*, supra; *Beaudoin v. Trudel*, [1937] O.R. 1, [1937] 1 D.L.R. 216 (C.A.); *Re Parsons*, 29 O.W.N. 430, [1926] 1 D.L.R. 1160 (H.C.).

86 It appears to me, however, that the appellant has confused the relationship between substantive law and conflicts rules when he states, "the question of the existence of a contract for the purposes of the British Columbia conflicts rules is a question of British Columbia law." Determining the existence of an implied contract is not merely a question of the conflicts rules of this province. Rather, it is a question of substantive law. The conflicts rules of this province merely tell the court which substantive law to apply in determining whether there is such an implied contract.

87 As Dicey and Morris, *The Conflict of Laws*, 11th ed. (London: Stevens & Sons Ltd., 1987) note, at p. 1059:

> The validity of a marriage contract or settlement, like the validity of an ordinary commercial contract, depends in general on the proper law of the contract.

88 "Proper law of the contract" has a particular meaning in conflicts matters. It is a choice of law rule which will reflect numerous connecting factors. Dicey and Morris, 11th ed., at pp. 1058-1059, state the conflict rules in respect of marriage contracts:

> Rule 154 — (1) The validity, interpretation and effect of a marriage contract or settlement are governed in general by the proper law of the contract.
>
> (2) In the absence of reason to the contrary *the proper law of a marriage contract or settlement is the law of the matrimonial domicile, i.e. the law of the husband's domicile at the time of marriage.*
>
> (3) The parties to a marriage contract or settlement may expressly or impliedly agree that it shall be governed by some other law than the law of the matrimonial domicile. (emphasis added)

89 In *Devos v. Devos*, [1970] 2 O.R. 323 at 610, 10 D.L.R. (3d) 603 at 610 (C.A.), Schroeder J.A. for the court stated:

> The marriage contract will be construed with reference to the proper law of the contract, *i.e.*, in the absence of reason to the contrary, by the law of the husband's actual domicile at the time of the marriage generally denominated the "matrimonial domicile". That term means the husband's actual domicile at the time of the marriage, and not the domicile which the spouses may have intended to acquire and did acquire immediately after the marriage.

90 In the present case the parties were Turkish by birth, nationality and domicile throughout the marriage. They were also resident in Turkey for most of their marriage. The marriage itself took place in Turkey. There is no "reason to the contrary" to displace the law of the matrimonial domicile as the proper law of the contract. The correct law for determining the existence and validity of an implied contract was therefore the law of Turkey. The learned trial judge did not err in accepting the evidence of the Turkish experts in this regard. The finding that there was not an implied contract according to Turkish law is a finding of fact and there is no basis upon which that finding can be disturbed.

91 In addition, I would also note that the principal case relied upon by the appellant in support of this argument was *De Nicols v. Curlier*, supra. In that case, an implied contract was found to exist, but the English court relied on expert evidence to determine whether an implied contract existed according to the laws of France.

92 Finally, even if an implied contract were found to exist, it would not assist the appellant's case in respect of the determination of the disposition of these immovable properties. As Dicey and Morris note at p. 1057:

> If parties marry under some foreign system of community property, the content of that system, including the question whether it is regarded by the law of the foreign country as applying to immovables situated outside that country, is of course a question of fact requiring proof of the foreign law in an English court. [*Callwood v. Callwood*, [1960] A.C. 659 (P.C.)]

93 There is no such proof before this court. In fact, the expert evidence was to the effect that the Turkish courts would not purport to apply the Turkish regime to immovables situate outside Turkey. The trial judge noted (pp. 282-3):

> Dr. Davran and Professor Uluocak then made reference to art. 23, para. 1, of the Turkish Code, No. 2675, "International Private and Procedural Law", stating that it had application to the circumstances of this matter. Article 23 reads as follows:
>
> > The right of ownership and other rights *in rem* in movable and immovable property are governed by the laws of the place where the property is located.
>
> Professor Uluocak stated further, referring to art. 23: "This article is competent to deal with the matters in issue in this case."

Therefore, even if an implied contract were found based on operation of the Turkish Code, it would not govern immovables situate in British Columbia.

VI. Should the lex situs test be rejected?

94 The appellant also submits that the lex situs choice of law rule for immovable property should be abandoned in the context of matrimonial disputes in favour of a "real and substantial connection test." He cites McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983), pp. 195-96, to support the proposition that this more modern test has become accepted in recent times. I note, however, that the discussion referred to in McLeod states:

> The [more flexible] approach has made its strongest impact in connection with legal issues involving contract and tort. The doctrine has also been suggested as a viable approach in legal issues involving intangible movables.

No mention is made in the cited pages relating to the suitability of the more flexible approach to immovables.

95 The appellant lists concerns which may arise from the application of the lex situs choice of law rule such as the application of several matrimonial regimes to the family's assets and the subjection of foreign nationals to Canadian law. I do not find either of these arguments persuasive. Persons who acquire assets in foreign countries are likely aware that they may be subject to different legal regimes in each. In addition, it is not uncommon to subject foreign nationals to Canadian law in respect of property held here.

96 Moreover, as the respondent notes, the parties may enter into a contract to be governed by a particular legal regime in order to override the lex situs choice of law rule. Though the courts of a foreign nation may not have power to adjudicate over land situate in British Columbia, it is open to the parties to contract to have their rights adjudicated in the province of British Columbia according to the law of a foreign system if that be their intention.

97 I am not persuaded that the actual relationship between these parties and the law of British Columbia as it relates to the land situate here is so tenuous that the application of the lex situs choice of law rule does any injustice. I therefore cannot conclude that the rule applied by the trial judge should be displaced.

VII. Renvoi

98 Renvoi arises from uncertainty in the meaning of "the law" of the foreign jurisdiction which may be deemed applicable by the choice of law rules of the lex fori. There are three modes of considering this issue (See Dicey and Morris, 9th ed., pp. 52-54):

99 (i) *No renvoi* — reference to the law of the foreign jurisdiction is taken to be only the substantive domestic law of that system. It is not to include any of the conflicts rules of that jurisdiction. Only the substantive law of that jurisdiction need be proven as a matter of fact.

100 (ii) *Partial renvoi* — reference to the law of the foreign jurisdiction is taken to include not only its substantive domestic law, but also the choice of law rules of that system. The court does not ask simply what the domestic law of the foreign jurisdiction is, but also what law the other jurisdiction would look to. The court then applies the law of a third jurisdiction (transmission), or its own law (remission) if that is what the choice of law rules of the foreign jurisdiction dictate. The choice of law rules of the other jurisdiction must be proven as a matter of fact.

101 (iii) *Total renvoi* — The forum court chooses which system of law to apply based on its own choice of law rules. It must then must decide the case exactly as if it were the court of the jurisdiction chosen. Therefore, it must ask itself not only which law the foreign court would apply having regard to its conflicts rules, but also whether the foreign court would look to the conflicts rules of other jurisdictions (i.e., would it apply renvoi). This requires proof of the foreign courts' choice of law rules as well as its rules regarding renvoi.

102 The Turkish experts gave evidence that the practice of Turkey, having regard not only to its substantive law but its conflicts rules as well, would have been to remit the matter back to British Columbia for determination by British Columbia law. Though the experts gave evidence regarding the choice of law rules of Turkey, they did not prove its rules relating to renvoi.

103 It is not important for choice of law purposes that the Turkish court would decline jurisdiction to hear the case. Jurisdiction is a matter separate from the conflict of laws issue: see *Tezcan v. Tezcan (No. 1)*, supra. However, the expert evidence stating that the Turkish courts would consider British Columbia law to be the lex causa is worth considering in respect of renvoi.

104 The issue of renvoi arose in this case in a more complex manner than is perhaps usual because it can be considered on two different levels.

105 Firstly, the issue arose with respect to the primary determination of which matrimonial property regime to apply. The appellant was presumably concerned that partial renvoi might be invoked to deny application of the Turkish matrimonial property regime if this court is to look to the conflicts rules of Turkey as well as to its substantive law but without regard to Turkish rules relating to renvoi. He therefore argued that the doctrine of renvoi is not to be taken as part of the law of British Columbia citing *Rosencrantz v. Union Contractors Ltd.* (1960), 31 W.W.R. 597, 23 D.L.R. (2d) 473 (B.C.S.C.), and McLeod, *The Conflict of Laws*, p. 197. The respondent challenged this submission and argued that renvoi is, indeed, part of the law of British Columbia which may be used at least in limited circumstances, also citing *Rosencrantz v. Union Contractors*; and *Ross v. Ross* (1894), 25 S.C.R. 307 [Que.]. This argument was obviously put forth in case the respondent failed to convince this court that the substantive law of British Columbia was the correct law to apply in the first instance.

106 Secondly, the issue of renvoi might have also arisen in an even more complex manner with respect to the secondary determination of whether there was an implied contract which superseded the normal British Columbia choice of law rules for immovable property. Because Turkish law was applied with respect to that limited determination (it being the proper law of the contract), it would have been in the interests of the appellant to argue that renvoi *does* exist in relation to this issue. That is to say, reference to Turkish law would include reference to the entire body of Turkish law (including its conflicts rules). This might have altered the ultimate determination if Turkish courts would look to the law of British Columbia to determine the existence of an implied contract based on Turkish conflicts rules. The respondent would undoubtedly have sought to argue *against* the application of renvoi in respect of the implied contract issue if the choice of law rules of Turkey regarding this matter were unfavourable to her position.

107 I do not consider it necessary to determine in this case whether renvoi (partial or total) is properly to be considered part of the law of British Columbia. Firstly, with respect to the implied contract issue, there is no evidence relating to the conflicts rules of Turkey for determining this matter, nor is there any evidence with respect to the Turkish rules relating to renvoi. In addition, renvoi was not argued by the appellant in respect of this issue. Secondly, with respect

to the determination of the applicable matrimonial property regime it was not necessary to consider renvoi because the law of Turkey was never resorted to.

VIII. Public policy

108 Because I have concluded that the law of Turkey is not applicable in the present case (save with respect to the limited determination that there was no implied contract between the parties) I do not consider it necessary to determine whether application of the Turkish laws relating to matrimonial property should be rejected by this court as being offensive to public policy.

IX. Should the value of the Turkish properties be taken into account in division of the British Columbia properties under the Family Relations Act?

109 The appellant submits that the learned trial judge erred by considering the value of the Turkish properties held by the appellant when he apportioned the British Columbia properties under the *Family Relations Act*. He states in his factum:

> There is no definition of property in the B.C. *Family Relations Act*. The words of the statute do *not* contemplate the taking into account of property in other jurisdictions.

110 There can be no question that the Act does not give the court the power to make orders in respect of rights or title to land held in other jurisdictions: *Duke v. Andler*, [1932] S.C.R. 734, [1932] 4 D.L.R. 529 [B.C.]. However, it is necessary to decide whether the court can consider those assets when apportioning matrimonial property held within British Columbia.

111 In *Wong v. Wong* (1985), 60 B.C.L.R. 135 at 143, 44 R.F.L. (2d) 82 (S.C.), Cowan L.J.S.C. (as he then was) stated:

> Assuming the court made a determination that all or part of the British Columbia assets were family assets for the purposes of the Act, it would then have to go on and consider under s. 51 whether the equal division which would follow from such determination would be unfair. To do this effectively, as well as deal with the plaintiff's claim to the Hong Kong assets, it would have to hear expert evidence as to the law of Hong Kong in order to determine what rights under Hong Kong law the plaintiff might have to those assets. This determination would have to be made to decide the issue of fairness even though this court could not make any order specifically affecting the Hong Kong assets since those assets are situate outside its jurisdiction. Even so, in my view, evidence would have to be called in this regard from Hong Kong witnesses pertaining to the value of the Hong Kong assets before the court could reasonably decide if an equal division of the British Columbia assets (assuming they were found to be family assets) would be unfair.

112 In *Laurence v. Laurence* (1991), 56 B.C.L.R. (2d) 254, 33 R.F.L. (3d) 27 (C.A.), Hutcheon J.A. considered whether a British Columbia court has the jurisdiction to order that a sum of money be made payable under the *Family Relations Act* in respect of a half interest in property situated in New Zealand. Speaking for the court, Hutcheon J.A. stated at pp. 257-58 [B.C.L.R.]:

> [The judgment in the court below] is an effective judgment so that the principle impeding an exercise of jurisdiction is not involved. Unlike the circumstances in *Duke v. Andler*, supra, no steps are required to be taken in the foreign jurisdiction to carry out the orders of the court. The court is exercising its personal jurisdiction over Mr. Laurence ...
>
> ... to carry out the objectives of the *Family Relations Act*, we should recognize the right to a compensation order in the circumstances of land located in a foreign jurisdiction.

113 It would seem that to the extent that the respondent received a greater interest in the British Columbia properties because of the trial judge's consideration of the assets owned in Turkey, that order is no different than the compensation order discussed in *Laurence*.

114 In *Tezcan v. Tezcan (No. 1)* (1987), 20 B.C.L.R. (2d) 253, [1988] 2 W.W.R. 264, 11 R.F.L. (3d) 113, 24 C.P.C. (2d) 13, 46 D.L.R. (4th) 176 (C.A.), McLachlin J.A. (as she then was) stated at p. 181 [D.L.R.]:

> ... assuming that a British Columbia court in such an action were to hold that the *Family Relations Act* was applicable or that the equitable doctrine of constructive trust applied, it would be open to the British Columbia court to take into account a division of property made in another jurisdiction in determining what order, if any, should be made in relation to the British Columbia land.

115 I agree with the learned trial judge's conclusion that this reasoning should be applied to regime-imposed division of property as well as court-ordered division of property in the other jurisdiction.

116 I conclude that the trial judge did not err in law in considering the value of the Turkish properties for the purposes of distributing the matrimonial properties in British Columbia.

X. Expert evidence regarding valuation

117 The appellant argued that the learned trial judge made a palpable error in failing to consider expert evidence of valuators relating to the Turkish properties. Specifically, he refers to a "property assessment report" which was included as Ex. 22, tab 7 in the trial materials. This report was signed by two real estate agents, a civil engineer and an architect.

118 From the transcript it seems clear that this evidence was not admissible at trial for the purposes sought by the appellant.

> MS. BASHAM: My Lord, there was one outstanding matter from yesterday my friend was going to think about and make further submissions on.
>
> THE COURT: This is out of the schedule —
>
> MS. BASHAM: Exhibit 22. I took issue with the documents [at] pages — second and third pages in Tab 7, on the basis that while this is called a property assessment report, it was no different than the document that you excluded in Tab 8, and for the reason — if this is intended to be expert evidence of value, then there is no qualification of that.
>
> THE COURT: No, I'm inclined to agree, subject to —
>
> MR. MAXWELL: I'm content. (Transcript vol. 5, p. 878)

119 I cannot see how a failure to consider such evidence would amount to a palpable error on the part of the trial judge. It was not properly before him.

120 In addition, the reasons given by Harvey J. indicate that he did indeed consider certain evidence of the defendant relating to the valuation of the Turkish properties. At p. 310 he stated:

> The defendant questioned the valuations, maintaining that they did not accurately reflect the values indicated. He gave detailed evdence in relation to the values of the properties.
>
> I have difficulty in accepting the plaintiff's valuations of the four properties in Turkey, having regard to certain of the evidence of the defendant. In this regard, the defendant referred to certain restrictions imposed by the appropriate local government related to development of properties which were acquired by him with the prospect in mind of development and sub sequent sale. I am satisfied, however, that what was the parties' matrimonial home in Istanbul, a substantial condominium, has a value in excess of $500,000 (Canadian). I consider the evidence to support the conclusion that the value of the defendant's properties in Turkey is probably worth an amount substantially in excess of $1 million (Canadian).

121 I therefore conclude that the learned trial judge did not err as argued by the appellant.

XI. Error in calculating the value of Turkish properties?

122 The appellant also argues that the trial judge reached an incorrect valuation of the Turkish property based upon evidence before him.

123 The appellant's property in Turkey included the home in Istanbul, a summer cottage, two parcels of land in Andolu, and 49 lots in Marmara. The trial judge found the value of the matrimonial home in Istanbul to be over $500,000 and the total value of all the Turkish properties combined to be substantially in excess of $1 million.

124 Evidence submitted by the respondent suggested that the total value of the Turkish properties was $1.5 million (Cdn.). While these values may have been disputed by the appellant, it was certainly open to the trial judge to come to the factual conclusion he did based on the evidence before him.

125 Counsel for the appellant states in his factum:

> [The learned trial judge] could only have done so by including a very high current value for the 49 Marmara lots. Yet these had been sold, on the Appellant's evidence, for $42,000.

126 This statement is clearly inconsistent with facts disclosed at trial. The appellant originally owned 60 Marmara lots. He testified that he gave three lots away and sold eight. In his evidence in chief the appellant said:

> Q. Thank you, my lord. I think we had left off last day where you had sold some property at Marmara?
>
> A. Yes.
>
> Q. All right. When was it that you sold some of the Marmara lots?
>
> A. Eight different lots have been sold within the year 1973 and '74.
>
> Q. And do you recall what you received for those lots, sir?
>
> A. Not the exact figure, but the sum was 800,000 Turkish lira.
>
> Q. How much would that translate into in Canadian dollars?
>
> A. I must look at the rates again.
>
> Q. All right. Again, I'm going to ask you — could you take a look, sir, at Tab 8?
>
> A. Yes. In '73 it is quoted $1.00 U.S. but from the look of the inflation between '73 and '78, I would guess it would be around 16 lira per dollar. So, we should divide 800,000 by 16 lira.
>
> Q. Do you have a calculator? Maybe you could tell us —
>
> A. In the order of 45 to $50,000. (Transcript, vol. 5, p. 690)

127 At the time of trial the husband did in fact still own the 49 Marmara lots and their value would properly have been taken into account by the trial judge. This value would have been well in excess of the $42,000 figure referred to by the appellant.

128 Upon considering the evidence tendered at trial, I cannot conclude that Harvey J. made any reversible error in respect of his determination of the value of the Turkish properties.

XII. Nature of the order — tax consequences

129 The formal order of Harvey J. dated March 6, 1990 requires the appellant to transfer his interest in both the Cornwall and Blythwood properties to the respondent. It provides (p. 2, third paragraph):

> THIS COURT FURTHER ORDERS that the Plaintiff is entitled to 70% of the Defendant's 65% interest in the Blythwood Apartment and that the Defendant shall transfer 70% of his 65% in the Blythwood Apartment to the Plaintiff within thirty days of this Order, failing which the Registrar of Land Titles for Vancouver shall, upon presentation of a certified copy of this Order, transfer and register the Defendant's title to the Blythwood Apartment in the Plaintiff's name.

130 It also provides (p. 4, third paragraph):

> THIS COURT FURTHER ORDERS that the Plaintiff and the Defendant shall have liberty to apply with regard to the tax consequences, if any, arising from this Order, and for further directions.

131 During the course of argument, counsel for the appellant made submissions with respect to the tax consequences which would result from the order of Harvey J. Specifically, the appellant contended that if he were forced to transfer his interest in the Blythwood property to the respondent, a large amount of tax would become payable. This is ostensibly because, as a non-resident, the appellant could not rely on provisions in the *Income Tax Act*, S.C. 1970-71-72, c. 63, which would allow a tax-free transfer of property to a spouse in respect of matrimonial property settlements. Therefore, he asked that the award to the respondent be reduced to reflect the amount which would be paid by the appellant in tax as a result of the transfer.

132 Counsel for the respondent noted that this issue was not argued at trial, nor was there sufficient evidence before the court relating to the particular tax circumstances of the parties for the court to have considered the matter. She therefore submitted that this court should not accede to the requests of the appellant because the question is speculative: see *Danish v. Danish* (1981), 33 B.C.L.R. 176 (C.A.). In addition, she argued that the issue could not be raised on this appeal for reasons discussed earlier regarding *McEvoy v. Ford Motor Co.*, supra. I agree with her in both respects.

133 Notwithstanding the foregoing, counsel for both parties agreed that this matter has taken an extraordinary length of time to work its way through litigation. The writ of summons was filed in January 1984. It has been twice to the Court of Appeal. Further delays in achieving a final order would only exacerbate the difficulties and add to the expense the parties have experienced to date.

134 It is therefore incumbent upon this court to reach a decision which will allow the parties fully and finally to dispose of these outstanding matters in a fair and efficient way. Specifically, this court may exercise its discretionary power pursuant to s. 9(1)(*a*) of the *Court of Appeal Act*, S.B.C. 1982, c. 7, to:

> (*a*) make or give any order that could have been made or given by the court or tribunal appealed from ...

135 In the present case the trial judge could have ordered a monetary award to the respondent, equivalent to the value of the interest in the Blythwood property, pursuant to s. 52 of the *Family Relations Act*: see *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99, 22 R.F.L. (3d) 337, 63 D.L.R. (4th) 18 (C.A.). Given the existence of the outstanding tax issues, it is my opinion that a monetary award would have been more suitable in the present case. It would allow the appellant the flexibility to meet his obligation in whatever way that has a minimum negative impact upon his tax situation. He might choose to use existing funds to pay the debt, sell other assets or perhaps mortgage the property. This determination will ultimately be a matter for the appellant and his accountants. Obviously, however, the appellant must have only a limited time to make this payment, failing which his interest in the Blythwood property should be transferred to the respondent.

136 I would therefore amend the third paragraph of p. 2 of the March 6, 1990 order of Harvey J. to read:

THIS COURT FURTHER ORDERS that the Plaintiff is entitled to 70% of the Defendant's 65% interest in the Blythwood Apartment. The Defendant shall pay the Plaintiff $709,800, within 60 days of this Order in satisfaction of this entitlement, failing which the Registrar of Land Titles for Vancouver shall, upon presentation of a certified copy of this Order, transfer and register 70% of the Defendant's title to the Blythwood Apartment in the Plaintiff's name. The Defendant will not dispose of, diminish or encumber his interest during the 60 days without the consent of the Plaintiff.

137 I would also strike out the third paragraph on p. 4 of the order relating to an application for further directions regarding tax consequences as it is no longer necessary.

Disposition

138 Subject to the aforesaid variation of the trial judge's order, I would dismiss the appeal.

139 The respondent, in her factum, seeks an order that she be entitled to costs at double the normal tariff. In my opinion, no convincing reasons have been advanced why costs should be on a larger than normal scale.

Appeal dismissed.

TAB 20

1998 CarswellBC 493
British Columbia Supreme Court

Wende v. Victoria (County) Official Administrator

1998 CarswellBC 493, [1998] 7 W.W.R. 480, [1998] B.C.J. No. 570, 21 E.T.R. (2d) 282, 37 R.F.L. (4th) 172, 48 B.C.L.R. (3d) 219, 78 A.C.W.S. (3d) 1055

In the Matter of the Estate Administration Act, c.114 R.S.B.C. 1979 and Amendments thereto;

In the Matter of the Estate of Johanna Karoline Viktorine Strachwitz, Deceased;

Margaret Wende, Petitioner, and Official Administrator for the County of Victoria, Respondent

Burnyeat J. [In Chambers]

Heard: February 23, 1998
Judgment: March 12, 1998
Docket: Vancouver A950553

Counsel: *A. Dhinsa*, for the Petitioner.
J.K. Greenwood, for the Respondent.

Subject: Family; International

Table of Authorities

Cases considered by *Burnyeat J.*:

Bedinger v. Graybill's Executor & Trustee (1957), 302 S.W.2d 594 (U.S. Ky.) — referred to

British Columbia (Assessor & Collector of Probate & Succession Duties) v. Canada Permanent Trust Co. (1969), 71 W.W.R. 199, 8 D.L.R. (3d) 569, [1970] C.T.C. 257 (B.C. C.A.) — considered

British Columbia (Public Trustee) v. Chiba (May 15, 1987), Doc. Vancouver A841262 (B.C. S.C.) — considered

Goodman, Re (1881), 17 Ch. D. 266 (Eng. Ch. Div.) — referred to

Jensen, Re (1963), 42 W.W.R. 513, 40 D.L.R. (2d) 469 (B.C. S.C.) — considered

Jensen, Re (1964), 47 D.L.R. (2d) 630 (B.C. S.C.) — considered

Mernickle v. Westaway, 1 B.C.L.R. (2d) 267, [1986] 3 W.W.R. 665, 25 D.L.R. (4th) 758, 22 E.T.R. 213 (B.C. C.A.) — considered

Milestone, Re (1958), 25 W.W.R. 514, 15 D.L.R. (2d) 546 (Sask. Q.B.) — considered

Oliphant v. Oliphant Estate (1990), 38 E.T.R. 133, 84 Sask. R. 44 (Sask. Q.B.) — considered

Raghbeer, Re (1977), 3 R.F.L. (2d) 42 (Ont. Co. Ct.) — considered

Valentine's Settlement, Re, [1965] 2 All E.R. 226, [1965] Ch. 831, [1965] 2 W.L.R. 1015 (Eng. C.A.) — applied

Statutes considered:

Adoption Act, R.S.B.C. 1979, c. 4

s. 3(1) — considered

s. 3(2) [am. 1985, c. 68, s. 1] — considered

s. 3(3) — considered

s. 3(4) — considered

s. 3(5) — considered

s. 7 — considered

s. 11 — considered

s. 11(1) [am. 1985, c. 68, s. 4] — considered

s. 11(2) — considered

s. 11(3) — considered

s. 11(4) — considered

s. 11(9) "child" — considered

s. 12 — considered

Adoption Act, R.S.B.C. 1996, c. 5
s. 37(1) — considered

s. 37(4) — considered

s. 47 — considered

Adoption Act, 1976 (U.K.), 1976, c. 36
Generally — referred to

s. 53(2)(a) — considered

Adoption of Children Act, S.S. 1922, c. 64
s. 13 — considered

Estate Administration Act, R.S.B.C. 1996, c. 122
Generally — referred to

Intestate Succession Act, R.S.S. 1978, c. I-13
Generally — referred to

Succession Duty Act, R.S.B.C. 1960, c. 372
s. 2 "child" — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
R. 10(1)(d) — pursuant to

PETITION for declaration that niece is lawful heir of deceased.

***Burnyeat J.* [In Chambers]:**

1 Pursuant to the provisions of the *Estate Administration Act* and Rule 10(1)(d) of the Supreme Court Rules, the petitioner seeks a declaration that the petitioner is the lawful heir of Johanna Karoline Viktorine Strachwitz.

Background Facts

2 Johanna Strachwitz (nee Frohde) was born on October 2, 1907 in Koln, Germany. Her only surviving sibling was her sister Edith Schonknecht who was born January 12, 1910. The petitioner is the daughter of Edith Schonknecht. During 1932, Johanna Frohde met Count Bernhard von Strachwitz and they began a romantic relationship. Johanna Frohde and Bernard von Strachwitz cohabited from August, 1941 until his death. Sometime during the late 1930s or early 1940s, Johanna Frohde started using the name Countess Johanna Strachwitz. Up until the time when her parents died (her father in 1942 and her mother in 1951), Johanna Strachwitz continued to maintain an active parent-child relationship with her parents and an active sibling relationship with her only sister and her daughter, the petitioner.

3 Bernhard von Strachwitz died on February 6, 1952 at the age of 84. Under his Will dated August 28, 1949, Johanna Strachwitz was his sole heir and, accordingly, she inherited his estate. This history would be somewhat unremarkable and the questions facing the respondent would not be complex if Bernhard von Strachwitz had not adopted Johanna Strachwitz on April 11, 1951 when he was 82 and she was 43.

Legislative Background to the Adoption

4 On July 6, 1938, a new law dealing with marriages came into force in Germany. That law prohibited marriages between persons with a large age difference. Under this law, Bernhard von Strachwitz was prohibited from marrying Johanna Strachwitz. When this law was repealed in 1946, Bernhard von Strachwitz was 78 years of age and Johanna Strachwitz was 39. On April 11, 1951 when Bernhard von Strachwitz adopted Johanna Strachwitz as his daughter, Bernhard von Strachwitz was approximately 83 years old while Johanna Strachwitz was 44 years old. In support of the petition, the affidavit of Dr. Gerhard Schreier from Berlin is filed. I accept him as being an expert on German laws with respect to adoption, marriage, and succession. In his affidavit he states:

> In those times in Germany [in the early 1950s], these types of adoption of an adult were a legal construction of legalizing a life partnership of an aristocrat with a person without noble birth.

5 After Bernhard von Strachwitz died in 1952, Johanna Strachwitz immigrated to Canada. She became a Canadian citizen on March 16, 1959. She died intestate in Victoria, British Columbia, on April 11, 1986. On May 26, 1986, the respondent was granted Letters of Administration of the Estate of Johanna Strachwitz and, as at that date, the estate was valued at $243,935.79. The respondent has administered her estate since that time.

Submissions of Counsel for the Petitioner

6 Counsel for the petitioner says that the adoption by Bernhard von Strachwitz of Johanna Strachwitz is contrary to public policy and should not be recognized in British Columbia, that her adoption is not an adoption as contemplated by the *Adoption Act*, R.S.B.C. 1979, c.4, that her natural sister Edith Schonknecht survived her, that when Edith Schonknecht died on December 19, 1992 she was survived by the petitioner who was her sole heir and that the petitioner is the sole and rightful heir of the whole of the estate of Johanna Strachwitz.

Submissions of Counsel for the Respondent

7 The respondent submits that British Columbia recognizes all foreign adoptions, that the law of British Columbia is that the "natural" family of a person adopted has no claim on the estate of the adopted person and that only the family into which the person is adopted has a claim, and that, if there is a finding that the von Strachwitz family is entitled to the estate, the respondent will undertake further searches to ascertain the rightful heir or heirs within the von Strachwitz family.

Applicable British Columbia Legislation

8 The following provisions of the *Adoption Act*, R.S.B.C. 1979, c.4, were in force in 1986 at the time of the death of Johanna Strachwitz:

> 3. (1) An adult person, or an adult husband and his adult wife together, may apply to adopt a child under the provisions of this Act.
>
> (2) In like manner an adult husband and his wife together may apply to adopt the child of either of them.
>
> (3) An adult husband or an adult wife may individually apply to adopt the child of either of them.
>
> (4) Notwithstanding any other provision in this Act, a person may apply to adopt an adult person.

(5) Where an application is made under subsection (4), the court may make an order for adoption if it is satisfied that

(a) the applicant has maintained as his own child the person who is to be adopted from the time the child commenced to live with the applicant until the child became self supporting or married or reached the age of majority, whichever is the earliest;

(b) the person who is to be adopted and, if he is married, his spouse consent to the adoption,

(c) the spouse of the applicant, if any, consents to the adoption; and

(d) it is not contrary to the public interest to make the order

11.(1) For all purposes an adopted child becomes on adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent.

(2) For all purposes an adopted child ceases on adoption to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption), and the existing parents of the adopted child cease to be his parents.

(3) The relationship to one another of all persons (whether the adopted person, the adopting parents, the natural parents, or any other persons) shall be determined in accordance with subsections (1) and (2).

(4) Subsections (2) and (3) do not apply, for the purposes of the laws relating to incest and to the prohibited degrees of marriage, to remove any persons from a relationship in consanguinity which, but for this section, would have existed between them.

(9) For the purpose of this section, "child" includes a person of any age, whether married or unmarried.

12. An adoption effected according to the law of any other province of Canada or of any other country or part of it has the same effect as an adoption under this Act.

9 The *Adoption Act* was amended in 1996 with the following provisions substituted for the previous sections 11 and 12:

37.(1) When an adoption order is made,

(a) the child becomes the child of the adoptive parent,

(b) the adoptive parent becomes the parent of the child, and

(c) the birth parents cease to have any parental rights or obligations with respect to the child except a birth parent who remains under subsection (2) a parent jointly with the adoptive parent.

(4) Subsections (1) and (3) do not apply for the purposes of the laws relating to incest and the prohibited degrees of marriage.

47.An adoption that has, under the law of another province or of a jurisdiction outside Canada, substantially the same effect in that other jurisdiction as an adoption under this Act has the same effect in British Columbia as an adoption under this Act.

Authorities of the Respondent

10 Counsel for the respondent provides a number of authorities in support of the proposition that s.11 of the 1979 *Act* severs all ties of succession on an intestacy between an adopted child and the natural family of the adopted child. As counsel for the petitioner takes no objection to the proposition that British Columbia law applies regarding the estate of Johanna Strachwitz, the respondent says that the von Strachwitz family rather than the natural niece of Johanna Strachwitz should inherit the estate of Johanna Strachwitz.

11 In *Jensen, Re* (1964), 47 D.L.R. (2d) 630 (B.C. S.C.), Branca J. dealt with the question of whether the adopting parents were the legal heirs of an adopted child who died intestate. In an earlier decision (1963), 40 D.L.R. (2d) 469 (B.C. S.C.), Collins J. had decided that the same adopted son would inherit the estate of his adopted parents who had also died intestate. At p.632 in his judgment, Branca J. concluded:

> Under the provisions ... of the ***Adoption Act*** ... an adopted child becomes the child of the adopting parent, and the adopting parents become the parents of the child as if the child had been born to the adopting parents in lawful wedlock, and for all purposes the adopted child ceases in the event of adoption to be the child of his natural parents, and the natural parents cease to be his parents.
>
> The Act really creates an irrebuttable presumption in the event of an adoption that the adopted child was born in lawful wedlock to the adopting parents. He could not under the provisions of our law inherit from the estate of his natural parents, but he does

> inherit from the estate of his adopted parents as if born to them in lawful wedlock. The adopting parents are in law his father and mother.

12 In *Milestone, Re* (1958), 15 D.L.R. (2d) 546 (Sask. Q.B.), Taylor J. dealt with the question of whether an adopted nephew once removed could receive part of the residue of an estate which was to be held for the nephews and nieces of the testator when one of the nieces had died leaving only her adopted son. The adoption order had been made in the State of Oregon and the court was called upon to interpret the meaning of s.13 of the Saskatchewan *Adoption of Children Act* which provided:

> A person resident out of the province who has been adopted in accordance with the laws of any of the provinces of Canada, shall upon proof of such adoption be entitled to the same rights of succession to property as he would have had in the province in which he was adopted, save insofar as those rights are in conflict with the provisions of this Act.

13 Taylor J. found that the adopted child was the only issue of the niece and was therefore entitled to any share or interest to which his adopted mother was entitled under the Will. Despite the fact that the adopting parents and the adopted child were domiciled in the State of Oregon, Taylor J. concluded that the following statement in Dicey's *Conflict of Laws*, 6th ed., at p.519, applies to the question of the laws governing the question of succession:

> The question whether an adopted child can succeed as a child ... under an intestacy ... is (semble) determined by law governing the succession, that is, the law of domicile of the ... intestate at the date of his death in the case of movables.

14 In *British Columbia (Assessor & Collector of Probate & Succession Duties) v. Canada Permanent Trust Co.* (1969), 8 D.L.R. (3d) 569 (B.C. C.A.), the British Columbia Court of Appeal dealt with the question of a substantial bequest to the natural child of a testator where the natural child was later adopted by his natural mother and by her second husband. The court dealt with the question of whether, under the *Succession Duty Act* and for the purposes of determining whether succession duty applied or not, the adopted son could be considered a "child" of the testator or not. In concluding that the beneficiary was not a "child" for the purposes of the *Succession Duty Act* so that succession duty was payable, the court noted:

> It seems to me clear that an adopted child ceases to be the child of his natural parents only from and after the making of the adoption order, leaving unchanged his status as a child of his natural parents from birth to the making of the adoption order. (at p.575)

15 In *Oliphant v. Oliphant Estate* (1990), 38 E.T.R. 133 (Sask. Q.B.), Grotsky J. dealt with the question of whether two natural children who were later adopted by their natural mother and her new husband were entitled to share in the estate of their natural father on his intestacy. The natural mother, her new husband and the children were domiciled in British

Columbia at the time of the death. Grotsky J. held that, as at the date of the adoption, the two natural children "ceased to be" the children of the deceased and that, accordingly, when they ceased to be his children they also ceased to be for all purposes his issue under *The Intestate Succession Act* of Saskatchewan. Grotsky J. also adopted the proposition that the question of succession to the movables of a deceased is governed by the law of his or her domicile at that date of his or her death.

16 The respondent submits that the definitive statement in British Columbia regarding the respective rights of the natural parents and the adopted parents is set out in *Mernickle v. Westaway* (1986), 22 E.T.R. 213 (B.C. C.A.). In that case, the natural father of the petitioner had died intestate in 1980. The petitioner's mother had been divorced from the deceased in 1957 and, when she subsequently re-married, she and her new husband adopted the petitioner. The petitioner contended that she was the "lawful lineal descendant" of the deceased and that, accordingly, she should be entitled to his estate on his intestacy. The trial judge had held that she could inherit her natural father's estate as the provisions of the *Adoption Act* did not effect rights of intestate succession. The appeal of that decision was allowed.

17 Speaking on behalf of the court, Seaton J.A. held that the chambers judge should have followed the decision of Mr. Justice Branca in *Jensen, Re*, supra. Seaton J.A. concluded:

> In my view, when subs.(2) [s.22(2)] says that an adopted child ceases on adoption to be the child of his existing parents, it uses the word "child" broadly. I do not think that one who is not the child of a person can be the issue of that person within the Estate Adminstration Act. I am influenced too in that interpretation by the introductory words "for all purposes". They are broad. The thrust of these provisions is to move the child from one family to another family, and make it a child of the new family and no longer a child of the old family. (at pp.219-220)

18 The chambers judge had found that the petitioner and her natural father had kept close contact over the years. Seaton J.A. dealt with that as follows:

> In the course of his decision he recounted the connections between the petitioner and her father, that they had kept in contact over the years and in all save the legal sense continued to be father and daughter. This is a consideration that I have already said I think irrelevant, but it is not irrelevant if the petitioner chooses to make an application under the Escheat Act, R.S.B.C. 1979, c.111. In my view, if there is to be a remedy it must be under that Act. I would hope that an application will receive sympathetic consideration. (at p.221)

19 In his concurring judgment, Esson J.A. dealt with the issue of whether a "child" under the *Adoption Act* continued to be "issue" for the purposes of the *Estate Administration Act* even after that child had been adopted. He found that not to be the case:

> Essentially what is said there is that issue is a word of much wider import than child or children. That is so, at least in some circumstances; the word "issue" can include descendants more remote than a child. But, the fallacy of the reasoning in applying that to the facts of this case, in my respectful view, is that it overlooks the fact that here the respondent, if she is to be issue of the late Mr. Hartman, can be so only because she was his child. The Adoption Act makes it clear that on the making of the adoption order she ceases to be his child and, therefore, she ceased also to be issue. (at p.222)

20 The respondent says that there is nothing in the *Adoption Act* which would allow the court to take into account "public policy" considerations after there had been a finding that the adoption in Germany was in accordance with the laws in Germany at the time of the adoption in 1951. I should therefore conclude that British Columbia laws as to succession govern and that the petitioner as part of the natural family of the deceased should not share in her estate.

Submissions of Counsel for the Petitioner

21 Counsel for the petitioner submits that the adoption in Germany in 1951 is not an adoption as recognized or contemplated by either the 1979 or the [1996] *Adoption Acts* and therefore the "adoption" is not subject to ss.11 or 37 of those *Acts* and is not subject to the decision in *Mernickle v. Westham*. Counsel submits that a foreign adoption is not to be recognized if it is founded on that which is contrary to public policy in British Columbia and that the court has the jurisdiction to withhold recognition of foreign adoptions. The submission is that s.7 (now s.47) of the *Adoption Act* does not affect the inherent jurisdiction of the court to withhold recognition of a foreign adoption.

22 Counsel for the petitioner relies upon the decision in *Valentine's Settlement, Re*, [1965] Ch. 831 (Eng. C.A.), to support the propositions advanced. In that case, the trial judge dealt with a British subject domiciled in Southern Rhodesia who had established a trust fund to pay income to her son during his life and, after his death, the capital and income was to go to his children. The son who was also domiciled in Southern Rhodesia had three children, one child of his marriage and two children adopted in South Africa. By South African law, an adopted child was deemed to be the legitimate child of his adoptive parents and entitled to any property devolving after the date of the adoption. By Rhodesian law, an adoption order could not be made in respect of any child who was not resident or domiciled in Southern Rhodesia at the time of the adoption. At trial, Pennycuick J. held that Southern Rhodesian law should apply so that the two adopted children were not children of the son for the purposes of the

settlement and the trust fund. With Salmon L.J. dissenting, the English Court of Appeal dismissed the appeal confirming that the law of Southern Rhodesia should apply.

23 At pp.841-42, Lord Denning M.R. states:

> I start with the proposition stated by James L.J. in *In re Goodman's Trusts* [(1881) 17 Ch.D.266 at 297, C.A.]: "The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilised country, should be respected and acknowledged by every other member of the great community of nations." That was a legitimation case, but the like principle applies to adoption.
>
> But when is the status of adoption duly constituted? Clearly it is so when it is constituted in another country in similar circumstances as we claim for ourselves. Our course should recognise a jurisdiction which mutatis mutandis they claim for themselves: see *Travers v. Holley* [[1953] P.246 at 257, C.A.] We claim jurisdiction to make an adoption order when the adopting parents are domiciled in this country and the child is resident here. So also, out of the comity of nations, we should recognise an adoption order made by another country when the adopting parents are domiciled there and the child is resident there.
>
> Apart from international comity, we reach the same result on principle. When a court of any country makes an adoption order for an infant child, it does two things: (1) it destroys the legal relationship theretofore existing between the child and its natural parents, be it legitimate or illegitimate; (2) it creates the legal relationship of parent and child between the child and its adopting parents, making it their legitimate child. It creates a new status in both, namely, the status of parent and child. Now it has long been settled that questions affecting status are determined by the law of the domicile. This new status of parent and child, in order to be recognised everywhere, must be validly created by the law of the domicile of the adopting parent. You do not look to the domicile of the child: for that has no separate domicile of its own. It takes its parents' domicile. You look to the parents' domicile only. If you find that a legitimate relationship of parent and child has been validly created by the law of the parents' domicile at the time the relationship is created, then the status so created should be universally recognised throughout the civilised world, provided always that there is nothing contrary to public policy in so recognising it. That general principle finds expression in the judgment of Scott L.J. in *In re Luck's Settlement Trusts, Walker v. Luck* [[1940] Ch.864 at 907-908, C.A.]. (emphasis added)

24 In dealing with the question of the effect of the recognition of a "foreign" adoption, Lord Denning concludes:

> In my opinion, when English law recognises a foreign adoption order as conferring the status of a child, it does not give to the child all the self-same rights and benefits of succession as a natural-born child. It only gives the child the self-same rights and benefits as a child adopted in England by an English adoption order. .... But I am quite clear that we do not look to the law of succession of the foreign country. If we did, we might find that a foreign-adopted child had greater rights of succession in England than an English-adopted child. Which is absurd. The correct solution is this: the child is to be treated in English law just as if he had been adopted in England, no better and no worse. (at p.844)

25 Salmon L.J. would have recognized the adoption. In his dissenting judgment, he also recognizes the overriding jurisdiction of the court to reject the adoption:

> Adoption - providing that there are proper safeguards - is greatly for the benefit of the adopted child and of the adoptive parents, and also, I think, of civilised society, since this is founded on the family relationship. It seems to me that we should be slow to refuse recognition to an adoption order made by a foreign court which applies the same safeguards as we do and which undoubtedly had jurisdiction over the adopted child and its natural parents.
>
> The laws of adoption in South Africa are very nearly the same as our own. The principles underlying them are the same. The whole emphasis is upon the welfare of the child and elaborate precautions are laid down for assuring that the adoption order shall not be made unless it is for the benefit of the child; the consent of the natural parents is required. It is difficult to see why in these circumstances, unless compelled to do so, our courts should refuse to recognise these adoption orders made lawfully in South Africa which conferred nothing but benefits on all the parties concerned. (at p.852)
>
> Mr. Templeman, in the course of an exceptionally able argument, emphasised what he described as the danger and absurdity of a childless man and wife being able to go abroad for a short holiday and return the mother and father of three children. It may or may not be absurd but the danger would exist only if the considerations for adoptions in the foreign country concerned were quite alien to our own and our courts were obliged to recognise the adoption whatever the circumstances. This is not so, for it is always open to our courts on grounds of public policy to refuse to recognise a foreign adoption even when the domicile of the adoptive father is impeccable. (at p.854)

26 Counsel for the petitioner relies upon the phrase "once duly constituted by the law of any civilised country" in the *Goodman, Re* decision [(1881), 17 Ch. D. 266 (Eng. Ch. Div.)] quoted by Lord Denning and Lord Denning's phrase "... provided always that there is nothing contrary to public policy is so recognising it" to substantiate the submission he makes on behalf of the petitioner. Counsel also relies on the caveat of Salmon L.J. to the effect that

adoptions do not have to be recognized where the considerations for the adoption in the foreign country "were quite alien to our own."

27 The decision in *Valentine's Settlement, Re* has not been cited in Canadian cases. However, one British Columbia has considered the question of whether all adoptions should be recognized. In the *British Columbia (Public Trustee) v. Chiba* (May 15, 1987), Doc. Vancouver A841262 (B.C. S.C.), Meredith J. dealt with distribution of an estate and the question of whether that estate should go to the natural family of the deceased or to the family of the deceased's former wife's parents. The question was whether a relationship created in Japan amounted to an adoption. Meredith J. concluded that it did not and that the estate would go to the next of kin stemming from the natural parents of the deceased. The facts in that case were described as follows:

> Before leaving Japan the deceased married. Under Japanese law and custom to perpetuate their family name he took by registration the surname of his wife's parents. He left no children. His wife divorced him in Japan some years later. He was already in Canada. But no registration of defeasance of the name or the relationship between himself and his wife's parents was registered as it could have been. Presumably those in Japan were not motivated to register a defeasance.

Meredith J. concluded as follows:

> By the laws of British Columbia, parents adopting a child become for all intents and purposes the parents of that child. The adopting parents are substituted for the natural parents. The adopting parents undertake the care and upbringing of the child. An adult cannot be adopted unless previously as a child he was in the care of the adopting parents. Adoptions are final and cannot be annulled.
>
> The purposes and effects of adoptions in British Columbia are obviously quite different from the arrangement I have described brought about by marriage in Japan. Common characteristics end with the assumption of the name and rights of inheritance. But the "adopting" parents in Japan, if the arrangement can be termed an adoption at all, having nothing to do with the care and upbringing of a child. The arrangement is brought about whatever the age of the husband, and, as one would expect, can be brought to an end by divorce. (at pp.2-3)

Commentaries on the Question

28 In Cheshire and North's *Private International Law*, 12th ed., the learned authors discuss the present effect of the English *Adoption Act, 1976* but state, with regard to the common law position, that recognition of a foreign adoption may be denied on grounds of public policy:

> We have seen that the statutory rules relating to the recognition of "overseas adoptions" provide that such an adoption may be denied recognition on grounds of public policy. Public policy is similarly relevant to the recognition of foreign adoptions at common law. Adoption law in other countries may be very different from ours, as with adoption of adults and married persons in the USA. Whilst great caution should be exercised in denying recognition on public policy grounds, the courts have power to do so both in relation to the incidents of the adoption, such as whether the child can succeed to the adoptive parents, and, in an extreme case, to the adoption's effect on the status of the parties, ie as to whether the parent and child relationship has been created at all. (p.769)

The reference to "statutory rules" relates to s.53(2)(a) of the *Adoption Act, 1976* which provides that the court may:

> (a) Order that an overseas adoption for determination shall cease to be valid in Great Britain on the ground that the adoption or determination is contrary to public policy or that the authority which purported to authorize the adoption or make the determination was not competent to entertain the case.

29 The Canadian author James G. McLeod in *The Conflict of Laws*, Carswell, 1983, says this about the recognition of foreign adoptions in Canada:

> The statutes of all of the Canadian jurisdictions provide that a foreign adoption, if recognized, has the same effect as if it were a local adoption. It is only Manitoba, however, that expressly recognizes that such effects should only be accorded to recognizable foreign adoptions having incidents substantially similar to domestic adoptions. Assuming that the adoption law of the granting country has a similar effect to the adoption law of Manitoba, the foreign adoption will be recognized if the adoption was in accordance with the internal law of the granting country.
>
> The latent conflict emphasized by the Manitoba legislation ought not to be ignored by other local forums. When a foreign order, alleged to be an adoption order, is put forward for recognition, the local court ought not, without more, to accept it as such and recognize it under the broad recognition powers in the Canadian law. The Manitoba statute clearly spells out the policy of the Canadian provinces in general. No broad recognition should be accorded under statute to foreign orders which purport to be "adoptions" where granted unless they are intended to have an effect similar to local adoptions. The term "adoption" is simply a label describing a judicial process the effect of which is succinctly stated in the Manitoba legislation. Whether the foreign order is an "adoption" order within such meaning is a definitional function to be decided in accordance with the concepts of the *lex fori*, i.e., the incidents of the foreign order should be determined and a conclusion reached by assessing whether such incidents accord

with the local forum's definition of adoption. Where the foreign "adoption" does not have the necessary effect but is used in the granting jurisdiction for a limited purpose, i.e., to perpetuate a family name or prevent the breakup of family property, the order should not be considered an adoption within the meaning of the adoption legislation. Rather, the original common law approach of determining whether a child or parent is a "child" or "parent" whenever the particular incident comes into play should be adopted. (at p.753)

30 As well, Mr. McLeod has the following comments:

Where, however, by the granting law the adoption is not one of general application, as are Canadian adoptions, but one undertaken for a limited purpose, the adoption will only be relevant when the particular purpose arises. An adoption which by the granting law has one effect, such as succession, is not really an adoption within the meaning of the rule. The issue is rather one of construction of wills or statute. To the extent that the adoption is recognizable, the limited effect under the granting law should follow so long as it is not contrary to public policy.

Where the adoption is to promote an immoral or unlawful purpose, the adoption as a whole should not be recognized. Such cases will be extremely rare. More common, perhaps, is the situation where a particular incident of the adoption under local law is offensive on the facts. Difficulties of this type can be overcome by granting to a general foreign adoption the same effect as a local adoption. If the foreign adoption as a whole is tainted, it ought not be recognized at all. Where the adoption is, by the granting law, of limited effect only, the *lex fori* should give effect to those incidents to long as they do not offend the fundamental public policy of the forum.

Under the Hague Convention on Jurisdiction, Applicable Law, and Recognition of Decrees Relating to Adoption, the effect of a recognizable foreign adoption will continue to be regulated by the local forum. Also, under the Convention, recognition will be afforded to all adoptions granted in accordance with the law of a contracting state. (at pp.756)

31 Dicey, *Conflict of Laws*, 11th ed., 1993, has the following commentary regarding the question of recognition of a foreign adoption where recognition is contrary to public policy:

Lord Denning M.R. in *Re Valentine's Settlement* entered one caveat against recognising a foreign adoption, namely, that there must be nothing contrary to public policy in so recognising it. Our Rule does not mention this qualification, because public policy is a necessary reservation in any conflict of laws case. However, it is more than usually important to keep this factor in mind when deciding whether to recognise a foreign

> adoption, because the laws of some foreign countries differ so widely from English law as to the objects and effects of adoption.
>
> Adoption is taken very seriously indeed in this country and is surrounded by all the safeguards which an active social policy can devise. In some other countries it is taken far less seriously and serves quite different objects. If the foreign adoption was designed to promote some immoral or mercenary object, like prostitution or financial gain to the adopter, it is improbable that it would be recognised in England. But, apart from exceptional cases like these, it is submitted that the court should be slow to refuse recognition to a foreign adoption on the ground of public policy merely because the requirements for adoption in the foreign law differ from those of English law. Here again the distinction between recognising the status and giving effect to its result is of vital importance. Public policy may sometimes require that a particular result of a foreign adoption should not be given effect to in England; but public policy should only on the rarest occasions be invoked in order to deny recognition to the status itself. For example, the fact that the foreign law permits the adoption of adults, or permits adoption otherwise than by court order, or does not require that the adopter and the child should live together for a trial period before the order is made, should not prevent the recognition of the status in England. There are, indeed, some American decisions or dicta which deny recognition to foreign adoptions on such grounds; but they have been justly criticised on the ground that they confuse recognition of the status with giving effect to its incidents. If, to take an improbable but striking example, the law of a foreign country allowed a bachelor of twenty-five to adopt a spinster of twenty, an English court might hesitate to give the custody of the girl to her adoptive parent; but that is no reason for not allowing her to succeed to his property on his death intestate. A system of law which is prepared to recognise polygamous marriages and extra-judicial divorces should not be too squeamish about recognising foreign adoptions. (at pp.897-898)

One of the examples given by the learned authors includes a Kentucky order allowing a husband to adopt his wife in order that she might qualify as a "child" under his mother's will: *Bedinger v. Graybill's Executor & Trustee*, 302 S.W.2d 594 (U.S. Ky. 1957). In that case, the Kentucky "adoption" was recognized.

Discussion and Decision

32 In the possession of the respondent and made available to the petitioner were a number of letters between the deceased and Bernhard von Strachwitz, the deceased and her natural sister and the deceased and her natural mother. Those letters consistently refer to the deceased as "Mrs. von Strachwitz" or "Countess von Strachwitz" and to Bernhard von Strachwitz as being her husband. From the materials filed, I can find that Johanna Strachwitz and Bernhard von Strachwitz were living as husband and wife for somewhere between 15 and

20 years prior to his death in 1952, that her natural sister and mother acknowledged that they were living as husband and wife, that Johanna Strachwitz continued to maintain an active parent/child relationship with her parents until they died, that Johanna Strachwitz continued to maintain an active relationship with her only sister until she died, that her natural sister survived her, that the relationship between Bernhard von Strachwitz and Johanna Strachwitz was never a relationship as between parent and child, that the petitioner is the closest living relative in the "natural" family of Johanna Strachwitz, and that the closest surviving relatives of Bernhard von Strachwitz are cousins three or four times removed.

33 If the adoption is to be recognized in British Columbia, it is clear that the "natural" family of Johanna Strachwitz can have no claim to her estate. The use of "for all purposes" in s.11 of the 1979 *Act* means that the natural parents of a child ceased to be the parents of that child and have no further claim to the estate of the child. As all of the assets of Johanna Strachwitz were movables, the law of British Columbia applies and that the 1979 *Act* which was in effect as at 1986 applies.

34 Nothing in the 1979 *Act* eliminates the ability of the court in rare circumstances to find that an adoption should not be recognized on the basis that to do so would be contrary to public policy. While the wording of s.47 of the 1996 *Adoption Act* makes it clearer that the effect of the adoption in the foreign jurisdiction must be "substantially the same effect" before the adoption will have the same effect as an adoption made under British Columbia legislation, if it had been the intention of the legislation to remove all discretion from the court, the language would have to have been more clearly stated in the 1979 *Act*. Accordingly, the statements contained within the *Valentine's Settlement, Re* decision to the effect that there must be nothing contrary to public policy if the foreign adoption is to be recognized accurately sets out the law in British Columbia at the time of the death of Johanna Strachwitz in 1986 and sets out the law which is presently in effect.

35 The 1979 and 1996 *Adoption Acts* set out the view of the Legislature as to public policy regarding adult adoptions. Under the provisions of s.3(5) of the 1979 *Act*, an adult adoption is only available if the applicant "has maintained as his own child the person who is to be adopted" and where the court is satisfied that: "... it is not contrary to the public interest to make the order." The 1952 adoption would not have been permitted in British Columbia. There is nothing in the statute to suggest that the Legislature has taken away the jurisdiction of the court to refuse to recognize a foreign adoption of an adult which would not have been permitted under s.3(5) of the 1979 *Act*.

36 The court has always been reticent to recognize adoptions where it is clear that the primary intent of the adoption is not to establish a parent child relationship. In *Raghbeer, Re* (1977), 3 R.F.L. (2d) 42 (Ont. Co. Ct.), Grossberg Co. Ct. J. dealt with the proposed adoption of the 17 year old sister of a woman who, along with her husband, were resident in

Canada. The court found that the proposed adoptee was not a "resident" in Ontario and was therefore not eligible for adoption but also concluded that the adoption was not one which would be recognized in Ontario:

> It is manifest that the entry into Canada of Indera was pursuant to a scheme or plan to attempt to have her remain in Canada. The inescapable conclusion from the evidence, and I so find, is that the application for adoption is a sham or ploy for immigration purposes. It is what was described by Cross J. in *Re A.*, ... [1963] 1 All E.R. 531 at 534, as in truth an "accommodation" adoption. In that case he refused the application. He held that the object of the application for adoption was to provide British nationality to the person sought to be adopted. (at p.44)
>
> I agree with the submission of counsel for the Director of Child Welfare that this application is not bona fide and is not for the purpose of establishing a genuine parent and child relationship, which is the object of Pt. IV of the Child Welfare Act.
>
> It strains credulity, in this case, to accept that the purpose of the proposed adoption is to create a parent and child relationship. I find on the evidence that there has not been, nor will there be, a true and genuine parent and child relationship. The relationship of sister and sister which exists will continue to exist.
>
> The Child Welfare Act of Ontario should not be abused by a pretended adoption for collateral benefits to circumvent immigration laws and regulations. (at p.45)

37 At the time of the adoption in Germany, Johanna Strachwitz and Bernhard von Strachwitz had been living as man and wife for 15 to 20 years. While their initial views as to why they chose adoption over marriage might have been affected by a 1938 law, it is clear that this law was repealed in 1946. There was therefore no legal impediment to their marriage other than the suggestion advanced by Dr. Schreier that adoption was a way of "legalizing a life partnership of an aristocrat with a person without nobel birth." Without deciding the question whether of this motive also violates public policy so that a British Columbia court would not recognize a foreign adoption having this purpose, it is clear that there should not be recognition of a foreign adoption where the primary purpose of that adoption was to allow a man and woman living as husband and wife to adopt so that a "father" and "daughter" could then continue to live as husband and wife. That concept is so foreign to British Columbia public policy that this German adoption should not be recognized in British Columbia.

38 When foreign adoptions are involved, the adopting parents and the adopted children should have the certainty that the adoption will be recognized in British Columbia. It will only be under very rare circumstances that a foreign adoption will not be recognized in British Columbia. This is one of those occasions. Accordingly, there will be a declaration that

the petitioner, Margaret Wende, is the lawful and sole heir of Johanna Karoline Viktorine Strachwitz.

Petition granted.

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TAB 21

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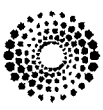

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1. DOMICILE AND RESIDENCE

30R–001 **RULE 173—(1) The domicile of a corporation[2] is in the country under whose law it is incorporated.[3]**

(2) A corporation is resident[4] in the country where its central management and control is exercised. If the exercise of central management and control is divided between two or more countries then the corporation is resident in each of these countries.[5]

COMMENT

30–002 **Clause (1) of the Rule.** The notion of a home or domicile, depending as it does in part on an intention to reside, is in its primary sense applicable only to human beings; but statutes occasionally and infelicitously attribute a domicile to corporations.[6] The attribution is achieved by way of analogy with the domicile of origin which is ascribed to every natural person upon birth, and

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[2] Farnsworth, *The Residence and Domicile of Corporations* (1939), pp.201 *et seq.*; Smart, *Cross Border Insolvency* (2nd ed. 1998), Ch.13; Rameloo, *Corporations in Private International Law* (2001), Ch.4; Nygh (1976) 12 U. of W.A.L. Rev. 466; Smart [1990] J.B.L. 126.

[3] *Gasque v Inland Revenue Commissioners* [1940] K.B. 80; *The Eskbridge* [1931] P. 51; *National Trust Company v Ebro Irrigation and Power Ltd* [1954] 3 D.L.R. 326 (Ont).

[4] Farnsworth, *The Residence and Domicile of Corporations* (1939), pp.74–200.

[5] *Cesena Sulphur Co v Nicholson* (1876) 1 Ex.D. 428; *San Paulo (Brazilian) Ry v Carter* [1896] A.C. 31; *Goerz v Bell* [1904] 2 K.B. 136; *De Beers Consolidated Mines v Howe* [1906] A.C. 455; *American Thread Co v Joyce* (1913) 108 L.T. 353 (HL); *Mitchell v Egyptian Hotels Ltd* [1915] A.C. 1022; *New Zealand Shipping Co v Thew* (1922) 8 T.C. 208 (HL); *Bradbury v English Sewing Cotton Co* [1923] A.C. 744; *Swedish Central Ry v Thompson* [1925] A.C. 495; *Egyptian Delta Land and Investment Co v Todd* [1929] A.C. 1; *Union Corp v IRC* [1952] 1 All E.R. 646 (CA), affirmed on another ground, [1953] A.C. 482; *Unit Construction Co Ltd v Bullock* [1960] A.C. 351; *Re Little Olympian Each Ways Ltd* [1995] 1 W.L.R. 560; see also *889457 Alberta Inc v Katanga Mining Ltd* [2008] EWHC 2679 (Comm.), [2009] I.L.Pr. 175; *Koitaki Para Rubber Estates Ltd v Federal Commissioners of Taxation* (1941) 64 C.L.R. 15, 241.

[6] See, e.g. Income and Corporation Taxes Act 1988, s.749(1), in force from January 1, 2011. For the meaning of domicile for jurisdictional purposes under the Brussels I Regulation and the Lugano Convention which is different from the traditional concept, see above, Rule 30(2) and Comment thereto.

3. X is a company incorporated in Liechtenstein. The company was formed for the purpose of acquiring and developing land in Egypt. The whole of the company's business is carried on and managed in Egypt, and the only connection with England is that the non-executive directors are English and live in England. The company is not resident in England.

2. STATUS

30R-009 **RULE 174—The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England.**[34]

COMMENT

30-010 **The principle in the Rule.** Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed.[35] That law will determine whether the entity has a separate legal existence.[36] The law of that country will determine the legal nature of the

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[34] *Bonanza Creek Gold Mining Co v R.* [1916] 1 A.C. 566 (PC); *Lazard Bros. v Midland Bank* [1933] A.C. 289; *National Bank of Greece and Athens SA v Metliss* [1958] A.C. 509; *Arab Monetary Fund v Hashim (No.3)* [1991] 2 A.C. 114; *Gulf Consolidated Company for Services and Industries EC v Credit Suisse First Boston Ltd* [1992] 2 Lloyd's Rep. 301; *Toprak Enerji Sanayi AS v Sale Tilney Technology Plc* [1994] 1 W.L.R. 840; *Presentaciones Musicales SA v Secunda* [1994] Ch. 271 (CA); *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] Q.B. 282; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017 (CA); *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *The Gilbert Rowe* [1997] 2 Lloyd's Rep. 218; *Oxnard Financing SA v Rahn* [1998] 1 W.L.R. 1465 (CA); *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep. 287; *Phoenix Marine Inc. v China Ocean Shipping Co* [1999] 1 Lloyd's Rep. 682; *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *JH Rayner (Mincing Lane) Ltd v Cafenorte SA Importadora* [1999] 2 All E.R. (Comm.) 577 (CA); *Eurosteel Ltd v Stinnes AG* [2000] 1 All E.R. (Comm.) 964; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550; *Dubai Aluminium Co Ltd v Al Alawi* [2002] EWHC 2051 (Comm.); *SEB Trygg Holding Aktiebolag v Manches* [2005] EWHC 35 (Comm.), [2005] 2 Lloyd's Rep. 129, affirmed in part and reversed in part, sub nom. *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 1237, [2006] 1 W.L.R. 2276 without reference to the point; *Laemthong International Lines Co Ltd v Artis (No.3)* [2005] EWHC 1595 (Comm.); *Re Eurodis Electron Plc* [2011] EWHC 1025 (Ch.); Foreign Corporations Act 1991, s.1, below, paras 30–014 *et seq.* See also *Dubai Bank Ltd v Galadari (No.4), The Times*, February 23, 1990; *Dubai Bank Ltd v Galadari (No.5), The Times*, June 26, 1990; *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338; *Trustees of Our Lady of the Sacred Heart v Registrar-General* [2008] NTSC 13; *Re Liquidation of Founding Partners Global Fund Ltd* [2011] SC (Bda) 19 Com (Sup Ct Bermuda); Foreign Corporations (Application of Laws) Act 1989, ss.7, 8 (Australia); *Taiwan via Versand Ltd v Commodore Electronics Ltd* [1993] 2 H.K.C. 650 (Hong Kong Foreign Corporations Ordinance 1993, s.2(1), (3)).

[35] *Associated Shipping Services v Department of Private Affairs of HH Sheikh Zayed Bin Sultan Al-Nahayan, Financial Times*, July 31, 1991 (CA); *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 W.L.R. 1302 (CA); *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *The Gilbert Rowe* [1997] 2 Lloyd's Rep. 218; *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338; *International Association of Science and Technology for Development v Hamza* (1995) 122 D.L.R. (4th) 92 (Alta CA).

[36] See authorities in preceding note.

entity so created, e.g. whether the entity is a corporation or partnership,[37] and, if the latter, the legal incidents which attach to it.[38]

It is well established that a corporation duly created in a foreign country is to be recognised as a corporation in England,[39] and accordingly foreign corporations can both sue[40] and be sued[41] in their corporate capacity in the courts. Whether a corporation has been dissolved must be determined by the law of its place of incorporation[42] for "the will of the sovereign authority which created it can also destroy it."[43] If according to that law the corporation is in the process of being wound up, it can still sue and be sued in England,[44] but if this process has ended, and the corporation has been dissolved, the corporation has been held to be dead in the eyes of the English courts.[45] If the **30–011**

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[37] *Von Hellfeld v Rechnitzer* [1914] 1 Ch. 748 (CA); *Dreyfus v CIR* (1929) 14 T.C. 560, 576–577 (CA); *The Saudi Prince* [1982] 2 Lloyd's Rep. 255; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418, 509; *The Kommunar (No.2)*, above; *The Gilbert Rowe*, above; *Oxnard Financing SA v Rahn* [1998] 1 W.L.R. 1465 (CA); *Laemthong International Lines Co Ltd v Artis (No.3)* [2005] EWHC 1595 (Comm.) *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338. *cf. Backman v Canada* [2001] S.C.R. 367 (Sup Ct Can) (whether a foreign partnership is recognised in Canada for the purposes of tax legislation depends on the requirements for the existence of a partnership in Canadian law).

[38] *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338. As to whether, if it is a partnership, the partners are to be sued alone, together or as a firm, see above, para.7–017; *Johnson Matthey & Wallace Ltd v Ahmed Alloush* (1985) 135 N.L.J. 1012; *The Gilbert Rowe*, above; *Oxnard Financing SA v Rahn*, above.

[39] *Henriques v Dutch West India Co* (1728) 2 Ld.Raym. 1532, 1535; *Lazard Bros v Midland Bank* [1933] A.C. 289, 297; *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep. 287.

[40] *Henriques v Dutch West India Co* (1728) 2 Ld.Raym. 1532.

[41] *Newby v Van Oppen* (1872) L.R. 7 Q.B. 293.

[42] As to identification of the law of the place of incorporation, see below, paras 30–014 *et seq.*

[43] *Lazard Bros v Midland Bank* [1933] A.C. 289, 297; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017 (CA); *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550; *Dubai Aluminium Co Ltd v Al Alawi* [2002] EWHC 2051 (Comm.); *Re Eurodis Electron Plc* [2011] EWHC 1025 (Ch.); Foreign Corporations Act 1991, s.1, below, paras 30–015 *et seq.* See M. Mann (1955) 18 M.L.R. 8; Wortley (1933) 14 B.Y.I.L.I. It is possible that the courts would not recognise a dissolution effected in defiance of a rule of public international law; see *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 A.C. 883 (CA and HL), above, paras 5–054, 25–011 and see F.A. Mann, *Studies in International Law* (1973), p.366, for a discussion of the recognition of international delinquencies by municipal courts.

[44] *cf. Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] A.C. 112; *Banque Internationale de Commerce de Petrograd v Goukassow* [1925] A.C. 150; *Employers' Liability Assurance Corporation Ltd v Sedgwick Collins & Co Ltd* [1927] A.C. 95; *First Russian Insurance Co v London and Lancashire Insurance Co* [1928] Ch. 922. *Semble*, whether an action must be brought or defended by the liquidator depends on the law of the place of incorporation: see *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch. 513, 524; and Rule 179, below.

[45] *Russian and English Bank v Baring Bros* [1932] 1 Ch. 435; *Deutsche Bank v Banque des Marchands de Moscou* (1932) 158 L.T. 364 (CA); *Lazard Bros v Midland Bank* [1933] A.C. 289; *Burr v Anglo-French Banking Corp* (1933) 49 T.L.R. 405; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017 (CA); *Phoenix Marine Inc v China Ocean Shipping Co* [1999] 1 Lloyd's Rep. 682. See also *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550. *cf. Home Mortgage Ltd v Robertson* [1988] 4 W.W.R. 260 (Sask).

foreign corporation has a branch in England, the latter cannot sue after the former has been dissolved.[46] The branch should be wound up,[47] and the English liquidator can then sue in the name of the company, although it has been dissolved.[48] Where a corporation is dissolved by the law of its place of incorporation but a branch existing in another country is still recognised there, and that branch claims to have a legal existence in England and seeks to bring proceedings here, it is dubious if recognition should be granted.[49] Whether a corporation has been amalgamated with another corporation must also be determined by the law of its place of incorporation.[50] If that law provides for a *successio in universum jus* then the amalgamated company will be recognised in England as succeeding to the assets and liabilities of its predecessors.[51] The law of the place of incorporation must, however, provide for a true universal succession[52] and, further, it is possible that the successor corporation may be so radically different from its predecessor that it cannot be properly described as the same legal entity.[53] But the law of the place of incorporation

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[46] *Russian and English Bank v Baring Bros* [1932] 1 Ch. 435.

[47] *Russian and English Bank v Baring Bros* [1932] 1 Ch. 435, 444; *Re Russian and English Bank* [1932] 1 Ch. 663; *Re Tea Trading Co and K. & C. Popoff Bros* [1933] Ch. 647; *Re Russian Bank for Foreign Trade* [1933] Ch. 745; *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] Ch. 404; *Banque des Marchands de Moscou v Kindersley* [1951] Ch. 112 (CA); *Re Azoff-Don Commercial Bank* [1954] Ch. 315. It has been held that, in these circumstances, the court may not make an administration order: *Re Eurodis Electron Plc* [2011] EWHC 1025 (Ch.) (a case involving the EC Insolvency Regulation).

[48] *Russian and English Bank v Baring Bros* [1936] A.C. 405. See M. Mann (1952) 15 M.L.R. 479; (1955) 18 M.L.R. 8.

[49] *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 K.B. 682, 691, reversed on other grounds, [1925] A.C. 150; *Re Russian Bank for Foreign Trade* [1933] Ch. 745, 763. Also *Sea Insurance Co v Rossia Insurance Co* (1924) 20 Ll.L.R. 308 (CA); M. Mann (1955) 18 M.L.R. 8, 10–11.

[50] *National Bank of Greece and Athens SA v Metliss* [1958] A.C. 509; *Toprak Enerji Sanayi AS v Sale Tilney Technology Plc* [1994] 1 W.L.R. 840; *Industrie Chimiche Italia Centrale v Tsavliris & Sons* [1996] 1 W.L.R. 774; *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep. 287; *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *JH Rayner (Mincing Lane) Ltd v Cafenorte SA Importadora* [1999] 2 All E.R. (Comm.) 577 (CA); *Eurosteel Ltd v Stinnes AG* [2000] 1 All E.R. (Comm.) 964; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550, reversed in part, sub nom. *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 1237, [2006] 1 W.L.R. 2276, without reference to the point. *SEB Trygg Holding Aktiebolag v Manches* [2005] EWHC 35 (Comm.), [2005] 2 Lloyd's Rep. 129. *cf. R.K.O. Pictures Inc v Cannon Screen Entertainment Ltd* [1990] B.C.L.C. 364. If companies incorporated in different countries are amalgamated it would seem that the law of the place of incorporation of each company must permit or recognise the amalgamation with the other: *Global Container Lines Ltd v Bonyad Shipping Co*, above, although in this case the capacity of the predecessor corporation to continue to proceed with litigation after the amalgamation was recognised since it was found to exist under the law of the place of incorporation of that corporation.

[51] *National Bank of Greece and Athens SA v Metliss*, above: *SEB Trygg Holding Aktiebolag v Manches*, above, affirmed, sub nom. *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 2276, without reference to the point. See also *Steel Authority of India Ltd v Hind Metals Inc* [1984] 1 Lloyd's Rep. 405, 407.

[52] *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8. *cf. Adams v National Bank of Greece & Athens SA* [1958] 2 Q.B. 59, 74; [1961] A.C. 255, 283, 289.

[53] *The Kommunar (No.2)*, above (Russian registered corporation limited by shares so fundamentally different from predecessor state trading enterprise privatised under Russian legislation that it could not be held to be the same entity).

TAB 22

CASTEL & WALKER

CANADIAN CONFLICT OF LAWS

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Volume 1

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CHAPTER 1

NATURE AND SCOPE OF THE CONFLICT OF LAWS

§1.1 NATURE OF THE SUBJECT

The division of the world into territorial units with distinct legal systems, such as Ontario, Quebec, or France, creates a host of problems for laypersons and lawyers alike. For example, Ontario laws are intended to govern persons in and of Ontario and their activities as if no other territorial units existed, and Ontario courts are open to all local litigants. Yet, of necessity, such persons often enter into relationships that may give rise to litigation with persons present or resident in other territorial units.

Social and commercial activities in the sphere of transborder private relations take many forms. For instance, a Torontonian marries a Montrealer in Vancouver, or being in New York on a visit, makes a will leaving to an adopted child all the property he or she owns that is situated in Nova Scotia. While on a business trip in Paris, he or she promises an Italian merchant to deliver in Rome products manufactured in Toronto, or while driving to British Columbia to attend a convention, injures a pedestrian in Alberta.

All these situations have one feature in common: they contain foreign elements. Each has a relevant fact that has a geographical connection with at least one territorial unit other than Ontario. "Foreign element" means a contact with a legal system other than that of Ontario. To be taken into consideration, the foreign element must be legally relevant; that is, it must play a role in determining the applicable law, as would, for instance, the place of wrongful conduct in an action for damages in tort.

Ultimately, the law in force in one of the territorial units having a legally relevant connection with each of these legal issues must be applied by a court with jurisdiction over the subject matter of the dispute and the parties, in order to give it recognition. Thus, rules are needed to coordinate the involvement of various legal systems in factual situations or cases containing legally relevant foreign elements.

In Canada, each territorial unit has a body of legal principles and rules governing purely local relations, that is, applicable to cases that contain no legally relevant foreign elements, and a body of legal principles and rules governing transborder private relations, in other words, containing at least one legally relevant foreign element. This latter body of principles and rules is called the conflict of laws or private international law.

The conflict of laws owes its existence to the diversity of the legal systems that prevail in the world. It is mainly concerned with the application of laws in space, that is, the area over which a rule of substantive law, whether foreign or domestic, extends. This area may in some cases be wider than the legal unit in which it originated. It will vary with the circumstances of each case. More generally, conflict of laws principles and rules enable the courts to determine what effect must be given to the fact that a case may havea significant contact with more than one territorial unit. Therefore, cases containing at least

one legally relevant foreign element, that is, cases with significant contacts with two or more territorial units, each having its own legal system, are not dealt with in the same manner as domestic cases.

§1.2 LEGAL UNITS

In a federal state such as Canada, for the purposes of the conflict of laws, each of the provinces and territories is a legal unit. In addition to those legal units, the country as a whole is a legal unit operating within international territorial limits with respect to matters that, under the Canadian Constitution,[1] come within the jurisdiction of the federal Parliament. Thus, each province or territory is a legal unit except as to matters governed by federal law, and Canada is a legal unit except as to matters governed by provincial or territorial law.

Of course, the principles and rules of the conflict of laws form an integral part of the branch of the law to which they relate, be it federal or provincial in nature. Any law other than the law of the particular legal unit in which the court sits when adjudicating a dispute containing legally relevant foreign elements is "foreign law." However, in Canada, federal law, which for the purpose of the subject matter discussed here means conflict of laws principles and rules found in federal statutes, is not foreign law since it is an integral part of the law of each province and territory.

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[1] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3; see *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. Note that the *Oceans Act*, S.C. 1996, c. 31, which repeals the *Canadian Laws Offshore Application Act*, S.C. 1990, c. 44 and the *Territorial Sea and Fishing Zones Act*, R.S.C. 1985, c. T-8, provides for the application of federal and provincial laws to offshore areas.

§1.3 NATIONAL AS OPPOSED TO INTERNATIONAL CHARACTER OF THE CONFLICT OF LAWS

Principles and rules of the conflict of laws are not international, they are essentially national in character. Since they are part of the local law, they are formulated by the legislative bodies of the different legal units or are to be found in the decisions of their courts. In principle, the courts will apply the conflict of laws principles and rules of the legal unit in which they sit except in the case of *renvoi*.[1] The Supreme Court of Canada has provided authoritative guidance on the constitutional imperatives underlying key principles of the conflict of laws.[2] Since they are based on the Constitution, these principles operate in all Canadian courts.[3]

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[1] See chapter 5, Renvoi.

[2] *Morguard Investments Ltd. v. De Savoye*, [1990] S.C.J. No. 135, 76 D.L.R. (4th) 256; *Tolofson v. Jensen*; *Lucas v. Gagnon*, [1994] S.C.J. No. 110, 120 D.L.R. (4th) 289.

[3] *Hunt v. T. & N. plc.*, [1993] S.C.J./A.C.S. No. 125, 109 D.L.R. (4th) 16.

CHAPTER 3

CHARACTERIZATION AND THE INCIDENTAL QUESTION

§3.1 THE ROLE OF CHARACTERIZATION IN CHOICE OF LAW ANALYSIS

In an action involving legally relevant foreign elements, a court might be asked to apply foreign law.[1] To decide whether to do so, the court must ascertain the legal nature of the questions or issues that require adjudication and then apply its appropriate conflict of laws rules to them. For instance, do the facts raise a question of succession or of matrimonial property, or a question of capacity or of form? This analytical process is called characterization or classification. Its purpose is to enable the court to find legal categories with which the forum is familiar.[2] In other words, the court must allocate each question or issue to the appropriate legal category. The application of the forum's conflict of laws rule to each legal question or issue will indicate which legal system governs that question or issue. That legal system is called the *lex causae*.

Once the court has characterized the issue, it will consider the connecting factor—a fact or element connecting a legal question or issue with a particular legal system. Finally, the court will apply the law identified as the governing law. In doing so it must separate the rules of substance from the rules of procedure of the legal systems involved, because questions of procedure are governed by the *lex fori*.[3]

If the fact situation includes at least one foreign place element as, for example, the domicile of a person, the place of making of a contract, or the *situs* of a thing, a problem of conflict of laws may arise. The court must decide whether it should apply its own domestic law or whether by reason of the existence of the foreign place element, it should apply rules of the law of that place, or even whether, as regards different aspects of the case, resort should be had to the various foreign laws of the places in which various elements are respectively localized.

A conflict of laws rule is usually stated in the form of an abstract proposition, such as "capacity to convey land is governed by the law of the *situs* of the land," or "the formalities of a contract are governed by the law of the place of contracting," or "succession to movables (as distinguished from administration) is governed by the law of the last domicile of the deceased person." A proposition of this kind is equivalent to saying that, as regards a particular kind of legal question or issue, a particular element (*situs*, place of contracting or domicile, as the case may be) is the one which should be used as the appropriate connecting factor, that is, the element that connects the factual situation or legal question or issue with the governing law. In a simple case, governed by a settled conflict of laws rule of the forum, the selection of the connecting factor may seem to be at best the use of a convenient mechanical device, and at worst the interjection of an unnecessary step, in the selection of the proper law. But in a doubtful or difficult case the deliberate consideration of the significance of various elements in the factual situation

CASTEL & WALKER

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SIXTH EDITION

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CHAPTER 30

FOREIGN CORPORATIONS

§30.1 STATUS, POWERS, DOMICILE, RESIDENCE AND NATIONALITY

Corporations and other legal persons or juridical entities duly created in foreign states or in other provinces or territories, are recognized and permitted to sue and be sued[1] in Canada in their corporate capacity[2] subject, in certain cases,[3] to registering or obtaining a local licence.[4] However, a foreign corporation's failure to obtain a provincial licence does not immunize it against suits brought against it in any of the provinces or territories nor does it affect its corporate existence.[5]

Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation.[5.1] This domicile is in the state, province or territory of incorporation or organization and it cannot be changed during the corporation's existence even if the corporation carries on business elsewhere.[6]

The law of the state, province or territory under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction,[7] the persons entitled to act on its behalf[8] including the extent of their liability for the corporation's debts,[9] and the rights of its shareholders.[10] Furthermore, 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.[11] The issues governed by the law of the corporation's domicile include its capacity to sue, the authority of directors, who may be appointed a director, its power to make contracts, the validity of conveyances of corporate property, the corporation's right to issue stock, and the validity of transfers of its stock.[12]

While the state, province or territory in which the foreign corporation intends to carry on business has the right to prescribe the extent to which the corporation may exercise its corporate powers and capacity, this does not mean that proceedings may be taken in this jurisdiction to affect its status as a corporation.[13] However an important exception to this exists in respect of a foreign partnership formed solely for the purposes of creating a tax loss in the forum and not for doing business. The existence of such a partnership will be determined by the law of the forum.[14]

There is some controversy over which law determines the liability of a corporation for the obligations of a foreign subsidiary. Since the personality and status of the subsidiary is called into question, it would seem that the law applicable to the status and capacity of the subsidiary should determine whether its corporate veil can be pierced. Alternatively, under the technique of *depeçage* the court could apply the *lex fori* to jurisdiction as a matter of procedure in order to determine the identity of the true defendant but this would encourage forum shopping for the jurisdiction most favourable to piercing the corporate veil. For other matters, the law governing the contract or tort that

1987). The tax conventions also use residence as a connecting factor.

[17] *A.G. v. Niagara Falls International Bridge Co.*, [1873] O.J. No. 197, 20 Gr. 490 at 497 (Can.).

[18] See *infra*, para. 30.3, note 17 and *Pet Milk Canada Ltd. v. Olympia & York Developments* (1974), 4 O.R. (2d) 640 (M.C.).

[19] *Daimler Co. Ltd. v. Continental Tyre & Rubber Co. (Great Britain) Ltd.*, [1916] 2 A.C. 307 at 339 (H.L.).

[20] *Charron v. La Banque Provinciale du Canada*, [1936] O.J. No. 78, [1936] O.W.N. 315 (H.C.J.); *Tytler v. C.P.R.*, [1898] O.J. No. 150, 29 O.R. 654 at 657; *Archer v. Society of the Sacred Heart of Jesus*, [1905] O.J. No. 141, 9 O.L.R. 474 at 487 (C.A.).

[21] *E.g.*, *Janson v. Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484 at 497, 498, 501, 505 (H.L.); *Barcelona Traction, Light & Power Co. Ltd.*, [1970] I.C.J. Rep. 3. A corporation could have more than one nationality, for example, if it were incorporated in more than one state.

[22] Siège social.

[23] Foley, "Incorporation, Multiple Incorporation and the Conflict of Laws" (1929), 42 Harv. L. Rev. 516 at 520; Smart, "Corporate Domicile and Multiple Incorporation in English Private International Law," [1990] J. of Bus. L. 126 (A.C.). See also *Arab Monetary Fund v. Hashim (No. 3)*, [1991] 2 A.C. 114 (H.L.), *per* Lord Templeman at 162 and *Westland Helicopters v. Arab Organization for Industrialization*, [1995] 2 All E.R. 387 at 403 (Q.B.) (principle of unity of the association in spite of multiple incorporation).

§30.2 CHANGES IN STATUS: AMALGAMATION, DISSOLUTION AND WINDING-UP

a. Amalgamation

If a foreign corporation is amalgamated with another foreign corporation under the law of the place of incorporation, the new entity will be recognized in Canada, and if that law provides for the new corporation to succeed to the assets and liabilities of its predecessors, the corporation will be recognized as having done so.[1] However, the law of the place of incorporation cannot discharge the new corporation from the liabilities of the old one unless it happens to be the proper law of the contract giving rise to those liabilities.[2]

b. Continuance and Dissolution

A corporation may, for a variety of reasons, such as amalgamation, wish to leave the jurisdiction where it was incorporated and to be continued and governed by the law of another jurisdiction. For such a continuance to be possible it must be possible by the law of the exporting jurisdiction and by the law of the importing jurisdiction.[3]

Canadian law recognizes that a foreign corporation can be dissolved under the law of its place of incorporation.[4] If, according to that law, the corporation is in the process of being wound up, it can still sue and be sued in Canada;[5] but if this process has ended and the corporation has been dissolved, it no longer exists in the eyes of Canadian law.[6] Neither the foreign corporation nor an unincorporated Canadian branch can sue or be sued in Canadian courts.[7] Whether the corporation has been so dissolved is a question of fact based on the evidence of the foreign law concerned.[8] A corporation dissolved by the law of the place of its incorporation ceases to be a legal person, and its Canadian assets belong to the Crown as *bona vacantia* since they cannot vest in a non-existent person. However, it has been held that the Crown, in right of the province[9] where land belonging to a foreign

dissolved corporation was located, could not claim the land on the ground that the foreign corporation was not dead for all purposes, but still had the capacity to liquidate its affairs. It did not matter that the corporation had been struck off the register of foreign corporations in the province.[10]

c. Foreign Resident Corporations

In New Brunswick, a foreign corporation that desires to protect its interests in time of war or other emergency is allowed to transfer its registered office to the province, provided it meets certain conditions set out in the relevant legislation.[11] Once allowed to exist and to operate in New Brunswick, it acquires the status of a foreign resident corporation until it has voluntarily returned to its original jurisdiction, or has voluntarily transferred its registered office outside New Brunswick or has been continued under the *Business Corporations Act*.[12] Where the foreign resident corporation undertakes obligations and incurs liabilities after the transfer of its registered office, such obligations and liabilities are governed by the law of New Brunswick.[13]

d. Winding-Up

Pursuant to its legislative powers respecting insolvency and bankruptcy,[14] the federal Parliament has enacted the *Winding-up and Restructuring Act*,[15] which deals with insolvent corporations doing business in Canada and with the property of such corporations within the jurisdiction.[16] The Act protects the rights of creditors to the property of foreign corporations doing business in Canada. As noted above, where the foreign corporation has been dissolved in the state of incorporation, its Canadian assets remain *bona vacantia*[17] until the corporation is revived by statute[18] for the purposes of liquidation. Accordingly, the Act effectively provides a fictional re-creation of the nonexistent corporation as a means of distributing assets within the forum, which does not operate retrospectively.[19] The *Winding-up and Restructuring Act* applies to foreign incorporated companies doing business in Canada[20] that are insolvent[21] or that are in liquidation or in the process of being wound up, on petition by any of their shareholders or creditors, assignees or liquidators, that ask to be brought under the Act. The application for a winding-up order may be made by petition to the court in the province where the head office of the corporation is situated, or, if there is no head office in Canada, then in the province where its chief place, or one of its chief places of business in Canada is situated.[22]

A person must be a creditor to qualify as a petitioner under the Act.[23] It does not matter that at the time of the Canadian proceeding the foreign corporation is in the process of being wound-up elsewhere, even in the state of incorporation.[24] In that case, the winding-up in Canada is ancillary to the foreign proceeding.[25] However, the court may refuse to wind up a foreign corporation that has no assets in Canada and is being wound up elsewhere. The court's power to wind up is discretionary. A substantial benefit must accrue to the petitioner.[26]

In winding-up foreign corporations, the courts apply the provisions of the *Winding-up and Restructuring Act* to both matters of substance and procedure, irrespective of whether or not there is a simultaneous winding-up under the law of the place of

TAB 23

ESSENTIALS OF
CANADIAN LAW

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these provisions do is define habitual residence very much in the terms of the common law of domicile, with the only real difference being the added presumption as to intention.[88] In contrast, in other provinces habitual residence is seen as something quite distinct from domicile.

4) Future Directions

Given the confusion in the jurisprudence, it would be beneficial if future legislative drafting using residence, ordinary residence, or habitual residence included a more detailed explanation as to how the chosen term is to be interpreted.[89] This would ensure that legislative intent is not frustrated by inconsistent judicial interpretation, which is the central problem in the current cases. In the absence of statutory precision, it would also be useful if the courts could agree on a common or core definition of each type of residence to be employed where no guidance is given. However, as noted earlier, a context-specific interpretive approach to residence mitigates against such a development.

As a link to an individual's personal law, residence tends to work best in contexts that do not require an exclusive answer. This is in part because an individual can have more than one residence. If the link is being used to determine which country's courts have jurisdiction, it is acceptable to conclude that the courts in each country in which the individual is resident have jurisdiction. But if the link is being used to identify the law to resolve a dispute, a unitary answer is required—something domicile, but not residence, provides. If domicile is to be replaced by residence in all contexts, this problem would have to be overcome, perhaps through some concept of residence that does provide a single answer.

D. CORPORATIONS

Domicile and residence are concepts that are mainly relevant to individuals. However, there are times when it is necessary to apply them to corporations. In *National Trust Company Ltd v Ebro Irrigation and Power Company Ltd* the court confirmed the well-established principle that a

88 Peter North, "Domicile" in *Private International Law Problems in Common Law Jurisdictions* (Dordrecht: Martinus Nijhoff, 1993) at 21.

89 See, for example, Canada Revenue Agency, "Determining an Individual's Residence Status," Income Tax Folio S5-F1-C1, 26 November 2015.

corporation's domicile is the country in which it was incorporated.[90] It is harder to generalize for residence, since different definitions can be used in different contexts. Several contexts adopt the approach that a corporation is resident where its central management and control are located.[91]

FURTHER READINGS

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90 [1954] OR 463 at 476 (HCJ). See also *Gasque v Commissioners of Inland Revenue*, [1940] 2 KB 80 at 84; *Axis Management Inc v Alsager* (2000), 197 Sask R 234 at 237 (QB).

91 For a broad definition, see *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 7.

D. PARTIES

A common preliminary issue in litigation is the status, standing, or capacity of either the plaintiff to commence proceedings or the defendant to be sued. This is in no way primarily a conflicts issue: it arises often in domestic litigation and is considered in detail in the civil procedure literature. Each jurisdiction has to determine rules for claims by or against individuals under a certain age, individuals with a mental illness, partnerships, trusts, unincorporated associations, and the like.[32]

In conflicts cases, the general rule is that issues concerning a party's status are governed by the law of the forum, on the basis that these are issues of procedure, not of substance.[33] Even if the dispute will be resolved using a foreign law, that law cannot, by virtue of being the applicable law, give to the plaintiff a status he, she, or it otherwise lacks under the law of the forum. For example, for an individual to sue in Ontario independently in his or her own name, he or she must be eighteen years old.[34] It is not relevant that he or she is sixteen years old and is resident or domiciled in a country where that is a sufficient age to so sue. The forum's requirement governs.

However, this rule would cause significant problems if strictly applied to non-natural persons. For example, for a corporation to sue in Ontario, must it meet Ontario's requirements for a valid corporation in terms of share structure, number of directors, and so on? In practice this would mean a large number of foreign corporations would lack status to sue in Ontario. Each jurisdiction can allow non-natural persons such as corporations, partnerships, and trusts to be created in slightly different ways. Strict insistence on the law of the forum for status questions would be a major barrier to cross-border litigation.

Accordingly, the status of non-natural persons is governed by the law of the person's "home" jurisdiction, such as the place of incorporation for a corporation. If the person has the status to sue or be sued under that law, that will be accepted by the forum. In *International Association of*

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eds, *The New Ontario Limitations Regime: Exposition and Analysis* (Toronto: Ontario Bar Association, 2005) at 110.

32 See, for example, Ontario Rules, above note 1, rr 7–10.

33 *Regas Ltd v Plotkins*, [1961] SCR 566 at 571–72; *International Association of Science and Technology for Development v Hamza* (1995), 28 Alta LR (3d) 125 at para 9 (CA) [*IASTD*].

34 See Ontario Rules, above note 1, r 1.03(1), which defines "disability" to include being a minor; and r 7.01(1), which requires those under a disability to use a litigation guardian; see also the *Age of Majority and Accountability Act*, RSO 1990, c A.7, s 1, which sets the age of majority at eighteen.

Science and Technology for Development v Hamza the plaintiffs, which were Swiss societies, were recognized as legal entities under Swiss law but had no such status under Alberta law. They sued in Alberta and the defendants challenged their status to sue. The Court of Appeal noted the general rule that foreign corporations, validly created under the law of a foreign country, could sue as corporations in a common law province of Canada.[35] It extended that rule to unincorporated foreign entities, holding that "the law tends to support a granting of status in cases where the entity in question is recognized as a legal or juridical person by the laws of its home jurisdiction, in the sense of having status to sue."[36] In the court's view this approach was consistent with the comity principle.

This can lead to some interesting results. In *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis* the English Court of Appeal had to consider whether a ruined Hindu temple had the status to sue, as a plaintiff, in the English courts.[37] The court noted the "formidable conceptual difficulty in recognizing as a party entitled to sue in our courts something which on one view is little more than a pile of stones."[38] This object lacked status under the law of the forum but under Indian law it had the status of a legal person. The court concluded that it was consistent with comity that its status under its home legal system be respected and it was therefore able to sue in England.[39]

In *Cirque du Soleil Inc v Volvo Group Canada Inc* the issue was whether a California corporation which had been dissolved could be sued in Ontario.[40] Under California law a dissolved corporation could be sued whereas under Ontario law it could not. The court held that the issue was governed by California law, in part relying on *IASTD*. But the court also stated that "the narrow issue of the capacity to be sued in Ontario is a substantive one."[41] Labelling the issue as substantive is unusual. Having resort to the procedural rules of a foreign legal system does not make the issue substantive. It remains procedural.

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35 *IASTD*, above note 33 at para 27.

36 *Ibid* at para 37. See also, on the issue of limited partnerships, *Devon Canada Corp v PE-Pittsfield, LLC (cob as Pittsfield Generating Co, LP)*, [2008] AJ No 1263 (CA).

37 [1991] 4 All ER 638 (CA).

38 *Ibid* at 647.

39 The resulting English judgment was subsequently enforced in Alberta, with the Alberta court similarly concluding that the ruined temple had the necessary status to bring the enforcement proceedings: *India v Bumper Development Corp* (1995), 29 Alta LR (3d) 194 at para 71 (QB), aff'd 4 December 1995 (Alta CA).

40 2015 ONSC 2698.

41 *Ibid* at paras 26–27.

Central to the court's analysis is a vigorous critique of applying the law of the forum. For the court, La Forest J explained how applying the first branch of *Phillips* to conduct in other countries could amount to improper extraterritorial application of forum law. Accordingly, the court rejected applying the law of the forum as part of the new rule and thus overruled double actionability. This was a very welcome development.

In place of double actionability, the court held that the new rule for choice of law in tort would be to apply the law of the place of the tort: the *lex loci delicti*. Justice La Forest based this decision on the theory that a state has exclusive jurisdiction within its own territory and on the practical need for a certain and predictable rule. He reasoned that people would ordinarily expect that their conduct would be governed by the law of the territory where it occurred.[12]

The court considered at some length whether the new rule should have an exception. In the end La Forest J indicated that a rigid rule could lead to injustice in international cases and so accepted that, in certain circumstances, the court could instead apply the law of the forum. However, he stressed that he could "imagine few cases where this would be necessary."[13] For interprovincial cases, he held that there could be no exception to the law of the place of the tort. He acknowledged that the twin underlying principles of private international law were order and fairness but stated that "order comes first."[14]

So after decades of cases and volumes of scholarly analysis, the court returned the law to where it started, coming back to the original common law rule. One commentator compared the adopting of such an ancient rule for modern tort disputes to going to the mall and finding a practising alchemist![15] There can be no doubt that the *lex loci delicti* is of central importance to choice of law in tort but adopting it as a rigid rule is controversial. It has overtones of the rejected theory of vested rights. The rule is open to the criticism that under the principle of proximity fairness, not order, should come first. Fairness is rarely well served by a rigid rule.[16]

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12 *Ibid* at 1050.

13 *Ibid* at 1058.

14 *Ibid.* Justices Major and Sopinka dissented on this specific issue: they would have allowed an exception for both international and interprovincial cases.

15 John Swan, "Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada" (1995) 46 *South Carolina Law Review* 923 at 948.

16 See Adrian Briggs, *The Conflict of Laws*, 3d ed (Oxford: Oxford University Press, 2013) at 269: "experience shows that the need to make an exception in the interests of flexibility becomes irresistible when the facts are sufficiently unusual . . . the courts in Canada . . . may yet have to eat some of their words."

which can imply that the parties want the law of the chosen forum to apply.[22] This inference is considerably stronger if the jurisdiction clause is exclusive rather than non-exclusive. Courts will also consider the transaction's connection to other contracts. If the contract in question is one of a series of related contracts, and those other contracts have the same applicable law, the court can infer that the parties intended the contract to use that same law. Similarly, if there have been previous similar contracts between the parties, it can be inferred that the parties meant the law previously applied to apply again. Some cases have considered the language or the currency of the contract as pointing to an implied choice of law, but these factors are weak and no inference should be drawn from them.

Some commentators are critical of allowing for an implied choice of law. They advocate that doing so is artificial, imputing intent to the parties that may not exist. They would prefer to have only two parts to the proper law rule: express choice and, absent that, objective determination of the governing law.

3) Absence of Choice

In the absence of party choice, either express or implied, the contract is governed by law with which the transaction has its closest and most real connection. A leading Canadian authority for this proposition is *Imperial Life Assurance Co of Canada v Colmenares*.[23] The Supreme Court of Canada had to determine whether two life insurance contracts were governed by Ontario law or by the law of Cuba. It rejected the outdated rule that the applicable law was that of the place where the contracts were made. It held that

> the problem of determining the proper law of a contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.[24]

Foreign Trade Transportation Corp, [1993] 2 Lloyd's Rep 445 (CA); *Re O'Brien and Canadian Pacific Railway Co* (1972), 25 DLR (3d) 230 (Sask CA); *Richardson International, Ltd v Mys Chikhacheva (The)*, 2002 FCA 97 at para 34. No inference can be drawn if multiple places for arbitration are indicated.

22 *Hamlyn & Co v Talisker Distillery*, [1984] AC 202 (HL). See also *Royal Exchange Assurance Corp v Sjoforsakrings Aktiebologet Vega*, [1902] 2 KB 384 (CA); *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co Ltd*, [1927] AC 604 (HL).

23 [1967] SCR 443 [*Imperial Life*].

24 *Ibid* at 448.